OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 69

1947

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16
B63
v. 69

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16
B63
v.69

Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 69

including

CM 319095

also

CM 319604 - CM 320489

C O R R E C T E D C O P Y

JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington: 1947

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

JAGN-CM 319095

UNITED STATES	)	HEADQUARTERS COMMAND EUROPEAN COMMAND
v.	)	Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 30 September and 3 October 1946. Dishonorable discharge and confinement for three (3) years.
Technician Fifth Grade EMERIC FISCHER (42134748), Attached 6800th Headquarters Company, Special Troops.	)	

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. Accused was tried upon the following Charge and Specifications:

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

Specification 1: In that Technician Fifth Grade Emeric Fischer, attached 6800 Headquarters Company, Special Troops, United States Forces European Theater, did, at or near Vienna, Austria, on or about 12 January 1946, violate standing orders contained in letter, Headquarters European Theater of Operations, dated 23 September 1944, Subject: Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels, by holding in his possession Five Hundred Ninety-Five ($595.00) Dollars, in United States Government currency. (Disapproved by reviewing authority).

Specification 2: In that Technician Fifth Grade Emeric Fischer, attached 6800 Headquarters Company, Special Troops, United States Forces European Theater, did, on or about 20 November 1945, at or near Wiesbaden, Germany, conspire with Technician

Fourth Grade Kent Fendler and Private First Class Arthur A. Rothenberg, to violate Circular 139, Headquarters United States Forces European Theater, dated 10 October 1945, by wrongfully and unlawfully obtaining United States Postal Money Orders by means of false Currency Control Books, the said Technician Fifth Grade Fischer knowing said Currency Control book to be false.

Specification 3: In that Technician Fifth Grade Emeric Fischer, did, at Wiesbaden, Germany, on or about 20 November 1945, with intent to violate Circular 139, Headquarters United States Forces European Theater, dated 10 October 1945, did, falsely make in its entirety a certain currency control book in the following words and figures, to wit:

Specification 4: In that Technician Fifth Grade Emeric Fischer, did, at Wiesbaden, Germany, on or about 20 November 1945, with intent to violate Circular 139, Headquarters United States Forces European Theater, dated 10 October 1945, did, falsely make in its entirety a certain currency control book in the following words and figures, to-wit:

Specification 5: In that Technician Fifth Grade Emeric Fischer, did, at Wiesbaden, Germany, on or about 20 November 1945, with intent to violate Circular 139, Headquarters United States Forces European Theater, dated 10 October 1945, did, falsely make in its entirety a certain currency control book in the following words and figures, to-wit:

Specification 6: In that Technician Fifth Grade Emeric Fischer, did, at Wiesbaden, Germany, on or about 20 November 1945, with intent to violate Circular 139, Headquarters United States Forces European Theater, dated 10 October 1945, did, falsely make in its entirety a certain currency control book in the following words and figures to-wit:

Specification 7: In that Technician Fifth Grade Emeric Fischer, did, at Wiesbaden, Germany, on or about 20 November 1945, with intent to violate Circular 139, Headquarters, United States Forces European Theater, dated 10 October 1945, did, falsely, make in its entirety a certain currency control book in the following words and figures, to-wit:

Accused pleaded not guilty to, and was found guilty of, all Specifications and the Charge. 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 three years. The reviewing authority disapproved the finding of guilty of Specification 1 of the Charge, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement.

Confinement in a penitentiary is not specifically authorized (AW 42) for any of the offenses of which the accused was found guilty as approved by the reviewing authority, nor were any of such offenses of a civil nature made punishable by confinement in a penitentiary, Federal reformatory or correctional institution under any statute of the United States of general application within the continental United States or by any law of the District of Columbia (CM 210762, Valeroso, 9 BR 345).

It appears from the Staff Judge Advocate's review that the part of the reviewing authority's action designating a Federal reformatory as the place of confinement is based on the assumption that the false making and use of the currency control books, as alleged in Specifications 3 to 7 inclusive, constituted a violation of Title 18, United States Code, section 132, which authorizes confinement in a penitentiary, Federal reformatory or correctional institution. The statute reads:

> "Whoever shall falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall willfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2000 or imprisoned not more than five years or both."

Violation of this statute constitutes a crime or offense not capital under Article of War 96 (MCM, 1928, par. 145c) and penitentiary confinement is authorized by Article of War 42 (MCM, 1928, par. 90a; 18 USCA, Sec. 541; CM 271865, Lavelle, (1944) 6 BR (ETO) 236-237).

The above statute is a criminal statute obviously designed

as a security measure to punish the use of forged or altered military passes or permits. In its application, as in the case of all penal statutes, it must be strictly construed in favor of the accused (Prussian v. U. S., 282 U. S. 675). A currency exchange control book is not a military pass or permit and therefore is not such a document as comes within the purview of the said statute.

Wharton's Criminal Law, Vol. II, page 1165, defines forgery as follows:

> "Forgery in its broadest sense includes the making or altering of any writing or record, with intent to prejudice the rights or interests of another."

In the instant case, it is obvious that neither the United States nor anyone else was defrauded of any money or property as a result of the accused's alleged actions since he was obliged to pay to the postal authorities the sums of money represented in the money orders in order to obtain them. It is equally obvious that such action was intended merely to deceive and not to defraud.

There remains the possibility that the designation of a Federal reformatory as the place of confinement may have been based on the finding of guilty of Specification 2, upon the theory that the facts therein, as proved, constituted a violation of section 88, Title 18, United States Code or established a common law conspiracy recognized by the law of the District of Columbia and punishable under the provisions of Section 107, District of Columbia Code.

Specification 2 alleges a conspiracy to violate a standing order, an offense similar to conspiracy to commit an offense against the United States as set out in 18 United States Code, Section 88, but does not allege that the accused did "any act to effect the object of the conspiracy" as is necessary to meet the requirement of the statutory offense (United States v. Noble, 18 F Supp. 808; Enrique Rivera v. United States, 57 F(2) 816). Failing as it does to allege the statutory offense of conspiracy, does the Specification meet the requirements of common law conspiracy which does not necessitate the alleging or proving of an overt act in furtherance of the conspiracy? (United States. v. Olmstead, 5 F 2nd 712; Robbins v. United States, 172 F 105, 96 CCA 307; McGuiniso v. United States, 256 F 621; 18 USCA 88, note 29). Common law conspiracy is actionable within the District of Columbia (Harrison v. Mayer, 224 Fed. 224). In considering what constitutes common law conspiracy it is well to note "* * * The early writers upon English law have very little to say about conspiracy and afford very little information upon it. * * * In fact, it has been said that it is perhaps more difficult to give exact definitions of a conspiracy than any other crime. Nevertheless, various definitions have been suggested. A definition often quoted is

that of Lord Denman, 'A conspiracy is either a combination to procure an unlawful purpose or to effect a lawful purpose by unlawful means'." Burdict on Crimes, Vol. 3, pages 437, 439, citing Rex. v. Seward, 7 A & E 706, 711-110 Eng. Reprint 1377, 1380. Again as stated in Callen v. Wilson, 127 US 555, "'The general rule of the common law,' the Supreme Judicial Court of Massachusetts said in Commonwealth v. Hurt, 4 Met. 111, 121, 'is, that it is a criminal and indictable offense, for two or more to confederate and continue together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual.'" The Specification adequately alleges the combination and states the object of such combination to be the violation of a standing order. It must then be determined whether or not the violation of a standing order is unlawful or criminal within the meaning of the common law. If the object of the combination is unlawful or criminal at common law, the offenders, inasmuch as the District of Columbia Code contains nothing denouncing conspiracy, are punishable under Section 22-107 of that Code which states:

> "Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than five years, or both."

(Harrison v. Mayer, supra.)

On the other hand if the object of the combination was not unlawful or criminal at common law, then there is no actionable conspiracy and Section 22-107 of the District of Columbia Code is not applicable.

The violation of a military standing order is purely a military offense under the Articles of War and was not recognized as being unlawful or criminal at common law. Consequently here no common law conspiracy has been alleged or proven. However the conduct of the accused as set out in the Specification and proved by the evidence clearly is violative of Article of War 96 as being to the prejudice of good order and military discipline, and of a nature to bring discredit upon the military service (CM 286184, Williams, 20 BR (ETO) 307).

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

Edward J. Johnson, Judge Advocate.

Joseph L. Brack, Judge Advocate.

Lucius E. Taylor, Judge Advocate.

JUN 12 1947

JAGN-CM 319095 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Headquarters Command, European Command, APO 757, c/o Postmaster, New York, N. Y.

1. In the case of Technician Fifth Grade Emeric Fischer (42134748), Attached 6800th Headquarters Command, Special Troops, 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 dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the 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 319095).

1 Incl
Record of trial

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

INSTRUCTIONS

ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS

Col 1 - Enter date of transaction.

Col 2 - Enter brief description of transaction: PTA; SD (soldier's deposit); EX (exchange - conversion); MO (money order); WB (war bond); IMP (importation); SPD (spearhead deposit).

Col 3 - Enter dollar equivalent of net pay and allowances or importations received in German or Austrian currency and/or dollar equivalent of other European currency converted into German or Austrian currency.

Col 4 - Enter dollar equivalent of funds in German or Austrian currency, transmitted outside the theater or exchanged for other European currency or converted into dollar instrumentalities.

Col 5 - Enter sum of preceding balance plus column 3 and minus column 4.

Col 6 - Enter dollar equivalent of net pay and allowances or importations received in other than German or Austrian currency and/or dollar equivalent of other European currency converted from German or Austrian currency.

Col 7 - Enter dollar equivalent of funds in other than German or Austrian currency, transmitted outside the theater or exchanged for German or Austrian currency or converted into dollar instrumentalities.

Col 8 - Enter sum of preceding balance plus column 6 and minus column 7.

Col 9 - Initials or stamp of finance officer, agent officer, cashier, or other authorized person making entry

. . .

NOTE: The last entry in column 5 or 8 represents the maximum amount which may be transmitted or exchanged from the currency concerned.

. . .

DETAILED INSTRUCTIONS CONCERNING THIS CURRENCY EXCHANGE CONTROL BOOK ARE CONTAINED IN CIRCULAR NO 139, HQ, USFET, DATED 10 OCTOBER 1945. NOTE PARTICULARLY PAR 13b THEREOF.

CURRENCY EXCHANGE CONTROL BOOK

Robert F. Steiger, 32645973

NAME: Sgt, Hq & Hq SQ, XIX TAC
(Last) (First) (MI) (ASN) (Grade) (Organ)

(All amounts will be expressed in dollars)

Net cash pay drawn by me in past three months	$ 224.00
Less amounts transmitted outside this Theater or converted into dollar instrumentalities	$ 200.00
BALANCE	$ 24.00
Cash and bank deposits in my possession in this Theater in European currency derived only as per following certificate	$1350.00

I* (certify) (solemnly swear) (affirm) that the amounts stated above are true and correct as of 10 Nov (Date) and that the amount of cash pay and bank deposits stated above were derived only from net cash pay and allowances drawn by me plus funds lawfully brought into this Theater by me

R F Steiger
(Signature)

Subscribed and sworn to before me this 10 day of Nov 5

T.R.Fischer
(Signature, Grade and Organ of Officer Administering Oath)
Capt AC

The foregoing initial *declaration of 1350.00 dollars is approved.

10 November 1945 (Date) K.F.Martin
(Signature, Grade and Organ of Approving Officer)
Maj. A.C.

* Strike out words not applicable

3

INSTRUCTIONS

ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS

Col 1 - Enter date of transaction.

Col 2 - Enter brief description of transaction: PTA; SD (soldier's deposit); EX (exchange - conversion); MO (money order); WB (war bond); IMP (importation); SPD (spearhead deposit).

Col 3 - Enter dollar equivalent of net pay and allowances or importations received in German or Austrian currency and/or dollar equivalent of other European currency converted into German or Austrian currency.

Col 4 - Enter dollar equivalent of funds in German or Austrian currency, transmitted outside the theater or exchanged for other European currency or converted into dollar instrumentalities.

Col 5 - Enter sum of preceding balance plus column 3 and minus column 4.

Col 6 - Enter dollar equivalent of net pay and allowances or importations received in other than German or Austrian currency and/or dollar equivalent of other European currency converted from German or Austrian currency.

Col 7 - Enter dollar equivalent of funds in other than German or Austrian currency, transmitted outside the theater or exchanged for German or Austrian currency or converted into dollar instrumentalities.

Col 8 - Enter sum of preceding balance plus column 6 and minus column 7.

Col 9 - Initials or stamp of finance officer, agent officer, cashier, or other authorized person making entry.

. . .

NOTE: The last entry in column 5 or 8 represents the maximum amount which may be transmitted or exchanged from the currency concerned.

. . .

DETAILED INSTRUCTIONS CONCERNING THIS CURRENCY EXCHANGE CONTROL BOOK ARE CONTAINED IN CIRCULAR NO 139, HQ, USFET, DATED 10 OCTOBER 1945. NOTE PARTICULARLY PAR 13b THEREOF.

CURRENCY EXCHANGE CONTROL BOOK

CARLSON, LLOYD C., 0-43569

NAME: Colonel, USTACS, TUFET
(Last) (First) (MI) (ASN) (Grade) (Organ)

(All amounts will be expressed in dollars)

Net cash pay drawn by me in past three months	$ 1116.00
Less amounts transmitted outside this Theater or converted into dollar instrumentalities	$ 150.00
BALANCE	$ 966.00
Cash and bank deposits in my possession in this Theater in European currency derived only as per following certificate	$ 2300.00

I* (certify) (solemnly swear) (affirm) that the amounts stated above are true and correct as of 10-11-45 (Date) and that the amount of cash pay and bank deposits stated above were derived only from net cash pay and allowances drawn by me, plus funds lawfully brought into this Theater by me

Lloyd C.Carlson
Col. Inf.
(Signature)

Subscribed and sworn to before me this ____ day of ____ 194__

10 November 1945
C.A. Johnson
1st Lt. Inf.
(Signature, Grade and Organ of Officer Administering Oath)

The foregoing initial *declaration of 2300 dollars is approved.

10 Nov 1945 (Date) L. F. Jackson
(Signature, Grade and Organ of Approving Officer)
Col, Sig. C.

* Strike out words not applicable

4

NOTICE

ANY FALSE OR UNAUTHORIZED ENTRY IN THIS BOOK, ANY IMPROPER EXCHANGE OR TRANSMITTAL OF CURRENCY, OR ANY OTHER VIOLATION OR EVASION OF THE TERMS HEREOF WILL BE DEALT WITH BY APPROPRIATE DISCIPLINARY ACTION

IMPORTANT

READ INSTRUCTIONS ON BACK COVER BEFORE MAKING ANY ENTRIES IN THIS BOOK

FOR ALL TRANSACTIONS			ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS						AUTHENTICATION
			FOR TRANSACTIONS IN MARKS OR AUSTRIAN MONEY			FOR TRANSACTIONS IN OTHER EUROPEAN CURRENCIES			
No	Date	Description	Amount Received	Amount Transmitted or Embargoed or Converted into Dollar Instruments	Balance Available	Amount Received	Amount Transmitted or Embargoed or Converted into Dollar Instruments	Balance Available	
	10 Nov 1945	Approved Initial *Declaration *Balance			1350.00				TRF 68 APO
1	22/11/45	N.O.		400.00	950.00				RO
2	30 Nov 45	Pd	74.66		1024.66				TRF 633
3	15-12-45	MO		300.00	724.66				DOS
4									
5									
6									

* Strike out word not applicable

3A

NOTICE

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FOR ALL TRANSACTIONS			ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS						AUTHENTICATION
			FOR TRANSACTIONS IN MARKS OR AUSTRIAN MONEY			FOR TRANSACTIONS IN OTHER EUROPEAN CURRENCIES			
No*	Date	Description	Amount Received	Amount Transmitted or Embargoed or Converted into Dollar Instruments	Balance Available	Amount Received	Amount Transmitted or Embargoed or Converted into Dollar Instruments	Balance Available	
	10 Nov 45	Approved Initial *Declaration *Balance			2300.00				L.F.J.
30	Nov 45	PD.	372.00		2672.00				LCC
1	6-12-45	M.C.		340.00	2332.00				68 APO PF
2	13-12-45	MO		300.00	2032.00				633 DOS
Dec	19 1945	KO		300.00	1732.00				APO633 JBS
5									
6									
7									

* Strike out word not applicable

4A

INSTRUCTIONS

ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS

Col 1 - Enter date of transaction.

Col 2 - Enter brief description of transaction: PTA, SD (soldier's deposit), EX (exchange conversion); MO (money order); WB (war bond); IMP (importation); SPD (spearhead deposit).

Col 3 - Enter dollar equivalent of net pay and allowances or importations received in German or Austrian currency and/or dollar equivalent of other European currency converted into German or Austrian currency.

Col 4 - Enter dollar equivalent of funds in German or Austrian currency, transmitted outside the theater or exchanged for other European currency or converted into dollar instrumentalities.

Col 5 - Enter sum of preceding balance plus column 3 and minus column 4.

Col 6 - Enter dollar equivalent of net pay and allowances or importations received in other than German or Austrian currency and/or dollar equivalent of other European currency converted from German or Austrian currency.

Col 7 - Enter dollar equivalent of funds in other than German or Austrian currency, transmitted outside the theater or exchanged for German or Austrian currency or converted into dollar instrumentalities.

Col 8 - Enter sum of preceding balance plus column 6 and minus column 7.

Col 9 - Initials or stamp of finance officer, agent officer, cashier, or other authorized person making entry.

. . .

NOTE The last entry in column 5 or 8 represents the maximum amount which may be transmitted or exchanged from the currency concerned.

. . .

DETAILED INSTRUCTIONS CONCERNING THIS CURRENCY EXCHANGE CONTROL BOOK ARE CONTAINED IN CIRCULAR NO 139, HQ. USFET, DATED 10 OCTOBER 1945. NOTE PARTICULARLY PAR 13b THEREOF.

CURRENCY EXCHANGE CONTROL BOOK

Kenneth E. Slater, 32645837

NAME: T/Sgt. WTS USFET
(Last) (First) (MI) (ASN) (Grade) (Organ)

(All amounts will be expressed in dollars)

Net cash pay drawn by me in past three months . . . . . $ 354.00

Less amounts transmitted outside this Theater . . . . . $ 200.00
or converted into dollar instrumentalities

BALANCE $ 50.00

Cash and bank deposits in my possession in this Theater . . $ 850.00
in European currency derived only as per following certificate

I* (certify) (solemnly swear) (affirm) that the amounts stated above are true and correct as of 10-11-45 (Date) and that the amount of cash pay and bank deposits stated above were derived only from net cash pay and allowances drawn by me plus funds lawfully brought into this Theater by me

Kenneth E. Slater
(Signature)

Subscribed and sworn to before me this 10 day of Nov 45

U.R. Cowman
Capt. Inf.
(Rank and Organ of Approving Officer)

The foregoing initial *balance *declaration of 850.00 dollars is approved.

10 November 1945 T.F. Morgan
(Date) (Signature, Grade and Organ of Approving Officer)
Maj. Inf.

*Strike out words not applicable

5

WCIT 6839

CURRENCY EXCHANGE CONTROL BOOK

33297613

Morgan, Edward T Sgt

NAME: (Last) (First) (MI) (ASN) (Grade) (Organ)

(All amounts will be expressed in dollars)

Net cash pay drawn by me in past three months $ 330.68

Less amounts transmitted outside this Theater $ None
or converted into dollar instrumentalities

BALANCE $ 330.68

Cash and bank deposits in my possession in this Theater $ _____
in European currency derived only as per following certificate

I* (certify) (solemnly swear) (affirm) that the amounts stated above are true and correct as of 10 Nov 45 (Date) and that the amount of cash pay and bank deposits stated above were derived only from net cash pay and allowances drawn by me plus funds lawfully brought into this Theater by me

Edward Morgan
(Signature)

Subscribed and sworn to before me this 10 day of Nov 5

C. H. Johnson
Capt. Inf.
(Rank and Organ of Approving Officer)

The foregoing initial *balance *declaration of 330.68 dollars is approved

Approved:
10 Nov 45 C. H. Johnson
(Date) (Signature, Grade and Organ of Approving Officer)
Capt Inf
WCIT 6839

*Strike out words not applicable

6

INSTRUCTIONS

ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS

Col 1 - Enter date of transaction.

Col 2 - Enter brief description of transaction: PTA, SD (soldier's deposit), EX (exchange conversion); MO (money order); WB (war bond); IMP (importation); SPD (spearhead deposit).

Col 3 - Enter dollar equivalent of net pay and allowances or importations received in German or Austrian currency and or dollar equivalent of other European currency converted into German or Austrian currency.

Col 4 - Enter dollar equivalent of funds in German or Austrian currency, transmitted outside the theater or exchanged for other European currency or converted into dollar instrumentalities.

Col 5 - Enter sum of preceding balance plus column 3 and minus column 4.

Col 6 - Enter dollar equivalent of net pay and allowances or importations received in other than German or Austrian currency and or dollar equivalent of other European currency converted from German or Austrian currency.

Col 7 - Enter dollar equivalent of funds in other than German or Austrian currency, transmitted outside the theater or exchanged for German or Austrian currency or converted into dollar instrumentalities.

Col 8 - Enter sum of preceding balance plus column 6 and minus column 7.

Col 9 - Initials or stamp of finance officer, agent officer, cashier, or other authorized person making entry.

. . .

NOTE. The last entry in column 5 or 8 represents the maximum amount which may be transmitted or exchanged from the currency concerned.

. . .

DETAILED INSTRUCTIONS CONCERNING THIS CURRENCY EXCHANGE CONTROL BOOK ARE CONTAINED IN CIRCULAR NO 139, HQ. USFET, DATED 10 OCTOBER 1945. NOTE PARTICULARLY PAR 13b THEREOF

NOTICE

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IMPORTANT

READ INSTRUCTIONS ON BACK COVER BEFORE MAKING ANY ENTRIES IN THIS BOOK

FOR ALL TRANSACTIONS			ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS						AUTHENTICATION
			FOR TRANSACTIONS IN MARKS OR AUSTRIAN MONEY			FOR TRANSACTIONS IN OTHER EUROPEAN CURRENCIES			
No.	1 Date	2 Description	3 Amount Received	4 Amount Transmitted or Exchanged or Converted into Dollar Instrumentalities	5 Balance Available	6 Amount Received	7 Amount Transmitted or Exchanged or Converted into Dollar Instrumentalities	8 Balance Available	
	10 Nov 1945	Approved Initial •Declaration •Balance			850.00				TFM.
1	30/11/45	Pd	118.00		968.00				NRC
2	14-12-45	MO		300.00	668.00				633 WOS
Dec 18 1945		M.O.		50.00	618.00				403 PF
4									
5									
6									
7									

* Strike out word not applicable.

MPS 1-46-7540 2915

5A

NOTICE

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IMPORTANT

READ INSTRUCTIONS ON BACK COVER BEFORE MAKING ANY ENTRIES IN THIS BOOK

FOR ALL TRANSACTIONS			ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS						AUTHENTICATION
			FOR TRANSACTIONS IN MARKS OR AUSTRIAN MONEY			FOR TRANSACTIONS IN OTHER EUROPEAN CURRENCIES			
No	1 Date	2 Description	3 Amount Received	4 Amount Transmitted or Exchanged or Converted into Dollar Instrumentalities	5 Balance Available	6 Amount Received	7 Amount Transmitted or Exchanged or Converted into Dollar Instrumentalities	8 Balance Available	
	10 Nov 45	Approved Initial •Declaration •Balance			330.68				CHJ
1	30 Nov 45	Pd.	110.23		440.91				TRL
Dec 12 1945		M.O.	100.00		540.91				LM 403
3	13 Dec 45	M.O.		125.00	415.91				PF 403
Dec 21 1945		M.O.		100.00	315.91				PF 403
Dec 27 1945		M.O.		20.00	295.91				PF 403
4									
7									

* Strike out word not applicable

INSTRUCTIONS

ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS

Col 1 - Enter date of transaction.

Col 2 - Enter brief description of transaction: FTA) SD (soldier's deposit), EX (exchange - conversion), MO (money order), WB (war bond), IMP (importation), etc. SPD

Col 3 - Enter dollar equivalent of net pay and allowances or importations received in German or Austrian currency and/or dollar equivalent of other European currency converted into German or Austrian currency.

Col 4 - Enter dollar equivalent of funds in German or Austrian currency, transmitted outside the theater, exchanged into other European currency, or conv into dol instru

Col 5 - Enter sum of preceding balance plus columns 3 and minus column 4.

Col 6 - Enter dollar equivalent of net pay and allowances or importations received in other than German or Austrian currency and/or dollar equivalent of other European currency converted from German or Austrian currency.

Col 7 - Enter dollar equivalent of funds in other than German or Austrian currency, transmitted outside the theater or exchanged for German or Austrian currency or conv into dol instru

Col 8 - Enter sum of preceding balance plus column 6 and minus column 7.

Col 9 - Initials or stamp of finance officer, agent officer, cashier, or other authorized person making entry.

. . .

NOTE The last entry in column 5 or 8 represents the maximum amount which may be transmitted or exchanged from the currency concerned.

. . .

DETAILED INSTRUCTIONS CONCERNING THIS CURRENCY EXCHANGE CONTROL BOOK ARE CONTAINED IN CIRCULAR NO 139, HQ, USFET, DATED 10 OCTOBER 1945. NOTE PARTICULARLY PAR 13b THEREOF.

CURRENCY EXCHANGE CONTROL BOOK

Robert S. Bolli, 32748596

NAME, M/Sgt. OCE, TSFET

(All amounts will be expressed in dollars)

Net cash pay drawn by me in the past three months . . . : 414.00

Less amounts transmitted outside this Theater or conv into dol instru : 150.00

BALANCE : 264.00

Cash and bank deposits in my possession in this Theater . . : 934.00

European currency derived only as per inclosure

I certify (solemnly swear) that the amounts listed above are true and correct as of 10-11-45 (Date) that the amount of cash pay and bank deposits stated above were derived only from net cash pay and allowances drawn by me plus funds lawfully brought into this Theater by me.

Robert S. Bolli
(Signature)

Subscribed and sworn to before me this 10 day of Nov, 19 5

G. F. Larson
(Signature, Grade and Organization of Officer)
Capt. Inf.

The foregoing initial *balance/*declaration of 964.00 (Dollars)

10 November 1945 (Date)

B. N. Audeesonfer
(Signature, Grade and Organization of Approving Officer)
Maj. CE

*Strike out words not applicable

NOTICE

ANY FALSE OR UNAUTHORIZED ENTRY IN THIS BOOK, ANY IMPROPER EXCHANGE OR TRANSMITTAL OF CURRENCY, OR ANY OTHER VIOLATION OR EVASION OF THE TERMS HEREOF, WILL BE DEALT WITH BY APPROPRIATE DISCIPLINARY ACTION

IMPORTANT

READ INSTRUCTIONS ON BACK COVER BEFORE MAKING ANY ENTRIES IN THIS BOOK

FOR ALL TRANSACTIONS			ALL AMOUNTS WILL BE EXPRESSED IN DOLLARS						AUTHENTICATION*
			FOR TRANSACTIONS IN MARKS OR AUSTRIAN MONEY			FOR TRANSACTIONS IN OTHER EUROPEAN CURRENCIES			
No	Date	Description	Amount Received	*Amount Transmitted or Exchanged	Balance Available	Amount Received	Amount Transmitted or Exchanged	Balance Available	
	10 Nov 1945	Approved Initial *Declaration *Balance		or conv into dol instru	964.00		or conv into dol instru		GFL 896 APO
1	18-11-45	M.O.		100.00	864.00				R.L.
2	30-11-45	Pd.	138.00		1002.00				GFL. 633 DOS
3	14-12-45	MO		300.00	702.00				403 PF
Dec 18 1945		M.O.		50.00	652.00				
5									
6									
7									

* Strike out word not applicable

7A

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

JAGH - CM 319604

15 MAR 1947

UNITED STATES v. Technician Fifth Grade FRANK DAVIS (38482455), Attached Unassigned Headquarters Company, Sixth Army (formerly of 634th Port Company, Transportation Corps)	HEADQUARTERS SIXTH ARMY PRESIDIO OF SAN FRANCISCO, CALIFORNIA Trial by G.C.M., convened at Presidio of San Francisco, California, 9 January 1947. Dishonorable discharge (suspended) and confinement for six (6) months. Post Guardhouse, Presidio of San Francisco, California

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

1. The record of trial by general court-martial 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 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 58th Article of War.

Specification: In that Technician Fifth Grade Frank Davis, attached unassigned, Headquarters Company, Sixth Army, Presidio of San Francisco, California, formerly of 634th Port Company, Transportation Corps, Vancouver Barracks, Washington, did, at Vancouver Barracks, Washington, on or about 19 July 1944 desert the service of the United States and did remain absent in desertion until he was returned to military control at Presidio of San Francisco, California, on or about 25 July 1946.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "desert" and "in desertion," substituting therefor, respectively the words "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of a violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for six months. The reviewing authority approved the sentence, suspended execution of the dishonorable discharge and designated the Post Guardhouse, Presidio of San Francisco, California, or elsewhere as the Secretary of War may direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 33, Headquarters, Sixth Army, Presidio of San Francisco, California, 27 January 1947.

3. Accused was tried on 9 January 1947 for desertion alleged to have begun on 19 July 1944 and to have terminated on 25 July 1946. By exceptions and substitutions he was found guilty of the lesser included offense of absence without leave for the same period. There is no doubt that the evidence sustains the court's finding that the accused was absent without leave for the period alleged.

Article of War 39 provides in part that:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person:"

The question raised by this case is whether, when an accused is charged with an offense against which the Statute of Limitations has not run, and is found guilty of an offense against which it has run, the court is obliged to advise him of his right to plead the statute as a bar where there is no indication in the record that he was aware of this right. The same question has recently been before the Board of Review in CM 312593, Sawyer, 5 Bull JAG 197. In the course of that opinion the Board discussed the rule laid down by CM 231504, Santo, 3 Bull JAG 58, 18 BR 235, wherein it was held that such an explanation to accused was not necessary since it was presumed that defense counsel advised accused of his rights in the premises before trial. In overruling the Santo case, the Board held that where an accused is found guilty by exceptions and substitutions of an offense against which the Statute of Limitations has apparently run, although it had not run against the offense of which he was originally charged, and the record fails to disclose that accused was cognizant of his rights to plead the statute, there being no indication that it had been tolled, a failure of the court to advise accused of his rights in the premises is fatal error voiding the conviction of such offense.

4. Pages 26, 27, and 28 of the record of trial show the following procedure by the court:

"Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon secret written ballot, two-thirds (2/3) of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused: Not Guilty as charged, but Guilty of the 61st Article of War."

* * *

"The court was (again) closed, and upon secret written ballot, two-thirds (2/3) of the members present at the time the vote was taken concurring, sentences the accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for six months.

"The court was opened and the president announced the findings and sentence.

"TJA: The finding of the Court will have to designate the specification as well as the charge. 'Not Guilty of the 58th Article of War, but Guilty of the Violation of the 61st Article of War.' And did the Court find the accused Guilty under this specification?

"PRES: I made this statement.

"TJA: The specification must be stated.

"PRES: It says he was not guilty of the specification and the charge.

"LW: Just stating the usual form.

"TJA: It should be stated that the court finds the accused Not Guilty of the specification as written, but Guilty of the specification with the substituted words 'absent himself without leave from' for 'desert' and 'remain absent without leave' for 'in desertion'.

"PRES: The Court will recess.

"TJA: Let the record show that the court, the prosecution, the defense, the accused and the reporter are present as before.

"The court reconvened at 3:00 P.M. January 9, 1947, with all members of the court, personnel of the prosecution and defense, and the accused, who were present at the close of the last session, present.

"PRES: Technician Fifth Grade Frank Davis, this court has reconvened of its own volition, prior to the time that the findings and sentence of this court have been announced to the reviewing authority, and prior to the time that any record of this case had been submitted to the reviewing authority, and this court has revoked its former findings and sentence and informs you that the court was closed and upon secret written ballot, two-thirds (2/3) of the members present at the time the vote was taken concurring, in each finding of guilty, finds you, of the Specification: GUILTY, except the words 'desert' and 'in desertion', substituting therefor the words 'absent himself without leave from' and 'without leave'. Of the excepted words: NOT GUILTY. Of the substituted words: GUILTY. Of the Charge: NOT GUILTY, but GUILTY of a violation of the 61st Article of War. And again in closed session and upon secret written ballot, two-thirds (2/3) of the members present at the time the vote was taken concurring, sentences you 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 six months."

The staff judge advocate on pages 3 and 4 of his review states as follows:

"The questions raised by this case in determining whether the findings and sentence should be sustained is whether the facts hereof come within the purview of of the holding of the Board of Review in C.M. 313593 (1946), paragraph 396 (1), Vol V, BULL JAG July-August 1946.

"The ruling as quoted states 'where an accused is found guilty by exceptions and substitutions of an offense against which the statute had apparently run, although it had not run against the offense with which he was originally charged and the record fails to disclose that he was cognizant of his rights to plead the statute, and there is no indication that it had been tolled, failure of the Court to advise the accused of his rights in the premises is fatal error voiding the conviction of that specification'.

"Article of War 39 provides in part that:

'Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person'.

"The previous leading opinions by the Board of Review and the Judge Advocate General, and which have not been expressly over-ruled, on the effect of a failure to advise or plead the statute of limitations are set forth in C.M. 201537 (1934) and C.M. 231504 (1943), holding that under paragraph 78a MCM, 1928, the 'Court may advise the accused in open court of his right to plead the statute' but it is not mandatory for the Court in every such case to take such action.

"In explanation of the ruling in C.M. 313593 (1946) the Board of Review stated as follows:

'We do not believe, however, that the permissive character of the present rule is a bar to our holding in the present case that the court was bound to advise the accused of his rights'.

'To be sure, the attention of accused and his counsel was directed toward the fact that he had been found guilty of absence without leave but this was done under such circumstances that there was little real opportunity to plead the bar of the statute. Where an accused is found guilty, the prescribed procedure is to open the court for evidence of previous convictions and personal data, close the court, vote on the sentence, open the court, and announce the findings and sentence (MCM, 1928, pp 267, 268). That procedure was followed in this case and immediately thereafter the court adjourned. All that defense counsel knew when the court opened after closing for a vote on the findings was that his client had been found guilty of some offense and, as we have said, he might not unreasonably assume that it was desertion. After the court had fixed the punishment it reopened and then for the first time accused and his counsel learned that he had been found guilty of absence without leave. Immediately after that announcement, however, the court pronounced sentence and adjourned. Neither the accused nor his counsel had any genuine opportunity to ponder the effect of these findings or to reflect upon the

legal principles which might govern the changed situation. In our opinion, it would be grossly unfair to penalize the accused on the basis of an assumption that his failure to plead the statute at that point in the trial was the result of a conscious choice made with full knowledge of his rights.'

'In brief, we think that the Manual, in failing to require such advice by the court in all circumstances, does not preclude us from requiring it in those cases where consideration of justice and fairness demand it.' (Underline of quote inserted at this headquarters.)

"It is felt that the instant case does not fall within the recent ruling of C.M. 313593 (1946), since the accused was afforded ample opportunity to plead the statute. There was no element of surprise, caused by the Court's final finding in this case. The accused and the defense counsel had full warning of the Court's intended action when the Court made its first announcement in open court of its finding as to the charge and sentence. The record shows a period of discussion on the original finding as to the specification between the Trial Judge Advocate and the court in the presence of the accused and his counsel and also a recess by the court to further ponder proper announcement of its finding as to the specification. In view of (a) the period of absence being over two years and obviously within AW 39, and (b) the extremely light sentence as pertains to confinement (six months), and (c) the opportunity afforded the accused to plead the statute since there is no surprise element, it is considered the court was not required under existing law and the facts of record to further advise accused of his rights in this case and, obviously, no substantial injury, within the meaning of AW 37, has been done the accused. Therefore, the finding and sentence of the Court should be sustained."

5. In CM 201537, Fouts, 5 BR 157, the accused was charged and convicted of an offense for which he could have successfully pleaded the statute of limitations in bar of trial. The record neither showed that he pleaded the statute of limitations in bar nor that the accused was advised by the court or his counsel that this defense was available to him. The Board of Review considered whether the failure of the record to show affirmatively that the accused was so advised nullified the finding of guilty.

It was pointed out that, both in the Federal courts and in military law, the pleading of the statute of limitations in bar of trial was a matter of defense which could be raised by a special plea or under the general issue, but in the latter case only if evidence was introduced as to its applicability. The provisions of both the 1917 and 1921 Manuals for Courts-Martial requiring an explanation in open court in appropriate cases, were referred to, together with decisions to the effect that a failure to comply with the provisions prejudiced the substantial rights of the accused. The Board stressed the fact that the 1928 Manual stated merely that the court may advise the accused of his rights to plead the statute both where the original specification (MCM 1928, par 67) or that remaining after exceptions and substitutions had been made (MCM 1928, par 78a), appeared to be barred by lapse of time and cited another provision of the Manual which requires defense counsel to explain to accused his rights in the premises "before the trial" (MCM 1928, par 45b). The Board concluded (p 251) as follows:

> "* * * The present requirement for the protection of the rights of the accused under such circumstances is merely the directory one that the military counsel of his own selection, or the defense counsel, will, before the trial explain to the accused in an appropriate case his rights to plead the statute of limitations; and that such explanation will be made regardless of the intention of the accused as to how he will plead. * * * In the absence of an affirmative showing to the contrary, it may be presumed that such military counsel performed * * * this duty * * *". (Emphasis in original).

Under the facts shown by the record in the instant case, we are of the opinion that it can not be presumed that the defense counsel advised the accused of his rights to plead the statute of limitations in bar with respect to an offense of which he was not charged before the trial. To presume that the defense counsel advised the accused of his rights to plead the statute of limitations in the instant case after the court indicated that it had found him guilty of an included offense which was barred by the provisions of Article of War 39, is to presume that a fact not disclosed by the record occurred during the trial. Such a presumption would also attribute to military counsel a degree of alertness which is not borne out by experience.

It was stated in the Sawyer case that:

> "* * * Where, as here, an accused is found guilty by exceptions and substitutions of an offense against which the statute had apparently run, although it had not run against the offense with which he was originally charged,

and the record fails to disclose that he was cognizant of his rights to plead the statute, and there is no indication that it had been tolled, a failure of the court to advise accused of his rights in the premises is fatal error voiding the conviction of that specification."

Admitted, that the court's procedure with respect to its announcement of the findings and sentence in the instant case differs from that followed by the court in the Sawyer case, nevertheless, the record fails to disclose that accused was cognizant of his rights to plead the statute, that it had been tolled, or that the court advised him of his rights in the premises.

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.

A. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 319604 1st Ind

WD, JAGO, Washington 25, D. C. MAR 2 5 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 Technician Fifth Grade Frank Davis (38482455), Attached Unassigned Headquarters Company, Sixth Army (formerly of 634th Port Company, Transportation Corps).

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and recommend that the findings of guilty and the sentence be vacated and 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 these recommendations, should such action meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Record of Trial
2. Form of Action

(G.C.M.O. 133, 15 April 1947).

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

JAGQ - CM 319606

Feb. 19, 1947

U N I T E D S T A T E S	)	RYUKYUS COMMAND
v.	)	Trial by G.C.M., convened at APO 331, c/o Postmaster, San Francisco, California, 10 December 1946. Dishonorable discharge and confinement for two (2) years. United States Disciplinary Barracks.
Private First Class JAMES W. GARDNER (RA 34952642), Company "F", 24th Infantry Regiment.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private First Class James W. Gardner, Co F, 24th Infantry did, at Ie Shima, APO 331, on or about 4 November 1946, feloniously take, steal, and carry away one (1) radio, value about $23.00, the property of Private Elbert Nelson, Company F, 24th Infantry.

Specification 2: In that Private First Class James W. Gardner, Co F, 245h Infantry did, at Ie Shima, APO 331, on or about 20 October 1946, feloniously, take, steal, and carry away one (1) radio, value about $23.00, the Property of Private First Class Darry L. Johnston, 24th Infantry.

Accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp McQuaide, California, 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. Inasmuch as it is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of larceny on both specifications, no detailed discussion of the evidence in that respect is pertinent. The Board deems it necessary to discuss only the aspect of the value of the articles involved.

4. Evidence for the Prosecution.

No evidence of value of the radio, Prosecution's Exhibit 1, was offered. Private First Class John Harris testified that he paid T/5 Johnston $23.00 (R 15) for the radio, Prosecution's Exhibit 2. It does not appear that Harris intended or attempted to establish the market value of Prosecution's Exhibit 2, or that he was qualified as an expert so to do.

5. There is no testimony whatsoever as to the value of the radio (Pros. Ex. 1) covered by specification 1. The only testimony as to the value of the radio (Pros. Ex. 2) covered by specification 2 is that of Private First Class Harris to the effect that this radio was loaned to him by T/5 Johnston while they were stationed in Ie Shima and that after it was descovered that the radio was missing he paid T/5 Johnston $23.00 for the radio (R 15). This, of course, is not competent proof of value.

However, both radios were introduced in evidence. The court had the oppurtunity to inspect them, and the court was warranted in finding that the radios had some value - not exceeding $20.00 (CM 216316, Thomas, 11 BR 129; CM 218143, Panetta, 11 BR 373).

6. The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for the larceny of property of a value of not more than $20 is confinement at hard labor for six months.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of each specification as involves a finding of guilty of larceny by accused, at the time and place alleged of the property of ownership as alleged, of some substantial value not in excess of $20; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year.

(Sick in Hospital), Judge Advocate

Charles M. Dickson, Judge Advocate

Francis Boyles, Judge Advocate

JAGQ - CM 319606 1st Ind Mar 7 1947

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Ryukyus Command, APO 331, c/o Postmaster, San Francisco, California

1. In the case of Private First Class James W. Gardner (RA 34952642), Company "F", 24th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the finding of guilty of each specification as involves a finding of guilty of larceny by accused, at the time and place alleged of the property of ownership as alleged of some substantial value not in excess of $20, and approval of only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, 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, please place the file number of the record at the end of the published order, as follows:

(CM 319606).

s/ Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGK - CM 319700

25 APR 1947

UNITED STATES v. Second Lieutenant JOSE CABADING (O-1896751), Infantry.	12TH INFANTRY DIVISION (PHILIPPINE SCOUTS) Trial by G.C.M., convened at Camp O'Donnell, Tarlac, P.I., 26 December 1946. Dismissal.

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 95th Article of War.

Specification 1: (Disapproved by reviewing authority).

Specification 2: In that Second Lieutenant Jose Cabading, 88th Field Artillery Battalion (Philippine Scouts) did, at Camp O'Donnell, Tarlac, on or about 21 October 1946, knowingly make a false official statement under oath before Major August F Kapp, Inspector General, 12th Infantry Division (Philippine Scouts) APO 613, an officer duly authorized to administer oaths during an investigation in a question and answer sworn testimony, Viz:--Q-- During the period of the Japanese occupation, did you ever hear of the Sekisan Seiko Kabushiki Kaisa? A.-"No, Sir." Q.-Were you ever employed by the firm which I referred to in the last question? A.-"No, Sir."--which Second Lieutenant Jose Cabading, actually knew that his statement was in fact untrue.

Accused pleaded not guilty to and was found guilty of the charge and both 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 disapproved the finding of guilty of Specification 1 of the Charge, approved only so much of the sentence as provided for dismissal and forwarded the record for action under Article of War 48.

3. Evidence for the Prosecution

On 5 August 1946 the accused officer was commissioned a second lieutenant, AUS, and assigned to the 88th Field Artillery Battalion, 12th Infantry

Division (Philippine Scouts). Major August F. Kapp, IGD, 12th Infantry Division, in response to a question by the trial judge advocate testified that "sometime in the past" he conducted an investigation and asked the accused certain questions. He identified Question 21 as follows:

"During the period of the Japanese occupation, did you ever hear of Seikisan Seiki Kabushiki Kaisha?
"Answer: No sir."

Question 22:

"Were you ever employed by the firm referred to in the last question?
"Answer: No, sir."

The document from which these questions and answers were extracted was not introduced in evidence although it was referred to as being before the court and the defense made no objection thereto. By way of preface to questioning Major Kapp, there was read by the trial judge advocate a statement, allegedly from the same document which averred that the witness (accused) was sworn and stated that he knew his rights under Article of War 24. The prosecution offered in evidence an alleged publication of "AFWESPAC" showing the names of firms or associations which were in operation in the Philippines during the Japanese control of the islands. The paper was not identified by any witness and on motion of the defense it was excluded (R. 7-8).

Mr. Simon Villanueva, Manila, P.I., a clerk employed by the Atlantic Gulf and Pacific Company, testified that during the Japanese occupation the Atlantic Gulf and Pacific Company was known as Seikisan Seiki Kabushiki Kaisha and that it was Japanese controlled. The witness was pay roll clerk for such firm, carried accused on the pay roll as a watchmen and knew that he worked as such for the Seikisan Company. He could not remember the exact date of accused's employment but it was "for several months." The Japanese had burned all the records of the company when they left (R. 8-11).

Narciso Sarmiento, 291 Mandaluyong, Rizal, testified that he knew the accused and had worked with him as a watchman for the Seikisan Seiki Kabushiki Kaisha during the Japanese occupation. He did not remember the dates, but both he and accused were employed as watchmen (R. 11-12).

Demitro Cantor, 327 Interior 1, Santa Ana, a watchman for Atlantic Gulf, stated that the company by which he was employed was, during the Japanese occupation, owned and controlled by the Japanese and was known as Seikisan Seiki Kabushiki Kaisha. The accused had been his companion as an employee of such Japanese company, both having served as watchmen. When the witness left the company, the accused remained as an employee. Mr. Cantor could not remember the dates concerning the asserted employment (R. 12-14).

Mr. Alfredo Borja, Mandaluyong, Rizal, testified that he was timekeeper

for the Seikisan Company during the occupation and that he knew accused "because we were working for the same factory." He thought the accused worked for the company a couple of months and he saw accused at the gate acting as watchman. On cross-examination the witness stated, "I sometimes see him carrying a stick, long and round like the one carried by MPs" (R. 16-18).

For the Defense

The accused being duly informed as to his rights elected to be sworn and to testify. He stated that he did not work for the Japanese firm Seikisan Seiki Kabushiki Kaisha during the occupation, that he fought at Bataan, was captured and released on 3 August 1942. From August to December 1942, he was in a hospital and when he had recuperated he sold his house and engaged in the business of buying and selling rice and clothes. He was thus engaged until the liberation. On 21 October 1946, he was called and "investigated" by the Inspector General (R. 20).

The defense being unable to produce an alleged witness named Joaquin Amatorio, there was received in evidence an unsworn statement allegedly made by Amatorio to the effect "that he first met Cabading in July 1942, that they became partners in a business in rice, vegetables, etc., worked together until September 1944, that he had not seen Jose Cabading since that time, that they worked during the day as partners separating only at night" (R. 21).

No further material evidence was presented.

5. Specification 2 alleges that the accused did

> (a) "At Camp O'Donnell, Tarlac," (b) "on or about 21 October 1946" (c) "knowingly make a false official statement under oath before Major August F Kapp, Inspector General, ***, an officer duly authorized to administer oaths during an investigation in a question and answer sworn testimony", *** (d) "which Second Lieutenant Jose Cabading, actually knew that his statement was in fact untrue."

This specification is laid under Article of War 95. It is obvious that the date the statement was made, and the status of accused on such date are important in establishing that the court-martial had jurisdiction of the offence. The statement of accused that he was investigated by the Division Inspector General on 21 October 1946 appears to establish the date in question and the record shows that accused was an officer in the United States Army on such date. The evidence indicates that the report of the Inspector General's investigation was before the court and was identified by Major Kapp. However, the procedure followed in allowing the trial judge advocate

to read therefrom and make certain observations concerning same, without properly introducing the report in evidence transgresses the best evidence rule. This report of investigation was the best evidence of what questions were asked and the replies thereto (see par. 116a, MCM, 1928, p. 118). Inasmuch as no objection was interposed by the defense we conclude that the requirements of the rule were thereby waived (CM 203259, Gould, 7 BR 49,74; CM 271153, Karsanoff, 46 BR 61,67; CM 314746, Garfinkle).

In his sworn testimony before the court-martial the accused asserted that he did not, during the Japanese occupation of the Philippines, work for the Japanese firm Seikisan Seiki Kabushiki Kaisha. Four witnesses who testified that they had been employed by the firm during the occupation, a pay roll clerk, two watchmen and a timekeeper testified that accused did work for the firm as a watchman for at least several months during the period of the Japanese occupation. The records of the firm had been destroyed. An issue of fact was therefore presented which was peculiarly within the province of the court to decide. The adequacy of the proof to support the court's findings is beyond question. Counsel for the defense has filed a brief which has been given careful consideration. Much of the argument therein relates to Specification 1 of the charge. Inasmuch as the finding of guilty of this specification was disapproved by the reviewing authority no discussion regarding the same is necessary. It is contended that in view of the fact that the record shows accused was sworn by the Division Inspector General before making the alleged false statements, the offense described is perjury as denounced by Article of War 93 rather than false swearing in violation of Article of War 95. This contention is patently without merit. Even if it be conceded that the act denounced constitutes perjury within the meaning of Article of War 93, it would also be a violation of Article of War 95 as being conduct unbecoming an officer and gentleman. There is ample authority whereby misconduct of officers is denounced under a specified Article of War and in addition thereto, the same misconduct is denounced as being in violation of Article of War 95. Accused cannot complain that he was convicted of violating Article of War 95 and not tried for a violation of Article of War 93, or Article of War 96, the offenses being considered entirely separate (McRae v. Henkes, 273 Fed. 108; App. 1, MCM, 1928, p. 224; CM 281663; Hindmarch, 22 BR (ETO) 223,229).

The record reveals that the charges in this case were not referred to the staff judge advocate for consideration and advice before trial as is directed in Article of War 70. Although such procedure is irregular, it is not such error as invalidates the proceedings. It has been consistently held that the requirement referred to is directory only and not mandatory so as to affect the jurisdiction of the court (CM 229477, Floyd, 17 BR 149, 153).

6. War Department records show that this officer is 29 years of age and was commissioned a second lieutenant, FA, AUS, on 31 July 1946. No

efficiency reports are available. The charge sheet shows prior enlisted service in the Philippine Scouts from 3 July 1934, including the period of Japanese occupation.

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 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.

Charles E. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ashcraft, Judge Advocate

JAGK - CM 319700 1st Ind MAY 8 1947

WD, JAGO, Washington 25, D. C.

TO: The Under Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jose Cabading (O-1896751), Infantry.

2. Upon trial by general court-martial this officer was found guilty of signing an affidavit to First Lieutenant Richard S. Ribner, AGD, stating that during the Japanese occupation of the Philippine Islands he was never employed by a Japanese owned or controlled firm, which statement he knew to be false (Spec. 1); and of knowingly making a false official statement under oath to Major August F. Kapp, Inspector General, 12th Infantry Division, during an investigation wherein he stated that during the Japanese occupation of the Philippine Islands he had never heard of, nor been employed by the Seikisan Seiki Kabushiki Kaisha, a Japanese controlled firm. Both specifications were laid under the 95th Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the finding of guilty of Specification 1, approved only so much of the sentence as provided for dismissal 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 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.

During the course of an investigation being conducted by Major August F. Kapp, Inspector General, 12th Infantry Division, the accused, who had been advised of his rights and was duly sworn, was questioned and made response thereto as follows:

"Q. During the period of the Japanese occupation, did you ever hear of the Sekisan Seiko Kabushiki Kaisa?
A. No, Sir.

"Q. Were you ever employed by the firm which I referred to in the last question?
A. No, Sir."

A pay roll clerk, three watchmen and a timekeeper who were employed by the Japanese firm during the occupation of the islands testified that they knew the accused and that he was in fact employed by Seikisan Seiki Kabushiki Kaisha as a watchman for several months during the Japanese occupation. The

accused testified at the trial and denied such employment, stating that he was engaged in peddling rice and clothes during such period of occupation.

I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

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

CM 319700

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 174, 20 May 1947).

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

JAGK - CM 319719

8 MAY 1947

UNITED STATES	THIRD UNITED STATES ARMY
v.	Trial by G.C.M., convened at Heidelberg, Germany, 22October 1946. To be hanged by the neck until dead.
Private JAMES DIXON (33876217), 428th Quartermaster Truck Company	

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

1. The record of trial in the case of the soldier 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 92nd Article of War.

Specification: In that Private James Dixon, 428th Quartermaster Truck Company did, at Ketsch, Germany on or about 20 March 1946, forcibly and feloniously, against her will, have carnal knowledge of Hedwig Kampter.

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

Specification 1: In that Private James Dixon, ***, having been duly placed in confinement in the Third Army Stockade, Mannehim, Germany on or about 30 March 1946, did, at Mannheim, Germany on or about 14 July 1946 escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private James Dixon, ***, having been duly placed in confinement in a Military Police Ambulance on or about 8 August 1946 for transportation from the Ninth Infantry Division Stockade to the Third Army Stockade, under armed guard, did, at Maulbronn, Germany on or about 8 August 1946 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private James Dixon, ***, did, in conjunction with Private Henry M. Jones, 660th Quartermaster Truck Company at Maulbronn, Germany on or about 8 August 1946, by force and violence and by putting him in fear, feloniously

take, steal, and carry away from the person of T/5 William McDonald one (1) Currency Control Book, 2150 Allied Marks, one (1) PX Ration Card, one (1) Wallet, one (1) Set Dog Tags, one (1) set keys, one (1) pair OD trousers, one (1) OD shirt, one (1) ETO Jacket, one (1) necktie all of a value of over $50.00 property of said T/5 William A. McDonald.

Specification 2: In that Private James Dixon, 428th Quartermaster Truck Company, did, in conjunction with Private Henry M. Jones, 660th Quartermaster Truck Company at Maulbronn, Germany on or about 8 August 1946, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the person of Private First Class Adam W. Stickney 1000 Allied Marks, $315.00 Postal Money Orders, one (1) pair OD trousers, one (1) kakhi shirt, one (1) ETO Jacket, one (1) fountain pen, one (1) Wallet, one (1) PX Ration Card, one (1) Drivers Permit, one (1) Dog Tag, one (1) Currency Control Book all of a value of over $50.00 property of said Adam W. Stickney, Jr.

Specification 3: In that Private James Dixon, ***, did, in conjunction with Private Henry M. Jones, 660th Quartermaster Truck Company at Maulbronn, Germany on or about 8 August 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Private First Class Adam W. Stickney a 45 caliber automatic pistol and a 3/4 ton ambulance truck, the property of the United States, value of over $50.00.

He pleaded not guilty to Charge I and its specification, but guilty to all other charges and specifications except Specification 3 of Charge III. He was found guilty of all charges and specifications with the following modifications:

"Of Specification 1, Charge III: Guilty, except the words 'One PX ration card' and 'One necktie'; of the excepted words, Not Guilty.

"Of Specification 2, Charge III, as amended by a ruling of the court in open session by adding the words, 'And a 45 caliber automatic pistol, and a 3/4 ton ambulance truck, the property of the United States, value of over $50.00.': Guilty, except the words 'One PX ration card,' 'one driver's permit,' and 'one currency control book'; of the excepted words Not Guilty."

By agreement, Specification 2, Charge III, had been amended by adding thereto: "And a 45 caliber automatic pistol, and a 3/4 ton ambulance truck, the property of the United States, value of over $50.00" and excepting therefrom the words "One PX ration card," "one driver's permit," and "one currency control book." Accused pleaded guilty to the amended specification.

Specification 3 of Charge III was thereupon eliminated from consideration. The words "PX ration card," and "one necktie" were excepted from the findings of guilty of Specification 1, Charge III. No evidence of previous convictions was introduced. The accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence but recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for forty years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Specification and Charge I

Frau Hedwig Kempter, Schwetzingerstrasse 52, Ketch, Germany, age 33, and weighing 96 pounds, a witness for the prosecution identified herself as a housewife whose husband had been killed during the war. At about 1400 hours, on 20 March 1946, as she was riding her bicycle along the road from Ketch toward Bruehl, Germany, a U.S. Army truck overtook her and as it passed she was struck on the left arm by a part of the truck and fell from her bicycle to the grass on the right side of the road. She was not seriously injured and a German named Schaefer, who lived nearby and who saw the incident, came to her aid and bandaged her hand. The driver of the truck which struck her, whom she identified as being the accused, stopped the truck a short distance beyond the place where she was struck, turned the truck around and came back to her insisting that he should take her to a doctor. She protested that she did not need a doctor, that her injuries were minor and that she did not want to go with him. Mr. Schaefer then stated, "Why, if he wants to bring you to the doctor you can go with him" and while he was speaking, the accused lifted her into the truck and drove off toward Ketch and Speyer (R. 15). Frau Kempter stated that, "I told him that the doctor was in Ketch, and he said to me he had to bring me down to Stuttgart." She did not want to go to Stuttgart and he told her that she would be back by "6 o'clock." She began to weep and as someone passed on a bicycle she cried out for help but accused struck her in the face and proceeded on toward Speyer and took her into the woods, where the witness testified the following occurred:

"A. He then stopped in the woods and got out of the car, and I too left the car - took my handbag and left the car.

"Q. Where was this?

"A. In the woods, and while I got out of the car he was standing before the door; he had already his pants open and I could see his male organ, and he told me in broken German, 'You do that and then you go home; if you don't do that you will die.' I ran away and he ran after me and caught me and when he got me he slapped my face. And when I was lying on the ground he threw himself on top of me and was choking me. I realized that I could defend myself no longer and couldn't go on struggling and then he said, 'Yes, then you can

go home.' I couldn't do anything else; I said, 'Yes' in order to get home then. Then he took me into the car and I had to lie down on the seat and then he used me.

"Q. What do you mean, he used you?

"A. He had intercourse with me.

"Q. Was this the first time he had intercourse with you?

"A. Yes.

"Q. Will you tell exactly what went on?

"A. I had to take his male organ into my mouth ..." (R.16)

After the parties had returned to the truck Frau Kempter testified that the following occurred:

"Q. Now you stated before that you got in the truck and he had intercourse with you. Will you tell exactly what happened from that time on?

"A. At first I had to lie down in the car, then I had to take off my pants; I wasn't well that day, I really didn't want to have intercourse with him. Then he slapped my face again all of a sudden. He said I had to take off all my clothes; I again refused but I had to do it, I had to take off all my clothes. He also had taken off his pants. He had intercourse with me, and then I had to take ...

"Q. You say you had intercourse with him. Just what happened, how?

"A. He put his male organ into my female organ.

"Q. Go ahead now.

"A. And then I told him I had to go home, I wanted to go home. He told me if he had finished I could go home, and if it would take until eleven o'clock in the night I couldn't go before eleven o'clock in the night.

"Q. Did he just have intercourse with you once?

"A. No, several times" (R. 17).

At about 1800 hours the accused returned with Frau Kempter to the residence of Arthur Schaefer in Bruehl where the woman had left her bicycle. As they were driving back accused told the woman that he would bring her 100 pounds of sugar. When they arrived at the Schaefer home Frau Kempter stated that she was crying and reported that accused had not taken her to a doctor, but had taken her into the woods. After accused had gone she went to her sister's home in Ketch and located a doctor (R. 19).

On cross-examination the German woman stated that accused's manner of driving the truck and the odor on his breath led her to believe that he was intoxicated, that he was not armed, that he spoke broken German and during the afternoon he slapped her four or five times. He had not given her the sugar which he mentioned. After she had secured a doctor in Ketch he directed her to wait a few days for an examination due to the fact that she was menstruating (R. 20-26).

Arthur Schaefer, Rohrhoeferstrasse 14, Bruehl, Germany, testified that in the "middle of March" he saw Frau Kempter riding her bicycle from Ketch to Bruehl when she was struck on the left elbow by the truck which accused was driving. When he went to the scene of the accident the accused told him to take the bicycle and that he (accused) "was going to bring the woman to the doctor." He took the bicycle to his house and about "six or half past six o'clock, when I just had changed my dress he came with the woman. The woman entered the house and was crying hard and told me she wasn't taken to the doctor, that he had taken her to another place, and then I went away." The witness further stated that when she returned "her hand was the same way bandaged as I had done it. I had bandaged the hand before; it hadn't changed." (R. 28). On cross-examination Mr. Schaefer asserted that the woman did not want to go with accused and stated, "Oh, it is not so bad; I don't want to go to a doctor" but that accused "helped" her into the truck and said, "Doctor and Ketch." As she rode away in the truck he did not notice any struggle but Frau Kempter w as crying. When she returned he did not notice any disarrangement of her clothing but she was very excited and he left the house (R. 29-30). Schaefer did not know any reason why the truck hit the woman on her bicycle. The highway was "normal" and he only saw a wagon about 300 meters infront of the woman (R. 32).

Specification 1, Charge II

Captain Edward L. Muhm, CMP, Commanding Officer of the Third U.S. Army Stockade at Mannheim, Germany, identified the accused as having been a prisoner in his stockade prior to 14 July 1946 and stated that on such date he escaped confinement. There was identified by Captain Muhm and received in evidence as Prosecution Exhibit 1 an extract copy of the stockade morning report of 14 July 1946 with entry thereon showing accused in escape (R. 13).

Specification 2, Charge II, and Specifications 1 and 2, Charge III

Private First Class Adam W. Stickney and Technician Fifth Grade William McDonald, both of the 9th Division Military Police Company, Augsburg, Germany, identified the accused as a military prisoner who, with another prisoner named Jones, they were directed on 8 August 1946 to transport from Augsburg to Mannheim, Germany. As they proceeded in a Government truck (ambulance) toward Mannheim, and at the outskirts of Moulbronn, the accused "grabbed" Stickney, the driver, and disarmed him of his 45-caliber pistol, while Jones struck McDonald on the head or neck and relieved him of both his carbine and 45-caliber pistol. Jones thereupon took control of the truck while accused held a cocked pistol on Stickney and McDonald. The truck was driven into a remote wooded area where accused and Jones dismounted, forced Stickney and McDonald to undress to their shorts and boots and then at gun's point they tied Stickney and McDonald each to a tree. Accused and Jones thereupon gathered together the clothes of their captives, kept their weapons, returned to the truck and drove away. The clothes taken from McDonald consisted of

a pair of OD trousers, a shirt, and an ETO jacket and contained among other items of personal property a currency control book, a wallet, 2150 Allied marks, a set of dog tags and a set of keys. The clothes taken from Stickney consisted of a pair of OD trousers, shirt and ETO jacket and contained among other items of personal property one wallet, 1000 Allied marks,, $315.00 in postal money orders, a fountain pen and a set of dog tags (R. 33-37, 38-40).

For the defense

After being duly advised of his testimonial rights, the accused elected to be sworn as a witness in his defense. He stated that he had been in the Army about two and one-half years, all of which time had been spent overseas excepting about four months. He had been married and had a wife and two children. He weighed about 135 pounds and was five feet 2-1/2 inches tall. In the afternoon of 20 March 1946 he left the house of a German named Werk in Ketch and at about "2 o'clock" as he was driving a truck toward Bruehl to see some soldiers that he knew, he came upon a "wagon and a woman on a bicycle." They were in the middle of the road and the woman was holding on the side of the wagon and talking to the man driving the horse and wagon. As he passed, the body of his truck "brushed" the wagon. After passing he turned around and asked the woman if he hit her. She said no and then she "fell." When he lifted up the "rag" he noticed that her hand kept on bleeding. He asked her if she wanted to go to a doctor and she said "Yes." Accused stated that "I helped her in the truck and I took her -- I was going ..." (R. 43). When they arrived in Ketch accused testified that he turned down a road going to Hohenheim and as they rode along Frau Kempter told him she did not want to go to a doctor and asked him for candy and cigarettes. He gave her a cigarette and as she smoked she asked him if he knew a soldier named John. She stated that John had given her sugar for "Du nicht wissen" and "started laughing." She told him about various "comrades" who had given her sugar, sometimes 25 pounds, sometimes 50 pounds and 100 pounds. He then suggested that she sleep with him in exchange for sugar. She replied, "No, she had to see her darling today, but that the next night, that was Thursday night, I was supposed to meet her at the roadhouse, some Rathaus or beer joint in Ketch. I starts the motor up and goes on down the road. She isn't talking about her hand anymore." When he returned her to the house in Bruehl a man came to the door and started "raising Cain" right away. The man asked accused his name and he replied, "Mac." He then got in the truck and left the place. Accused contended that he did not go into any woods with Frau Kempter because "there was no woods to go into; there was a house right there." He did not keep any date with her the next day because he had a fraulein. On cross-examination the accused was asked why he did not stop the truck in Ketch. He replied that he did not know any doctor in Ketch. When asked if he had not stated that there were no woods "down there" the accused replied, "Well, there is some trees along the river on the right hand side going down but there is also a road there up on a bank; there is a bank along the road" (R. 45-46).

After turning the truck around and passing through Ketch he noticed "a clock and the time was 1330." He returned to Bruehl about 45 minutes later. The distance from the two towns was "maybe two or three kilometers" and the place where he "turned" the truck was about six or seven kilometers. He was sure he arrived back at the house where he picked up the woman at "quarter of four" (R. 47-48). Accused asserted that both Frau Kempter and Herr Schaefer were "lying on the witness stand." "He says he was on the road and he came over and bandaged up this woman's hand. Nobody bandaged that woman's hand. He wasn't on the scene unless he was the man in the wagon and the man in the wagon didn't get out of the wagon" (R. 48).

No further material evidence was presented.

5. The pleas of guilty to Charges II and III and the specifications thereto together with the undisputed evidence establishing the offenses alleged render unnecessary a further discussion of these offenses. The defense moved that Specification 3 of Charge III be stricken as violating the rule against unreasonable multiplication of "charges" (MCM, 1928, par. 27, p. 17). The court overruled the motion but later in the trial and by consent of the parties Specification 2 was amended to include the property alleged to have been forcibly taken from Private First Class Stickney in Specification 3, and this specification was stricken from the pleadings. The accused was then asked how he pleaded to Specification 2 as amended and he replied that he pleaded guilty to the specification as amended (R. 41). This procedure was irregular but inasmuch as it was accomplished by agreement and the authorized punishment was in no manner affected, no prejudicial error could result thereby.

In her testimony concerning the alleged carnal knowledge by accused, the witness stated that she "had" to take his male organ into her mouth. Defense counsel vigorously contended that this testimony was highly prejudicial, was of such a nature as to inflame the minds of the court, and inasmuch as the accused was not charged with sodomy this evidence should be stricken from the record. The court overruled the motion. The ruling of the court in this regard cannot be successfully attacked. Admittedly, as a general rule, upon the trial of a criminal case, evidence of the commission of other independent crimes by the defendant is inadmissible to show either guilt or that the defendant would be likely to commit the crime for which he is charged even though it is a crime of the same character (Wharton's Criminal Evidence, Vol. I, 7th Ed., sec. 343, p. 483). However there are many well recognized exceptions to this rule. In criminal actions involving any of the crimes known as "sexual offenses" evidence of other closely related criminal acts has been very liberally permitted for a reason peculiar to those crimes. The reason is aptly stated by the Supreme Court of Delaware in State v. Clough (33 Del. 140; 132 Atl. 219) as follows:

> "This exception to the general rule is founded not so much upon the desire to show the intent with which the offense alleged

in the indictment was committed, but more upon a broader ground of showing sexual inclination or lustful disposition of the defendant toward the prosecuting witness, and making it more probable that the offense charged was committed." (Wharton's Criminal Evidence, Vol. I, sec. 356, p. 537; 27 A.L.R. 351; 22 C.J.S. 1168; also MCM, 1928, par. 112b).

The testimony of the woman, Hedwig Kempter, if believed, leaves no reasonable doubt that on the afternoon of 20 March 1946 she was, under pretense of being taken to a doctor, forcibly and against her will caused by the accused to ride with him into a wooded area near Ketch, Germany, where she was compelled to disrobe and engage in sexual relations with him. When it became apparent to her that the accused was not taking her to a doctor she cried out attempting to attract the attention of a passing bicyclist, but was slapped in the face and restrained by the accused. When they reached the woods and had dismounted from the truck she attempted to flee but he caught her and again slapped and choked her. It was then that she realized the futility of "struggling" and, in her own language, "I couldn't do anything else." A woman of small stature and weighing 96 pounds finding herself in circumstances as shown in this case could not reasonably be expected to offer great physical resistance. And if, because of fear or frailty on the part of the woman, it was not necessary for the accused to exercise great force to overcome her resistance it is none the less rape if she did not in fact consent (MCM, 1928, par. 149b; 44 Am. Jur., sec. 6, p. 905; CM 298362, Swain, 28 BR (ETO), 251,256; CM 261857, Seymour, 2 BR (A-P), 13, 28; CM 317948, Wells).

That the woman said "Yes" under duress of being held captive, of being choked and slapped is not such consent as negatives rape. If such were the law, the culprit could hold a bayonet to a woman's breast and exact from her the word "Yes," accomplish his nefarious design and go acquit. Consent, in order to be a defense, must be a consent not dominated or controlled by fear (Roberson's New Kentucky Criminal Law and Procedure, sec. 549, p. 753). Accused's testimony regarding his relations with the woman is both contradictory and fantastic. He testified that he asked the woman if she wanted to go to a doctor and that she said, "Yes." On cross-examination he stated that she did not say she wanted to go to a doctor, but "acted" like she did. On further cross-examination, he stated, "She did not say she didn't want to go to a doctor." If accused's story that this woman was one of easy virtue, selling the favors of her body for sugar and attempting to make a date with him is true, it is strange that she would cry out or make accusation against him. It is not hinted that any benefit could accrue to her by virtue of such alleged false accusation. And again he avers that his purpose was to take her to a doctor in Stuttgart, although the record shows he never went to such a place. He went to Ketch, but did not know any doctor at Ketch and kept on driving. He did not keep any date with her because he already had a fraulein.

The court-martial by its findings rejected accused's testimony in denial that he had sexual relations with the woman, and, inasmuch as we

are permitted to weigh the evidence in this type of case, we likewise reject it. We believe that his carnal knowledge of Hedwig Kempter was accomplished by force and putting her in fear. Should it be conceded that this woman, who was the wife of a deceased German soldier, was a common harlot, the offense of rape could yet be, and undoubtedly was, committed upon her. As was stated in CM 278700, Powell, 13 BR(ETO),111,"a prostitute has the right to preserve the sanctity of her person when she elects." The testimony of the woman is corroborated by that of Arthur Schaefer who saw her being lifted into the truck by the accused and who observed her excited and almost hysterical condition when accused returned with her to his house. He thereupon caused the accused to leave the place so that the woman could go in peace to her home. The admissions of the accused further corroborate such testimony.

6. The charge sheet shows the accused to be 28 years of age and although he testified that he has a wife and two children in the United States, the charge sheet shows that he has no allotments to dependents. He was inducted on 24 July 1944 at Harrisburg, Pennsylvania, to serve for the duration plus six months.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92.

Chester D. Silverb, Judge Advocate

Carlos E. McAfee, Judge Advocate

Albert G. Ackroyd, Judge Advocate

(40)

JAGK - CM 319719 1st Ind

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

TO: The Under Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and opinion of the Board of Review in the case of Private James Dixon (33876217), 428th Quartermaster Truck Company.

2. The accused was found guilty of rape upon a German woman, in violation of Article of War 92; of two offenses of robbery committed upon U.S. soldiers detailed to guard him, in violation of Article of War 93; and of two offenses of escape from confinement, in violation of Article of War 69. He pleaded guilty to all offenses of which he was convicted except that of rape, to which he pleaded not guilty. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence but recommended commutation thereof to dishonorable discharge, total forfeitures and confinement at hard labor for forty years, and forwarded the record of trial for action under Article of War 48.

I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence, but in view of all the circumstances and the recommendation of the reviewing authority I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years, and that an appropriate U.S. penitentiary be designated as the place of confinement.

3. Consideration has been given to the letter of 4 February 1946 from Reverend Julius V. Reeves, Zion Baptist Church, Edgemont, Pennsylvania, addressed to the President of the United States and requesting clemency in behalf of the accused.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Drft ltr sig USW
3. Form of Ex action
4. Ltr fr Rev Reeves

(G.C.M.O. 196, 4 June 1947).

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

JAGN-CM 319721

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Wiesbaden, Germany, 11 October 1946. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private HARRY W. HESS (6065365), Troop C, 11th Constabulary Squadron.	)	

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

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

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

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

Specification: In that Private Harry W. Hess, "C" Troop 11th Constabulary Squadron, did, at Rothwesten, Germany, on or about 15 August 1946, feloniously take, steal, and carry away one radio, value of about $25.00, and one camera, value of about $15.00 property of Private Henry L. Hull, "C" Troop 11th Constabulary Squadron and one radio, value of about $25.00 property of Private William M. Alteson, "C" Troop 11th Constabulary Squadron, total value of about $65.00

CHARGE II: Violation of the 94th Article of War.
(Disapproved by Reviewing Authority)

Specification: (Disapproved by Reviewing Authority)

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

Specification 1: In that Private Harry W. Hess, "C" Troop 11th Constabulary Squadron, having been restricted to the limits of the Troop Area, did, at Grossalmerode, Germany, on or about 15 August 1946, break said restriction by going to Rothwesten, Germany.

Specification 2: (Disapproved by Reviewing Authority)

Accused pleaded not guilty to all Charges and Specifications, was found not guilty of Charge II but guilty of a violation of the 96th Article of War, 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 three years. The reviewing authority disapproved the findings of guilty of Charge II and Specification 2 of Charge III, approved the sentence but reduced the period of confinement to two years, designated the 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 pursuant to Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the finding of guilty of Charge III and its Specification and further reference thereto is deemed unnecessary.

4. The accused was found guilty of Charge I and its Specification, alleging a single larceny on 15 August 1946 of a radio, value $25.00 and a camera, value $15.00, the property of Private Henry L. Hull; and a radio, value $2500, the property of Private William M. Atleson, a total value of $65.00. Because of the nature of the proof offered it is necessary to consider the alleged larceny from Hull and Atleson separately.

With respect to the radio and camera alleged to have been stolen from Hull it was incumbent upon the prosecution to prove:

(1) The taking by the accused of the radio and camera as alleged;
(2) The carrying away by the accused of such property;
(3) That the property belonged to Hull;
(4) That the value of such property was as alleged; and
(5) That the taking and carrying away was with fraudulent intent to deprive Hull permanently of his property (MCM, 1928, par. 149h).

With respect to (1) and (2) the record shows that a jeep driven by accused, who was accompanied by a German girl, was involved in an accident on the way from the girl's home in Kassel enroute to the "club"

(R. 7, 9, 10). The "club" referred to is indicated to have been an enlisted man's club (R. 15). There were two radios and a camera in the jeep (R. 7). They were impounded following the accident and introduced in evidence (R. 8, 16, 17).

As to (3) the record is vague. Pertinent parts of the testimony of the Officer of the Day, who was present at the time the accused was questioned, are as follows:

"Q. Tell the court the circumstances surrounding your seeing that camera for the first time?

A. This camera and the radios were given to me in the guardhouse by the sergeant of the guard.

* * *

Q. Will you now tell the court how you are positive that that is the same camera?

A. When the man came in to identify it, he said if the little red window is loose it is mine and the same little red window is loose.

Q. And who was that individual?

A. I don't know his name. He came in from C Troop with this Private Atleson.

* * *

Q. Do you know Private Henry Hull?

A. Hull? That name sounds familiar, I think that is the other boy, I'm not sure however.

* * *

Q. Did you hear Private Hull or another party in the presence of the accused identify a radio as belonging to him?

A. Yes, sir, a radio and a camera, that camera.

Q. Did you hear the other party in the presence of the accused make any other statement concerning the radio and the camera?

A. No, sir, I don't believe so, I know he tried the radio to see if it still operated" (R. 16-17).

As to (4) no evidence whatever was offered to show the value of the articles allegedly belonging to Hull.

As to (5) there was no direct evidence introduced to show intent.

From the entire record relative to this aspect of the case the Board concludes that there was a complete failure on the part of the prosecution to prove that the articles in question had been stolen; that there was no competent evidence that the radio and camera were the property of Hull; and that there is no evidence of the value of such articles in the record. It is the opinion of the Board of Review, therefore, that the record of trial does not support the finding of guilty of Specification 1 of Charge I so far as it pertains to the radio and camera alleged to be the property of Private Henry L. Hull.

The Board of Review is of the opinion, as to the radio alleged to be the property of Atleson, that the record of trial is legally sufficient to support the finding of guilty of the larceny. However, the only attempt made to prove the value of the stolen property was to show that Atleson had paid $23.00 for the radio, three or four days before it was stolen (R. 13).

It is well settled that

> "Other than as to destructive articles of Government issue (par. 1533, Supp V, Dig. Ops, JAG, 1912-30) or other chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny thereof is the market value. CM 208002, Gilbert; * * *" (CM 212983, Dilsworth 10 BR 265).

There is no competent evidence as to the market value of Atleson's radio. It does not appear that Atleson intended to or attempted to estimate the market value of his radio, or that he was qualified to do so as an expert or as one who had familiarized himself with market prices or values. The court could not, from its observation alone, determine the market value of the stolen radio. In that connection the Board of Review has held in similar cases that the court, from its inspection alone, may determine that a stolen article has some value but that to permit the court to find specific market value,

> "* * * would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possess" (CM 208481, Ragsdale, 9 BR 13).

It may be inferred from the description and inspection of the stolen radio that it had some substantial value not in excess of $20.00 (CM 228742, Blanco, 16 BR 299).

5. The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for the larceny of property of value of not more than $20 is confinement at hard labor for six months.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the finding of guilty of Charge III and its Specification; legally sufficient to support the finding of guilty of Charge I; and legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as involves a finding of guilty of larceny by the accused at the time and place alleged of the radio of Atleson of some substantial value not in excess of $20.00; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven months.

Edward D. Johnson, Judge Advocate.

Hugh P. Brack, Judge Advocate.

James H. Dryden, Judge Advocate.

JAGN CM 319721 1st Ind MAY 2 1947

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 Private Harry W. Hess (6065365), Troop C, 11th Constabulary Squadron, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of the Specification, Charge I, be approved as involves a finding of guilty of larceny by the accused at the time and place alleged of the radio of Atleson as described, of some substantial value not in excess of $20.00; 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 seven months. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 319721).

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 319747

27 JUN 1947

UNITED STATES v. Major DAVID F. WATSON (O-909086), Quartermaster Corps	HEADQUARTERS COMMAND UNITED STATES FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 15,21,22,23,24,25, 28,29,30 and 31 October 1946. Dismissal, total forfeitures and confinement for three (3) years.

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 above named officer and submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Major David F. Watson, Quartermaster Corps, Headquarters Command, United States Forces European Theater, did, at or near Kronberg, Germany, at some time or times between 1 October 1945 and 1 June 1946, willfully, wrongfully, and unlawfully agree and conspire with Colonel Jack W. Durant and Captain Kathleen B. Nash Durant (then Captain Kathleen B. Nash), individually and collectively, to convert to their own use the following items of personal property, each of a value of more than $50.00:

1 diadem pearls and diamonds
1 necklace diamonds (cataract)
1 emerald jewel
1 reviere diamonds
1 pair of big ear drops
2 rings with diamonds
1 lady's watch enamel diamonds
1 riviere diamonds
1 diadem
1 fan mother of pearl
1 medal diamonds and onyx
1 amethyst diadem with diamonds
1 large amethyst necklace with diamonds
1 small amethyst necklace with diamonds
1 buckle amethyst diamonds, 3 parts
1 large brooch amethyst diamonds, 2 parts
1 pair of ear rings
4 not fixed amethysts with diamond edge
2 ear rings with pendants
2 big diamonds

1 big diamond as brooch
1 big diamond with pearl as brooch
2 gold bracelets, blue enamel & diamonds with pictures of Friedrich Wilhelm IV and Queen Elisabeth of Prussia
1 necklace with 27 pearls and buckle
1 pearl-chain, 49 pearls
1 necklace, turquoise, diamonds
2 ear drops
1 necklace, gold with diamonds, changeable links, 17 links
1 necklace, silver (platinum) with pearls
1 necklace, gold with lapislazuli
1 necklace, gold with several stones in egg shape
1 necklace, corals with pendant
1 necklace, corals with big stones (short chain)
1 necklace, gold, thin with light pendant
1 necklace, silver, thin with pendant, sapphire with diamonds
1 necklace, gold without pendant
1 pendant, big sapphire with diamond edge
1 pendant, big knot 2 diamonds
1 pendant, big cross, 7 pearls with diamonds
1 pendant, medal with gold and pearls
1 pendant, gold with turquoises and diamonds, horseshoe form
1 pendant, big amethyst heart
1 pendant, small amethyst heart
1 pendant, golden heart with enamel and diamonds
1 pendant, gold with 4 pearls and diamonds
1 pendant, medal, gold with glass (Amor spotted)
1 pendant, medal, gold with glass (red cross)
1 pendant, small golden cross with diamonds
1 pendant, medal, gold with blue enamel monogram
1 pendant, medal, gold with photo
1 pendant, medal, gold with tooth
1 pendant, medal, gold with iron cross
1 pendant, gold, with pearls, a jour
1 pendant, gold with pearls, a jour and ladybird
1 pendant, gold, with pearls and ruby in leaf form
1 pendant, gold, with rose quartz
1 pendant, gold, with diamond splinters
1 pendant, golden souvenir coin
2 pendant crosses
3 pendants, small for children
1 pin, diamonds, 4 rosettes and drops
1 pin, diamonds, 1 flower with 3 clusters
1 pin, diamonds, 2 pearls, one as a drop
1 pin, 4 pearls and diamond splinters
1 pin, gold with diamond, 3 sapphires, 2 rubies
1 pin, gold, square with 5 pearls and 4 diamonds
1 pin, gold, with 2 pearls and 1 small diamond
1 pin, gold, with 3 sapphires and 2 diamonds
1 pin, gold, 2 sapphires, 2 diamonds
1 pin, gold, with 4 pearls and diamonds
1 pin, long, platinum with diamonds
1 pin, gold with emeralds
On a blue cover 7 pins
On a blue cover 2 pins
On a light green cover 5 pins
On a light green cover 6 pins
2 hat pins
1 tie pin, gold as a crown
1 tie pin gold with coral and star
1 bracelet, platinum with 1 big pearl 2 diamonds and splinters
1 bracelet, gold with watch (square)
1 bracelet, tight with monogram & photo
1 bracelet, gold with sapphire and ruby, chain
1 bracelet, gold chain with sapphire and diamonds
1 bracelet, gold chain with sapphire, ruby and emerald, horseshoe form
1 bracelet, gold chain with pearl and diamonds
1 man's watch, gold with monogram

1 lady's watch, gold with monogram
1 lady's watch, gold with lapislazuli
1 pair of sleeve links, gold with sapphire
1 pair of sleeve links, gold with diamonds
1 shirt stud, sapphire with crown of diamond splinters
1 shirt stud, pearls
1 wedding ring
1 ring with round turquoise and diamond edge
1 ring with oval turquoise and diamond edge
1 ring with sapphire and 2 diamonds
1 ring with large blue-grey stone, gold
1 ring, gold with ruby and diamonds
1 large buckle, gold with blue enamel
1 small buckle, gold with dark blue enamel
2 buckles, light blue-gold on black velvet ribbon
1 golden lion order
1 Badische Haus order on yellow ribbon
1 Gmundener order on pink ribbon
1 diadem (sapphire)
1 necklace (sapphire)
1 brooch (sapphire)
1 bracelet, diamond
1 brooch, rose turmalin
1 pendant, diamond
1 bracelet, emerald, pearls, diamonds
1 bracelet, gold
1 pair of buttons, gold, emerald
4 golden rings
1 ring
1 heavy golden watch chain
1 gilt mesh lady's bracelet
1 ring with sapphire, diamond shape surrounded by rose diamonds,
1 pin
3 roman clasps
1 golden man's watch with monogram and chain
1 compass
1 pair of red sleeve links (enamel) with case
5 pairs of sleeve links
6 shirt buttons
3 shirt buttons, gold
3 tie pins
1 golden pin, monogram with crown
1 ring, gold with ruby
2 medals, gold and silver
1 pin, black pearl
1 fan, mother of pearl, gold framed, flower designs and initial "M" on one side. Gold ornamentation with diamonds, rubies and sapphires
1 prayer book, bound in gold with blue cloth, 7 ribbons with pendants, in cloth cover
1 autograph book bound in red velvet with ribbon ties
1 autograph book (with pictures) bound in light red cloth, tied with ribbon
1 small autograph book bound in red cloth
1 ring with large sapphire (cabochon) round (35c carat)
1 chain bracelet with diamonds and diamond splinters
1 brooch with gold chin, surrounded by diamonds
2 brooches, gold with small stones
5 charms
1 large amethyst in shape of a drop, 100 carat

(Items excepted in the findings or disapproved by reviewing authority omitted.)

and of a total value of more than $50.00, the property of Prince Wolfgang of Hesse, with the intent and purpose of depriving the owner thereof permanently of his ownership therein, and that, in pursuance of and to effectuate such conversion and conspiracy, the following overt acts were committed:

a. Between about 6 November 1945 and 1 June 1946 the said Major David F. Watson, Colonel Jack W. Durant and Captain Kathleen B. Nash Durant did break up and dismantle certain items of said jewelry and destroy or dispose of settings and fittings thereof;

b. Between about 6 November 1945 and 1 June 1946 the said Major David F. Watson, Colonel Jack W. Durant and Captain Kathleen B. Nash Durant did mail or cause to be mailed or transported from Germany to themselves or other persons in the United States of America and other places certain items, parcels or packages containing some of the items of said personal property referred to herein above.

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

Specification 1: In that Major David F. Watson, ***, did, at or near Kronberg, Germany, at some time or times between about 6 November 1945 and about 1 June 1946, feloniously, willfully, wrongfully and unlawfully receive, have, conceal, and transport or cause to be transported therefrom to at or near Burlingame, California, in foreign commerce, one silver water pitcher, leaf design with tiger handle, scalloped lyre shape opening, hall mark on bottom, Melillo - Napoli, value over $50.00, of the goods and chattels of Her Royal Highness Margarethe Dowager Landgrafin of Hesse, then lately before feloniously, wrongfully and unlawfully stolen, taken and carried away; he, the said Major David F. Watson, then well knowing the said goods and chattels to have been so feloniously, wrongfully and unlawfully stolen, taken and carried away.

Specification 2: In that Major David F. Watson, ***, did, at or near Kronberg, Germany, at some time or times between about 6 November 1945 and about 31 December 1945, feloniously, willfully, wrongfully and unlawfully receive, have, conceal, and transport or cause to be transported therefrom to at or near Belfast, Northern Ireland, in foreign commerce, one small silver hand mirror, antique, with the date 1893 inscribed thereon, value over $50.00, of the goods and chattels of Her Royal Highness Margarethe Dowager Landgrafin of Hesse, and one baroque pearl surrounded by diamonds, value over $2,500.00, of the goods and chattels of His Highness Prince Wolfgang of Hesse, then lately before feloniously, wrongfully and unlawfully stolen, taken and carried away; he, the said Major David F. Watson, then well knowing the said goods and chattels to have been so feloniously, wrongfully and unlawfully stolen, taken and carried away.

Specification 3: In that Major David F. Watson, ***, in conjunction with Colonel Jack W. Durant and Captain Kathleen B. Nash Durant

(then Captain Kathleen B. Nash), did, at or near Kronberg, Germany, at some time or times between about 6 November 1945 and about 1 June 1946, feloniously, willfully, wrongfully and unlawfully receive, have, conceal, and transport or cause to be transported therefrom to at or near Belfast, Northern Ireland, the following goods and chattels:

1 5 segmented diamond bracelet
1 3 segmented diamond bracelet broken up in 3 parts
1 double strand pearl necklace, small
1 golden kitten figure with pearl
2 matched gold rings with ruby and two diamonds each
1 golden pin "Baby" with pearl at each end
1 miniature baby pin, five small diamonds
1 gold safety pin with one pearl
1 large sapphire, 80 carat, unset
1 large amethyst in the shape of a drop, 100 carat
1 cut and polished rose quartz stone with Scarabaeus design, 40 carat
1 ring with large sapphire, cabochon, round, 35 carat
1 ring with sapphire, diamond shape, surrounded by rose diamonds
1 ruby (heart shaped) ring with diamonds
1 ruby (double heart shaped) ring with two miniature hands, 3 sections
1 seed pearl necklace
1 silver necklace with golden lock
Miscellaneous loose stones as follows:
583 diamonds (chips etc)
20 ruby chips
4 emerald chips
2 sapphire chips

(Items excepted in the findings or disapproved by reviewing authority omitted.)

value over $5000.00 of the goods and chattels of His Highness Prince Wolfgang of Hesse, then lately before feloniously, wrongfully and unlawfully stolen, taken and carried away; he, the said Major David F. Watson, then well knowing the said goods and chattels to have been so feloniously, wrongfully and unlawfully stolen taken and carried away.

Specification 4: In that Major David F. Watson, ***, did, at or near Belfast, Northern Ireland, on or about 2 April 1946, feloniously, willfully, wrongfully and unlawfully dispose of by sale 4 gold coins, 1 gold mesh bracelet, 3 charms, 2 gold and one with 2 corals and rose diamond rim, 1 gold chain, of a total value of more than $50.00, of the goods and chattels of His Highness Prince Wolfgang of Hesse, then lately before feloniously, wrongfully and unlawfully stolen, taken and carried away; he, the said Major David F. Watson, then well knowing the said goods and chattels to have been so feloniously, wrongfully and unlawfully stolen, taken and carried away.

Specification 5: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its specifidation, guilty of the Specification, Charge

II, except the words "each of the value of more than $50.00" and of the items not shown on the specification as copied above, and guilty of Charge II; guilty of Specifications 1 and 2, Additional Charge, guilty of Specification 3, Additional Charge, except the words "in conjunction with Colonel Jack W. Durant and Captain Kathleen B. Nash Durant (then Captain Kathleen B. Nash)," and the items not shown in the specification as copied above, guilty of Specification 4, Additional Charge, and not guilty of Specification 5, Additional Charge, and guilty of the Additional Charge. No evidence of any previous conviction was introduced. 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 three years. The reviewing authority disapproved so much of the finding of guilty of the Specification, Charge II, as involved "1 brooch, solitaire, diamonds" and so much of Specification 3, Additional Charge, as "involved in excess of 583 loose diamonds." He approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

In the fall of 1944 Prince Wolfgang was head of the House of Hesse, his older brother being in a concentration camp. As head of the House of Hesse he was president of the Board of Directors of the Kurfuerstliche House Foundation. This foundation owned lands, houses, jewels and other property belonging to the House of Hesse. The jewels were known as the Landgrafin and Kurhesse jewels (R. 63,64). During the fall of 1944 the Hesse family decided that due to the air raids over their country it was not safe to leave the jewels belonging to the foundation and to the individual members of the family in the usual bank vaults. They decided to bury the jewels in the family castle, Friedrichshof, in Kronberg (hereinafter called Kronberg Castle), Germany (R. 63,64,72,78,89). In order to carry out the decision of the family, Prince Wolfgang caused a wooden box lined with zinc to be constructed (R. 64). Prince Wolfgang also instructed Herr Lange, the "chief of the administration" of the House of Hesse, to collect all of the jewels (R. 64).

Herr Lange inventoried jewels belonging to the Foundation (Pros. Exs. A-1a, A-2a, A-5a), to Prince Christoph (Pros. Ex. A-3a) and to Prince Richard (Pros. Ex. A-4a), after which he wrapped them in packages (R. 37, 41). Prince Wolfgang inventoried the jewels belonging to himself and to his wife Marie Alexandra and wrapped them in packages (R. 64, 71; Pros. EX. A-7a), Princess Sophia (R. 72, Pros. Ex. A-8a), Prince Richard (R. 78, Pros. Ex. A-9a), and Margarethe, the Landgrafin of the House of Hesse (R. 89, Pros. Ex. A-10, 10a), each inventoried their jewels and wrapped them in packages, after which they were delivered to Herr Lange. Prince Heinrich, son of Princess Mafalda, delivered to Herr Lange a bag of jewels belonging to his mother. These jewels were never inventoried but Prince Heinrich remembered seeing among other things a bracelet in the shape of

a snake, a bracelet with rubies in the center and two rows of diamonds on the borders, a chain bracelet with diamonds and sapphires, a sapphire ring (cabochon), a chain bracelet with aquamarines. Concerning the bag, he testified, "I could feel that the bag was full up to the top" (R. 107,108,109).

The various persons making the inventories retained a duplicate original thereof (usually referred to as a copy) and delivered the original of the inventories to Herr Lange. The packages of jewels and the inventories were placed in the box ordered prepared by Wolfgang, and the zinc lid was soldered by a plumber, after which a wooden lid was affixed to the box (R. 44,65).

The box containing the jewels was delivered into the custody of Prince Wolfgang for safe keeping (R. 44). On 31 October 1944 Prince Wolfgang assisted by his brother Richard and a mason, buried the box of jewels in Kronberg Castle "at the deepest place under the castle where the furnace installation is located." The mason covered the place of burial with a layer of cement (R. 44,64,78). Prince Wolfgang never authorized anyone to remove the jewels from their burial place and they had not been removed at the time of his arrest on 13 April 1945 (R. 65). Margarethe, the Landgrafin of Hesse, owned Kronberg Castle, but at this time she was living in a cottage on the grounds. She lived in the cottage until April 1945, at which time the Americans requisitioned the property. The castle and cottage contained silver plate, silverware, candlesticks, silver boxes and other articles at the time of the requisition (R. 88-92). In April 1945 Kronberg Castle and its adjoining buildings, including the cottage were requisitioned by the United States Army and used as a recreation club for Army personnel (R. 481, Def. Ex. K). In July 1945, Captain Kathleen B. Nash was placed in charge of the castle and thereafter she was in active control of the castle until February 1946 (R. 45,64,99; Def. Ex. K).

On 6 November 1945, Walthur Weidmann, a German bartender at the castle, was ordered by Captain Nash to go downstairs to the furnace room of the castle. A German workman named Weiss, Sergeant Carlton, and Captain Nash were all in the room when he arrived. Weiss was kneeling in front of a hole in the floor. Under some concrete was a wooden box with a metal lining. Acting under orders from Captain Nash, Weidmann assisted Weiss in removing part of the wooden box and opening the metal lining. The box contained several packages. These packages which were wrapped, corded and partly sealed were all removed from the box and carried to Captain Nash's bedroom. Thereafter one Colonel Durant and the accused were observed to be with and talking to Captain Nash in her bedroom on several occasions (R. 99,100). Colonel Durant and the accused were frequent visitors at the castle (R. 104).

On 8 November 1945 Herr Lange requested of Captain Nash that she give

a certificate stating that the box of jewels had been taken away or confiscated. This request was denied by Captain Nash with the explanation that the jewels would be returned to the family when they returned to the castle (R. 45).

Lieutenant Colonel James R. Boyd and Major Joseph R. Ambrose were in charge of the Legal and Fiscal Section of the Special Activities Branch of G-1 USFET during November and December 1945. On 6 November 1945, the accused inquired of them as to the disposition of war trophies. This inquiry was of a general nature, no specific articles being mentioned. Lieutenant Colonel Boyd stated that he knew of no hard and fast rules with respect to the disposition of war trophies, that it was common practice for officers to appropriate some trophies as souvenirs. The accused returned on 7 November 1945 and asked hypothetical questions concerning the disposition of Kaiser Wilhelm's crown jewels should they be found, Eva Braun's jewels and Hitler's silverware were also discussed as examples of individually owned property being treated by some people as war trophies. The accused was advised that in their (Boyd and Ambrose's) opinion all items having military or intelligence value or items which had become property of the United States should be turned in to the proper authorities and that they knew of no similar requirement in the case of personally or individually owned property (Def. Ex. M).

Major Phillip P. Boaz, Theater Provost Marshal's Office, saw the accused on 7 June 1946. Major Boaz warned the accused of his rights under the 24th Article of War. Thereafter the accused made a voluntary statement in writing which was received in evidence as Prosecution Exhibit B (R. 112,124). This statement provides in part:

> "About November, 1945, somewhere in Frankfurt, Colonel Jack W. Durant asked me if I would like to see a sight for sore eyes. He told me that some jewels had been found in the Kronberg Castle (Officers Club) (Schloss Friedrichshof, Kronberg). That same day I went with Colonel Durant to the Castle to view the jewels. Captain Kathleen B. Nash, WAC officer in charge of the Club had all the jewels in her room. She showed them to us, and explained that they had been dug up in the basement of the Castle, several days prior. I understood T/5 Carlton was present when the jewels were dug up. I don't know. Within two weeks after the finding of the jewels, I, Colonel Jack W. Durant, and Captain Kathleen B. Nash, after deliberation as to correct disposition (whether to turn in to Hqs. Command, USFET or to the Office of Military Government) it was decided that the jewelry was loot, as Captain Nash stated there was no inventory on the property in Schloss Friedrichshof Officers' Club which listed or hinted that any such jewelry was in the properties. The background of the possible owners was thoroughly discussed and it was determined

that they were either dead, SS members or ardent Nazi members and as such the properties would never be returned to them no matter where or how they turn up. We three felt, and expressed to each other, the fact that each believed that this was legitimate loot, found and not illegally possessed. Our decision was that with these possessions, we could form a joint business together after leaving the service. It was not our plan at all to divide the properties in known shares for each. This decision was reached by myself, Colonel Jack Durant, Captain Kathleen Nash and T/5 Carlton. No discussion was ever made by any of us outside, nor was anyone notified of our findings. / The exact means how the jewels were transferred home, I don't know. Until the time Captain Nash left the jewels always remained in her possession. I do not have any of these jewels in my possession. I did not know of the disposition of the jewels until today."

After signing the above statement the accused requested Major Smith and Major Boaz to examine his billet and belongings. This examination was made but no jewels were found (R. 114). On the way to accused's billet he orally explained that portion of his statement, "Our decision was that with these possessions, we could form a joint business together after leaving the service," as a joke which they had discussed when they were drinking and that it was not a serious fact (R. 129). On 9 June 1946, the accused came to Major Boaz's office and stated that he wished to assist in every way possible in rectifying any wrongdoing, and stated that he had mailed some of the Kronberg jewels, which he had received from Colonel Jack Durant, to Belfast, Ireland. He then prepared a list of the jewelry mailed to Ireland (R. 116, Pros. Ex. C). He also wrote a letter, addressed to "Peggy," requesting her to deliver to Agent Benzell "all of the things I gave you and left with you to keep for me" (R. 116,159; Pros. Ex. 6). Major Boaz and "CID" Agent Benzell went to Ireland and secured from Peggy Harvey 23 items of jewelry. This jewelry was identified in court as Prosecution Exhibits D-1 to D-23, inclusive, Exhibit D-21 being 583 unset diamonds (R. 117-120,159,160). Agent Benzell showed this jewelry to the accused and the accused identified it as being the jewelry he sent to Ireland (R. 161).

Peggy Harvey met the accused in March 1944 in Belfast, Ireland. The accused visited her on several occasions and in November 1945 he presented to her a silver hand mirror (identified as Pros. Ex. D-23) and a baroque pearl surrounded by diamonds (identified as Pros. Ex. D-22). In May 1946 she received a letter from the accused stating he was sending her some candy which included some mints which she was to save for him. The candy arrived and she discovered that it contained jewels. She kept the jewels until 11 June 1946, at which time she turned them over to Major Boaz and Agent Benzell at the request of the accused (R. 154, Pros. Ex. F).

On or about 21 June 1946 Major Boaz discussed with the accused the

origin of the unset diamonds (Pros. Ex. D-21), at which time the accused stated that "Colonel Durant had given him all these items that had been returned and that these items, the loose diamonds, had been broken up in his presence and in the room of Mrs., or Captain, Nash Durant and at the castle" (R. 123).

On 14 June 1946 the accused stated to Major Boaz that he had sold scrap metal, appearing to be gold, to a jeweler in Belfast, Ireland (R. 123). Acting upon orders of Major Boaz, Captain Bart E. Sullivan went to Belfast and secured 1 mesh bracelet (Pros. Ex. I-1), 1 gold chain (Pros. Ex. I-2), 3 charms (Pros. Ex. I-3), and four gold coins (Pros. Ex. I-4). These items came from the shop of Mr. Corran (R. 280). Mr. William Corran, a jeweler of Belfast, Ireland, identified Prosecution Exhibits I-1,2,3 and 4 as being part of some jewelry purchased by him from the accused on 2 April 1946. For these and other items he paid the accused 80 pounds English money. The items purchased were of gold and brass. He sold the majority of the items purchased from the accused. At the time he purchased the jewelry the accused gave his correct name and identified himself by his identification card (R. 302-310).

During the winter of 1945-1946 Major General Bevans, Colonel Durant and the accused were quartered in a place known as "Spin Inn," later known as the "Park House." During the latter part of January 1946 Captain Kathleen Nash brought to "Spin Inn" three pitchers and presented one to General Bevans, one to Colonel Durant and one to the accused. At the time of the presentation it was disclosed that the pitchers were from Kronberg Castle (R. 476, 479,494). Major Watson mailed the pitcher presented to him to his parents in California. He also sent them a letter stating that he had received a present from Captain Nash, a WAC officer in charge of Kronberg Castle, which present he was sending to them to be shown to his friends as a souvenir from Germany. The accused informed "CID" Agent Benzell that the pitcher was at his parents' home and gave him a letter to be mailed to his (Watson's) parents, which letter requested the return of the pitcher (R. 163,164). This pitcher was returned in June 1946 to Major Boaz (R. 484). The pitcher (Pros. Ex. E-1, R. 337) was the property of Margarethe, the Landgrafin of Hesse, and was in the cottage occupied by the Landgrafin at the time the castle was requisitioned. It was a Christmas present from the King and Queen of Italy (R. 224,327). This pitcher was shown to have a value of over $50.00 by a prosecution witness (R. 262). Its value as scrap metal was about $11.00 (R. 343). It would cost between $125.00 and $250.00 to make a duplicate of the pitcher (R. 300,352).

In December 1945 the accused showed Angela Justice Hardy a bottle about three inches long, a half inch in diameter, three quarters filled with diamond chips and told her "he was collecting chip diamonds." Miss Hardy referred to Prosecution Exhibit D-21 and stated that the diamonds shown her, "They didn't look as big as that. They were as big as that,

or that, I should say, but I wasn't too interested. I just saw them in a bottle. They were between this size and that size" (R. 229).

Major John D. Salb, Corps of Military Police, identified a box (Pros. Ex. J) as a box found by him on 3 June 1946 at the home of a sister of Captain Kathleen Nash in Hudson, Wisconsin. This box was addressed to Captain Nash and bore the return address "From Major D. F. Watson 0909086, G-1 Division Headquarters USFET, APO 757, c/o Postmaster New York, N.Y.", all names and addresses being printed (Pros. Ex. J). Attached to this box was a portion of a certificate "that must be placed on boxes when they are mailed from the theater" (R. 186,188; Pros. Ex. L). The box was open but contained some books (Pros. Ex. J-1), a fan (Pros. Ex. J-2) and some heavy paper (Pros. Ex. J for identifications; R. 189-192). The fan (R. 327; Pros. Ex. J-2) was the property of Margarethe and was one of the articles placed in the box and buried in the castle (Pros. Ex. 10a). It was valued at about $1800.00 by a prosecution witness (R. 261) and $333.00 by a defense witness (R. 346).

During the fall or early winter of 1945, Joseph Loibl, a German gardener at the "Parkhouse" in Bad Homberg, observed the accused and Colonel Durant packing a box shown to be about 20x12x15 inches in size. This was about 10:30 p.m. in the furnace room. This was unusual in that most of the time some one else made the boxes. He also observed that the box contained paper similar to Prosecution Exhibit J for identification and a type used by the German Navy to replace windows (R. 202-206).

The court received in evidence Prosecution Exhibits K-1, K-2, K-3, K-4, K-5 and K-6, as being exemplars of handwriting of accused (R. 211). Captain Joseph E. Vincent, Military Intelligence, a witness for the prosecution, qualified as a handwriting expert. He compared the known specimens of accused's handwriting with the certificate found on the box in Hudson, Wisconsin, Prosecution Exhibit L, and was of the opinion they were written by the same person (R. 211-213). Captain Vincent testified that it was more difficult to determine handwriting from numbers than from letters but that it could be done (R. 214,215). Albert Schlumpf of Zurich, a witness for the defense, qualified as a handwriting expert and testified that he compared the known specimens of accused's handwriting with the writing on the box found in Hudson, Wisconsin (Pros. Ex. J) and was of the opinion that the same was not written by the accused. He was unable to come to any conclusion as to the certificate (R. 405,406; Pros. Ex. L).

Ronald Martin, a solicitor of Belfast, Ireland, a witness for the defense, saw the accused in Belfast sometime in April 1946. The accused showed him a cigar box of jewels and stated they were jewels his commanding officer had obtained in Germany. The accused also stated, "Well, he then said that he wishes to have a valuation put on the jewels." The jewels were shown to him while they were in a restaurant and anyone looking or passing by could have seen them. Later the accused stated that he had been unable to secure

a valuation as there was a regulation against valuing jewels which came from Germany (R. 420).

Specification 2, Additional Charge, described two items of property, one of which, the antique silver hand mirror (Pros. Ex. D-23) was shown to belong to Margarethe, Landgrafin of Hesse. It was a wedding present from English friends (R. 329), and had a value of between $36.80 and $41.40, according to the prosecution witness Merker (R. 263). Defense witness valued this item at $17.00 (R. 346). The other item, a baroque pearl surrounded by diamonds (Pros. Ex. D-22) was a portion of a large diadem consisting of pearls and diamonds (R.222,327) and a part of the Hesse House jewels (R. 330, Pros. Ex. 1a). This diadem was worn on occasions by Princess Mafalda, and Prosecution Exhibit O is a photograph of her wearing this diadem (R. 331,332; Pros. Ex. O). The diadem was one of the articles placed in the box and buried by Prince Wolfgang (R. 37, Pros. Ex. 1a). This pearl set in diamonds was valued by a prosecution witness at $2300.00 (R. 246,248) and by a defense witness at $546.00 (R. 346).

The property described in Specification 3, Additional Charge, was identified as Prosecution Exhibits D-1 to D-21, inclusive, and some of these exhibits were shown to belong to various members of the Hesse family. Prosecution Exhibits D-1, 11, 12, 14 and 15 belonged to Princess Mafalda and Prince Heinrich, her son, identified Exhibits D-1, D-14 and D-15 as being part of the jewelry delivered by him to Herr Lange for the purpose of placing it into the box to be turned over to Prince Wolfgang (R. 175, 176). Prosecution Exhibit D-2 belonged to Princess Sophia and was in the box buried by Prince Wolfgang (R. 221). Exhibits D-5, D-6, D-16, D-17, belonged to Margarethe, the Landgrafin, and were also in the box (R. 327, 328). Exhibits D-3, D-8, and D-18 belonged to Elizabeth, daughter of Mafalda (R. 176,177), but there was no showing that these items were in the box. Exhibits D-4, 7, 10, 13, 20 and 21 were not identified as belonging to anyone except that the accused, in his statement to Major Boaz and Agent Benzell, stated that they were among the jewelry he had obtained from Colonel Durant. He identified all of these items as jewelry sent by him to Ireland (R. 161) and obtained by him from Colonel Durant, the loose diamonds (Ex. D-21) being those broken out of settings in Captain Nash's room in the castle (R. 123).

These exhibits were valued by witness for the prosecution and the defense as follows:

Exhibit	Description of Exhibit	Value by Pros. Witness	Value by Def. Witness
D-1	5 segmented diamond bracelet	$9200. to $12,500. (R. 250)	$3485. (R. 343)
2	3 segmented diamond bracelet broken into 3 parts	$2760. (R. 260)	$1266. (R. 344)

3	double strand seed pearl necklace	$350. to $400.	(R. 252)	$157.	(R. 344)
4	Golden kitten figure with pearl	$70.	(R. 252)	$ 15.	(R. 344)
5	Gold ring with ruby and two diamonds	$350.	(R. 253)	$125.	(R. 344)
6	Gold ring with ruby and two diamonds	$350.	(R. 253)	$109.	(R. 344)
7	Gold pin "Baby" with pearl	$ 27.60	(R. 254)	$ 10.	(R. 344)
8	Baby pin with 5 diamonds	$ 41.40 to $46.	(R. 255)	$ 29.	(R. 344)
9	Gold safety pin with pearl	$ 23.	(R. 255)	$ 12.	(R. 344)
10	Sapphire 80-carat	$5750. to $6210.	(R. 255)	$2917.	(R. 344)
12	Amethyst, shape of a drop, 100-carat	$115. to $138.	(R. 257)	$50.	(R. 345)
13	Rose quartz stone, scarabaeus design	$37.50	(R. 257)	$25.	(R. 345)
14	Sapphire ring, cabachon	$575.-	(R. 257)	$356.	(R. 345)
15	Sapphire ring, surrounded with rose diamonds	$368.	(R. 258)	$83.	(R. 345)
16	Ruby ring, heart shaped, with diamonds	$460.	(R. 258)	$103.	(R.345)
17	Ruby ring, double heart shaped	$69.	(R. 258)	$ 42.	(R. 345)
19	Seed pearl necklace	$92.	(R. 259)	$ 59.	(R. 345)
20	Silver necklace with gold lock	$5.75	(R. 259)	$ 15.	(R. 345)
21	583 unset diamonds 20 ruby chips 2 sapphire chips 4 emerald chips	$8740.	(R. 260)	$5456.	(R. 345)

The property described in Specification 4, Additional Charge, was identified as belonging to Princess Mafalda (R. 177,178; Pros. Exs. E-1,2,3,4). Its value was fixed by a defense witness as follows:

Exhibit	Description	Value	R. No.
I-1	Gold chain	$4.00	345
I-2	Mesh bracelet	$40.00	345
I-3	3 charms	$30.00	345
I-4	4 gold coins	$34.00	345

Mr. David Ronald Martin, a solicitor of Belfast, Ireland, became acquainted with the accused at the beginning of the year 1943. He testified that the reputation of the accused for honesty and integrity was good. The accused "was very highly thought of in Belfast by every person who knew him, including myself, and was a welcome visitor any time he came back there on leave. He was welcome in many homes" (R. 415,424).

Major Hedwig Cadell, assigned to GI-USFET, testified that the accused was her immediate superior. Her duty required that on occasion she find Army circulars and directives for her superiors and from time to time she did search out circulars and directives for the accused. The accused also had access to the files and examined them on various occasions (R. 432,433).

The court took judicial notice of War Department Circulars 155, section 6, 28 May 1945; Circular 266, 5 September 1945; Circular 331, Section 3, 21 September 1944; USFET Circular 112, 17 August 1945; Circular 138, 9 October 1945 (R. 439). These circulars refer to war trophies and souvenirs.

Walthur Weidmann, a German civilian employed at Kronberg Castle, was recalled as a defense witness and testified that two days before the discovery of the jewels a sealed room containing several hundred bottles of wine was found in the castle (R. 455,456). This wine was served to officers when ordered by Captain Nash and Sergeant Carlton. 400 bottles of this was transferred to the "Cogen House" (another club) and sold to guests at the club (R. 456,459). This testimony concerning the wine was stricken from the record on motion of the prosecution (R. 460,462).

Corporal James W. Conklin, a chauffeur assigned to G-1, USFET, testified that he was driving for the officers quartered at Spinn Inn. He frequently wrapped and mailed packages for officers and enlisted men living at Spinn Inn. On each package he placed a certificate. The certificates were made out and signed before he wrapped the packages. He sent packages for the accused. One package was a sword and another was candy which was sent to Ireland. He did not recognize the wooden box obtained by Major Salb in Hudson, Wisconsin, and the certificate attached thereto was different from the ones he customarily used (R. 464-467).

It was stipulated that if Colonel Thomas Houston Dameron were present in court he would testify that he has known the accused since August 1944. This acquaintanceship was of a social and military nature. The accused's

character was unimpeachable and his ability superior (R. 488).

Major Ferrell D. Lowe, Special Service Officer for the Continental Base Section, worked with accused from July 1943 to August 1944. Their association was very close. Major Watson's reputation for honesty and integrity was very fine (R. 470,471). He further detailed some of the accused's military record and concluded that "all considered him as an exceptionally honest officer" (R. 473).

The 66-1 file of accused was offered in evidence by defense and received by the court as Exhibit K-6. This record shows that the accused received the Croix de Guerre with star from France, medal for battle merit from Russia, Croix de Guerre with Palm from Belgium, and the Bronze Star. He was eligible for rotation 8 January 1946 but extended his time of duty to 30 June 1947. His efficiency ratings for the period 15 August 1944 to June 1946 were equivalent to superior (R. 475).

Mr. Robert Frank, International Red Cross Delegation, became acquainted with accused in August 1945. He often sought information from accused. The reputation of accused is that of an honest man. Information secured from accused was honest and truthful (R. 482,483).

Albert J. Watson, certified public accountant, father of accused, testified that in March 1946 he received a letter from accused stating that he had received a present from a Captain Nash, a WAC officer in charge of Kronberg Castle, and that he was sending it under separate cover to be shown to his friends as a souvenir from Germany. The pitcher (Pros. Ex. E-1) was apparently silver plated. It was on display in his dining room until June when it was sent to Major Boas at the request of the accused. Major Watson was experienced in the operation of chain stores, having worked for Safeway Stores. The witness and accused had planned to establish a chain of Frozen Food Stores in their community. The witness has made arrangement to build a plant for their proposed business. He had also retired from his business connections in order to go into business with the accused. During the last two years he had been sending accused literature relative to the handling of frozen foods (R. 485,486).

Colonel Jack W. Durant, Headquarters Command, USFET, testified that in late 1945 and early 1946 he was executive officer of G-1, USFET, and the accused was his assistant. The accused was an excellent officer and thorough in work assigned to him. He recommended that accused be promoted to major. In the fall of 1945 the fact that a secret wine cellar was found in Kronberg Castle was discussed at the dinner table. Present at this discussion were General Bevans, Major Watson, Colonel Durant and Captain Nash. The disposition of the wine was also discussed. On one occasion Captain Birmingham showed the accused two items, a mirror and a bottle, as having come from Kronberg Castle (R. 491-494). Early in November 1945 he gave the accused

instructions to check into the proper disposition of property abandoned or concealed from the Allied Forces. When asked, "Did you ever give any orders or directions to Major Watson with respect to any Kronberg jewels?" he answered, "No" (R. 496). On cross-examination he refused to answer questions concerning the Kronberg jewels on the grounds that the answers might incriminate him (R. 500).

Defense Exhibits L,M,N,O,P,Q,R,S,T,U,V,W are letters or affidavits from friends and employees, both civil and military, of the accused. They all attest in one form or another, to his honesty, good reputation and efficiency in doing any assigned work.

4. a. The defense urged that other persons had committed offenses against enemy property for which they had not been tried and by doing only what other people were doing with impunity the accused was following precedent and therefore he was acting without a guilty mind. In support of this theory the defense offered evidence relative to the discovery of a secret wine cellar in Kronberg Castle containing a large amount of wine and the subsequent disposition of this wine. The court excluded this evidence on motion of the prosecution. It appears from the record (R. 511) that this evidence was offered solely for the purpose of showing that inasmuch as others took property from Kronberg Castle accused was warranted in assuming any property therein could rightfully be appropriated by individuals and that accused did not, therefore, have the specific intent necessary to make out the offenses charged. In excluding this evidence the court was correct. It is a general rule that custom and usage prevailing in a community or neighborhood cannot be set up as a defense to a prosecution for a crime. It is likewise a general rule that every individual in a community is responsible for his own acts, conduct and infractions of the criminal laws without regard to any usage or custom that prevails in the community and without regard to the acts and conduct of others and that it is not a defense to the prosecution for a crime that another individual who has committed the same offense has not been indicted. (Wharton's Criminal Law, Vol. 1, secs. 388, 392; Regina v. Reid, 12 Cox C.C.1).

In Commonwealth v. Doane (1 Cushing 5 (Mass.)), the defendant was accused of the larceny of pig iron from a ship. The accused was engaged in removing cargo from the ship and after the bulk of the cargo was removed and most of the crew discharged the accused and others took pig iron from the remnants of the cargo. He offered evidence to show "a custom for the officers of ships to appropriate to themselves a part - a small part - of the cargo." This evidence was ruled inadmissible. The defense argued among other things that this evidence had a tendency to show that there was no intention on the part of the defendants to steal. The court said:

> "The proposed evidence was objectionable ***. But such a custom could not be sustained as a legal custom. A custom to take another man's property and convert it to one's own use,

without consent, or giving an equivalent, is a custom bad on its face and cannot be supported."

"It surely will not be contended, that the fact, that similar offenses have been committed by others, would constitute any legal defense for the parties charged in the present case, and to that extent the question was clearly incompetent."

101,105

In Barnes v. District of Columbia (27 App. Cases, D.C.), the defendant was charged, as the owner of a licensed hack, with stopping and loitering on the street, at a place not a regular hack stand in violation of the police regulations of the District. He defended this charge upon the theory that other persons violated this police regulation with impunity. In affirming the conviction the Court of Appeals said:

"** it is no defense to him to show that other persons have violated it with apparent impunity. That other persons may have escaped punishment, either through the failure of the municipal government to vigorously enforce the law in every possible case, or through the erroneous interpretation by the courts of the scope and effect of the law in particular cases, does not give him the right to violate the law and escape the consequences of his own act when regularly prosecuted therefor."

(For other cases discussing these propositions see: Bolin v. State, 51 Neb. 581; 71 N.W. 444; Crockford v. State, 73 Neb. 1, 102 N.W. 70; Everhart v. People, 54 Colo. 272, 130 P. 1076; Hendry v. State, 39 Fla. 235; Banby v. State, 4 Ind. 114; Clark v. Commonwealth, 111 Ky. 443, 63 S.W. 740; People v. Fletcher, 60 N.Y.S. 777; Ragazine v. State, 47 Tex. Cr. 46, 84 S.W. 832; 16 C.J. 87.)

b. Specification, Charge II, Conspiracy

This specification charges a conspiracy to unlawfully apply property of a value of more than $50.00 and belonging to Prince Wolfgang of Hesse, to the benefit of the conspirators. In furtherance of this conspiracy two overt acts were alleged: (1) that the conspirators broke up certain items of jewelry and destroyed or disposed of the settings and fittings; (2) that the conspirators mailed or caused to be mailed or transported from Germany to themselves or other persons in the United States of America and other places packages containing some of the property.

A conspiracy is the corrupt agreeing together with two or more persons to do by concerted action something unlawful either as a means or an end (MCM, 1928, par. 150e, p. 182).

Conspiracy is an independent substantive offense both at common law and under the Federal statutes. The conspiracy charged herein comes within the provisions of section 37, Federal Criminal Code (18 U.S.C.A. 88), inasmuch as overt acts are alleged. At common law it was unnecessary to allege or prove any overt acts in furtherance of the conspiracy, the crime being complete upon the making of the agreement to do an unlawful act (Harrison v. Moyer, 224 Fed. 224).

At common law and under the statute the gist of the offense charged is the conspiracy or the agreeing to effect the unlawful purpose (CM 301983, Young, 19 BR (ETO) 105).

"A conspiracy under Section 37 Criminal Code (18 U.S.C.A.88) is an agreement by two or more persons to commit an offense against the United States. The gist of the offense is the conspiracy; that is the agreement between two or more persons to effect the unlawful end; but before the offense is a completed one, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy. Such act is called an overt act.

"Two things, therefore, must be proved before a conviction can properly be had: (1) The conspiracy or agreement to commit the offense named against the United States; (2) an overt act or acts done in furtherance of the conspiracy. The overt act or acts need not be criminal per se; but an overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy.

"(3) The overt act or acts, the manner and circumstances under which they are done may be considered in connection with other evidence in the case as circumstances in determining whether or not there was formed the conspiracy or agreement charged; but it must be established that the agreement which is charged to have existed and which is the gist of the offense had been formed before and was existing at the time of the commission of the overt act or acts.

"Proof of the overt acts may or may not be sufficient to prove the conspiracy. This will depend upon the character of the overt acts; not whether they are criminal per se or not, but whether they are of such character separately or collectively that they are clearly referrable to a preagreement or conspiracy of the actors. If the jury is satisfied beyond a reasonable doubt, from the evidence, that such is the character of the overt acts proven, the jury may find the preexistence of the conspiracy. Otherwise, evidence independent of the overt acts is necessary to prove the conspiracy.

"(4-6) Circumstantial evidence is equally available with direct evidence to prove the conspiracy, ***" (Dahly v. United States, 50 Fed. (2d) 37,42). (Underscoring supplied.)

A conspiracy to commit any act which is a crime under a Federal statute or a crime by common law, in those instances where the common law is a law of the United States, is punishable under Section 37, Criminal Code (18 U.S. C.A. 88). This statutory conspiracy may be against the Government or it may be against private individuals and their rights, the words "offense against the United States" appearing in the statute having the same meaning as the words "offense against the laws of the United States". (U.S. v. Sanch, 7 Fed. 715; U.S. v. Galleanni, 245 Fed. 977; Thomas v. U.S., 156 Fed. 897; Tyner v. U.S., 23 App. D.C., 324.)

The wrongful conversion of property by persons subject to military law is a violation of Article of War 96 and is therefore a crime under the statutes of the United States (CM 252620, Watterson, 34 BR 95,101).

"The fact of a conspiracy may be proved by any competent evidence. The conspiracy may of course be shown by direct evidence, and, it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy. Proof of the combination charged, it has been said, must always be extracted from the circumstances connected with the transactions which form the subject of the accusation. The nature of the crime usually makes it susceptible of no other proof, and the rule which admits this class of evidence applies equally in civil and criminal cases. Circumstantial evidence if sufficiently strong may outweigh the positive statement of a party or witness (12 C.J., sec. 266, pp. 633,634)." (CM 301983, Young, supra.)

The direct evidence of the conspiracy appears in the written statement of the accused introduced in evidence as Prosecution Exhibit B wherein he stated:

"*** Within two weeks after the finding of the jewels, I, Colonel Jack W. Durant, and Captain Kathleen B. Nash, after deliberation as to correct disposition (whether to turn in to Hqs. Command, USFET or to the Office of Military Government) it was decided that the jewelry was loot, as Captain Nash stated there was no inventory on the property in Schloss Friedrichshof Officers' Club which listed or hinted that any such jewelry was in the properties. The background of the possible owners was thoroughly discussed and it was determined that they were either dead, SS members or ardent Nazi members and as such the properties would never be returned to them no matter where or how they turn up. We three felt, and expressed to each other, the fact that each

believed that this was legitimate loot, found and not illegally possessed. Our decision was that with these possessions, we could from a joint business together after leaving the service. It was not our plan at all to divide the properties in known shares for each. This decision was reached by myself, Colonel Jack Durant, Captain Kathleen Nash and T/5 Carlton. No discussion was ever made by any of us outside, nor was anyone notified of our findings. ***."

It is a well recognized rule of law that an accused cannot be convicted upon his unsupported confession. In addition to the confessions or admissions of an accused, the record must contain other evidence either direct or circumstantial that the offense charged has been committed (par. 114a, p. 115, MCM, 1928).

Evidence of the conspiracy other than the statements made by accused must come primarily from the acts of the conspirators which show concert of action in carrying out their scheme and other facts from which the natural inference arises that their acts were in furtherance of the common design of the alleged conspiracy (CM 301983, Young, Supra; U.S. v. Holt, 108 Fed. (2d) 365,368). Summarized briefly, the evidence in this case shows that the jewels were unearthed by Captain Nash. Almost immediately the accused made inquiry concerning the proper disposition of private property of a nature similar to these jewels. The accused, and the other persons alleged to have conspired with him, were frequently seen at Kronberg Castle talking together and on at least one occasion they conferred in Captain Nash's bedroom where the jewels were located. Colonel Durant and the accused constructed a wooden box in a surreptitious manner. A wooden box mailed from Germany was found in Hudson, Wisconsin, at the same time and place as part of the jewelry. Part of the jewels were secretly transferred to Ireland and to the United States by accused and others involved in the alleged conspiracy. The relation between the accused, Colonel Durant and Captain Nash was such that Captain Nash was under no obligation to deliver to accused any of the jewels unearthed by her, yet the accused is shown to have been in possession of part of the jewels. The accused displayed a cigar box filled with jewels to a friend in Belfast, Ireland, and stated that he was going to have them appraised for his commanding officer. The accused gave a baroque pearl to a girl friend in Belfast, Ireland. This pearl had been taken from a diadem which was a part of the jewelry. The accused sold some of the jewelry. The accused mailed a box of "candy" from Germany to the girl in Ireland and requested her to save the "mints" therein for him. The "mints" were part of the jewels.

The Board of Review concludes that the independent evidence as a whole discloses a series of acts on the part of the accused and the other persons alleged to have conspired with him, which indicate that they were carrying out a preconceived plan to effect the conversion of these jewels. The independent evidence in the case being sufficient to corroborate accused's

pre-trial statements, they were properly admitted in evidence.

The accused admitted that he received some of the jewelry from Colonel Durant and that the unset diamonds sent by him to Ireland were broken from their settings in his presence and in the room of Mrs., or Captain, Nash Durant and at the castle. The evidence showed that the accused had part of the jewelry in his possession in Ireland, at which time he gave Peggy Harvey a baroque pearl which had been removed from a diadem which was a part of the Hesse jewels and buried by Wolfgang. On a subsequent date he mailed some of the jewelry to Belfast, Ireland, in a box of "bandy." Other items of property were found in Hudson, Wisconsin, together with a wooden box which had been mailed from Germany, from which it appears that some of the property was mailed or transported to Hudson, Wisconsin. Such acts constitute overt acts in carrying out the conspiracy and are the overt acts alleged in the specification.

The conspiracy specification itemizes a great number of articles of jewelry. Only a small portion of these items was introduced in evidence. It was shown however that a great amount of jewelry was in the box buried by Prince Wolfgang and that most of the items introduced were from this box. The conspiracy related generally to the jewelry buried by Prince Wolfgang and the fact that part of the jewelry was not introduced in evidence is immaterial inasmuch as sufficient jewelry was identified and introduced to show the actions of the conspirators and that the value was more than the value alleged. Ownership of this property was properly alleged to be in Prince Wolfgang of Hesse, for when he took charge of the box and its contents he acquired a special ownership therein (CM 317327, Durant).

The evidence adduced by prosecution and defense relative to the value of the property is in sharp conflict, the prosecution witness consistently placing a greater value on the property than the defense witness. Such conflict of testimony is immaterial in this case because all witnesses testified that the total value of the items introduced was more than $50.00.

In conspiracy cases, it is not necessary that all conspirators be tried in the same proceedings or that they be triable before the same judicial tribunal. Even when all may be tried before the same tribunal the prosecution is free to elect whether to try them in the same or in separate proceedings (CM 296630, Seidentop, 58 BR 191,198).

c. Receiving stolen property and disposing of stolen property

Receiving stolen property is a common law offense (53 C.J., sec. I, p.502). Although this offense is not specifically denounced by any Article of War, the acts which constitute it are prejudicial to good order and military discipline and tend to bring the military service into disrepute. Such acts, therefore, are properly chargeable under Article of War 96. The elements of the offense of receiving are (1) the property must have been stolen, (2) the accused must have received the property, and (3) he must have known it was stolen at the

time he received it. Knowledge that the goods were stolen need not be full and complete. It is sufficient if accused receives the goods under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen (Commonwealth v. Finn, 108 Mass. 466; CM 287198, Davis, 20 BR (ETO) 171,176).

The selling of property knowing the same to have been stolen is also a violation of Article of War 96 (CM 267476, Wilson, 44 BR 1, 10).

Specification 1, Additional Charge

This specification alleges in substance that the accused unlawfully received a silver pitcher of a value of more than $50.00, the property of Margarethe, knowing the same to have been stolen, and transported it in "foreign commerce" to Burlingame, California.

The evidence discloses that in April 1945 the United States Army requisitioned Kronberg Castle and its grounds, the property of Margarethe, the Dowager Landgrafin of Hesse. The pitcher in question was also owned by Margarethe. At the time Kronberg Castle was requisitioned this pitcher was in a cottage on the castle grounds. In July 1945 Captain Kathleen B. Nash was placed in charge of this castle. While in charge of the castle Captain Nash gave the pitcher to the accused. At the time she made this gift it was disclosed to the accused that the pitcher came from the castle. An Army officer, such as Captain Nash, has, speaking technically, only custody of property of whatever nature that comes under his or her care as a result of his or her official position. A conversion of such property by such officer would therefore constitute a larceny thereof (CM 252103, Selevitz, 33 BR 383; 394; CM 268478, Brown, 44 BR 291,294; CM 275547, Garrett, 48 BR 77, 104; CM 317327, Durant).

It is apparent that at the time the accused received this pitcher he knew it belonged in Kronberg Castle and that Captain Nash did not have such ownership in the pitcher which would justify her giving it away. The evidence further discloses that the accused mailed the pitcher to his parents who lived in Burlingame, California, and that the pitcher remained in Burlingame for some time. The value of this pitcher was sharply disputed. One witness valued it at more than $50.00 and a defense witness valued it only at about $11.00 as scrap metal. Witnesses for the prosecution and defense agree however that it would cost at least $125.00 to duplicate the pitcher. The Board of Review is of the opinion that the evidence, although conflicting, is sufficient to support the finding by the court that the pitcher had a value of more than $50.00.

Specifications 2, 3, and 4, Additional Charge

Specifications 2 and 3 of the Additional Charge each alleges that the accused unlawfully received and transported certain property to Belfast, Ireland, knowing at the time that the property was stolen. Specification 2

also alleges that the property was transported "in foreign commerce." Specification 4 of the Additional Charge alleges that accused unlawfully disposed of by sale certain property knowing that the same had been stolen. These specifications will be discussed together. One of the items in Specification 2 of the Additional Charge, an antique silver hand mirror, was alleged to have a value of over $50.00 and to be the property of Margarethe, Landgrafin of Hesse (Spec. 2). All other property in these specifications was alleged to be the property of Prince Wolfgang of Hesse.

The silver hand mirror was shown to have been in the cottage attached to Kronberg Castle at the time it was requisitioned. It was the property of Margarethe. The accused gave this mirror to Peggy Harvey in Belfast, Ireland. The accused admitted he received this mirror from Colonel Durant together with various other jewels. Its value was shown to be between $17.00 and $41.40.

The other property described in Specification 2, Additional Charge, a baroque pearl surrounded with diamonds, was shown to have been a part of a diadem which was in the box buried by Prince Wolfgang. The property described in Specification 3 (except 9 items including the 583 loose diamonds) was shown by direct evidence to have been in the box buried by Prince Wolfgang and unearthed by Captain Nash. Three of the nine items mentioned above were shown to belong to Elizabeth, daughter of Mafalda. The property described in Specification 4, Additional Charge, was shown to belong to Mafalda. The evidence discloses that jewels belonging to Mafalda were sent from Italy and placed in the box buried by Wolfgang but no inventory was made of these jewels. The accused admitted receiving all of the property described in these specifications from Colonel Durant and admitted that the 583 loose diamonds were broken from settings while in Captain Nash's room at Kronberg Castle.

Under all the circumstances of the case the Board of Review is of the opinion that all of the items mentioned in these specifications, except the hand mirror, came from the box buried by Prince Wolfgang and that the jewels shown to belong to Mafalda and Elizabeth as well as the jewels not shown to belong to any specific individual were part of the uninventoried jewels in the box. The 583 loose diamonds were, of course, never inventoried inasmuch as they had been integral parts of certain ornaments and had been detached from their mountings by the conspirators.

Prince Wolfgang acquired a special ownership in the box of jewels because it was delivered to him for safe keeping. Therefore, ownership of the jewels mentioned in these specifications which had come from the box was properly alleged to be in him (CM 317327, Durant). The accused received this property from Colonel Durant and took it or sent it by mail to Belfast, Ireland.

The question now arises, did the accused know that the property was stolen? The accused admittedly knew the circumstances under which this

property came into the hands of Captain Nash. The jewels were shown to him at the instance of Colonel Durant and later he received part of these jewels from Colonel Durant.

Regulations respecting the laws and customs of war on land have in the past been made the subject of treaty by the civilized nations of the world. The regulations annexed to the Hague Convention No. IV of 18 October 1907 contain several sections relating to the treatment of private and public enemy property by belligerent nations. The provisions of these regulations are set forth, translated and construed in War Department Field Manuals and Technical Manuals. Articles 46, 47 and 53 of the mentioned Hague Regulations appear on pages 31 and 33 of TM 27-251, 7 January 1944, as follows:

"Article 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

"Article 47.

Pillage is formally forbidden."

"Article 53.

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

These and other provisions respecting enemy property are quoted and explained in FM 27-10, 1 October 1940, "Rules of Land Warfare," pages 81-84.

Articles of War 79 and 80 also regulate the disposition of captured or abandoned enemy property. Although accused was not charged with a violation of these Articles, they should have sufficed to warn him of the danger of his chosen course of action. These Articles read as follows:

"ART. 79. Captured Property to be Secured for Public Service.- All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct."

"ART. 80. Dealing in Captured or Abandoned Property. - Any

person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties."

In CM 310446, Ruppel (61 BR, 291,306), the Board of Review in discussing captured and abandoned enemy property said:

"This course of legislation is in accord with principles of modern international law which on the one hand hold that upon its capture enemy public property becomes the property of the captor state and not the property of the individual soldier who captures it (AW 79; FM 27-10, par. 327; Hague Regulations, Art. 53, TM 27-251, p. 33; SPJGD/D75534, 4 Bull JAG 389) and, on the other hand, protect enemy private property from plunder and pillage (FM 27-10, par. 329; Hague Regulations, Art. 47, TM 27-251, p. 31). Although the words 'plunder or pillage' as used in Article of War 75 have been held to mean a taking by force or violence (CM ETO 11725, Whitfield, 4 Bull JAG 488; see Winthrop's Mil. Law and Prec., 2d Ed., p. 626), 'pillage' in the broader sense, the sense in which that term is used in the Hague Regulations and generally in writings on international law, may be defined simply as the unauthorized taking away of property, public or private. (Westlake, International Law (2d Ed.), Part II, p. 104; Hunt Report on Am. Mil. Govt. Vol. 4, p. 360; Nast, 26 Revue Generale de Droit International Publique (1919) p. 111 et seq.). Winthrop says, speaking of enemy private property,

> 'But all the captures recognized as legitimate in our law and practice have been captures for, and by authority of, the United States. No taking for private use or gain has been allowed, but such taking has been regarded as a grave military offense in violation of the 42nd (now 75th) or other Articles of War.' (Winthrop's Mil. Law and Prec., 2d Ed., p. 781.)

Such an unauthorized taking or unlawful disposition of captured or abandoned enemy private property is now prohibited by Article of War 80, a protection to the inhabitants of occupied territory not afforded by Article of War 79 or Article of War 75. Thus it is said in the 1921 Manual for Courts-Martial, page 430, in reference to Article of War 80,

'Unless the captured or abandoned property is private, or unless the acts charged fall within the descriptions of this Article, the offense should be charged under Article 79, supra.'

Also, it may well be that Article of War 80 seeks to protect abandoned private property of friend and foe alike from acts of pillage. Winthrop, speaking of the earlier Article of War 42, now Article of War 75, prohibiting pillage under certain circumstances, says, 'and whether private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offence.' (Winthrop's Mil. Law and Prec., 2d Ed., p. 627). Obviously, Article of War 80 prohibits the wrongful appropriation or disposition of enemy public property as well as enemy private property (CM ETO 9573, Konick, 4 Bull, JAG 338; CM ETO 17667, Truex (CM 308337))."

A belligerent power takes title to moveable enemy public property, whatever its nature, captured on the battlefield and, when the belligerent becomes an occupant, it may take title to all moveable enemy public property adaptable for use in military operations which is found in the occupied territory. The belligerent or occupant, as the case may be, can, therefore, relinquish to individuals its title in such enemy public property by appropriate regulation. During the course of the recent hostilities against the Axis Powers, the United States on several occasions promulgated regulations, those upon which accused here relies being examples, providing for the acquisition by individuals of certain minor items of enemy public property which were of more value to such individuals as so-called "souvenirs" than to the Government. However, with the exception of certain limited rights of requisition and seizure not material in the instant case, a belligerent or occupant does not take title to and cannot appropriate enemy private property and thus cannot, by regulation or otherwise, purport to give individuals other than the rightful owners any interest therein (Oppenheim, International Law, Vol. II, 6th Ed. Rev., p. 360 et seq.).

The property involved herein was obviously private property. All persons are presumed to know the law. The accused knew the manner in which this property was acquired by Captain Nash and Colonel Durant. The surreptitious conduct of the conspirators indicates that they were either aware of the provisions of international law discussed above or at least suspected the existence thereof. The Board of Review concludes, therefore, that the accused knew or reasonably should have known that the property received by him was stolen (CM 234472, Cannon, 1st Ind., 21 BR 1,9; CM 304323, Hewett, 32 BR (ETO) 139,141).

It appears that Specifications 1 and 2, Additional Charge, were drawn in an attempt to plead within the provisions of Title 18, Section 416, U.S.C., in that the specifications contain the words "in foreign commerce." It is sufficient to say that neither the pleading nor the proof are sufficient to bring these offenses within the provisions of the above-mentioned section of

the Code. The proof discloses that the property was received as alleged and transported to the place alleged. As we have said above, the act of the accused in receiving property which he knew to have been stolen and selling property which he knew to have been stolen is clearly conduct of a nature to bring discredit upon the service and is therefore a violation of Article of War 96 as alleged.

The property described in each specification was shown to have some substantial value and, therefore, any discrepancy between the value alleged and the value proven is, in this particular case, immaterial. Section 288 of the Federal Criminal Code (18 U.S.C. 467) provides that whoever shall receive stolen goods knowing the same to have been stolen shall be imprisoned "not more than three years." The offense of receiving stolen goods of any substantial value, knowing them to have been stolen, is thus punishable by penitentiary confinement where the sentence adjudged by the court includes confinement for more than one year (AW 42, 18 U.S.C. 753 f). Penitentiary confinement is likewise authorized upon a conviction of the crime of conspiracy under Section 37, Criminal Code (18 U.S.C.A. 88) when the sentence adjudged by the court includes imprisonment for more than one year.

5. War Department records show the accused to be 34-7/12 years of age and married. He received a B.A. degree from Pomona College in 1934. Prior to his entry into service he was employed by Safeway Stores, Inc., earning $3120 per annum. On 15 June 1942 he was appointed and commissioned a first lieutenant, AUS. He was promoted to captain on 1 July 1944 and to major on 16 September 1945. For meritorious service between 1 September 1944 and 28 February 1945 he was awarded a Bronze Star. He received a Croix de Guerre from France on 27 June 1945 and one from Belgium on 2 May 1946. His efficiency reports for the period 1 July 1944 to 31 December 1945 are "Superior."

6. Consideration has been given to the recommendations for clemency signed by the defense counsel, all the members of the court, Lieutenant Colonel Redmond J. Connolly, Provost Marshal who had custody of accused during his confinement, Lieutenant Colonel Francis S. Gabel and Colonel A. H. Rosenfield, Jr., which are attached to the record of trial. Consideration has also been given to communications from Honorable E. C. Johnson, Honorable William F. Knowland and Honorable Sheridan Downey, Members of the U. S. Senate, Honorable Norris Poulson and Honorable William C. Cole, Members of the House of Representatives, and to 276 letters from military personnel and civilians, all urging clemency for accused or attesting to his prior good character. John Harlan Amen and Smith W. Brookhart, special defense counsel for the accused, filed a brief, and appeared before the Board of Review and orally argued the case on behalf of the accused.

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 an officer of a violation of Article of War 96 and confinement in a penitentiary or other Federal correctional institution is authorized upon conviction of conspiracy or of knowingly receiving stolen property.

Lehuston D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ashcraft, Judge Advocate

JAGK - CM 319737 1st Ind

WD, JAGO, Washington 25, D. C. JUL 5

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 David F. Watson (O-909086), Quartermaster Corps.

2. Upon trial by general court-martial accused was found guilty of conspiring with Colonel Durant to convert to their own use 143 items of jewels and other chattels, the property of Prince Wolfgang of Hesse, of a total value of more than $50.00 (Spec. and Charge II), and of three specifications (Specs. 1,2,3, Add'l Chg.) of knowingly receiving 21 items of property knowing the same to have been stolen. The total value of the property in each specification was shown to be more than $50.00. The property belonged to Margarethe, Landgrafin of Hesse, and Prince Wolfgang of Hesse. He was also found guilty of selling four items of jewelry knowing the same to have been stolen (Spec. 4, Add'l Chg.). All specifications were in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three 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.

In April 1945 the German castle of Kronberg, the home of the Hesse family, was occupied by the American Army and used as a club. In June of that year one Captain Kathleen B. Nash, WAC officer, was placed in charge of this castle. On 6 November 1945, a wooden box containing jewels and other valuable chattels was found concealed under a concrete floor of the basement of the castle. Thereafter, the accused, Colonel Durant and Captain Nash discussed the possible ownership of this property and conspired together concerning ways of converting it to their own use. This property belonged to the House of Hesse and individual members thereof. It had been placed in a box and buried sometime in October 1944 under the personal supervision of Prince Wolfgang of Hesse who was responsible for the property. Following these discussions, the accused received some of the property from Colonel Durant. He took part of this property to Belfast, Ireland, and gave Peggy Harvey a baroque pearl set in diamonds. He also gave her a silver hand mirror which came from Kronberg Castle. While in Belfast he sold some of the jewelry to a pawnbroker.

In May 1946 the accused wrote Peggy Harvey that he was mailing her a box of candy and asked her to save the "mints" therein for him. When she opened the box of candy the "mints" were jewels the accused had received from Colonel Durant.

During February 1946 Captain Nash made the accused a present of a silver pitcher. This pitcher was from Kronberg Castle and this fact was known to accused at the time. The accused mailed this pitcher to his parents in Burlingame, California.

The value of the stolen property received by the accused was sharply contested. The pitcher (Spec. 1, Add'l Chg.) received from Captain Nash was found to have a value of more than $50.00. The silver hand mirror and the baroque pearl received from Colonel Durant (Spec. 2, Add'l Chg.) was valued by a prosecution witness at about $2336.00, while the defense witness valued these items at about $563.00. The property received from Colonel Durant and described in Specification 3, Additional Charge, was valued by prosecution witnesses as between $28,995.25 and $33,832.85, while the defense witnesses valued it at $14,314.00. Defense witness valued the property received from Colonel Durant and sold by accused (Spec. 4, Add'l Chg.) at $108.00.

4. Accused is 34-7/12 years of age and married. He received a B.A. degree from Pomona College in 1934. Prior to his entry into service he was employed by Safeway Stores, Inc., earning $3120.00 per annum. On 15 June 1942 he was appointed and commissioned a first lieutenant, AUS. He was promoted to captain on 1 July 1944 and to major on 16 September 1945. For meritorious service between 1 September 1944 and 28 February 1945 he was awarded a Bronze Star. He received a Croix de Guerre from France 27 June 1945 and one from Belgium on 2 May 1946. His efficiency reports for the period 1 July 1944 to 31 December 1945 are "Superior."

5. Consideration has been given to the recommendations for clemency on behalf of accused attached to the record of trial and signed by the defense counsel, all members of the court and three officers who have served with the accused. Consideration has also been given to communications from Honorable E. C. Johnson, Honorable William F. Knowland and Honorable Sheridan Downey, members of the U. S. Senate; Honorable Norris Poulson and Honorable William C. Cole, members of the House of Representatives, and to 276 letters from military personnel and civilians, all urging clemency for or attesting to the good character of the accused.

John Harlan Amen and Smith W. Brookhart, special defense counsel for the accused, filed a brief, appeared before the Board of Review and orally argued the case on behalf of the accused.

6. The actions of the accused in conspiring to convert jewelry and other chattels of great value and thereafter receiving stolen property valued somewhere between $15,000.00 and $36,000.00 as well as selling

some of the stolen property, all tend to bring great discredit upon the military service. A great number of letters requesting clemency have been received. These letters all tend to show that the reputation of accused prior to these offenses was good. In CM 317327, Kathleen B. Nash Durant, the accused therein was sentenced to five years confinement on charges arising by reason of the asportation of the jewels involved herein and embezzlement of other property. Her sentence has been confirmed and she is now serving her sentence at the Federal Reformatory for Women, Alderson, West Virginia. I recommend that the sentence be confirmed and carried into execution and that a United States disciplinary barracks be designated as the place of confinement.

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

CM 319737

3 Incls
1. Record of trial
2. Form of action
3. Correspondence mentioned in par. 5 above contained in Vols. I, II, III accompanying file

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 255, 23 July 1947).

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

JAGH - CM 319774

23 JUL 1947

UNITED STATES v. Corporals ROBERT E. L. DEAKINS (RA 34822065), 1208th Labor Supervision Company, WALLACE R. EILER (RA 33422626), 1684th Labor Supervision Company, and JOSEPH H. SORRENTINO (42254968), 1459th Labor Supervision Company	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Antwerp, Belgium, 18, 21, and 22 October 1946. Deakins: Dishonorable discharge and confinement for two (2) years. Eiler: Dishonorable discharge and confinement for one (1) year. Sorrentino: Dishonorable discharge (suspended) and confinement for one (1) year. Deakins and Eiler: The Branch United States Disciplinary Barracks. Sorrentino: Wurzburg Rehabilitation Center

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

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

2. The accused were tried, in one trial, upon the following Charges and Specifications:

As to Corporal Robert E. L. Deakins:

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

Specification: In that Corporal Robert L. Deakins, 1208th Labor Supervision Company, United States Forces, European Theater, did, at Eigenloo Temsche, Belgium, on or about 25 April 1946, by force and violence and by putting him in fear, feloniously take, steal, and carry away, from the presence of Vincent Alfons Vercauteren, 20,000 francs lawful money of Belgium, the property of Vincent Alfons Vercauteren.

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

Specification: In that Corporal Robert E. L. Deakins, 1208th Labor Supervision Company, United States Forces, European Theater, did, in conjunction with First Lieutenant Freddie R. Walker, Headquarters, 145th Labor Supervision Center, and Corporal Wallace R. Eiler, 1684th Labor Supervision Company, at Eigenloo, Temsche, Belgium, on or about 25 April 1946, wrongfully attempt to sell to one Vercauteren a 2½ ton truck, of a value of more than $50.00, property of the United States.

As to Corporal Wallace R. Eiler:

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

Specification: In that Corporal Wallace R. Eiler, 1684th Labor Supervision Company, United States Forces, European Theater, did, in conjunction with First Lieutenant Freddie R. Walker, Headquarters, 145th Labor Supervision Center, and Corporal Joseph A. Sorrentino, 1459th Labor Supervision Company, at Malines, Belgium, on or about 11 June 1946, wrongfully and knowingly sell one 2½ ton truck of a value of more than $50.00, property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 96th Article of War. (Findings of guilty disapproved by the reviewing authority).

Specification: (Findings of guilty disapproved by the reviewing authority).

As to Corporal Joseph A. Sorrentino:

CHARGE: Violation of the 94th Article of War.

Specification: In that Corporal Joseph A. Sorrentino, 1459 Labor Supervision Company, United States Forces, European Theater, did, in conjunction with First Lieutenant Freddie R. Walker, Headquarters, 145th Labor Supervision Center, and Corporal Wallace R. Eiler, 1684th Labor Supervision Company, at Malines, Belgium, on or about 11 June 1946, wrongfully and knowingly sell a 2½ ton truck, value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

First Lieutenant Freddie R. Walker was charged with the alleged attempt to sell on 25 April 1946 and the unlawful sale on 11 June and was tried with the accused in the same trial, but the case as to him is considered by the Board of Review in a separate opinion.

Prior to arraignment the defense, for each accused, objected to a common trial. This objection, treated as a motion to sever, was denied by the court.

Each accused pleaded not guilty to and was found guilty of each applicable charge and specification. No evidence of previous convictions was introduced as to any of the accused. The accused Deakins and Eiler were each 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 four years. The accused Sorrentino 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. In the case of accused Deakins, the reviewing authority approved the sentence but reduced the period of confinement to two years. In the case of accused Eiler, the reviewing authority disapproved the findings of guilty of the Specification of Charge II and Charge II, approved the sentence, but reduced the period of confinement to one year. In the case of the accused Sorrentino, the reviewing authority approved the sentence but suspended the execution of the dishonorable discharge until the soldier's release from confinement. In the case of all the enlisted men the order directing execution of the sentence was withheld pursuant to Article of War 50½, even though in the case of Sorrentino the execution of the sentence to dishonorable discharge was suspended.

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

A Belgian civilian named Alfons Vercauteren, residing at Temsche, Belgium, testified that five or six months before the trial (18 Oct 46) in April, May, or June, two American soldiers, one of whom may have been Polish, entered his home and offered to sell him a jeep or a truck, as they wanted money (R 10, 12). Vercauteren said that he "did not agree to buy" (R 10). The soldiers then asked the way and distance to various places and also asked for a map. Vercauteren's wife procured a map from a cupboard. There was some money in the cupboard, amounting to 20,000 francs, which was seen by the soldiers. One of the soldiers then drew his pistol and took the money from the cupboard. He pointed his pistol at Vercauteren and forced him against the wall. The soldier, who took the money, then left the house, jumped into a truck and drove away (R 11). Vercauteren unsuccessfully pursued the truck on his motorcycle, noticing, as he started in pursuit, a jeep parked about 100 to 150 meters from his house (R 11, 38). He did not state what became of the Polish soldier. Sometime subsequent to this incident, two American soldiers, but not the same ones who had robbed him (R 43), and not the accused (R 36), appeared at his home and returned the 20,000 francs to him. Before he was given the money, however, he and his wife were required to sign a receipt or slip of paper containing about ten or fifteen words in English. He could not read it and does not know what was written on it (R 36-37).

Vercauteren could not identify any of the accused as either the soldiers who robbed him or who returned the money. He stated, however, that the soldiers were dressed differently on the two occasions (R 43) and that the accused were dressed differently in the court room (R 41). When soldiers are wearing different clothes it is impossible for him to identify them (R 41).

Edward A. Beck, an agent of the Criminal Investigation Division, testified that he conducted an investigation of this case during the course of which he had "paid a visit to the two people at Temsche" (R 20) and that subsequently he had searched Deakins and had found a note in Deakins' wallet (R 32). The original of this note had been attached to the original CID report (R 32), but had been lost. The witness made a search for this document but was unable to locate it. The CID unit to which the report had been submitted had been inactivated (R 26). Prosecution Exhibit E, a certified true copy of the original note found on Deakins by the witness (R 32), was admitted in evidence and, in pertinent part, reads as follows:

> "The undersigned swear that this man Robert E. L. Deakins has never stolen or robbed any money from me at any time.
>
> s/ Alfons Vercauteren
>
> s/ De Canwer Zulman"

First Lieutenant Ernest F. Seale, Commanding Officer, 1417th Labor Supervision Company at Ghent, Belgium, testified that on or about 11 June 1946, after receiving telephone calls from the military police, he discovered that one of his 2½-ton, 6 x 6 trucks was missing, and had been replaced with another similar truck, which did not belong to his unit, but which bore his unit's bumper markings (R 13-15, 17-18). His truck was returned sometime "after 2 a. m." (R 19). Sorrentino, his acting motor sergeant, told him where the "wrong" truck had come from (R 16), and he ordered that it be returned after his truck had been returned to him (R 16, 19).

After testimony of Agent Beck that they were voluntarily made, and after overruling an objection by the defense that the corpus delicti had not been established, a pre-trial statement of Eiler (Pros Ex B; R 29) and copies of pre-trial statements of Deakins (Pros Ex A; R 28), and Sorrentino (Pros Ex D; R 31) were admitted in evidence. There was also an objection to the statements of Deakins and Sorrentino on the ground that the originals were not introduced and that copies were not the best evidence (R 28, 31). Agent Beck testified, however, that the original statements had been in the files of the CID unit which had been inactivated. He had searched and checked various places but had been unable to locate the original statements (R 26-27).

The statement of accused Deakins is summarized as follows:

Lieutenant Walker had a plan to sell a truck to a Belgian civilian. A man referred to only as "the Polock" had informed Lieutenant Walker concerning the opportunity to make this sale. Deakins was to deliver the vehicle and collect the money and for this purpose drove the truck from the depot. Lieutenant Walker followed behind in his own vehicle. Deakins first picked up "the Polock" who knew where the civilian lived, and then drove to the civilian's house. Lieutenant Walker parked some distance away. The civilian, however, took his motorcycle and led Deakins to another town, Hamme, where Deakins met a second civilian. The two civilians gave Deakins 20,000 francs and wanted him to leave the truck at Hamme. This Deakins did not wish to do. It was Lieutenant Walker's plan that after the truck had been sold and Deakins had obtained the money, Lieutenant Walker would "pick up" the truck as an unattended vehicle, so that "the U. S. Army would not lose the truck." Deakins did not know where Lieutenant Walker was, and pursuaded the civilians to return to the house to which he had first gone. On the way back, Deakins had engine trouble. The two civilians decided that they had made a bad bargain and asked Deakins to go into the house and talk it over. Deakins went in, hoping that Lieutenant Walker would arrive and "take over." The civilians demanded their money back and Deakins stated that three civilians "came towards me for the money." One of them went out of the house to take the truck, and because he did not want to lose it, Deakins drew his pistol. He went outside, pulled the civilian out of the truck and drove off. "The Polock" had already left but Deakins met him and Lieutenant Walker some distance down the road. Deakins told Lieutenant Walker what had happened and then returned to the depot. Deakins then went to Lieutenant Walker's quarters, gave him 10,000 francs, and kept 10,000 francs himself. After the investigation began, and since Deakins had spent his money, Lieutenant Walker gave Deakins 20,000 francs which Deakins returned to "the people." Deakins stated that "They said everything was O.K. and they were willing to sign anything to get their money back."

The portion of Eiler's statement pertinent to Charge I and its Specification, reads as follows:

> "During the later part of May I received a truck from a soldier, whose name I can't remember, at the 654A. The truck was a GMC 2 1/2 ton 6x6. I agreed to pay the soldier approximately 14,000 francs. I then took the truck to Gent where I turned the truck over to the Motor Sgt of the 1417 LSC Co. I went with the soldier to sell the truck to a civilian. We took the truck approximately 10 miles from Gent into the country where we met a civilian at a cafe. The civilian and the Motor Sgt then drove to the civilian's house in the truck and I followed in a 'jeep.' The Motor Sgt and the civilian went into the house and I remained

outside. The soldier and I then returned to his company where he gave me approxamately fifty thousand francs and he kept five thousand francs as his share of the money for making the sale.

"I wish to state at this time that the truck we sold was not the one I originally got from the 654A. It was a good truck and the Motor Sgt of the 1417 LSC Co. had a poor one so her kept the good one and we sold the poor one to the civilian. We neglected to take the 1417 LSC Co bumper markings off the truck we sold.

"I then returned to the company and put the fifty thousand francs in my foot locker. Several of the other men in the company were present and saw me place it there. One of the men was Cpl Robert E. L. Deacons. I told the men I had just sold the truck for about fifty thousand francs. The next day I paid Lieutenant Fred Walker approxamately 14,000 francs as his share for arrainging for the man at the 654A depot to give me the truck. At the time I paid Lt. Walker we were in my billet.

"I had already paid off the man at the 654A depot the night before. I gave him approxamately 14,000 francs."

* * *

"In reguard to the truck which I traded to the motor sgt of the 1417 LSC Co. mentioned in the first part of the statement I want to add that when I traded him the good truck he put the bumper markings of his old truck on the one I traded him without removing them off his old one so that when the MP's recovered the truck we sold, the 1417 LSC Co. had two trucks with the same bumper markings." (Pros Ex B).

Sorrentino's statement reads as follows:

"One day Cpl Eiler came to me and asked if he could park a truck on my Motor Pool. He said he was going to Holland to get rid of it, so I asked him if I could switch trucks with him, because one of my trucks was bad. He said it was OK with him. The truck was there for a few days, and then one day Cpl. Eiler asked me if I knew where he could sell the truck. I told him I knew of a cafe where it might be possible. I went with him to the cafe, in Ghent. There we met this girl who said she might know someone who might buy the truck. So the girl took us to a cafe in Malines where the persons who was to buy the truck was called. The man came in looked the truck over and was taken for a ride in the truck. He paid for it there and took it with him to his farm. He paid 50,000 frs for the truck. Then Cpl. Eiler took the girl and myself back to my camp, and the girl and I

stayed there at the camp for a while. Then I took her back to Ghent in one of my own trucks. Before Eiler left, he gave me 5,000 frs, I didn't ask him for it. We drove the truck to the farm for the farmer, and he paid for it there." (Pros Ex D).

4. After having had their rights as witnesses explained to them, each accused elected to remain silent (R 48). The defense introduced no evidence.

5. With respect to the offenses allegedly committed on 11 June 1946 (Charge I and its Specification as to Corporal Eiler, and the Charge and Specification as to Corporal Sorrentino), the only evidence pertinent to the offense charged against each accused, aliunde the confession of each accused, is that contained in the testimony of Lieutenant Seale. His testimony merely shows that on or about 11 June 1946 a truck which did not belong to his unit, but which bore his unit's bumper markings was in the motor pool of his unit, and that another truck belonging to his unit was in the hands of the military police. At the most this evidence shows that a truck belonging to the unit was not in the motor pool where it should have been, and that it may have been exchanged for the one that was present but did not belong there. This evidence established merely that a truck was missing. Evidence that property is missing is not, of itself, sufficient to prove the corpus delicti in the offense of wrongful sale. Such evidence has been held insufficient to establish the corpus delicti, in several cases of wrongful sale (CM 211218, Fleming, 10 BR 25, and cases cited therein).

"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. * * * Examples: * * * In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with this rule" (MCM 1928, par 114a, p 115) (Underscoring supplied).

Therefore, 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 against Corporal Eiler and the Charge and Specification against Corporal Sorrentino.

6. With respect to Deakins and Sorrentino the question is presented, whether the record of trial is legally sufficient to support the findings of guilty and the sentences, in view of the denial of their motions for severance.

Deakins was charged with the robbery of Vercauteren on 25 April and also with wrongfully attempting to sell a truck to Vercauteren on the same date, in conjunction with Lieutenant Walker and Corporal Eiler. He was not charged with, nor in any way involved in the offense of wrongfully selling a truck on 11 June 1946, with which Lieutenant Walker, Corporal Eiler and Corporal Sorrentino were charged. The offenses with which Deakins was charged were totally unrelated to the offense of 11 June; they occurred at different times and places and were provable by entirely different evidence. Prior to arraignment he objected to a common trial but the objection was overruled. The same situation arises with respect to Corporal Sorrentino, who was charged only with the offense of 11 June 1946, and who likewise objected to a common trial.

In CM 195294, Fernandez, 2 BR 205, Dig Op JAG 1912-40, par 395 (33); and in CM 267696, Whittier, 44 BR 107, it was stated, with respect to common trials, that where two or more persons each commit offenses which can not be considered joint, but which are committed at the same time and place and in which the evidence and witnesses may be the same, there may be a common trial if the appointing authority so directs and if no one of the accused objects. In both cases the common trial was held to be valid because there was no objection, and hence, the rule of those cases is not applicable to cases where there is an objection. The same rule was later set forth in TM 27-255, Military Justice Procedure, at page 85, where it is stated:

> "Two or more persons may each commit an offense which cannot be considered joint, but, if committed at the same time and place, the evidence and witnesses may be the same as to each. In such circumstances, the separate charges against the several accused may be tried together at a common trial. This may be done, however, only if the appointing authority so directs and no one of the accused objects" (Underscoring supplied).

While TM 27-255 is entitled to great weight, it does not have the authority of the Manual for Courts-Martial, for the latter embodies rules of procedure and evidence established by authority of the President. The Technical Manual merely restates the law as it is believed to be, but it does not establish the law.

Although provisions are made in paragraph 71 of the Manual for Courts-Martial for motions to sever in the case of joint accused, the Manual is silent on the subject of common trials. The rules authorizing such trials must therefore be found in rules of procedure in the Federal courts. The Fernandez case, above cited, in arriving at the rule stated, considered many Federal court cases.

In a case involving a common trial where a motion to sever was denied, the Board of Review sitting in the European Theater of Operations stated:

> "Accordingly, it is held that where, as in the present case, the appointing authority has directed a so-called 'common trial' of two or more accused, separately charged with offenses of the same character committed at the same time and place and provable by the same evidence, the denial or grantint of a motion for severance is within the sound judicial discretion of the court, whose ruling will not be disturbed unless it is shown that it injuriously affected the substantial rights of the accused" (CM 297114, Dear et al, 16 BR (ETO) 127) (Underscoring supplied).

The rule stated in the Dear case, rather than that stated in the Fernandez case, or in the Technical Manual, is substantially the Federal rule applicable in cases where joinder is permitted. The Rules of Criminal Procedure for the District Courts of the United States, promulgated by the Supreme Court pursuant to USC Title 18, Section 687, are, with respect to this question, as follows:

> "Rule 8. Joinder of Offenses and of Defendants.
>
> "(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common plan or scheme.
>
> "(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."
>
> "Rule 13. Trial together of indictments or information. The Court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information" (Underscoring supplied).

It will be noted that the rule as to joinder of offenses (Rule 8a) is not the rule provided for in the Manual for Courts-Martial. But, the rule as to authority for common trials in court-martial procedure is found only in

the law as applied in the Federal courts, since it is not found in the Manual for Courts-Martial, and it therefore follows that there may be a common trial only when the prerequisites set forth in the Federal Rules are met (CM 195294, Fernandez, supra).

That the matter of ordering a common trial, or of granting or denying a motion to sever, is discretionary with the court is shown by the use of "may" in Rule 13. It is also so stated in many Federal cases as indicated below.

In the instant case, however, the necessary facts that are prerequisite to permitting a common trial under the Federal Rules are not present. The 25 April and 11 June offenses were totally separate and distinct, occurred at different times and places, and were provable by different evidence and witnesses. The accused are not the same in both offenses and are not alleged to have participated in the same act or transaction or in the same series of acts or transactions. The two offenses are not alleged to have arisen from, and, in fact, do not arise from the same series of acts or transactions. The question is therefore raised as to the rule applicable in a case which does not come within the rules permitting a common trial.

A leading case on this question is McElroy v. United States, 164 U. S. 76. In that case five persons were charged, in three indictments, with assault with intent to kill A on 16 April 1894, with assault with intent to kill B on 16 April and with arson on 1 May 1894. Three of the five were charged with arson on 16 April in a fourth indictment. There was an objection to the common trial which was overruled and all defendants were convicted. The Supreme Court reversed the convictions. In its opinion the Supreme Court stated:

> "The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might properly be joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence."
>
> * * *
>
> "It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion" (Underscoring supplied).

Two of the justices agreed with the majority only insofar as the two defendants who were not charged with all the offenses were concerned.

In DeLucca v. United States, CCA NY, 1924, 299 Fed 741, one indictment against nine defendants charged conspiracy to defraud the United States by removal of opium from a bonded warehouse without payment of the duty thereon, and a second indictment against five of the nine defendants charged a sale of opium in violation of the Harrison Narcotic Act. The two offenses had no relation to each other and it was not shown that the opium was the same. It was held that the consolidation of the indictments for trial over objection was reversible error. There had been a severance granted as to all defendants not named in both indictments. Those remaining were tried and convicted.

The court in its opinion stated:

> "Thus the statute (R.S. Sec. 1024) permits consolidation of indictments only where offenses might have been joined originally in separate counts.
>
> "Although it appears that certain of the Defendants were members of both groups, others were not, and therefore the groups were distinct. The statute refers to several charges, which shall be against the same persons, and when the charges are against more than one person, there can be no consolidation, unless all the defendants are identical in all indictments.
>
> "The only exercise of discretion in permitting consolidation of indictments relates to those which could lawfully have been joined in separate counts in one indictment by the grand jury. The court's discretion is to determine whether the interest of justice will be furthered by consolidating such indictments; but where the accusations could not have been charged in one indictment by the grand jury, they cannot be consolidated by the court" (Underscoring supplied).

It was held that to consolidate the indictments for one trial was, therefore, fatal error requiring a reversal of the convictions.

The DeLucca case has been to an extent overruled. In United States v. Kelley, 105 Fed 2d 912, three accused were tried under two indictments for assisting in the preparation and presentation of fraudulent income tax returns. There were also two indictments against the same three and five others for conspiracy. On the conspiracy indictments there was a severance as to the additional five who were not included in the first two indictments. The remaining three were tried on all indictments and found not guilty of the conspiracy, but convicted on both indictments for assisting in the preparation and presentation of the fraudulent returns. There was a claim of error in the consolidation of the four indictments. The court, in its opinion, assumed for purposes of argument

that the Consolidation Statute (18 USC 557, R.S. Sec 1024) does not allow joinder of two indictments, in one of which the accused include some not charged in the other. The court then stated:

> "Even so, the severance did away with that objection, so far as the statute gave any practical protection to the accused. It is true that the opposite has been held" (Citing the DeLucca case and another similar case). "However, (the DeLucca case and the other) depended chiefly upon McElroy v. The United States, 164 U.S. 76 * * *, and that decision does not bear them out. The court had there before it the consolidation of four indictments in which not only were the accused different, but which concerned separate crimes. There was no severance, and the court thought the crimes so disparate that justice could not be done if they were tried together. Nowhere did it suggest that if only the accused common to all the indictments had been tried, and if the crimes were closely interwoven the conviction should not have stood. We can discover no basis for any peremptory rule forbidding such a joinder, and so far as DeLucca v. The United States, supra, so holds we overrule it. Moreover, even if the consolidation had been technically an error, it would not have been ground for reversal. (Sec. 391, Title 28 U.S. Code, 28 U.S.C.A. 391)."

Thus, the Kelley case overrules the DeLucca case to the extent that the DeLucca case held that the consolidation of the two indictments for trial was prejudical error in spite of the severance of the defendants not common to both indictments. It did not purport to overrule the principle of law stated in the DeLucca case as applicable where a joinder is in fact unauthorized.

The last sentence of the quotation from the Kelley opinion cited above raises another point. The statute cited, Title 28 USC, Section 391, is as follows:

> "All United States Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties" (Underscoring supplied).

The first sentence of the above statute is the act of 24 September 1789, C. 20, section 17, 1 Stat 83, R.S. section 726. The second sentence, however, was enacted in 1919 as act of 26 February 1919, C. 48, 40 Stat 1181. It has substantially the effect of Article of War 37 with respect to courts-martial. It appears, however, that the last sentence quoted from the Kelley opinion, supra, refers to a situation which assumes the consolidation in the DeLucca case to have been technical error after the severance, and not to what the situation would have been in the DeLucca case had there had been no severance.

The case of Zedd v. United States (CCA 4), 11 Fed (2d) 96, must also be considered. In that case three defendants, A, B, and C were tried on three informations, one against each defendant, they being separately charged. A was charged with possession and selling liquor on 17 January and with possessing and selling other liquor on 13 January 1925. B, his wife, was also charged with possessing and selling, on 17 January, the same lot of liquor as involved in the first charge against A. C was charged with possessing and selling some other liquor (which was neither of the above lots). The court, over objection, ordered all three tried by the same jury. Three separate verdicts were returned, finding all the defendants guilty. The court stated in its opinion:

> "The exercise of the power of consolidating indictments against separate persons will often be a delicate one, and there will be occasions upon which an appellate court will not be able to agree that the trial judge has rightly exercised it with resulting reversals, new trials, expense, and delay. For all these reasons, prompt, sure and cheap justice will be furthered by the joint indictment of joint offenders. Those who are not even charged with having united to commit the crime should not be forced, against their will, into a common trial. * * *"
>
> "It follows that the judgments below must be reversed, and the cases remanded in order that each of the defendants may be given a new trial."

In Culjak v. United States, CCA Wash. 53 Fed 2d 554, the court stated:

> "We are cited to no decision which approves a practice of the joining in one indictment different defendants, some of whom are charged with one crime and some with another. The established rule is to the contrary. Counsel for the appellant very properly argues that prejudice would result to the accused, if such practice were permitted, and that such prejudice is apparent and must be assumed" (Underscoring supplied).
>
> * * *

"The Federal Statute (18 USCA 557) (R.S. 1024) defining offenses that may be joined in an indictment as against a defendant, notwithstanding that it may change the common-law parties, furnishes no authority for charging several defendants in separate counts with separate and distinct offenses. Its provisions do not touch the latter subject at all."

In United States v. Tuffanelli, 131 Fed 2d, 890 (cert. denied, 318 U.S. 772) the court stated:

"District Attorneys, in drafting indictments, ought to keep in mind the admonition of the courts that it is not good practice to join in an indictment counts charging distinct offenses against separate defendants, (cases cited), and while we do not approve the practice followed in this case, we cannot say the action of the court in overruling appellants' motion may be assigned as prejudicial error, since all of the counts charged closely related offenses, based upon a series of transactions constituting a preconceived system and plan to defraud the United States of the revenue imposed on distilled liquor" (Underscoring supplied).

The court distinguished the McElroy case (supra) on the ground that in that case the offenses charged were "wholly different, having no relation to each other. They included assault with intent to kill two different persons and arson of two different dwellings each by a different combination of defendants."

One judge, in the Tuffanelli case, dissented on the ground that he disagreed with the majority in their holding that the offenses were connected and stated he thought the situation was similar to the McElroy case, though the facts were different. He also said, "ordinarily prejudice should be presumed from such practice," meaning such misjoinder. Thus the majority and the dissenting judge disagreed not on the law but on the fact of whether the charges were connected so as to enable them to be joined.

From the foregoing cases it appears that under the Federal procedure, it is prejudicial error to deny a severance in situations where there are several defendants, against some of whom there are charges which are completely separate and distinct from those against others, so that a joinder in one trial is not permissable. Where, however, several charges may be tried together, and are so tried, but where a severance ought to have been granted for some reason, the denial of the severance, though error, is not fatal unless prejudice be shown.

In the instant case, the Federal rules would not permit the joinder for one trial of the offenses of 25 April and of 11 June insofar as Deakins and Sorrentino are concerned, and the Federal courts hold that such a misjoinder is prejudicial error.

For the foregoing reasons the Board of Review is of the opinion that the denial of the motion for a severance in the case of Corporal Deakins, and Corporal Sorrentino, was prejudicial error.

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence as to each accused.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 319774 1st Ind

WD, JAGO, Washington 25, D. C. SEP 2 1947

TO: Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, New York

1. In the case of Corporals Robert E. L. Deakins (RA 34822065), 1208th Labor Supervision Company, Wallace R. Eiler (RA 33422626), 1684th Labor Supervision Company, and Joseph H. Sorrentino (42254968), 1459th Labor Supervision Company, 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 sentences, which holding is hereby approved. I recommend that the findings of guilty and the sentences be disapproved.

2. The action on the record of trial was taken by the Commanding General, Western Base Section. By paragraph 6, General Orders Number 16, Headquarters European Command, dated 3 April 1947, you appear to have been designated successor in command to the Commanding General, Western Base Section.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement for convenience of reference. Please place the file number of the record in brackets at the end of the published order, as follows: (CM 319774).

1 Incl
Record of Trial

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

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

JAGH - CM 319774

23 JUL 1947

UNITED STATES v. First Lieutenant FREDDIE R. WALKER (O-1032126), Cavalry	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Antwerp, Belgium, 18, 21, and 22 October 1946. "Dishonorable discharge," total forfeitures, and confinement for four (4) 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, at one trial, together with three enlisted men, upon the following Charges and Specifications:

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

Specification: In that First Lieutenant Freddie R. Walker, Headquarters, 145th Labor Supervision Center, United States Forces, European Theater, did, in conjunction with Corporal Robert E. L.Deakins, 1208th Labor Supervision Company, and Corporal Wallace R. Eiler, 1684th Labor Supervision Company, at Eigenloo, Temsche, Belgium, on or about 25 April 1946, wrongfully attempt to sell to one Vercauteren a 2½ ton truck of a value of more than $50.00, property of the United States.

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

Specification: In that First Lieutenant Freddie R. Walker, Headquarters, 145th Labor Supervision Center, United States Forces, European Theater, did, in conjunction

with Corporal Wallace R. Eiler, 1684th Supervision Company, and Corporal Joseph A. Sorrentino, 1459th Labor Supervision Company, at Malines, Belgium, on or about 11 June 1946, wrongfully and knowingly sell a 2½ ton truck, value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

Corporal Deakins and Corporal Eiler were tried for the offense alleged in Charge I. Corporal Eiler and Corporal Sorrentino were tried for the offense alleged in Charge II. Corporal Deakins was also charged with robbery. There were separate Charges and Specifications as to each individual. An objection to common trial made before arraignment, was treated as a motion to sever, and was denied by the court.

The accused then pleaded not guilty to and was found guilty of each Charge and Specification. No evidence of previous convictions was introduced. The accused was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for four 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 so far as applicable to the offenses charged against this accused is summarized as follows:

A Belgian civilian named Alfons Vercauteren, residing at Temsche, Belgium, testified that five or six months before the trial (18 October 1946) in April, May, or June, two American soldiers, one of whom may have been Polish, entered his home and offered to sell him a jeep or a truck, as they wanted money (R 10, 12). Vercauteren stated that he "did not agree to buy" (R 10). The soldiers then inquired the way to various places and asked for a map. Vercauteren's wife procured a map from a cupboard. There were 20,000 francs in the cupboard, which were seen by the soldiers. One of the soldiers then drew his pistol and took the money from the cupboard. He pointed his pistol at Vercauteren and forced him against the wall. The soldier, who took the money, then left the house, jumped into a truck and drove away (R 11). Vercauteren unsuccessfully pursued the truck on his motorcycle, noticing, as he started in pursuit, a jeep parked about 100 to 150 meters from his house (R 11, 38). He did not state what became of the Polish soldier. Sometime subsequent to this incident, two American soldiers, but not the same ones who had robbed him (R 43), and not the accused (R 36), appeared at his home and returned the 20,000 francs to him. Before he was given the money, however, he and his wife were required to sign a receipt or slip of paper containing about ten or fifteen words in English. He could not read it and does not know what was written on it (R 36-37).

Vercauteren could not identify any of the accused as either the soldiers who robbed him or who returned the money. He stated, however, that the soldiers were dressed differently on the two occasions (R 43) and that the accused were dressed differently in the court room (R 41). When soldiers are wearing different clothes it is impossible for him to identify them (R 41).

Edward A. Beck, an agent of the Criminal Investigation Division, testified that he conducted an investigation of this case during the course of which he had "paid a visit to the two people at Temsche" (R 20) and that subsequently he had searched Deakins and had found a note in Deakins' wallet (R 32). The original of this note had been attached to the original CID report (R 32) but was lost. The CID unit to which the report had been submitted had been inactivated (R 26). The witness made a search for the original note but was unable to locate it. Prosecution Exhibit E, a certified true copy of the original note, was admitted in evidence, and, in pertinent part, reads as follows:

> "The undersigned swear that this man Robert E. L. Deakins has never stolen or robbed any money from me at any time.
>
> s/ Alfons Vercauteren
>
> s/ De Cauwer Zulman"

First Lieutenant Ernest F. Seale testified that he was Commanding Officer of the 1417th Labor Supervision Company at Ghent, Belgium, on or about 11 June 1946 and that after receiving several telephone calls from the military police, he discovered that one of his 2½-ton, 6 x 6 trucks was missing, and had been replaced with another similar truck, which did not belong to his unit, but which bore his unit's bumper markings (R 13-15, 17-18). His truck was returned sometime "after 2 a.m." (R 19). Sorrentino, his acting motor sergeant, told him where the "wrong" truck had come from (R 16) and he ordered that it be returned after his truck had been returned (R 16, 19).

After testimony by Agent Beck that it was voluntarily made, and over objection of defense that the corpus delicti had not been established, a pre-trial statement of accused was admitted in evidence (Pros Ex C; R 30). In his pre-trial statement the accused stated:

> "The whole thing started about the latter part of April. At that time this girl from France came up. On the night of the 25 April 1946 Deakins came up to me after supper with this deal. He was Sgt. of the guard that night and said he had this deal with the Polock all fixed up. The Polock had given

him an offer that he could sell a 6x6 that night. The deal he made with me was that he was to pick up the Polock, sell the truck and then I was to confiscate it. The Polock was to get him 40.000 frs for the job, and he promiced me 10,000 frs. Deakins left the room, and I stayed with the girl until about 2130 hrs. At 2130 I observed Cpl. Deakins leave the post with a 6x6. I left my room and followed in my jeep. Deakins droved to a cafe, located at the first crossroad East of the depot. There he picked up the Polock. He then proceeded to the first crossroad after the junction of 325 and N 14 going East from the depot, and proceeded up that road about a mile or a mile and a half. Here he turned left and went down a small road. I stayed on the main road. He passed me again about 15, or 20 minutes later, being led by a motor cycle, heading in the direction of St. Nikolas. I followed for a half a mile, and when Deakins turned left, I stopped and waited again. I thought he was going to another farm house to complete his business. At that time he was gone quite a while, A half hour or fourty five minutes. He come back the motorcycle following this time. He went down to this crossroad, and turned his lights on. This was a signal that he still had the truck. From there he led the way back into town, the motor cycle following. I followed him this time. He went down to the spot where was supposed to leave the truck, turned aroud and headed the truck back in the same direction, and left his lights on. About three blocks away, I backed in behind a building where I could see his lights. He was there about twenty minutes, then when he came up, I pulled in behind and pulled on the siren. Then when he stopped the Polock left the truck. I told him to get out. At this time he told me there was no deal, so I said OK follow me back to camp. He did, and when he came to the same place where picked up the Polock, he left the Polock off. Then he came on to camp. He put the truck on the Motor Pool, I went to my room. He later came up to my room. There were two other men in my room before he got there, one was Eiler, the other I can't remember who. We had a drink, and then Deakins came in. The girl Olga Jouenne was still in my room. Deakins came up, and he said he had approxamately 20,000 frs. He gave me 10,000 frs, the rest he kept. He later told me what he had done, of how he got the money. He said he had to use his pistol to get out of the house. At that time I didn't want any part of the damm deal. The next morning, I told him that I would accept the money.

"This deal of Eilers's was in the first or second week of June. One afternoon Cpl. Eiler came to me while I was in command of 1417 ISC, and asked me to park a truck. I said OK. .

It was on a Friday or Saturday, because I lost command of the 1417 on that day. That afternoon, Eiler said he and the motor Sgt. of the 1417 Joseph T. Sorrentino, were going to park this truck at the parking lot of the 1417 ISC. They had obtained the truck from the depot. I didn't know who drove it off the Depot or at what time. The first I knew the truck was on the lot was when I met Eiler walking toward the depot, and I was headed for St. Nikolas in my jeep with my girl to go to the movies at St. Nick. He said the battery had dropped out, and he had to get another one. Later that eveaning he told me it was parked on the lot, and that I was supposed to get a cut out of it, for useing the company number and letting it sit there. They were supposed to have got it off the depot, because there was a convoy of trucks leaving the depot that night, and they were going to get one out of the convoy. On a Sunday evening Eiler came into the Stadt Leuvin with an envelope of money and said this was my cut, 13,000 frs. It was short and just about 11,000 frs in the envelope. That closed the deal on that one.

"When the center notifyed me that the Military Police were investigating the deal, the Major told me to lock Deakins up. I had no cell on the post so Deakins gave me his word that he would stay on the post. While we were talking he asked to borrow 20,000 frs so he could pay these people back. I asked the First Sgt. to open the safe because I did not know the combination., The First Sgt. opened the safe and gave me my money envelope. I gave Deakins 20,000 frs and the First Sgt took him to the place. Later that night he showed me the note he had gotten the people to sign. On Sunday I went with Deakins to the the people he had taken the money from. They said they were afraid that they would get hooked up in a Bladk Market charge, but since they had they money back they wouldn't say anything. On the following Thursday, I asked Deakins what he was going to do about the 20,000 frs. I had lent him. He had told me originally that he would send to the States and get some money orders for it. When I asked him about it, he blew up. Then he told me I could have his camara he had bought and also have the rest of some French Francs that I had of his, and call the deal square. He brought the camara into me and said that I could have it along with 3,000 or 5,000 belgian Francs I had. The only reason I took this is so I wouldn't be full looser.

"I added 600 dollars on his Currency control book, so he could buy the jeeps for himself Eiler and me. The rest of the money 403 dollars he had in his possession" (Pros Ex C).

4. The accused, having had his rights as a witness explained to him, elected to remain silent (R 48). The defense introduced no evidence.

5. With respect to Charge I and its Specification the evidence aliunde the confession of the accused shows that sometime in April, May, or June of 1946, two soldiers, one American and one Polish but otherwise unidentified, came to the house of a Belgian civilian named Vercauteren, at Temsche, Belgium, and offered to sell to him a jeep or a truck. He did not accept the offer. Vercauteren's exact words, in testifying as to what the soldiers said, were "As much as I could understand they wished to sell a jeep or a truck," and "they continued their story and said they were in want of money and wished to sell something, but as I did not understand them they asked me the way to different places in the neighborhood." While the Belgian's wife was getting a map from a cupboard for them, the American soldier saw some money in the cupboard. He drew his pistol, pointed it at the Belgian, took the money, which amounted to 20,000 francs, and escaped. Later two soldiers, also not identified, returned the money. Vercauteren stated that the latter were not the same two as those who first came to his house, nor were they any of the four accused. He also stated that because they were dressed differently he could not identify them. Before the money was given to him, Vercauteren was required to sign a paper containing ten or fifteen words in English, which he could not read. Later Agent Beck found in the possession of Deakins, one of the enlisted men on trial with accused, the note, a copy of which was introduced in evidence. Vercauteren did not, and of course could not, identify this copy. The remainder of the evidence against this accused is his pre-trial statement.

The first question for consideration is whether this evidence establishes the corpus delicti for the offense charged, an attempt to wrongfully sell Government property, as a basis for consideration of accused's confession as evidence against him. "An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt" (MCM 1928, par 152c, Attempts, p 190). Vercauteren testified that the soldiers "wished" to sell something. It is not clear from the portion of his testimony as quoted above, whether he meant that the soldiers, having for sale a jeep and a truck, wished to sell either one or the other, or whether he meant he did not know which they had and wished to sell, but that it was one or the other.

An actual offer for sale would be such an overt act as is necessary to make out an attempt to sell, but a mere inquiry with respect to whether a person wants to buy or with regard to buying or selling is not (See CM 194441, Mauro, 2 BR 145). The distinction is important and may depend upon the exact words used. Vercauteren could not, or said he could not, understand the soldiers too well. Necessarily, however, whether an actual offer is intended, or whether a mere inquiry not amounting to an offer is made, can often be a close question, and it cannot be said that the court was unwarranted in finding that an offer was probably made.

It was necessary, however, to establish not only that an attempt to sell was probably made, but that that particular attempt was the attempt charged.

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"A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, * * * that the offense charged has probably been committed; * * *" (MCM 1928, par 114a, p 115).

To determine this it is obvious that only the evidence by which the corpus delicti is proved and the language of the charge concerned may be considered. The confession of the accused cannot be considered. The evidence shows that an offer was probably made to sell either a truck or a jeep to a person named Vercauteren, at Temsche, Belgium, sometime in April, May, or June of 1946. The question now is whether this evidence establishes, not only, that an offense was probably committed, but also whether that offense was the one charged. If it were established by the evidence that what was offered for sale was a Government vehicle, then clearly the probability of an offense having been committed would be established. But the evidence merely shows that a jeep or a truck was offered for sale. Considering, however, that an American soldier made the offer in Belgium in the spring of 1946, and that a jeep or a truck was concerned, it is so doubtful that it could have been anything but a vehicle belonging to the United States, that it may be taken as most probable that it was such. It is clear that if it were a Government vehicle, it was probably unlawfully offered for sale. Also, if no other offers were made to Vercauteren in these three months, then the one in evidence must be the one charged. And if there were other such offers, then obviously the one in evidence might be the one charged. Inasmuch as it is only necessary, before accused's statement may be considered, to establish that the offense charged was probably committed, and no particular degree of proof is required, it would appear that the corpus delicti of the offense charged was established, despite the obvious weaknesses of the evidence as to time, personal identifications, and the specific property involved.

There remains for consideration whether the pre-trial statement of the accused, together with the other evidence, is sufficient to support the findings of guilty. Because the testimony of Vercauteren does not connect the accused with the offense, it is necessary to find this connection in the accused's statement. The accused establishes the date of the offense as that alleged, 25 April 1946. Accused states that "the Polock" knew where a truck could be sold and told Deakins. Accused and Deakins then arranged that Deakins would sell the truck, a 6 x 6, and it was expected that 40,000 francs would be obtained, of which accused would get 10,000 francs. After the sale, accused was to confiscate the truck and bring it back to the post. About 2130 on 25 April 1946 Deakins left the post with the 6 x 6 truck and accused followed in his jeep. Deakins went to a cafe and picked up "the Polock." It then appears that Deakins drove to various places, passing by accused who was apparently merely waiting in his jeep for a signal from Deakins. Sometime elapsed and then Deakins passed by followed by a motorcycle. Deakins drove to a spot where he stopped and turned his lights on,

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which was a prearranged signal that "he still had the truck." Accused parked where he could see the lights. In about twenty minutes Deakins "came up," accused "pulled in behind and pulled on the siren." Deakins stopped and told accused "there was no deal." Accused returned to camp followed by Deakins. Upon arrival Deakins put the truck in the motor pool and then went to accused's room where accused was with some other people. Deakins told accused he had about 20,000 francs and gave accused 10,000 francs. Deakins later told accused how he got the money and that he had to "use his pistol to get out of the house." Accused didn't want to take the money, but decided to keep it. Sometime later, after the investigation began, Deakins wanted to borrow 20,000 francs from accused to "pay these people back." Accused gave him the money and Deakins returned it to the people from whom he got it. On his return Deakins showed accused the note which he had "the people" sign and later the accused went with Deakins to see these people. Deakins gave the accused a camera and a sum of French francs so accused "wouldn't be full loser."

The statement is a confession that the accused conspired with Deakins to sell a 6 x 6 truck which, from accused's statement, obviously belonged to the Government. After the sale it was planned to confiscate the truck and return it to the motor pool, and with a view to carrying out this plan, the accused followed Deakins. Deakins and not the accused was to handle the sale, but accused was nearby ready to perform his part of the scheme. Vercauteren's testimony establishes that an offer to sell was actually made but Vercauteren did not know who made the offer. That it was Deakins who made the offer to Vercauteren, and that he did so on the occasion of the affair referred to by accused in his statement is shown by the following evidence:

a. Vercauteren's testimony that he was robbed of 20,000 francs and that it was later returned to him, but only after he and his wife signed the note,

b. Accused's admissions that Deakins gave him 10,000 francs of the 20,000 francs that Deakins said he had obtained, and that later accused loaned Deakins 20,000 francs to pay "the people" back, and,

c. The fact that the 20,000 francs Deakins had was obtained from Vercauteren, as shown by the note which was found in Deakins' possession, and which the accused admits that Deakins showed to him just after he came back from having returned the money.

As the statement of accused is a confession of a joint venture or common design between accused and Deakins to commit the offense charged, it follows that the overt act of offering the truck for sale made by Deakins is sufficient to support the findings of guilty of an attempt with respect to accused.

"In cases where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them. It is immaterial whether such acts or statements were done or made in the presence or hearing of the other parties."

* * *

"Foundation must first be laid by either direct or circumstantial evidence sufficient to establish prima facie the fact of conspiracy between the parties" (MCM 1928, par 114c, p 117).

The prima facie establishment of the fact of the common design necessary as a foundation is of course found in accused's confession thereof.

The original of the note found in Deakins' possession was lost and could not be found. The certified true copy introduced in evidence was admitted after Agent Beck had testified that it was a true copy and that a search had not disclosed the whereabouts of the original. The copy was therefore properly admitted. Because the original was not introduced in evidence, and Vercauteren could not read English, he did not identify the note as the one he signed. As to Deakins, the mere possession of such a note would be material and inculpatory evidence of his guilt of robbery. Since accused was not charged with robbery, the note is of value as evidence against accused only to show that the 20,000 francs stolen from Vercauteren and the 20,000 francs involved in the transaction related in accused's statement were in fact the same. This fact shows that the offer to sell made to Vercauteren on the same occasion as the robbery was also part of the same transaction related by the accused. Though there is no direct evidence that the note was the same one signed by Vercauteren, or the same one Deakins showed to the accused, all the circumstantial evidence about the note is sufficient to justify a finding that it was.

All of Deakins' statements to accused as to what he (Deakins) did, as related in accused's statement, are admissible against the accused for they were either made in furtherance of the common design, or in furtherance of an attempt to conceal the offenses and to escape the consequences thereof. They are also admissions by the accused as to acts of his admitted accomplice.

The evidence therefore is sufficient to support the findings of guilty with respect to Charge I and its Specification.

6. With respect to Charge II and its Specification, the only evidence aliunde the confession is the testimony of Lieutenant Seale. His testimony merely shows that on or about 11 June 1946 there was in the motor pool of his

unit a truck which did not belong to his unit, but which bore his unit's bumper markings, and that another truck belonging to his unit was in the hands of military police. At most this evidence shows that a truck belonging to the unit was not in the motor pool where it should have been, and that it may have been exchanged for the one that was present but did not belong there. This evidence established merely that a truck was missing. Evidence that property is missing is not, of itself, sufficient to establish the corpus delicti in the offense of wrongful sale. (CM 211218, Fleming, 10 BR 25 and cases cited therein).

The Manual for Courts-Martial states:

> "A court-martial 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. * * * Examples: * * * In a case of alleged larceny, or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicated in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with this rule" (MCM 1928, par 114a, p 115, Underscoring supplied).

It is also noted that the evidence in its entirety (i.e. including accused's statement) is insufficient to establish a prima facie case. With respect to the offense alleged in the Specification of Charge II, the accused stated the following in his pre-trial statement:

> "This deal of Eilers's was in the first or second week of June. One afternoon Cpl. Eiler came to me while I was in command of 1417 LSC, and asked me to park a truck. I said OK. It was on a Friday or Saturday, because I lost command of the 1417 on that day. That afternoon, Eiler said he and the motor Sgt. of the 1417 Joseph T. Sorrentino, were going to park this truck at the parking lot of the 1417 LSC. They had obtained the truck from the depot. I didn't know who drove it off the Depot or at what time. The first I knew the truck was on the lot was when I met Eiler walking toward the depot, and I was headed for St. Nikolas in my jeep with mu girl to go to the movies at St. Nick. He said the battery had dropped out, and he had to get another one. Later that eveaning he told me it was parked on the lot, and that I was supposed to get a cut out of it, for useing the company number and letting it sit there. They were supposed to have got it off the depot, because there was convoy of trucks leaving the depot that night, and they were going to get one out of the convoy. On a Sunday evening Eiler

came into the Stadt Leuvin with an envelope of money and said this was my cut, 13,000 frs. It was short and just about 11,000 frs in the envelope. That closed the deal on that one" (Pros Ex C).

The above statement is vague as to the offense alleged in the Specification of Charge II and cannot be considered a confession of it, although it clearly admits some wrongdoing on accused's part.

Therefore, in the opinion of the Board, the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification.

7. There remains for consideration whether the trial of accused in the same proceeding with the other three was proper. Prior to arraignment, the defense, on behalf of this accused as well as of the others tried with him, objected to a common trial, but this motion for a severance was denied.

The two offenses, wrongfully attempting to sell military property and wrongfully and knowingly selling military property, were separate and distinct offenses, occurring at different times and places and provable by different evidence. The accused and Eiler alone of the three enlisted men was charged with both these offenses. Deakins was charged only with the attempt to sell, and Sorrentino only with the sale. In neither offense were those charged therewith, jointly charged in one specification. The separate charge and specification against accused for each of the offenses did allege, however, that he acted in conjunction with the others charged therewith. The separate specifications against each of the others charged with either of these offenses were in similar form. Though the charges were not, therefore, technically joint charges, joint offenses were alleged, and it would seem that, as to each group of three charged with each one of the offenses, it was a joint trial within the group, according to the meaning of that term as used in the Manual for Courts-Martial under the heading "motion to sever" (MCM 1928, Par 71b). But if this is not so, then as to each of the four accused, it was a common trial. In any event, insofar as it concerns the trial of these two offenses together, the trial was a common trial and not a joint trial. Furthermore, Deakins alone was charged with robbery, and the trial of that charge in the same proceeding is an additional circumstance making the trial a common trial. It therefore is necessary to consider whether or not the accused had a right not to be tried with others in a common trial over his objection thereto.

It has been stated that a common trial may be had in cases where two or more persons each commit offenses which cannot be considered joint, but which are committed at the same time and place and in which the evidence and witnesses may be the same as to each. But, it has also been stated that this may only be done if the appointing authority so directs and no one of the accused objects. In 1931 this was stated as the rule applicable

to common trials in CM 195294, Fernandez, 2 BR 205, Dig Op JAG 1912-40, paragraph 395 (33); and it was again stated as the rule in CM 267696, Whittier, 44 BR 107. In both cases the common trial was held valid because no objection thereto was made. This rule was later restated in TM 27-255, Military Justice Procedure. But in a case involving a common trial where a motion to sever was denied, the Board of Review sitting in the European Theater of Operations stated:

> "Accordingly, it is held that where, as in the present case, the appointing authority has directed a so-called 'common trial' of two or more accused, separately charged with offenses of the same character committed at the same time and place and provable by the same evidence, the denial or granting of a motion for severance is within the sound judicial discretion of the court, whose ruling will not be disturbed unless it is shown that it injuriously affected the substantial rights of the accused." (CM 297114, Dear et al, 16 BR (ETO) 127).

The question whether the rule stated in the Fernandez and Whittier cases and in the Technical Manual that there may be a common trial only if no one of the accused objects is correct, or whether the Dear case is correct in stating that the granting of a severance is a matter for the court's discretion, must be considered. The Manual for Courts-Martial (1928) provides for and discusses the motion to sever made by one of two or more joint accused, and provides forms for joint charges, but it is silent as to common trials and neither authorizes nor prohibits them. The rules applicable to common trials must, therefore, be sought in the rules applied in Federal courts (CM 195294, Fernandez, supra).

Under the procedure in the Federal courts, when a joinder of offenses or defendants is permissible, the ordering of a common trial, or the granting or denial of a severance, is a matter within the discretion of the trial court (Stokes v. U.S., 93 Fed, 2d, 744; Culiak v. U.S., 53 Fed, 2d, 554; DeLucca v. U.S., 299 Fed 741). It has been held however that where there is no connection between the offenses and a joinder is not permitted there is no discretion in the court, and to deny a severance is fatal error (McElroy v. U.S., 164 U.S. 76; Zedd v. U.S., 4 Fed, 2d, 96; DeLucca v. U.S., 299 Fed 741).

The Rules of Criminal Procedure for the District Courts of the United States, promulgated by the Supreme Court pursuant to the provisions of a statute enacted in 1940 (June 29, 1940, Ch 485, 54 Stat. 688, 18 U.S.C. 687) now embody the law applicable in Federal courts on the subject of joinder. While the Rules of Criminal Procedure supersede any provisions of prior existing statutes inconsistent with them, the Rules on the subject of trying offenses and defendants together in one proceeding restate the

prior law (Notes to Rules 8 and 13, Fed Rules of Criminal Procedure, 18 U.S.C.A. foll. Sec. 687). Under the provisions of Rule 13 the consolidation for trial together of indictments involving either several offenses or several defendants may be ordered by the trial court, if under the provisions of Rule 8 (a) and (b) the offenses charged, or the defendants could be joined in one indictment. Rule 8 (a) provides that offenses may be joined in one indictment if they are "of the same or similar character, or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common plan or scheme." Rule 8 (b) provides that defendants may be joined in one indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It is further provided that "such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count."

In the opinion of the Board, therefore, the Dear case states the correct rule, if, and when, the necessary connection between the offenses and the several accused exists. The accused, in such case, do not have an absolute right to a separate trial, but the matter of granting or denying a separate trial is discretionary with the court.

The rule as to joinder of offenses, i.e. the trial of an accused for several offenses at one time, provided for in the Manual for Courts-Martial is not the same as in civil cases, and there is no question, insofar as accused is concerned, but that he may be tried at one time for both the offenses with which he was charged. Even under the Federal rules it would appear that he could be so tried. The sole question is the propriety of the trial of accused with the others.

By reason of the allegation in each specification against the accused that he acted in conjunction with the others charged with the same offense, if for no other reason, it is clear that with respect to those offenses, the prerequisites set forth in the Federal rules were met. It is immaterial that the charges were not in the technical form of joint charges.

It is evident, however, that the robbery charge against Deakins was an offense of a very different character from the other offenses, and accused was not charged with the robbery. It cannot, however, be said the robbery is entirely unconnected with the attempt to sell, as it occurred at the same time and place as the overt act of the offer for sale and both offenses were provable in part by the same evidence and witnesses. The evidence concerning the allegedly stolen money is important evidence connecting the acts and transactions related in accused's confession with those testified to by the Belgian, who was both the offeree and the victim of the robbery.

It is not necessary to decide in this case what the rule is in a case where, over his objection, an accused is tried in a common trial with others for different offenses which are entirely separate and unrelated and when the accused could not be joined for trial under the Federal Rules of Criminal Procedure. In the instant case, there is a direct connection between the two offenses, which arose from the same transaction. In view of the Dear case, which we believe states the correct rule, it was, therefore, a matter of discretion whether there be a common trial or separate trials. The denial by the court of the motion to sever, assuming that it was error, was not fatal, unless it be shown upon the whole record to have injuriously affected the substantial rights of the accused. On this point, the only conceivable prejudice to the rights of the accused lies in the possibility that the court might have considered evidence contained in the confession of one or more of the accused against the others. In the instant case, however, each confession was specifically admitted as evidence only against the accused whose confession it was, and the court was warned in this regard. On the whole record of trial it does not appear that the substantial rights of the accused were in fact injuriously affected.

8. The accused is 27 years of age and is married. From 1933 to 1941 he worked on a Missouri farm as a laborer, and thereafter for a produce company. He was inducted into the Army in April 1942 and served as an enlisted man until he was commissioned as a second lieutenant on 8 April 1943. He was promoted to first lieutenant on 1 August 1945. Accused saw combat in the European Theater and received the Purple Heart for wounds received in action in Germany on 14 January 1945. Efficiency reports available among War Department records show that he was rated excellent for the period from 1 July 1944 to 31 December 1944, superior from 1 January 1945 to 30 June 1945, and excellent from 1 July 1945 to 31 December 1945.

9. A letter to the reviewing authority dated 11 November 1946, signed by individual defense counsel, setting forth arguments for "reversal" and urging clemency for the accused, is attached to the record of trial and has been considered by the Board of Review.

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. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, legally insufficient to support the findings of guilty of Charge II and its Specification, and legally

sufficient to support the sentence and to warrant confirmation thereof. Dismissal, total forfeitures, and confinement at hard labor for four years is authorized upon a conviction of a violation of Article of War 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 319774 1st Ind

WD, JAGO, Washington 25, D. C. AUG 1 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action, the record of trial and the opinion of the Board of Review in the case of First Lieutenant Freddie R. Walker (0-1032126), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully attempting to sell a truck, property of the United States, in violation of Article of War 96 (Chg I and Spec) and of wrongfully and knowingly selling another truck, property of the United States, furnished and intended for the military service, in violation of Article of War 94 (Chg II and Spec). He was sentenced to dismissal, total forfeitures, and confinement at hard labor for four 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 of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification (wrongfully attempting to sell a truck, in violation of AW 96), legally insufficient to support the findings of guilty of Charge II and its Specification (wrongfully and knowingly selling a truck, in violation of AW 94), legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

About 25 April 1946, the accused and an enlisted man under his command, Corporal Robert Deakins, entered into a scheme to sell a truck belonging to the United States. At the time, the accused was commanding officer of a labor supervision company in Belgium. A Polish soldier had informed Deakins, that he knew where a truck could be sold. Deakins informed the accused, and the two planned to make the sale. It was further planned that, after the sale was completed and Deakins had the money, the accused was to drive up in his jeep and "confiscate" the truck, returning it to the motor pool. Deakins drove the truck from the company's motor pool and the accused followed him in a jeep. Deakins first "picked up" the Polish soldier who had made contact with the prospective purchasers, and then went to make the sale. The accused was not present when the actual attempt to sell was made, but was waiting in the vicinity for a signal from Deakins. Deakins offered the truck for sale to a Belgian civilian but he refused to buy it, whereupon Deakins, at the point of a gun, according to the Belgian's testimony, robbed him of 20,000 francs which was in a cupboard in his house. Accused was not charged with the robbery, but he received from Deakins half of the stolen money. After the investigation of the case began, the accused provided Deakins with

20,000 francs which Deakins returned to the Belgian in an attempt to cover up the transaction. It is doubtful whether accused knew exactly how Deakins got the money, at least until after the whole affair was over and the money had been returned to the Belgian.

The charge involving the alleged sale of a truck in June 1946, was an entirely separate transaction. With respect to this offense there was a complete failure of proof.

4. The accused is 27 years of age and is married. From 1933 to 1941 he was employed in farming in Missouri as a laborer, and thereafter worked for a produce company. He was inducted into the Army in April 1942, and served as an enlisted man until he was commissioned in the grade of second lieutenant on 8 April 1943. He was promoted to first lieutenant on 1 August 1945. Accused saw combat in the European Theater and received the Purple Heart for wounds received in action in Germany on 14 January 1945. Efficiency reports available among War Department records show that he was rated "Excellent" for the period from 1 July 1944 to 31 December 1944, "Superior" from 1 January 1945 to 30 June 1945, and "Excellent" from 1 July 1945 to 31 December 1945.

5. A letter to the reviewing authority dated 11 November 1946, signed by the individual defense counsel, setting forth arguments for "reversal" and urging clemency on behalf of accused, is attached to the record of trial and has been considered.

The accused was tried in a common trial with three enlisted men each of whom was involved in one or both of the offenses for which the accused was tried. As to each of the enlisted men involved, the Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentences.

6. I recommend that the findings of guilty of Charge II and its Specification be disapproved and that the sentence be confirmed, but in view of all the circumstances of the case, including the prior good record of the accused and his creditable combat service, recommend that the forfeitures and the confinement be remitted, and that the sentence as thus modified be carried into execution.

7. 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. 316, 2 Sept 1947).

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

JAGK - CM 319802

21 MAY 1947

UNITED STATES)	UNITED STATES CONSTABULARY
)	
v.)	Trial by G.C.M., convened at Wiesbaden,
)	Germany, 29 October 1946. Dismissal
Second Lieutenant EDWARD J.)	
McMILLEN (0-1331072), Infantry)	

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

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

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

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

Specification: In that Second Lieutenant Edward J. McMillen, 1697th Engineer Combat Battalion, did at Eichenberg Station, Germany, from on or about 14 July 1946 to on or about 21 July 1946 conduct himself in a manner unbecoming an officer and a gentleman by sleeping during rest periods spent in his bedroom with a German woman, not his wife, in the presence of Technical Sergeant Forrest L. Stone, Troop E, 11th Constabulary Squadron, an enlisted man then under his command.

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

Specification: In that Second Lieutenant Edward J. McMillen, ***, did at Eichenberg Station, Germany, from on or about 14 July 1946 to on or about 21 July 1946 neglect his duty by permitting in his presence, Technical Sergeant Forrest L. Stone, Troop E, 11th Constabulary Squadron, an enlisted man then under his command, to sleep with a German woman not his wife during rest periods in his bedroom.

He pleaded not guilty to and was found guilty of all charges and specifications. He was sentenced to be dismissed the service and to pay to the United States a fine of $500. The reviewing authority approved only so much of the sentence as involved dismissal from the service and forwarded the record of trial pursuant to Article of War 48.

3. Evidence

Techinical Sergeant Forrest L. Stone, Troop E, 11th Constabulary Squadron,

Eichenberg, Germany, identified the accused as his platoon leader and testified that during the period 14 to 21 July 1946 he and accused occupied the same room on the second floor of a house about 50 yards from the troop billets in Eichenberg. The accused had a girl-friend named "Gertie" or "Blondie" who slept with him in this room and the witness also had a girl-friend who slept with him in this same room during the times alleged. Sergeant Stone testified further that neither "Gertie" nor his girl-friend was the wife of either the accused or the witness (R. 6-8).

Hildegundis Ingeborg Tiebel, Stetenstrasse 32, Augsburg, Germany, a witness for the prosecution, testified that she knew the accused as "Mac"; that on or about 17 July 1946 she visited Sergeant Stone at 7 or 8 Bahnhofstrasse, Eichenberg, and slept with him. She stated further that during this time, and while she was in bed with Sergeant Stone the accused was in bed with "Gertie" in the same room (R. 9-10).

No evidence was presented by the defense and the accused, after being duly advised of his rights, elected to remain silent.

4. After stating in open court that he desired to be defended by the regularly appointed defense counsel and assistant defense counsel together with Captain Lawrence P. Fick as individual counsel, all of whom are shown to have been present at the trial, the defense moved for a continuance "on the ground that he has been unable to procure the counsel he desires, the counsel that he would like to have is Major Denny who is now on leave in London." The court denied the motion for continuance on the ground that there was no showing of diligence on accused's part in requesting the named officer and because of his unavailability. No renewal of the motion was made at the close of the prosecution's case. The record shows that the charge sheet was served on accused on 11 October 1946, that trial was had on 29 October 1946, and there is no indication that accused ever made any request to be defended by the alleged "Major Denny" until the court-martial assembled to try him. The granting of a continuance rests within the sound discretion of the court and we find no reasonable basis for concluding that the court abused its discretion in overruling the motion under the circumstances shown (CM 257632, Greulich, 50 BR 121,155; CM 275715, Burleigh, 48 BR 137; CM 233763, Lowther, 20 BR 111,118; AW 20).

The evidence in this case is brief but uncontradicted and sufficient to establish the overt acts alleged in the Specification, Charge I, and the neglect of duty alleged in the Specification, Charge II. There is no direct evidence that the "woman" referred to in each specification was in fact a German woman as alleged but the nationality of the women is immaterial.

The historical definition of the "conduct unbecoming an officer and gentleman" denounced by Article of War 95, and to this day the most comprehensive yet succinct pronouncement is that given by Colonel Winthrop, which is as follows:

"*** Action or behavior in an official capacity which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; or action or behavior in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Winthrop's Military Law and Precedents, 2d Ed., p. 713.)

Whether accused's conduct herein be considered in an official or unofficial capacity, and we consider it to have been a combination of both, no argument is necessary to establish the fact that it is unbecoming an officer and gentleman, within the meaning of the Article, for an officer to keep a woman, not his wife, in his bedroom and in the continued presence of an enlisted man. And the fact that the enlisted man was immediately under his command renders the act of a more compromising nature (CM 216152, Wells, 11 BR 111,119; CM 202212, Coulter, 5 BR 373, 402,403).

It is alleged that accused did neglect his duty by permitting Sergeant Stone to sleep with a woman in his bedroom and presence. The record shows that accused not only condoned or permitted Sergeant Stone to "sleep" with the woman in his bedroom and presence thereby neglecting his duty as an officer, but that he assented to such misconduct so as to become particeps criminis thereto. Even though it were conceded that the conditions under which accused lived might be considered somewhat antagonistic to accepted standards of social and moral behavior, a proper regard for the military status and responsibility of platoon leader to platoon sergeant does not permit of such a relationship (CM 303049, Pinick, 19 BR (ETO) 257,260; CM 308435, Thompson, 31 BR (ETO) 235,236).

Certain members of the court-martial exhibited much concern regarding what acts occurred in the respective beds and asked the witnesses pointed questions with reference thereto. The law is not so concerned because intercourse may be inferred from man and woman occupying the same bed (2 C.J. Sec., p. 492, and cases cited thereunder).

Each specification alleges that the woman involved was not the wife of her bedmate. Should there be any question regarding the sufficiency of Sergeant Stone's testimony that none of the parties were married each to the other, as affecting the accused herein, it is sufficient to state that in the absence of proof of marriage it is generally presumed that the parties are single and unmarried and the burden is on them to rebut the presumption. The rule is aptly stated as follows in Gaunt v. State (50 N.J.L. 490, 14 Atl. 600):

"The single state is, however, the natural and during early life, the only possible one; nor is there any period at which it

is necessarily terminated or merged into marriage. In the absence, therefore, of testimony tending to the contrary, the presumption is that the celibacy which existed during puerilescence continues. Therefore, until drawn into actual question, no affirmative testimony on this point was required from the prosecution." (See also State v. McDuffie, 107 N.C. 885, 12 S.E. 83, an indictment for fornication and adultery wherein it is stated that the connubial relation being peculiarly within the knowledge of the defendants, the burden is upon them to prove it (26 C.J. 991).)

5. War Department records show that accused is 33 years of age and married. He attended Boston University for two years and from 1941 to 1943 he was engaged as a civilian in construction work in Hawaii, New Caledonia, and the Fiji Islands. He was inducted into the Army as a private on 25 March 1943 and was appointed second lieutenant, AUS, at Fort Benning, Georgia, on 20 January 1945. Available efficiency reports rate him as "Excellent."

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. 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.

Charles L. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schroyd, Judge Advocate

JAGK - CM 319802 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 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 Edward J. McMillen (O-1331072), Infantry.

2. Upon trial by general court-martial this officer was found guilty of conduct unbecoming an officer and gentleman by sleeping during rest periods with a German woman, not his wife, in the presence of Technical Sergeant Forrest L. Stone of his platoon, in violation of Article of War 95, and of neglect of duty by permitting Sergeant Stone to sleep with a German woman in his (accused's) bedroom and presence, in violation of Article of War 96. He was sentenced to be dismissed the service and to pay to the United States a fine of $500. The reviewing authority approved only so much of the sentence as involved dismissal 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.

During July 1946 the accused officer was platoon leader of Troop E, 11th Constabulary Squadron, and Technical Sergeant Forrest L. Stone was his platoon sergeant. On or about 14 July and until about 21 July 1946 the accused and Stone occupied a room jointly in a German house at Eichenberg Station, each sleeping with a woman not his wife in a separate bed. One of the women, Hildegundis Ingeborg Tiebel, testified that she was a waitress at Augsburg and had gone to Eichenberg to visit Sergeant Stone. The other woman was known only as "Gertie," or "Blondie."

4. In view of all the circumstances of this case and accused's demonstrated lack of proper appreciation of his status and relation to enlisted men of his command, I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

5. 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. 236, 26 June 1947).

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

(119)

JUL 15 1947

JAGQ - CM 319815

UNITED STATES	SEVENTEENTH MAJOR PORT
v.	Trial by G.C.M., convened at Bremen, Germany, 23 November 1946. Dishonorable discharge and confinement for life. Penitentiary.
Private First Class WILLIAM W. EADS (34581147), Company D, 382nd Military Police Battalion.	

REVIEW by the BOARD OF REVIEW
JOHNSON, SCHENKEN and PARSONS, 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 William W. Eads, Company "D" 382nd Military Police Battalion, did, in conjunction with Private First Class Wallace B. Clapp, at or near Bremen, Bremen Enclave, Germany, on or about 27 February 1946, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Edgar Knapp, a human being, by shooting him with a pistol.

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

Specification: In that Private First Class William W. Eads, Company "D" 382nd Military Police Battalion, having been duly placed in confinement in Lehe Barracks, Bremerhaven, Germany, on or about 23 March 1946, did, at Bremerhaven, Germany, on or about 10 June 1946, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private First Class William W. Eads, Company "D" 382nd Military Police Battalion did, at Bremerhaven, Bremen Enclave, Germany, on or about 10 June 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Stuttgart, Germany, on or about 25 September 1946.

Accused pleaded not guilty to and was found guilty of all Specifications and Charges. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the period of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

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

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 that accused and his accomplice (Private First Class Wallace B. Clapp), on the evening of 27 February 1946 were drinking cognac together at their company club near Bremen, Germany. At approximately 2230 that evening they departed from the club, went to their billet where each armed himself with his pistol and began walking toward a Polish camp. While enroute they met deceased, a German civilian, and asked him to sell them some schnapps and when he replied "Oh, you Americans are always drinking" Clapp acted if he were going to strike the civilian and the latter seized his hands. Clapp then pushed him and the civilian began running down the street. Accused and Clapp each fired three shots in the direction of the German civilian and then turned and ran in the opposite direction. While running accused stated "We dropped him", and Clapp replied "Ya Ya" even though he did not see the civilian fall. The body of deceased was discovered at 2400 that evening at approximately the place where the shots were fired and he was pronounced dead from gunshot wounds, three bullets having entered his body.

Accused's accomplice Clapp testified under oath to accused's participation in the affair and his testimony leaves no doubt that the

killing was ruthless, vicious and with no provocation whatever.

The offenses of escape from confinement and desertion are adequately supported by the evidence.

5. The charge sheet shows that accused is 24 years of age. He was inducted at Fort McClellan, Alabama, on 20 November 1942 with no prior service.

6. The court was legally constituted and had jurisdiction over the accused and 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. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the Criminal Code of the United States.

W. H. Johnson Jr., Judge Advocate

[illegible], Judge Advocate

On Leave, Judge Advocate

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

JAGN-CM 319823

23 April 1947

UNITED STATES v. Private First Class WILLIE B. RHIMES (38602086), 3396th Transportation Corps Truck Company (Troop).	)	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremen, Germany, 2 December 1946. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Willie B. Rhimes, 3396th Transportation Corps, Truck Company (Troop), did, at or near Eggestedt, Bremen Enclave, Germany on or about 7 November 1946, wrongfully and unlawfully kill Otto Loefler by striking him with a motor vehicle which he was then operating in a reckless and grossly negligent manner.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence for the Prosecution:

At about 0700 to 0720 on 7 November 1946 Privat First Class John Sizemore stopped the Army truck he was driving, on a road near Eggestedt (R. 6, 13). Several Germans walked to the rear of the truck to mount it (R. 6, 7). A second truck, driven by accused, headed in the same direction as the halted vehicle, approached it from the rear (R. 7). Accused put on his foot brake, the truck gave a sudden jerk, stopped about 25 to 30 meters from the first truck, and then rolled ahead into the rear of the first truck, crushing the deceased who was attempting to climb thereon (R. 11, 12, 13, 15). Sizemore had signaled for a stop and accused saw the signal, but could not stop the truck rolling forward because the brakes were no good (R. 15). The deceased Otto Loefler was placed on Sixemore's truck and taken to the 280th Station Hospital, where he died about half and hour later from profound shock and loss of blood (R. 15, 18).

The place were the accident occurred was on a flat, slightly downhill stretch of road (R. 13). The road was dry and clear, and no vehicles were coming from the other way (R. 10, 15). The passenger, Ernst Reinelt, riding in the front seat of the truck driven by accused and who had been driving vehicles for about fifteen years, testified he thought the accused could have avoided the accident by turning to the side of the road, or using the hand brake (R. 9, 10). Reinelt also testified that he thought the brakes were good as there was a sudden jerk when the foot brake was applied (R. 11).

At about 0630 the morning of the accident accused told Sizemore that the brakes on his (the accused's) truck would not hold (R. 14). Accused made no complaint to the dispatcher that morning (R. 21).

At 0900 to 0930 of 7 November 1946, Technical Sergeant Harry Jefferys, motor sergeant of accused's unit, checked the truck. He found the brakes to work properly at speeds of 15, 20, and 30 miles an hour. When he stopped the truck with the brakes, it did not roll forward (R. 23). The master cylinder was full of fluid (R. 24). Witness is a mechanic and from his examination, the brakes were in perfect working condition. Captain Harold A. Devine was present during the test (R. 30).

Staff Sergeant William R. Davis tested the brakes at about 0900 of 7 November 1946, and found them to be in good condition. The truck did not roll forward after being stopped. He did not try stopping the truck on an incline (R. 26). First Sergeant Anthony J. Daniels, who had twenty years' driving experience, testified to substantially the same facts as Davis.

4. Evidence for the defense:

First Lieutenant Alfred L. Taylor testified he had been motor officer for six months, that the vents in the hydro-vac and master cylinder of the truck were not covered, that it was possible for dirt

or trash to enter these vents, which would stop the fluid of the master brake cylinder going to the brakes (R. 30, 31). The reason for that is that a seal will then break and allow the fluid to escape. On cross-examination he stated that if the master cylinder was full of brake fluid, none could have been lost (R. 32). It is possible for the vent on the master brake cylinder to clog temporarily so the brakes would not hold and be freed "by the dirt or a knock on the lines." This could happen twenty or thirty times a day. (R. 32).

5. Accused was found guilty of involuntary manslaughter. That offense is defined in the Manual for Courts-Martial, paragraph 148a, as follows:

> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, as by culpable negligence in performing a lawful act, or in performing an act required by law."

So far as this offense is concerned, gross negligence is legally comparable to culpable negligence (CM 240043, Vislan, 25 BR 352). In order to sustain a conviction of involuntary manslaughter at common law the homicide must be occasioned by "criminal," or "gross," or "culpable," negligence. The terminology indicates, and the courts are practically unanimous in holding, that this type of negligence is of a degree higher than that required to sustain civil liability for negligence. They have declared that criminal, gross, or culpable negligence must be of such a character as to show an utter disregard for life or limb, or a total disregard for the consequences, or conduct indicating such wilful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons (State v. Murphy, 324 Mo 183, 23 S.W. 2nd, 36; Dunville v. State, 188 2nd 373, 123 N.E. 689). The test is not what a reasonably purdent man would or would not do but whether the negligence is sufficiently gross to come within the descriptive phrases herein set out (CM 292271, Bently, 4 ETO 217, 221).

Examining the record of trial in the light of the cited authorities the Board of Review finds no evidence to indicate any "wilful disregard" for the rights of others, or "wanton recklessness" as required to sustain the finding of guilty of manslaughter.

The evidence merely shows that accused was operating his vehicle in a lawful manner, for a lawful purpose, and in possession of all his faculties. When the truck ahead of him stopped, he applied his brakes and stopped also, but the truck being on a decline, rolled forward at a slow rate of speed and crushed the deceased against the truck he was attempting to mount. That the accused was negligent in not stopping the car and preventing it from rolling forward is evident.

The fact that the truck did roll forward, in itself, cannot be said to constitute the requisite wanton recklessness of manslaughter. The evidence, however, does establish that the accused while negligently operating a motor vehicle struck and killed a German civilian. Such conduct was of a nautre to bring discredit upon the military service, a violation of Article of War 96 (CM 252521, Groat, 34 BR 67), and "a lesser included offense necessarily included in that charged" (CM 293509, Coats et al, 8 BR (ETO) 39).

The Board of Review is of the opinion that the record of trial is insufficient to support the finding of guilty of manslaughter but legally sufficient to support a finding of guilty of a violation of Article of War 96 for the killing of another by negligently operating a motor vehicle.

The question then arises whether the offense warrants the sentence to confinement imposed by the court and approved by the reviewing authority. The offense sustainable is not listed in the Table of Maximum Punishments, but an offense similar in all respects is denounced by the law of the District of Columbia. It is provided in section 40-606 (6:246a), District of Columbia Code that:

> "Any person who, by operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or both" (Underscoring supplied).

It is provided in section 40-607 (6:246b), District of Columbia Code, that:

> "The crime of negligent homicide defined in section 40-606 shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if they jury shall find the defendant not guilty of the crime of manslaughter such jury may, in its discretion render a verdict of guilty of negligent homicide" (Underscoring supplied).

It is observed that the Specification does not include the word "felonious," however, irrespective thereof, the pleading is sufficient (CM 283744, Leonard, 16 BR (ETO) 279).

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings

of guilty of the Specification and Charge as involves a finding of guilty that the accused did, at the time and place alleged, kill Otto Loefler by striking him with a motor vehicle which he, the accused, was then operating in a negligent manner, in violation of Article of War 96; and legally sufficient to support only so much of the sentence as adjudges dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to be confined at hard labor for one year.

Edward T. Johnson, Judge Advocate

Joseph Brack, Judge Advocate

Francis Boyles, Judge Advocate

JAGN-CM 319823 1st Ind Jun 16 1947
WD, JAGO, Washington 25, D.C.
TO: Commanding General, Seventeenth Major Port, APO 69, c/o Postmaster, New York, N.Y.

1. In the case of Private First Class Willie B. Rhimes (38602086), 3396th Transportation Corps Truck Company (Troop), I concur in the foregoing holding of the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of the Charge and its Specification be approved as involves a finding that the accused did, at the time and place alleged, kill Otto Loefler by striking him with a motor vehicle which he, the accused, was then operating in a negligent manner, in violation of Article of War 96; 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 one year. Upon taking such action you will have authority to order the execution of the sentence.

2. In view of the nature of the offense of which accused was properly convicted and the circumstances surrounding the transaction, it is recommended that execution of the disbonorable discharge be suspended until the soldier's release from confinement.

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

(CM 319823).

1 Incl
Record of trial

s/ Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

DEPARTMENT OF THE ARMY
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

OCT 14 1947

JAGQ - CM 319845

UNITED STATES v. Private FRANK GATES (44066629), 3418th Ordnance Medium Automotive Maintenance Company.	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremerhaven, Germany, 10 October 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, 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 89th Article of War.

Specification: In that Private Frank Gates, then in the 3078th Motor Vehicle Distributing Company, now in the 3418th Ordnance Medium Automotive Maintenance Company, being assembled at a club for United States Military Personnel together with Second Lieutenant Theodore B. Conway, and Private Cornelius Norris, both of the 3078th Ordnance Motor Vehicle Distributing Company and an undetermined number of unidentified American soldier, so described for want of a better description, did in conjunction with the said Second Lieutenant Theodore B. Conway and Private Cornelius Norris and the said unidentified American soldiers, so described for want of a better description, at Wesermunde, Bremen Enclave, Germany, on or about 22 April 1946, commit a riot in that he and they together with the other soldiers, numbers and names unknown, and with force and arms and in a violent and tumultous manner, assemble to disturb the peace of Wesermunde, and having so assembled did unlawfully, and riotously assault a group of German nationals which included the following people: Adolph Hinrich, Willy Gutendorf, Guenther Arning, Wilhelm Ulrich, Georg Reimann, Kurt Fischer, Bruno Dornbach, Guenther Lueck and Guenther Miethke, by shooting at the

said group with carbines and pistols, and during the course of the said assault, did wrongfully and unlawfully and felonously kill Adolph Hinrichs to the terror and disturbance of Wesermunde, Germany.

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

Specification: In that Private Frank Gates, then in the 3078th Motor Vehicle Distributing Company, now in the 3418th Ordnance Medium Automotive Maintenance Company, did in conjunction with other American soldiers whose names and numbers are unknown, so described for want of a better description, at Wesermunde, Bremen Enclave, Germany, on or about 22 April 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Adolf Hinrichs, a human being by shooting him with a carbine.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 50½.

3. Accused consented to a common trial with Private Cornelius Norris who was tried on identical charges, and with Second Lieutenant Thomas B. Conway, who was charged in conjunction with the accused, Private Norris, and others with committing a riot (A.W. 89), with failure to prevent a riot, failure to learn identity of rioters, wrongful possession of a pistol, and failure to report a riot (A.W. 96). (R. 3). (The cases of Lieutenant Conway and Private Norris have been made the subject of a separate opinion and holding.)

Between 2200 and 2230, 22 April 1946, a group of 300-500 German men and women were in the street on Weserstrasse, Wulsdorf, (Wesermunde, Ex. I, Bremerhaven, R. 39), Germany, on their way home from a dance which had been held at the Boese Club (R. 13, 15-17, 19). A big, 5-ton American truck (R. 18) came up from behind, passed the people in the street, and made a three-quarter turn in front of the Club Simon (also known as Club 3078 for the 3078th Ord MVD Co.) located on Weserstrasse, about 500 meters north of the Club Boese (R. 19 and Ex. G). There were no lights on the street (R. 17) and the truck headlights blinded the people walking toward the Club Simon (R. 16). A few people passed by the truck and "when others wanted to follow somebody fired" (R. 14).

Included in this group of people going home from the dance were Helene Hinrichs and her husband, Adolph Hinrichs. They were about 75 meters from Club Simon when about 30, 40 or 50 German marines passed them. There were no women in this group. The men were singing and were not armed. Mrs. Hinrich "saw a big light and the Navy soldiers went up the slope and then shots were fired * * *" (R. 20). The shots came from the direction of the Club Simon (R. 21). Mrs. Hinrich entered a nearby house and a little later, some men carried her husband into the same house (R. 22). She did not see her husband fall (R. 22). Dr. Karl M. Marggarf performed an autopsy on the body of Adolph Hinrichs on 25 April 1946 and found that his death was caused by internal bleeding as a result of a gunshot wound that went through his lung, stomach and spleen. The shot was "from a distance. The man was shot from behind and he must have been shot (while) in a bending position" (R. 12-13 and Ex. B).

Wilhelm Ulrich testified that he lived about 200 meters from the Club Simon, that about 2200, 22 April 1946, he was in the front of his home saying goodbye to some visitors, that he saw a crowd of people in front of the Club Simon and he asked the people passing his home "what was the matter". Almost simultaneously, shots were fired and witness was hit in the lower part of his left leg. There were "plenty of shots" but witness did not know how many. He saw Hinrichs on a couch in his kitchen and his (Hinrichs') breast was bleeding (R. 23).

Kurt Fischer testified that the shots came "from the direction where the truck stood", that he turned and jumped into a ditch, that he received a little wound on his left hand but he did not know whether it was a gunshot wound (R. 14).

Alois Zuber, "a corporal on a ship", testified that he left the Boese dance hall about 2230 (R. 16-19) with his commander and several others (R. 16), that they went up Weserstrasse (toward Club Simon) with other people on their way to their homes (R. 16), that the people were "talking back and forth" (R. 18) but none was carrying sticks or clubs and witness did not hear any threats (R. 19). A truck passed the group, stopped across the street at the Club Simon and "blinded us with the lights. And then the shooting started." (R. 16). Witness turned, was shot in his back, and jumped down a slope at the side of the street (R. 17). He heard 20 or 30 shots and was unconscious thereafter (R. 17).

None of the witnesses mentioned above was able to identify accused, Private Norris or Lieutenant Conway.

Ernst Popall testified that he was employed as a waiter at the Club Simon. He had an off-day on 22 April 1946, but went by the Club

at 2130, 22 April 1946. Norris was on SP duty that night. He (Norris) was drinking beer and while witness was talking to him, Norris looked at his watch several times and remarked "It is 10:00 o'clock" as if "something would happen." A girl entered the club and informed the soldiers "that the Navy soldiers were coming". The soldiers went out, then they returned to the club, and at that time, witness and a Miss Boemert left. About 300 or 400 meters in the direction of Club Boese, they met a group of German marines. Witness advised them not to pass as the soldiers were drunk, but some continued on their way (R. 27). Witness saw the truck standing in the street and the lights from another truck approaching from beyond Club Simon enabled witness to observe American soldiers hiding behind the wheels of the parked truck (R. 28). As the Navy soldiers approached about 15-20 meters from the truck, the shooting started "as if it were a machine gun" (R. 28). Witness saw German marines returning and heard them shouting "I am hit." He did not see the German marines do any shooting nor did they have any weapons (R. 28). Witness saw Norris in the Club with a pistol in his breast pocket but did not see him outside the Club. He did not see Norris or Gates do any shooting (R. 28). He could not identify any of the American soldiers who did the shooting — "I saw just the fire" (R. 29). He could tell that the Americans were doing the shooting because he could see the fire come from behind the truck (R. 29).

Henry Riefe testified that he was employed as a foreman at Club Simon (R. 29). Usually, only one carbine was kept at the Club, but on the night of 22 April 1946, "there were a lot of them" (R. 32). About 2200, Gates, who had been staying outside as a guard, came in and said the German marines were coming and that some of the marines had sticks (R. 30). Witness saw four men go into the kitchen and get rifles, and about 18 or 20 soldiers had pistols. Witness went outside and saw a truck with its lights in the direction of Club Boese. One of the SPs told him to go home because they would kill everybody on the street (R. 30-31). As he went through the Club to his room, he saw some of the soldiers loading their pistols (R. 30). He did not see accused load a pistol (R. 32). Witness had been back in his room five or six minutes when the shooting started (R. 31). He remained in his room and did not see any of the shooting (R. 32). After the shooting stopped, witness returned to the Club (R. 33) and then went back to his room which was right behind the Club with only a door between his room and the Club's kitchen (R. 33). After the shooting, there was a party in the kitchen, or a continuation of one that had started earlier in the evening (R. 34).

Annelese Kuehne testified that she was an employee at Club Simon. On the night of 22 April 1946, there were about six or eight carbines in the room where the MPs kept their guns—this was "two or three more than before" (R. 24). About 15 or 20 soldiers entered the Club about 2230 and

and took these carbines and some pistols out of this room. They asked witness for the ammunition and she told them it was in the drawer. The soldiers took the ammunition and witness went back to her work of counting money (R. 24-25). One of the soldiers advised witness to go into the next room with Lieutenant Conway "that there was shooting out of doors".

Sometime between 1700 and 2330, 22 April 1946, the supply room of the 3419th Ord MVD Company at Bremen was entered, the rifle rack and ammunition case were broken into, 8 carbines were removed and ammunition was "scattered afar" (R. 40-41).

Technician Fifth Grade John M. Jones testified that he was manager of the Club Simon. He saw accused and Private Norris carrying out their duties on guard at the club" about 1900 or 2030. He left the Club and did not return until about 2300 and was not present during the disturbance. On cleaning up that night, he found 8 carbines in various places in the club - "in corners and under chairs" (R. 36-37).

Robert R. Taylor, 6th CID, testified that he made an investigation of the shooting in question and after warning accused, he secured a statement from him as follows:

Gates stated that he had been placed on exterior guard outside Club 3078 on the night of 22 April 1946. At about 2030, he saw a group of people approaching the Club.

> "They crossed from one side of the street to the other. He had commanded them to halt. When they didn't he fired one shot. The group proceeded in his direction, so he fired twelve shots into the group and towards them, which made a total of thirteen shots from his rifle. * * *"

Sergeant William J. Bevin, 382d MPs, Co. D, Bremerhaven, testified that he made an investigation on the night of 22 April 1946 and found "a lot of empty shells mostly carbines". Most of the shells were in the street between the cartracks in front of the Club Simon and the farthest shell was 18 yards from the Club entrance (R. 38).

4. The rights of accused as a witness were explained to him and he elected to remain silent.

5. <u>Specification, Charge I.</u>

A riot is defined in the Manual for Courts-Martial as:

"a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was, of itself, lawful or unlawful" (MCM, 1928, par. 147c).

"Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such. It involves the execution of an agreement, express or implied, between three or more persons to commit an assault or battery or a breach of the peace ..." (54 C.J. sec. 3, p.830).

"It is not necessary that the riotous violence should have been premeditated by the assembled perpetrators; therefore the original assembly may have been by accident, or for a lawful purpose ..." (idem, sec. 6, p. 832).

"All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common object of the assembly, and all who are present at the commission of any riotous act and actively engage therein by act, sign or word are principal rioters ..." (idem, sec. 15, p. 834).

"In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional, and where it tends to the encouragement of the rioters, be prima facie inferred to be participants; and the obligation is cast upon a person so circumstanced, in his defense, to prove his actual noninterference. ***" (Wharton's Crim. Law, 12th Ed., Vol. II, Sec. 1865).

Specification, Charge II.

"Murder is the unlawful killing of a human being with malice aforethought" (Par. 148a, MCM). When a killing results during a riot, all participants therein are guilty of murder (Par. 523, Wharton's Criminal Law, Vol. I, 12th Edition).

The specification of Charge II alleges that instant murder was committed "in conjunction with other American soldiers." Since it is alleged to have been accomplished by group action and since the evidence shows that

other soldiers whose names are unknown participated, it is only necessary, if the findings of guilty under this specification are to be sustained, that the proof show that the fatal blow resulted from the concerted action of the group. It is not necessary to show that accused struck the death blow. The doctrine which imposes responsibility upon a principal for the act of his agent in the perpetration of a crime is a very ancient one. This doctrine is well illustrated in the case of State v. Jenkins (94 American Decisions 132; 14 Richardson's Law 215), wherein the Court stated:

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

Furthermore, Justice Story in the case of United States v. Ross (Federal Cases #16, 196), asserted that,

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

In the case of CM 123414, Cook, et al., where 19 general prisoners were tried for a murder committed in the United States Disciplinary Barracks, the Board of Review said:

> "* * * to constitute any of the accused aiders and abettors, it is not necessary that they should have assisted in the particular acts of criminal violence resulting in the death of the deceased, but it is sufficient if they were acting in general concert with the actual perpetrators of such acts in their commission."

The record of trial clearly shows that there was a riot and a murder as alleged. The only question involved is whether the record contains sufficient competent evidence from which the court could reasonably infer that accused participated in the riot and murder.

The record shows that accused had been posted as a guard at Club Simon on the night of the riot and as such, it was his duty to be armed and to protect club property. About 2200 accused entered the club and announced that the German Marines were coming and that some of them had sticks. According to his own statement, he then went outside again, called upon the approaching marines to halt, and fired once into the air; when they failed to halt, he "fired twelve shots into the group".

It is the opinion of the Board of Review that findings of the court are amply supported by the evidence in the record of trial on the theory that the extra guns and pistols at the Club indicated a riot had been planned, that accused's announcement of the approaching marines was the "spark" that set the riot in motion, and his admitted firing twelve shots into the group carried him beyond the call of duty as guard at the Club, and identified him as a participant in the riot and the resulting murder.

The record of trial shows that extra-judicial statements made by the three men at this common trial were received in evidence without restrictions. "The recognized practice in such a situation is to admit the act or declaration against the actor or declarant, but the court must instruct the jury that such act or declaration is not admissible against the other * * * defendants and is not to be considered in determining his guilt" (Wharton's Crim. Evid., 11th Ed., Sec. 700).

While the practice followed in this matter during the trial of this case is to be condemned, it cannot be said that it resulted in any violation of substantial rights of either of the accused. The statements were devoid of any direct incrimination of the other accused and could not therefore constitute hearsay testimony against them (CM 267878, Lumpkins, et al., 44 BR 166).

6. On motion of the Defense Counsel, the court recommended that consideration be given to extending "clemency and leniency" to accused.

7. Accused Gates is 20 years old and was inducted on 28 March 1945 at Camp Shelby, Mississippi.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. A sentence to death or life imprisonment is mandatory for a violation of Article of War 92. 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 of Title 18, United States Code.

W H Johnson Jr, Judge Advocate

[illegible], Judge Advocate

A. M. Kane, Judge Advocate

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

JAGQ - CM 319845

JUN 23 1947

UNITED STATES v. Second Lieutenant THEODORE B. CONWAY (0-2017359), 3078th Ordnance Motor Vehicle Distributing Company.	SEVENTEENTH MAJOR PORT Trial by G.C.M., convened at Bremerhaven, Germany, 10 October 1946. Dismissal and confinement for ten (10) years.

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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Second Lieutenant Theodore B. Conway, 3078th Ordnance Motor Vehicle Distributing Company and now in the 3419th Ordnance Medium Automotive Maintenance Company, being present during the commission of an affray and a riot by military personnel, did, at Wesermunde, Bremen Enclave, Germany, on or about 22 April 1946, fail to do his duty as an officer by not taking immediate steps to ascertain identification of all the military personnel involved.

Specification 3: (Finding of Not Guilty).

Specification 4: (Disapproved by the reviewing authority).

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

Specification: In that Second Lieutenant Theodore B. Conway, 3078th Ordnance Motor Vehicle Distributing Company and now

in the 3419th Ordnance Medium Automotive Maintenance Company, being assembled at a club for United States Military Personnel together with Private Cornelius Norris and Private Frank Gates, both of the 3078th Ordnance Motor Vehicle Distributing Company and an undetermined number of unidentified American soldiers, so described for want of a better description, did, in conjunction with the said Private Cornelius Norris, Private Frank Gates and the said unidentified American soldiers, at Wesermunde, Bremen Enclave, Germany, on or about 22 April 1946, commit a riot in that he and they, together with the other soldiers, numbers and names unknown, and with force and arms and in a violent and tumultuous manner, assemble to disturb the peace of Wesermunde, Bremen Enclave, Germany, and having so assembled, did unlawfully and riotously assault the following German Nationals: Adolph Hinrich, Willy Gutendorf, Guenther Arning, Wilhelm Ulrich, Georg Reimann, Kurt Fischer, Bruno Dornbach, Guenther Lueck, Guenther Miethke, to the terror and disturbance of Wesermunde, Bremen Enclave, Germany.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 1 and 3 of Charge I and guilty of all remaining Specifications and the Charges. 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 ten years. The reviewing authority disapproved the finding of guilty of Specification 4, Charge I, approved the sentence, and forwarded the record of trial pursuant to Article of War 48.

3. The accused consented to a common trial with Privates Frank Gates and Cornelius Norris who were charged with committing a riot (A.W. 89) and with the murder of one Adolph Hinrichs (A.W. 92) (R. 3).

Between 2200 and 2230, 22 April 1946, a group of 300-500 German men and women were in the street on Weserstrasse, Wulsdorf, Germany, on their way home from a dance which had been held at the Boese Club (R. 13, 15-17, 19). A large, 5-ton American truck (R. 18) came up from the rear, passed the people in the street, and made a three-quarter turn in front of the Club Simon (also known as Club 3078 for the 3078th Ord MVD Co.) located on Weserstrasse, about 500 meters north of the Club Boese (R. 19 and Ex. G). There were no lights on the street (R. 17) and the truck headlights blinded the people walking toward the Club Simon (R. 16). A few people passed by the truck and "when others wanted to follow somebody fired" (R. 14).

Included in this group of people returning home from the dance were Helene Hinrichs and her husband, Adolph Hinrichs. They were about 75 meters from Club Simon when "about 30, 40 or 50" German marines passed them. There were no women in this group. The men were singing and were not armed. Mrs. Hinrichs "saw a big light and the Navy Soldiers went up the slope and then shots were fired * * *" (R. 20). The shots came from the direction of the Club Simon (R. 21). Mrs. Hinrichs entered a nearby house and a little later, some men carried her husband into the same house (R. 22). She did not see her husband fall (R. 22).

Dr. Karl M. Marggarf performed an autopsy on the body of Adolph Hinrichs on 25 April 1946 and found that his death was caused by internal bleeding as a result of a gunshot wound that went through his lung, stomach and spleen. The shot was "from a distance. The man was shot from behind and he must have been shot (while) in a bending position" (R. 12-13 and Ex. B).

Wilhelm Ulrich testified that he lived about 200 meters from the Club Simon, that about 2200, 22 April 1946, while he was in the front of his home saying goodbye to some visitors, he saw a crowd of people in front of the Club Simon and he asked the people passing his home "what was the matter". Almost simultaneously, shots were fired and witness was hit in the lower part of his left leg. There were "plenty of shots" but witness did not know how many. He saw Hinrichs on a couch in his kitchen and his (Hinrichs') breast was bleeding (R. 23).

Kurt Fischer testified that the shots came "from the direction where the truck stood", that he turned and jumped into a ditch, and he received a little wound on his left hand but he did not know whether it was a gunshot wound (R. 14).

Alois Zuber, "a corporal on a ship", testified that he left the Boese dance hall about 2230 (R. 16-19) with his commander and several others (R. 16), that they went up Weserstrasse (toward Club Simon) with other people on their way to their homes (R. 16), that the people were "talking back and forth" (R. 18) but none was carrying sticks or clubs and witness did not hear any threats (R. 19). A truck passed the group, stopped across the street at the Club Simon and "blinded us with the lights. And then the shooting started." (R. 16). Witness turned, was shot in his back, and jumped down a slope at the side of the street. He heard 20 or 30 shots and was unconscious thereafter (R. 17).

None of the witnesses mentioned above was able to identify the accused or Privates Norris and Gates.

Ernst Popall testified that he was employed as a waiter at the Club Simon. He had an off-day on 22 April 1946, but went by the Club about 2130 that evening. Private Norris was on "SP duty" that night. He (Norris) was drinking beer and while witness was talking to him, Norris looked at his watch several times and remarked "It is 10:00 o'clock" as if "something would happen." A girl entered the club and informed the soldiers "that the Navy soldiers were coming". The soldiers went out, then they returned to the club, and at that time, witness and a Miss Boemert left. After walking 300 or 400 meters in the direction of Club Boese, they met a group of German marines. Witness advised them not to pass as the soldiers were drunk, but some continued on their way (R. 27). Witness saw the truck standing in the street and the lights from another truck approaching from beyond Club Simon enabled witness to observe American soldiers hiding behind the wheels of the parked truck (R. 28). As the marines approached about 15-20 meters from the truck, the shooting started "as if it were a machine gun" (R. 28). Witness saw German marines returning in his direction and heard them shouting "I am hit." He did not see the German marines do any shooting nor did they have any weapons (R. 28). Witness saw Norris in the club with a pistol in his breast pocket. He did not see Norris outside the club. He did not see accused at all during this day. He did not see accused or Norris or Gates do any shooting (R. 28). He could not identify any of the American soldiers who did the shooting — "I saw just the fire" (R. 29). He could tell that the Americans were doing the shooting because he could see the fire come from behind the truck (R. 29).

Henry Riefe testified that he was employed as a foreman at Club Simon (R. 29). Usually, only one carbine was kept at the club, but on the night of 22 April 1946, "there were a lot of them" (R. 32). About 2200, Private Gates, who had been staying outside as a guard, came in and said the German marines were coming and that some of the marines had sticks (R. 30). Witness saw four men go into the kitchen and get rifles, and about 18 or 20 soldiers had pistols. Witness went outside and saw a truck with its lights turned in the direction of Club Boese. One of the SPs told him to go home because they would kill everybody on the street (R. 30-31). As he went through the club to his room, he saw some of the soldiers loading their pistols (R. 30). He did not see accused, Gates or Norris loading pistols but accused "was in the room where the pistols were" (R. 32). Witness had been back in his room 5 or 6 minutes when the shooting started (R. 31). He remained in his room and did not see any of the shooting (R. 32). After the shooting ceased, witness returned to the club (R. 33) and then went back to his room which was right behind the club with only a door between his room and the club's kitchen (R. 33). After the shooting, there was a party in the

kitchen, or a continuation of one that had started earlier in the evening (R. 34).

Annelese Kuehne testified that she was an employee at Club Simon. On the night of 22 April 1946, there were about 6 or 8 carbines in the room where the MPs kept their guns — this was "two or three more than before" (R. 24). About 15 or 20 soldiers entered the club about 2230 and took these carbines and some pistols out of this room. They asked witness for the ammunition and she told them it was in the drawer. The soldiers took the ammunition and witness went back to her work of counting money (R. 24-25). One of the soldiers advised witness to go into the next room with accused, "that there was shooting out of doors". Accused did not have a pistol (R. 25) and witness did not see him go in the room where the guns were kept (R. 26).

Accused was the executive officer of the 3078th Ord MVD Co., Bremen, Germany. Second Lieutenant Henry B. Richardson was relieved as commanding officer on 19 April but his successor had not arrived on 22 April 1946 and Lieutenant Richardson considered himself "physically" but "not technically" present with this company (R. 39). This company maintained a club in Bremerhaven and having "heard rumors that they were going to have trouble with the German Marines" in the club area, Lieutenant Richardson stopped at the MPs in Bremerhaven about 2130, 22 April 1946 and asked that a patrol be sent to the club about 2230. Lieutenant Richardson did not recall seeing accused during the evening of 22 April 1946 but did see him at 1730 on the following day. Accused never made any report to him as to what had happened at the club on the 22nd (R. 40).

Sometime between 1700 and 2330, 22 April 1946, the supply room of the 3419th Ord MVD Co. at Bremen was entered, the rifle rack and ammunition case were broken into, 8 carbines were removed and ammunition was "scattered afar." (R. 41).

T/5 John M. Jones testified that he was manager of the Club Simon. He saw Gates and Norris "carrying out their duties on guard at the club" about 1900 or 2030 on 22 April 1946. He left the club and did not return until about 2300 and was not present during the disturbance. On cleaning up that night, he found 8 carbines in various places in the club - "in corners and under chairs" (R. 36-37).

Robert R. Taylor, 6th CID, testified that he made an investigation of the shooting in question and after warning accused, Gates and Norris he secured statements from them as follows:

Gates stated that he had been placed on exterior guard outside Club 3078 on the night of 22 April 1946. At about 2230, he saw a group of people approaching the Club.

> "They crossed from one side of the street to the other. He had commanded them to halt. When they didn't he fired one shot. The group proceeded in his direction, so he fired twelve shots into the group and towards them, which made a total of thirteen shots from his rifle. * * *"

The people were about 40 to 45 yards away when he opened fire (R. 44). He had been with this company only a short time and did not know any of the other soldiers involved (R. 45).

Norris stated that:

> "he heard a soldier come into the club and say the Marines were coming, and then he heard the shooting. He went out to see what was going on. He saw people coming toward the club and said he was afraid that they would do some damage to the club or to the personnel in the club, so he commanded them to halt, in fact, he said it three times. Then he removed his pistol from his holster and fired one shot into the air. Returning to the club, he locked the door and called the first sgt." (R. 44).

Norris had been with the 3078th Ord MVD Co. "quite a while" but he said he did not know any of the other soldiers (R. 45).

Accused stated (25 April 46) that he was in the kitchen of the club when he heard the disturbance outside. He went outside and ordered the soldiers back into the club. He heard one shot which he thought had been fired by Gates, and then several more shots, the number and source being undetermined. Then the people "disbursed" and he

> "kept trying to usher the remaining soldiers into the club. He ordered them to remain there and secured the Club and called Sergeant Smith, Sergeant of the Guard, to come. He came with nine guards in order to suppress the disturbance which had occurred. When Corporal Smith arrived with the MP's, the disturbance had ceased and everything was under control. So he ordered the men back to the Co. and the men went back in a truck that had been parked outside the club" (R. 43).

He made no report because he did not know where to report it and he did not think he was supposed to. His commanding officer had been relieved

and he thought he was in command (R. 43). Accused was able to identify only Norris and Gates and said that he "recognized the other soldiers but he did not know them well enough to identify" and he made no attempt to identify them or the German women. Accused was wearing a "35 automatic service pistol * * * on a cartridge belt" on the night in question (R. 45).

Accused also made three written statements. In the first statement (3 July 1946) (Ex. I), he stated that he had only been with the 3078th Ord MVD Co. for about 4 weeks, was not familiar with the men and that was the reason he did not recognize them. He did not secure a list of those present "because he was under emotional stress and excitement due to the violence which had just transpired." In his second statement (9 July 1946) (Ex. K), accused stated that:

> "* * * he was in the office on the ground floor of the club when an unidentified soldier announced that the Marines were coming, that immediately after this announcement there was a commotion and excitement among the men and the frauleins then present at the club, that he went out into the beer room during the excitement, that he did not see any carbines at that time or any other time in the club during that evening or in the hands of his men or any other men in the club, that the first time he knew about any carbines being present at the club was the next day through hearsay on information given him by others, that after the incident between the American soldiers at the club and the German Marines terminated, the Military Police showed up, that the American Military Police rounded up the German Marines, split them into groups and searched them, that he was present when the searching of the Marines was conducted, that he saw some weapons removed by the Military Police from some of the German Marines, that after the searching of the German Marines was made he spent about fifteen minutes to a half hour in the club on the ground floor in the beer room, office and the dance room, that he left with the truck of the 3078th Ord MVD Company with more than ten men of the 3078th Ord MVD Company, that during the time after the termination of the incident and the searching of the German Marines by the American Military Police and the time that the truck of the 3078th Ord MVD Company left, which was about 2315 hours, there was no party at the 'Club 78' in which singing and dancing by the American soldiers there at that time transpired." (Ex. K).

In his final statement (18 July 1946)(Ex. J), he stated that while he was in the club, he heard "some unknown soldier" say "in a normal tone of voice that the German Marines were coming". He thereupon went outside to investigate.

"I was looking at Gates when he fired the first shot. He fired in the air. The German Marines were about fifty feet (50') away when he fired. I can't say where he fired the other shots. The only time I was looking at him was when he fired the first shot. I was busy getting the soldiers back into the club. I never did succeed in getting all of them back into the club.

"There was a two and one-half (2½) ton truck parked on the sidewalk right next to the club, locked and with its rear facing the direction as the people were coming from. This truck belonged to the 3078th Ord MVD Co. Later we tried to find the driver to turn the truck around but we could not do so. This was the truck we rode home in later.

"I did not see or hear Norris firing any shots. He was outside the club while I was outside the club. I said in a previous statement that Norris had fired one shot in the air but I was going by what someone else said. Norris may have fired one shot, two shots or no shots. I can't say because I was not looking at him.

"I did not see anybody other than Gates firing any shots. Gates and Norris were the only ones in front of me. The headlights of the two and one-half (2½) were not on. No lights were on. The back of the truck was to the oncoming Germans. There was no other vehicle around.

"I did not have a pistol in my hands or on my person at any time that evening inside or outside the club. I don't carry a pistol." (Ex. J).

Sergeant William J. Bevin, 382d MPs, Co. D, Bremerhaven, testified that he made an investigation on the night of 22 April 1946, and found "a lot of empty shells mostly carbines". Most of the shells were in the street between the cartracks in front of Club Simon and the farthest shell was 18 yards from the club entrance (R. 38).

A register was maintained at the club listing the names of all soldiers and frauleins as they entered the club each evening (R. 34-35). These lists for 22 April 1946 were secured by the CID agent who was investigating this riot (R. 34; Exs. H-1, 2, and 3) but it was found that the date of the sheets had been altered and the sheets dated 22 April did not list persons who attended the club on that date (R. 35-36).

4. The rights of accused as a witness were explained to him and he elected to remain silent.

5. A riot is defined in the Manual for Courts-Martial as:

"a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was, of itself, lawful or unlawful" (MCM, 1928, par. 147c).

"Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such. It involves the execution of an agreement, express or implied, between three or more persons to commit an assault or battery or a breach of the peace ..." (54 C.J. sec. 3, p. 830).

"It is not necessary that the riotous violence should have been premeditated by the assembled perpetrators; therefore the original assembly may have been by accident or for a lawful purpose ..." (idem, sec. 6, p. 832).

"All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common object of the assembly, and all who are present at the commission of any riotous act and actively engage therein by act, sign or word are principal rioters ..." (idem, sec. 15, p. 834).

"In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional, and where it tends to the encouragement of the rioters, be prima facie inferred to be participants; and the obligation is cast upon a person so circumstanced, in his defense, to prove his actual non-interference. ***"

That a riot occurred at the time and place alleged seems too clear to require comment. The only question involved is whether accused participated therein.

There is no question about accused's being present during the riot in question. Two German civilian employees testified that accused

was inside the club prior to the riot and accused admitted in his several statements that he was outside the club during the shooting. His statement that he was trying to get the soldiers back in the club was not contradicted.

The evidence establishes beyond a reasonable doubt that accused failed "to do his duty as an officer by not taking immediate steps to ascertain identification of all the military personnel involved" in the riot in question. His specific failures might be listed as follows:

(1) Failure to impound club's register which would have furnished a list of soldiers and frauleins present at the club on the night in question.

(2) Failure to identify the soldiers who were in front of the club during the riot.

(3) Failure to identify the soldiers who returned to the club after the shooting and disposed of their carbines "under chairs and in corners."

(4) Failure to identify the ten soldiers with whom he rode from the club to the company area after the shooting.

Accused's failure to impound the club's register may possibly be excused as poor judgment and his inability to identify the men in the street during the shooting may be partly explained by the "emotional stress and excitement." His failure to identify the men who returned to the club with carbines is explained by accused by his denial that he saw any soldiers with carbines at any time during the evening. Accepting for present purposes all the foregoing excuses and explanations, there remains the fact that 15 to 30 minutes after the shooting was over, accused rode in a truck with ten men from his own company from the club back to his company area. He stated that he had only been with this unit for four weeks and did not know the names of these ten soldiers, and claimed (on 3 July 1946) that he would be unable to recognize these men in an "identification parade."

In connection with these failures, it is pertinent to consider other factors which indicate a possible motive therefor. Two civilian employees at the club were aware of a large number of carbines being at the club on the night in question — accused did not observe this situation. Soldiers were seen seizing these carbines and ammunition and loading pistols — accused saw none of this. There is overwhelming evidence that the Army truck was turned facing the group of German marines and civilians - accused stated that the rear of the truck was facing these people. The evidence is also overwhelming that these people were blinded by the headlights from the truck - accused stated

that the truck lights were not turned on. There was no evidence whatever that the German people were armed — accused stated that he saw the MPs remove weapons from the German marines.

The record of trial establishes beyond a reasonable doubt that accused failed to do his duty to identify the rioters and that such failure was motivated by a desire to protect those guilty thereof.

The record of trial is lacking in any proof that accused participated in the riot and his subsequent activity or lack of activity was not sufficient to establish him as an accessory. The Board of Review is therefore of the opinion that the evidence is legally insufficient to support the finding of guilty as to the Specification of Charge II and Charge II.

6. Accused is 22 years old and single. He graduated from Armstrong High School, Washington, D. C., where he served as a Major, High School Cadets. He entered the military service on 14 July 1943 and was commissioned a second lieutenant, AUS, on 3 May 1945, upon graduation of Infantry Officer Candidate School in France. Only one Efficiency Report is on file, showing a numerical rating of 3.4 as of 31 December 1945. This report commented as follows:

> "This officer is sincere and conscientious in all endeavors. He performs assigned duties well and with experience in Ordnance is capable of beomming an excellent Ordnance officer."

7. On motion of the defense counsel, the court recommended to the reviewing authority that consideration be given to extending "clemency and leniency" to accused and to Privates Norris and Gates.

8. Consideration has been given to a brief filed on behalf of accused by his attorney, Thomas Russell Jones.

9. The court was legally constituted and had jurisdiction over the accused and the subject matter of the offenses charged. Except as noted above, 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 insufficient to support the findings of guilty as to the Specification, Charge II and Charge II, legally sufficient to support the findings of guilty of Specification 2,

Charge I and Charge I, legally sufficient to support the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

W. H. Johnson Jr., Judge Advocate

Joseph J. Stern, Judge Advocate

E. J. Schuman, Judge Advocate

JAGQ - CM 319845 1st Ind

WD, JAGQ, Washington 25, D. C. AUG 14 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 Theodore B. Conway (0-2017359), Infantry.

2. Accused was tried on common trial by general court-martial with two enlisted men, Norris and Gates. Accused Conway was found guilty of committing a riot with others at Bremen, Germany (Spec., Charge II), in violation of Article of War 89, of failing to take steps to identify the rioters (Spec. 2, Charge I) and failing to report said riot to the proper authorities (Spec. 4, Charge I), in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of ten years. The reviewing authority disapproved the finding of guilty as to Specification 4, Charge I (failure to report the riot to proper authorities), approved the sentence, and forwarded the record of trial pursuant to 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. The Board is of the opinion that the record is legally insufficient to support the findings of guilty of Charge II and its Specification (committing a riot), legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder (failing to take steps to identify the rioters, in violation of Article of War 96) and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that about 2230, 22 April 1946, a group of 300 to 500 German men and women were on their way home from a dance. Enroute, they had to pass the service club of the 3078th Ordnance MVD Company. Included in the group were 30 to 50 German marines. The people were singing and shouting back and forth. As they approached the service club, an Army truck made a three-quarter turn in front of the club and the headlights blinded the people walking toward the club. A few people passed around the truck and then a group of U.S. soldiers opened fire on the Germans. One German civilian was killed and at least three others were injured.

Activity at the Club Simon prior to 2230 indicated that the riot was prearranged. There were additional carbines at the club and eight carbines had been stolen from the supply room of the 3419th Ordnance MAM Company. About 2230, someone entered the club and announced "the Navy soldiers were coming." Most of the soldiers seized guns, ran out and hid behind the wheels of the truck which had been turned crosswise in the street.

Accused was the only officer present at the club during the entire evening and made a statement that he tried to get the men back in the club. After the shooting, he remained at the club and then rode back to the company area with ten of the men from his own company. He identified only two of the men involved, explaining that he had been with the unit only four weeks and did not know the names of the other men.

Although there is no evidence to show that accused participated in the riot, the record of trial clearly shows that accused failed to do his duty in that he made no effort to identify the rioters and that he made an apparent effort to protect the rioters. The disturbance was a serious one and accused's inaction constituted a neglect to the prejudice of good order and military discipline.

5. Accused is 22 years old and single. He graduated in 1943 from Armstrong High School, Washington, D. C., where he served as Cadet Major. He entered military service on 14 July 1943, attended Infantry Officer Candidate School in France, and was commissioned a Second Lieutenant on 3 May 1945. His 31 December 1945 efficiency report shows a numerical rating of 3.4.

6. I recommend that the sentence be confirmed, but in view of the character of the offense of which accused was properly convicted, the recommendation for clemency, and all other circumstances of the case, recommend that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

7. Consideration has been given to two letters from accused to his mother and his attorney, to a brief filed by his attorney, and to several letters certifying to accused's excellent civilian record. Consideration has also been given to argument presented at a Board of Review hearing attended by the following persons:

Mr. Thomas Russell Jones, attorney for accused
Mr. Marcus H. Roy, Civilian Aide to the Secretary of War
Mr. James Evans, Assistant Civilian Aide
First Lieutenant Brand, former Executive Officer of 3419 Ordnance MAM Company

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

4 Incls
1. Record of trial
2. Form of action
3. Ltr fr accused to his mother, 7 May 1947
4. Ltr fr accused to atty, 4 June 1947

(G.C.M.O. 296, 27 Aug 1947).

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

JAGH - CM 319857

12 JUN 1947

UNITED STATES	ZONE COMMAND, AUSTRIA
v.	Trial by G.C.M., convened at Salzburg, Austria, 28 September and 1-4 October 1946. Dismissal
Captain HENRY M. DINGLEY (0-540373), Air Corps	

HOLDING by 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.

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

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

Specification 1: In that Captain HENRY M. DINGLEY JR, 0 540 373, AC, 6824 Hq. and Hq. Co. CA/A, did, at St. Johann, Austria, on or about 1 March 1946, unlawfully and wrongfully dispose of the following captured property of the United States, namely: One Mercedes Benz Model V170 automobile of the value of about $350.00, thereby receiving as profit, benefit, and advantage to himself, an "Exacta" camera.

Specification 2: In that Captain HENRY M. DINGLEY JR, 0 540 373, AC, 6824 Hq. and Hq. Co., CA/A, did, at St. Johann, Austria, on or about 30 June 1946, unlawfully and wrongfully dispose of the following captured property of the United States, namely: One Mercedes Benz Model V170 automobile of the value of about $350.00, thereby receiving as profit, benefit, and advantage to himself, a Leica camera.

Specification 3: In that Captain HENRY M. DINGLEY JR, O 540 373, AC, 6824 Hq. and Hq. Co., CA/A, did, at St. Johann, Austria, on or about 12 September 1945, unlawfully and wrongfully dispose of the following captured property of the United States, namely: One Praga automobile, Engine #54010, of the value of about $300.00, thereby receiving as profit, benefit, and advantage to himself, a small silver hand engraved pistol.

Specification 4: In that Captain HENRY M. DINGLEY, JR O 540 373, AC, 6824 Hq, and Hq. Co., CA/A, did, at St. Johann, Austria, on or about 24 January 1946, knowingly and without proper authority, unlawfully and wrongfully dispose of the following captured property of the United States, namely: One Lancia automobile of the value of about $250.00, by giving said vehicle to a Mr. Heinz Starke, Hotel Imperial, Bad Gastein, Austria, an Austrian citizen.

Specification 5: In that Captain HENRY M. DINGLEY JR, O 540 373, AC, 6824 Hq. and Hq. Co., CA/A, did, at St. Johann, Austria, on or about 15 January 1946, knowingly and without proper authority, wrongfully and unlawfully dispose of the following captured property of the United States, namely: One Lancia automobile, motor #38-8787, of the value of about $300.00, by giving said vehicle to a Mr. Paul Wuhrer, of Bad Gastein, Austria, an Austrian citizen.

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

Specification: In that Captain HENRY M. DINGLEY JR, 0540 373, AC, 6824 Hq. and Hq. Co., CA/A, did, at St. Johann, Austria, on or about 22 June 1946, feloniously take, steal, and carry away one BMW sport racing automobile, of a value of about $1000.00, knowing the said automobile to be captured property of the United States.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Captain HENRY M. DINGLEY JR, O 540 373, AC, 6824 Hq. and Hq. Co., CA/A, having been restricted on or about 9 July 1946 to the limits of the City of Salzburg, Austria, by the Military Government Area Commander, Land Salzburg, Lt Col RICHARD L. LOLLER, his immediate superior officer, did, at Salzburg, Austria, on or about 8 September 1946, break said restriction by going to Fuschl See, Austria, and the vicinity thereof, the same being outside the limits of the City of Salzburg, Austria.

Specification 3: In that Captain HENRY M. DINGLEY JR, O 540 373, AC, 6824 Hq. and Hq. Co., CA/A, having been restricted on or about 9 July 1946 to the limits of the City of Salzburg, Austria, by the Military Government Area Commander, Land Salzburg, Lt Col RICHARD L. LOLLER, his immediate superior officer, did, at Salzburg, Austria, on or about 14 August 1946, break said restriction by going to Fuschl See, Austria, and the vicinity thereof, the same being outside the limits of the City of Salzburg, Austria.

Specification 4: In that Captain HENRY M. DINGLEY JR, O 540 373, AC, 6824 Hq. and Hq. Co., CA/A, did, at St. Johann, Austria, on or about 25 June 1946, wrongfully and unlawfully conspire with one Mrs. Eugenie Grasser, Hotel Bellevue, Bad Gastein, Austria, a civilian, to defraud the United States by proposing that he report as stolen a BMW automobile, captured Property of the United States, while having full knowledge that the said automobile would be in the possession of the said Mrs. Grasser.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specifications, guilty of the Specification of Charge II, except the word "captured," of the excepted word not guilty, guilty of Charge II, not guilty of Specification 1, Charge III and guilty of Charge III and Specifications 2, 3, and 4 thereof. 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 seven years. The reviewing authority approved only so much of the findings of guilty of each of the Specifications of Charge I as finds the accused guilty of unlawfully and wrongfully disposing of captured property of the United States of some value, and only so much of the finding of guilty of Charge II and its Specification as finds that the accused did willfully, knowingly, and unlawfully misapply to his own benefit captured property of the United States of a value of more than $50.00, in violation of Article of War 96. He approved only so much of the sentence as involves dismissal, and forwarded the record of trial for action under Article of War 48.

3. The principal question presented by the record of trial with respect to Charges I and II and the Specifications thereof is whether a conviction can be supported in view of the exceptions and substitutions made by the reviewing authority in his action. Because of the position which must be taken by the Board of Review concerning the effect of the reviewing authority's action with respect to Specifications of Charges I and II as discussed below in paragraphs 7 to 9 (incl.), only the evidence pertinent to the findings of guilty of Specifications 2, 3, and 4 of Charge III is herein summarized.

4. The evidence for the prosecution pertinent to the findings of guilty of Specifications 2, 3, and 4 of Charge III is summarized as follows:

During the early part of July 1946 the accused was a member of Detachment E 1 B, 6824th Headquarters and Headquarters Company, CA/A, stationed in Salzburg, Austria. He had previously been assigned as Military Government Chief in St. Johann, Austria, and Bad Gastein, Austria (R 83-85; Pros Ex 1, R 9). On 8 July 1946 the accused was under orders for redeployment to the United States (R 85).

As to Specifications 2 and 3, Charge III: Lieutenant Colonel Richard L. Loller, the Commanding Officer of the Military Government Detachment, Salzburg, Germany (Detachment E 1 B, 6824th Hq & Hq Co, CA/A (R 85, 88)), testified that in July 1946 the accused was an officer assigned to Military Government duty under his command (R 83-84). On 8 July 1946 (R 85) the witness received a telephonic order (R 88) from Major Alexander, G-2, 42d Infantry Division, to take from the accused the orders redeploying him to the United States and to "confine" him to Salzburg. Major Alexander directed the witness "to specifically instruct him (the accused) that he must not go to St. Johann and Bad Gastein" (R 85). In accordance with the instructions received from Major Alexander, the witness called the accused to his office on 9 July 1946 and informed him that "Major Alexander told me to put you under arrest to Salzburg and told me specifically you must not go to Bad Gastein or St. Johann." When asked on cross-examination whether he had implied to the accused that the arrest was for an indefinite period the witness replied that he told accused "that the CID was making an investigation down there and did not want him down there until it was over with" (R 85-86). Although the witness may have used either the words "arrest" or "confined" his intention was to place the accused in restriction (R 87-88). At the same time the witness took the accused's copies of orders for his redeployment (R 85). The witness did not subsequently give the accused permission to leave the City of Salzburg and he did not rescind the orders placing him under "city arrest" (R 84). After the accused had been placed under arrest he was not required to perform any duties (R 86), except that on one occasion he was directed to assist with a post exchange inventory by order of Colonel Rooth, Commanding Officer, 6824th Headquarters and Headquarters Company (CA/A) (R 87).

On cross-examination the witness stated that his detachment was a part of the 6824th Headquarters and Headquarters Company, CA/A commanded by Colonel Rooth. The witness did not have summary court-martial jurisdiction over the military personnel under his command (R 84). The accused was not carried on the morning report as in arrest because the witness did not keep a morning report. "The morning report is kept at Colonel Rooth's Headquarters" for each of the three detachments of the 6824th Headquarters and Headquarters Company (R 87). When asked if he was the accused's commanding officer or just the accused's immediate superior officer the

witness replied, "I am the Commanding Officer of E 1 B Detachment * * * This is a Military Government Organization. If anybody wants to know, I am the boss of the outfit. They all know it and I know it. Dingley knows what I was talking about" (R 88). The only authority for the accused's restrictions were the orders of Major Alexander (R 87-88). The restriction was not imposed as punishment but only in compliance with orders from higher headquarters (R 88).

On 8 September 1946 the accused was seen at the Officers' Rest Club at Fuschl See, Austria, by First Lieutenant John J. Atkinson (R 93). On the same day Colonel Charles W. Rooth, the Commanding Officer of the 6824th Headquarters and Headquarters Company, CA/A, saw the accused riding in an automobile in the vicinity of Fuschl See, Austria. The accused was between Fuschl See and Salzburg but was outside the city limits of Salzburg (R 93).

First Lieutenant Glenn P. McConnell testified that on the evening of 14 August 1946 the witness, the accused, and another officer spent the night at the USFA Officers' Rest Home at Fuschl See, Austria, and that the party returned to Salzburg at about 0800 hours on 15 August 1946 (R 88). Fuschl See is approximately nine miles from the city limits of Salzburg (R 89).

Lieutenant McConnell's testimony was corroborated by that of Captain Richard F. Tayler, who was the other officer in the party who accompanied the accused to Fuschl See on the evening of 14 August 1946. In the opinion of Captain Tayler, Fuschl See is approximately eighteen or twenty miles by road from the city limits of Salzburg (R 89).

<u>As to Specification 4, Charge III</u>: Mrs. Eugene Grasser testified that she met the accused in May 1945 at St. Johann, Austria, where she was employed as his interpreter and secretary. On or about 25 June 1946 the witness asked the accused about purchasing a BMW automobile for herself. The accused told her he could not do anything for her and if she took a BMW automobile, she would have to assume the full responsibility therefor. The accused also told her that if she took the automobile he would have to report it as stolen. Thereafter the witness went to Mr. Karl Stepanik (R 69), Chief of Austrian Civilian Transportation Office at St. Johann, Austria (R 23), and asked for papers for this car. On that occasion the accused did not accompany the witness (R 69).

At that time Mr. Stepanik told the witness that if she stole the car he could not help her to get papers for the car and that he was definitely not willing to assist her in any way. The witness offered Stepanik 500 Swiss Francs if he issued papers on the car (R 70) or assisted her in obtaining the papers on the car "in a legitimate way." Stepanik again told the witness that he could not help her in any way.

She then offered to deposit 10,000 Austrian Shillings in his office "for him to regulate the whole affair with the Austrian Government * * * if further regulations came out." Stepanik again refused and the witness suggested that the matter be discussed at a later time and Stepanik asked her to come to his apartment on that evening (R 71).

On the evening of the same day the accused accompanied the witness to Stepanik's home where Mr. Stepanik's wife and brother were also present (R 70). The witness carried on a conversation with Stepanik only a part of which was translated to the accused who does not speak German (R 75). On that occasion when the witness mentioned that she wanted papers for the car Stepanik stated that he had thought over the matter and that it would not be wise to go ahead with her plan. The witness stated that she did not remember whether this part of the conversation was translated to the accused. At some time during the conversation the accused stated, "We sometimes have to take risks in this life" but the witness stated that she did not remember in what connection the remark was made (R 71).

At this point the prosecution requested that Mrs. Grasser be declared a hostile witness and requested permission to impeach her, which request was allowed by the law member (R 72). Thereupon the witness was asked if she had made various pre-trial statements to the CID which were inconsistent to her testimony in court to which questions the witness replied in the affirmative (R 73-74).

On cross-examination the witness again stated that the accused told her that the only way she could obtain the vehicle was to steal it in which event he would report it as stolen. Her understanding of this remark was that she would have to take the sole responsibility for her actions and that the accused would have to report the car as stolen. The accused at no time suggested that the witness steal the car (R 75-76).

5. The evidence for the defense pertinent to Specifications 2, 3, and 4 of Charge III is summarized below:

After having been advised as to his rights as a witness, the accused was sworn and testified as follows:

<u>As to Specifications 2 and 3, Charge III:</u> With respect to the alleged restriction the accused stated that the conversation he had with Lieutenant Colonel Lollar at the time he was placed in restriction was vague. The accused stated that he did not recall the use of the words "arrest", "restriction", or "confinement" in the conversation. He testified, "As near as I can remember, he (Col Lollar) told me to remain in Salzburg, available for the forthcoming investigation. I had no idea whether the investigation concerned myself or some civilian case * * *" (R 97).

On cross-examination the accused stated that initially Colonel Lollar did not tell him specifically that he was not to go to Bad Gastein and St. Johann. About a week after 9 July the accused went to Bad Gastein and was returned to Salzburg by the Military Police. Upon his return Colonel Lollar told him that he was to remain in Salzburg, that he should not have gone to Bad Gastein, and that he was not to go there again or to St. Johann.

At that time there was no doubt in his mind that he was restricted to the City of Salzburg (R 109). However on 8 September 1946 he went to Fuschl See (R 104, 108).

As to Specifcation 4, Charge III: The accused testified that he told Mrs. Grasser that if the car she wanted was stolen he would have to report it. He did not encourage her or suggest that she steal the car. He neither attempted to obtain papers on the car from civilian authorities nor did he tell her to try to obtain such papers. He knows practically no German and stated that he did not understand 90 per cent of the alleged conversation between Mrs. Grasser and Karl Stepanik. He knew nothing about any offered bribe to Stepanik until two weeks prior to trial (R 96).

On cross-examination the accused admitted that he was present at Stepanik's apartment with Mrs. Grasser and that he may have said, "All of us have to take risks in this life" and "I get lists of stolen vehicles from Salzburg every week" (R 103). He denied, however, ever having said, "They do nothing about stolen automobiles"? (R 103-104).

6. Rebuttal evidence as to Specification 4, Charge III: Karl Stepanik testified as a rebuttal witness for the prosecution (R 109) that he remembered a visit by the accused and Mrs. Grasser to his apartment at which time there was a discussion concerning the possibility of Mrs. Grasser obtaining an automobile. At that time nothing was said regarding the fact that Mrs. Grasser would have to steal the automobile but she translated the following questions: "What would happen if this car would be reported stolen?" to which the witness replied, "My God, that isn't possible." The witness believed that Mrs. Grasser translated his remarks to the accused, but the witness does not understand English. However he believed she translated the substance of the conversation because "Mrs. Grasser used to translate very fast and fluently, so that I didn't have the feeling that she translated something else"(R 110-111).

7. Specification 1 of Charge I alleges that the accused "did, at St. Johann, Austria, on or about 1 March 1946, unlawfully and wrongfully dispose of the following captured property of the United States, namely; One Mercedes Benz Model V170 automobile of a value of about $350.00, thereby receiving as profit, benefit and advantage to himself an 'Exacta' camera," in violation of Article of War 80.

Specifications 2 and 3, Charge I, are identical with Specification 1 except for dates, description and value of vehicles alleged to have been disposed of, and nature of alleged profit, benefit and advantage. These variations are tabulated as follows:

Specification	Date of Offense	Description of Vehicle	Value of Vehicle	Profit, Benefit, etc.
2	30 June 1946	1 Mercedes Benz, Model V170	$350	Leica camera
3	12 Sept 1945	1 Praga automobile Engine No 54010	300	A small silver hand engraved pistol

For the purposes of this opinion it may be assumed that each allegation of the three specifications now under consideration was proved by competent evidence, except the allegations with respect to the value of the vehicles described therein.

As indicated above, as to each of the specifications under consideration the reviewing authority approved "only so much of the findings of guilty by the court of Specification 1 (2, 3) of Charge I as finds the accused guilty of unlawfully and wrongfully disposing of captured property of the United States of some value."

Thus, inadvertently perhaps, the reviewing authority disapproved not only the findings of the court with respect to value but also:

a. The findings with respect to time and place alleged.

b. The findings with respect to the specific property described in the specification.

c. The findings that the accused received a certain profit, benefit, and advantage to himself by reason of the disposition of the captured property.

As a result of the exceptions and substitutions made by the reviewing authority the findings of guilty of each specification under Charge I as approved read as follows:

Specification: In that Captain Henry M. Dingley, Jr. 0540373, AC, 6824th Hq. and Hq. Co., CA/A, did, unlawfully and wrongfully dispose of captured property of the United States of some value.

It has been held that the omission of time, date, or place in a specification does not necessitate a disapproval of a finding of guilty where the record does not show that the accused objected to such omission or was otherwise misled thereby. (As to time and date: CM 228527, Wall, 16 BR 233; CM 229526, Van Winkle, 17 BR 189; CM 242082, Reid, 26 BR 399; CM 259026, Coleman, 38 BR 228. As to place: CM 122281, Dig Op JAG, 1912-40, Sec 428 (13); CM 230026, Bullard, 17 BR 288).

By analogy to the foregoing authorities it is readily seen that the reviewing authority's failure to approve the findings as to time and place are not fatal to the proceedings in the instant case.

There remains for consideration whether his failure to approve the findings of the court as to the profit, benefit, and advantage derived by the accused as a result of the alleged wrongful disposition of captured property and the description of the specific property involved in each specification amounts to fatal error.

The three specifications under consideration are laid under Article of War 80 which provides:

> "Dealing in Captured or Abandoned Property.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties."

Although there is no discussion of Article of War 80 in the 1928 Manual for Courts-Martial, the 1921 Manual contains a useful discussion thereof. There it is said in part:

"ANALYSIS AND PROOF"

> "The article * * * defines a number of offenses which may be treated as follows:
>
> "I. Any dealing in or disposition of captured or abandoned property <u>whereby the accused receives or expects to receive an advantage</u>."

* * *

"I. DEALING IN CAPTURED OR ABANDONED PROPERTY"

"This portion of the article addresses itself to several specific acts of wrongful dealings and looks especially to cases, where, instead of appropriating the property to his own use in kind, the accused in any other way deals with it to advantage. The article prohibits receipt as well as disposition of captured or abandoned property by barter, gift, pledge, lease or loan. It lies against the destruction or abandonment of such property if any of these acts are done in the receipt or expectation of profit, benefit, or advantage to the actor or to any person directly or indirectly connected with himself. The expectation of profit need not be founded in contract, it is enough if the prohibited act be done for the purpose, or in the hope, of benefit or advantage, pecuniary or otherwise" (MCM 1921, Sec 430, p 387) (Underscoring supplied).

The elements of proof as discussed in the 1921 Manual are:

"(a) That the accused has disposed of * * * certain public or private captured or abandoned property.

"(b) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself" (MCM 1921, Sec 430, p 387) (Underscoring supplied).

It is readily seen from the foregoing discussion of Article of War 80 that the gist of the offense denounced therein is the dealing in or disposition of captured public or private property for personal gain (CM 310446, Ruppel, 5 Bull JAG 205-206). Such conduct is further specifically prohibited by paragraph 328, FM 27-10, Rules of Land Warfare, which reads as follows:

"Private gain by officers and soldiers prohibited—Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate."

It is to be noted that Article of War 80 does not denounce wrongful disposition. In our opinion it is immaterial whether an alleged disposition of captured property is wrongful or legitimate insofar as Article of War 80 is concerned. The gist of the offense denounced by that article is the receiving of some profit, benefit, or advantage to himself as a result of such disposition.

It follows from the foregoing that by disapproving the findings of the court with respect to the receipt by the accused of a "profit, benefit or advantage to himself" the reviewing authority disapproved not only an essential element of the offense charged, but the very gravamen of that offense.

It is also noted that by failing to approve the findings of the court as to the description of the property involved in each specification the reviewing authority eliminated the element of certainty of the property alleged to have been disposed of by the accused, another essential element of the offense charged.

Accordingly it is our opinion that the approved findings of guilty of Specifications 1, 2, and 3 of Charge I do not state offenses under Article of War 80.

There remains for consideration whether the approved findings of guilty of those specifications, namely the wrongful disposition of unspecified captured property of the United States, state offenses under any of the Articles of War.

In CM 310446, Ruppel (op cit), an accused was found guilty by a court-martial of wrongfully and unlawfully selling "the following captured property of the United States: One Wanderer passenger motor vehicle, of the value of about $1500 thereby receiving as a profit, benefit and advantage to himself the sum of 40,000 German marks and Austrian shillings * * *." The reviewing authority approved only so much of the findings of this specification as involves a finding that the accused did at the time and place alleged wrongfully and unlawfully sell one Wanderer automobile, ownership unknown, and thereby receive a profit, benefit and advantage to himself in the sum alleged in violation of Article of War 96.

Thus in the Ruppel case the reviewing authority disapproved the finding that the property described in the specification was "captured" property. The Board of Review held the offense as approved was a lesser included offense of that offense charged and held the record of trial legally sufficient to support the findings of guilty.

The wrongful disposition of military property belonging to the United States is denounced and made punishable by Article of War 83. The wrongful disposition of property of the United States furnished or intended for the military service thereof is denounced by Article of War 94.

In our opinion the wrongful disposition of property of the United States falling short of a violation of Articles of War 83, or 94 may be a violation of Article of War 96, provided the wrongful disposition of such property is alleged and proved. In such cases the wrongful disposition is the gist of the offense rather than the obtaining thereby of profit, benefit, or advantage.

In the instant case the approved findings of guilty amount to a finding that the accused wrongfully disposed of unspecified captured property in a manner not stated.

In the cases wherein wrongful disposition is the gist of the offense charged it has been held that the manner of the wrongful disposition must be alleged and proved (CM 162158, Dig Op, JAG 1912-40, Sec 452 (20); CM 138334, Haynes; CM 138679, Frisbie, cited in CM 217868, Schiedinger, 11 BR 329, 338).

In the Frisbie case, it was held that the words "dispose of" might mean any one of many acts, either lawful or unlawful, such as to arrange, to find a place or use for, to have the control or ordering of, to dispose of troops, pawn, barter, give away, burn, destroy, determine the fate of, mortgage, and many others. It was said of the words "dispose of" that "Standing by themselves without qualification these words have no legal signification."

It is to be noted, also, that the forms for specifications shown in Appendix 4, Manual for Courts-Martial 1928 for wrongful disposition in violation of Articles of War 83, 84, and 94 indicate that the manner of disposition must be alleged, whereas the manner of disposition is not indicated in the form of specification prescribed for violations of Article of War 80.

Since the original specifications upon which the accused was tried, and the approved findings of guilty do not state the manner in which the wrongful disposition of captured property was effected, we are of the opinion that the approved findings of guilty do not state offenses under the Articles of War. Accordingly, the approved findings of guilty as to Specifications 1, 2, and 3, Charge I cannot be sustained (CM 310602, Skinner; 32 BR (ETO) 297; CM 319573, O'Brien).

8. Specification 4, Charge I alleges that the accused "did, at St. Johann, Austria, on or about 24 January 1946, knowingly and without proper authority, unlawfully and wrongfully dispose of the following captured property of the United States, namely: One Lancia Automobile of the value of about $250.00, by giving said vehicle to a Mr. Heinz Starke, Hotel Imperial, Bad Gastein, Austria, an Austrian citizen."

Specification 5, Charge I is identical with Specification 1, except that it alleges the wrongful disposition by gift of a "Lancia automobile motor No. 38-8787 of the value of about $300.00 to a Mr. Paul Wuhrer, on 15 January 1946.

For the purpose of this opinion it may be assumed that each allegation of the two specifications now under consideration was proved by competent evidence except the allegations with respect to the value of the vehicles described therein.

As to both of the specifications under consideration the reviewing authority's action was identical to his action with respect to Specifications 1, 2, and 3 of Charge I. Again he approved "only so much of the findings of guilty by the court of Specification 4 (5) of Charge I as finds the accused guilty of unlawfully and wrongfully disposing of captured property of the United States of some value."

Thus the approved findings of guilty of Specifications 4 and 5, Charge I are identical in every respect to those of Specifications 1, 2, and 3 of Charge I.

It is to be noted that Specifications 4 and 5 were improperly laid under Article of War 80 since in neither specification is it alleged that the accused received or expected some profit, benefit, or advantage to himself. (See discussion in paragraph 7, above.) Since, however, the manner of wrongful disposition was properly alleged in both specifications, it is our opinion that they alleged offenses under Article of War 96.

Nevertheless, the findings of the court as to the means by which the wrongful dispositions were effected were disapproved by the reviewing authority in the same manner as his disapproval of the findings with respect to the receipt by the accused of a profit, benefit, and advantage as to Specifications 1, 2, and 3, Charge I.

For the reasons stated in paragraph 7, above, we are of the opinion that the approved findings of guilty as to Specifications 4 and 5 of Charge I cannot be sustained.

9. As to the Specification of Charge II the accused was found guilty of the larceny of one BMW racing automobile, of a value of about $1000, knowing the said automobile to be the property of the United States in violation of Article of War 93.

With respect to this Charge and Specification the reviewing authority's action is as follows:

> "* * * Only so much of the findings of guilty by the court of the Specification of Charge II as finds that the accused did wilfully, knowingly and unlawfully misapply to his own benefit captured property of the United States of a value of more than $50.00 is approved. Only so much of the finding of guilty by the court of Charge II as finds the accused guilty of a violation of the 96th Article of War is approved."

Assuming for the purposes of this opinion that there is no material variance between the court's findings as to description of the property involved in the specification and the reviewing authority's action with respect thereto, the record of trial presents for consideration the following question with reference to the approved findings of guilty of Charge II:

Is the offense of willfully, knowingly and unlawfully misapplying the property described in the specification in violation of Article of War 96, lesser than and included in the offense charged, namely, larceny of such property in violation of Article of War 93?

A similar question has recently been before the Board of Review in CM 318499, White, et al. In that case an accused was charged with larceny but the proof established that he was guilty of receiving stolen property. The reviewing authority attempted to cure the variance by approving only so much of the finding of guilty as involved the finding of guilty of misappropriation of the described property in violation of Article of War 96. In the White case, as in the instant case, the reviewing authority's action was based on the theory that misappropriation (or misapplication) in violation of Article of War 96 is an offense necessarily included in the offense of larceny of the same property in violation of Article of War 93.

In the White case the Board of Review reconsidered the earlier cases (CM 197396, Christoper, 3 BR 91; CM 199841, Miotke, 4 BR 173; CM 207203, Allen and Sharp, 8 BR 315; and CM 216239, Gibson, 11 BR 123) wherein it was held that misappropriation or misapplication are not necessarily included in an averment alleging larceny, in the light of the more recent opinion of the Board of Review in CM 243287, Poole, 27 BR 321.

The reason advanced for the conclusion that misappropriation is not necessarily included in larceny in the Miotke, Allen and Sharp, and Gibson opinions was that misappropriation involves an initial rightful possession which is obviously inconsistent with the taking by trespass element of larceny. This reason was rendered untenable by the Poole case, wherein it was held that 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.

In the White case the Board of Review concluded its considerations of the problem by stating:

> "In view of the Poole case which has been consistently followed by the Board of Review in recent years we are of the opinion that misappropriation of military property is incidental to larceny, embezzlement, misapplication, wrongful selling and wrongful disposition of military property. It does not follow, however, that it is an offense necessarily included in the other offenses denounced by the 9th sub-paragraph of Article of War 94. The indivisible and unexpungeable elements of larceny are a taking and carrying away by trespass. In misappropriation, the devotion to an unauthorized purpose, it is immaterial whether the initial taking is by trespass or not, or that there be any taking

at all. Thus all types of misappropriation cannot be included in larceny, since misappropriation may involve wrongful dealings with property which are in no way connected with larceny.

"This view is supported by the line of Board of Review opinions which hold that wrongful possession is not an offense necessarily included in larceny for the reason that the wrongful possession may have been obtained by some means other than by trespass, although wrongful possession is always an incident of larceny.

"In 151032, Yewell, et al, wherein it was held that a finding of unlawful possession of personal property was not a lesser included offense of larceny, the Board of Review stated:

> 'Here the accused were found guilty of unlawful possession without specifying the kind of unlawful possession. Since all kinds of unlawful possession not included in larceny were not excluded from the findings of guilty the convictions in this case are not of an offense necessarily included in the offense alleged and for which the accused were tried and the findings of guilty were therefore unauthorized and illegal' (Underscoring supplied). (See also CM 294896, Faulkner, 58 BR 13; CM 198798, Sherwood, Dig Op JAG, 1912-40, Sec 451 (43) p 328).

"By analogy to the cases involving wrongful possession cited above, it is clear that the finding of guilty of misappropriation as approved by the reviewing authority does not indicate how the accused misappropriated the property described in the specification. Obviously the reviewing authority attempted to exclude a taking by trespass. Trespass being eliminated and the kind of misappropriation not being specified, it cannot be said that the offense as approved was necessarily included in that charged.

"It is also apparent that the specification in the instant case did not fairly apprise the accused of the offense of which he was found guilty as approved by the reviewing authority. Since misappropriation may involve acts which are in no way connected with larceny, it is impossible to determine in the instant case, of what particular offense the accused stands convicted."

Since misappropriation means the devoting to an unauthorized purpose, and misapplication is the devotion to an unauthorized purpose for the party's own benefit (MCM 1928, par 150i, p 184) it is readily apparent that the principle expressed in the White case wherein misappropriation was involved applies with equal force to the misapplication involved in the instant case.

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

10. Specifications 2 and 3 of Charge III allege that the accused, "having been restricted on or about 9 July 1946 to the limits of the City of Salzburg, Austria, by the Military Government Area Commander, Land Salzburg, Lieutenant Colonel Richard L. Lollar, his immediate superior officer, did, at Salzburg, Austria" (on or about 8 September and 14 August 1946, respectively) "break said restriction by going to Fuschl See, Austria, and the vicinity thereof, the same being outside the limits of the City of Salzburg."

The evidence is clear that on the dates alleged, the accused was at Fuschl See, Austria, outside the city limits of the City of Salzburg. The only problem presented by the record with respect to Specifications 2 and 3, Charge III is whether the accused was legally placed in restriction by competent authority.

There is some confusion in the record as to the type of restraint which Lieutenant Colonel Lollar sought to impose upon the accused on 9 July 1946. With respect thereto the record of trial shows that Lieutenant Colonel Lollar testified as follows:

"DIRECT EXAMINATION"

* * *

"Q. Did you at any time prior to 15 July 1946, place Captain Dingley under city arrest in the city of Salzburg, or city restriction?
"A. I did.

"Q. Can you state the date on which you placed him under arrest?
"A. The 8 or 9 July 1946" (R 84).

* * *

"CROSS EXAMINATION (cont.)

"Q. Will you explain to the court exactly how you placed the accused under arrest?

"A. Major ALEXANDER of G-2, 42 Division, gave me the information. The first information I had was he called me and said that Captain Dingley had orders to be redeployed and was leaving that day or the next day. He had already received his orders to go home and for me to take those orders from him and confine him to Salzburg. I was to specifically instruct him that he must not go to St. Johan and Bad Gastein. I called Captain Dingley into my office and he gave me his orders and I told him just that."

* * *

"Q. What did you say to the accused at the time you placed him in arrest?
"A. Just what I told you.

"Q. Just what did you tell him?
"A. I said that Major Alexander told me to put you under arrest to Salzburg and specifically you must not go to Bad Gastein or to St. Johann.

"Q. Was that your orders, Sir. To place the man in arrest or restricted arrest?
"A. The information came from Major Alexander. It was all news to me.

"Q. What were the exact words you did say to the accused at the time you placed him under arrest? (R 85)

"TJA. I object. This is the third time he has asked that question.

"PRES. The objection is overruled. Answer the question.

"A. I can't say as to the exact words. I do know the meaning was clear. He was confined to Salzburg and he must not go to those two places.

"Q. Did you ever tell him he was in arrest?
"A. Yes.

"Q. You used the word 'arrest'?
"A. Yes, arrest in Salzburg.

"Q. Did you tell him for how long a period he was under arrest?

"A. No.

"Q. Did you imply he was under arrest indefinitely?
"A. I said that the CID was making an investigation and didn't want him down there until it was over with.

"Q. Did you ever ask the accused whether he understood your orders?
"A. No.

"Q. Did you ever use the word 'available' to the accused, to make himself available?
"A. I don't remember.

"Q. Did you ever use the word 'restricted' to the accused?
"A. I don't remember but I am sure that it was understood by all parties concerned.

"Q. Did you place any specific limits to the arrest?
"A. The arrest was for Salzburg.

"Q. To Land Salzburg or the City of Salzburg?
"A. To the city of Salzburg.

"Q. Did you place any restrictions as to distance?
"A. First to the city of Salzburg, and later to the hotel.

"Q. You say this took place on about the 9 July 1946?
"A. Yes.

"Q. What was the purpose of your placing him in arrest?
"A. I did this on the basis of the information from Major Alexander of G-2.

"EXAMINATION BY THE COURT

"PRES. Who was Major Alexander?
"A. He was in G-2 of the 42 Division, of the ZCA.

"PRES. In your testimony you have stated that the accused was restricted in arrest and limited to the City of Salzburg, and that specifically he wasn't to go to either St. Johann or Bad Gastein. By the use of 'specifically' not to go either to St. Johann or Bad Gastein, did you infer that he might go somewhere else?

"A. No, that is just the words I received from Major Alexander. It was out of a clear sky to me. I just received the call and was told to pick up the orders from him.

"Q. After you placed the accused under arrest, after the 9 July 1946, was he required to perform any duties? (R 86)
"A. No, I told him for one or two days to start with to stay around the Adjutant's Office, and he did. After that, nothing. He was the public safety officer and he would stay around the public safety office but he wasn't required to do Duty.

"PRES. He wasn't required after he had been placed in arrest to perform any official duties?
"A. No, at one time after that it was maybe a month or so later, Colonel Rooth issued orders that he would help take inventory in the PX.

"PRES. Did you specifically point out to the accused the limits of his restriction?
"A. The City of Salzburg.

"PRES. Did you make sure he knew the limits of the city, in your own mind?
"A. Yes.

"PRES. Did you give him a map?
"A. No, he has been here much longer than I have.

"PRES. Did you tell him he was under arrest or restriction?
"A. I said he was restricted to Salzburg, confined to the city of Salzburg. I don't think I used the word 'arrest'.

"PRES. In your understanding is there a difference between 'arrest' and 'restriction' or do you use them interchangeably?
"A. They mean about the same thing. I hated to use the word 'arrest' for just an investigation of an officer, so I did say he was confined to the city of Salzburg.

"MC. You are not using Court Martial language then?
"A. No, just the layman's language right now.

"REDIRECT EXAMINATION

"Questions by the prosecution.

"Q. There are three words involved, arrest, confined, and restricted. Please tell the court at the time did you place Dingley under arrest, confinement, or restriction?
"A. Under restriction.

"RECROSS EXAMINATION" (R 87)

* * *

"Q. You didn't use the word 'arrest'?
"A. No, I restricted him to Salzburg.

"EXAMINATION BY THE COURT"

* * *

"Q. There was no question that you were imposing restriction as an act under the 104th Article of War was there?
"A. No. There was no punishment coming from me. This was just orders from higher headquarters that I was carrying out" (R 88).

With reference to the restraint which may be imposed upon persons subject to military law pending disposition of charges against them, the Manual for Courts-Martial provides in relevant part:

"Arrest and Confinement-General and miscellaneous.—Any person subject to military law charged with crime or with a serious offense under the Articles of War shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. (A.W. 69.) This requirement is not mandatory. * * * The character and duration of the restraint imposed before and during trial, and pending final action upon the case, will be the minimum necessary under the circumstances * * *" (MCM 1928, par 19, p 13).

"Status of person in arrest.—Any person placed in arrest under the provisions of A.W. 69 shall thereby be restricted to the barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. (A. W. 69).

"For other restrictions see AR 600-355." (MCM 1928, par 21, p 14).

The restrictions which accompany the status of arrest as shown in paragraph 7, AR 600-355, are:

"* * * A person in arrest -

"a. Cannot exercise command of any kind.

"b. Will restrict himself as required in paragraph 1b." (Same as par 21, MCM 1928, op cit)

"c. Will not bear arms.

"d. Will not visit his commanding or other directly superior officer unless directed to do so.

"e. Will make requests of every nature in writing, unless otherwise authorized.

"f. Will, unless otherwise directed, fall in and follow in the rear of his organization at formations and on the march."

After considering the incidents which accompany an arrest it is apparent that Lieutenant Colonel Lollar intended to impose some restraint upon the accused's liberty short of arrest pending investigation of charges against him. Such a restraint may properly be termed a "restriction" and a breach thereof may properly be charged as a violation of Article of War 96 (MCM 1928, par 139a, p 154, wherein it is said "A violation of a restraint on liberty other than arrest or confinement * * * should be charged under A. W. 96 ;" CM 228657, Helton, 16 BR 279, 281).

The Judge Advocate General's Office has heretofore expressed the view that:

* * *

"'2. It may frequently happen that while it is not considered necessary or desirable to place an accused in confinement or under arrest pending trial, it may nevertheless, be desirable as an administrative measure or precaution to require him to remain within a specified area either because his continued presence pending investigation may be necessary or because it may be considered a wise precaution administratively to restrict him to such an area in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges.

"'3. Under these circumstances, this office is of the opinion that a commanding officer in his discretion may, instead of confinement or arrest, administratively restrict an accused person to specified areas of a military command.

Of course, the rule of common sense and reasonableness must apply with the result that arrests may not be converted to restrictions by a mere use of words. An officer restricted continuously to his quarters or a soldier similarly restricted to his barracks is in fact under arrest, and the designation of the restraint as restriction would have no effect. On the other hand, an administrative restriction to the limits of the regimental area with the further provision that the individual will participate in all military activities of his organization is not necessarily arrest and may be properly designated as administrative restriction (SPJGJ 1942/5170, 5 Nov. 1942).'

"It therefore follows that where a person subject to military law has been placed in administrative restriction pending investigation of charges and trial by court-martial, a breach of restriction may properly be charged as a violation of Article of War 96." (SPJGJ 1943/15606).

It follows from the foregoing that a conviction of a violation of Article of War 96 for breach of restriction may be sustained where an accused is properly restricted by competent authority.

There remains for consideration whether Lieutenant Colonel Lollar had authority in the instant case to impose a restriction short of arrest upon the accused under the circumstances reflected by the record. In other words, the problem under consideration resolves itself to the following question:

May an officer be restricted for the purpose of insuring his presence within a given area pending investigation of charges against him by any authority other than the one authorized to place him in arrest?

The Manual for Courts-Martial states that an officer may be placed in arrest:

"By commanding officers only, in person, through other officers, or by oral or written orders or communications. The authority to place such persons in arrest or confinement will not be delegated. Subject to such limitations as may be imposed by superior competent authority the term 'commanding officer' includes the commanding officer of a garrison, fort, camp, or other place where troops are on duty and the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superiors." (MCM 1928, par 20).

The evidence shows that the accused was a member of Detachment E 1 B, 6824th Headquarters and Headquarters Company, CA/A. The detachment was commanded by Lieutenant Colonel Lollar who testified that he imposed a restraint upon the accused upon information from, and by order of, a Major Alexander, G-2, 42d Infantry Division (who obviously had no command function with relation to the accused). The detachment of which Lieutenant Colonel Lollar and the accused were members was a part of the 6824th Headquarters and Headquarters Company, CA/A, commanded by a Colonel Rooth. Morning reports for detachments under Colonel Rooth's command were maintained by the 6824th Headquarters and Headquarters Company and no morning report was kept by the detachments of that unit. Lieutenant Colonel Lollar testified that he did not have summary court-martial jurisdiction over the enlisted men under his command.

In construing the words of paragraph 20 of the Manual for Courts-Martial, as cited above, the Board of Review has held:

> "* * * The words 'regiment, detached battalion, detached company, or other detachment' appearing in paragraph 20 of the Manual are exactly the same as those employed in Article of War 10 and, under universally recognized rules of legal construction, must be given an identical interpretation. The Judge Advocate General, in passing upon that Article has held that:
>
> > '* * * so far as the regiment to which a battalion normally belongs was concerned, the latter became "detached", within the meaning of the summary court-act, when removed from the immediate command of the regimental commander, and remained "detached", so far as the administration of justice through summary courts was concerned, until it again came under the disciplinary control of the regimental commander, even though while so "detached" from the regiment such battalion came under the general command and control of an officer commanding a garrison, fort, or other place. * * * [Within] the meaning of the same act any body of troops was a "detachment in the Army" when designated, pointed out, or separated from other troops in such manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same.' (30-730, Mar. 11, 1913; Dig. Ops. JAG, 1912-1940, sec. 367 (1)).

"To give varying and conflicting shades of interpretation to the same phrases would lead to a chaotic and arbitrary administration of military justice. Regard for precedent and sound policy required that the word 'detached' be given the same meaning for the purpose of determining the scope of a battalion commander's authority to arrest an officer as in cases involving his authority to appoint summary courts." (CM 251599, Allmeroth, 33 BR 297, 306-307).

It follows from the foregoing that a body of troops may be considered a detachment in the sense of paragraph 20 of the Manual for Courts-Martial only when the commander thereof may be considered to have summary court-martial jurisdiction. The evidence shows clearly that Colonel Rooth reserved summary court-martial jurisdiction to himself as well as the administration of his unit and its subordinate "detachments."

It is well settled that a company commander within a regiment lacks the authority to place an officer under his command under arrest (CM 226282, Loring, 15 BR 61, 66). In our opinion Lieutenant Colonel Lollar's relation to the accused was comparable to that of a company commander to an officer under his command. Accordingly, Lieutenant Colonel Lollar did not have authority to place the accused in arrest except by order of Colonel Rooth or by order of one of Colonel Rooth's superiors.

There is nothing in the record to show that the accused was placed in restraint by order of Colonel Rooth, nor is there anything in the record to show that the 6824th Headquarters and Headquarters Company, CA/A, was attached to the 42d Infantry Division whose G-2 ordered the restraint.

In our opinion the degree of restraint to be imposed upon an officer pending investigation of charges or pending trial is a matter within the discretion of the officer competent to order the officer into arrest or confinement. It is not a matter for the determination of any subordinate commander. Since the restraint involved in the instant case was in lieu of an arrest for the purpose of insuring the accused's continued presence in Salzburg pending investigation of charges against him, we are of the opinion that only the authority competent to order the accused into arrest was competent to direct his restriction in lieu of arrest at his discretion. We do not imply, however, that subordinate commanders are lacking in authority to order such purely administrative restriction as may be necessary in the interest of sanitation, security or training, for example.

In view of the limitation upon Lieutenant Colonel Lollar's authority to place the accused in arrest or in restriction in lieu of arrest, it is apparent that the accused was not legally restricted on 9 July 1946, and that, therefore, he could not be guilty of breaking his restriction on the date alleged. It necessarily follows that the evidence is legally insufficient to support the allegations of Specifications 2 and 3 of Charge III.

11. Under Specification 4 of Charge III the accused stands convicted of wrongfully and unlawfully conspiring with one Mrs. Eugenie Grasser to defraud the United States by proposing that he report as stolen a BMW automobile, captured property of the United States, while having full knowledge that the said automobile would be in the possession of the said Mrs. Grasser.

A criminal conspiracy is a combination of two or more persons to do an unlawful act or to effect an unlawful object by any means, or to do a lawful act or to effect a lawful object by unlawful means or in an unlawful manner (Pinkerton v. U. S., 145 Fed (2d) 252, 259; CM 255975, Ranziger et al, 1 BR (CBI-IBT) 105). This definition of a common-law conspiracy was first enunciated in 1821 by the Court of Appeals of Maryland in State vs. Buchanan, 5 Harr. and J, 317, 9 AM. Dec. 534, and has been almost universally followed in the Federal courts as well as in most of the state courts ever since. The Federal Criminal Code has not changed the nature of the offense of conspiracy but has added merely that where a conspiracy to commit an offense against the United States is alleged, an overt act to effect the object of the conspiracy must be charged and proved (18 U.S.C. 88; U. S. vs. Britton, 108 U.S. 199, 27 L Ed 698; Berkowitz vs. U. S., 93 F 452).

Although it is well settled that to prove a conspiracy it is not necessary to show a formal agreement between the parties to effect the object of the conspiracy (CM 262217, Williams, 1 BR (CBI) 153, 159; CM 307097, Mellinger; Reavis vs. U. S., 106 Fed (2d) 989; U. S. vs. Manton, 107 Fed (2d) 834), nevertheless an actual or tacit meeting of the minds of the confederates to accomplish the common and unlawful design must be established by direct or circumstantial evidence (CM 262217, Williams, op cit; CM 273791, Gould, 47 BR 29, 66; CM 307097, Mellinger, op cit; Hoffman vs. U. S., 68 Fed (2d) 101; Marino vs. U. S., 91 Fed (2d) 691, 113 ALR 975; Marresh vs. U. S., 168 Fed 225; Graham vs. U. S., 15 Fed (2d) 740; Asgill vs. U. S., 60 Fed (2d) 780). In State vs. Hopkins, 68 Montana 504, 219 Pac 1106, it was stated that while it is not essential that the unlawful agreement be formal, it is necessary that the minds of the parties meet, so as to bring about an intelligent and deliberate agreement to do the acts.

The competent evidence shows that on 25 June 1946, shortly before the accused was to be redeployed to the United States, Mrs. Grasser, who acted as the accused's secretary and interpreter, approached him with a request that she be permitted to purchase a certain BMW automobile for herself from among the vehicles held in the Military Government Motor Pool at St. Johann, Austria. The accused told her that he could not do anything for her and that the only way she could get a car was to steal it. If she took a BMW automobile she would have to assume the full responsibility therefor and he would have to report the automobile as stolen.

Thereafter, Mrs. Grasser went alone to a Mr. Karl Stepanik, Chief of the Austrian Civilian Transportation at St. Johann and asked him for the necessary papers which would authorize her to use the car. Mr. Stepanik refused to help her and declined several proffered bribes in exchange for such papers. On the evening of the same day Mrs. Grasser and the accused went to Stepanik's apartment where Mrs. Grasser carried on a conversation with Stepanik in German, only a portion of which was translated to the accused who did not understand German. Mr. Stepanik told Mrs. Grasser that he still was of the opinion that her scheme was unwise.

Stepanik testified that during the course of the conversation Mrs. Grasser purported to translate a question of the accused's, "What would happen if the car would be reported stolen?" (Since however, Stepanik did not understand English his testimony is not conclusive that the accused actually asked that question). The accused admitted that during the course of the conversation he may have said, "All of us have to take risks in this life" and "I get lists of stolen vehicles from Salzburg every week."

Considered in its most inculpatory aspects, the competent evidence for the prosecution establishes no more than that accused and Mrs. Grasser considered the alleged scheme and investigated the feasibility of carrying it out. Upon discovering that Stepanik would not cooperate by supplying the necessary papers no further action was taken by either party. The only inference which may be drawn from the circumstances presented is that both the accused and Mrs. Grasser abandoned the scheme before an agreement was arrived at. Mere negotiation and investigation, preparatory to, and leading toward an agreement for the accomplishment of an unlawful purpose falls short of proof of an agreement.

It is to be noted that the prosecution was apparently surprised by the testimony of Mrs. Grasser, which failed to show that the accused had suggested to her that she steal the BMW car. Thereupon, on motion of the prosecution Mrs. Grasser was declared a hostile witness and the prosecution proceeded to impeach her by asking her if she had made various inculpatory pre-trial statements to the CID which were inconsistent to her testimony in court. Mrs. Grasser admitted that her pre-trial statement contained the following:

> "* * * I asked Captain Dingley, whether there was any possibility of my obtaining this vehicle in a legitimate matter. Captain Dingley said no. He said that he could report the automobile as stolen if I would take it away. I told him that I would first see Mr. Stepanik, the Austrian transportation official in St. Johann and find out, whether he would give me any papers for it, in the event Captain Dingley could give me the car in the way he suggested. * * *" (R 73).

Relative to the visit to Stepanik's apartment Mrs. Grasser admitted that she made the following pre-trial statements:

> "I went back to see Capt. Dingley and I told him that Stepanik refused to give me papers for the BMW and I told further that Stepanik was expecting both of us in his apartment to talk the whole thing over. That same night we went to Stepanik's apartment and saw Stepanik * * *. I did most of the talking. Capt. Dingley could not understand or speak German, but I translated most of the remarks that were made, so that he could understand most of what was going on (R 73). Stepanik said that he could not give me the papers and that it was not worth taking such a risk. After I translated this remark to Capt. Dingley, Capt. Dingley said in English 'We sometimes have to take risks in this life'. I translated this particular remark to Stepanik. Stepanik's brother Friedrich then made the remark that if this particular BMW was reported stolen and right after this, Capt. Dingley left for America and I left for Switzerland, people would fit two and two together. Capt. Dingley then made the remark in English 'Oh my God, Salzburg gets a long list of stolen vehicles every week and nobody would pay any special attention to another vehicle that was reported stolen'. * * * Two or three days later, Capt. Dingley told me that there was no possibility whatsoever to get the car. When Capt. Dingley told me this I completely gave up the idea of getting the BMW." (R 74).

Whatever may have been the probative effect upon the minds of the members of the court of Mrs. Grasser's impeachment by means of her pre-trial statement, it is of course elementary, that evidence of a prior inconsistent statement on the part of a witness cannot be considered as evidence of the accused's guilt.

Since the competent evidence of the alleged conspiracy is entirely inconclusive, we are of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 4, Charge III.

12. The accused is 36 years of age, married, and a high school graduate. War Department records show that his civilian occupations were: plastic engineer, automobile dealer, and manager of an airport. From October 1942 until September 1943 the accused was a pilot and assistant operations officer in the Civil Air Patrol on anti-submarine patrol duty at Portland, Maine. He was commissioned as a first lieutenant, Air Corps, Army of the United States on 17 November 1943, and entered on extended active duty on that date, with a rating as a service pilot. He was promoted to captain, Army of the United States on 27 May 1944. He served as a combat operations officer in the Mediterranean Theater of

Operations from February 1945 to April 1945 when he was assigned to Military Government duties. With the exception of one efficiency rating which was satisfactory and one which was very satisfactory, all of the accused's efficiency ratings are excellent.

13. In our deliberation upon the record careful consideration has been given to a brief filed on behalf of the accused by Mr. Joseph F. O'Connell, Boston, Massachusetts, attorney for the accused. Oral argument by Mr. O'Connell was heard by the Board of Review. In addition thereto the Board has considered a letter from Mr. O'Connell addressed to The Judge Advocate General, dated 1 April 1947, wherein clemency on behalf of the accused was recommended.

14. The court was legally constituted and had jurisdiction of the person and offenses. 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

Waldemar A. Solf, Judge Advocate

Philip R. Smith, Judge Advocate

JUL 3 1947

JAGH - CM 319857 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Zone Command Austria, APO 541, c/o Postmaster New York, New York

1. In the case of Captain Henry M. Dingley (O-540373), Air Corps, I concur in 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, and for the reasons stated recommend that the findings of guilty and the sentence be disapproved.

2. When copies of the published order in this case are forwarded to this office 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 319857).

RECEIVED 17 JUL 1947 Office of the Judge Advocate Headquarters

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 319858

9 SEP 1947

UNITED STATES	ZONE COMMAND AUSTRIA
v.	Trial by G.C.M., convened at Salzburg, Austria, 23,24,31 October and 6 and 7 November 1946. Dismissal, total forfeitures and confinement for one (1) year.
Second Lieutenant THOMAS J. CORRELLE (O-1020297), Cavalry	

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 the following charges and specifications:

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

Specification 1: In that 2nd Lieutenant Thomas J. Corelle, 4th Constabulary Squadron, being at that time Post Exchange Officer, did, at Hallein, Austria, on or about 19 August 1946 feloniously embezzle by fraudulently converting to his own use about 200 cartons of cigarettes of the value of $140.00 the property of the United States furnished and intended for the military service thereof entrusted to him the said 2nd Lieutenant Thomas J Corelle by Post Exchange Authorities.

Specification 2: In that 2nd Lieutenant Thomas J Corelle, 4th Constabulary Squadron, did, at or near Hallein, Austria, on or about 19 August 1946 wrongfully and unlawfully sell about 200 cartons of cigarettes of a value of about $140.00, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that 2nd Lieutenant Thomas J Corelle, 4th Constabulary Squadron, did, at or near Hallein, Austria, on or about 26 June 1946, wilfully, wrongfully and unlawfully obtain by direct purchase from the United States Army Post Exchange one Leica camera in violation of orders from higher Headquarters, viz: Letter, Headquarters United States Forces,

European Theater, dated 9 May 1946, subject: "Watch and Camera Lottery," and Letter, Headquarters United States Forces in Austria, dated 21 May 1946, subject: "Lotteries, Post Exchange."

Specifications 2,3,4, and 5: (Findings of guilty disapproved by reviewing authority).

Specification 6: In that 2nd Lieutenant Thomas J Corelle, 4th Constabulary Squadron, did, at or near Hallein, Austria, on or about 15 July 1946, knowingly and wrongfully fail to have made deductions from his currency control records for purchases made from a United States Post Exchange in violation of Circular 139, Headquarters United States Forces, European Theater, dated 10 October 1945 as amended.

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

Specification: In that Second Lieutenant Thomas J. Corelle, 4th Constabulary Squadron, did, at or near Hallein, Austria, on or about 19 August 1946, knowingly and unlawfully have in his possession about six hundred and thirty-two ($632.00) dollars in money of the United States of America in violation of the provision of Letter AG 123-PAFIN, Headquarters, United States Forces in Austria, dated 4 April 1946.

He pleaded not guilty to all charges and specifications. After arraignment and during the course of the trial, the court amended Charge I to read "Violation of the 93rd Article of War" and amended each specification thereunder by striking the words "United States furnished and intended for the military service thereof" and substituting therefor the words, "Army Exchange Service" (R 27,28). The court also, after arraignment and during the course of the trial, amended Specification 6 of Charge II to read, "In that 2nd Lieutenant Thomas J. Correlle, 4th Constabulary Squadron, did, ar or near Hallein, Austria, on or about 15 July 1946, knowingly and wrongfully fail to have made deductions from his currency control records for purchases made from a United States Post Exchange in violation of Circular 82, Headquarters United States Forces, European Theater, dated 3 June 1946" (R 65). Accused was found guilty of Charge I and its specifications as amended, guilty of Specification 1, Charge II, guilty of Specifications 2,3,4 and 5 of Charge II with exceptions, guilty of Specification 6 of Charge II as amended, guilty of Charge II and guilty of the Additional 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 five years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge I as involved a finding of guilty thereof in violation of Article of War 96, disapproved the

findings of guilty of Specifications 2,3,4 and 5 of Charge II, approved the sentence but reduced the period of confinement at hard labor to one year and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

As to Charge I and its Specifications

Accused was special service and post exchange officer of the 4th Constabulary Squadron and as such operated the special service office and the post exchange at Hallein, Austria. In August, 1946, Second Lieutenant William Franz was assigned as assistant to accused and noticed that there were some post exchange items, consisting of about forty-three cases of cigarettes and some soap, in the special service office. Accused explained to Lieutenant Franz that these items had been "left over" from a post exchange formerly operated by accused at Bad Hall and that they were "over and above inventory." The cigarettes had been brought to Hallein for distribution to the various troops in the squadron and later Lieutenant Franz saw a receipt from "E" Troop for some of these cigarettes and was present when a sergeant from "B" Troop paid for some more of them. Accused told Lieutenant Franz that all the troops had received some of the cigarettes. On 20 August, there were only five cases of cigarettes left in the special service office and that day accused ordered the remaining cases to be taken to the Hallein post exchange to be sold. These cases arrived at the post exchange about 4:30 p.m. and about an hour later Agent Denove of the Criminal Investigation Division entered the post exchange and caused it to be closed (R 47-50).

Private First Class Frank Trinka was the manager of the post exchange at Hallein and worked under the supervision of accused. Prior to taking inventory of the post exchange for the month of July, accused ordered the removal of about forty-three cases of cigarettes and some soap and shoe polish. These items were to be taken to the special service office and there distributed to the troops as an extra ration. They were not entered on the inventory for the month of July. From speaking to members of the various troops, Private Trinka knew that some of the cigarettes and other items had been issued but he did not know in what quantities. About "22 August," he returned approximately five or six cases of cigarettes to the post exchange by direction of accused. Each case contains fifty cartons of cigarettes (R 37-43).

Niklos Roth, a resident of Hallein, Austria, was employed to make small repairs about the Hallein post exchange building. He first became acquainted with accused in the middle of June, 1946. Thereafter, accused told Roth that he would like to buy some jewelry if Roth could find some that was for sale. Roth then met Count Odelskalski who offered to sell a ring and a brooch for 60,000 schillings. Roth exhibited the ring and brooch to accused and informed him that they could be purchased for 60,000 schillings. Accused told Roth that he would buy the jewelry for 200 cartons of cigarettes. After obtaining Count Odelskalski's consent, Roth agreed to the exchange. Accused

delivered the cigarettes to Roth's house in Hallein and received from Roth the ring and brooch. Count Odelskalski took away 120 cartons of the cigarettes and left the remainder in Roth's house, where they were seized by agents of the Criminal Investigation Division. It appears that Roth did not disclose to accused the fact that he was acting as agent for the Count (R 34-37).

At the trial, Criminal Investigation Agent Joseph P. Denove identified a case of Camel cigarettes, which was opened in court, and a case containing a number of cartons of Chesterfield cigarettes as the cases of cigarettes seized by his assistant at the home of Niklos Roth. During the pre-trial investigation conducted by Agent Denove, accused pointed to these cigarettes and said "they were the cigarettes." The case containing Camel cigarettes was admitted in evidence as Prosecution Exhibit 22 and that containing Chesterfield cigarettes was admitted as Prosecution Exhibit 23 (R 20-29-31). One carton from each of these cases was exhibited to the court and the trial judge advocate pointed out, without objection by the defense, that there were no duty stamps on either of them and that each carried "the yellow seal of the armed forces" (R 73).

Agent Denove also identified a wooden box, introduced in evidence as Prosecution Exhibit 2, as a box he had taken from the Government quarters occupied by Captain Lundberg, the squadron executive officer. On 23 August 1946, Captain Lundberg had found this box covered with clothes in Captain Martin's room and had removed it to his quarters where he opened it and noted its contents. He then asked his commanding officer to notify the Criminal Investigation Division of his find. Captain Martin's room was in the Staff Officers' Quarters and on 22 August, during a dinner conversation in which "facetious" remarks were being passed about the "CID being in town," accused had asked Captain Martin if his "storeroom" was "big enough for a piano" and said something about putting it under the captain's bed. Accused lived in a room over the post exchange. After Captain Martin had been informed that accused had been placed in custody, he noticed that some object covered with clothes had been placed under a night stand at the foot of his bed. He kicked it and had the impression that it was a box, but did not inquire further.

At the time Captain Lundberg opened the box, he noticed that it contained, among other items, "a lot of diamond rings" (R 13,31,32,59,60,67, 68). Agent Denove identified a diamond ring exhibited at the trial as one of the rings found in the box. At the pre-trial investigation accused had said that the ring was his and that he had obtained it from Niklos Roth in exchange for 200 cartons of cigarettes. The ring was admitted in evidence as Prosecution Exhibit 30 (R 13,31,32,59,60,67,68).

In his written pre-trial statement, dated 7 September 1946, which was admitted in evidence as Prosecution Exhibit 1 without objection by the defense after a showing of its voluntary nature (R 6-13), accused stated that Roth

had approached him with a ring and a brooch for which he wanted 60,000 schillings. Roth did not want this price in cash but in cigarettes. Accused finally decided to give Roth 200 cartons of cigarettes for this jewelry. Prior to this and several days before inventory of the post exchange was taken, accused had removed therefrom and placed in the special service office 41 cases of cigarettes, intending to issue an extra cigarette ration. He distributed eight cases of these cigarettes to each of the four troops of the squadron. About the second or third week in August, he delivered four of these cases, containing a total of 200 cartons, to Roth's home for which he received the ring and the brooch. He returned the remaining five cases to the post exchange. The ring contained a large diamond, 14 smaller diamonds and 12 rubies. The brooch had 36 small diamonds and four rubies. The wooden box found in Captain Martin's room belonged to him. He had placed it at the foot of Captain Martin's bed after hearing that Roth had been arrested.

As to Specifications 1 and 6, Charge II

One of the items in the wooden box was "a Leica Camera." When it was exhibited to accused at the pre-trial investigation accused said, "This is the camera" (R 19,23,68). According to Private Trinka, from the end of June to the end of August only two Leica cameras were issued to the Hallein post exchange. Neither of these cameras had a 1.2 lens and he had never seen a Leica with that type lens in the post exchange. He had not seen "that camera with a 1.2." He handled the items that were for lottery and sale and both the Leica cameras he had received were disposed of by lottery. Accused had never won a lottery in the post exchange (R 45,46,57).

Private Trinka had seen Letter, Headquarters, United States Forces, European Theater, 9 May 1946, Subject: "Watch and Camera Lottery," for this was the directive under which lotteries were conducted in the Hallein post exchange. This letter provided that from its date until 31 July 1946 only United States military personnel and civilians who were on duty in an overseas combat theater on V-E Day would be authorized to participate in lotteries for these items. In the event that the available quantities of these items exceeded the number of personnel authorized to buy under the terms of the letter, the excess was to be disposed of in accordance with "existing arrangements." The letter was introduced in evidence as Prosecution Exhibit 33 (R 45).

Accused personally went several times to Wels, Austria, to "pick up" post exchange items. First Lieutenant Tracy Webb was the commanding officer of the Wels Post Exchange Depot and identified a tally out sheet as an official record from the files of his office. The tally out contained a list of a number of post exchange items delivered to accused as post exchange officer of the 4th Constabulary Squadron, among these items being one 1.2 Leica camera, the selling price of which was $60. The date of delivery appearing on the tally was 26 June 1946 and the signature thereon of the unit exchange officer receiving these items seemed to be "F. G.

Correlle 2nd Lt," two undecipherable initials or letters appearing to the left of this signature. This document was admitted in evidence as Prosecution Exhibit 35. According to Private Trinka, the items on this tally out had never been delivered to the post exchange but had gone to the special service building. The signature on the tally indicating receipt of the items listed thereon was that of accused (R 55-58).

In his written pre-trial statement, accused stated that on many of his trips to the Wels depot he had expressed a desire to purchase a Leica camera. He was told at first that the depot had discontinued "over the counter" sales but sometime in late May or early June, 1946, he was informed that a Leica camera would be put on his tally out for the following month and that he could pay for it at the end of the month when he settled his bill. Consequently, "about" 22 June 1946 he received the Leica camera which had been found in the wooden box. At the end of the month he merely "made up the difference" caused by having taken the Leica camera by paying for it out of his own pocket (Pros Ex 1).

During the pre-trial investigation, Agent Denove asked accused for his "currency control book" and accused delivered his "currency control book" to the agent. This record was accepted in evidence as Prosecution Exhibit 32(R 32,33). Captain Luther M. Chaney, deputy to the disbursing officer, 45th Finance Disbursing Detachment, Salzburg, Austria, was shown Prosecution Exhibit 32 at the trial and identified it as a "currency control record, USFET." The "initial entry" in the record was made on 25 June 1946 and the last entry on 2 August 1946. There were no deductions in the book made by a post exchange (R 63,64). Circular Number 82, Headquarters United States Forces, European Theater, 3 June 1946, was introduced in evidence as Prosecution Exhibit 36 (R 63). Paragraph 5 f of this circular provides:

> "f. Purchases. (1) The dollar value of all purchases from official agencies in the theater such as exchanges, commissaries and clothing stores, shall be entered in column 4 (or 7) and the balance in column 5 (or 8) reduced accordingly. Such entries will be made to the nearest dollar and no entry need be made for individual purchases amounting to less than $5.00.
>
> (2) All entries for purchases which reduce the balance available will be made by the person receiving payment and will be authenticated."

This circular rescinded Circular Number 139, same headquarters, dated 10 October 1945, the effective date of recission being 20 June 1946 after which date the "currency exchange control book" authorized by Circular Number 139 was to be no longer used and a "Currency Control Record" was to be substituted therefor. Circular Number 139 was introduced in evidence as Court's Exhibit 1. This circular did not require that deductions be made in the "currency exchange control book" for purchases of post exchange items (R 65,66).

As to the Additional Charge and its Specification

Agent Denove had found $632 in United States "currency" in the wooden box. Captain Lundberg had also seen some American money in the box and described it as being "a little over six hundred dollars in 20 dollar and 5 dollar bills." This money was introduced in evidence as Prosecution Exhibit 13 (R 17,18,23,68). Accused, in his pre-trial written statement, said that he had won by gambling at least $3000 in American money during the passage from New York to LeHavre. When he landed in LeHavre about 17 December 1945, he spent some of this money and had about $2400 left. Prior to his arrival in Austria on 28 December 1945, he had been issued a currency control book but had not declared therein all the American money he had with him. He had declared about $1800 and the remaining American money, about $600, was that found in the box (Pros Ex 1).

The court was requested to take judicial notice of Letter AG 123-PAFIN, Headquarters, United States Forces in Austria, 4 April 1946 (R 73). This letter provides:

> "1. Except as authorized, all personnel subject to the jurisdiction of this headquarters, including those individuals who come within the scope of Cir 364, WD, 8 Sep 1944 and Cir 139, USFET, 10 Oct 1945, are prohibited from:
>
> a. Importing, holding, transferring, exporting or in any way dealing in U.S. or British paper currency in liberated or occupied territory within the European Theater.
>
> * * *
>
> "4. The provisions of this letter will be brought to the attention of all personnel and will be conspicuously posted in appropriate places."

The European Theater Circular Number 139, cited above provides:

> "2. Purposes. It is the policy of the Theater Commander to deny army facilities for the exchange or transmission of funds derived from sources other than cash pay and allowances received in this theater, and money lawfully imported into the theater [by individuals while on duty in the theater and subject to US military law].
>
> "3. Issue of Book. Commanders of all echelons will issue, to all personnel within their command, a Currency Exchange Control Book. A supply of such books will be distributed by this headquarters. A sample of such book, containing sample entries, is attached as Annex A to this circular.
>
> "4. Initial Declaration. a. Effective 10 Nov 1945, all personnel in this theater subject to US military law will declare their holdings in currencies (including bank deposits) in this theater, by executing the affidavit or certificate on the front of the Currency Exchange Control Book.
>
> * * *

c. The initial declaration, when approved as provided below, will be entered as authorized holdings in the Currency Exchange Control Book of the individual concerned, by the officer authorized to approve the declaration.

"5. Approval of Initial Declaration. * * *

b. Authority is delegated to commanders of all echelons down to company and similar unit level, to examine and approve initial declarations of military and civilian personnel under their command or jurisdiction, in amounts not in excess of the net cash pay and allowances drawn by the individual during the three-month period immediately preceding the time of declaration, less amounts transmitted outside this theater during such three-month period.

c. Initial declarations in excess of the amount above indicated will require the approval of the next higher administrative commander.

* * *

"6. In determining whether an initial declaration should be approved or disapproved, all concerned will be guided by the policy outlined in Par 2, above. Money received from other sources, including profits from black-market operations, proceeds from the sale of property of any kind, and gambling profits are not considered as being within the terms of such policy.

* * *

"9. New Arrival in Theater. a. All finance officers exchanging currency from outside this theater into the currency of a country in this theater, for personnel arriving in the theater, will furnish such personnel with a statement in substantially the following form:

'I hereby certify that I have converted _____ dollars worth of _____ (name of country) money into _____ (name of country) currency for _____ (name, rank, and serial number), who has recently arrived in the European Theater.'

Such certificates will be dated and signed by the finance officer, giving his disbursing symbol number.

b. The individual, upon arrival at his first station in this theater, will be issued by his unit commander a Currency Exchange Control Book; such individual will make an initial declaration of the amount stated in the certificate referred to in a above, and such amount, unless excessive, will be approved as his initial declaration by the commander concerned. Where deemed advisable, the appropriate provisions of Par 5 above will be employed."

And paragraph 3 of the cited European Theater Circular Number 82 reads as follows:

"3. Original Issue. a. Commanders of all echelons will issue to all personnel within their command, or under their jurisdiction, who are paid from US Army or Navy appropriated funds, a Currency Control Record. Records will be serially numbered and issued

through command channels. Each headquarters will maintain a record to account for all issued and unissued Records.

"b. Effective 20 Jun 1946, personnel officers, or such officials as may be designated by commanders to act as such for the purposes of this circular, of all persons in the theater paid from US Army or Navy appropriated funds, will make an initial entry in the Record of each such individual. This initial entry will be the sum of money expressed in whole dollars which each such person has in his possession, including European bank deposits, derived only from pay and allowances and money lawfully imported into the theater. This entry will be made only on presentation of the currency exchange control book authorized by Cir 139, and in no case will the initial entry exceed the balance available as indicated therein."

Evidence for the Defense.

Accused, his rights as a witness in his own behalf having been explained to him, elected to remain silent (R. 73).

4. Discussion

Special Matters

Individual Defense Counsel

Before arraignment, accused requested that Captain Charles W. Bradley, "of Vienna," act as his individual defense counsel. The trial judge advocate then announced that accused had heretofore made this request in writing and that it had been denied by the Commanding General, United States Forces in Austria. Accused thereupon stated that he had no objection to being defended by the regularly appointed defense counsel and assistant defense counsel (R 3a). Accused was arraigned and, at the first session of the court, two prosecution witnesses were sworn and testified as to the voluntary nature of accused's pre-trial statement, one of these witnesses also identifying various prosecution exhibits (R 6-25). After several continuances, Captain Charles W. Bradley, who in the meantime had been made available to act as accused's individual defense counsel, was introduced to the court and thereafter conducted the defense (R 26,27,75). From the accompanying papers, it appears that the Commanding General, United States Forces in Austria, had originally denied accused's request to have Captain Bradley serve as individual defense counsel on the ground that the captain was "not available at this time *** due to the large volume of court-martial matters pending at present."

Questions concerning the availability of military counsel are primarily to be determined by the officer authorized to make the detail or by that officer's immediate superior on appeal and a decision adverse to accused will not be reviewed by us except upon a showing of abuse of discretion.

We find no abuse of discretion here. Moreover, accused did not object to going on trial upon being notified that his request had been denied, did not ask for a continuance to procure other individual defense counsel and indicated his willingness to be defended by regularly appointed defense counsel. Captain Bradley was made available to act as accused's individual defense counsel as soon as his services could be spared by his commanding officer. In view of these circumstances, we are of the opinion that accused has no just cause to complain of his representation at the trial (par. 45a, MCM, 1928; CM 307044, Landry, 60 BR 123,127; CM 317327, Durant).

Irrelevant Exhibits

During the examination of Agent Denove, the trial judge advocate exhibited to the court, and had the agent identify, the various objects which had been found in the wooden box belonging to accused and several other articles which had been seized in accused's office or in his quarters. Of these items, those which had not been made the subject of any of the specifications against accused were not formally offered or accepted in evidence as exhibits. In this category were a radio, binoculars, speedgraphic cameras, novelty swords, European currency and miscellaneous watches, rings and other articles (R 13-25). Accused explained, in his pre-trial statement, that some of the property listed above belonged to the post exchange and that some of it belonged to him. Some of the post exchange property did not appear on the inventory thereof because it had been "lotteried off" and had not been claimed by the winners. He had been buying up rings, diamonds and other jewelry "from whoever wanted to sell" with European currency which he had purchased with American money in LeHavre from men returning to the United States (Pros Ex 1).

Defense counsel, from time to time, objected to the trial judge advocate placing before the court the articles which were not connected with the charges against accused. The law member and the president of the court each expressed an opinion that such evidence was irrelevant to the issues being tried but, upon receiving from the trial judge advocate a vague explanation as to the necessity for establishing "a chain of evidence," the prosecution was permitted to continue its inquiry with respect to these items (R 14,15,21,25).

The interrogation of Agent Denove concerning that property found in accused's possession, or in his constructive possession, which had no bearing whatsoever upon accused's guilt or innocence of the offenses for which he was being tried, and the exhibition of this property to the court was clearly improper. The admission in evidence of those parts of accused's pre-trial statement which referred to his acquisition of this property was likewise improper. The whole of this evidence was irrelevant and might well, under some circumstances, have been highly prejudicial (CM 296462, Hicks, 88 BR 139,145). In the instant case, however, it clearly appears

that both the president and the law member recognized the remote quality of this evidence, indicated to the court that little or no weight should be attached to it and permitted its presentation in the early stages of the case merely on a de bene basis. Under these circumstances, an assumption that such evidence could have materially influenced the court in arriving at its findings of guilty would be unwarranted and, considering the compelling nature of otherwise competent proof adduced against accused, we are of the opinion that his substantial rights were not injuriously affected by the reception of the evidence in question (CM 253868, Barrette, 35 BR 125,128).

Improper Constitution of the Court after Arraignment

On pages 26-27 of the record of trial the following appears:

"Salzburg, Austria
31 October 1946

"The court met pursuant to adjournment at 0930, all the personnel of the court, prosecution and defense, reporters and interpretors, who were present at the close of the previous session in this case being present except the accused.

PRES Court will come to order. Prosecution may proceed.

TJA The Special Defense Counsel is involved in a case in Vienna and will not finish the case before Saturday. Therefore, we ask for further continuance until Wednesday morning, 6 November 1946 at 0930 hours.

PRES The continuance is granted. Court will adjoun and reconvene on 6 November 1946 at 0930 hours for this case."

"Salzburg, Austria
6 November 1946

"The court met, pursuant to adjournment, at 0930 hours, with all the members of the court (with exception as noted), prosecution, defense and accused, reporter and interpreter, who were present at the last session being then present and proceeded as follows:

TJA Mr. President all the members present at the last session are present with the exception of Captain Martin L. Davis, 0336888, 524 MP Bn. Captain Davis has been relieved for military necessity by the Commanding General, Zone Command Austria, pursuant to Special Orders No. 85, Hq. Zone Command Austria, paragraph 3, dated 28 October 1946, and by that same order Major Robert H. Bull, 023424, 4th Constabulary Regiment is appointed a member of this court and is now present. Mr. President Major Bull is a new member and, therefore, it will be necessary to read to him the entire record if the counsel for the defense does not

desire to challenge."

Paragraph 3, Special Orders Number 85, Headquarters Zone Command Austria, 28 October 1946, reads as follows (R 1):

"3. Par 5 SO 79 this Hq cs (aptd of GCM) is amended to read:

MAJOR ROBERT H BULL 023 424 INF 4th Constab Regt

VICE

CAPT MARTIN L DAVIS O 336 888 INF 524 MP Bn"

The court which tried this case was appointed by the cited paragraph 5, Special Orders Number 79, same headquarters, dated 19 October 1946.

It seems, therefore, that when the court met on 31 October, Captain Martin L. Davis sat as a member thereof although he had been regularly relieved as a member on 28 October. In CM 302975, Machlin, 59 BR 343,345), the Board of Review said:

> "It thus appears that Major Anderson, without any authority whatsoever, acted as member and law member during the arraignment, and deliberation and determination of three interlocutory questions. He had not been appointed pursuant to the provisions of Article of War 8, the law for appointing general courts-martial. It has been repeatedly held that where an individual without authority sits as a member of a general court-martial and takes part in all proceedings, including findings and sentence, such proceedings are thereby invalidated. ***
>
> "The Manual for Courts-Martial, 1928 clearly contemplates that unauthorized individuals shall not sit as members of a court-martial at any time after the court is sworn: 'Among the grounds of challenge for cause are *** Second: That he is not a member of the court' (Par. 58e, MCM, 1928, p. 45). 'If it appear *** that a member is subject to challenge on any ground stated in clauses first to fifth of 58e, *** such member will be excused forthwith' (Par. 57b, id., p. 44) (underscoring supplied)
>
> "The Board of Review holds that the participation of Major Anderson, who was not detailed as member of the court, in that part of the proceedings during which accused was arraigned and interlocutory questions were ruled upon by the court, rendered the entire proceedings null and void."

We are of the opinion that the language used in the Machlin case, and in the cases cited in support of the holding therein, must be interpreted in the light of the factual situation presented to the Board of Review at the time. Certainly, any proceedings had before a court-martial while an unauthorized member is sitting thereon are void but neither law nor reason

requires that the entire proceedings in any given case, or those parts thereof which were had at sessions wherein the court was duly constituted, should be fatally affected, ipso facto and re-ardless of the peculiar circumstances of the case at bar, by the fact that at some time after arraignment and during the trial the court was improperly constituted. The principle to be derived from the reported decisions on this question would seem to be that the presence of an interloper on the court will constitute fatal error only where the proceedings had during his presence materially affect the course of the trial, as where evidence is taken during such a session without which the record of trial would be legally insufficient to support the findings, where defense evidence is heard relative to the issue of guilt or innocence, where such interloper has participated in a ruling or decision adverse to the interests of accused or where his presence could otherwise be presumed to have been prejudicial to accused. In the instant case the only event that transpired at the meeting of 31 October at which an unauthorized member sat was the granting of a continuance by the president so that accused's individual defense counsel could attend the trial. This action of the court was clearly beneficial to accused and, considering the rule we have expressed above, no prejudicial error resulted from the fact that the court was improperly constituted at this session.

Preparation, Investigation and Reference to Trial of the Charges

From the accompanying papers it appears that charges were originally preferred against accused on 11 September 1946 by Lieutenant Colonel Norman G. Reynolds. These charges contained allegations that accused sold about 200 cartons of cigarettes, property of the United States Army Post Exchange, to "Nicholas" Roth (Specification 1), that he unlawfully obtained from the post exchange by purchase one Leica Camera (Specification 7), that he failed to have proper deductions made in his currency control record for purchases from the post exchange in violation of European Theater Circular Number 82 (Specification 11) and that he wrongfully and unlawfully had in his possession about $600 in American currency (Specification 2), all specifications being laid under Article of War 96. These charges were investigated in accordance with the 70th Article of War on 14 September 1946. The charges upon which accused was arraigned, with the exception of the additional charge, were signed and sworn to by Captain James H. McGuire on 10 October 1946 and were referred for trial on that date. The additional charge was preferred by the same officer on 18 October. Captain McGuire was the trial judge advocate in this case. The oath to these charges was taken before Lieutenant Colonel James Garnett, Jr., the staff judge advocate. At the trial, defense counsel contended that the provisions of Article of War 70, which he considered to be mandatory and jurisdictional, had not been complied with in that the charges upon which accused had been brought to trial had not been investigated (R. 64,65).

Although perhaps not a practice to be encouraged (see par 41a, MCM, 1928), no error lies in the fact that the trial judge advocate herein was

also the accuser (CM 255335, Besherse, 50 BR 73,85). From the circumstance that the staff judge advocate took the accuser's oath to the charges upon which accused was arraigned, we may fairly assume that he had notice of the actions of the accuser and that the new charges had been preferred with his consent if not with his advice. The charges as originally drawn had been properly investigated and the same basic facts which called forth the preparation of these charges were employed in the drafting of the charges upon which accused was finally arraigned. Investigation of the new charges, therefore, would have been fruitless, for insofar as they contained allegations differing from those appearing in the old charges they represented merely a somewhat different legal conclusion based upon facts already brought to light by the investigation had on the charges as originally preferred (CM 280385, Warnock, 17 BR (ETO) 163,179; CM 268240, Closson, 44 BR 235,238). There had been, we believe, a substantial compliance with the provisions of Article of War 70.

However, even if there had been no substantial compliance with the provisions of the 70th Article of War, this would not, per se, constitute prejudicial error. In CM 323486, Ruckman, the Board of Review had occasion to say:

> "The pre-trial investigation directed by Article of War 70 is for the benefit of the appointing and referring authority and compliance with said article is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial. And, a fortiori, the failure of the appointing or referring authority to comply with the provisions of said article does not constitute ground for annulling a sentence by general court-martial otherwise valid and enforceable. For a discussion of the legislative intent of Article of War 70 see CM 229477, Floyd, 17 BR 149,156, wherein it is shown that the provisions of Article of War 70 are entirely administrative in character, not affecting the jurisdiction of general courts-martial, and in which it is also noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the 'record of trial' and is not concerned with extraneous matters of (administrative) procedure. A contrary view would allow a defect in a purely administrative and preliminary hearing to vitiate the judicial proceeding. Analogies cannot be effectively drawn between the investigation required by Article of War 70 and the grand jury procedure required by the Fifth Amendment to the Constitution of

the United States. The Fifth Amendment specifically excepts cases arising in the land and naval forces from the grand jury requirement. The state and federal courts empanel grand juries and, within the purview of the various statutory and code provisions, supervise the conduct of such bodies. In military jurisprudence, the court-martial ordered to try a given case may not have been in existence during the investigation and as has been stated has no relation thereto. To be sure, an accused, upon representations made to the court that due to inadequacy of the investigation he is unable to properly prepare his defense and is not ready to proceed, may justly be entitled to a continuance for the purpose of securing witnesses or producing evidence, for the court must safeguard accused's right to a fair trial. But a plea in bar of trial upon the ground of defective investigation, if granted, would amount to an unauthorized invasion of the prerogatives of the appointing or referring authority. The function of the court is to 'well and truly try and determine, according to the evidence, the matter now before' it, between the United States of America and the person to be tried, and to 'administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States ***' (AW 19). Its function does not include a determination of whether the appointing or referring authority ordered trial without a fair and impartial investigation. ***"

Here, accused did not complain at the trial that he had been prejudiced in the preparation of his defense by a lack of investigation of the charges upon which he was arraigned nor did he base any request for a continuance on this theory (see also CM Durant, supra).

The advice of the staff judge advocate to the appointing authority was dated 1 October 1946 and deals with the charges originally preferred against accused. These charges were not referred for trial. The accompanying papers contain no letter of advice as to the charges upon which accused was arraigned. The requirement of Article of War 70 that before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice is directory only and can have no effect upon the jurisdiction of the court trying such a charge (CM 229477, Floyd, 17 BR 149,153).

It appears that the additional charge was never referred to trial by formal, written order. The order of reference for trial is not a jurisdictional matter. It may be oral as well as written or it may be implicit in the action of the reviewing authority in approving the sentence and thus ratifying the actual reference of the case to the legally constituted court which tried it (CM 198108, Casey, 3 BR 159,164; CM 314939, Greene).

Direction by Appointing Authority to Amend Charges after Arraignment

During the argument on prosecution's motion to amend Charge I and

its specifications, the trial judge advocate requested the court to take judicial notice of a letter from the appointing authority. This letter was read to the court and appears as an exhibit in the record of trial (R 28; Miscellaneous Papers for Judicial Notice). It was addressed to the trial judge advocate, signed by an assistant adjutant general "by command of" the appointing authority and contained instructions "to move the court" to make the amendments urged at the trial, citing legal authorities in support of the proposed amendments. Defense counsel claimed that by directing these amendments to "be made," the appointing authority became the accuser and that the court was thus without jurisdiction to hear and determine the charge in question (R 28). It is obvious that the appointing authority did not direct the amendments to "be made," as defense counsel contended, but that he merely directed the trial judge advocate "to move the court" to make them. It is not at all necessary to assume that the appointing authority intended his letter to the trial judge advocate to be exhibited to the court, as it was. However, in view of what actually happened at the trial and having in mind the weight likely to be attributed to this letter by the court, we will treat the matter as though the reviewing authority had, in fact, directed the court to make the amendments. The propriety of the amendments, as such, will be discussed later under the heading "Charge I and its Specifications."

Paragraph 5a, Manual for Courts-Martial, 1928, provides:

> "The President of the United States ***, and the other commanding officers designated in A.W. 8 may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior competent authority. (A.W. 8.)
>
> "Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried or proved. *** Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. Thus a division commander may, without becoming the accuser or a prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases. ***
>
> "An officer who has power to appoint a general court-martial may determine the cases to be referred to it for trial and may dissolve it; but he can not control the exercise by the court of powers vested in it by law. He may withdraw any specification or charge at any time unless the court has reached a finding thereon." (Underscoring supplied.)

And in paragraph 73 of the Manual it is provided that:

"If a specification, while defective, is nevertheless sufficient fairly to apprise the accused of the offense intended to be charged, the court upon the defect being brought to its attention will, according to the circumstances, direct the specification to be stricken out and disregarded, or continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case, or permit the specification to be so amended as to cure such defect ***." (Underscoring supplied.)

The above-quoted provisions of the Manual make it abundantly clear that the appointing authority does not become an accuser or prosecutor merely by performing those administrative and legal functions pertaining to his office which serve only to bring an accused to trial upon charges and specifications appropriate to the facts as they have been reported to him and that he retains a measure of control over the case for this purpose even during the course of the trial (see also par 64a, MCM, 1928). Although he "can not control the exercise by the court of powers vested in it by law" (see CM 260479, Mankowski, 39 BR 277; CM 291449, Thorne, 7 BR (NATO-MTO) 287), he may empty the court of its jurisdiction over any particular cause by withdrawing it from the court altogether. It follows, then, that what he can do wholly he can do partially and that if he should determine after the trial commences that there are errors in a charge or specification which can be cured without changing the identity of the offense for which accused was arraigned or that accused should be subject to conviction only for a lesser included offense, he may send instructions to the court to carry into effect his determination by the making of proper amendments. In doing so, he does not adopt and become responsible for the amended charge, in the sense that he vouches for the truth of the allegations therein contained, nor does he indicate that he is taking an active part in the prosecution thereof but he is simply making a change in the matters referred to the court for trial, which he has every right to do.

Charge I and its Specifications

The two specifications of Charge I upon which accused was arraigned alleged that he had embezzled and wrongfully sold, respectively, 200 cartons of cigarettes, property of the United States furnished and intended for the military service thereof. Charge I alleged a violation of Article of War 94. During the course of the trial, the charge and its specifications were amended to allege an embezzlement and wrongful sale of 200 cartons of cigarettes, property of the Army Exchange Service, in violation of Article of War 93. The accused was found guilty of the amended charge and its specifications. The evidence established beyond a reasonable doubt that accused actually did embezzle and then wrongfully sell 200 cartons of cigarettes, property of the Army Exchange Service, at the time and place alleged in each of the two specifications.

In embezzlement as in larceny cases a variance between the ownership

alleged and that proved is generally fatal to the conviction and ordinarily this defect may not be cured by amendment of the specification after arraignment or by exceptions and substitutions in the finding of guilty (CM 193191, Hosmer, 2 BR 77; CM 272588, McGovern, 46 BR 305,310; CM 297906, Kenney, 19 BR (ETO) 311). Nevertheless, if the alleged owner has a special property interest in the goods embezzled or stolen this will be sufficient to support a conviction even though it appears from the evidence that the general ownership was in another and in such a case the name of the general owner may be substituted for that of the special owner by amendment of the specification or in the finding of guilty, such substitution not being necessary, however (CM 230070, Henry, 17 BR 291,296; CM 244621, Morrison, 28 BR 355,361; CM Durant, supra). The United States has a special ownership in property of the Army Exchange Service inasmuch as such property is in the control and custody of officers of the Army (CM 199737, Taft, 4 BR 163; CM Durant, supra; CM 312273, Mascarella). An embezzlement of property in which the United States has a special ownership, in violation of Article of War 93, is an offense lesser than and necessarily included in an alleged embezzlement in violation of Article of War 94 of the same property, described as belonging to the United States generally and to have been furnished and intended for the military service thereof (CM Taft, supra; CM 191638, Giles, 1 BR 269; CM 316193, Holstein). Therefore, considering the proof adduced in the instant case, accused could have been convicted of an embezzlement of 200 cartons of cigarettes, property of the United States, in violation of Article of War 93, the United States being considered the special owner of the cigarettes. The court did not err, then, in finding him guilty of an embezzlement of these cigarettes, in violation of Article of War 93, under an amended specification describing them to be the property of the general owner, the Army Exchange Service.

What we have said with respect to the embezzlement specification applies with equal force to the specification and the amendment thereto alleging the wrongful sale of the cigarettes, except that a wrongful sale of property in which the Government has only a special ownership and which is generally owned by the Army Exchange Service is not a violation of Article of War 93 but of Article of War 96 (CM Mascarella, supra). This error was cured by the action of the reviewing authority in approving only so much of the finding of guilty of this specification as involved a finding of guilty thereof in violation of the appropriate Article of War.

No evidence was adduced as to the market or other value of the 200 cartons of cigarettes embezzled and sold by accused but since it appeared that they were in a useable condition the court could assume that they had some substantial value. The limitations upon punishments set forth in paragraph 104 of the Manual for Courts-Martial, 1928, not applying to officer cases and there being no question of penitentiary confinement involved herein due to the reduction of the term of confinement to one year

(AW 42), it is immaterial what the monetary value of the cigarettes embezzled may have been (CM Durant, supra).

There was no undue multiplication of charges in arraigning accused upon one specification alleging the embezzlement of 200 cartons of cigarettes and upon another alleging the wrongful sale of the same cigarettes, each offense being separate and distinct from the other (CM 304486, Green, 21 BR (ETO) 189; CM 270058, Pearson, 4 BR (NATO-MTO) 79, 83).

Specifications 1 and 6, Charge II

Accused admitted in his pre-trial statement that he had obtained the Leica camera found in the wooden box by direct purchase from the Hallein post exchange. The evidence aliunde the confession shows that accused had ample opportunity to purchase such a camera in the manner described in his statement, that a Leica camera was delivered to accused as post exchange officer on or about the date he admitted having received the one found in his possession, that the camera so delivered was never seen about the Hallein post exchange and that accused had never won a lottery. We are of the opinion that this evidence sufficiently corroborates his pretrial admission that he had obtained a Leica camera by direct purchase from the post exchange, the only reasonable alternative to such corroboration being an assumption that he had misappropriated the camera found in the wooden box; an assumption we think neither necessary nor proper to be made (par. 114a, MCM 1928).

The tally out from the Wels post exchange depot shows that a Leica camera was delivered to accused on 28 June 1946. This was the camera which never became part of the stock of the Hallein post exchange. Accused admitted that he had received the camera he bought "about" 22 June 1946 and that he settled his accounts with the Wels depot at the end of that month. Therefore, accused's purchase of the Leica camera was consummated sometime during the latter part of the month of June, 1946. The European Theater directive on the subject of watch and camera lotteries, dated 9 May 1946, provided that from its date to 31 July 1946 only personnel who were on duty in an overseas combat theater on V-E Day would be authorized to participate in lotteries for these items unless such items were on hand in sufficient quantities to exceed the number of personnel authorized to purchase them under the terms of the directive, in which exceptional event the excess of these articles would be disposed of according to "existing arrangements." Although it is not clear that under "existing arrangements" cameras were required to be sold by lottery at all times (see Sec. XIII, Memorandum No. 9, USFET AES, 1 March 1946, found in Miscellaneous Papers for Judicial Notice), the directive of 9 May clearly indicated that cameras were not to be disposed of except by lottery during the prescribed period unless there were more cameras available for sale than there were personnel eligible to buy them. According to the manager of the Hallein post exchange,

Private Trinka, lotteries were conducted by that exchange under the provisions of the directive in question and the two Leica cameras he had received between June and August, 1946, had been disposed of by lottery. Accused had never won a lottery. It appears, therefore, that the Hallein post exchange was not operating under the exception set forth in the theater directive of 9 May and that accused's direct purchase of a Leica camera from the exchange constituted a violation of this directive as alleged in Specification 1 of Charge II. This specification also alleged that accused's direct purchase of the Leica camera was in violation of Letter, Headquarters United States Forces in Austria, dated 21 May 1946, subject: "Lotteries, Post Exchange." This letter appears not to have been adverted to at the trial and we do not have it before us. However, since the purchase under discussion was shown to have been in willful violation of one of the orders set forth in the specification, and therefore wrongful, we may treat the allegation that it entailed a violation of still another order as surplusage (CM 255663, Davis, 3 BR (ETO) 59,95; CM 246044, Copeland, 2 BR (ETO) 291,295).

Specification 6 of Charge II alleged that accused knowingly and wrongfully failed to have deductions made from his currency control records for post exchange purchases in violation of European Theater Circular Number 139, 10 October 1945, "as amended." During the course of the trial the specification was amended to allege that this failure was in violation of European Theater Circular Number 82, 3 June 1946. This amendment did not change the nature or identity of the offense charged, for Circular 82 expressly rescinded Circular 139, covered the same subject matter and thus clearly amounted to an "amendment" of the circular it replaced. The defense, when asked by the court whether a continuance was desired because of the amendment to the specification, replied in the negative (R. 66). Accused was not, therefore, prejudiced in any manner by being placed on trial upon the amended specification (par 73, MCM, 1928). Although Circular 139 did not require that deductions be made in currency control records for post exchange purchases, the specification as originally drafted did not for this reason fail to state an offense, for it alleged a violation of that circular "as amended."

Circular 82 required that the dollar value of all purchases from post exchanges amounting to $5.00 or more be entered in the "Currency Control Record" of the purchaser. These entries were to be made by the person receiving payment. The provisions of this circular went into effect on 20 June 1946. Accused obtained by direct purchase from the Hallein post exchange a Leica camera for which he made payment at the end of the month of June 1946 by applying the purchase price to his account as post exchange officer with the Wels depot. Accused was thus the person receiving the payment as well as the person making it. He should have entered the purchase price of the camera in his currency control record as a deduction from the balance available therein, such price being above the $5.00 limit. The initial entry in accused's currency control record was made on 25 June 1946 and the last on 2 August 1946, none of the entries therein being deductions made for post exchange purchases. Accused thus violated the

provisions of Circular 82. As officer in charge of the Hallein post exchange he was responsible for enforcing the provisions of Circular 82 here under discussion and it must be presumed that they had been brought to his attention. In any event, Circular 82, being a directive of the Commanding General, United States Forces, European Theater, became a part of the written military law in that theater on the date of its promulgation and accused was chargeable with knowledge of its content (CM 307097, Mellinger, 60 BR 199,216; CM 291176, Besdine, 18 BR (ETO) 181,185). The finding of guilty of Specification 6 of Charge II is, therefore, sufficiently supported by the evidence.

The Additional Charge and its Specification

Accused was found guilty under this charge and specification of knowingly and unlawfully having in his possession about $632.00 in "money" of the United States in violation of Letter AG 123-PAFIN, Headquarters, United States Forces in Austria, 4 April 1946. United States "currency" in the amount of $632 was found in the wooden box belonging to accused. In his pre-trial statement accused admitted that this money was his, that it had been in his possession ever since he had first arrived in the European Theater in December 1945, and that although he had been issued a currency control book upon his arrival in the European Theater he had not declared this sum for exchange. It would appear that at least one of the reasons accused may have had for not declaring this money was the difficulty in showing that it had been derived from his pay and allowances. The PAFIN letter prohibited personnel subject to the jurisdiction of Headquarters, United States Forces in Austria, from holding United States "paper" currency in liberated or occupied territory within the European Theater "except as authorized." Whatever the exceptional circumstances may have been which were deemed adequate for a specific grant of authority in an individual case to retain possession of United States paper currency within liberated or occupied territory in the European Theater, it is obvious, from a perusal of the provisions of European Theater Circulars 139 and 82 quoted in the statement of facts relating to this charge, that personnel subject to military law in the European Theater were generally required to surrender United States currency for the currency in use at their military stations. Indeed, the PAFIN circular is but the progeny of earlier European Theater directives containing identical prohibitions (see CM Mellinger, supra, p. 220; CM 310446, Ruppel, 61 BR 291,297). All these financial directives point to but one legal conclusion, that it was, at the time this offense was alleged to have been committed, prima facie unlawful to have possession of United States currency in liberated or occupied territory within the European Theater. Accused has not attempted to show that he was given any specific authority to retain the United States currency found in his possession nor do any facts appear in the record of trial which would tend to dispel the presumption that such possession was unlawful (see CM Mellinger, supra, p. 230).

The PAFIN letter accused is charged with having violated proscribes the holding of United States "paper" currency. Although the proof shows that the $632 found in the wooden box was mostly in twenty dollar and five dollar bills, the specification alleges that accused unlawfully held "money" of the United States in that sum. We are of the opinion, however, that no lexigraphical dissertation is required to dissipate this seeming failure of the specification

to state an offense. The Board of Review in the exercise of its appellate function has the power to construe and interpret specifications and in construing the specification here in question it would be absurd to assume that the pleader intended to charge accused with unlawfully possession $632 in metal coin or that accused reasonably could have understood the allegation to be thus limited (CM 285969, Sanders, 10 BR (ETO) 255, 276).

The PAFIN letter, dated 4 April 1946, requires that its provisions be brought to the attention of "all personnel" and that copies of the letter be conspicuously posted. The money accused was found guilty of having unlawfully held in violation of this letter was found in his possession in the latter part of August, 1946. Considering the wide distribution to be given the letter and the fact that it was but in implementation of long established and widely known financial policy of the European Theater, accused must be presumed to have had knowledge of its contents (CM 307372, Manly, 61 BR 79, 82). We conclude, therefore, that accused was properly found guilty of the Additional Charge and its specification.

5. War Department records show that accused is 29 years of age, is married and has one dependent other than his wife. He is a high school graduate and in civilian life worked as a watch maker for the Bulova Watch Company and as a maintenance man in a building owned by the Diesel Electric Company of New York City. He was a member of the Enlisted Reserve Corps from 1942 to October 1943 and on 25 August 1944 was inducted for active service in the Army of the United States. He served as an enlisted man until 13 October 1945 when, having graduated from the officer candidate school at Fort Knox, Kentucky, he was commissioned and appointed a second lieutenant in the Army of the United States.

6. Joseph F. O'Connell, Junior, Lieutenant Colonel, Judge Advocate General's Department Reserve, appeared before the Board of Review as civilian counsel for accused and made argument and filed a brief on accused's behalf. Careful consideration has been given to both argument and brief.

7. 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 or Article of War 96.

Lehrton E. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Albert G. Schopf, Judge Advocate

JAGK-CM 319858 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 1947

TO: The Secretary of the Army

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 Thomas J. Correlle (0-1020297), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of the embezzlement and wrongful sale of 200 cartons of cigarettes, property of the Army Exchange Service, in violation of Article of War 93 (Specifications 1 and 2, Charge I), of wrongfully obtaining by direct purchase from an Army post exchange one Leica camera in violation of the directives of higher authority (Specification 1, Charge II), of four specifications alleging that he wrongfully obtained from an Army post exchange certain watches in violation of the directives of higher authority (Specifications 2, 3, 4 and 5, Charge II), and of wrongfully failing to have deductions made from his currency control records in violation of a European Theater circular (Specification 6, Charge II), all specifications of Charge II being alleged in violation of Article of War 96. He was also found guilty of an additional charge and specification alleging that he unlawfully had in his possession about $632 in money of the United States in violation of a directive of higher authority and Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge I (wrongful sale of cigarettes) as involved a finding of guilty thereof in violation of Article of War 96, disapproved the findings of guilty of Specifications 2, 3, 4 and 5 of Charge II (wrongfully obtaining watches) approved the sentence but reduced the period of confinement at hard labor to one year and forwarded the record of trial for action under Article of War 48.

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

Accused was the officer in charge of the Army post exchange located at Hallein, Austria. Sometime in July or August 1946, he removed 41 cases of cigarettes therefrom. After distributing some of these cigarettes to the troops served by the post exchange, he delivered four cases, containing a total of 200 cartons, to one Niklos Roth, an Austrain civilian,

and received from Roth a ring and a brooch. This sale took place about the second and third week in August. The ring contained a large diamond, 14 smaller diamonds and 12 rubies and the brooch contained 36 small diamonds and four rubies.

On the last of June 1946, accused obtained a Leica camera by direct purchase from the Hallein post exchange. At this time, a directive of Headquarters, United States Forces, European Theater, required that Army exchanges conduct sales of cameras and other scarce items by lottery. A circular, emanating from the same headquarters, also required that purchases from post exchanges of $5 or more be deducted from the balance available on the purchaser's currency control record by the person receiving payment. The Leica camera bought by accused cost $60 and accused, as post exchange officer, was both purchaser and person receiving payment with respect to this sale. Accused's currency control records contained no deduction for this purchase.

In August 1946, accused, while stationed in Austria, was found to have $632 in United States currency in his possession. Over six hundred dollars of this sum was in 20 dollar and 5 dollar bills. A directive of Headquarters, United States Forces in Austria, in effect at this time, prohibited the holding of United States paper currency in liberated or occupied territory within the European Theater except when expressly authorized. Accused stated that he had retained this money in his possession ever since he had first arrived in the European Theater in December 1945, and had never declared it. There was no evidence that such possession had been authorized.

4. Accused is 29 years of age, is married and has one dependent other than his wife. He is a high school graduate and in civilian life worked as a watch maker for the Bulova Watch Company and as a maintenance man in a building owned by the Diesel Electric Company of New York City. He was a member of the Enlisted Reserve Corps from 1942 to October 1943, and on 25 August 1944 was inducted for active service in the Army of the United States. He served as an enlisted man until 13 October 1945 when, having graduated from the officer candidate school at Fort Knox, Kentucky, he was commissioned and appointed a second lieutenant in the Army of the United States.

5. Joseph F. O'Connell, Junior, Lieutenant Colonel, Judge Advocate General's Department Reserve, appeared before the Board of Review as civilian counsel for accused and filed a brief on accused's behalf. Careful consideration has been given to both argument and brief. Consideration has also been given to letters from accused to The Judge Advocate General, dated 9 and 27 January 1947; to a letter dated 18 July 1947, with accompanying affidavits, addressed to the Secretary of War by Captain James H. McGuire, the trial judge advocate in this case; and to a recommendation for clemency dated 11 August 1947 and signed by the commanding officer of the European Command Military Prison wherein accused is being held in restraint.

6. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution. In view of the fact that the sentence was adjudged on 7 November 1946, I recommend that a post guardhouse or a place other than a United States disciplinary barracks be designated as the place of confinement.

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

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 28, 22 Oct 1947).

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

JAGK - 319950

6 MAR 1947

UNITED STATES	HEADQUARTERS IX CORPS
v.	Trial by G.C.M., convened at Sendai, Honshu, Japan, 17 and 18 January 1947. Forfeiture of all pay and allowances due or to become due and confinement for one (1) year and six (6) months. Penitentiary.
VICTOR N. ITO, P-3, a civilian employee of the War Department serving with the Armies of the United States in the field	

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

2. Accused was tried upon and, by exceptions, was found guilty of the following charges and specifications:

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

Specification: In that, Victor N. Ito, P-3, 172d Station Hospital, a person accompanying and serving with the Armies of the United States without the territorial jurisdiction of the United States, did, at Sendai, Honshu, Japan, on or about 2 December 1946, sell, wrongfully and without authority, to one Jujiro Kobayashi, for the sum of about 31,350.00 Yen, 14 cans of evaporated milk, value about $.70, 16 cartons of cigarettes, value about $10.40, about 5 pounds of sugar, value about $.35, 1 package of cookies, value about $.15, 1 package of whole wheat wafers, value about $.15, 1 can of pineapple-rice pudding, value about $.05, 1 can of pork and eggs, value about $.05, 1 can of fruit cake, value about $.05, 1 can of cheese, value about $.05, 1 package of Army rations, value about $.25, one can of nuts and candy, value about $.50, 2 bags of candy, value about $.40, 21 bars of soap, value about $1.86, 12 bottles of saccharin tablets, value about $1.20, these articles having been transported into the Pacific Theater by use of means of transportation operated or furnished by or on behalf of the United States Government or her allies, or operated under contract with the United States Government, and about 3397 Acetophenetidin tablets, value about $2.65, about 2716 Sulfathiazole tablets, value about $8.60, about 401 Sulfaguanadine tablets, value about $1.67, and about 23 vials of penicillin sodium, value about $24.84, these latter articles being the property of the United States, furnished and intended for the military service thereof, and total value of $37.76.

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

Specification: In that, Victor N. Ito, P-3, ***, did, at or near Sendai, Honshu, Japan, on or about 2 December 1946, feloniously take, steal and carry away about 3397 Acetophenetidin tablets, value about $2.65, about 2716 Sulfathiazole tablets, value about $8.60, about 401 Sulfaguanadine tablets, value about $1.67 and about 23 vials of penicillin sodium, value about $24.84, the property of the United States, furnished and intended for the military service thereof, and total value of $37.76.

He was sentenced "to be discharged the service of the United States Government," to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved only so much of the sentence as provided for forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and six months, designated the U.S. Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration is the propriety of the designation of a U.S. penitentiary as the place of confinement. Wrongful sale or larceny of property of the United States furnished and intended for the military service thereof of a value of $50 or less, larceny of other property of a value of less than $50 or wrongful sale of other property of any value by a civilian subject to military law is not recognized by any statute of the United States or by the law of the District of Columbia as an offense of a civil nature punishable by penitentiary confinement for more than one year (see 18 U.S.C. 87; D.C. Code, sec. 22-2202). Furthermore, where an accused is found guilty under several specifications of the larceny or wrongful sale of various items of Government property, the total values of such property found under each specification may not be aggregated for the purpose of determining the appropriate place of confinement nor, where he is found guilty under several allegations of separate and distinct offenses included in the same specification, may the values of the property found under each such allegation be so aggregated (CM 226579, Evans, 15 BR 125; CM 288588, Hawkins; Cartwright v. United States, 146 F. (2d) 133).

Therefore, the value of the property appearing in the specification to Charge I of which no ownership is alleged, amounting to $16.16, may not be added to the value of the other property described in such specification as being property of the United States furnished and intended for the military service thereof, amounting to $37.76, so as to bring the total value above $50 for the purpose of authorizing penitentiary confinement, for the dual reason that the wrongful sale of the first mentioned type property is not a penitentiary offense and, even if it were, such sale is obviously a separate and distinct offense from the sale of the other property mentioned in the specification. Likewise, the value of the military property which accused was found guilty of having wrongfully sold under the specification to Charge I may not be added for such purpose to the value of the military property which he was found guilty of having stolen under the specification to Charge II. It is obvious, therefore, that penitentiary confinement is not authorized in the instant case under the provisions of Article of War 42.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and only so much of the sentence as approved by the reviewing authority as involves forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and six months in a place other than a penitentiary, Federal correctional institution or reformatory.

Whistler E. Silvus, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ackroyd, Judge Advocate

JAGK - CM 319950 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, IX Corps, APO 309, c/o Postmaster, San Francisco, California

1. In the case of Victor N. Ito, P-3, a civilian employee of the War Department serving with the Armies of the United States in the field, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the sentence as involves forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and six months in a place other than a penitentiary, Federal correctional institution or reformatory, you will have authority to order the execution of the sentence.

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

(CM 319950).

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.

APR 17 1947

JAGQ - CM 319968

UNITED STATES v. Private REGINALD PAIGE (RA 14207453), Air Corps, Unassigned, Attached Squadron TR-3, 3705th Army Air Forces Base Unit, Lowry Field, Denver, Colorado.	TECHNICAL DIVISION, AIR TRAINING COMMAND Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 24 January 1947. Dishonorable discharge and confinement for three (3) years. United States Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HICKEY, SCHENKEN and PARSONS, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Reginald Paige, Air Corps Unassigned, Attached Squadron TR-3, 3705th Army Air Forces Base Unit, did, at Lowry Field, Denver, Colorado, on or about 6 November 1946, make under oath a statement in substance as follows: "That on or about 29 October 1946 he heard Private George H. Roberts, Squadron TR-1, known as 'Lopez' make certain remarks and hit certain persons with his fists" which statement he did not then believe to be true.

Accused pleaded not guilty to, and was found guilty of, the Charge and specification. Evidence of one previous conviction by special court-martial of wrongfully striking a soldier on the cheek with his fist was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement, and forwarded the record for action pursuant to Article of War 50½.

3. Evidence for the prosecution. In November, 1946, Lieutenant Colonel Vernie N. Rollo, Inspector General's Department, Technical Division,

Air Training Command, Scott Field, Illinois, was ordered by his commanding general to investigate an alleged racial disturbance at Scott Field that had occurred on 29 October 1946. In that connection accused testified under oath on 6 November 1946 that a soldier named "Lopez" and another soldier walked up to the Service Club door and asked if there was going to be a dance and after a few brief remarks, Lopez "hauled off and hit the guy". Accused seemed at ease during this questioning. At first Colonel Rollo gave this testimony no credence but gave it a little credit later. (R 6-10) Before testifying, accused was advised of his rights under Article of War 24 and the consequences of making a false statement under oath were clearly explained to him (R 12).

When called on 2 January 1947 as a witness in the special court-martial trial of Private George H. Roberts, accused testified under oath that he had not seen Private George H. Roberts, also known as Lopez, hit anybody; that he remembered his statement to Colonel Rollo, that "it's the truth what I said now", that he was "scared" when he was talking to Colonel Rollo, that he was not threatened or promised anything but "went up and told a story" knowing at the time that it was untrue (R 13-15; Ex. 1).

4. Evidence for the Defense.

Accused made an unsworn statement that he is 16 years old. He finished the sixth grade at Spartanburg, South Carolina, and left school to join the Army. He stated that he was frightened when he was questioned by Colonel Rollo "because I hadn't never been up for no trial or been in trouble", and that he did not realize the import of his testimony before Colonel Rollo (R 16-17).

5. To establish the offense of false swearing the falsity of the testimony involved must be established (MCM, 1928, par. 152c).

The evidence shows that accused was sworn and made oath in the course of an investigation, as alleged. The only evidence to establish that the testimony so given was false was evidence that accused contradicted his testimony before the Inspector General and asserted that such previous testimony was false.

It is well established that evidence that accused has made contradictory or inconsistent statements does not alone establish the falsity of either statement and will not support a conviction (Sec. 451 (53) Dig. Op. JAG 1912-40). The general rule is stated in Corpus Juris (48 CJ 900) as follows:

"A statement of accused, directly contradicting that upon which perjury (false swearing) is assigned, is not sufficient evidence of the falsity of the latter, but other extrinsic evidence is necessary to establish its falsity."

This same rule of law is stated in Wharton's Criminal Law (par. 1583) as follows:

"When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false."

It is the opinion of the Board of Review that the falsity of accused's testimony was not established by competent evidence, and the findings of guilty must fall.

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

Albert D. Kane, Judge Advocate

Carlton E. Johnson, Judge Advocate

Thomas L. Parsons, Judge Advocate

JAGQ - CM 319968 1st Ind

WD, JAGO, Washington, D. C.

TO: Commanding General, Technical Division, Air Training Command, Scott Field, Illinois

1. In the case of Private Reginald Paige (RA 14207453), Air Corps, Unassigned, Attached Squadron TR-3, 3705th Army Air Forces Base Unit, Lowry Field, Denver, Colorado, I concur in the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. 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 319968)

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGK - CM 320020

7 MAR 1947

UNITED STATES	)	FIFTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at Davis-Monthan Field, Tucson, Arizona, 6 December and 21 January 1947. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant DALE M. JONES (0-838107), 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: In that Second Lieutenant Dale M. Jones, Air Corps, Attached Squadron A, 248th Army Air Forces Base Unit (OB(Bmr)), did, at Davis-Monthan Field, Tucson, Arizona, on or about 28 May 1946, present for approval and payment a claim against the United States by presenting to Major Raymond H. Wood, Finance Officer at Davis-Monthan Field, Tucson, Arizona, an officer of the United States, duly authorized to approve and pay such claim, a War Department Form Number 336a, Pay and Allowance Account, in the amount of about $333.15, about $78.75 of which was for services alleged to have been rendered to the United States by Second Lieutenant Dale M. Jones for flying pay for the month of May 1946, which portion of the claim was false and fraudulent in that Second Lieutenant Dale M. Jones did not participate in regular and frequent aerial flights sufficient to meet the requirements of Executive Order 9195, 7 July 1942 (Army Regulation 35-1480), and was then known by the said Second Lieutenant Dale M. Jones to be false and fraudulent.

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

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: (Nolle Prosequi).

Specification 3: In that Second Lieutenant Dale M. Jones, ***, did, at Army Air Forces Overseas Replacement Depot, Kearns, Utah, on or about 27 February 1946, with intent to defraud, wrongfully and unlawfully make and utter to the Officers' Mess, Army Air Forces Overseas Replacement Depot, Kearns, Utah, a certain check, in words and figures as follows, to wit:

Kearns, Utah. Feb 27 1946

PRINT NAME OF BANK THE BANK OF AURORA

CITY AND STATE AURORA, COLO

PAY TO THE ORDER OF -- OFFICERS' MESS -- $25.00

Twenty five & no ----------/100 DOLLARS

RANK 2nd Lt

(s) Lt. Dale M. Jones

ASN 0-838107

and by means thereof, did fraudulently obtain from the Officers' Mess, Kearns, Utah, about $25.00, lawful money of the United States, he, the said Second Lieutenant Dale M. Jones then well knowing that he did not have and not intending that he should have any account with the Bank of Aurora for the payment of said check.

NOTE: Specifications 4, 5, 6, and 7 are identical in words and figures with Specification 3. Specifications 8 and 9 vary only as to date, each having been executed on 28 February 1946.

Specification 10: In that Second Lieutenant Dale M. Jones, ***, did, at March Field, California, on or about 5 November 1945, wrongfully and unlawfully make and utter to Stanley O. McNaughton, 502 East 72nd Street, Seattle 5, Washington, then First Lieutenant Stanley O. McNaughton, March Field, California, a certain check, in words and figures as follows, to wit:

TO THE BANK OF AURORA BANK
Name of Bank

COUNTER CHECK

BRANCH
Name of Branch

DATE Nov 5 1945

Aurora, Colo
Bank Address

PAY TO THE ORDER OF Cash $ 339.00

Three Hundred Thirty Nine & no ----------/100 DOLLARS
SIGN HERE Dale M. Jones

IN PAYMENT OF _____ ADDRESS 2nd Lt A.C., O-838107
TELEPHONE _____

Service Line Standard Counter Check Form 4092

in payment of a gambling debt to First Lieutenant Stanley O. McNaughton, he, the said Second Lieutenant Dale M. Jones, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Aurora for the payment of said check, such conduct being of a nature to bring discredit upon the military service.

Specification 11: (This specification is identical with Specification 10, except as to the amount of the check, $257.00.)

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority disapproved the findings of guilty of Specification 1 of Charge II. He approved the sentence and forwarded the record of trial pursuant to the provisions of Article of War 48.

3. Evidence for the prosecution

Concerning the Specification of Charge I and Charge I

Major Raymond H. Wood, FD, 28th Base Service Squadron, Davis-Monthan Field, Tucson, Arizona, identified two documents which were introduced into evidence without objection as Prosecution Exhibits 1 and 2 and being respectively, the certified true copy of the pay and allowance voucher of accused for the month of May 1946, numbered 1689-4, and a photostatic copy of the original voucher of accused for such month (R.13). Under "Credits" (R.7) both exhibits bear the following entry: "For additional pay for flying from 1 May 1946 to 31 May 1946 - $78.75." On the back of the Prosecution Exhibit 2 and immediately above the signature "Dale M. Jones" there appears the following certificate:

"CERTIFICATE FOR OFFICER CLAIMING FLYING PAY

"I certify that I hold an aeronautical rating as PILOT that during the period for which aviation pay is claimed on this voucher, I was, by orders of competent authority, required to participate regularly and frequently in aerial flights; and, in consequence of such orders, I did participate in regular and frequent

flights, while in a duty status, sufficient to meet the requirements of Executive Order No. 9195, 7 July 1942 (AR 35-1480).

/s/ Dale M. Jones"

The voucher, containing the above "credit" for flying pay for the month stated, was presented to Major Wood, the finance officer, and payment was made thereon on 5 June 1946 as evidenced by accused's receipt therefor, "Item 18," on the face of the voucher (R. 15, Pros. Ex. 2). On or about 10 June 1946, and after receipt of information concerning accused's flying status, Major Wood testified that he contacted accused and asked him if he had "met flight requirements," to which the accused replied that he had not but he further assured Major Wood that he would make every effort to repay the Government. This admission of the accused was voluntarily made and without threat or promise on the part of the Finance Officer. On 22 August 1946 accused repaid the Finance Officer the amount represented as flying pay on the voucher (Pros. Exs. 1 and 2) and obtained from Major Wood his receipt therefor (R. 16-17, Pros. Ex. 3). The receipt recites, "overpayment of flying pay ($78.75) and longevity ($2.75) on vou. #1689-4. May/46 account of undersigned." The defense objected to the introduction into evidence of the Finance Officer's copy of the receipt on the grounds that repayment of the flying pay was not evidence as to whether the accused actually "completed flying time for the month of May." The objection was overruled (R. 20-22). On motion of the prosecution, the court took judicial notice of "AAF Regulation 15-5, Hq AAF, Wash DC 1 Oct 1945," providing, in part, for the recording of all pilot flying time on Form 5, the maintenance of a copy thereof in the righthand side of the individual's Flight Record File and the transmission of the original thereof to the Commanding General, Army Air Forces, Winston-Salem 1, North Carolina, Att: Chief, Flying Safety (R. 23). The court also took judicial notice of AR 35-1480, incorporating Executive Order 9195 and establishing requirements for flight pay (R. 24).

The deposition of Captain Bernard V. Keever, Headquarters Flying Safety Service, Langley Field, Virginia, dated 18 December 1946, was received into evidence and made a part of the record marked for identification Prosecution Exhibit 4. In answer to pertinent interrogatories, Captain Keever stated that he was Chief of the Flight Records Division which was the official depository of the Army Air Forces individual flight record files (Forms 5 and 5A) under Army Air Forces Regulations 15-5 and that all such original forms on all officers on flying status with the Army Air Forces were required to be forwarded to his organization; that if the accused had flown military aircraft during May 1946 his office would have a record of such flights. Captain Keever further stated that there was no record in his headquarters of the accused having received flying time during the month of May 1946 (R. 23, Pros. Ex. 4). The prosecution introduced further evidence showing that in order to qualify for flying pay an officer was required, in one calendar month, to participate in ten or more flights totaling three hours or, in lieu thereof,

to be in the air a total of at least four hours (R. 24).

Concerning Specifications 3,4,7,8 and 9, Charge II

There was received into evidence as Prosecution Exhibit 6 the deposition of Mr. Eugene L. Hill, 340 Hane Avenue, Marion, Ohio, dated 17 December 1946. In answer to the interrogatories therein Mr. Hill stated that during February 1946 he commanded Squadron H, AAF, ORD, Kearns, Utah, and that he knew the accused. During the evening of 27 February 1946 he met the accused in the officers' club at Kearns, Utah. On two occasions accused asked him to indorse checks which he (accused) had executed to the officers' mess and which were in the amount of $25 each. Mr. Hill, then a Major, asked accused if each check was "good." Upon assurance from accused that they were good Major Hill indorsed each and they were cashed by the accused.

Mr. Hill further testified that on 28 February 1946 at the officers' club at Kearns, Utah, he indorsed three checks which were executed by the accused to the officers' mess in the sum of $25.00 each. The accused immediately thereafter cashed these checks. Upon his return from overseas Mr. Hill was required to "take up" all the foregoing checks and pay the officers' mess the amounts shown thereon because they were returned marked "no account." He identified inclosures 1 to 5 inclusive to his deposition as being photostatic copies of the foregoing checks, bearing his indorsement and showing the reason for return. The accused had never repaid the witness (R. 25, Pros. Ex. 6).

Concerning Specifications 5 and 6, Charge II

The deposition of Captain Joseph E. Gazdak, AC, 467th AAF BU, Kearns, Utah, with two inclosures thereto was received into evidence as Prosecution Exhibit 7. Captain Gazdak stated that on 27 February 1946 he indorsed two checks which were executed by accused to the officers mess, each being in the amount of $25 and which were cashed by the accused at the cashier's cage, officers mess, Kearns, Utah. On a subsequent date Captain Gazdak was required to make good the payment of these checks. He identified inclosures 1 and 2 to his deposition as being photostatic copies of these checks, each showing that it was returned "no account." The accused had never repaid the witness (R. 28, Pros. Ex. 7).

Concerning Specifications 10 and 11, Charge II

There was received in evidence as Prosecution Exhibit 8 the deposition of Mr. Stanley O. McNaughton, 502 E. 72nd Street, Seattle, Washington, dated 18 December 1946. McNaughton stated that on 2 November 1945 the accused executed and gave him a check drawn on the Bank of Aurora, Colorado, in the amount of $257.00 and that on 5 November 1945 the accused also executed and gave to him a check in the sum of $339.00 drawn on the same bank. Both checks were for payment of gambling debts and accused showed McNaughton his bank book evidencing sufficient funds to meet payment thereof. He requested however that

McNaughton hold the second check ($339.00) for a few days so that he could buy it back. On 15 December 1945 the accused wired McNaughton $250.00 and stated that if he (McNaughton) could not wait he would borrow the balance of $346 and pay off the debt. These checks show evidence of having been deposited for collection but the indorsement of the collecting bank in each case was cancelled.

The original checks mentioned in Specifications 3 to 11 inclusive were received in evidence, viewed by the court, withdrawn and photostatic copies thereof were received in evidence without objection, as Prosecution Exhibits 13 to 21 inclusive (R. 27-28).

There was read into evidence the deposition of Mr. Joseph DeVries, Assistant Cashier of Bank of Aurora, Aurora, Colorado. Mr. DeVries identified a true copy of the ledger sheet entries concerning accused's account which he personally prepared from the original thereof. He stated that accused's account was opened November 3, 1944 and closed November 23, 1945. He identified inclosures 2 through 9 (checks mentioned in Specifications 2 to 9 inclusive) as having been returned because the accused had no account at the time the checks were drawn. Inclosures 10 and 11 (checks mentioned in Specs. 10 and 11) were returned because of insufficient funds. On 2 November 1945 the accused had $705.52 on deposit, however, on the date the checks mentioned in Specifications 10 and 11 reached the bank, accused's balance had been depleted so as to render it insufficient to meet payment (R. 25, Pros. Ex. 9).

By his deposition duly received in evidence without objection thereto, First Lieutenant Gerard O'Cleary, AC, Secretary and Treasurer of the Officers' Mess, Kearns, Utah, testified that his records showed that nine checks in the sum of $25 which the mess had cashed for the accused, seven having been indorsed by Major E. L. Hill, and two having been indorsed by Captain Joseph Gazdak, were on various dates shown between 7 February 1946 and 13 March 1946 returned dishonored by the bank on account of either "account closed" or "no account" (R. 25, Pros. Ex. 10). By stipulation between the prosecution and defense there was admitted into evidence a sworn statement executed by the accused before First Lieutenant Jack Lewis after accused had been duly warned of his rights. The statement, which is a detailed account of accused's losses at gambling and his domestic difficulties, has little bearing on the charges herein except that accused's admissions carry the implication that his unlawful acts were the result of his critical financial condition and his attempt to cover his losses by continued and reckless gambling (R. 26, Pros. Ex. 11).

4. <u>For the defense</u>

Staff Sergeant Paul A. Piligian, 63rd Bombardment Squadron, Davis-Monthan Field, Tucson, Arizona, was called as a witness for the defense and testified that he was group operations clerk and as such was familiar with Form 5 mentioned

in AAF Regulations 15-5. The only amendment that had been made thereto was "the change of address from Winston- Salem to the Flying Safety Service at Langley Field." Sergeant Piligian asserted that Form 5 was forwarded whether an officer had flying time or not. The form is required to be made out and forwarded every three months, however, the regulations do not require that the receiving officer acknowledge receipt therefor and there is no way for the sender to know whether these forms were received by the addressee (R. 31-32).

After explanation of his rights the accused elected to testify. He admitted writing the checks in question "across the poker table." He had no money in the bank but "was expecting it." He figured that when he got the money he would put it in the bank. His expenses at home amounted to about $250 per month and with flying pay he was receiving approximately $329.00 per month but he had accumulated about $1300 gambling debts of which about $650 had been repaid. He admitted owing the amounts represented by the checks in evidence, but asserted he had repaid Mr. McNaughton $250.00. On cross-examination he admitted his signature on all the checks and admitted that he had no account with the Bank of Aurora when he executed Prosecution Exhibits 12 to 19 inclusive. In response to a question by the court accused stated that he was desperate for money (R. 33-36).

Comments

At the close of the case for the prosecution the defense contended that the corpus delicti as to the specification and Charge I had not been adequately proven and moved for a finding of not guilty as to this charge. The execution of the voucher including flying pay and payment therefor for May 1946 was proven by the Finance Officer paying same. The records of the office which were required by regulations to keep individual flying records showed that accused had no record of flying time for May 1946. This evidence sufficiently satisfied the requirement that the offense alleged had probably been committed (Wharton's Criminal Evidence, 11th Ed. Vol. II, Sec. 641; MCM, 1928, par. 114a, p. 115). The accused admitted to the Finance Officer that he had no flying time for May 1946, promised to and did repay the amount fraudulently acquired on the voucher. While repayment may have evidenced repentance on the part of accused, it did not operate to diminish, in the law, the gravity of the offense already committed. Nor does the fact that accused was desperate for money alleviate the offense. The Board of Review is therefore of the opinion that the proof is adequate to show that the accused presented to the Finance Officer as alleged the false and fraudulent claim for flying pay for the month of May 1946, well knowing the claim to have been false. Knowledge of such falsity is sufficient, the intent to defraud can be presumed (CM 253323, McClure, 34 BR 355).

The proof conclusively shows and the accused admits that when he executed checks on the Bank of Aurora, Aurora, Colorado, mentioned in Specifications 3 to 9, inclusive, of Charge II, he had no funds in the bank. The undisputed evidence further shows that accused's account at the bank had been closed for several months prior to the issuance of these checks. Under such facts and circumstances, the legal presumption is justified that he executed such checks

"then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Aurora for the payment of same."

Although at the time accused executed the checks mentioned in Specifications 10 and 11 of Charge II he had sufficient funds on deposit in the drawee bank to cover payment thereof, the issuance by him of other checks reaching the bank prior to the checks in question depleted his account so as to render it insufficient for payment of the checks to McNaughton. It has been uniformly held that one is charged with knowledge of the day to day condition of his bank account. It was accused's responsibility, backed by his signature and honor, to see that he had sufficient funds on deposit to cover the checks when presented, if they were presented within a reasonable time. Subsequent payment is not a defense (CM 202601, Sperti, 6 BR 171; CM 307491, Haire). Inasmuch as these checks were given at March Field, California, it would be expected that several days would elapse before they cleared. Since the accused, by his actions rendered it impossible for the checks to have been honored, the court could, under all the circumstances conclude that when he made and uttered same he had knowledge that other checks given by him would clear the bank so as to cause dishonor of these checks. The intent denounced in these specifications is not the intent never to cover such checks but the intent not to have sufficient funds to pay them when they were presented in the ordinary course of business to the drawee bank (CM 257417, Sims, 37 BR 117). As has been heretofore stated, a payment of $250 of the total amount of these checks, while a mitigating circumstance, is no defense. The accused stated, and the evidence shows that all the checks mentioned herein were given as a result of gambling transactions. Whatever may be the law with reference to the consideration, it is an offense denounced by Article of War 96 for a person in the military service to issue checks well knowing and not intending that he have sufficient funds on deposit to cover the payment thereof. Such conduct is of a nature to bring discredit upon the military service (CM 258171, Lucas, 37 BR 336; CM 258412, Merker, 38 BR 27).

5. War Department records show that accused is 23 years of age and married. He graduated from high school and on 23 April 1943 enlisted in the Air Corps. After preliminary training as a cadet he was on 8 September 1944 rated as a pilot and commissioned a second lieutenant, AC, AUS, at Army Air Forces Pilot School (Advanced Single Engine), Craig Field, Selma, Alabama. His efficiency ratings are not shown.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 94 or Article of War 96.

Christy D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Robert E. Lockwood, Judge Advocate

JAGK - CM 320020 1st Ind

WD, JAGO, Washington 25, D. C. MAR 1 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 Dale M. Jones (O-838107), Air Corps.

2. Upon trial by general court-martial held on 21 January 1947 this officer was found guilty of presenting to a finance officer a false and fraudulent claim for flying pay for the month of May 1946 in the sum of $78.75, in violation of Article of War 94, of making and uttering seven checks in the sum of $25 each and thereby fraudulently obtaining the amounts shown from the Kearns Officers Mess, well knowing that he did not have any account with the drawee bank, in violation of Article of War 96, and of making and uttering two checks in the respective sums of $339.00 and $257.00, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment thereof, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board 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 evidence shows that on or about 28 May 1946 accused executed and presented to Major Raymond H. Wood, FD, finance officer at Davis-Monthan Field, Tucson, Arizona, a pay and allowance voucher for the month of May containing a credit of $78.75 and certifying that he did for the period claimed participate in regular and frequent flights, while in a duty status, sufficient to meet the requirements of Executive Order No. 9195, 7 July 1942 (AR 35-1480). He collected the flight pay shown for the period alleged. The record shows that he had no flight time for the period of 1-31 May 1946 and accused subsequently admitted this fact to the finance officer. On 22 August 1946 he repaid the amount so collected.

On 27 and 28 March 1946, while engaged in poker games the accused made and uttered nine checks to the Kearns Officers' Mess in the sum of $25.00 each, drawn on the Bank of Aurora, Aurora, Colorado, and collected the amounts shown thereon. On those dates he had no account with the Bank of Aurora, Aurora, Colorado. On 2 November and 5 November 1945 accused made

and uttered to another officer in payment of gambling debts checks drawn on the Bank of Aurora in the sums of $257 and $339.00, respectively. Both of these checks were returned to the indorser because of insufficient funds, outstanding checks having depleted accused's account.

The record shows that accused became financially embarrassed due to his losses at poker and his difficulties were a result of his attempts to recoup his losses. Prior to the trial accused had repaid $250 on the checks last above mentioned. On 12 June 1946 this officer was convicted by general court-martial of absence without leave for the period 18 March 1946 to 5 April 1946 in violation of Article of War 61, and of making a false official statement in violation of Article of War 95. He was sentenced to be dismissed the service. The record of trial in that case is now in my office (CM 315148, Jones). The accused's repeated unlawful acts and reckless behavior render his retention in the service undesirable. I recommend that the sentence in this case be confirmed but that the period of confinement be reduced to one year; that the sentence as thus modified be carried into execution and that a United States disciplinary barracks be designated as the place of confinement. I further recommend that no further action be taken in the former case, CM 315148, Jones.

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. 102, 19 March 1947).

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

JAGH - CM 320028

UNITED STATES v. Private First Class PAUL E. JONES (34546001), Company F, 16th Infantry.	1ST U. S. INFANTRY DIVISION Trial by G.C.M., convened at Landshut, Germany, 9 October 1946. Dishonorable discharge (suspended) and confinement for four (4) years. 7720th Rehabilitation Center, Wurzburg, Germany.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SMITH, 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 to be legally insufficient in part to support the findings 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: Violation of the 92nd Article of War.

Specification: In that Private Paul E. Jones, Company "F", 16th, Infantry did at Landshut, Germany, on or about 8 September, 1946, forcibly and feloniously, against her will, have carnal knowledge of Elisabeth Lux.

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

Specification: (Disapproved by the reviewing authority).

He pleaded not guilty to both Charges and the Specification under each. As to the Specification of Charge I he was found not guilty but guilty of the following:

"In that Private Paul E. Jones, Company 'F', 16th Infantry, did, at Landshut, Germany, on or about 8 September 1946, with intent to do her bodily harm, commit an assault upon Elisabeth Lux, by willfully and

feloniously striking the said Elisabeth Lux on the face with his hand and by threatening her with a dangerous weapon, to wit, a knife",

and not guilty of Charge I but guilty of a violation of Article of War 93. He was found guilty of Charge II and its 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 four (4) years. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. The 7720th Rehabilitation Center, Wurzburg, Germany, or elsewhere as the Secretary of War may direct, was designated as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 145, Headquarters First Infantry Division dated 31 December 1946.

3. The findings of guilty of the Specification of Charge I and Charge I as approved, alleging a violation of the 93d Article of War, present the only question for consideration. It is not necessary to discuss the evidence as the sole point involved is whether the finding of guilty was a legal finding of an offense lesser included in that charged, and whether the findings of guilty support the sentence. The Specification of Charge I alleges rape in violation of the 92d Article of War. The court, however, found accused guilty of an assault with intent to do bodily harm by striking the victim on the face with his hand and threatening her with a dangerous weapon, to wit, a knife, in violation of the 93d Article of War.

Paragraph 148b, Manual for Courts-Martial in pertinent part provides:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent. ***"

"Among the lesser offenses which may be included in that of rape, are assault with intent to commit rape, assault and battery, assault, and an attempt to commit rape."

It has also been held that indecent assault is a lesser included offense in that of rape (CM 248412, Stoddard, 31 BR 257; CM 218643, Bright, 12 BR 103).

Paragraph 78c, Manual for Courts-Martial, 1928 (see also TM 27-255, paragraph 106) provides:

"Lesser Included Offense.—If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter. * * *"

"The true test as to whether an offense found is included in that charged, is that the offense found is included only if it was necessary to the proof of the offense charged to prove all elements of the offense found. * * *" (CM 316917, Morrison, 1st Ind.,6 Bull JAG 12).

Except where a finding with exceptions and substitutions concern figures, dates or other minor details that do not operate to change the nature or identity of an offense alleged, a court may not, in its finding introduce any foreign element that would render the offense a separate or distinct offense from that charged. Findings by exception and substitutions are only authorized where all the elements constituting the offense of which the accused is found guilty, are included in the offense charged. CM 271392 Ebarb, 1 BR (NATO-MTO) 104.

In CM 287472 Gray, 13 BR (ETO) 335, 4 Bull JAG 89, accused was charged with assault with intent to commit rape in violation of Article of War 93 and was found guilty of assault with intent to do bodily harm in violation of Article of War 93. The record was held legally sufficient to support only so much of the findings as involved a finding of guilty of the lesser included offense of assault and battery in violation of Article of War 96. The Board of Review held that assault with intent to commit rape and assault with intent to do bodily harm are separate and distinct offenses and that the latter is not included in the former. Accused having been charged with an assault involving one specific intent, could not properly be found guilty of an assault involving an entirely different type of intent.

In the instant case, although the findings of guilty were not phrased in the usual form for findings of guilty with exceptions and substitutions, the accused was found not guilty of the Specification of Charge I, but guilty of a substituted Specification. Every element of the offense contained in the substituted Specification, not contained in the original Specification must be disregarded, since, as stated above, a court may not introduce any foreign element which renders the offense separate or distinct from that charged. When these elements are excluded from the substituted Specification, the only remaining element which is a lesser included offense of rape is assault and battery (MCM 1928, par. 148b,p.165).

As the substituted Specification contains no elements expressing indecency or an intent to commit rape it follows that accused was found not guilty of any such elements which are included in the original Specification. Although an assault with intent to commit rape and an aggravated indecent assault are lesser included offenses in a charge of rape, the accused has been found not guilty thereof. The elements in the findings of guilty that the assault was committed with intent to do bodily harm and by threatening the victim with a dangerous weapon are elements of aggravation that must be disregarded because they are not included in the original charge. It follows that the findings of guilty are legal only to the extent that they involve a finding of guilty of assault and battery in violation of Article of War 96.

The sentence predicated on the finding of the court is illegal insofar as it exceeds that authorized for assault and battery under the 96th Article of War (CM 243923 Strong, 28 BR 134). The maximum sentence for assault and battery is confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for six months. Two-thirds of accused's pay as a private for one month is $50.00.

4. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves a finding that the accused did at the time and place alleged, wrongfully commit an assault and battery upon the person described in the Specification in violation of Article of War 96 and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of fifty dollars of accused's pay per month for a like period.

[illegible], Judge Advocate.

Waldemar A. Solf, Judge Advocate.

Philip L. Smith, Judge Advocate.

JAGH CM 320028 1st Ind

WD, JAGO, Washington 25, D. C. AUG 11 1947

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½ as amended by Act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522) is the record of trial in the case of Private First Class Paul E. Jones (34546001), Company F, 16th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of Charge I and its Specification be vacated as involves findings other than that the accused did, at the time and place alleged, wrongfully commit an assault and battery upon the person described in the Specification in violation of Article of War 96, that so much of the sentence be vacated as is in excess of confinement at hard labor for six (6) months and forfeiture of $50.00 of the accused's pay per month for six (6) months, and that all rights, privileges and property of which the accused has been deprived by virtue of the portion of the sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect the 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. 288, 25 Aug. 1947).

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

JAGK - CM 320062

23 JUN 1947

UNITED STATES v. Private First Class DAVID B. YENTZER (RA 33878204), Company "A", 6th Engineer Combat Battalion, APO 6.	6TH INFANTRY DIVISION Trial by G.C.M., convened at Pusan, Korea, 27 December and 3 January 1947. Dishonorable discharge and confinement for life.

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

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

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

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

Specification: In that Pfc David B. Yentzer, Company "A", 6th Engineer Combat Battalion, APO 6, did, at APO 6, on or about 18 September 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Whang, Chang Ho, a human being, by repeated blows of a blunt instrument on the head.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Pfc David B. Yentzer, ***, did, at APO 6, on or about 18 September 1946, with intent to commit a felony, viz murder, commit an assault upon Kim, Yong Jun, by willfully and feloniously choking the said Kim, Yong Jun with his hands and with his arm.

Specification 3: In that Pfc David B. Yentzer, ***, did, at APO 6, on or about 18 September 1946, with intent to commit a felony, viz murder, commit an assault upon Moon, Kyong Sand, by willfully and feloniously striking the said Moon, Kyong Sand on the head with a blunt instrument.

Specification 4: In that Pfc David B. Yentzer, *** did, at APO 6, on or about 18 September 1946, with intent to commit

a felony, viz robbery, commit an assault upon Cha, Jung Ok by force and violence and by putting him in fear, feloniously search the person of the said Cha, Jung Ok.

Specification 5: In that Pfc David B. Yentzer, ***, did, at APO 6, on or about 18 September 1946, with intent to do him bodily harm, commit an assault upon Cha, Jung Ok by striking him on the head and body with his fists.

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

Specification: In that Pfc David B. Yentzer, ***, did, at APO 6, on or about 18 September 1946, knowingly and willfully apply to his own use and benefit one (1) 3/4 ton weapons carrier of the value of more than $50.00, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 of Charge II, but guilty of the Charges and the remaining Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence for the Prosecution.

The Specification, Charge III: Staff Sergeant Perry R. Clayton, Headquarters and Service Company, 6th Engineer Combat Battalion, testified that "on the night of 18 September 1946" he was charge of quarters at the headquarters motor pool and was responsible for the dispatching of vehicles. At approximately "7:30" he saw accused and three or four men leave the motor pool in a "3/4 ton weapons carrier with no top on it." (R 8). Sergeant Clayton did not dispatch the vehicle to accused or any of the persons in the truck and the taking of the vehicle was unauthorized. The accused was dressed in fatigues and in response to the question, "How could you see Yentzer driving it," the sergeant replied "Because I know him, sir. I could tell it was Yentzer by just glancing at him. I stayed at the motor pool all the time" (R 37). It was stipulated that the described weapons carrier was property of the United States furnished and intended for the military service and had a value of over $50 (R 37-38). Later "that night" the accused returned with the vehicle and Sergeant Clayton asked him why he "took it" whereupon the accused replied that "he went out to Tongnae and killed a couple of Koreans." The accused's fatigues were "bloody" and "muddy" and blood was found in the back end of the

weapons carrier. The accused proceeded to the shower room, removed his clothes and, in the presence of Clayton, burned his clothing in the stove (R 36).

Specification 2, Charge II: Kim, Yong Jun, a farmer residing at 32-2 Kichall-lli, Pukokr, Pusan, Korea, was affirmed through the interpreter and testified that after he had eaten his supper in the evening of 18 September 1946 he was attracted by headlights of a vehicle in front of his house. He went out to the road and two "American personnel got down from the vehicle, and one American personnel pointing to me, another personnel pointing to my friend." The witness stated that one (soldier) held a pistol to his neck and the other "beat me up". He fell to the ground and "with the accused's arms he choked my neck." Kim stated that he tried to escape and that another "G.I." came up and took the accused to another place (R 27). When he had gotten back on his feet someone fired a pistol and the projectile penetrated his upper right arm. Kim identified a photograph of himself showing the bullet hole in his arm which was received in evidence as Prosecution Exhibit No. 3 (R 28).

Jung, Ha Soo, the mother of Kim, Yong Jun, asserted that she was a Christian and testified through the interpreter that she saw the soldiers assault her son and his friend, Cha, Jung Ok. She could not, however, identify the offenders nor could she describe the truck in which they were riding (R 31-32).

Specifications 4 and 5, Charge II: Cha, Jung Ok, Pukok-Ri, Pusan, Korea, was affirmed and testified that on the evening of 18 September 1946, he was a guest at the home of his friend, Kim, Yong Jun. Observing the brightness of headlights in front of Kim's place, he and Kim went to the gate and suddenly two Americans advanced upon them, one of whom pointed a pistol at his neck. The other American, whom he identified as the accused, struck him on both sides of his face with his fist and then "went through my pockets." The witness stated further that "I begged with him" (accused), but he beat me up very often, and after that, another G.I. still keeping the pistol pointing at my neck, the accused went to Kim, Yong Jun and he beat him up." Cha then ran away and when he had reached the back of the house he heard three pistol shots (R 30). The vehicle in which the accused and his companions were riding was "about middle size truck, and no roof...no top." The accused wore "blue" trousers, his clothes were muddy and wet and "when he beat me up my hands also were muddy." There were about five soldiers in the party (R 31).

Specification 3, Charge II: Moon, Kyong Sand, 262 Myung Yoon Jung, Pusan, Korea, was affirmed and testified through the interpreter that on the night of 18 September 1946, and near the Hot Springs at Tongnae, "a vehicle came and stopped close to me and one G.I. got out from the vehicle, and there was another G.I. in the truck in the front seat pointing the rifles to me, and the G.I. who got out from the vehicle beating me up.

He struck me one blow, and two times I turned my body a little bit so I escaped two blows. The driver, another G.I., got out from the vehicle and forced me to get on the truck." The witness identified accused as the soldier who got out of the truck and assaulted him (R 33). Moon stated that he was beaten until he became unconscious but that he remembered that while he was being choked some "G.I.'s" went through his pockets and took away one package of cigarettes, some shoe heels and a key. The vehicle then "drove a little while" and then stopped. Moon was ordered out of the truck, beaten "with an iron stick" and left by the roadside. Another Korean, passing along the road found Moon and took him to a hospital. Without objection, there was received in evidence as Prosecution Exhibit 4 a photograph of Moon taken by the Tongnae police after he had been treated at the hospital (R 33-34).

The Specification, Charge I: Pak, Sung Dong, a Korean farmer residing at Kuso-Ri, Puk Myun, was affirmed and testified that after eating his supper on 18 September 1946 he heard American voices eminating from a truck as it passed his house. After the truck had proceeded about fifty steps beyond his house it stopped and remained idle for about twenty minutes before leaving. He saw no other trucks on the road that night (R 10-11).

Chung, Ill Chun, another Korean living in the same neighborhood went out to urinate after he had eaten supper on the evening in question and heard "horrible" sound with mingled voices of Americans and Koreans which were coming from the paddy field nearby. Americans often hunted in these fields and the witness stated that he did not "take it seriously" and returned to his house. For ten minutes he heard these voices, and for another ten minutes there was silence and the "vehicle left with the headlights put on" in the direction of Pusan. Repeating, the witness stated "I heard the sound in the paddy, and after that I saw their headlights put on, and the vehicle passed" (R 13-14).

Pak, Moo Kee, a farmer residing at Kusee-Ri, Puk Myun, testified that on the morning of 19 September 1946 he "went to the paddy field to work, and in my paddy field I saw some paddies trampled down and I found the dead body." The dead body was about ten steps from the road and about fifty lengths of his (witness') body from the house where Chung, Ill Chun, lived. The clothes on the dead body were wet and the place was "muddy, murky and trampled down." The witness reported the incident to the village authorities (R 14-15).

Pak, Kyung Soon, 807 Tongnae, Pusan, a Korean policeman working at the Puk Nyun police box, acting on information he had received from the village leader, on 19 September 1946 went to the rice paddy and examined the dead body of a Korean whom he found to be Whang, Chang Ho. Near the body he found a piece of paper with writing thereon. After being interrogated by defense counsel regarding the paper, it was, without objection, received in evidence as Prosecution Exhibit No. 1. The witness

stated that from his investigation, "Now I know the dead man was Whang, Chang Ho." The paper received as Prosecution Exhibit 1 is obviously a leaf from a note book and there was written thereon, in English, the following, "Service A-32, A 33" (R 16-18).

Dr. Pak, Chang Koo, Pusan, Korea, a qualified surgeon, testified that on 20 September 1946 he performed an autopsy and issued a certificate of inquest on the body of Whang, Chang Ho. The doctor described in detail the condition of the body showing severe wounds about the head and stated positively that death was caused by "shock of brain" from severe beating with "stick or iron or strong fist."

The report of autopsy was received in evidence without objection as Prosecution Exhibit No. 2 and was apparently withdrawn at the close of the trial. On cross-examination there was elicited from the doctor an admission that Whang had suffered with kidney trouble, but the witness reaffirmed his conclusion as to the cause of death in the following language,

> "I inquested over the body, but I could not find out that the body drank any poison or he died by disease, but beneath the skin he bled so much and his skin swelled up, so I decided he was killed by another." (R 19-24)

Cha, Pan Suk, Chief of Detectives, Tongnae Police Station, testified that on the night of 18 September 1946 Kim, Yong Hun, and Cha, Jung Ok, reported having been assaulted by Americans in a truck near Kim, Yong Jun's house and on the following afternoon it was reported that a dead body was found in a paddy field. He went to the field, found doctors and Policeman Pak, Kyung Soon, the clerk of the village, and upon investigation the body was identified as that of Whang, Chang Ho. The body was removed and the detective witnessed the autopsy (R 25-26).

First Lieutenant Charles D. Ellison, Headquarters Special Troops, 6th Infantry Division, testified that on 13 October 1946 he interviewed the accused after he had been brought in by an agent of the "C.I.S." He explained to accused his rights under the 24th Article of War, after which accused made a sworn statement to him. The statement, reduced to writing and duly signed and sworn to by accused was received in evidence without objection as Prosecution Exhibit No. 5 (R 38). Briefly summarized, the statement sets forth that about a week before accused was first interrogated (which was on 2 October 1946) some soldiers requested him to take them out to a place called the "water-point", about a mile from the 6th Engineers in the direction of Pusan in order to find some women. He first refused, then secured a truck from the motor pool. The "boys got in and we started off." They had some liquor and in the course of their search "McCarlson" stepped on a plank which struck accused in the

face and he went back to the dispensary where stitches had to be taken in his nose. Accused remembered having a note in his pocket which had been given to him by Sergeant Hamilton, the motor sergeant, stating, "Service A-32, A-33." Sometime during the night he threw the note away (R 38, Pros. Ex. 5).

For the Defense

The accused, after having his testimonial rights explained to him by his counsel and also by the law member of the court, stated that he desired to be sworn as a witness. Upon being asked to relate his "story" concerning the events of 18 September 1946, he stated that after some "heavy drinking" he and some of the "fellows" wanted to go out. They went to the motor pool and requested Sergeant Clayton to let them take the weapons carrier. The sergeant refused but Beatty argued with him and finally he consented. McCarson was driving the truck when they went out the gate. Higgs and Beatty also went along. They drove towards Tongnae and as they approached the city they met a jeep from their outfit. The "man" in the jeep told them that the Koreans down in Tongnae were "acting up" so they put rocks "and everything" in the truck and went into Tongnae. Everything was quiet in the city and the men turned around and started back to camp. They passed one or more Koreans along the road and the truck stopped and Beatty and Higgs got out and "this Korean" started giving them some "back talk". Accused asserted that he hated Koreans, got off the truck and "started to get into them" and "we started a little row there." Accused hit the Korean a couple of times and the Korean struck back and ran into "the rice paddy." Accused followed him and "got up from him and started up." As he left the Korean, he stated that he saw Beatty drop a piece of paper. They got back in the truck and passed another Korean. They stopped and the "other two men" got off first and then accused "started in to fight with this Korean." As they rolled into a ditch the other two men pulled accused off of this Korean and as he got up Beatty "fired at him." He started running and Beatty fired again and they let him go. The truck started driving on down the road and accused stated that "somehow or other" there was a Korean in the truck and that "him and I had a struggle in there." McCarson was driving and the truck failed to negotiate a curve and ran into a ditch. Although accused contended that he was drunk, he took control of the vehicle, put it in four-wheel drive and brought it out. About the time he got the truck out of the ditch the men recognized another vehicle coming toward them. In order to evade notice accused stated that they drove "a little ways and stopped the truck" and "let the other truck pass. It was a KBC truck." They then returned to the company and Sergeant Clayton "asked us where we had been, and I don't remember telling him, but as he says, I told him I killed a couple of Gooks" (R 40-41).

On cross-examination the accused asserted the following: That on the night in question he wore fatigues; that he told the guard at the gate that they were driving over to another guard post; that he hated

Koreans and gave to Beatty the pistol which the latter used on the night in question; that he did not see the Korean get up after he "went after him" in the rice paddy; that the motor sergeant gave him the paper (Pros. Ex. 1) but that he threw it in the waste basket before he left the motor pool; that Koreans and Japanese are all alike and that he "choked" and "rolled" the Korean in the "ditch" but that he was drunk and "couldn't hold myself"; that Beatty shot one of the Koreans after Higgs "pulled me back," McCarson remaining "up there in the drivers seat"; that he beat the Korean in the truck and they threw him out into a ditch; that he did not remember telling Sergeant Clayton that he had killed a couple of them, however, he must have said so because Clayton "wouldn't have said it if I hadn't said it"; that he burned his clothes in the stove at the shower room because they were bloody and dirty; that he drove the weapons carrier to the motor pool, and that it was dispatched "as required", meaning that it could be driven on any required mission and that he did not know why he told the guard that he was going over to the "guard shack" (R 42-55). In response to questions by the court, accused stated that he had been in the Army eighteen months and that he hated orientals because some of his buddies had been killed in the Pacific Theater; that he hit "this man" first but after he had "sassed" the two men in the truck; that when he came out of the rice paddy he did not look back to see if the Korean ever got up and afterward someone mentioned that he had better burn his clothes and "I did"; that the blood must have come from the one he assaulted in the truck because he didn't "attack the man in the rice paddy with anything to make him bleed." (R 55-59)

The court recalled Sergeant Clayton who stated that accused did not appear to be drunk when he returned to the motor pool on the night in question, but that he was not close enough to smell his breath. The witness reasserted that although the men requested permission to take the vehicle, he had refused to dispatch the vehicle to them and that they took it "illegally" (R 59).

5. The Specification, Charge I, alleges murder of Whang, Chang Ho, by repeated blows of a blunt instrument on the head. The dead body of the victim was sufficiently identified by the village authorities, the autopsy shows the nature of the wounds and the surgeon was of the opinion that death was produced by beating with a stick or iron, or strong fist. Accused admitted assaulting this Korean in the rice paddy where the body was found, admitted that immediately thereafter there was blood and mud on his clothes which he burned but denied that he used any instrument other than his arms and body in effecting the assault. His motive was hatred of the Koreans and he did not look back to see if the Korean ever "got up." If Whang died from the injuries he received at accused's hands, there can be no doubt, under the facts proven and admitted, that the offense was murder. But if it be conjectured that Beatty, who was also at the scene, may have inflicted injury upon the victim, which contributed to or caused his death, the accused, being a coactor or aider and abettor is none the less guilty of murder, because,

> "Whoever directly commits any act concerning an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." (Sec. 332, Fed. Criminal Code, 18 U.S.C. A. 550; 35 Stat. 1152)

The distinction between principals and aiders and abettors is also not recognized in military law (Winthrop's Mil. Law and Precedents, Reprint, p. 108; CM 285969, Sanders, 10 BR (ETO) 255,266; CM 314939 Greene, 5 Bull JAG 281; CM 295678 Keech 28 BR (ETO) 22, 28).

It is unnecessary to discuss the elements of the offense of murder as defined in the Manual for Courts-Martial, 1928, paragraph 148a, pages 162-164, inasmuch as the direct and circumstantial evidence in this case, including accused's own brazen and boastful admissions, portray a most brutal and unprovoked killing totally lacking in mitigation or justification in law. All elements of the offense were proven beyond any reasonable doubt.

The victims of the assaults, Kim, Yong Jun, Moon, Kyong Sand, and Cha, Jung Ok, each identified accused as being his assailant.

Specifications 2 and 3 of Charge II allege that the assaults were with intent to commit murder. Kim, Yong Jun (Spec. 2) appears to have been the Korean accused was choking and beating in the ditch when Higgs pulled him off of the victim and Beatty fired the shot into his body. Although neither Kim, Yong Jun nor Moon, Kyong Sand died we believe that the court-martial could reasonably infer from accused's conduct and admissions that the assaults were effected with the intent alleged. At the same time and place, near Kim Yung Jun's house, some one of the American soldiers held a gun on Cha, Jung Ok, while accused assaulted him and "went through his pockets." He had no property therein. Cha gave a vivid description of accused's dress, saying he had on "blue ones" and that they were muddy. Moon, Kyong Sand was the victim who was loaded into the truck and whom accused admitted assaulting therein. The victim asserted an "iron stick" was used on him by the accused. The evidence sufficiently shows that the assault was with intent to commit robbery and also to do bodily harm to the victim independent of the robbery.

With regard to the Specification and Charge III there is a conflict in the evidence as to whether accused and his companions had authority to use the truck. The surreptitious manner in which they procured exit at the gate, viz, by accused asserting that they were going to the "guard shack" and the absence of a dispatch certificate, lend credence to the testimony of Sergeant Clayton that the use was unauthorized and therefore constituted wrongful application to his own use and benefit as alleged. The ownership and value, as alleged, was agreed to in a stipulation signed by accused.

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

substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Christy D. Silvers, Judge Advocate

On Leave
_____, Judge Advocate

Gilbert E. Schroyd, Judge Advocate

W. D., J. A. G. O. Form No. 84
(Revised July 1, 1940)

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Board of Review

CM 320062

18 April 1947

UNITED STATES	6TH INFANTRY DIVISION
v. Private First Class DAVID B. YENTZER (RA 33878204), Company "A", 6th Engineer Combat Battalion, APO 6.	Trial by G.C.M., convened at Pusan, Korea, 27 December and 3 January 1947. Dishonorable discharge and confinement for life. Penitentiary.

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

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

Chester D. Silvers, Judge Advocate.

(Sick in Quarters), Judge Advocate.

Elbert J. Ackroyd, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. JUN 23 1947 To the Commanding General, 6th Infantry Division, APO 6, c/o Postmaster, San Francisco, California.

1. In the case of Private First Class David B. Yentzer (RA 33878204), Company "A", 6th Engineer Combat Battalion, APO 6,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. A radiogram is being sent advising you of the foregoing holding and my approval thereof. Please return the said holding and this indorsement and, if you have not already done so, forward therewith five copies of the published order in this case.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGN-CM 320152

UNITED STATES v. Private JEROY CARTER (43049284), 3581st Transportation Corps Truck Company, APO 317.	)	KOBE BASE Trial by G.C.M., convened at Headquarters Kobe Base, Kobe, Japan, 24 January 1947. Dishonorable discharge and confinement for three (3) years. United States Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, BRACK and BOYLES, 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 Jeroy Carter, 3581st Transportation Corps Truck Company, did, at Kobe, Honshu, Japan, on or about 12 November 1946, feloniously embezzle by fraudulently converting to his own use one bicycle, of a value over $50.00, the property of Tomigo Hirayama, entrusted to him by Saburo Tsuchimochi.

Specification 2: In that Private Jeroy Carter, 3581st Transportation Corps Truck Company, did, at Kobe, Honshu, Japan, on or about 12 November 1946, with intent to commit a felony, viz, embezzlement, commit an assault upon Saburo Tsuchimochi, by willfully and feloniously striking the said Saburo Tsuchimochi, on the body with a metal bar.

Accused pleaded not guilty to, and was found guilty of, the Charge and both Specifications thereunder, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, 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 finding of guilty of Specification 1 of the Charge, and the Charge, and to support the sentence. The only question which will be hereinafter discussed is whether the record of trial is legally sufficient to support the finding of guilty of Specification 2 of the Charge.

4. Evidence for the prosecution:

On 12 November 1942 accused asked a Japanese bicycle dealer named Saburo Tsuchimochi to sell him a bicycle for 300 yen. The dealer advised accused he would not do so as the price of the bicycle was 4000 yen. Accused secured possession of the bicycle from the dealer for examination and after riding up and down the street in front of the bicycle shop he put the bicycle on his truck and drove away (R. 8-10). In pertinent part the testimony of Tsuchimochi follows:

"* * * After he started to drive off I tried to get in the cab and was standing right at the door of it and this soldier drove off toward Komagabayashi-cho and stopped the truck there, and told me to get off but I said I wouldn't. I told him that if he returned the bicycle I would get off. We were discussing it there about five minutes and then he drove the truck toward Itaya-dori and while the truck was headed toward Itaya-dori, I put down the number of the truck in my notebook and when we reached Itaya-dori, the soldier took this notebook away from me.

"Q. Did you say he took the notebook away from you, or did you give it to him?

"A. He took it away from me. The driver stopped the truck at Itaya-dori and stayed there for about five minutes and during this time he struck my hands and arms with an iron bar. The Japanese people saw us struggling and they crowded around, so the soldier took off again. Then he drove the truck toward Ohashi 9-chome. When we reached Ohashi, the soldier told me to get off again and I said I wouldn't get off unless he returned my bicycle. We stopped there for just a while and then he drove down the hill for a few yards and told me to get off again but I answered the same, that I wouldn't get off unless he returned the bicycle. While he was driving down this hill, I was clinging to the bar at the side of the cab and he struck my hands with this iron bar.

"Q. How big was this iron bar?

"A. It was about this long. (Witness indicated about 2½ feet long)

"Q. How big around?

"A. (Witness indicated about 1 inch in diameter.)"

* * *

"Q. You have stated previously that the driver of the truck struck you with an iron bar. On what parts of the body were you struck by this iron bar?

"A. My left shoulder, arm and both hands.

"Q. Were you struck on the body at all?

"A. Just at the back of my shoulder.

"Q. The back of your shoulder you say?

"A. Yes.

"Q. Were you injured by the blows?

"A. My fingers were swollen afterwards" (R. 10, 28-29).

Tsuchimochi later succeeded in removing the bicycle from the truck and returned it to his shop.

5. Evidence for the defense:

No evidence was introduced by the accused and upon being advised of his rights he chose to remain silent.

6. An assault and battery by accused at the time and place and upon the person alleged was clearly proven. The remaining question for determination is whether the "intent to commit a felony, viz., embezzlement" was proven to accompany the act as alleged. We think not. In fact it would clearly appear from the record of trial that at the time of the assault the offense of embezzlement had already been committed and the obvious intent of accused at that time was to escape with his ill gotten gains. Assault and battery in violation of Article of War 96 is a lesser included offense in that charged. The maximum authorized punishment for assault and battery in violation of Article of War 96 is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (par. 104c, MCM, 1928).

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) in this case the embezzlement, for which the maximum authorized punishment is fixed at dishonorable discharge, total forfeitures and confinement at hard labor for five years.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Specification 2 as finds accused guilty of assault and battery upon the person and at the time and place and in the manner alleged, in violation of Article of War 96; legally sufficient to support the findings of guilty of Specification 1 of the Charge, and the Charge; and legally sufficient to support the sentence.

Edward I. Johnson, Judge Advocate

Hugh T. Brook, Judge Advocate

Francis J. Taylor, Judge Advocate

JAGN-CM 320152 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Kobe Base, United States Army, APO 317, c/o Postmaster, San Francisco, California.

1. In the case of Private Jeroy Carter (43049284), 3581st Transportation Corps Truck Company, I concur in the foregoing holding by the Board of Review and for the reasons stated recommend that only so much of the finding of guilty of Specification 2 of the Charge be approved as finds the accused guilty of assault and battery upon the person and at the time and place and in the manner alleged, in violation of Article of War 96. Upon taking such action you will have authority to order the execution of the sentence.

2. In view of the early recovery of the embezzled property and all the other circumstances in the case, it is recommended that the term of confinement be reduced to one year and that a United States Disciplinary Barracks be designated as the place of confinement.

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

(CM 320152).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 320174

19 MAR 1947

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters PHIBCOM, AFWESPAC,
General Prisoner CLIFTON	)	APO 358, 29 November 1946.
W. HOLLAND	)	Confinement for seven (7) years.
	)	United States Penitentiary.

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

1. The record of trial in the case of the general prisoner 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 65th Article of War.

Specification: In that General Prisoner Clifton W. Holland, having received a lawful order from Corporal Anthony Mundziak, a non-commissioned officer who was then in the execution of his office, to move his equipment from one cell to another, did, at AFWESPAC Stockade, Los Banos Laguna, P.I., (APO 75), on or about 5 November 1946, willfully disobey the same.

CHARGE II: Violation of the 64th Article of War.

Specification 1: In that General Prisoner Clifton W. Holland, having received a lawful command from Captain Norman R. Hueston, his superior officer, to go to "C" & "D" Blocks, did, at AFWESPAC Stockade, Los Banos Laguna, P.I., (APO 75), on or about 5 November 1946, willfully disobey the same.

Specification 2: In that General Prisoner Clifton W. Holland, did, at AFWESPAC Stockade, Los Banos Laguna, P.I., (APO 75), on or about 5 November 1946, strike Captain Norman R. Hueston, his superior officer, who was then in the execution of his office, on the face with his fist.

CHARGE III: Violation of the 63rd Article of War.

Specification: In that General Prisoner Clifton W. Holland, did, at AFWESPAC Stockade, Los Banos Laguna, P.I., (APO 75), on or about 5 November 1946, behave himself with disrespect toward Captain Norman R. Hueston, his superior officer, by saying to him, "I want to get at Captain Hueston; Captain Hueston is the one I want to get; you come in here Captain Hueston," or words to that effect.

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

Specification: In that General Prisoner Clifton W. Holland, did, at AFWESPAC Stockade, Los Banos Laguna, P.I., (APO 75), on or about 9 November 1946, with intent to do him bodily harm, commit an assault upon Private Harry A. Tracy, by willfully and feloniously striking the said Private Harry A. Tracy over the eye with a stick.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one 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 sixteen years. The reviewing authority approved only so much of the sentence as provides for confinement at hard labor for seven (7) years, designated the United States Penitentiary, McNeil Island, Washington, 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 accused is a general prisoner under a sentence to dishonorable discharge (executed), forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years, in a penitentiary (GCMO NO. 1715, Hq US Army Forces, Western Pacific, 11 Sep 1946; CM 315806).

The specification of Charge I avers that the accused wilfully disobeyed the lawful order of a non-commissioned officer on or about 5 November 1946, in violation of Article of War 65.

Article of War 65 provides:

"Insubordinate Conduct Toward Noncommissioned Officer.--Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct."

Since the accused was not a soldier at the time of the offense alleged in the Specification of Charge I, and since Article of War 65 is limited in its application to soldiers, it follows that the accused can not be convicted of a violation of Article of War 65.

The Board of Review is of the opinion that the Specification of Charge I was erroneously laid under Article of War 65, but that the offense alleged was a violation of Article of War 96. The error of laying the Charge under the wrong Article of War does not injuriously affect the substantial rights of the accused (Dig Op JAG 1912-40, Sec 394 (21)).

4. The only other question presented by the record is whether confinement in a penitentiary is authorized for the offenses of which the accused was convicted.

5. Article of War 42 provides in relevant part:

"* * * no person shall, under the sentence of a court martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910" (18 USC 468) "or by the law of the District of Columbia * * *" (Underscoring supplied).

It is obvious, without further discussion, that the offenses alleged under Charges I, II, and III were military offenses for which penitentiary confinement is not authorized by Article of War 42.

There remains for consideration whether the finding of guilty of assault with intent to do bodily harm by striking Private Harry A. Tracy over the eye with a stick, alleged in the Specification of Charge IV, warrants confinement in a penitentiary.

Assault with intent to do bodily harm (by some means other than with a dangerous weapon, instrument or other thing) is not denounced by any Statute of the United States of general application within the continental United States or by the law of the District of Columbia. Assault with intent to do bodily harm with a dangerous weapon, instrument,

or other thing is punishable by penitentiary confinement for not more than five years by Criminal Code Section 276, United States Criminal Code (18 U.S.C. 455).

An assault with a dangerous weapon is punishable by penitentiary confinement for not more than ten years by Section 22-502 (6:27), Chapter 5, Title 22, District of Columbia Code. A simple assault is punishable by imprisonment for not more than twelve months under the District of Columbia Code (Sec 22-503 (6:28), Chapter 5, Title 22, D.C. Code).

It follows, from the foregoing authorities that a finding of guilty of assault with "intent to do bodily harm" only will not support a sentence of confinement in a penitentiary (CM 123265, Dig Op JAG 1912-40, Sec 399 (2), p 245).

In the instant case it was not alleged that the stick used by the accused was a dangerous weapon, instrument, or other thing. There was evidence that the stick was used in a manner as to render it likely to produce great bodily harm, but the instrument was nor per se a dangerous one, and the description and use thereof did not, ex vi termini import dangerous character. Punishment as for the greater offense of assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, is not, therefore authorized (CM 210370, Renfroe, 9 BR 263).

There remains for consideration whether the accused may be punished by confinement in a penitentiary for the offenses alleged in this case since he was at the time of the trial, serving a sentence which includes penitentiary confinement.

The first proviso of Article of War 42 provides:

> "Provided, That when a sentence of confinement is adjudged by a court martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence may be executed in a penitentiary."

The foregoing provision of Article of War 42 has been held to authorize confinement in a penitentiary, for several offenses, one of which may be punished by such confinement, only where the various convictions are the result of a single trial. The fact that an accused had been previously properly sentenced to confinement in a penitentiary does not authorize the designation of a penitentiary as the place of confinement upon a subsequent conviction for an offense not otherwise so punishable (CM 143326, Dig Op JAG 1912-40, Sec 399 (5)).

Accordingly the Board of Review is of the opinion that penitentiary confinement is not authorized by Article of War 42 for any offense of which the accused was convicted in this case.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification of Charge I as involves a finding of guilty of this Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of Charges II, III, and IV and all Specifications thereunder and legally sufficient to support only so much of the sentence as involves confinement at hard labor for seven years in a place other than a penitentiary, Federal correctional institution or reformatory.

A. J. Fortenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 320174 1st Ind

WD, JAGO, Washington 25, D. C. APR 11 1947

TO: The Commanding General, Philippines-Ryukyus Command, APO 707, c/o Postmaster, San Francisco, California

1. In the case of General Prisoner Clifton W. Holland, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of Charge I and its specification be approved as involves findings of guilty of the specification in violation of Article of War 96, and that a place other than a penitentiary, Federal correctional institution, or reformatory be designated as the place of confinement. Thereupon you will have authority, under the provisions of Article of War 50½, 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 320174).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGH - CM 320229

7 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
	)	Munich, Germany, 16 December
Private First Class ELI J.	)	1946. Dishonorable discharge
PORTER (RA 38780987),	)	and confinement for three (3)
Infantry, Service Troop,	)	years. The Branch, United
Second Constabulary	)	States Disciplinary Barracks
Regiment	)	

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private First Class Eli J Porter, Service Troop, Second Constabulary Regiment (On detached service with Headquarters and Headquarters Troop, Second Constabulary Squadron, Lenggries, Germany) did near Murnau, Germany, on Highway Number Two (2), on or about 11 August 1946, kill a male German civilian by careless and negligent operation of a government vehicle, two and one half ton truck, six by six.

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

Specification: (Disapproved by the reviewing authority).

The accused pleaded not guilty to all the Specifications and Charges. He was found not guilty of Specification 1 of Charge I, but guilty of all other Specifications and of the Charges. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority disapproved the findings of guilty of Charge II and the specification thereunder, approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The only questions presented in this case are: (a) whether Specification 2 of Charge I states an offense in violation of the Articles of War and (b) if it does state an offense, what is the maximum punishment for a violation thereof. Unquestionably it was the intent of the accuser to allege the offense of involuntary manslaughter since the Charge was laid under the 93rd Article of War.

The evidence establishes beyond any reasonable doubt that the accused while under the influence of liquor operated a government vehicle in a grossly negligent and reckless manner upon a highway in Germany. While so operating the vehicle, he collided with an automobile driven by a German civilian, resulting in such serious injuries to the German that he died shortly after the accident. The killing of a human being under these circumstances constitutes the offense of involuntary manslaughter, which authorises a maximum punishment of three years confinement at hard labor (MCM 1928, 104c).

Specification 2 of Charge I is legally insufficient to charge an offense of manslaughter under Article of War 93. The definition of manslaughter as stated in the Manual for Courts-Martial and as found in a discussion of the 93rd Article of War, the article under which accused is charged, is as follows:

> "* * * manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.
>
> "Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.
>
> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law." (MCM 1928, par 149a).

The specification alleges that the accused "* * * did near Murnau, Germany, on Highway Number Two (2), on or about 11 August 1946, kill a male German civilian by careless and negligent operation of a government vehicle * * *."

It is apparent that the specification, as drawn, falls short of charging the offense of involuntary manslaughter. Allegations of facts essential to the validity or sufficiency of a specification cannot be supplied by mere deduction or speculation. The specification under discussion wholly fails to allege that the accused was culpably negligent in the operation of the motor vehicle which resulted in the homicide. Neither does it allege that the killing was wrongful, unlawful, nor felonious.

It is alleged, however, that the accused, by negligently and carelessly operating a government truck, killed a male German civilian, and ample evidence was introduced to sustain the allegation. Accused's negligent killing of a German civilian on a public highway was conduct of a nature to bring discredit upon the military service and a violation of Article of War 96 (CM 252521, Groat, 34 BR 67).

The second question presented for consideration is whether this offense is one sufficient to support the sentence to confinement as imposed by the court and approved by the reviewing authority. The offense sustainable is not listed in the Table of Maximum Punishments, but an offense similar in all respects is denounced by the law of the District of Columbia. It is provided in Section 40-606 (6:246a), District of Columbia Code that:

> "Any person who, by operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor; and shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or both" (Underscoring supplied).

4. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 2, Charge I, as finds the accused guilty of that specification in violation of Article of War 96, 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 of hard labor for one year.

_____, Judge Advocate

Werner Toebbe, Judge Advocate

Charles Fenwick, Judge Advocate

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

JAGK - CM 320230

31 MAR 1947

UNITED STATES v. Private First Class WILLIAM E. HUFFMAN (35757086), Troop B, 37th Constabulary Squadron	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Wiesbaden, Germany, 3 December 1946. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 69th Article of War.

Specification: In that Private First Class William E. Huffman, Troop "B", 37th Squadron, 3rd Constabulary Regiment, having been duly placed in arrest at Troop "B", 37th Squadron, on or about 14 September 1946, did, at Troop "B", 37th Squadron, on or about 19 September 1946, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Private First Class William E. Huffman, ***, did, near Bad Schwalbach, Germany, on or about 19 September 1946, feloniously, unlawfully and negligently kill Erman Lang, as a result of a vehicle accident.

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

Specification 1: In that Private First Class William E. Huffman, ***, did, at Bad Schwalbach, Germany, on or about 19 September 1946, wrongfully take and use a government motor vehicle, to wit: a quarter ton truck.

Specification 2: In that Private First Class William E. Huffman, ***, did, at Bad Schwalbach, Germany, on or about 19 September 1946, carry an unauthorized German female in a government vehicle in violation of standing orders.

Specification 3: (Nolle prosequi).

He pleaded guilty to Charge I and guilty to the specification thereunder except the words, "Troop B," appearing "in the third line of the specification," substituting therefor the words "Bad Schwalbach," and not guilty to Charges II and III and their specifications. He was found guilty of Charge I and guilty of the specification thereunder, except the words "at Troop B, 37th Squadron," substituting therefor the words "at Bad Schwalbach, Germany," and guilty of Charges II and III and their specifications. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor for three years at such place as the reviewing authority might direct and "to be reduced to the grade of private." The reviewing authority approved the sentence, designated the 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. Accused having pleaded guilty to the material allegations of Charge I and its specification and there being no reason to disturb the court's finding of guilty based on such plea, the discussion herein will be limited to Charges II and III and their specifications.

Evidence for the prosecution

Sometime before daybreak on 20 September 1946 a German civilian, while waiting for a bus, noticed an overturned American jeep from the underneath of which a foot and two hands were protruding. When workers on a milk delivery truck came by, he told one of them to notify the military police in Schlangenbad. The rear bumper of the jeep was marked with the "Constabulary patch" and the letter and numerals "M-32" (R. 6,7). Later, several soldiers came from Schlangenbad and turned the jeep on its side. The body under the jeep was put in a "hospital truck." The civilian had come "from Hattenheim" that morning (R. 26,27).

On the morning of 20 September 1946, First Lieutenant William E. Percy, 317th Station Hospital, on detached service with the Bad Schwalbach Special Services, was "called out to view the body of a German girl who was dead." Approximately one-half mile out of Bad Schwalbach, he came upon a "peep" which "had been turned over, back off the body of the German girl." The girl's chest had been crushed and rigor mortis had set in. She had been dead about four or five hours which would place the time of her death at around three or four o'clock in the morning. There were imprints of the windshield "on her feet" and it seemed as though the steering wheel had crushed her chest (R. 7). Lieutenant Percy was unable to identify the body and it was taken away in an ambulance belonging to the Constabulary, "from 'B' Troop" (R. 29).

Technician Fifth Grade Robert Ewing, Troop "D", 37th Squadron, 3rd

Regiment, about 9:00 A.M. on 20 September 1946 "went down to Special Services in Bad Schwalbach and picked up a body" of a woman. He took the body to a German civilian hospital in Wiesbaden and left it there (R. 8). Wilhelm Lang, a German civilian, identified the dead body of his daughter, "Erma" Lang, in the city hospital in Wiesbaden on 21 September 1946 (R. 9). He had seen his daughter alive for the last time at about 8:00 P.M., 19 September 1946, at which time she had left his house. He did not know accused nor did he know who was accompanying his daughter when she left the house. She could have come in the house and gone out again later, for she had a separate entrance to her room. He had heard no unusual noises in front of his house "about midnight" (R. 27,28).

Captain George C. Mosely, Troop "B", 37th Squadron, accused's company commander, first learned that the vehicle "B-II" was missing about 8:00 A.M., 20 September 1946. He located the vehicle, turned over on its side, about a mile and a half out of Bad Schwalbach (R. 30). He did not give accused permission to remove "a Government vehicle" from the caserne which his troops occupied on 19 and 20 September 1946, nor did he give accused authority to carry a German civilian in a Government vehicle. There were "orders" against carrying German civilians in Government vehicles without prior authorization (R. 10).

Private First Class Ralph Garrett, Troop "B", 37th Squadron, 3rd Constabulary Regiment, saw accused in the Winkel Motor Pool Club about 9:00 or 10:00 P.M., 19 September 1946. He noticed nothing unusual about accused and did not remember whether or not accused was with a girl. This club is about 20 miles from Bad Schwalbach (R. 11,12,28).

Lieutenant Percy, at the request of Captain Mosely, examined the men of Troop "B", 37th Squadron, on 20 September 1946 to determine whether any of them had scratches which would indicate that they had been involved in an "accident." On the thigh of one man, whom he could not identify as accused, he found scratches, or excoriations, "that could have been caused by an accident, although I noticed he had scabies at the time and they could have been caused by scratching with his fingernails" (R. 8). Captain Mosely called the roll of the men in his organization on 20 September and had them come before Lieutenant Percy and strip. Lieutenant Percy found "a couple of skinned places, or abrasions" on accused (R. 10).

Accused, in a signed statement written in longhand which was admitted in evidence over objection of defense counsel (R. 24, Pros. Ex. 1), stated that the 24th Article of War had been read and explained to him and that he had been told that he did not have to make a statement and that if he did it might be used against him. According to this statement, about 6 "o'clock" on 19 September 1946 a kitchen employee brought two bottles of schnapps or cognac to accused's room and accused and a friend proceeded to drink about one and a half bottles of this liquor, the friend drinking "very little" and accused

drinking "the rest." Sometime later he left his troop area and caught a ride to Winkel to attend a club frequented by some friends of his. At this club he drank "at least two water glasses full of champagne and about 6 shots of brandy." He did not remember how he got back to Bad Schwalbach but the next act he recalled was backing "B-11" out of the maintenance shop of Troop "B" between 11:00 and 12:00 P.M. that night. He then drove to "Erma" Lang's house and blew the horn, whereupon she came out and got in the jeep. They proceeded along the road toward Hattenheim and

> "*** about a mile out I remember the jeep started to sway. I was going pretty fast at the time. The next thing I remember I was laying on the ground. I don't know whether I was under the jeep or away from it. I felt gasoline on my back. I got to my feet and immediately started walking away. I was very dazed and didn't notice any details. I then realized I was walking in the wrong direction and turned around and started back. I had had to pass the jeep to get back to Bad Schwalbach. I noticed the jeep on its back then and that it was against a tree and the lights were burning. I did not see the girl. I had forgotten entirely about her. I did not stop to examine the jeep. I kept on walking to Bad Schwalbach along the road that I went out on. ***"

Accused then returned to his room and went to bed. Next follow recitals that the statement is the free and voluntary act of accused, that he was not induced to make it by threats or promises and that it is the truth. The statement is witnessed by Captain Walter Parkins, Provost Marshal, 37th Constabulary Squadron, and Technician Fourth Grade Charles Fish, Provost Marshal Section, 37th Constabulary Squadron, and is dated 21 September 1946.

Evidence for the defense

Accused, his rights as a witness having been explained to him, elected to remain silent on the issue of his guilt or innocence of the charges and their specifications. (R. 26)

4. Evidence re the voluntary nature of the confession

For the prosecution

Captain Walter S. Parkins, 37th Constabulary Squadron, was present when accused made his written statement on 21 September 1946. He did not mention to accused "any possible lesser punishment that he might receive if he signed this statement." After interrogation, accused had "evidently in his own mind decided he'd make a statement," and he was asked to write the statement in his own hand. The statement was in the handwriting of accused, signed by him, and witnessed by Captain Parkins and Sergeant Fish, a member of

Captain Parkins' office. That part of the statement referring to accused's rights under the 24th Article of War and the "ending" was dictated to accused (R. 12,13,24). Staff Sergeant Charles Fish, Headquarters, 37th Constabulary Squadron, was also present when accused wrote his statement. Accused was not, in the sergeant's presence, given any hope of a light punishment in return for making the statement (R. 25,26).

For the defense

Accused, having been advised of his rights, elected to testify under oath as to the voluntary nature of his pre-trial statement. About 11:30 A.M. on 20 September 1946, after a formation for a medical inspection of the men in accused's organization, accused was called to the orderly room and

> "*** the Captain put me in one room, the big radio room. I was kept in there and questioned about every two hours. I was kept there that evening, and all that night, and the guard was told that I wasn't to go to sleep, that if I did he was to shoot under my chair. The Captain came in about eleven-thirty and accused me of taking a jeep, and he said, 'I betcha you do remember.' He said it like he was ready to hit me. He had his fist doubled up ready to hit me. He told the guard, 'Shoot under his chair if he goes to sleep. Keep him awake all night long.' There was an awful storm that night, and I was wearing just a suit of fatigues, no under clothes, and they kept me there all that night and kept me up, and the next morning they started calling me back again to question me. Then about noon -- I had no chow -- at noon -- they were still calling me in and asking me questions, and I was getting hungry and thought it was just as well to tell them something so I could get something to eat. I was cold all through, and getting stiff." (R. 14-15)

About 1:30 P.M. on the afternoon of 21 September accused "started telling a little stuff" and "they" let him go to eat and then told him he was to take his time, all afternoon if he had to, to write up his statement. Captain Mosely, Captain Parkins and a "CID man" did the questioning. He knew what to put in the statement because he had overheard "the Captain" talking about what time the jeep was found and he "just heard some of the boys talking around there." "The captain," at the time he was questioning the accused, had stated the name of the girl. Accused did not know the girl. He had heard the first sergeant say the reason the formation was being called was because the maintenance jeep had been upset and a German girl killed "last night." Accused knew the jeep's number was "B-11." One of his friends, named Fletcher, had told him where the accident had taken place. There were really large windows in the radio room and there was no way to get warm. The guard was instructed to sit at one end of the room and accused at the other so that no one could talk to him. The guards'

names were Myers, Truex, Brenner and Tucker. Myers had gone back "to the States." He did write in his statement words to the effect that the statement was voluntary and that it was the truth, but he was cold and hungry and wanted "to get it over with and get out of there" (R. 14-16).

Technician Fifth Grade Jay Brenner, Troop "B", 37th Constabulary Squadron, was one of the guards over accused in the radio room. His hours of duty were from 10:00 to 12:00 A.M. and 2:00 to 4:00 P.M. on 21 September. He sat on one side of the room and accused sat on the other. Accused had on a pair of coveralls or fatigues and it was cold in the room. During his two tours of duty he brought accused to the orderly room twice. Technician Fifth Grade Brenner did not hear anyone say, "Keep him awake, and if he nods his head, shoot under his chair," but did receive instructions not to let accused talk to anyone and to "keep him awake" (R. 17,18). Private Allen Tucker, Troop "B", 37th Constabulary Squadron, was a guard over accused in the radio room from 2:00 to 4:00 A.M. and from 8:00 to 10:00 A.M. on 21 September. Accused sat at one end of the room and the guard at the other. Private Tucker had no orders to keep accused sitting down. Accused had on a set of fatigues and it was cold in the room. Private Tucker wore a fatigue jacket and a field jacket and "was still cold." No one visited accused during these two tours of duty and he was not taken out of the room for questioning. Private Tucker did not receive instructions to shoot under accused's chair if accused went to sleep but was told by the sentinel he relieved not to let accused go to sleep. He saw accused in the mess hall that morning (R. 18-20). Private First Class LeRoy Truex, Troop "B", 37th Constabulary Squadron, was a guard over accused in the radio room from 12:00 to 2:00 A.M. and from 6:00 to 8:00 A.M. on 21 September. Accused had coveralls on and it was cold in the room. At no time during Private Truex's tours of duty was accused taken from the room for questioning but when he relieved a guard named Myers a "CID" man was in the room talking to accused. He received no instructions to shoot under accused's chair if accused nodded his head, but was ordered not to let accused talk to anyone or to go to sleep. Accused had breakfast on 21 September (R. 20-21). Captain Parkins questioned accused on 20 and 21 September and took a statement from him on 21 September. He talked to accused four or five times before the statement was taken. On 20 September accused "evidently didn't want to make a statement" (R. 22).

5. It becomes apparent from a perusal of the evidence in this case that accused's pre-trial statement constitutes a full and complete confession to the offenses set forth in Charges II and III and their specifications. The details therein recited at least tend to show that the circumstances surrounding accused's operation of the jeep just prior to the fatal misadventure were attended by that degree of culpable negligence necessary to a conviction of involuntary manslaughter (see CM 313965, Holley; CM 303912, Gerringer, 28 BR (ETO) 235). Such details also necessarily contain

an admission of guilt as to the wrongful taking and using of a Government vehicle and the wrongful transporting of a German civilian. Indeed, it is only through the medium of his confession that accused is in any way linked with the events culminating in the discovery of the overturned jeep with the dead body of a German girl pinned underneath. Aliunde this confession, whatever may be said concerning the sufficiency of the corroborating evidence, the testimony elicited at the trial rises to no higher level of proof than to provide a mere suspicion of accused's complicity in the offenses here under consideration. Accordingly, if upon examination by the Board of Review accused's confession is found to have been procured by illegal means, the findings of guilty as to these offenses and so much of the sentence as is necessarily based upon such findings must be set aside.

Stripping from the voluminous evidence concerning the taking of the confession all those contentions of accused which were met by contrary assertions adduced by the prosecution, concerning which controverted circumstances the findings of the triers of fact in favor of the prosecution are final and conclusive, there yet remains uncontradicted evidence of coercion in the procuring of accused's statement (see CM 316986, Boykin). It was not denied by the prosecution, nor was any attempt at a denial made, that accused was confined under constant guard to the radio room of his organization, except for intervals of interrogation in the orderly room, from about 11:30 A.M. on 20 September 1946 until his confession was obtained sometime on the afternoon of 21 September, that during this period of confinement he was not permitted to sleep or to speak to any one and that, although the temperature in the radio room was so low that one of the guards "was still cold" while wearing a field jacket, accused had to endure the rigors of his all-night vigil inadequately clad in but a suit of fatigue clothes.

It has often been said that the fundamental reason for the exclusion of a confession not voluntarily made is the obvious probability that such a confession would not reflect the truth (see CM 313786, Howard). Here, it may be noticed, the officer who took accused's confession stated that on 20 September accused "evidently didn't want to make a statement." On 21 September, however, accused succumbed to the desires of his inquisitors and gave as a reason for confessing as he did that he "was cold all through, and getting stiff," that he wanted "to get it over with and get out of there." He also stated that he had made up his story out of whole cloth from information he had obtained prior to his incarceration and from conversations he had overheard subsequent thereto and that he did not know the decedent, "Erma" Lang. Considering the circumstances under which accused's purported confession was procured, this may well have been so. The statements appearing at the beginning and end of the confession to the effect that accused had been warned of his rights under the 24th Article of War and that the confession was voluntary and contained the truth, being affected by the same taint of coercion as the other statements therein, will not preclude a determination that such confession

was in fact involuntary (CM 274678, Ellis, 47 BR 271,284).

In Wan v. United States, 266 U.S. 1, petitioner had been convicted of murder and his confessions, obtained only after seven days of interrogation, were admitted in evidence at the trial. During this prolonged period of interrogation, petitioner was sick with a stomach ailment and was weak and exhausted. Guards were constantly stationed in the hotel room where he had been detained by the police. On the day he finally began his series of confessions he had been subjected to constant questioning from seven o'clock in the evening until five o'clock in the morning and was not allowed a moment of sleep. The Supreme Court said:

> "In the Federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily although it was made to police officers, while in custody and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise ***. None of the five statements introduced by the Government as admissions or confessions was made until after Wan had been subjected for seven days to the interrogation. The testimony given by the superintendent of police, the three detectives and the chief medical officer left no room for a contention that the statements of the defendant were, in fact, voluntary. The undisputed facts showed that compulsion was applied. As to that matter there was no issue upon which the jury could properly have been required or permitted to pass. The alleged oral statements and the written confession should have been excluded."

(See also CM 302675, Tielemans, 26 BR (ETO) 233,243, and cases therein cited.) On the other hand, it has also been held that mere protracted questioning or solitary confinement of accused, standing alone and unaccompanied by any deprivation of the brute necessities of life or by any unnecessary imposition of other physical discomfort, does not require the exclusion of a confession obtained from accused under such circumstances on the ground of its involuntary nature (Lisenba v. California, 314 U.S. 219, 239; CM 252086, Kissell, 33 BR, 331,342). However, the Board of Review is of the opinion that between the Scylla and Charybdis of the above two lines of decision, the course set by the circumstances disclosed in the instant case must bring shipwreck to the confession here under consideration and to the findings and sentence based thereon.

Although the official coercion exhibited by the evidence in this case is not of such gross caliber as that displayed in the Wan case or in many other cases where the Supreme Court of the United States has found it necessary and proper to invoke the safeguards to human liberty set forth in the

Fifth Amendment to the Constitution, the conduct which we here decry varies only in degree, as do all other third degree methods which courts operating under our system of justice have consistently struck down, from the medieval torture of the rack and the thumb-screw. This so-called "sweating" method of obtaining admissions of guilt from those accused of crime has been universally condemned not only because of its illegality but also because of its tendency to bring the administration of justice into disrepute (Lang v. State, 178 Wis. 114,189 N.W. 558, 24 A.L.R. 680). We condemn it here for the same reasons and hold the confession of accused to be involuntary and inadmissible in evidence.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its specification, legally insufficient to support the findings of guilty of Charges II and III and their specifications, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

Chester D. Gilbert, Judge Advocate

(Sick in Hospital), Judge Advocate

Gilbert E. Schroyer, Judge Advocate

JAGK - CM 320230 1st Ind APR 17 1947

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 Private First Class William E. Huffman (35757086), Troop B, 37th Constabulary Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, legally insufficient to support the findings of guilty of Charges II and III and their specifications, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period, which holding is hereby approved. Upon disapproval of the findings of guilty of Charges II and III and their specifications and the approval of only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period, 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 320230).

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 320233

23 APR 1947

UNITED STATES	)	FORT BENNING
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 26 November 1946. Confinement for six (6) months, and forfeiture of $30.00 pay per month for like period. Post Detention Barracks, Fort Benning, Georgia.
Staff Sergeant WALTER H. FLEMING (35002224), Company B, 37th Infantry, School Troops, The Infantry School, Fort Benning, Georgia.	)	

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

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

2. Accused pleaded not guilty to and was found guilty of seven specifications alleging the fraudulent obtaining of money by means of making and uttering certain checks then knowing that he did not have or not intending that he should have sufficient funds on deposit in the drawee banks for the payment of such checks, all specifications being in violation of Article of War 96. He was sentenced to be "reduced to the grade of private," 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 six months. The reviewing authority approved only so much of the findings of guilty of the specifications as involved findings of guilty of wrongfully failing to maintain a sufficient bank balance to meet payment of the checks described in the specifications and only so much of the sentence as imposed confinement at hard labor for six months and forfeiture of thirty dollars of accused's pay per month for a like period, ordered the sentence as thus modified executed and designated the Post Detention Barracks, Fort Benning, Georgia, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 1, Headquarters, Fort Benning, 11 February 1947.

3. On page 3 of the record of trial it appears that when accused was asked by the trial judge advocate whom he desired to introduce as counsel, he stated that he desired to be defended "by the regularly

appointed defense counsel and Captain Van Cleave P. Warren, O-24856, Infantry." In the order appointing the court which tried this case "Captain Joseph H. Rouse O-404226 Infantry" was detailed as defense counsel (R. 1). This officer was present at the hearing in the capacity of defense counsel and signed the record of trial indicating that he had examined the same before it was authenticated (R. 2, 31). Captain Van Cleave P. Warren apparently functioned as individual defense counsel at the trial and signed a recommendation for clemency on behalf of accused which is appended to the record of trial (R. 20; Recommendation for Clemency). It appears from the papers accompanying the record of trial that Captain Joseph H. Rouse was appointed to investigate the charges upon which accused was here tried and that, as such, he recommended trial by general court-martial. It appears from the charge sheet that "V.P. Warren, Capt. Inf" signed and swore to the charges as accuser. In announcing the names of the accuser and investigating officer, the trial judge advocate stated (R. 3):

> "Accuser: Van Cleave P. Warren, Captain, Infantry. -
> Investigating Officer: Joseph H. Rouse, Captain, Infantry."

4. It thus appears that Captain Joseph H. Rouse was both investigating officer and regularly appointed defense counsel and that Captain Van Cleave P. Warren was both accuser and individual defense counsel.

In CM 316898, Mesquite (5 Bull. JAG 332), the investigating officer who had recommended trial by general court-martial was the regularly appointed defense counsel and functioned as such at the trial. The Board of Review 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 CM 319176, Henry, applying the rule in the Mesquite case, we held the record of trial legally insufficient to support the findings and sentence where it appeared that the investigating officer who had recommended trial by general court-martial acted as regularly appointed assistant defense counsel at the trial. Following this trend of authority, we held in CM 320391, McDonald, that since it appeared that the accuser who had signed and made oath to the charge and specifications,

thus formally announcing his belief in accused's guilt, performed the duties of regularly appointed defense counsel at the trial, the findings and sentence were invalid, there being no showing that accused particularly desired to retain the services of that officer in spite of his apparently inconsistent role as accuser (see also Glasser v. United States, 315 US 60, 76).

In each of the three above cited cases the record of trial contained a statement that accused desired to be defended by the regularly appointed defense counsel and in the Henry case accused had stated that he desired to be defended by the regularly appointed defense counsel and assistant defense counsel. The Board of Review did not consider these somewhat formalized statements the equivalent of a specific request to be defended by such regularly appointed defense counsel in preference to or along with other counsel. However, in the McDonald case, modifying the earlier rule laid down in CM 284066, Mejie (4 Bull. JAG 334), we took care to point out that in accordance with the plain mandate of Article of War 17 that "The accused shall have the right to be represented in his defense before the court by counsel of his own selection," there could be no legal objection to accused being represented by one who had officially or otherwise announced his belief in accused's guilt, provided accused particularly desired to be defended by such counsel.

Thus it may be said that an accused is entitled as of right to request, either personally or through counsel, that the accuser, investigating officer, or other person who has indicated a belief in accused's guilt, be permitted to act as his individual defense counsel or that a regularly appointed defense counsel remain to defend him in any capacity even though such counsel be an officer who has expressed views inconsistent with accused's innocence. A refusal of such a request, if the desired defense counsel is reasonably available, might well amount to a denial of due process of law. Where an accused insists upon retaining the services of a regularly appointed defense counsel after having been informed of such counsel's prior actions as accuser or investigating officer, or where he introduces to the court individual defense counsel who has performed such duties, we can only assume that for reasons acceptable to him, even though undisclosed, accused has elected to stand or fall on the merits of his case as presented by counsel of his own selection (see CM 252284, Simmons, 4 BR (ETO) 1, 3; Tompsett v. Ohio, 146 F. (2d) 95). However, actual misfeasance of defense counsel, appointed or individual, occurring during the course of the trial will always be considered as grounds for a reversal (CM 316970 Howard, 26 BR (ETO) 197, 201).

Applying the above rules to the instant case, it can readily be seen that no error lies in the circumstance that accused's individual

defense counsel, Captain Warren, was the accuser. Although, having regard to the Mesquite decision, the representation of accused by Captain Rouse, who was both regularly appointed defense counsel and investigating officer, would seem at first blush to constitute error prejudicial to the substantial rights of accused, we are nevertheless of the opinion that under the circumstances herein disclosed the statement of accused that he desired to be defended by the regularly appointed defense counsel and the individual defense counsel was the equivalent of an insistence on his part that the regularly appointed defense counsel remain to defend him along with counsel of his own selection. Any other interpretation of this statement of accused would appear to be foreclosed by the following language of Article of War 17:

> "* * * Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel" (underscoring supplied).

Accused could not have been misled as to Captain Rouse's prior status as investigating officer, for this fact was announced in open court by the trial judge advocate.

5. The findings of guilty, as approved by the reviewing authority, being sustained by ample evidence, the Board of Review, for the above stated reasons, holds that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority.

Christy D. Silvus, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Schwartz, Judge Advocate

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

JAGH - CM 320240

JUN 1947

UNITED STATES	)	THIRD ARMY
v.	)	Trial by G.C.M., convened at Heidelberg, Germany, 27 December 1946. Dismissal
Captain JAMES W. DUNLAP (O-1945117), Transportation Corps	)	

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 61st Article of War.

Specification: In that Captain James W. Dunlap, attached-unassigned, 207th Replacement Company, 3rd Replacement Depot, did, without proper leave, absent himself from his organization at Marburg, Germany, from about 20 August 1946 to about 26 September 1946.

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

Specification: In that Captain James W Dunlap, attached-unassigned 207 Replacement Company, 3rd Replacement Depot, did, without proper leave absent himself from his organization at Tannenberg Caserne Marburg, Germany, from about 21 November 1946 to about 24 November 1946.

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

Specification 1: In that Captain James W Dunlap, attached-unassigned 207th Replacement Company, 3rd Replacement Depot, did, at Tannenberg Kaserne, Marburg, Germany, on or about 3 December 1946, with intent to deceive Major NED E ACKNER, officially depose under oath to the said Major NED E ACKNER, that; "Before me, the undersigned authorized to administer oaths in cases of this nature, personally appeared Captain James W Dunlap, who having been duly sworn according to law and explained his rights under AW 24, deposed and stated:

"I was attached-unassigned to the 207th Repl Co, on the 27th of September 1946 and placed in arrest of quarters for one week. I was notified in writing of my release from arrest of quarters on 3 October 1946. From 3 October to 24 November 1946 I have never been given an assignment or an order to report to any person at any specific time or place daily for purposes of being recorded in the morning report. During this period I understood that I was allowed to go any place in the area of the City of Marburg and the Tannenberg Kaserne. I usually saw Captain Darrah in the area or at mess and considered this sufficient evidence of my presence for accounting purposes in lieu of orders. I have never used a sign-in or sign-out register while assigned to this Company nor have I been instructed to do so.

"I was in the limits of the City of Marburg or the Tannenberg Kaserne during the period 0001, 21 November to 1900, 24 November 1946."

/s/
/t/ JAMES W DUNLAP 0-1945117
Captain TC

"Subscribed and sworn to before me this 3rd Day of December 1946

/s/
/t/ NED E ACKNER
Major CAC
Investigating Officer"

which affidavit was known by the said Captain James W Dunlap to be untrue in that he was not at Tannenberg Kaserne or Marburg, Germany.

Specification 2: In that Captain James W Dunlap, attached-unassigned 207th Replacement Company, 3rd Replacement Depot, did, at Tannenberg Caserne Marburg, Germany, on or about 3 December 1946, with intent to deceive Lieutenant HOMER K CURTIS, officially depose under oath to

the said Lieutenant Colonel HOMER K CURTIS, that; "Before me, the undersigned authorized to administer oaths in cases of this nature, personally appeared Captain James W Dunlap, who having been duly sworn according to law and explained his rights under AW 24, deposed and stated:

"I was attached unassigned to the 207th Repl Co on the 27th of September 1946 and placed in arrest of quarters for one week. I was notified in writing of my release from arrest of quarters on 3 October 1946. From 3 October to 24 November 1946 I have never been given an assignment or an order to report to any person at any specific time or place daily for purposes of being recorded in the morning report. During this period I understood that I was allowed to go to any place in the area of the City of Marburg and the Tannenberg Kaserne. I usually saw Captain Darrah in the area or at the mess and considered this sufficient evidence of my presence for accounting purposes in lieu of orders. I have never used a sign-in or sign-out register while assigned to this Company nor have I been instructed to do so.

"When I came to my room on the night of November 21st, I noticed that painter's materials had been left in this room. I didn't ask anyone regarding to whom they belonged. It was some time after that when I found out they belonged to Hans Meyer, a German civilian artist.

"I was in the limits of the City of Marburg or the Tannenberg Kaserne during the period 0001, 21 November to 1900, 24 November 1946.

/s/
/t/ JAMES W DUNLAP 0-1945117
Captain TC

"Subscribed and sworn to before me this 9th day of December 1946.

/s/
/t/ HOMER K CURTIS 0-363908
Lt Col F A
Investigation Officer"

which affidavit was known by the said Captain James W Dunlap to be untrue in that he was not at Tannenberg Kaserne or Marburg, Germany.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. 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:

a. Charge I (Absence without leave): The prosecution introduced in evidence an extract copy of an order dated 16 August 1946 (Pros Ex 1) transferring accused from the 11th Traffic Regulating Group to the 69th Replacement Battalion, with EDCMR of 20 August 1946. It was stipulated that the order was a true copy and that it was issued by proper authority (R 6).

An extract copy of the morning report of the 11th Traffic Regulating Group for 20 August 1946, showing accused transferred in accordance with the above order, was received in evidence over the objection of defense counsel (R 7; Pros Ex 2).

On 26 September 1946, Captain James E. Kelly of the Provost Marshal Section, Continental Base Section, Bad Nauheim, Germany, called the Provost Marshal at Frankfurt, requesting that accused be "picked up." Captain Kelly then went to Frankfurt, found accused in the office of the Provost Marshal and took accused back to Bad Nauheim, where he turned him over to the Chief of Transportation (R 8-9).

An extract copy of the morning report of the 207th Replacement Company, 3rd Replacement Depot, for 1 October 1946, showing the accused attached unassigned but not yet joined as of 20 August 1946, joined as of 27 September 1946 and from duty to arrest in quarters as of 27 September 1946, was received in evidence over the objection of the defense (Pros Ex 3; R 10). The company commander who signed the morning report testified that he did not take command of the company until 28 September 1946 (R 10).

A pre-trial statement of the accused (Pros Ex 6) was received in evidence (R 14). Accused stated therein that he reported to the 69th Replacement Depot at Marburg on 20 August 1946 and was told to report to the 3rd Replacement Depot at Bremerhaven Staging Area for redeployment to the United States, and that he went to Frankfurt on the same day to request extended service in the European Theater.

b. Additional Charge I (Absence without leave): Extract copies of the morning reports of the 207th Replacement Depot for 23 November 1946, showing the accused from duty to AWOL as of 0001 hours, 21 November 1946 and for 24 November 1946, showing accused from AWOL to duty as of 1900 hours, 24 November 1946, were received in evidence. (Pros Exs 4, 5; R 11). The company commander testified that he had not seen accused in the company area during the period from 21 to 24 November, that he made an inspection

of the entire area on 22 November, and that witness went to an apartment house in Marburg where accused had a room, to look for him (R 12-13). He further stated that accused was free to leave the Kaserne and to go to the City of Marburg, that the company maintained no officers' register, and officers did not need permission to leave the Kaserne, but used their AGO cards as passes (R 13-14).

Miss Hertha Witte testified that she left Marburg on a trip on 20 November 1946, but when asked who had accompanied her, refused to answer (R 17-19). After she had been threatened with contempt proceedings (R 19), she testified that accused had accompanied her to Cologne on 20 November and had been with her continuously until 23 November, when they returned to Marburg (R 19-20).

c. Additional Charge II (False affidavits): Accused went to Cologne on 20 November 1946 and returned to Marburg on 23 November (R 19-20).

(1) Specification 1: Major Ned E. Ackner testified that he was appointed to investigate charges of absence without leave against accused, and that on 3 December 1946 accused made a voluntary sworn statement in the course of such investigation, stating that "I was in the limits of the city of Marburg or the Tannenburg Kaserne during the period 0001, 21 November to 1900, 24 November 1946." (R 22; Pros Ex 8). As a result of such statement, Major Ackner recommended that no charges be preferred against accused (R 23).

(2) Specification 2: Lieutenant Colonel Homer K. Curtis testified that he was appointed to investigate charges of absence without leave against accused and that on 9 December 1946, in connection with such investigation, accused made a voluntary sworn statement, stating that "I was in the limits of the city of Marburg or the Tannenburg Kaserne during the period 0001, 21 November to 1900, 24 November 1946." (R 23-24; Pros Ex 9).

4. The accused, after having been apprised of his rights, elected to remain silent, and the defense offered no evidence.

5. a. Charge I (Absence without leave from 20 August to 27 September): It was shown by the evidence introduced by the prosecution that the accused was absent from his unit at Marburg, Germany, from 20 August to 27 September 1946. It was not shown, however, that such absence was unauthorized. The morning report entries introduced did not show the accused as absent without leave. It was shown that the accused was in Frankfurt on 26 September and that he was returned from Frankfurt to Bad Nauheim and placed in arrest in quarters. The accused's pre-trial statement shows that he went to Frankfurt, but nowhere does it appear that the trip was unauthorized. It was held in CM 125261 (Sec

419(2), Dig Op JAG, 1912-40), that failure to introduce evidence showing that the absence was unauthorized is fatal to a finding of guilty of absence without leave.

In CM 126112 (op cit), it was held that absence without leave may be inferred from the circumstances, and the requirements of proof are substantially met if the circumstances are such that it would be unreasonable to suppose that the accused could have obtained leave for the purpose of his absence. This is not such a case, for the avowed purpose of the accused in absenting himself from his organization was to obtain permission to remain in the European Theater instead of returning to the United States. It is conceivable that the accused had obtained permission for such a mission, and the circumstances are as consistent with the innocence of the accused as with his guilt.

In CM 317087, Osbourne (5 Bull JAG 335), where the circumstances raised a stronger inference that the absence was unauthorized than do the facts in the instant case, it was held that the record of trial was legally insufficient to support the findings of guilty, since "Absence itself is not the gist of the offense, but absence without proper leave." In that case, the accused was absent for a period of nearly five months, living in a private home, wearing civilian clothes part of the time and was in the hands of the civil authorities when he was apprehended by the military police.

The Board of Review is therefore of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification.

b. Additional Charge I (Absence without leave from 21 November to 24 November 1946): The absence alleged is proved by a duly authenticated extract copy of the morning report of accused's organization and the direct evidence of his company commander. Although the accused's organization was loosely operated and maintained no officers' register, the fact that the accused was carried on the morning report as absent without leave is sufficient evidence to show that he was not authorized to leave the Kaserne or the City of Marburg.

The defense objected to the action of the court in requiring Miss Witte to testify relative to accused's absence, over her objection that her testimony might incriminate her. Whether that ruling was in error is immaterial, insofar as the issues in the instant case are concerned, for the immunity from self-incrimination is personal, and only the person whose rights are violated is entitled to object. (Wharton's Criminal Evidence, 11th Ed, Sec 1143, p. 1981). The accused's rights, therefore, were not affected by any possible invasion of the rights of the witness, and the question of the propriety of forcing her to testify, insofar as it concerns this case, is immaterial.

c. Additional Charge II (False affidavits): It is alleged in Specifications 1 and 2 of this Charge, that accused, by affidavits dated 3 and 9 December 1946, made the following statement in each which was known by him to be untrue: "* * * I was in the limits of the city of Marburg or the Tannenberg Kaserne during the period 0001, 21 November to 1900, 24 November 1946. * * *." The accused contends that, since the evidence shows that he was in the City of Marburg during a part of that period, the statements are not false. Such a position is untenable, for to the mind of any reasonable person, such a statement as that made by the accused carries the implication that the accused was in the two places named, and no place else, during the period specified. That the statements were made with the intent to deceive is reasonably inferable from their nature, and from the fact that, relying on the statement alleged in Specification 1, the investigating officer to whom it was made recommended that the charge of absence without leave from 21 November 1946 to 24 November 1946 be dismissed.

6. The accused is 47 years of age, married and a high school graduate. War Department records show that he served honorably as an enlisted man from 24 March 1918 to 3 April 1919 and from 9 April 1942 to 30 March 1943, when he was discharged to accept a commission upon graduation from Army Administration Officer Candidate School. He was commissioned a second lieutenant, Army of the United States, and entered upon active duty on 31 March 1943. He was promoted to the rank of first lieutenant on 12 July 1943 and to the rank of captain on 1 January 1945.

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. 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 findings of guilty of Additional Charges I and II and the Specifications thereunder, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 and is mandatory upon conviction of a violation of Article of War 95.

_____, Judge Advocate

Walkemar A. Solf, Judge Advocate

_____, Judge Advocate

JAGH - CM 320240 1st Ind

WD, JAGO, Washington 25, D. C. JUN 23 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 Captain James W. Dunlap (0-1945117), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 20 August to 27 September 1946 and from 21 to 24 November 1946, in violation of Article of War 61, and of two specifications of making a false affidavit, with intent to deceive, in violation of Article of War 95. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification (absence without leave from 20 August to 27 September 1946), legally sufficient to support the findings of guilty of Additional Charges I and II and the Specifications thereunder, and legally sufficient to support the sentence. I concur in that opinion.

On 20 August 1946, accused was transferred from the 11th Traffic Regulating Group to the 69th Replacement Battalion. The morning report of his new organization carried him as "attached unassigned but not yet joined" until 27 September, when he was shown as "joined" and from duty to arrest in quarters. He was never shown as being absent without leave, and it does not appear that his absence was unauthorized.

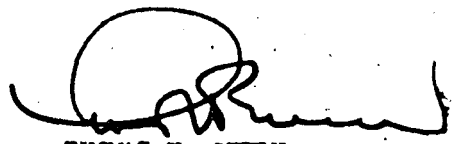
On 21 November 1946, accused went to Cologne, Germany, from Marburg, where he was stationed and returned to Marburg on the 24th. He was authorized to be anywhere in the city of Marburg or the Tannenburg Kaserne during this period, but was not authorized to leave those places. On 3 and 9 December 1946, the accused made affidavits stating that he was within the limits of the city of Marburg or the Tannenburg Kaserne during this period, 21 November to 24 November.

There are mitigating circumstances which should, I feel, be taken into consideration in this case. The three-day absence of which the accused was legally found guilty was from a replacement depot where the accused was a casual officer with no duties to perform. The organization

to which accused was attached was not operated in accordance with Army custom, in that the officers were not required to sign a register before leaving, and upon returning to, the area. It is also noted that the second of the two false affidavits made by the accused is an exact copy of the first, with the addition of an immaterial paragraph.

I recommend that the sentence be confirmed but for the reasons stated, recommend that it be commuted to a reprimand and forfeiture of $100 pay per month for two months and that the sentence as commuted be carried into execution.

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



2 Incls
1 - Record of Trial
2 - Form of Action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 235, 26 June 1947).

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

JAGK - CM 320250

20 MAR 1947

UNITED STATES v. Private First Class DWIGHT F. CROCKER (RA 13206476), E Troop, 74th Constabulary Squadron.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Munich, Germany, 20 December 1946. Dishonorable discharge and confinement for one (1) year. 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 charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Dwight F. Crocker, "E" Troop, Seventy-fourth Constabulary Squadron, did at Memmingen, Germany, on or about 12 October 1946 feloniously take, steal, and carry away 2 watches and camera, value about $100.00, the property of Technician Fifth Grade Lawrence O. Pigg, "E" Troop, Seventy-fourth Constabulary Squadron.

He pleaded not guilty to the charge and specification and was found guilty of the charge and of the specification thereto except the words "value about $100," substituting therefor the words "value about $45." No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, designated the 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. The prosecution offered no evidence as to the value of the watches alleged to have been stolen by accused. On direct examination, Sergeant James H. Carlton, who had at one time owned the camera allegedly stolen by accused, was permitted to state that in his opinion it was worth "about ten or fifteen dollars." Upon cross-examination of Corporal Pigg, the owner of the property in question, defense counsel produced a pen and tablet and asked the witness to itemize what he considered to be the value of each item

and to give the sum total of such values. The witness stated that he considered the camera to be worth $20.00 and that he had paid $8.00 for one of the watches and $17.50 for the other, making a total value of $45.50. Aside from the question of value, which is not an essential element of the crime of larceny, all the essential elements of the offense herein charged were proved at the trial (see CM 301154, Hufendick, 15 BR (ETO) 137,138).

It has been uniformly held by the Board of Review that the testimony of the owner of stolen personal property as to the value thereof is not competent unless he is an expert or has special knowledge on the subject. It is immaterial that the articles themselves are before the court, where such articles are not of an obviously great value. To permit the court on its inspection alone to find definite market values of such articles "would be to attribute to the members of the court technical and expert trade knowledge which it cannot be presumed that they possess" (CM 268007, McKinney, 44 BR 205,206). It necessarily follows that the finding of the court that the various articles listed in the specification had a total value of about $45 is not sustained by the evidence. The evidence supports only a finding that the articles had some substantial value not in excess of $20 and therefore can support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of six months (CM 228742, Blanco, 16 BR 299,300).

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the specification as involves a finding of guilty of larceny by accused of the specified property at the time and place and of the ownership alleged of some substantial value not in excess of $20, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for six months.

Charles D. Silver, Judge Advocate

(Sick in Hospital), Judge Advocate

Robert E. Hough, Judge Advocate

APR 30 1947

JAGK - CM 320250 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 Private First Class Dwight F. Crocker (RA 13206476), E. Troop. 74th Constabulary Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of the specification as involves a finding of guilty of larceny by accused of the specified property at the time and place and of the ownership alleged of some substantial value not in excess of $20, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for six months, which holding is hereby approved. Upon compliance with the foregoing holding and the reduction of the period of confinement to six months, 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 320250).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 320252

19 Mar 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, 3 January 1947. Dishonorable discharge and confinement for six (6) months. The Branch, United States Disciplinary Barracks
Private First Class ROGELIC RODRIGUEZ (RA 15214850), Troop A, 94th Constabulary Sqadron	)	

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 had been examined by the Board of Review.

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

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

Specification 1: (Nolle Prosequi)

Specification 2: (Nolle Prosequi)

Specification 3: (Nolle Prosequi)

Specification 4: In that Private First Class Rogelic Rodriquez, Troop "A" 94th Constabulary Squadron, did, without proper leave, absent himself from his proper station at Weiden Germany, from about 15 October 1946 to about 21 October 1946.

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

Specification: In that Private First Class Rogelic Rodriguez, "A" Troop, 94th Constabulary Squadron, having been duly placed in confinement in the Weiden Military Community Guard House on or about 21 October 1946, did, at Weiden, Germany, on or about 2010 hours 26 October 1946 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to the Charges and Specifications and was found guilty of Specification 4, Charge I, Charge I, the Specification of Charge II and Charge II. 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 six (6) months. The reviewing authority approved the sentence, designated the Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The only question presented by the record is the legal sufficiency of the record to support the findings of guilty of the Specification of Charge II and the sentence.

4. The evidence pertinent to the Specification of Charge II is summarized as follows:

The accused was lawfully confined in the 11th Constabulary Regiment Stockade, Weiden, Germany, on 21 October 1946 (R 7-9; Pros Ex 2).

Master Sergeant Paul Patrick, Provost Sergeant, 11th Constabulary Regiment, testified that accused was not released by proper authority at any time between 21 October and 30 October 1946 (R 9-10). The customary uniform for prisoners in the stockade is fatigue clothing. On the morning of 27 October the witness entered the stockade and saw the accused dressed in an OD uniform. At that time the sergeant of the guard told the witness that the accused had run away (R 10). Upon being questioned by the prosecution as to whether the witness had a conversation with the accused the following colloquy took place:

"Q. What did you say and what did the accused say?

"A. I asked him what he was doing with the uniform on. He said that he went out to see his girl last night and I asked him where he had got the uniform and he said that his uniform was at his girl's house, he had sent the uniform over there to be laundered and his uniform was down there, and he also stated to me that he did run away from the guard house through the window.

"Q. Did the accused state from where he escaped?

"A. Yes, sir.

"Q. Will you state where that was?

"A. He told me he told the guard he was going to the latrine and from there the window was open and he took off." (R 10)

The morning report of the 11th Constabulary Regiment Stockade, dated 27 October 1946, which was introduced into evidence without objection as Prosecution Exhibit 3 shows the following entry:

"Rodriguez Rogelio 15214850 Pfc.
from AWOL to Conf. at 0030 hours
Oct 27, 1946."

5. The elements of proof of escape from confinement as stated in the Manual for Courts-Martial are:

"(a) That the accused was duly placed in confinement, and (b) that he freed himself from the restraint of his confinement before he had been set at liberty by proper authority."
(MCM 1928, par 139b, p 154).

The competent evidence shows that the accused was duly placed in confinement and that he had not been released by proper authority.

The only evidence, other than the accused's confession, that he had freed himself from the restraint of his confinement is the testimony of Master Sergeant Patrick that on the morning of 27 October 1946, he saw the accused dressed in an OD uniform, although the customary prison uniform is fatigue clothing. In addition thereto the morning report for 27 October 1946 shows that the accused was confined at 0030, 27 October.

This evidence sufficiently established a corpus delicti of the offense charged, but does not establish a prima facie case.

There remains for consideration whether Master Sergeant Patricks's testimony with respect to the accused's confession was properly admitted in evidence.

With respect to the accused's confession the record does not show that Sergeant Patrick warned the accused of his rights against self-incrimination at any time during the questioning of the accused concerning the alleged escape from confinement.

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 indicates 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, expecially 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 investiga tion 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, 25 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, 36 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 obviously under investigation for an alleged escape from confinement when the provost sergeant entered the stockade and found him dressed in an OD uniform. At that point the sergeant of the guard told Sergeant Patrick that the accused had "run away." Sergeant Patrick then interrogated the accused about the uniform, and during the course of this interrogation the accused confessed that he had escaped through an open window in the latrine and had gone to visit his girl.

There is no showing of spontaneity in the evidence relating to 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 authority which a provost sergeant has over prisoners confined in a stockade, we are of the opinion that his questions to the accused were in the nature of an implied command. In the absence of a showing that the accused was warned of his rights against self-incrimination, such an implied command imports an element of coercion.

In view of the foregoing authorities we are of the opinion that the court committed error in admitting Sergeant Patricks's testimony as to the accused's confession. Since the evidence, other than the accused's confession, is insufficient to establish the offense charged we are of the opinion that the record of trial is legally insufficient to support the finding of guilty of the Specification of Charge II and Charge II.

6. The maximum sentence authorized by the Table of Maximum Punishments for six days absence without leave (15 Oct 1946 to 21 Oct 1946; Spec 4, ChgI) is confinement at hard labor for eighteen days and forfeiture of pay for twelve days (MCM 1928, par 104c, p 97). The accused's pay as a private, for twelve days (considering a $22.00 Class F deduction) is $21.12.

7. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Specification of Charge II, and Charge II, legally sufficient to support the findings of guilty of Specification 4, Charge I, and Charge I, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for eighteen (18) days and forfeiture of twenty-one dollars and twelve cents ($21/12) of the accused's pay for one (1) month.

D. Hottenstein, Judge Advocate

W.A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 320252 1st Ind Mar 28 1947

WD , JAGO, Washington 25, D. C.

TO: The Commanding General, United States Constabulary,
APO 46, c/o Postmaster, New York, New York

1. In the case of Private First Class Rogelic Rodriguez (RA 15214850), Troop A, 94th Constabulary Squadron, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated recommend that the findings of guilty of Charge II and its specification be disapproved and that only so much of the sentence be approved as involves confinement at hard labor for eighteen (18) days and forfeiture of $21.12 of accused's pay for one month. Thereupon you will have authority, under the provisions of Article of War 50½, to order the execution of the sentence as thus modified.

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

(CM 320252).

s. Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGH - CM 320272

19 JUN 1947

UNITED STATES v. Staff Sergeant CLYDE O. THOMAS (RA 33657384), Technician Fifth Grade WILBERT J. RAYMOND (RA 38622573), and Private SULTON RANDOLPH (RA 44138832), all of 1942d Engineer Utilities Company (Avn)	FIFTH AIR FORCE Trial by G.C.M., convened at Headquarters 315 Composite Wing, APO 929, 25 November 1946. Each: Dishonorable discharge (suspended) and confinement for two (2) years. Each: Branch United States Disciplinary Barracks

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

1. The record of trial in the case of the soldiers named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and the sentence as to each accused. The record has now been examined by the Board of Review and the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences.

2. Accused were tried upon the following Charges and Specifications:

THOMAS

CHARGE: Violation of the 93rd Article of War.

Specification: In that S/Sgt. Clyde O. Thomas, 1942d Engineer Utilities Company (Avn), APO 929, having taken an oath in a trial by Court-Martial of T/4 Ray F. Coleman, before Captain Frank D. Henderson, a competent officer, that he would testify truly, did, at Headquarters 315 Composite Wing, APO 929, on 3 October 1946, willfully, corruptly, and contrary to such oath testify in substance that T/4 Coleman was in the 1942d Engineer Utilities Company (Avn)

Enlisted Men's Club, APO 929, between 2030 and 2100, 14 August 1946, because he leaned over S/Sgt Thomas's shoulder and talked to him at that time while S/Sgt. Thomas was playing cards with T/5 Raymond and Pvt. Randolph but that T/4 Coleman was not in the card game, this testimony being given to establish the whereabouts of T/4 Coleman which testimony was a material matter and which he did not then believe to be true.

RAYMOND

CHARGE: Violation of the 93rd Article of War.

Specification: In that T/5 Wilbert J. Raymond, 1942d Engineer Utilities Company (Avn), APO 929, having taken an oath in a trial by Court-Martial of T/4 Ray F. Coleman, before Captain Frank D. Henderson, a competent officer, that he would testify truly, did, at Headquarters, 315 Composite Wing, APO 929, on 3 October 1946, willfully, corruptly, and contrary to such oath testify in substance that he was in the company of T/4 Coleman from shortly after 1930 to 2130, 14 August 1946, at the 1942d Engineer Utilities Company (Avn) Enlisted Men's Club, APO 929, and during part of this time T/4 Coleman was playing cards with S/Sgt Clyde O. Thomas, 1942d Engineer Utilities Company (Avn), and two unidentified persons who have since been returned to the United States, but that he, T/5 Raymond, did not join in the game, this testimony being given to establish the whereabouts of T/4 Coleman which testimony was a material matter and which he did not then believe to be true.

RANDOLPH

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Sulton Randolph (NMI), 1942d Engineer Utilities Company (Avn), APO 929, having taken an oath in a trial by Court-Martial of T/4 Ray F. Coleman, before Captain Frank D. Henderson, a competent officer, that he would testify truly, did, at Headquarters, 315 Composite Wing, APO 929, on 3 October 1946, willfully, corruptly, and contrary to such oath testify in substance that T/4 Ray F. Coleman was playing cards with him, S/Sgt Clyde O. Thomas of the 1942d Engineer Utilities Company (Avn), and unidentified other persons at or about 2045, 14 August 1946, at the 1942d Engineer Utilities Company (Avn) Enlisted Mens Club, APO 929, shortly after T/4 Coleman entered the club, this testimony being given to establish

the whereabouts of T/4 Coleman, which testimony was a material matter and which he did not then believe to be true.

Each accused pleaded not guilty to and was found guilty of the respective Charge and Specification upon which he was arraigned. No evidence of previous convictions was introduced as to accused Thomas and Raymond. Evidence of one previous conviction was introduced as to accused Randolph. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. As to each accused the reviewing authority approved the sentence and ordered it executed but suspended execution of the dishonorable discharge until the soldier's release from confinement. The Branch United States Disciplinary Barracks, Camp McQuaide, California, was designated as the place of confinement in each case. The proceedings were published in General Court-Martial Orders Nos. 18, 19, and 20, Headquarters Fifth Air Force, 30 January 1947.

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

On 3 October 1946, the three accused, all members of the 1942d Engineer Utilities Company (Avn) (R 15, 19, 21) were called by the defense as witnesses in the trial by general court-martial of Technician Fourth Grade Ray Field Coleman, also a member of the 1942d Engineer Utilities Company (Avn) (Pros Ex 1), who was charged with rape in violation of Article of War 92, assault with intent to commit rape and assault with intent to do bodily harm in violation of Article of War 93. The rape and assaults were alleged to have been committed against one Sumiko Yokoo at Fukuoka, Kyushu, Japan, on or about 14 August 1946 (R 11; Pros Ex 1, p 13).

The oath was administered to each accused in the manner required by Article of War 19 by Captain Frank D. Henderson, Jr, AC, the trial judge advocate of the court appointed by paragraph 5, Special Orders No. 183, Headquarters Fifth Air Force dated 16 August 1946 (R 10-12; Pros Ex 1). The purpose of the testimony of each accused was to establish an alibi for Coleman by testifying that the latter was present at the Enlisted Men's Club of the 1942d Engineer Utilities Company (Avn) at the approximate time of the alleged rape and assaults (R 12).

A duly authenticated copy of the record of trial in the Coleman case was received in evidence without objection as Prosecution Exhibit 1. In offering the Coleman record the trial judge advocate stated, "I wish to state I offer in evidence only the facts which are relevant" (R 13).

Relevant portions of the record, some of which were read to the court, showed that the three accused testified at the Coleman trial substantially as indicated below:

Testimony of Accused Thomas:

The accused Thomas testified that he was in the Enlisted Men's Club of his organization between 1930 and 2200 hours on 14 August 1946. Coleman was standing behind his back while he (Thomas) played cards at the club between 2030 and 2100 hours on that evening and talked to him about obtaining some whiskey from the hospital. Thomas fixed the time of this conversation because it took place during a news broadcast which was heard over the radio between 2030 and 2100 hours (Pros Ex 1, pp 27, 29). The conversation lasted less than a minute and Thomas did not again talk to Coleman during that evening (Pros Ex 1, p 29). Thomas was playing cards with several soldiers including Raymond and Randolph, but Coleman did not get into the game (Pros Ex 1, p 44).

Testimony of Accused Raymond:

On direct examination accused Raymond testified that on the evening of 14 August 1946, Raymond and Coleman were at the Red Cross Club. At 1930 Raymond left Coleman at the Red Cross Club and went to the Enlisted Men's Club arriving there at about 1930 hours. Upon his arrival he saw Coleman sitting at the card table with some other men. Raymond left the Enlisted Men's Club alone at 2130 (Pros Ex 1, p 39).

On cross examination Raymond testified that when he arrived at the Enlisted Men's Club at about 1930 Coleman was playing cards (R 19) with the First Sergeant (Thomas) and two other men. Raymond did not get into the card game but talked to Coleman about demobilization at about 2000 hours. At that time Coleman had left the card table (Pros Ex 1, p 39).

On examination by the court Raymond was asked to explain certain entries on the pass register for 19 August pertaining to him and admitted that he may have left the base at 1245 and returned for mess at 2100 hours on 14 August 1946 (Pros Ex 1, p 40).

Raymond further testified that Coleman and he were sitting at the Victrola which he and Raymond were playing shortly after Raymond entered the club. After they had played the Victrola for about thirty minutes Sergeant Thomas invited Coleman to join the game which he did (Pros Ex 1, p 42). Raymond further testified that he did not play cards that evening and that he had never played cards in his life. He had heard no conversation pertaining to whiskey (Pros Ex 1, p 43).

Testimony of Accused Randolph:

Accused Randolph testified that he was present at the Enlisted Men's Club between 1930 and 2200 hours on the evening of 14 August 1946. Coleman entered the club at approximately 2030 hours at which time Randolph talked to him.

On cross examination Randolph stated that he (Randolph) talked to Coleman about buying whiskey from the hospital (Pros Ex 1, p 32). Coleman, Thomas, Randolph, and one other soldier were playing cards at that time. Randolph stated that the events to which he testified were fixed in his memory as occurring on 14 August 1946 because there was an arrangement on that date to obtain whiskey from the hospital (Pros Ex 1, pp 31-34) but that he (Randolph) did not participate in or have any interest in that conversation (Pros Ex 1, pp 33-39). He also admitted that the conversation about whiskey occurred in the "Area" on the morning of 14 August and not at the card table that night (Pros Ex 1, pp 34-35). However, he again stated that he saw Coleman when he first came into the club at about 2030 hours and that Coleman started to play cards "about ten or fifteen minutes after we got there" (Pros Ex 1, p 34). Thereafter he stated that he started to play cards with Coleman at 2045 hours (Pros Ex 1, pp 36-37).

Emiko Ishida, a Japanese civilian testified that she had previously been a witness at the Coleman trial (R 25). She identified Coleman as a soldier she had seen near a dance hall (R 25) which was in the vicinity of a bridge and a railroad crossing (R 28), at "past seven o'clock" on 14 August (R 27-28). At that time the witness saw that Coleman "had grabbed" a girl named Sumiko.

Tsuruta Chimori, another Japanese civilian who had been a witness at the Coleman trial (R 30) identified Coleman as a soldier he had seen in Fukuoka at about 2030 hours on 14 August. At that time the witness saw Coleman dragging a girl (R 31). The witness had first identified Coleman as the assailant from among a group of sixteen colored soldiers (R 32). Thereafter he identified Coleman at the Coleman trial (R 30) and again at the trial in the instant case (R 31). At the time of the line-up, Coleman was also identified by Emiko and Sumiko (R 32).

Sumiko Yokoo, the victim of the offenses alleged to have been committed by Coleman, testified that at about 1930 on 14 August 1946 she was "dragged away" by a light colored negro who had "three stripes and a T on his arm" at Fukuoka (R 34). The witness identified Coleman as her assailant (R 35) and testified that she had previously identified Coleman at the line-up prior to his trial and again at the Coleman trial.

She further testified that she was in the company of Coleman continuously from 1930 to 2100 hours (R 35-36). Coleman left her about 2100 hours from the vicinity of the shop of a contractor named Notomi, located near the Yaquin station (R 36-37).

4. After their rights with respect to testifying were explained to them by the law member, each of the accused elected to remain silent. The defense called no witnesses.

5. "Perjury is the willful and corrupt giving, upon a lawful oath, * * * in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry (Clark). 'Judicial proceedings or course of justice' includes trial by court-martial (Wharton Crim. Law)."

* * *

"A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing be true or false in fact. So, also, a witness may commit perjury in testifying falsely as to his belief, remembrances, or impression, * * *" (MCM 1928, par 149i, p 174).

The proof of perjury as discussed in the Manual is as follows:

"Proof.—(a) That a certain judicial proceeding of course of justice was pending; (b) that the accused took an oath or its equivalent in such proceeding, or course of justice, as alleged; (c) that such oath was administered to the accused in a matter where an oath was required or authorized by law, as alleged; (d) that such oath was administered by a person having authority to do so; (e) that upon such oath he gave the testimony alleged; (f) that such testimony was false, and material to the issue or matter of inquiry; and (g) the facts and circumstances indicating that such false testimony was willfully and corruptly given.

"The testimony of a single witness is insufficient to convict for perjury without corroboration by other testimony or by circumstances which may be shown in evidence tending to prove the falsity * * *" (MCM 1928, par 149i, p 175).

The evidence here presented is clear and undisputed that the accused were under oath administered by a person competent to administer such oath, and

that they testified at the time and place and before a general court-martial as alleged. It is also clear that the testimony of each accused, as to Coleman's whereabouts on the night of 14 August 1946 was material to the issue in the Coleman case.

The substantial questions presented by the record are:

a. Did the accused testify substantially as alleged?

b. Is there sufficient evidence to establish the falsity of the alleged testimony?

c. If the former question is answered affirmatively, does the evidence establish sufficiently that such false testimony was willfully and corruptly given?

It, therefore, becomes necessary to examine closely the testimony of each accused in the Coleman case and that of the Japanese witnesses in the present case, to determine whether the court was justified in finding that such testimony of the accused was perjured.

Although the testimony of each accused in the Coleman case shows inconsistencies with that of the other two, such inconsistencies must be disregarded. The testimony of each accused may be considered only against himself and not against the others, for no part of the record of trial beyond an accused's own testimony is competent to prove the <u>falsity</u> of that to which he swore (CM 190628, <u>Coleman</u>, 1 BR 215).

Accused Thomas testified that some time between 2030 hours and 2100 hours on 14 August 1946, Coleman was at the Enlisted Men's Club and that he (Thomas) spoke to him for approximately one minute. He did not purport to testify that Coleman was at the club for the entire period from 2030 hours to 2100 hours.

The substance of accused Raymond's testimony was that he was in the company of Coleman at the Enlisted Men's Club from 1930 to 2000 hours on the night of 14 August. Although he testified that he (Raymond) remained at the club until 2130 hours he did not testify that Coleman was there at any time after 2000 hours. It may be inferred from his testimony, however, that Coleman was at the club for some time after 2000 hours since he joined the card game at that time on Thomas' invitation. Raymond admitted that he may have left the base at 1245 hours and that he did not return until 2100 hours, when confronted with the unit's pass register.

The substance of accused Randolph's testimony was that Coleman entered the Enlisted Men's Club at approximately 2030 hours and that the latter began to play cards at approximately 2045 hours on 14 August.

To prove the falsity of the testimony of each accused the prosecution relied on the testimony of three Japanese witnesses one of whom testified that she had seen Coleman at Fukuoka in the company of Sumiko Yokoo sometime past 1900 hours on 14 August 1946. Another Japanese witness testified that he had seen Coleman in the company of Sumiko Yokoo at about 2030 hours on 14 August and that Coleman at that time was dragging a girl. The victim of Coleman's assault, Sumiko Yokoo, testified that he was with her continuously from 1930 hours to 2100 hours on the night in question.

6. With respect to the question as to whether the record shows that each accused testified as alleged, there is no substantial variance between the allegation and proof insofar as accused Randolph is concerned.

The specification as against Thomas is somewhat ambiguous. In pertinent part it is alleged therein that Thomas testified falsely that "T/4 Coleman was in the 1942d Engineer Utilities Company (Avn) Enlisted Men's Club * * * between 2030 and 2100, 14 August 1946." If the language of the specification is to be construed as alleging that Thomas testified that Coleman was in the club <u>at some time</u> between 2030 hours and 2100 hours, on the evening in question, there is no variance between the proof and the specification. Construed either way the specification alleges false testimony which is material to the issue in the Coleman case.

The specification with respect to accused Raymond alleges in relevant part that he testified "that he was in the company of T/4 Coleman from shortly after 1930 to 2130, 14 August 1946." As indicated above the proof shows only that Raymond testified that he saw and talked to Coleman from 1930 hours to 2000 hours on 14 August.

In view of the testimony that Coleman was with Sumiko Yokoo in Fukuoka from about 1930 hours to 2100 hours we are of the opinion that the variance between the allegations and proof as to the time period involved is not fatal to the proceedings.

7. A substantial question presented by the record is whether the prosecution offered sufficient evidence to establish the alleged falsity of the testimony of each accused.

The prosecution adduced substantial evidence that Coleman was in Fukuoka in the company of Sumiko Yokoo from about 1930 hours until 2100 hours on 14 August. Since it is obvious that Coleman could not have been engaged in the acts of assaulting his victim at Fukuoka at the same time that he was present at the Enlisted Men's Club of the 1942d Engineer Utilities Company, there is a substantial conflict between the testimony of Sumiko Yokoo and that of the three accused.

It is well settled that the testimony of a single witness is insufficient to convict for perjury without corroboration by other testimony or by circumstances which may be shown by evidence tending to prove the falsity (MCM 1928, par 149i, p 175; Hammer v. U. S., 271 U.S. 620, 70 Law Ed 1118 (1920); U. S. v. Wood, 14 Pet. 430, 10 Law Ed 527 (1840)).

In Hammer v. U. S. (op cit) the United States Supreme Court stated the general rule as follows:

> "The general rule in prosecution for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of this rule in Federal and State courts is well nigh universal (citing cases). The rule has long prevailed and no enactment in derogation of it has come to our attention."

If Sumiko Yokoó's testimony were in fact uncorroborated we would, of course, be compelled to hold this record legally insufficient on the ground that the falsity of the alleged testimony has not been established in accordance with the foregoing rule.

But in the instant case the testimony of Sumiko Yokoo, which is contradictory to the testimony of each of the three accused in that she testified that Coleman was with her in Fukuoka at the very time that each of the three accused stated Coleman was at the Enlisted Men's Club, is corroborated by the testimony of the other two Japanese who saw Coleman in her presence at 2030 hours and "past seven o'clock" respectively.

As to accused Raymond only the court was also warranted in considering as evidence of falsity his admission that he may have been absent from the post from 1245 hours to 2100 hours on 14 August 1946.

It may be argued that as to accused Thomas the evidence of falsity is not compelling since the only inference which may be drawn from his testimony is that some time between 2030 hours and 2100 hours he carried on a conversation with Coleman at the Enlisted Men's Club for something less than a minute. Although he fixed the time positively with relation to a news broadcast, it does not follow that he might not have talked to Coleman very shortly prior to 2100 hours. Since Sumiko Yokoo testified that Coleman left her about 2100 hours, the testimony might be reconciled with that of Thomas provided she were mistaken as to the exact time of Coleman's departure or provided the distance between the scene of the assault and the Enlisted Men's Club were relatively short.

It is to be noted that there is no competent evidence in the record to show how far the scene of the alleged assault in Fukuoka is from the 1942d Engineer Utilities Company Enlisted Men's Club. In his closing argument the trial judge advocate referred to this distance as about eight or nine miles (R 40).

The court was warranted in taking judicial notice of the location of the 1942d Engineer Utilities Company's station and of the location of Fukuoka (MCM 1928, par 125, pp 134-135) and was thus warranted in considering the possibility of reconciling Thomas' testimony with that of the Japanese witnesses within the tolerance of normal error in the estimation of time. It is apparent that the court concluded that the accused's statements could not be reconciled with that of Sumiko Yokoo.

The possibility that Sumiko Yokoo may have been mistaken as to time, involves a controverted question of fact which goes to the credibility of the witnesses and the weight of the evidence.

The resolution of such question rests with the court and with the reviewing authority and not with the Board of Review.

> "Except where the President is the reviewing or confirming authority, it is not the function of the board of review or the Judge Advocate General, in passing upon the legal sufficiency of a record under A.W. 50½, to weigh evidence, judge of the credibility of witnesses, or determine controverted questions of fact. In such cases the law gives to the court-martial and the reviewing authority exclusively this function of weighing evidence and determining what facts are proved thereby; therefore, if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the board of review and the Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts" (CM 152797, cited in MCM 1928, Appendix 1, p 216).

Accordingly we are of the opinion that there was sufficient evidence in the record to warrant the court in finding that the alleged testimony of each accused was false.

8. There remains for consideration whether the evidence establishes sufficiently that the false testimony of the three accused was willfully and corruptly given.

<u>As to Accused Raymond</u>:

As indicated above accused Raymond admitted that he may have been absent from the base from 1215 hours to 2100 hours on 14 August when confronted with the pass register of his organization for that date. Thereafter he again insisted that he was with Coleman at the club from 1930 hours to 2000 hours.

Had Raymond not admitted that he might have been absent from his base during the entire period when, according to his testimony, Coleman and he were both present at the club, the court might have been justified in believing that Raymond's postive testimony as to Coleman's whereabouts was the result of honest error or mistake. But after the possibility of such error was pointed out to him and admitted by him his subsequent unqualified insistence upon the truth of the alibi to which he had previously testified, is compelling evidence that his false testimony was willfully and corruptly given. He reaffirmed the truth of a state of fact although the record clearly shows that he could not have had probable cause for believing these facts to be true.

It is well settled that a witness may commit perjury by testifying that he knows a thing to be true when in fact he is not sure about it (MCM 1928, par 149i, p 174; Wharton's Crim Law, 12th Ed, Sec 1512, p 1789 and cases cited therein).

As to Accused Thomas and Randolph:

The record proof that the alleged false statements of accused Thomas and Randolph were willfully and corruptly given is not in our opinion, compelling.

The only competent proof that their false testimony as to Coleman's whereabouts between 2030 hours and 2100 hours on 14 August 1946 was not the result of an honest, and perhaps natural mistake but was given corruptly and with knowledge of its falsity, lies in whatever inference may be drawn that their testimony was, as to details of time untrue and pertained in that respect to matters within their knowledge. Nevertheless, in the absence of prejudicial error, a conviction based on such inference is sustainable (CM 190628, Coleman, 1 BR 215). When falsity is proved, the burden is on the accused to show that it arose from surprise, inadvertence, or mistake and not from corrupt motive (State v. Chamberlain, 30 Vermont 554, cited in Wharton, op cit, Sec 1586, p 1840).

In our opinion the evidence introduced by the prosecution was sufficient to establish a prima facie case against each accused, which was not rebutted in any way by the defense.

In this connection the rule expressed by the United States Supreme Court in Agnew v. U. S. (165 U.S. 36, 41 L Ed 624) appears to be applicable.

> "But when a prima facie case has been made out, as conviction follows unless it is rebutted, the necessity of adducing evidence then devolved upon the accused."

It is both reasonable and just to require the accused to go forward with proof of facts of which they alone may have knowledge and which may serve to exculpate them from responsibility. In apposition, no injustice is inflicted if they refuse or fail to accept such challenge and fail to introduce explanatory evidence in the face of proof of their inculpatory conduct (CM 262042, Pepper, 5 BR (ETO) 125, 139).

Accordingly, we are of the opinion that the record of trial establishes sufficiently that the false testimony of the accused was willfully and corruptly given.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as to each accused.

On Leave, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip L. Smith, Judge Advocate

JAGH - CM 320272 1st Ind

WD, JAGO, Board of Review #1 19 JUN 1947

TO: The Judge Advocate General

For his information.

Waldemar A. Solf
WALDEMAR A. SOLF
Major, JAGD
Actg. Chairman, Board of Review #1

6/27/47

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

JAGH - CM 320307

31 JUL 1947

UNITED STATES	)	CAMP CAMPBELL
	)	
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 19 February 1947. Dismissal
	)	
Captain RICHARD C. ROBINSON (O-1794993), Infantry	)	

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 85th Article of War.

Specification: In that CAPTAIN RICHARD C. ROBINSON, Headquarters Company, 3d Infantry Division was, at Camp Campbell Kentucky, on or about 31 January 1947, found drunk while on duty as Officer of the Day, Camp Campbell, Kentucky.

He pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be reprimanded and to forfeit one hundred and fifty ($150) dollars of his pay. The reviewing authority approved the sentence and ordered it to be carried into execution. The result of trial was published in General Court-Martial Orders No. 19, Headquarters Camp Campbell, Kentucky, 27 February 1947. Thereafter, by General Court-Martial Orders No. 22, Headquarters Camp Campbell, Kentucky, dated 28 March 1947, the action of the reviewing authority was revoked as being null and void because the mandatory sentence to dismissal provided by Article of War 85 was not adjudged. The reviewing authority returned the record of trial to the court for proceeding in revision with instructions to revoke its previous void sentence and to

adjudge an appropriate one, on the grounds that a sentence to dismissal is mandatory upon conviction of a violation of Article of War 85 where the offense was committed in time of war. Thereupon, on 1 April 1947 the court reconvened, revoked its previous sentence and sentenced the accused to be dismissed the service. The reviewing authority approved the sentence, recommended that clemency be granted in this case, 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 detailed to duty as Officer of the Day at Camp Campbell, Kentucky, on 31 January 1947 (R 10; Pros Ex 1).

Major Charles S. Finch, Provost Marshal, Camp Campbell, Kentucky, testified that at 1630 hours on 31 January 1947, accused reported to him and assumed his duties as Officer of the Day (R 10-11). At that time the accused did not appear to be intoxicated (R 16). He further testified, without objection by the defense, that shortly after 2015 hours a Sergeant Bandeen reported to him that a quarter-ton vehicle occupied by the accused failed to make a stop at a stop sign and that Bandeen chased the accused's vehicle at 60 miles per hour. Bandeen also reported to the witness that the accused appeared to be drunk. Thereafter he received a report that the accused was in Service Club No. 2, whereupon the witness went to the club where he found the accused (R 11). He took the accused into the witness's car and drove to the guardhouse. When the accused entered the car, the Provost Marshal smelled liquor on his breath (R 12). When they reached the guardhouse, the Provost Marshal saw that the accused appeared to be under the influence of intoxicants. His hair protruded from under his cap, his cap was not on straight (R 12), and his eyes were glazed. The accused spoke in a loud tone of voice, his answers to questions were not quite positive, and his continuity of thought did not appear to be clear (R 17). The Provost Marshal reached the conclusion that the accused was drunk and not in a proper condition to perform his duties as Officer of the Day. The Provost Marshal thereupon relieved the accused as Officer of the Day, took from him his gun and belt, and took him to the State Line Provost Marshal's Office (R 12). The matter was reported to the Chief of Staff. Acting upon direction of the Chief of Staff the Provost Marshal took the accused to the station hospital at about 2300 hours for the purpose of having a blood alcohol test made, and he left the accused at the hospital (R 12). At the hospital a blood sample was taken from the accused by Lieutenant Margaret Hogan (R 18). In the opinion of Lieutenant Hogan the accused was not drunk (R 18). She noticed no impairment of his speech, but did notice the odor of liquor on his breath (R 18). After taking the blood sample, Lieutenant Hogan delivered it to the ward boy (R 19).

A blood alcohol test was made from the sample and the results recorded upon a Miscellaneous Form No. 8-81, which form was signed by Major Russell S. Jones, Medical Corps (R 20-21). Major Jones identified the Form 8-81 which was a request by Captain McClain for blood alcohol test of a sample of blood from the accused and on which the results of the test appeared. When a blood sample is taken at the hospital, the sample is submitted to the laboratory and a Form 8-81 is attached to the tube containing the specimen, for purposes of identification. These specimens are placed in a refrigerator where they are kept until the test is actually made. While it is possible that specimens and identifying papers might become mixed, it is not probable (R 21).

Existing hospital regulations require that blood tests be made by a medical officer, by a nurse under the supervision of a medical cofficer, or by a competent technician designated by a medical officer. The responsibility for the accuracy of the report rests on the medical officer (R 26). The document indicated a blood alcohol concentration of 1.55 miligrams per cubic centimeter (R 20-21; Pros Ex 2).

Major Jones, having been qualified as an expert and having testified that he was the head of the Laboratory Service at the Station Hospital, Camp Campbell, Kentucky, explained the physiological action of alcohol within the human body (R 22). He also discussed the relationship of the alcoholic content of the blood to intoxication, stating that the consumption of 30 cubic centimeters of grain alcohol, or two bottles of 3.2 beer, or two mixed drinks, produced a stage of intoxication in which a person is bouyant, more agreeable, and forgets his worries. This he designated as the social stage. He stated that a normal person in this stage exhibits .5 miligrams of alcohol per cubic centimeter of blood. He stated that a consumption of 80 cubic centimeters of grain alcohol, or 7 bottles of beer, or one-half pint of 100 proof whiskey produces effects which are not definitely marked, and is known as the pre-intoxication stage. Blood alcohol in this stage ranges from .6 to 1 miligrams per cubic centimeter. Consumption of 150 cubic centimeters of grain alcohol, or 13 bottles of beer, or one pint of 100 proof whiskey is the stage of intoxication, and in this stage blood alcohol content will run from 1.5 miligrams per cubic centimeter up until one reaches the comotose stage (R 23). A person having a blood alcohol count of 1.5 miligrams per cubic centimeter is definitely drunk (R 23).

On examination by the court, Major Jones testified that some persons with a blood alcohol concentration of 1.5 miligrams per cubic centimeter may be able to walk well and appear to be normal, but that when such persons are given certain neurological tests it is usually found that their judgment and ability to think clearly is impaired (R 27).

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

On the night of 31 January 1947, after duty hours, a number of officers gathered in the quarters of Captain Harold G. Clode in the bachelor officers' quarters (R 30). The accused was present in Captain Clode's quarters for about half an hour. While there the accused had two drinks of whiskey and coca cola (R 30). Captain Clode was unable to notice any indications that the accused had been drinking from his actions (R 30). First Lieutenant Michael J. Dill was present in Captain Clode's quarters and observed the accused there from about 1900 to 1930 hours (R 34). He observed the accused take a drink of coca cola and whiskey (R 35). In his opinion the accused was not drunk and did not in any way indicate that he had been drinking. The accused ordinarily speaks in a voice louder than the average person (R 35).

On the night of 31 January the accused came to the attention of Master Sergeant Wilbur E. Bandeen. Sergeant Bandeen, while driving a vehicle on the post, observed a jeep fail to stop for a stop sign. He was unable to stop it because of its speed, and followed it to the post stockade (R 31). When he got to the stockade, the accused came out of the stockade and talked to him (R 31). At that time the accused's cap was not straight, a little of his hair was sticking out from under his cap, and he walked a little unsure as he came down the steps. The sergeant was unable to give an opinion as to the accused's sobriety (R 32-33).

Lieutenant John Andrews was Officer of the Guard on the night of 31 January 1947 and was present in the guardhouse between 2030 and 2130 hours when Major Finch, the Provost Marshal, relieved the accused of his belt and gun (R 36). He heard the Provost Marshal charge the accused with being drunk and heard the accused reply, "I am not, sir" (R 36). He observed the accused for a period of about eight minutes (R 37). He did not smell liquor on the accused's breath at that time, but had smelled it earlier in the tour (R 36). He noticed no indication about the accused that he was drunk (R 36).

Lieutenant Hogan was recalled as a witness for the defense. She testified, that in her opinion, the accused was not drunk, when she took the blood specimen. He did not seem impaired mentally or physically, and the only indication that he might have been drunk which she noticed was the odor of liquor (R 29).

The accused, having been advised of his rights as a witness, took the stand in his own behalf. He testified that he had served overseas in the Pacific Theater with the 37th Division for 51 months, having been overseas from May 1942 to September 1946. During his service overseas he served in New Guinea, Luzon, Bougainville, Guadalcanal, Fiji Islands and Leyte. He received his commission through officers' candidate school in the Fiji Islands on 31 January 1943 (R 39). Prior to entering upon active service in the Army he served as an enlisted man in the National Guard from August 1934 to October 1940 (R 40).

5. The specification of the charge alleges that the accused was found drunk while on duty as Officer of the Day on or about 31 January 1947, in violation of Article of War 85.

Drunkenness is described in the Manual for Courts-Martial as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties" (MCM 1928, par 145, p 160).

The elements of proof as stated in the Manual for Courts-Martial are:

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

It is uncontradicted that the accused was duly detailed as Officer of the Day and that he entered upon his duties as such at 1630 hours on 31 January 1947.

The only substantial question presented by the record is whether the competent evidence establishes, beyond a reasonable doubt, that the accused was in fact drunk as alleged.

With respect to this question there is a substantial conflict in the evidence. The determination of this question requires a careful analysis of all the evidence.

Two officers testified as witnesses for the defense, that between 1900 and 1930 hours on 31 January, the accused drank two drinks of whiskey and some coca cola, but that he did not appear to be intoxicated <u>at that time</u>.

Sergeant Bandeen, also a defense witness, testified that he observed the accused at the stockade on the evening of 31 January 1947 (apparently shortly after 2000 hours). At that time the accused's cap was not on straight and he walked "a little unsure" as he descended some steps. The witness was unable to give an opinion as to the accused's sobriety.

Sometime after 1815 hours, the Provost Marshal found the accused at the Service Club and believed him to be drunk to the extent that he was incapable of performing his duties. He based his opinion on his observation of accused's appearance, speech, and behavior. His eyes were glazed, his hair protruded from his cap, his cap was not on straight, and he detected the odor of alcohol on his breath. He also noticed that the accused spoke in a loud tone of voice, his answers to questions were not quite positive; the continuity of his thoughts was not clear. Consequently he relieved the accused as Officer of the Day.

At about 2300 hours the Provost Marshal took the accused to the station hospital where a blood alcohol test was performed.

The result of this test showed that at that time the accused had a blood alcohol concentration of 1.55 miligrams per cubic centimeter. According to expert medical testimony a person having a blood alcohol count of 1.5 miligrams per cubic centimeter is definitely drunk. Although some persons may appear to be normal in spite of a blood alcohol concentration of 1.5 miligrams, their judgment and ability to think clearly is impaired.

On the other hand, the Officer of the Guard, who was present at the time the accused was relieved of his duties, testified that he noticed no indications that the accused was drunk, although he had smelled alcohol on accused's breath earlier in the tour.

The nurse who took the blood specimen upon which the blood alcohol test was based, testified that she noticed no indications of drunkenness on the part of the accused. Neither his mental nor his physical faculties appeared to be impaired, but she detected the odor of alcohol on his breath.

In view of the somewhat meager evidence of drunkenness, and the conflict of the evidence, it is obvious that the court relied heavily on the report of the blood alcohol test and the expert medical testimony with respect thereto.

The defense objected vigorously to the introduction of the report, apparently on the grounds that no evidence had been introduced as to the actual processing of the sample from the time it was placed in the refrigerator until it was analyzed. It was contended that the blood sample was improperly identified and that there was no direct proof that the blood sample which was analyzed and which was the subject of the report of analysis introduced into evidence was in fact the blood taken from the accused. (See Defense Brief). In effect the defense's objection was that it was not shown that the regular routine of processing blood samples had been followed, and that the entries contained in the report were not made in the regular course of business.

The evidence with respect to the blood test shows that Lieutenant Hogan took from the accused a sample of blood and delivered the test tube containing the blood to the ward boy. The procedure in effect at the hospital requires that a Form 8-81 bearing the patient's name be attached to each sample submitted for analysis. There is no direct testimony as to what then happened to the sample, but Major Jones, the Chief of the Laboratory Service at the station hospital, who signed the exhibit and identified it at the trial, testified that the established procedure of the hospital is that the ward boy would put the sample in a refrigerator from which the laboratory technician would take the sample with the form

attached. Major Jones further testified that under existing regulations, the test should be made by a medical officer, a nurse under the supervision of medical officer, or by another competent person, in which event the medical officer is responsible for the test. The results of the analysis is then entered on the form by the person who made it. It is then signed by the Chief of the Laboratory Service. He testified that his signature on the form was affixed because he knew that the blood sample was processed through regular channels and that the report was authentic.

Since the analysis was made in a regularly established Army Medical installation under the regularly established procedure, accuracy may be presumed in the processing of laboratory samples because of the presumption of regularity in the conduct of governmental affairs. Accordingly we are of the opinion that the grounds upon which the defense's objection to the admissibility of the document was made were not tenable.

It is to be noted, however, that Major Jones did not state that he made the analysis or that it was made under his immediate supervision. It is obvious, moreover, that the analysis was made by a technician or other person in the laboratory, whose identity was not disclosed. The failure to introduce the testimony of the person who actually made the analysis was not explained.

Thus it is obvious that the report of the blood alcohol test was hearsay and that the matters contained therein were not based on the personal knowledge of the witness who authenticated and identified the document (CM 236807, Shortly, 23 BR 135, 137).

There remains for consideration whether the report of the blood alcohol test was properly admitted under an exception of the hearsay rule.

We must first determine whether the exhibit was admissible as an official writing.

The Manual for Courts-Martial provides:

> "An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record, * * * is competent (i.e., prima facie) evidence of such facts and events, without calling to the stand the officer or other person who made it. For instance, the

originals of an * * * physical examination paper, * * * are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge * * *" (MCM 1928, par 117a, p 121) (Underscoring supplied).

Records of Army field hospitals have been held to be admissible in evidence as official writings because of the trustworthiness of records made by Government officials in the course of duty, who had no motive to record anything but the truth (U.S. vs. Wescoat, 49 Fed (2d) 193 (C.C.A. 4, W. Va)).

Similarly, a certified copy of the record of a state chemist for the purpose of proving the alcoholic content of certain liquors has been held to be admissible as an official writing (State vs. Torello, 103 Conn. 54).

In the instant case it is apparent that the entry on the report was not based on the personal knowledge of the reporting officer, but rather, that it was based upon information the reporting officer, having a duty to ascertain the facts, had obtained from other sources which did reflect first hand knowledge of the matters contained in the report.

In CM 320957, Boone, wherein a question as to the admissibility of a morning report which was made by an officer who did not have personal knowledge of the reported fact was considered, it was stated:

"The Manual, * * * as well as the common law, requires only that an official record, to be admissible in evidence be based on personal knowledge and that the public official making the entry have a duty to determine the facts recorded and to enter them in a public document. There is no requirement that the person by whom the entry is actually made have himself personal knowledge of the facts recorded, it being sufficient that he had the duty to ascertain such facts through the personal knowledge of his subordinates or informants. It is in this manner that his entry is based on personal knowledge, the observations of his agents in the matter being legally attributable to him. * * * The registrar of vital statistics who enters the fact of John Doe's birth in his record book obviously has no personal knowledge of John Doe's birth. The entry, however, is based on personal knowledge, for the attending physician or parent from whom the registrar derives his information has been a witness to the event and its result."

The Board held that the morning report in question was properly admitted in evidence.

By analogy to the Boone case we are of the opinion that the report of the blood alcohol test was properly admitted into evidence as an official writing.

Even if it were decided that a report of a blood alcohol analysis is not an official writing, it would still be admissible, for whatever it is worth, as an entry made in the regular course of business under the provisions of the Federal Shop Book Rule (28 U.S.C. 695).

This statute provides:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible in evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of such business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

This statute is applicable to cases tried by courts-martial under the provisions of paragraph 111, Manual for Courts-Martial 1928, page 109 which provides:

> "So far as not otherwise prescribed in this manual or by Act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States will be applied by courts-martial."

In applying the Federal Shop Book Rule hospital records made in the regular course of business by persons unconnected with the litigation have been held to be admissible notwithstanding that the records contained some hearsay statements (Tucker vs. Loew's Theater & Realty Corporation (CCA, NY, 1945) 149 Fed (2d) 677; New York Life Ins Co vs. Taylor, 147 Fed (2d) 297; Norwood vs. Great American Indemnity Co, 146 Fed (2d) 797) wherein a report of autopsy was involved. In Reed vs. Order of United Commerical Travelers of America, 123 Fed (2d) 252, a hospital record of the attending doctor's diagnosis of a patient's condition was held admissible.

It is readily apparent from the record that the analysis of the accused's blood was made in the regular course of business at the Station Hospital at Camp Campbell, by persons who had no interest or connection with the case. In view of the Federal Shop Book Rule and the foregoing authorities we are of the opinion that the report was properly admitted into evidence.

In our opinion the report showing accused's blood alcohol concentration to be 1.55 coupled with its interpretation by an expert medical witness and the testimony of the Provost Marshal, as to accused's drunkenness, are sufficient to establish beyond a reasonable doubt that the accused was intoxicated to the extent that the rational and full exercise of his mental and physical faculties was sensibly impaired.

6. Serious error was committed by the court in permitting the Provost Marshal to testify as to hearsay reports made to him by Sergeant Bandeen and others, as to accused's drunkenness and as to his violation of post traffic regulations. The defense, however, cured the error by introducing Sergeant Bandeen's testimony which substantially corroborated the incompetent hearsay evidence offered by the prosecution.

7. As noted above the court sentenced the accused to be reprimanded and to forfeit $50 of his pay. The reviewing authority returned the record of trial to the court for appropriate corrective action in view of the court's failure to adjudge dismissal which is mandatory upon a conviction of the offense alleged.

In proceedings in revision the court revoked its previous sentence and sentenced the accused to dismissal.

Article of War 85, in pertinent part provides:

> "Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct, * * *."

The power of a reviewing authority to return a record of trial for reconsideration of a sentence less than the mandatory sentence fixed by law is recognized in Article of War 40, which provides in pertinent part:

> "* * * No authority shall return a record of trial to any court-martial for reconsideration of—"
>
> * * *
>
> "(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had."

Accordingly, the action of the reviewing authority in returning the record of trial for reconsideration of the sentence was proper (CM 225639, Raymond, 14 BR 311, 314; CM 314994, Mowery).

8. The accused is 31 years of age, married and the father of one child. War Department records show that he is a high school graduate. His civilian occupation was that of a nickel plate inspector. He enlisted in the Ohio National Guard in August 1934 and was inducted into Federal service on 15 October 1940, with the 37th Infantry Division. He attended an officers candidate school in the Fiji Islands and was appointed a second lieutenant, Infantry, Army of the United States, on 31 January 1943. He was promoted to the rank of first lieutenant on 10 February 1944 and to captain on 22 July 1946. From 26 February 1943 until 17 March 1945 he was assigned to the 129th Infantry, 37th Infantry Division and was engaged in combat for 14 months. On 15 February 1945 reclassification proceedings were initiated against him. These proceedings were terminated on 21 July 1945, and the accused was reassigned to Headquarters Philippine Base Section. His Officers Qualification Card, WD AGO Form 66-1, shows that his efficiency ratings vary from satisfactory to superior. He is authorized to wear the Combat Infantryman's Badge, the American Defense Service Ribbon, the Asiatic-Pacific Theater Ribbon with Bronze Service Stars for the North Solomons Campaign, the Philippine Liberation Ribbon, the American Theater Ribbon, and the World War II Victory Ribbon.

9. There is attached to the record of trial a recommendation for clemency dated 2 April 1947, signed by six of the eight members of the court wherein it is stated in part:

> "a. While the evidence at the time of trial established the guilt of the accused within the meaning of Article of War 85, it did not indicate that the accused was grossly drunk, and the court did not feel in the original hearing that the offense as proved justified a sentence of dismissal.
>
> "b. At the time of the original hearing the court acted under the belief that the offense was not committed in time of war and that dismissal was not mandatory."

10. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon a conviction of a violation of Article of War 85 where the offense is committed in time of war.

A. Hottenstein, Judge Advocate

Waldemar A. Solf, Judge Advocate

Philip E. Smith, Judge Advocate

(820)

JAGH - CM 320307 1st Ind

WD, JAGO, Washington 25, D. C. AUG 18 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Richard C. Robinson (0-1794993), 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. No evidence of previous convictions was introduced. He was sentenced to be reprimanded and to forfeit one hundred and fifty ($150) dollars of his pay. The reviewing authority approved the sentence and ordered it into execution. Thereafter the reviewing authority returned the record of trial to the court for proceeding in revision with instructions to revoke its previous void sentence and to adjudge an appropriate one, on the grounds that a sentence to dismissal is mandatory upon conviction of a violation of Article of War 85 where the offense was committed in time of war. Thereupon, the court reconvened, revoked its previous sentence and sentenced the accused to be dismissed the service. The reviewing authority approved the sentence, recommended that clemency be granted, and forwarded the record of trial for action under Article of War 48.

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

The accused was properly detailed as officer of the day at Camp Campbell, Kentucky, and entered upon his duties as such at 1630 hours on 31 January 1947. Between 1900 and 1930 hours on that day he drank some whiskey in the company of two other officers. After 1815 hours he was found by the Provost Marshal to be drunk and the Provost Marshal relieved him as officer of the day. An analysis of the blood sample taken from accused at 2300 hours showed that he had a blood alcohol concentration of 1.55 miligrams of alcohol per cubic centimeter. A medical officer who was qualified as an expert testified that an individual with a blood alcohol concentration of 1.5 is definitely drunk, at least to the extent that his judgment and ability to think clearly is impaired.

Considerable evidence was introduced by the defense which tended to show that the accused did not appear to be noticeably drunk.

4. The accused is 31 years of age, married, and the father of one child. War Department records show that he had 51 months of overseas service, in the Pacific, 14 of which were in combat as a platoon leader and company executive in the 129th Infantry, 37th Infantry Division.

5. There is attached to the record of trial a recommendation for clemency dated 2 April 1947, signed by six of the eight members of the court wherein it is stated in part:

> "2. This recommendation is made for the following reasons:
>
> "a. While the evidence at the time of trial established the guilt of the accused within the meaning of Article of War 85, it did not indicate that the accused was grossly drunk, and the court did not feel in the original hearing that the offense as proved justified a sentence of dismissal.
>
> "b. At the time of the original hearing the court acted under the belief that the offense was not committed in time of war and that dismissal was not mandatory."

6. In view of all the circumstances in the case including the nature of the sentence originally imposed by the court, the accused's combat record, the recommendation for clemency by members of the court and the reviewing authority, I recommend that the sentence be confirmed, but commuted to a reprimand and forfeiture of $50 of accused's pay per month for three months, and that as thus commuted the sentence be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 299, 27 Aug 1947).

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

JAGK - CM 320308

4 JUN 1947

UNITED STATES v. First Lieutenant ROY W. HARNACK (0-1547319), Medical Administrative Corps	FOURTH AIR FORCE Trial by G.C.M., convened at Hamilton Field, California, 16,17,18,19 December 1946. Dismissal, total forfeitures, and confinement for one (1) year.

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 93rd Article of War.

Specification: In that First Lieutenant Roy W. Harnack, assigned 401st Base Unit, Hamilton Field, California, did, at Kearns, Utah, between 28 April 1946 and 4 October 1946, feloniously embezzle by fraudulently converting to his own use money of the value of about $1,295.65, the property of the Post Hospital Fund, Kearns, Utah, entrusted to him by the Commanding Officer, Post Hospital, Kearns, Utah.

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

Specification 1: In that First Lieutenant Roy W. Harnack, ***, being indebted to Master Sergeant Everett H. Shircliff in the sum of $177.82 for telephone bill which amount became payable on or about 11 September 1946, did, at Salt Lake City, Utah, from 11 September 1946 to 8 November 1946, dishonorably fail and neglect to pay said debt.

Specification 2: In that First Lieutenant Roy W. Harnack, ***, did, at Kearns, Utah, on or about 4 October 1946, with intent to deceive Captain Arthur C. Fritog, officially state to the said Captain Arthur C. Fritog, that "I have liquidated all personal indebtedness in this area or have made arrangements satisfactory to my creditors; that I have made settlement of all public funds, property accounts, and debts due all agencies

and instrumentalities of the United States," which statement was known by the said Roy W. Harnack to be untrue in that he had not paid his personal debts and had not made settlement of public funds for which he was responsible.

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

Specification: In that 1st Lt. Roy W. Harnack, ***, having been restricted to the limits of Army Air Force Ground Training Installation, Kearns, Utah, did, at Army Air Force Ground Training Installation, Kearns, Utah, on or about 9 November 1946, break his said restriction by going to Salt Lake City, Utah.

ADDITIONAL CHARGE II: Violation of the 94th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found not guilty of the Additional Charge II and its specification but guilty of the remaining charges and specifications. Evidence of one previous conviction was introduced. 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 two years. The reviewing authority approved the sentence, remitted one year of the confinement imposed, designated the United States Disciplinary Barracks, Camp McQuaide, California, 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 48.

3. For the prosecution

Charge I and its Specification

Paragraph 1, Special Orders No. 29, Army Air Forces Station Hospital, Kearns, Utah, dated 2 May 1946, confirmed and made of record the verbal orders of the Commanding Officer, 28 April 1946, assigning the accused as Custodian, Hospital Fund, vice Captain Shott, relieved. By agreement, a duly authenticated copy of this order was received in evidence as Prosecution Exhibit 1 (R. 8). No audit appears to have been effected when Captain Shott transferred the fund to accused and the transfer was accomplished by some sort of mutual understanding between Captain Shott, the accused and the Continental National Bank and Trust Company of Salt Lake City, Utah, whereby the bank accepted accused as the new custodian and he executed a certificate on the reverse of the bank statement as follows:

"Bank Balance	$302.97
Deposits in Transit	49.63
TRUE BANK BALANCE	$352.60

I certify that the amount of $352.60 is the true and accurate balance on deposit to the credit of the Hospital Fund, AAF Overseas Replacement Depot, Kearns, Utah as of 30 April 1946.

(s) Roy W. Harnack
ROY W. HARNACK
1st Lt, MAC
Custodian"

The certified true copy of the certificate as set out above was received in evidence by stipulation between the prosecution, accused and his counsel and was marked for identification Prosecution Exhibit 2 (R. 20).

Captain Shott testified that the foregoing constituted all the assets of the fund save possibly a small amount of change in the cash drawer, "at least a dollar" (R. 13).

First Lieutenant James H. Lincoln, Air Corps, the Assistant Budget and Fiscal Officer at the AAF Ground Training Installation, Kearns, Utah, stated that in October 1946 he made an audit of the Hospital Fund, for the five months period from May to September 1946, inclusive. Lieutenant Lincoln identified and there was received in evidence by agreement certified copies of the bank statements of the fund for the period stated (R. 20, Pros. Exs. 3-7). As shown by the final statement the fund had been overdrawn in the amount of $217.35 as of 26 September 1946. The following records of the hospital fund were identified by Lieutenant Lincoln, were received in evidence and withdrawn at the conclusion of the trial: Cash Receipts Register (R. 27, Pros. Ex. 8), Cash Disbursements Register (R. 26, Pros. Ex. 9), General Ledger (R. 28, Pros. Ex. 10). As a result of Lieutenant Lincoln's audit of the fund, and based on the total receipts and expenditures, there existed a shortage or deficit in the fund of $1295.65 as of 30 September 1946 (R. 39). The report of audit was received in evidence without objection and was identified as Prosecution Exhibit 12 (R. 18). This audit revealed numerous irregularities in the handling of the fund. Many cancelled checks were missing from the records and there were found in the cash receipts book several deposit slips made out in various amounts but the bank records revealed no corresponding deposit had actually been made (R. 20,21,27). Lieutenant Lincoln found that the daily receipts, as reflected by the cash receipts register, tallied with the total cash receipts as shown in that register. He also found that except for a withdrawal of $100 shown by the September bank statement, for which no cancelled check was found, the entries in the disbursements register "checked" with the cancelled checks (R. 26).

Captain David L. McAbee, Air Corps, the Assistant Budget and Fiscal Officer, Fourth Air Force, stated that on or about 31 October 1946 he audited the Hospital Fund, Kearns, Utah. He testified at length as to the manner in which he audited the records and stated that there was a shortage in the fund of $1295.65 which represented "money which was never deposited in the bank as shown by the bank statements, which should have been, but

was never deposited" and included a $100 withdrawal of which there was no record except the bank's debit. The shortage was determined as follows:

Balance in bank as of 30 April 1946	$ 352.60	
Total receipts, 1 May to 30 Sep (Pros. Ex. 8)	6224.35	
Total -	6576.95	
Less total disbursements (Pros. Ex. 9)	5498.65	
Total -	1078.30	
Plus overdraft, 30 Sep 1946 (Pros. Ex. 7)	217.35	
Total shortage, 30 Sep 1946	$1295.65	(R. 53,59).

Corporal Willard C. Page, the bookkeeper of the fund, testified that on several occasions he made out deposit slips in various amounts but that no deposit was made, that he called this matter to accused's attention and he said on one occasion that the deposit book was lost and on another "just let it go." He stated further that although he had access to the safe, only accused and Miss Gunderson, whom accused married, knew the combination (R. 67).

Pauline Maria Gunderson, 444 Coatsfield, Salt Lake City, Utah, stated that she was a clerk in the office of the hospital fund at Kearns, Utah, while accused was custodian of the fund and that she married him on 29 June and got an annulment on 30 September. The accused taught her the combination to the safe but she had nothing to do with the fund except to open the safe. She lived with accused in the apartment with the Shircliffs and knew the phone bill was $177. She and accused were in debt and had to borrow a considerable amount of money. She never saw accused in possession of a large amount of money (R. 119-122).

Charge II and the specifications thereto

Master Sergeant Everett H. Shircliff, McChord Field, Washington, testified that during the period 7 July to 11 September 1946 he and his wife together with accused and his wife occupied the same apartment in Kearns, Utah. The rent was $55.00 per month and the July phone bill was $45.00. It was mutually agreed between Sergeant Shircliff and accused that Shircliff would pay the rent on the apartment and accused would pay the telephone bill for the period of such joint occupancy. Sergeant Shircliff paid the rent and on 11 September when he left Kearns the telephone bills in the total sum of $177.82 were unpaid. Shircliff paid the total bill himself upon repeated assurances from accused that he would reimburse him in the amount paid. The accused never reimbursed Shircliff and on the date of trial, 16 December 1946, the debt remained unpaid (R. 104,107). The telephone bill was received in evidence over objection by defense and marked for identification as Prosecution Exhibit 18(R. 106).

Captain Herman I. Little, MAC, testified that he was at accused's apartment when Sergeant Shircliff "brought up" the telephone bill, then $117.00,

and that accused agreed to pay it the next day (R. 112).

Additional Charge I and its Specification

Lieutenant Colonel H. Dodge Dean, AC, Commanding Officer of AAF GTI, Kearns, Utah, testified that on or about 4 October 1946 he ascertained that accused had, without proper authority, cleared the post and he notified the Provost Marshal, Hamilton Field, California, who returned accused to the Post on or about 17 October. Colonel Dean confronted accused with certain discrepancies in his fund account and gave him until noon the following day, 18 October 1946, to make satisfactory explanation. The accused offered no explanation and at noon on 18 October Colonel Dean caused orders to be issued restricting accused to "your quarters, the club, the adjutant's office where you sign in and your place of business on the Post." By first indorsement thereon accused acknowledged receipt of such orders (R. 87, Pros. Ex. 16). On 9 November 1946 and without authority from Colonel Dean, accused procured Private First Class Forrest D. Hastings to drive him to the Skylark Tavern on State Street in Salt Lake City, Utah (R. 88,96). Mr. Harold Karogi, bartender at the Skylark Tavern, stated that accused was present in the tavern on 9 November 1946 (R. 152).

Captain Arthur C. Fritog, AC, Assistant Adjutant at Kearns, Utah, identified a copy of WD AGO Form No. 137, Officers Clearance Certificate, dated 4 October 1946 duly signed by the accused and containing the following certificate:

> "I certify that I have turned in all classified documents for which I am responsible, except those which are my personal property; That I have liquidated all personal indebtedness in this area or have made arrangements satisfactory to my creditors: That I have made settlement of all public funds, property accounts, and debts due all agencies and instrumentalities of the United States, including the above. There are no charges against me at the agencies listed where no checks or initials appear.
>
> (s) ROY W. HARNACK
> (Signature) "

The certificate was received in evidence as Prosecution Exhibit 17 (R. 94).

4. For the defense

It was stipulated that if Dorothy E. Mills, Salt Lake City, were present she would testify that she was a driver in the motor pool at Kearns, Utah, from August 1945 to September 1946, and that on occasion she drove accused, Fred Templin, Captain Chamberlin and Sergeant Harvey Meyerpeter to town, apparently to make deposits in the bank (R. 138). Captain Harold C. Chamberlin stated that he and a nurse had made phone calls from the apartment of accused

and Master Sergeant Shircliff and that they left the money for the calls with accused (R. 139).

Captain Robert C. Fritog, called by the defense, stated that on three occasions while accused was in restriction he was authorized to leave the Post. On one occasion accused's wife was at the Temple Square Hotel and he was permitted to visit her, on the other two occasions accused was permitted to leave with Lieutenant Genesen who was investigating the case. On cross-examination the witness stated that on none of these occasions was accused permitted to visit any taverns in Salt Lake City (R. 143,144).

Captain Maurice Morrison, AC, a witness for the defense, visited the Harnack-Shircliff apartment and made some telephone calls in July or August. The toll for these calls amounted to $5 or $6. Captain Morrison testified that upon completion of the calls he paid the amount of the toll to Master Sergeant Shircliff (R. 147).

The defense called Lieutenant James A. Lincoln, Private Forrest E. Hastings and Mr. Franklin R. Smith, Jr., who, as a soldier had worked in the statistical office at the hospital. The testimony adduced from these witnesses appears to have no material bearing on the issues in the case (R. 154-169).

The accused, cognizant of his rights as a witness, elected to testify under oath. He stated that he had served 13 months in the China Theater and was twice under bombardment; that between April 1946 and October 1946 he was assigned numerous duties at the Station Hospital, Kearns, Utah, such as Registrar, Custodian of the Hospital Fund, Adjutant, Inspector, Librarian and Air Evacuation Officer; that the personnel assigned to him was inadequate and that he had to do much of the work himself. Accused stated that he was seldom present when the collections were made and the money was received by others; that on occasion he had entered the mess office, found the door to the safe open and no one in the office; that on numerous occasions he cashed checks "for officers, including nurses and that during his custodianship no Fund Council was ever appointed and none ever met; that the fund was audited by the Air Inspector for the months of June and July and received ratings of 'Excellent' for June and 'Superior' for July." With regard to the telephone bill accused stated that his agreement with Shircliff was that they share all the expense on a "50-50" basis but later agreed that Shircliff pay the rent and he agreed to pay the telephone bills. He had not paid either but intended to pay half of the total when the rent, $110, was added to the phone bill, $177.00. Accused admitted going to the Skylark Tavern on 9 November but stated that he had permission on said date from Colonel Dean to go to Salt Lake City. When he left Kearns, Utah, accused stated that he considered all of his accounts "cleared" and that he signed the Clearance Certificate (R. 170-205, Pros. Ex. 17).

5. The evidence conclusively shows that a shortage of $1295.65 existed

in the Hospital Fund for the period 1 May to 30 September 1946 and that accused was custodian of the fund. The defense evidence tended to show that subordinates of the accused had access to part if not all of the receipts of the fund and that there was laxity in the operation of the fund. Such circumstances, if true, do not relieve accused of the responsibility which fastens on him as custodian.

There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with proof of exculpatory circumstances then falls upon the steward and his explanatory evidence, when balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined, in the first instance at least, by the court. Here the court, by its findings of guilty of embezzlement resolved this question against accused and the reviewing authority did not, nor do we, find any reason to disturb such findings. (CM 276435, Meyer, 48 BR 331, 338; CM 301840, Clarke, 24 BR (ETO) 203, 210; CM 262750, Splain, 4 BR (ETO) 197, 204.)

The testimony of Master Sergeant Shircliff and the admissions of accused sufficiently establish an indebtedness of accused for the telephone bills for the period July and August 1946. Since he paid none of the debt, although promising on several occasions to settle the matter, any minor discrepancy in the total amount due the sergeant would not operate to the prejudice of accused's rights. The circumstances under which accused agreed to pay the phone bills, his failure to pay although repeatedly promising the sergeant that he would effect settlement, and the fact that the sergeant was ultimately required to pay the bill to protect his honor are sufficient facts to establish that accused's failure to make final settlement with Shircliff was under dishonorable conditions.

The statement of accused on 4 October 1946 that "I have liquidated all personal indebtedness in this area or have made arrangements satisfactory to my creditors; that I have made settlement of all public funds, property accounts, and debts due all agencies and instrumentalities of the United States" was, in the light of the foregoing, obviously untrue and known by accused to have been untrue. Whatever he may have considered to be the condition of the fund he certainly knew that Sergeant Shircliff had not been satisfied. With regard to the breach of restriction alleged in the Specification, Additional Charge I, there is a direct conflict between the testimony of Colonel Dean, who stated that he did not authorize accused to leave the Post on 9 November 1946 and accused who stated that he had authority from Colonel Dean to go to Salt Lake City. The court-martial resolved this question of fact against accused and under all the circumstances we find no reason to question the court's decision in this regard (CM 205920, McCann, 8 BR 239,246; CM 212505, Tipton, 10 BR 237,244).

6. War Department records show that this officer is 27 years of age and married. After graduating from high school he attended business college for one year and Gonzaga University for four years, but did not graduate. Only one efficiency report appears in the records, dated 30 June 1945, and shows a numerical rating of 3.6, or "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 thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Articles of War 93 or 96.

Christy E. Silvers, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert E. Stoddard, Judge Advocate

JAGK - CM 320308 1st Ind

WD, JAGO, Washington 25, D. C. JUN 1 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 Roy W. Harnack (O-1547319), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of embezzlement of $1,295.65, property of the Post Hospital Fund, Kearns, Utah, in violation of Article of War 93; of dishonorably failing to pay Master Sergeant Everett H. Shiroliff the sum of $177.82 for a telephone bill, and of making a false official statement to Captain Arthur C. Fritog that he had liquidated all indebtedness in his area or had made arrangements satisfactory to his creditors, both in violation of Article of War 95; and of breach of restriction on 9 November 1946, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence, remitted one year of the confinement, 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 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 sentence and to warrant confirmation of the sentence.

On 28 April 1946 accused was appointed custodian, Hospital Fund, AAF Station Hospital, Kearns, Utah. As evidenced by a bank statement and the certificate of accused attached thereto, the fund consisted of $352.60 on deposit at the Continental Bank and Trust Company of Salt Lake City, Utah. In October 1946 the Hospital Fund was audited by both First Lieutenant James H. Lincoln, AC, the Assistant Budget and Fiscal Officer at Kearns, Utah, and Captain Davis H. McAbee, AC, the Assistant Budget and Fiscal Officer, 4th Air Force. Their reports of audit which are made a part of the record, show that for the period 30 April 1946 to 30 September 1946 the accused received as custodian of the fund the sum of $6576.95 and that for the same period he officially disbursed the sum of $5498.65 and that as of 30 September the fund was overdrawn at the bank in the amount of $217.35, making a total shortage of $1295.65, the amount alleged to have been embezzled. The record also shows that from about 7 July to 11 September 1946 accused and his wife, together with Master Sergeant Everett H. Shiroliff and his wife occupied jointly an apartment at Kearns, Utah. It was agreed between the parties

that accused would pay the phone bills and Shircliff would pay the rent. The phone bills accumulated to a total of $177.82 and although Shircliff paid the rent, accused never paid the phone bill or any part of same. Finally, on about 11 September 1946 when Shircliff moved to Hamilton Field, California, he paid the bill himself and accused agreed to reimburse him. Shircliff was never repaid any part of the bill.

On 4 October 1946 accused "cleared" the post at Kearns, Utah, signing a certificate that he had liquidated all personal indebtedness in the area or had made arrangements satisfactory to his creditors and that he had made settlement of all public funds, property accounts and debts due all agencies and instrumentalities of the United States. On 17 October he was returned to Kearns, Utah, by the Provost Marshal at Hamilton Field, California, and was restricted to the Post. On 9 November 1946, and without being released from restriction, accused procured an enlisted man to drive him to a tavern in Salt Lake City.

The record shows that on 4 September 1944 accused was convicted by general court-martial of wrongfully applying to his own use a military vehicle in violation of Article of War 94, and of making a false official statement concerning his authority to use the vehicle, in violation of Article of War 96. He was sentenced to forfeit $50 of his pay per month for ten months.

4. Consideration has been given to a letter dated 22 March 1947 from Mrs. Patricia C. Harnack, wife of accused, and letter of 23 March 1947 from Mrs. Walter Harnack, mother of accused, both of 3610 E Street, Spokane, Washington, which letters were addressed to the Secretary of War, requesting clemency on accused's behalf.

5. I recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed, and that an appropriate United States disciplinary barracks be designated as the place of confinement.

6. 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

4 Incls
1. Record of trial
2. Form of action
3. Ltr fr Mrs. Patricia C. Harnack, dtd 22 Mar 47
4. Ltr fr Mrs. Walter Harnack dtd 23 Mar 47

(G.C.M.O. 230, 26 June 1947).

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

JAGK - CM 320352

29 APR 1947

UNITED STATES	RYUKYUS COMMAND
v.	Trial by G.C.M., convened at APO 331, c/o Postmaster, San Francisco, California, 29 January 1947. JONES: Dishonorable discharge and confinement for life. Penitentiary. NIOUS: Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks.
Private First Class ROBERT JONES (RA 38384251) and Sergeant GILBERT B. NIOUS (RA 18013102), both 3096th Quartermaster Laundry Platoon, Quartermaster Corps, APO 331.	

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

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

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

JONES:

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

Specification: In that Private First Class Robert Jones, 3096th Quartermaster Laundry Platoon, did at Naha, Okinawa (APO 105), on or about 15 December 1946, forcibly and feloniously, against her will have carnal knowledge of Mitsuko, Teruya.

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

Specification: In that Private First Class Robert Jones, ***, did, at Oruku, Okinawa, on or about 15 December 1946, feloniously, and unlawfully kill Uyehara, Haruko, by running over her with a 2½ ton 6x6 truck.

NIOUS:

CHARGE: Violation of the 93d Article of War.

Specification: In that Sergeant Gilbert B. Nious, 3096th Quartermaster Laundry Platoon did, at Oruku, Okinawa, on or about 15 December 1946, with intent to commit a felony, viz, rape, commit an assault upon Mitsuko, Teruya, by willfully and feloniously grabbing the said Mitsuko, Teruya, against her will.

Accused Jones pleaded not guilty to and was found guilty of all charges and specifications pertaining to him. Accused Nious pleaded not guilty to and was found guilty of the charge and specification pertaining to him. No evidence of any previous conviction was introduced as to either accused. Jones 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. Nious 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 twenty years. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement as to Jones and the Branch United States Disciplinary Barracks, Camp McQuaide, California, as the place of confinement as to Nious, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of evidence and law contained in the staff judge advocate's review as to both accused Jones and Nious, however, it is considered appropriate to set forth more fully the facts and law concerning the conviction of the accused Nious.

The accused were members of a Quartermaster Laundry Platoon stationed near Naha, Okinawa. At about 1730 hours on 15 December 1946 they loaded five Okinawans (3 men and 2 women) into a Government truck at Naha and proceeded to take them to their homes in the village of Oruku. Jones was the driver of the truck and Nious rode with him in the driver's seat (R. 7). When they arrived at a watering place called Otenda at the outskirts of Oruku, the truck stopped, and the accused told the men to go to their homes and the women, Mitsuko Teruya and Uyehara Haruko, to remain in the truck. The brother of Uyehara Haruko attempted to get her off of the truck and was kicked by Nious and all the men were forced to leave. The women attempted to follow the native men and got off the truck two or three times, but Nious, who was at the rear of the truck, made them get back into the bed of the vehicle. Jones was armed and when it became apparent that Nious could not restrain the women, who were screaming and attempting to flee, he went to the rear of the truck and threatened the women with a pistol. Nious then got into the bed of the truck and held the women. Jones got back in the driver's seat and started driving away (R. 8,18,20). One of the women, Uyehara Haruko, extricated herself from Nious, went over the side of the truck, and was run over and killed (R. 9,15,31). One of the Okinawan men gave an alarm in the village where a shot was fired, and accused Nious got out of the truck and left the area. Jones' subsequent rape of the woman who remained in the truck is adequately proved by the evidence (R. 10-11). Nious was convicted of assault with intent to rape Mitsuko Teruya. In his unsworn statement Nious admitted going with Jones to drive the Okinawans home. When they arrived at "Oruku" he stated that they stopped to let the people out and that when Jones "started up" one of the "girls started crawling over the side and yelling that someone had been run over." He then "stepped out of the cab to hold this one girl to keep her from falling over the side and when she screamed someone had been

run over they stopped the truck." A carbine shot was fired, Jones drove away in the truck, and Nious was scared and "wanted to get away from there" which he did. He "did not see any girl that was run over and did not hold any woman on any vehicle except to keep her from falling off when the vehicle was moving" (R. 30, 30(a)). Although the testimony of the prosecution witnesses was given through an interpreter, rendering it somewhat difficult to understand, the foregoing is a reasonable statement of the facts. The testimony of four Okinawan witnesses, the woman who lived and the three men who were in the truck, is in direct conflict with accused's contention that he was trying to prevent injury to the women.

It is said that once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted (MCM, 1928, par. 149l). The court found that the assault, viz, holding and forcing the women back in the truck, was with such intent. The fact that Jones went ahead and consummated the rape for which he was convicted may be considered as indicative of the intent of both Jones and Nious who were acting in concert until one of the women had been killed and Nious fled. The women were forcibly separated from the native men at a place near their home. Their screams attracted attention in the village. A shot was fired, apparently by a sentry. The statement of Nious that he got scared and ran off is also inconsistent with his alibi that he was trying to prevent injury to the woman. Had he desired to prevent injury to them all he had to do was to let them proceed to their homes. Such violence as is proven would not reasonably be attributed to a desire to protect these helpless natives. In CM 288875, Hayes, 1 BR (POA), the Board aptly stated that the question of intent is one of fact rather than law except in a case where the facts proved afford no reasonable ground for the inference drawn.

It was said in Ware v. State, 67 Ga. 349, 352,

> "What other motive could he have had? *** The fiendish flame of lust alone could impel him to such acts. In seeking the motives of human conduct, the jury need not stop where the proof ceases; inferences and deductions from human conduct are proper to be considered where they flow naturally from the facts proved. And such conduct as this points with reasonable, if not with unerring certainty to the lawless intent he had in view."

The foregoing statement from the decision in Ware v. State is quoted with approval in CM 195035, Talley, 2 BR 181, wherein the facts showed that accused, a colored soldier, entered the quarters of the wife of an Army officer who, being alone, was directed to "turn out the lights, I want to talk to you" and repeating the request stated, "If you call I will shoot." The ultimate purpose of accused failed through her resistance but the Board of Review held the record legally sufficient to sustain a finding of guilty that the assault was with intent to rape. The Board further noted that neither a spoken desire for sexual intercourse (Dickens v. People, 60 Colo.

141, 152 Pac. 909, 911) nor any physical contact of the offender with the person assaulted is necessary to prove the element of intent to consummate sexual intercourse by force in the crime of assault with intent to rape (Jackson v. State, 91 Ga. 322, 18 S.E. 132,133). We are of the opinion that there is ample competent evidence in this case from which the court was warranted in inferring that Nious' assault on the Okinawan woman, Mitsuko Teruya, was committed with intent to rape her as alleged (CM 233183, Gray, 19 BR 349,355).

4. 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 sentences. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, section 2801, District of Columbia Code.

Christy D. Silvus, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stygall, Judge Advocate

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

JAGK - CM 320391

31 MAR 1947

UNITED STATES v. Private WILLIAM McDONALD (35736846), Company A, 25 Heavy Construction Signal Battalion.	THIRD UNITED STATES ARMY Trial by G.C.M., convened at Heidelberg, Germany, 20 and 24 December 1946. Dishonorable discharge and confinement for ten (10) years. Penitentiary.

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 pleaded not guilty to and was found guilty of three specifications alleging housebreaking and three specifications alleging robbery in violation of Article of War 93 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, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, 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 "Captain Willis R Stark 0293869 FA Hq Third US Army" was detailed as defense counsel. It appears from the Charge Sheet that "Willis R. Stark, Captain, FA" signed and swore to the charges as accuser. The record of trial reveals that Captain Stark was present at the hearing in the capacity of defense counsel and that he signed the record of trial signifying that he had examined the same before it was authenticated (R. 2,34). When accused was asked by the trial judge advocate whom he desired to introduce as counsel, the following reply was elicited:

"DEFENSE: By the regularly appointed defense counsel, Captain Stark." (R.3).

On page 3 of the record of trial, the following also appears:

"PROSECUTION: *** The charges were preferred by Willis R Stark, Captain, FA. I would like to ask the accused if he realizes that Captain Stark has been the accuser in this case and if he has any objection, in view of that fact, to having Captain Stark act as his defense counsel.

"DEFENSE: In that connection I would like to explain to the

court that I have explained to the accused the circumstances under which I signed those charges, and he understands that it doesn't interfere with my conduct of the defense' case."

4. It thus appears that Captain Willis R. Stark was both accuser and regularly appointed defense counsel in this case. As accuser he made oath that he personally signed the charges and specifications upon which accused was placed on trial and that, to the best of his knowledge and belief, the matters set forth in such specifications were true in fact. On the other hand, as defense counsel he undertook to prepare and present to the court accused's defense and to assiduously safeguard accused's legal rights at the trial. The inconsistency between these two positions is at once glaringly apparent.

In CM 284066, Mejia (55 BR 241, 4 Bull. JAG 334), the regularly appointed defense counsel was, as in the instant case, the accuser. When queried by the trial judge advocate as to whether he was aware of this fact accused replied in the affirmative and when asked if he desired to have the accuser act as his defense counsel, accused replied that he "still" wished that officer to be his defense counsel. 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'. Observance of these simple principles compel the conclusion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence."

In CM 316898, Mesquite, the Board of Review held the record of trial

therein legally insufficient to support the findings and sentence since it appeared that the regularly appointed defense counsel, who represented accused at the trial, had been the investigating officer, and in CM 319176, Henry, the findings and sentence therein suffered the same adverse fate because the regularly appointed assistant defense counsel, who was present in such capacity at the trial, had also been the investigating officer. The extent and meaning of the decisions in both these cases can best be demonstrated by the following quotation from the Henry case:

> "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."

It will be noticed that under the principles announced in the Mejie case accused is not to be allowed the option of insisting upon the services of the accuser as defense counsel, whereas in the Mesquite and Henry cases there is no objection to accused being represented by one who has formally and officially announced his belief in accused's guilt provided accused particularly desires to be defended by such counsel in preference to or along with other counsel (see also CM 252284, Simmons, 4 BR (ETO) 1,3). In accordance with the plain mandate of Article of War 17 that "The accused shall have the right to be represented in his defense before the court by counsel of his own selection ***," it would seem that the effect of the holding in the Mejie case must be likewise limited so that accused may, if he so desires, request that the accuser act as his individual defense counsel or, having full knowledge of the facts, specifically insist that the regularly appointed defense counsel remain to defend him even though such counsel be the accuser.

Notwithstanding the limitations we have placed upon the holding in the Mejie case, we are of the opinion that the representation of accused by Captain Stark, the accuser, under the circumstances here disclosed, was error prejudicial to the substantial rights of accused. The mere occurrence of accused having been asked whether he had "any objection" to having Captain Stark act as his defense counsel and Captain Stark's reply that accused understood that the captain's prior role as accuser "wouldn't interfere" with the conduct of the defense is not the equivalent of a specific request by accused to be represented by Captain Stark in preference to other counsel. From all that appears in the record of trial, accused may not have known of his right to have other counsel and may simply have been assured by the regularly appointed defense counsel that he would do his best to defend accused despite his previous acts as accuser. Also, following the rule laid down in the Henry case, the somewhat formalized statement that accused desired to be defended by regularly appointed defense counsel is not, in the light of Captain Stark's apparent disqualification, a sufficient showing that accused was properly represented.

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.

_____, Judge Advocate

(Sick in Hospital), Judge Advocate

_____, Judge Advocate

JAGK - CM 320391 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Headquarters Third Army, Atlanta, Georgia.

1. In the case of Private William McDonald (35736846), Company A, 25 Heavy Construction Signal Battalion, 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. In view of the fact that the Third United States Army has not been inactivated and the possibility that you may desire to authorize a rehearing in this case, the record of trial is returned for appropriate action by your Headquarters.

3. Please return the foregoing holding by the Board of Review, together with this indorsement and copies of the published War Department general court-martial orders.

1 Incl
1. 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 320408

17 APR 1947

UNITED STATES	UNITED STATES AIR FORCES IN EUROPE
v.	Trial by G.C.M., convened at Furstenfeldbruck, Germany, 3-7, 9, 10 December 1946. Dishonorable discharge and confinement for life. Penitentiary.
Private First Class BONNIAL LAFLORE (34156420), Company B, 837th Engineer Aviation Battalion, APO 208, US Army.	

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

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

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private-first-class Bonnial Laflore, Company B, 837th Engineer Aviation Battalion, did, at Army Air Forces European Theater Replacement Depot, Furstenfeldbruck, Germany, Army Post Office 208, on or about 1 October, 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technical Sergeant Oscar W. Brown, 366th Bombardment Squadron, a human being by shooting him with a pistol.

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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of evidence and law contained in the Staff Judge Advocate's review and holds that upon a conviction for murder or rape in violation of Article of War 92 it is within the power of the court to adjudge dishonorable discharge and total forfeitures with life imprisonment (CM 244445, Lakas, 2 BR (ETO) 709). Any other construction of Article of War 92 is repugnant to reason and, we believe, does violence to the congressional intent in providing mandatory penalty

of death or life imprisonment for murder or rape.

4. 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. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452,454).

Charles L. Silvus, Judge Advocate

(Sick in Quarters), Judge Advocate

Edward E. Schmidt, Judge Advocate

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

AUG 1 1947

JAGH - CM 320455

UNITED STATES v. Major HOWARD GAILLARD, JR. (0-914835), Air Corps and Captain TOD H. COHEN (0-565065), Air Corps	UNITED STATES AIR FORCES IN EUROPE Trial by G.C.M., convened at Paris Detention Barracks, Paris, France, 5 November - 21 December 1946. Gaillard: Dismissal and total forfeitures. Cohen: Dismissal, total forfeitures and confinement for six (6) months.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SMITH, 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 and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Major Howard Gaillard, Jr., Headquarters and Base Service Squadron, 414th Air Service Group, and Captain Tod H. Cohen, Headquarters Squadron, 306th Bombardment Group (H), did, at or near Istres, France, between about 1 March 1946 and about 31 May 1946, jointly and in conjunction with each other and Joseph Sigal, a civilian, wrongfully and unlawfully conspire and agree to engage in the business of bringing into France from Egypt and other countries for the purpose of sale, barter, exchange, and otherwise dealing therein, quantities of gold, diamonds, silk, perfume, and other commodities for their joint and mutual profit and gain.

Specification 2: In that Major Howard Gaillard, Jr., Headquarters and Base Service Squadron, 414th Air Service Group, and Captain Tod H. Cohen, Headquarters Squadron, 306th Bombardment Group (H), acting jointly and in pursuance of a common intent and in furtherance of a conspiracy and agreement previously entered into and then existing between them to engage in the business of bringing into France from Egypt and other countries for the

purpose of sale, barter, exchange, and otherwise dealing therein, quantities of gold, diamonds, silk, perfume, and other commodities for their joint and mutual profit and gain, did, at or near Istres, France, Cairo, Egypt, and Dakar, Senegal, French West Africa, sometime in April or May 1946, in conjunction with Joseph Sigal, a civilian, wrongfully and unlawfully attempt to obtain from Waghy I. Zaky Bey in Cairo, Egypt, and from Antoinne Buovangure in Dakar, Senegal, French West Africa, quantities of gold, diamonds, silk, perfume, and other commodities.

Specification 3: In that Major Howard Gaillard, Jr., Headquarters and Base Service Squadron, 414th Air Service Group, and Captain Tod H. Cohen, Headquarters Squadron, 306th Bombardment Group (H), did, at or near Istres, France, Paris, France, and Brussels, Belgium, and at various and sundry places between said places, from about 1 May to about 6 June 1946, jointly and in conjunction with each other and Joseph Sigal, a civilian, wrongfully and unlawfully conspire and agree to engage in the enterprise of buying allied military marks and converting them into United States Postal Money Orders for their joint and mutual profit and gain.

Specification 4: (Finding of Not Guilty as to Gaillard; Disapproved by reviewing authority as to Cohen)

Specification 5: (Finding of Not Guilty as to Gaillard; Disapproved by reviewing authority as to Cohen)

Specification 6: (Stricken by Court on motion of Defense)

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

Specification 1: In that Major Howard Gaillard, Jr., Headquarters and Base Service Squadron, 414th Air Service Group, and Captain Tod H. Cohen, Headquarters Squadron, 306th Bombardment Group (H), did, at or near Istres, France, between about 1 March 1946 and about 31 May 1946, jointly and in conjunction with each other and Joseph Sigal, a civilian, wrongfully and unlawfully conspire and agree to engage in the business of bringing into France from Egypt and other countries for the purpose of sale, barter, exchange, and otherwise dealing therein, quantities of gold, diamonds, silk, perfume, and other commodities for their joint and mutual profit and gain.

Specification 2: In that Major Howard Gaillard, Jr., Headquarters and Base Service Squadron, 414th Air Service Group, and Captain Tod H. Cohen, Headquarters Squadron, 306th Bombardment Group (H), acting jointly and in pursuance of a common intent and in furtherance of a conspiracy and agreement previously entered into and then existing between them to engage in the business of bringing into France from Egypt and other countries for the purpose of sale, barter, exchange, and otherwise dealing therein, quantities of gold, diamonds, silk, perfume, and other commodities

for their joint and mutual profit and gain, did, at or near Istres, France, Cairo, Egypt, and Dakar, Senegal, French West Africa, sometime in April or May 1946, in conjunction with Joseph Sigal, a civilian, wrongfully and unlawfully attempt to obtain from Waghy I. Zaky Bey in Cairo, Egypt, and from Antoinne Buovangure in Dakar, Senegal, French West Africa, quantities of gold, diamonds, silk, perfume, and other commodities.

Specification 3: In that Major Howard Gaillard, Jr., Headquarters and Base Service Squadron, 414th Air Service Group, and Captain Tod H. Cohen, Headquarters Squadron, 306th Bombardment Group (H), did, at or near Istres, France, Paris, France, and Brussels, Belguim, and at various and sundry places between said places, from about 1 May to about 6 June 1946, jointly and in conjunction with each other and Joseph Sigal, a civilian, wrongfully and unlawfully conspire and agree to engage in the enterprise of buying allied military marks and converting them into United States Postal Money Orders for their joint and mutual profit and gain.

Specification 4: (Finding of Not Guilty as to Gaillard; Disapproved by Reviewing Authority as to Cohen)

Specification 5: (Finding of Not Guilty)

Specification 6: (Stricken by Court on motion of Defense)

Each accused pleaded not guilty to all applicable Charges and Specifications. Accused Gaillard was found guilty of both Charges and Specifications 1, 2, and 3 and not guilty of Specifications 4 and 5 under each Charge. Accused Cohen was found guilty of Charge I and Specifications 1, 2, 3, 4, and 5 thereunder, guilty of Charge II and of Specifications 1, 2, 3, and 4, and not guilty of Specification 5 thereunder. No evidence of any previous convictions was introduced. Accused Gaillard was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. Accused Cohen 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 months. As to accused Cohen the reviewing authority disapproved the findings of guilty of Specifications 4 and 5 under Charge I and of Specification 4 under Charge II. As to each accused he approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The relevant evidence for the prosecution pertinent to the approved findings of guilty is summarized as follows:

<u>As to Specifications 1 and 2 under both Charges</u>: On motion of the prosecution, the court took judicial notice of paragraph 2e, Army Regulations 600-10, Personnel, Military Discipline, 8 July 1944 (R. 446), which provides in relevant part:

"2. General.— * * *

"e. Miscellaneous.

(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.

(a) It is impossible to enumerate all the various outside activities and interests to which these regulations refer. The following examples may be regarded as typical:

1. Acceptance by an officer of a substantial loan or gift or any emolument from a person or firm with whom it is the officer's duty as an agent of the Government to carry on negotiations.

2. Acquisition or possession by an officer of a financial interest in any concern whose business includes the manufacture and sale of articles of a kind of which it is the duty of the officer to make purchases for the Government.

3. Service by an officer in the transaction of business between the War Department and any corporation, firm or civil project (a) of which the officer concerned is an officer, member or agent or (b) in the pecuniary profits or contracts of which the officer concerned has a direct or indirect interest. See sec. 41, act of 4 March 1909 (35 Stat. 1097; 18 U.S.C. 93). See 14 Op. Atty. Gen. 483.

(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."

Letter, Headquarters European Theater of Operations, dated 4 April 1945, file AG 004 OpGA, subject: "Prohibition Against 'Engaging in Business'" was introduced into evidence as Prosecution Exhibit 29 (R. 514). In relevant part this directive provides:

"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."

Judicial notice was taken of Section III, Circular Number 67, Headquarters U.S. Forces, European Theater, 18 May 1947, which provides in relevant part:

"III—PROHIBITION AGAINST ENGAGING IN BUSINESS.

"1. Letter, this headquarters, AG 004 ApGA, 'Prohibition Against Engaging in Business', 4 Apr 1945, is rescinded.

"2. It is the policy of the Theater Commander that all military personnel and all persons accompanying or serving with the Army in this theater shall not, so far as can be avoided, disturb the

economy of countries within the theater, nor use their presence here in order to obtain or to lay plans to obtain any commercial advantages for themselves or for others.

"3. Pursuant to this policy, all military personnel and all persons accompanying or serving with the Army are prohibited, except as provided in this circular, from engaging in business in this theater.

"4. 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. Dealings in currency are also prohibited, by the provisions of letter, this headquarters, AG 123.7 GAP-AGO, 'Prohibition Against Circulating, Importing, Mailing or Exporting US and Continental Currencies, including British currency, in Liberated and Occupied Areas, and Transactions Involving All Currency Except Through Official Channels', 27 Feb 1946.

"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."

During the period between March to 1 June 1946 accused Gaillard was the Commanding Officer of the Headquarters and Headquarters Service Squadron, 415th Air Service Group stationed at the Istres Army Air Base in Southern France (R 161-162) and also acted as Base Executive Officer (R 880-881). During this period accused Cohen was the Base Civilian Personnel Officer at the Istres Army Air Base. Prior to that assignment he had been assigned to the Office of the Director of Supply, Air Transport Command (R 161-162).

In the spring of 1945 accused Cohen met Joseph Sigal, a Belgian civilian who lived in Marseille, France (R 75; Pros Ex 31, R 734). They became very friendly and Cohen became a frequent visitor at Sigal's home (R 75; Pros Ex 31). Sigal had many desirable business connections in Marseille and at times he was of assistance to Cohen in obtaining various materials for use at the base (R 76). At one time Cohen discussed with Sigal the fact that many Army Officers were making substantial profits in various business ventures (Pros Ex 31) and the two discussed projects

for an import and export business which they planned to begin after Cohen's relief from active duty (R 77).

In July 1945 (R 147; Pros Ex 2) or late in 1945 (R 120) Sigal and Cohen met an Egyptian business man named Waghy Zaky Bey in Paris where theydiscussed the business of exporting goods from Egypt to France (R. 120; Pros Ex 2). Cohen told Waghy Zaky Bey that he would send a messenger to Egypt who would communicate with the latter upon his arrival (Pros Ex 2, p 2). For the purpose of identifying any communication he might send, Cohen wrote his signature in Waghy Zaky Bey's presence (Pros Ex 2, p 3).

Cohen and Gaillard, who had known each other since November 1945, became fairly fast friends after 1 February 1946. In their conversations they frequently discussed plans for making money prior to their release from active duty (R 620; Pros Ex 30, 31).

On one occasion early in 1946, the two accused went to the home of Sigal in Marseille (R 80). They discussed the fact that Gaillard was going to be separated and that he wanted to earn some money before he went home (R 81-82, 84-85; Pros Ex 30, p 5).

At this time, Cohen asked Sigal what they could do about making some money. Sigal mentioned that some people were getting gold in Africa and bringing it back to Belgium for sale but he stated that gold could be obtained only with AOF francs (African Occidental francs) (R 89), and that the price of one kilo of gold in Africa was approximately 160,000 AOF francs (R 89). One kilo of gold could be resold in Belgium for the equivalent of 450,000 French francs. Sigal testified that one of the accused said, "Well, perhaps that could be a way of doing money" and Cohen added that it would be the thing to do, provided there was not going to be any trouble (R 89). Gaillard mentioned that he knew a flyer who could go anywhere (R 92).

On 24 February 1946, Gaillard visited the quarters of Captain Carlo M. DeGennaro, a rated pilot, who was the Group Air Inspector of the 306th Bombardment Group and the Station Air Inspector at Istres (R 161-162). Gaillard referred to a previous conversation which he had had with DeGennaro and to a transaction in which the two had been engaged and asked DeGennaro if he was still interested in making some money to which DeGennaro replied in the affirmative (R 163).

On the morning of the following day, DeGennaro saw Gaillard in the latter's office. Gaillard told DeGennaro that the latter could make some money by delivering certain packages to addresses in Cairo and Dakar and by carrying back packages from those addresses. Gaillard stated that he knew of a syndicate which was interested in these deals. He asked DeGennaro to arrange a trip to Dakar in his capacity as Air

Inspector on the pretext of inspecting a courier run from Istres to Liberia. Gaillard stated that he would undertake the matter of getting a clearance to Cairo in connection with the purchase of Post Exchange supplies. DeGennaro was told that the people in Africa were expecting a messenger with plans for the exchanges and packages from Istres. The packages from Istres would contain either currency, or letters confirming previously established plans (R 164-165).

Gaillard told DeGennaro that they were all links in a chain, that it was only necessary for DeGennaro to know him and the people that he was supposed to contact at Dakar and Cairo and that, as to Gaillard, it was only necessary for him to know DeGennaro and the other individuals in the syndicate with whom he had been making arrangements. Gaillard added that the syndicate would some day own its own liberty ships, and asked DeGennaro whether he was interested in representing the syndicate at Brazil. He also mentioned that the commodity to be brought back from Dakar was gold bullion and that the commodity to be brought back from Cairo was essence of perfume (R 167-169). DeGennaro's share would be approximately 20% of the profits arising from the sale of the imported merchandise, which Gaillard estimated would be $10,000. He also stated that he (Gaillard) would not receive any profit from the enterprise except whatever DeGennaro chose to "tip" him (R 164-165).

DeGennaro told Gaillard that he would think about the proposal. DeGennaro thought about the matter for about a week, after which he made up his mind to tell the base commander the entire story. He did not report it at the time the proposal was made as he was surprised that Major Gaillard had made such a proposition. As he (DeGennaro) was an applicant for a Regular Army commission, he thought that Gaillard might be filling out a report in connection with his application. He also thought Gaillard might be trying to "frame him." He reported the matter to Colonel Harris who was then base commander, told him the complete story, and requested assistance in connection therewith. He asked Colonel Harris to request higher headquarters to send properly trained investigators to Istres to conduct an investigation of Gaillard's proposition (R 167-169, 273, 276).

Between 26 February and 16 April 1946, DeGennaro and Gaillard had short conversations almost daily around the base or wherever they met. On some of these occasions Gaillard told DeGennaro to hurry up and make the trip to Dakar and Cairo because he was about to be redeployed. He also told DeGennaro that the syndicate was having difficulty getting the AOF francs. On one occasion he asked DeGennaro if he could permit a stop at Tripoli in his itinerary because a contact was being established there. At another time he told DeGennaro that he wanted the latter to arrange for a stop at Rome because a contact was being established there. DeGennaro was told at one time that he could carry home a package — an

ordinary package, but of extraordinary value, and he would be compensated accordingly. At various other times he told DeGennaro that he would try to accompany him on the trip; that DeGennaro could throw the money away if he ever got in trouble on the trip but that the syndicate would revenge itself in case he absconded with the money; and that he would be carefully observed from the moment he accepted the package from him up until the time he returned to Istres with the commodities.

He once asked DeGennaro if he thought Colonel Harris would be interested in joining the syndicate in its activities. On another occasion he told him that a member of the syndicate had been apprehended at a Paris "fence" with platinum and diamonds (R 171).

Major Gaillard told him that diamonds and hashish were available in Cairo (R 171). He also said that DeGennaro could get essence of perfume, which was in great demand by French perfume manufacturers, from Cairo in a parcel approximately the size of a jerry-can which could be carried easily among the big boxes of the Post Exchange supplies (R 173). The perfume transactions could be considered both a legitimate and a profitable one (Pros Ex 30, p 4). The commodities mentioned in these conversations included gold bullion, diamonds, silk, essence of perfume, and hashish (R 176).

At one time Gaillard asked DeGennaro how he felt about carrying dope, opium and hashish, and DeGennaro answered that he did not like the idea. Gaillard replied that hashish was available in Cairo. To the further question, "Would you object to carrying opium or narcotics back from Cairo," DeGennaro replied, "I certainly do." Gaillard answered,"Well, no opium or narcotics are involved in any of the deals" (R 177, 285-286).

A few weeks after the two accused and Sigal had discussed the African venture Cohen came to the latter's house and asked him what was delaying his preparation for that venture. He stated that the pilot was ready to go whenever they wanted him to leave. At that time Sigal told Cohen that the business venture would only result in trouble. Cohen agreed but stated that they had promised to engage in the enterprise and they would have to do something about it. Sigal replied that the easiest solution for discouraging the venture was to say that no AOF francs could be found (R 93). Sigal, however, contacted a friend named Jacques La Vielle and asked him if he knew anyone in Africa connected with the gold business (R 94). As a result of Sigal's conversation with La Vielle, the latter wrote a letter to a certain Antoine in Dakar on 8 April 1946. La Vielle gave the letter to Sigal who in turn handed it to Cohen (R 95). Cohen told Sigal at that time that he was going to give the letter to Gaillard, who would give it to the pilot. This letter provided, as follows:

"Marseille, April 8, 1946

"Dear friend Antoine,

"You are going to be astonished after such a long silence to have the occasion of receiving news from me. I knew through our common friends what was becoming of you. I know that you are doing well in business and you know how much pleased I am about it. The purpose of this letter is to ask you if I could contemplate an arrangement through your channel, which even could interest you if you so desired. This is what is the matter. The bearer of this letter, in whom I fully trust, travels regularly between Dakar and here. He could quite safely transport 'Jonc', which one can find in good conditions in your place, and that one can sell on our place with a substantial profit.

"Could you procure him this merchandise, which would be paid cash? I am sure that everything could be done. You would find the most superior merchandise.

"I believe I can rely on our old friendship for you to take the necessary steps in that sense, because I need to disentangle, and this is a unique occasion for the relief.

"Through the bearer have me word sent giving me full necessary details to get this business through to a good end, and let me know at the same time if the currency of over here might do, or if the one of AOF is absolutely necessary, or another one.

"I believe Therese is doing well. I am kissing both of you love.

Jacques La Vieille"

"As I don't know which currency would be needed you can give him two kilos which will be paid to you in about eight days. Do for the best. You may act without fear.

J. V."

"It is your brother-in-law Toine who gave me your address. His health is all right, but think life is not treating him well at all.

"All the family of cousin Jean is all right" (R 135,214; Pros Ex 5).

According to the interpreter the word "jonc" is either a slang

expression with which he is not familiar or it means "Rush, a Flexible Rod" (R 225-227).

At the time he delivered the letter to Cohen, Sigal said that nobody would part with any merchandise without money, "but by that way we had kept our promise to the Major and his pal * * *" (R 96).

On or about 27 March 1946 De Gennaro reported Gaillard's remarks to agents of the USAFE CID. He also made reports to Lieutenant Colonel Smith, Chief Agent, CID, ETO; to Major Boas, the executive officer of the Theater Provost Marshal's office, to Captain Sullivan, Chief Inspector, CID, and to Agent Aviv Blackman, CID. The report to the latter two was made on 15 April 1946 (R 170).

The flight to Africa, with De Gennaro as pilot, was scheduled for 13 April 1946, but was not made until 16 April because De Gennaro was delayed by other duties and because Major Gaillard had requested that the trip be postponed several days because the syndicate had high hopes of receiving AOF francs from a man supposedly en route to Istres (R 178).

Shortly prior to De Gennaro's departure, Gaillard told him to be terse and tight-lipped, to represent himself only as the courier of this mission and not to answer any questions, because the people at the other end might develop doubts as to whether they should turn the commodities over to De Gennaro. He also suggested that if the latter had any opportunities to obtain any commodities from other sources that the syndicate could handle the disposition of those commodities in France on the legal or illegal markets — and that "We would share the profits ourselves" (R 178-179).

On 15 April 1946, De Gennaro saw Gaillard in the latter's office where Gaillard went to his field safe and took from it an envelope which he enclosed in a second envelope (R 179). Some time later he gave the envelope to De Gennaro and told him that it was to be delivered to Antoine in Dakar. It was open and Gaillard suggested that De Gennaro read it if he wished to, which De Gennaro did (R 181). Gaillard remarked that the letter was an ordinary letter between the two men asking that commerce between them be reestablished. He told De Gennaro that there was no mention of gold in the letter but that Antoine would understand the reference therein to two kilos, which was requested, was to gold bullion (R 381). Together with the letter, Gaillard gave De Gennaro a slip of paper from his wallet upon which Antoine's address in the native section of Dakar was written (R 181-182). At that time Gaillard told De Gennaro that upon his arrival in Dakar he would be under surveillance. He also suggested that if Antoine were unable to give him any gold he was to try to get from him the names of other individuals in Dakar who may have some gold and who were willing to send it to France for sale. De Gennaro was also to ask Antoine if he had any other commodities available for export to France (R 183).

At the time De Gennaro was handed the letter from LaVielle to Antoine, he was also given a letter addressed to "Waghy I Zaky Bey, Rue Mansour Mohammed, Zamulek, Cairo" (R 188-189; Pros Ex 6). This letter (Pros Ex 3), which was written by Cohen (Pros Ex 2, Pros Ex 31), provided:

"It has been some months since I had the pleasure of meeting you in Paris with our friend Joe Sigal. At that time I hoped to be able to get to Cairo very soon afterwards but events seemed to keep coming up and I never made the trip. Now I have a Colonel who is very anxious to make some money and has arranged to have one of his men make an inspection trip with an airplane and he is in sole charge of the trip and thus will be able to bring anything back that is available. Because of military reasons, the man who is bringing this note to you does not know me and has no idea of the name on this signature and it is best that he does not know my name at all. We have not sent any money with him as French francs have very little value outside of this country but as I understood you have interests here who can take care of your money, if not and you have some thing that you wish brought back to Cairo it can easily be arranged for the next trip. Anything that you have for France can be carried and the weight is no importance, if you can arrange for some transportation to the air field for the Captain who is making the trip. He himself is a good man and I have utmost confidence in him altho he does not know I am interested in this deal. As I said before anything can be carried from essence of perfume in any quantity to diamonds, silk, cloth or dope if necessary. The Colonel wishes this to be a real clean up and will give up 100% protection on the delivery, to here and the sale of all items will be handled by Sigal. If you are not in a position to give something for the trip will you put the Captain in touch with some one who is interested as this is the opportunity of a life time as there will be no inspection of this ship on its return and it can carry many pounds of materiel of all kinds. Anything that you can do to make this a real profitable trip and with the idea that it is only the beginning will surely meet with all approval on the part of the parties interested on this end and especially me. If you can furnish us with a list of prices for the stuff that you send so that we can make adequate prices on this end all will be well. Hoping that this is the start of a really valuable business, I will end on a note of success,

"My most sincere wishes for your health and happiness, and may I extend my best hopes for you and your family,"

When Gaillard handed this letter to De Gennaro, they discussed the itinerary of the African trip. De Gennaro told Gaillard that he was going to go first to Dakar, then to Cairo and then back to Istres. De Gennaro mentioned that he might not be able to take off the following morning due to the weather. Gaillard then suggested that he reverse his itinerary and go to Cairo first. Gaillard asked De Gennaro to return to Istres after six o'clock in the evening, because it would be easier to move any commodities from the field without detection. He added that he was going to wait at the field until seven o'clock on each evening from 22 April to 25 April.

De Gennaro was not given any money by either of the accused for use in connection with the African trip (R 330). Nothing was said at this time nor at any other time, by either accused to De Gennaro, about paying customs duties on any of the commodities (R 396-399).

Gaillard also stated that the letter to Waghy Zaky Bey was written by one of the most powerful men in France and added, in substance, that protecting De Gennaro's life was secondary to destroying the letter so that no one could see the signature. Gaillard also added that if De Gennaro ever did see the signature he was never to breathe it to anyone else (R 190).

On 16 April at about 1300 hours, De Gennaro took off in a B-17 for the African trip. On the night of 16 April he met Captain Sullivan and Agent Blackman of the Theater Provost Marshal Office at Port Lyautey, where Blackman opened the letter to Waghy Zaky Bey and made a photostatic copy thereof. From Port Lyautey De Gennaro went to Dakar, arriving 20 April, where he met Antoine and gave him LaVielle's letter. He told Antoine that he was from Istres, near Marseille, but that he had no money. He asked Antoine if he had any friends who might have any gold for export to France, and asked him if he had any commodities other than bullion which De Gennaro could take back to France. He also asked him for a letter outlining details for a future transaction (R 193).

On 21 April 1946, prior to leaving Dakar, De Gennaro was given a letter by Antoine's wife at Antoine's home (R 196). On 21 April De Gennaro flew to Cairo where he saw Waghy Zaky Bey on 23 April. Waghy Zaky Bey lived at the address indicated on the envelope given De Gennaro by Gaillard (R 196-197). De Gennaro gave him Cohen's letter (Pros Ex 3) and Waghy Zaky Bey read it (R 197-198). Thereafter they went to an office building in another section of Cairo, where Waghy Zaky Bey introduced De Gennaro to a Dr. Solomon (R 198). Zaky Bey showed Cohen's letter to Solomon and read it to him in a native language (R 199). De Gennaro, in response to a question by Solomon, told him that he had come from Istres in a B-17 and that he could carry as much as five tons of commodities. Prior to De Gennaro's departure from Cairo he was given a letter by Waghy Zaky Bey for Cohen.

De Gennaro left Cairo on 25 April and went to Telaviv upon instructions from Captain Sullivan, who was in charge of the flight (R 203, 884). So far as De Gennaro was concerned, he went to Telaviv to get hashish at Waghy Zaky Bey's suggestion. Upon landing at Lydda he reported to Wing Commander Earl, the commanding officer of the airdrome (R 202-203, 308), and discussed matters relating to the case with the latter (R 204).

From Telaviv De Gennaro flew to Oran where the letters from Antoine to LaVielle and Waghy Zaky Bey to Cohen were photostated. From there De Gennaro proceeded to Rome and arrived at Istres on 3 May, some time in the afternoon. About half an hour later he saw Major Gaillard and gave him the two letters from Antoine and Waghy Zaky Bey. The letter from Waghy Zaky Bey to Cohen was in an envelope marked "Tod H. Cohen, Personnel" (Pros Ex 7, R 204). De Gennaro stated that he didn't get anything from either of the contacts; that he was pretty angry about having flown 11,000 miles and having been in the air 56½ hours with nothing to show for it. He told Gaillard that he refused to jeopardize himself further on another long trip unless at least 2,000 pounds were deposited in his office. He referred to pounds because Gaillard told him the syndicate could get "beaucoup" pounds (R 283).

Gaillard told De Gennaro that he was surprised that De Gennaro didn't get anything and that he was going to find out that night what had happened and who had failed to carry out his part of the previous commitments (R 205). Gaillard asked De Gennaro whether the latter had high-jacked the materials, and was told by De Gennaro that he could cable Antoine and Waghy Zaky Bey if he had any doubts about it.

The next day De Gennaro saw Gaillard in Gaillard's office where Gaillard stated that he had been up with Sigal and Captain Cohen the whole night and that they had concluded that the people in Dakar and Cairo had failed to carry out their part of the bargain. Gaillard again asked if De Gennaro hadn't high-jacked the materials.

The letter from Antoine to LaVielle provided in part:

> "I can, to oblige you * * * let you have one or two, maybe three, but at the condition that you send me the money, and this I can only do once, perhaps twice * * * Here the French money is not accepted, only the American and British or Swiss, here the dollar is worth at the most 100 AOF francs and the pound 350 AOF francs. * * * As regards what you ask me, it is worth nowadays between 180 and 185 (money here). Consequently, if you find the necessary money, if you are interested, and if the same person comes back, send me a forewarning cable * * * I repeat it, do not count on it if there is no money. * * * it is not that I distrust you, but first, I do not have any money at hand." (Pros Ex 1; 1-A; R 105-106).

The letter which Waghy Zaky Bey wrote to Cohen and which De Gennaro likewise delivered to Gaillard provided, in part:

> "It is most unfortunate that no message came to me from you sometime before the arrival of your messenger * * * time now was for this trip much too short without the slightest notice * * * There is plenty of stuff here but nobody is ready to handle it without some sort of guarantee, promissory note or anything along this line. As I understand your messenger is coming back, will you please send with him next time the necessary guarantee for exchange, that will be real business and I got here a few very confident friends as enthusiastic about it as we could be" (Pros Ex 4, R 159).

Prior to De Gennaro's return, Cohen had called Sigal one day and stated that he had no news from De Gennaro and he expressed the fear that an accident had befallen the pilot. A few days after that Cohen telephoned Sigal and told him that the pilot had returned, but that he thought he had not brought back anything. The next day Cohen came to Sigal's house and gave Sigal the letter from Dakar which Sigal read to Cohen. Then Sigal gave the letter to LaVielle (Pros Ex 1, R 100).

During the early part of May 1946 Gaillard asked De Gennaro what currencies Antoine would accept in Dakar, and stated that he was planning another trip to Africa. De Gennaro replied that he felt certain that AOF francs, English pounds, and American dollars would be acceptable.

On one occasion between 7 and 15 May Gaillard told De Gennaro that he had approached Lieutenant Colonel Kesling and proposed that the latter make a round trip to Dakar and Cairo. He explained that this was merely an "organizational" effort on Gaillard's part in case De Gennaro were redeployed, so that there would be someone available to make the trip (R 209).

About 1 May 1946, Major Gaillard went to the office of Lieutenant Colonel Earle W. Kesling, Deputy Commander of Istres Army Air Base, where the two conducted a general conversation. Several days later, on or about 6 or 7 May, Gaillard invited Kesling to eat at the Casino in Istres. After they left the Headquarters they met Captain Cohen, and all three went to the Casino in Cohen's car. They discussed the stock market, brokerage business and risk and gain. Major Gaillard introduced the subject of risk and gain and there was a discussion of different kinds of risk and gain — for instance, risk of life or limb; risk of property; risk of going to jail for a monetary sum; how much a person would deem a sufficient sum to risk spending a little time in jail (R 661-662). Several days later, on or about 11 May, Kesling went to the Monrev Club in Marseille with Gaillard and their lady friends. While there Gaillard asked Kesling what he thought of picking up a little easy money. When Kesling asked how the

money was to be earned Gaillard replied, "It is very easy to pick up a little money just taking a package down to Africa and bringing another package back." Gaillard said that the package would contain either hashish, cocaine, or diamonds, and other merchandise. Kesling inquired how much money that would involve and Gaillard replied, "An amount of $10,000." Gaillard said that Kesling would have to transact the entire business himself; that Gaillard would not go aloft. The next day Kesling told Colonel Harris, the Base Commander, and Captain De Gennaro, about Gaillard's remarks and asked De Gennaro to report the incident to higher headquarters in Germany. They decided to "keep stalling off" Gaillard and obtain as much information as possible. It was decided that Colonel Kesling should delay any transaction until De Gennaro returned from a contemplated trip to Germany because if that trip did not turn up any evidence, Kesling would try to get the necessary evidence by taking the trip to Africa which Gaillard had proposed.

About a week later Gaillard came in to Kesling's office and discussed the proposition he had mentioned at the Monrev. Kesling asked how many people would know that he took the package to Africa, and Gaillard replied that Captain De Gennaro, himself, Kesling, Cohen, and one other whom he would not name would be the only persons who would know anything about it. Kesling asked what his share of the profits would be and Gaillard said there would be "an even split all the way around," which would probably be about $10,000 per person. Kesling asked what the outcome would be if he threw the package overboard en route to Africa, if he suspected that CID agents were aboard his plane. Gaillard "took a dim view" of that and said that "it would not be right to throw it overboard, one particular reason being that anyone involved in this was responsible for the carrying out of the mission." Gaillard explained that it would not do any good for anyone to "squeal" because "each flight was a separate flight of its own and nobody could be part of any other." He also stated that money would be contained in the package and that he could get practically any amount of money in any currency within forty-eight hours. A little later Gaillard returned to Kesling's office and asked if Kesling could possibly hold him over a little longer so that he could share in the proceeds of at least one trip before he had to go home. Gaillard stated that he had received no money from the transaction yet. He added that Kesling could make several other trips "on his own" and that everything was all set with the "big boys." A dozen times or so thereafter, Gaillard remarked to Kesling, "When you are ready to do business let me know" (R 660, 664-665, 674).

In a pre-trial statement which was admitted in evidence as prosecution's Exhibit No. 30 (R 620) over objection by the defense that it had not been voluntarily obtained (R 605-620), accused Gaillard confirmed and corroborated the other evidence adduced by the prosecution. With respect to Specifications 1 and 2 under both charges, accused Gaillard stated in substance that he knew Cohen since November 1945. He had social contacts with him since January or February 1946. On various occasions

during February and March they talked about perfume. He asked De Gennaro if he would be interested in taking a letter to Egypt and bringing back a package which would be given him in return for the letter. The package was to contain essence of perfume and that it would be considered a legitimate and profitable transaction. He told De Gennaro that if he (Gaillard) got any share of the profits, De Gennaro's share would equal Gaillard's. He met Sigal in early March of 1946, having been introduced to him by Cohen, and visited at his home in Cohen's company. During the first visit, Sigal mentioned the fact that gold could be purchased in Africa and resold in France at a hundred percent profit. Sigal also said he knew someone in Dakar, Africa, who might have as much as two kilograms of gold which he would be willing to send to France for sale. A few days before De Gennaro was to leave for Africa, he received two letters from Cohen, one unaddressed which was intended for Cairo, and the second addressed to a person in Africa. Gaillard received the address to the Cairo envelope from Cohen on a separate piece of paper. Gaillard looked at the letter to Dakar, sealed the two letters and gave them to De Gennaro. Upon De Gennaro's return he took the two letters the latter had given him and delivered them to Cohen, who opened the letters and explained the contents to Gaillard. Gaillard compiled a list of currency exchange rates of sixteen countries from information at the Base Finance Office for the purpose of checking Sigal's quotations on gold and clearing up in his mind the difference in currency exchanges. Gaillard also talked to Colonel Kesling in a club and at dinner and discussed the possibility of picking up commodities for delivery in France and the possibility of Kesling's making a flight for this purpose. Gaillard named several commodities to Kesling and told him that there was unlimited capital available on short notice. Gaillard did not advance or promised any money for these transactions and never received any proceeds from them.

Cohen also made a pre-trial statement which was admitted in evidence as prosecution's Exhibit 31 (R 734) over objection by the defense that it had not been voluntarily obtained (R 714-734). With respect to Specifications 1 and 2 under both Charges Cohen stated in substance that from about 1 February 1946 Cohen and Gaillard became fairly fast friends and talked from time to time on the subject of making some money. Cohen was also a close friend of Joseph Sigal, and told Sigal at one time that a great many officers in the Army were engaged in various business ventures and had made a lot of money thereby. Cohen asked Sigal what they could do in regard to making money in foreign places and the latter suggested that they could import some things from Africa for sale in France. Sigal stated that he could give Cohen a letter to be carried to Dakar requesting gold on credit.

Cohen had met a man from Cairo in Paris in November 1944, and Cohen gave Gaillard a letter addressed to Zaky Bey in Cairo.

The court was instructed to consider the statement of each accused as evidence only against the accused who made it (R 620, 735).

As to Specification 3 under both Charges: Judicial notice was taken of War Department Circular No. 64, 5 March 1946, which provides in relevant part:

"2. CURRENCY AND EXCHANGE CONTROLS. a. To protect the interests of the United States Government, to assist foreign countries to maintain monetary stability and to diminish or prevent currency black market operations, it is the responsibility of theater commanders overseas to establish and maintain effective controls over - -

* * *

"(3) Exchange of foreign currencies. * * *

"c. Rigid controls to establish and maintain appropriate safeguards and security measures are essential to obstruct and prevent black market operations in United States currency, to prevent its falling into unauthorized hands, and to block the flow of that already in unauthorized hands back into general circulation.

* * *

"e. The obligation of the War Department to exchange foreign currency for authorized personnel extends only to those currencies in which troops are paid. With respect to a foreign currency in which troops are paid, the obligation of the War Department to take back such currency from military personnel in exchange for dollars, dollar credit, or other foreign currency, extends only to the net cash pay and allowances paid to each individual plus sums given to him in exchange for dollar instruments, and minus whatever sums the individual has expended at Army exchanges, commissaries, Government messes or other official or quasi-official installations. A vital principle of the War Department's currency transactions with foreign countries is that the total amount of a foreign currency taken in by disbursing officers shall not exceed the total sum of the same currency disbursed or given in exchange. Adequate accounting records are available to each theater commander to analyze total receipts in comparison with total payments in the currency of each country within his theater; and such records, when considered in conjunction with the normal expenditures of military personnel in other than official and quasi-official installations, immediately indicate the adequacy or inadequacy of existing exchange controls. The necessity for keeping receipts of a specific currency below the total amounts paid out can be understood when it is realized that the War Department must settle transactions in each foreign currency with the issuing country separately and independently from War Department transactions in currencies of other countries. Thus, while an excess of receipts of one currency taken in exchange for another leaves the disbursing officer's books in balance, a serious and costly disequilibrium may nevertheless exist from the viewpoint of over-all currency settlements. Observance of the principles expressed above and the enforcement of exchange controls are essential to avoid an unauthorized expenditure of War Department funds and to block individuals from black market or collusive operation for personal gain.

"f. Foreign currencies not used for disbursements should be exchanged only in exceptional instances in accordance with the

provisions of paragraph 16. * * *

"11. EXCHANGE OF FOREIGN CURRENCIES IN OVERSEA THEATERS.

a. Disbursing officers in oversea areas will accept from authorized personnel, in accordance with appropriate War Department and theater exchange control regulations, local currency at the rates of exchange prescribed in paragraph 15, for dollar remittances to the United States as personal transfer account transmittals; or in exchange for military payment orders, or U.S. Savings Bonds; or regular United States currency for personnel returning to the United States. Disbursing officers in oversea theaters, however, will satisfy themselves prior to making exchanges that such currency was acquired by the individual requesting exchange only as his cash pay and allowances, or in exchange through official channels for another currency received as his cash pay and allowances, or by cashing dollar instruments through official channels. The form illustrated in paragraph 12a may be used for this purpose.

* * *

"c. Where excessive amounts of local currency are presented for conversion, in relation to the pay scale of the individual concerned, disbursing officers will require the execution of appropriate certificates and/or affidavits by the applicant establishing that such currency was obtained by him only from the foregoing specified sources. In those areas where individual Currency Exchange Control Books have been issued, disbursing officers in such areas will be guided by the specific regulations applicable thereto. When a disbursing officer in an oversea area is not satisfied as to the reasonableness of the amount, or as to the legitimacy of the source, or as to the legal tender status of the currency presented, or as to any other phase of the certificate, affidavit, or other document submitted by the individual requesting the exchange, the request should be referred to the theater fiscal director or other appropriate authority designated by him.

* * *

"i. Disbursing officers in oversea areas to whom European Theater currencies and Italian lira currency are presented for exchange will require presentation of individual Currency Exchange Control Books in accordance with procedure established in paragraph 12g.

"12. EXCHANGE OF FOREIGN CURRENCIES WITHIN CONTINENTAL UNITED STATES. * * *

"b. Disbursing officers are informed that the only foreign currency considered eligible for exchange into dollars under item 1 of WD AGO Form R-5346 above, is currency received by the individual as his cash pay and allowances, or in exchange through official channels for another currency received as his cash pay and allowances, or by cashing dollar instruments through official channels, and disbursing officers to whom foreign currencies are presented for exchange will satisfy themselves prior to making exchanges that such currencies were acquired by the individual holders only through the foregoing specified sources."

(364)

Letter, Headquarters United States Forces, European Theater, dated 27 February 1946, AG 123.7 GAP, subject: "Prohibition against circulating, importing, mailing, or exporting United States and Continental currencies including British currency in Liberated and Occupied Areas and transactions involving all currencies except through official channels" was introduced into evidence as Prosecution's Exhibit 21 (R 453). In relevant part the directive provides:

> "2. Except as authorized, all personnel subject to the jurisdiction of this headquarters including those individuals who come within the scope of Cir 364, WD, 8 Sep 1944 and Cir 139, this headquarters, 10 Oct 1945 are prohibited from:
>
> a. Importing, holding, transferring, exporting or in any way dealing in US or British paper currency in liberated or occupied territory within the European Theater of Operations.
>
> * * *
>
> c. Dealing in gold coins or gold bullion.
>
> d. Taking part in negotiations involving the sale of one continental currency for another on behalf of persons resident in Europe not amenable to the jurisdiction of this headquarters as set forth above.
>
> e. Importing into and exporting from Europe, funds, securities or money for the account of persons residing in Europe who are not subject to the jurisdiction of this headquarters as defined above.
>
> f. The term 'continental currencies' as used in this directive includes Allied military marks and British pounds sterling.
>
> "3. Violation of any prohibition hereof will subject the offender to trial by court-martial or other appropriate action" (Pros Ex 21; R 453).

Sometime in April, Cohen had met a Staff Sergeant Rudolph Z. Mamula in a Paris cafe and bought him a drink. Cohen told Mamula that he was in a position to make a lot of money but that it wasn't an easy matter to dispose of it. Mamula replied that it wasn't hard to do if one knows the proper people and that he knew the proper people. Mamula stated that he had a friend in the Post Office who could take care of him. Cohen then said, "You are the man I am looking for" and took the sergeant's name,

address, and telephone number, after learning that the sergeant was stationed in Frankfurt (R 402-403). In his pre-trial statement, Cohen stated that he had learned of Mamula through a friend who told him that there was a sergeant in Frankfurt who could exchange German marks at the official rate of exchange for "a percentage" (Pros Ex 31, p 2).

Upon his return to Marseille, Cohen told Sigal that he had met a sergeant in Paris who had plenty of money and was dead drunk. Cohen stated that the sergeant told him that he was in the pay office at Frankfurt and that he was changing marks for dollars (R 109).

On the night of 3 May 1946, immediately after De Gennaro's return from his trip to Africa, and for a few days thereafter, the two accused and Sigal carried on various conversations concerning means for obtaining currency which would be valid in Dakar (R 106; Pros Ex 30, p 9; Pros Ex 31, p 2). They stated that a profitable venture ought to be found and that it was ridiculous that nothing came of the trip to Africa (R 107). Gaillard stated that they ought to do something soon because he was going to be separated from the service and he needed some money to go home (R 108).

As related above, on 4 May 1946, on the day after he had returned from his trip to Africa, De Gennaro had a conversation with Gaillard. During the course of this conversation Gaillard asked De Gennaro when he planned to go to Germany and told him that Cohen had met a sergeant in Paris who could exchange Allied Military Marks for postal money orders for a ten percent service charge. Gaillard told De Gennaro that he wanted to contact the sergeant and determine how much currency could be exchanged for postal money orders and when the transaction could be handled (R 324-325). At the same time Gaillard told De Gennaro to contact higher headquarters while he was in Germany and attempt to postpone Gaillard's redeployment on the grounds that De Gennaro needed him in connection with certain official matters (R 206).

On 5 May 1946, De Gennaro flew to Frankfurt. After his arrival there he spoke to the CID officers and went to Wiesbaden where he saw the USAFE Provost Marshal. He telephoned Mamula and went to his organization to look for him, but found that the latter was in Paris. De Gennaro left a note for Mamula telling him to call Captain Cohen (R 208).

In the meanwhile Gaillard told Sigal and Cohen that the pilot was in Germany and that a substantial exchange of marks could be easily effected if the marks were obtained. Sigal suggested that marks could probably be obtained in Marseille or Paris. Cohen stated that Sigal would have to get the marks if the transaction was to be completed and Sigal agreed to do so. A few days later Sigal told Cohen that he had not yet found any marks. Cohen replied, "It is idiotic. You promised. You must keep your promise." Sigal then promised to send someone to Paris to buy marks but again did not do so. Sometime later Sigal went to Paris and was followed by Cohen. Cohen told Sigal that he had borrowed 200,000

francs from a friend with which to purchase marks. It was decided that if marks could not be found in Paris, an attempt should be made to get them in Brussels. Thereafter Cohen and Sigal went to Brussels where Cohen got a room in the Metropole Hotel (R 110-113).

Sometime in May, Cohen telephoned Mamula and asked, "How is my friend in the Post Office?" to which Mamula replied, "Fine." Cohen then stated, "It is going to be pretty heavy" and Mamula replied, "No limit." Cohen stated that he would either fly down in the near future to see Mamula or send someone to see him (R 403-404).

From 7 to 15 May, Gaillard had additional conversations with De Gennaro and one time told the latter that a contact had been made with Mamula, but that the amount of marks to be exchanged had not been established. Gaillard asked De Gennaro when he was going to Germany again, because he wanted De Gennaro to contact Mamula (R 209). He also told De Gennaro that the syndicate could get many marks and by making computations on a pad he explained to De Gennaro about the enormous profit which he expented to make by exchanging marks for money orders. Because De Gennaro could not comprehend at that time Gaillard's explanation on the computations of the profits, he gave De Gennaro the slip of paper and told him to think about it (R 211; Pros Ex 8, R 213). Gaillard also stated that two exchanges of marks for money orders would result in enough capital to finance the purchase of gold bullion from Dakar on a future trip.

Gaillard told De Gennaro that Cohen was going to Paris and would meet Sigal in Brussels, and suggested that De Gennaro meet them there. On 17 May, De Gennaro spoke to Cohen in the latter's office (R 339). Cohen said that he was leaving for Paris the following day and that he was going to look for Sigal there. If Sigal was not in Paris he was going on to Brussels. He stated that he would get a minimum of 300,000 marks in Brussels and asked De Gennaro to meet him there if possible. He also gave De Gennaro Sigal's address in Brussels (Pros Ex 9; R 220), and they made arrangements for meeting in Brussels at that time. Cohen asked De Gennaro to see Mamula again and find out how much Mamula could handle and how the money order exchange was to be effected. Cohen added that 300,000 marks should be at least the minimum, and that it was for De Gennaro to find out from Mamula how fast he could handle them (R 216, Pros Ex 30, p 12). Major Gaillard was present during this conversation and wondered why more than 300,000 marks could not be obtained. Cohen replied that he would try to get as many as possible.

The following morning Gaillard told De Gennaro, "Our friend (Cohen) has gotten off safely."

The next day De Gennaro flew to Frankfurt in a B-17 where he stopped at the CID office and spoke to Agent Blackman. On the same date he telephoned Mamula and made an appointment to see him at 1830 hours at the Eschborn Air Terminal (R 218, 406).

When De Gennaro saw Mamula he asked the latter how many marks could be handled and what percentage he was going to charge (R 219). Mamula stated that the percentage would be ten or twenty percent, but he could not recall which he had said. He also said that his contact had gone to Paris about three days ago and that he couldn't do anything for De Gennaro at that time. Ordinarily he could handle $4000 a day and he showed De Gennaro some money orders (R 406-407). De Gennaro told Mamula that Cohen was in Brussels expecting to get at least 300,000 marks, and perhaps a million. He also told Mamula that he was going to Brussels to meet Cohen and that he was going to return to Frankfurt either on the following Tuesday or Wednesday. He asked Mamula to stand by his telephone from ten in the morning until two in the afternoon, so that they could effect the transaction of obtaining the money orders (R 219). The two then parted (R 408).

De Gennaro then flew to Brussels and saw Cohen there on Tuesday, 21 May. Cohen asked him whether he had seen Mamula and De Gennaro told him that he had. The two went to a bar where De Gennaro told Cohen that Mamula had said the sky was the limit as far as the number of marks was concerned and that Mamula wanted ten percent as his compensation for exchanging the marks. De Gennaro told Cohen that he did not think it was necessary to "cut" Gaillard in on the profits of the transaction because he was only the middle man and they were doing all the work. Cohen agreed and said that he would "cut" Gaillard in on only the first 200,000 marks because Gaillard thought that was all they were going to get. Cohen told De Gennaro that the mark transaction was better than the African enterprise because the profits were greater (R 221).

On the same afternoon De Gennaro met Sigal for the first time in Cohen's room at the Hotel Metropole. Sigal stated that he had made arrangements to get 200,000 marks from Antwerp and that they were going to arrive the following day (R 223-224).

At that time De Gennaro made the remark that this was a chance to make a lot of money. He testified that this was an "exploratory remark." Cohen agreed that it was a chance to make a large profit. However, Sigal was hesitant about trying for too large a sum (R 345).

Nevertheless, Sigal used the francs which Cohen had brought and some money which he himself obtained, to purchase approximately 487,000 allied military marks. Cohen, Sigal and De Gennaro counted the marks in the hotel room (R 114-115, 230) and from about eleven o'clock in the morning until about five in the afternoon they wrapped the marks in various packages. All Russian marks were segregated and removed (R 232, 353, 231, 115). After they were counted and packed they were placed in De Gennaro's B-4 bag, after which De Gennaro left for the Brussels airfield (R 233-234). Both Cohen and Sigal were fully aware of the fact that De Gennaro was returning to Frankfurt to contact Mamula. They also knew that Mamula had to coordinate with another individual in order to get the money orders written (R 356). The carton

containing the marks and the 487,000 marks were introduced in evidence as Prosecution Exhibits 12 and 13 (R 237-238).

De Gennaro left the airport at Brussels on the afternoon of 22 May and flew to Frankfurt where he saw the CID officials. He made an effort to see Mamula but discovered that he was away. He did not see Mamula until the following Monday, 27 May, at Marburg, where De Gennaro told Mamula that he had met Cohen in Brussels and had obtained 487,000 marks which he showed Mamula (R 239). Mamula stated that the "IG inspectors" were "making it hot" for him due to certain vehicle transactions. He said that he had "made his pile" and wanted to go home. De Gennaro asked for the names and addresses of those individuals who were making out money orders, and Mamula gave him the address of Lieutenant Shadrack in Paris who might be able to help him (R 239, 409; Pros Exs 14, 15, R 241-242). That was the last conversation between Mamula and De Gennaro in connection with exchanging the marks for money orders (R 409).

The following day De Gennaro went to Paris where he saw a Lieutenant Shadrack, to whom he showed the note given him by Mamula (Pros Ex 15, R 242) and the marks. Shadrack was unwilling or unable to cooperate in effecting the exchange.

On 29 May he called Cohen by phone and told him that he (De Gennaro) was in Paris contacting Shadrack upon Mamula's recommendation, but that it didn't look as if Shadrack was going to be able to change the marks for money orders. He asked Cohen what he was supposed to do with the marks. Cohen replied, "Don't bring the shirts to Istres but leave them with Sigal at the Hotel Victor Masse." Cohen also said that Gaillard was nervous over a TWX from higher headquarters which directed that De Gennaro, Gaillard and Cohen were not to be transferred from the base without approval of higher headquarters (R 242-247).

A few days before the first of June, Colonel Kesling, then Deputy Base Commander at Istres, received the TWX referred to above from 40th Bomb Wing. That morning Gaillard brought it in to Kesling's office, laid it on his desk and said, "Do you know anything about this?", to which Kesling said, "No and until I do I wash my hands of the whole affair" (R 665-666).

On Monday, 3 June 1946, agents of the CID interrogated Gaillard and Cohen and that night the two were placed in arrest by Colonel Harris, the base commander (R 552, 599-600).

Relevant to the offense alleged in Specification 3 under both Charges, Gaillard, in his pre-trial statement, stated that during various conversations between the two accused and Sigal, the question came up as to how and where to obtain currency which was valid in Dakar. On one of these occasions there was a discussion on the possibility of obtaining

marks. Later Gaillard asked De Gennaro if he would be going to Germany and told him that Cohen had a contact in Frankfurt who would exchange German marks into American money orders and that the marks would be given De Gennaro by Gaillard prior to the former's take off. Gaillard also told De Gennaro that he should make arrangements with Cohen as to landing in Brussels. Gaillard and De Gennaro went to Cohen's office and discussed schedules for meeting in Brussels. Gaillard wrote Mamula's address and telephone number on a slip of paper and handed it to the pilot; Gaillard figured that De Gennaro, Cohen, Sigal, himself, and an unknown person would share equally in the profits. In a conversation with Cohen by phone Gaillard said, "How much paint did you get?", meaning how many marks were obtained. Gaillard expected that 200,000 were obtained.

In his pre-trial statement accused Cohen stated that he had talked to someone about a sergeant in Frankfurt who could effect the changing of marks to money orders for a percentage. He had called Mamula in Frankfurt about the marks. Everything was set for the deal except getting the marks. Sigal, thereafter, left for Paris after borrowing 200,000 francs from a friend and Sigal and Cohen left together for Brussels from Paris. There was an agreement that the plane would land at Brussels and that Cohen would give De Gennaro the marks and that he (De Gennaro) would fly on to Frankfurt, accomplish the exchange and return to Istres. Sigal, Cohen and De Gennaro met in Metropole Hotel in Brussels and discussed the whole affair and the three counted a total of 487,000 marks. After that Cohen told Sigal that he would meet the latter in Marseille and give him his share of the marks.

4. In the presentation of its case, the prosecution introduced much irrelevant and insubstantial evidence, which was improperly admitted into evidence over the objection of the defense. In our summary of the prosecution's evidence, such irrelevant matters have been excluded. Accordingly, so much of the evidence introduced by the defense to contradict the irrelevant evidence presented by the prosecution is not summarized below. Suffice it to say that the defense's evidence in explanation of the irrelevant matters adduced by the prosecution was sufficiently convincing to cure any possible prejudicial effect thereof.

5. The relevant evidence for the defense pertinent to the approved findings of guilty is summarized as follows:

Lieutenant Colonel Earle W. Kesling, as a defense witness, testified that he had known accused Gaillard for approximately eight months during which time he worked under the witness's supervision. In the opinion of the witness Gaillard performed his duties in a superior manner (R 680-681). He stated "at no time while I was there did I see him other than paying attention to his duty during work hours". (R 682).

During the period during which the alleged offenses were comitted the distribution of circulars, regulations, and directives of higher headquarters at the Istres Army Air Base was not satisfactory (R 877-882; Def Ex H, R 918). Accused Gaillard, however was the executive officer at the air base and distribution of directives from higher headquarters to him was good (R 880-881).

It was shown that De Gennaro's trip from Cairo to Telaviv was instigated by the CID agent who accompanied him in connection with a general investigation of the smuggling of narcotics from Palestine and that the accused were not necessarily involved in that phase of the investigation (R 884-886; 901). The parents of Aviva Blackman, one of the CID agents who accompanied De Gennaro, lived in Telaviv and Blackman visited them after his arrival there (R 901).

Major Gaillard requested permission to remain in Europe because his services were required in the completion of certain official reports and studies in which he was engaged (Def Ex C, R 915; Pros Ex P, R 927). Because his services as executive officer at the air base were vitally needed, Lieutenant Colonel Chapman requested Gaillard to sign a Class 4 category statement in order to defer his redeployment (Def Ex K, R 920-922).

The stipulated testimony of a former superior officer shows that the reputation of accused Gaillard for truth and veracity is good and he is industrious and efficient in carrying out his duties as an officer and a gentleman (Def Ex N; R 925-926).

Accused Cohen received the Legion of Honor, Degree of Chevalier, from the French Government on 16 July 1946 (Def Ex R, S; R 932-933).

6. In our deliberation upon this record careful consideration has been given to a brief filed on behalf of accused Cohen by Mr. Arthur J. Aronson of Brooklyn, New York, Attorney for accused Cohen. Oral argument by Mr. Aronson and accused Cohen was heard by the Board of Review. Numerous assignments of error have been made, all of which have been considered by the Board. However, only those requiring comment are discussed below.

7. At the trial, the defense objected strenuously to the admission into evidence of the pre-trial statements made by both accused, on the grounds that the circumstances under which they were obtained show that they were not voluntarily made. In his brief filed with the Board of Review, counsel for accused Cohen strongly urged that the court erred in admitting Cohen's confession.

The evidence relative to the circumstances under which the statements were obtained is summarized and discussed below:

a. As to accused Gaillard: Munio Podhorser, a CID agent, testified that on 3 June 1947 he and Agent Comerford interviewed Gaillard in the Senior Officers Quarters at the Istres Army Air Base. Podhorser asked him if he was familiar with his rights under Article of War 24 and the accused replied in the affirmative (R 527). At that time Gaillard refused to make any statement (R 537). The agent then suggested that Gaillard reconsider his decision in the light of the facts which they already knew and stated that "as a matter of fact (they) did not need any information from him, as all the facts had come to us beforehand" (R 541) but that they desired to get Gaillard's version of the transaction (R 547). After about an hour's discussion during which his rights under Article of War 24 were again fully explained to him (R 541) and after being told that De Gennero "was picked up" (R 560) Gaillard agreed to discuss the case (R 542-543). At approximately 1830 hours, 3 June the accused's commanding officer placed Gaillard in arrest in the Senior Officers Quarters and told him he was to talk to nobody except the CID agents (R 552-553, 572).

After Gaillard agreed to discuss the case on 3 June 1946, the agents proceeded to ask him questions and took notes of his answers (R 555, 559-560). On 5 June Gaillard made a handwritten statement consisting of 20 pages (Pros Ex 30) in the presence of the witness (R 528), Agent Comerford and Captain Sullivan (R 530). Before he wrote the statement he was formally apprised of his rights under Article of War 24 (R 529, 555). In writing his statement the agents used their notes made during the informal discussion to refresh Gaillard's recollection as to details (R 560, 562). At the time that the statement was signed, Gaillard remarked that he was "highly satisfied with the conduct on the part of the agents" (R 563).

At the end of his statement the accused wrote:

> "This statement was made in connection with questions by the above named agents which was conducted in a highly decorous and gentlemanly manner with no promises or threats of any nature on their part" (Pros Ex 30, R 20).

Accused Gaillard took the stand for the limited purpose of narrating the circumstances under which his statement had been obtained (R 570-582). In general he corroborated Podhorser's testimony as to the initial interview. He stated that after he had been placed in arrest by Colonel Harris, Podhorser stated to him that it isn't too important whether he made a statement or not and that Podhorser then indicated facts to him concerning which only De Gennaro and Gaillard would have had any knowledge. Gaillard then asked why the agents wanted a statement from him since they already knew so much, to which Podhorser replied:

"Well it is just for your protection. As you see, we don't need a statement from you, but we have been instructed to obtain a statement from you if possible *** You probably won't be involved in this thing any further than being a witness anyway, even if something does develop out of it, and you wouldn't make such a good witness" (R 573).

Gaillard's testimony continued:

"I was still curious to know why, then, I should make a statement, so he said 'Well I tell you, you never can tell how these things are going to go and I can't make any promises'. He was very definite in that. 'I can't make you any promises.' He emphasized. Then he said, 'But I can assure you that if you will cooperate in this matter and will make us a statement, then it will certainly go a lot easier with you.' So then I agreed to discuss the matter with them, to talk about what I had come to know as 'the case'" (R 573-574).

The accused then proceeded to discuss the case, being very careful that all his statements were exactly and chronologically exact because:

"The one thing I feared in the whole thing was to make a misstatement and get all wound up with perjury. At that time, of course, I had in mind that I would probably be a witness, I was hoping so * * *;"

He told the agents:

"If I'm going to give you anything I prefer to give you a complete story and an absolutely correct one, one that will stand up in case, anybody tries to break it down" (R 576).

In cross-examination the accused admitted that he had written the commendation of the agents conduct contained in his statement and reaffirmed that it was a true statement (R 579).

Major Robert R. Renfro, the investigating officer appointed pursuant to Article of War 70 testified that during the course of his investigation of the case, he discussed the accused's pre-trial statement with him and the manner in which it might be used at the trial. At that time Gaillard in substance stated that the statement made to the CID was voluntary (R 585; Def Ex A, R 789).

In our opinion, the circumstances under which the pre-trial statement was taken, as related by the accused himself, renders untenable any argument that the statement was not freely and voluntarily given. It may be true that by subtle suggestions, the agents encouraged in the accused a series of wishful thoughts that he would not be involved in the case in any capacity other than that of a witness. The accused

admitted however that no promises of immunity were made to him. It is not reasonable to suppose that a mature officer whose duties were primarily administrative as an executive officer of an air base, would be led to believe that any of the agents remarks amounted to a promise of any benefit whatsoever. It also stretches the imagination to suppose that the agent's ambiguous remarks, accompanied by an emphatic statement that he could make no promises, would be regarded as so strong an inducement of reward by an officer, fully aware of his rights against self-incrimination, as to destroy the voluntary character of his acts.

b. As to accused Cohen: There is little conflict in the evidence as to the circumstances surrounding the taking of accused Cohen's statement.

Cohen took the stand for the limited purpose of narrating the circumstances under which his confession was obtained (R 653). He testified that on 3 June 1946, he was taken to the staff officer's quarters by Captain Sullivan, Agent Murphy, and Agent Kidd, all of the CID, who told him that they wished to discuss a transaction relating to allied military marks (R 654). When asked by Captain Sullivan if he knew his rights under Article of War 24 he said that he was well acquainted with them and stated that it was not necessary to read or explain them to him. The agents then asked him some preliminary questions as to whether he had been in Brussels and whether he knew Captain De Gennaro. After he answered those questions affirmatively, he was asked if he had met De Gennaro in Brussels, to which he replied in the negative. The agent then said, "Why don't you stop fooling. We picked De Gennaro up in Paris and he spilled his guts. You might as well say everything you know, because we know it anyhow." Cohen replied that he had nothing to say. The agents then confronted him with a box full of allied military marks and proceeded to ask him several questions. He told them that he had been in Paris on official business and that he went to Brussels on private matters but that he had authority for his trip to Brussels (R 655). The agents prepared a written statement for his signature which related largely to the itinerary of his travels and he signed that statement without objection. At about 1630 hours Colonel Harris placed him in arrest, fixing the limits thereof as the Junior Officers Quarters and instructed him to speak to no one except CID agents or himself (R 656).

The agents continued to question him and searched his private quarters and his person. At about 2300, Captain Sullivan told him that he hadn't been telling the truth and asked him to "come clean." Cohen told Sullivan, "abstractly" that some people have a personal code of honor which inhibits them from implicating their friends. He also said that he was tired and would think it over after he had some sleep (R 657).

That night he got little sleep because there was no sheets on his cot, a guard was outside the room which he shared with several other officers, and because the light was left on all night in the room (R 657-658).

On the following morning he told Captain Sullivan that if his treatment on that night was supposed to be "moral pursuasion" it would not work with him. Sullivan apologized because the bed had not been made but Cohen told him that he had not yet made up his mind as to making a statement. During the next two days one or the other of the agents came to Cohen at frequent intervals and asked him if he were ready to talk, but Cohen continued to state that he had not yet made up his mind (R 658).

On the morning of 6 June he was taken to the Terminal Building where he was introduced to Agent Blackman. Sergeant Blackman was introduced to him as "Captain" Blackman (R 658, 703, 706-707, 713) and wore captain's insignia (R 713).

After they had some lunch in the snack bar one of the agents remarked "You know, this is a very serious matter, and when we turn over our report to the Staff Judge Advocate, why the first question that he asks is 'Was the accused cooperative.' It makes a big difference, you know, the light that they hold your actions in, whether you are cooperative or not." Cohen again reiterated that his personal code would forbid him to implicate his friends (R 703).

At this point Blackman stated that his attitude was all wrong and that he had complete statements from Gaillard, De Gennaro and Sigal. Blackman showed him Sigal's statement. He was still reluctant to make a statement. Agent Murphy left him alone with Blackman for a short time. At this point Blackman said, "You're being foolish! Everybody is crucifying you!" When asked for an explanation he said, "Well, your friends aren't friends * * * Listen, Cohen, I'm a Jew the same as you are, and I'm not telling you wrong * * * I'm telling you, you got to protect yourself because Gaillard and De Gennaro and Sigal, they are all putting the whole blame on you for the whole affair * * * Now, the thing for you to do is talk -- tell the whole story and protect yourself."

Blackman offered to show Cohen Gaillard's statement and Cohen stated that might go a long way toward convincing him (R 704).

Blackman continued:

> "I know what I'm talking about, all I have tried to do is to try to keep the Jews from getting into trouble * * * That's why I want to see you save yourself if you can, because nobody cares what happens to you except yourself."

While waiting for Gaillard's statement to be brought Blackman said:

"You'll be much better off if you will tell the whole truth. After all I have seen most of this case, and it's just a big mess. There's nothing to it. Everybody thought it was a big thing and it turned out to be nothing. They haven't got a case on you at all. Get yourself a good defense counsel, and you'll have no trouble at all in beating it."

After Gaillard's statement was shown to him Cohen agreed to make another statement (R 705).

Blackman then said:

"Now, look, that first statement that you made is perjury."

Cohen replied that he knew what perjury was and he had not committed that offense. Blackman, however, advised him to insist on getting his first statement back before he made another one because it would look bad in court. Cohen thanked him for the advice and followed it.

Cohen then personally typed a confession consisting of 5 closely typed pages (Pros Ex 31) and signed it in the presence of Captain Sullivan and Agents Blackman and Murphy. After he handed the statement to the agents, Agent Murphy returned to him his first statement. He put it in the fireplace, watched it burn and said, "Well at least that will never be used against me." (R 706).

On cross-examination Cohen was asked, "Did you sign this statement voluntarily?" He replied, "Yes, certainly" (R 708).

During the course of the pre-trial investigation the accused made a sworn statement which provided in relevant part:

"On or about 6th, 7th or 8th of June 1946, in the presence of Ovin Blackman and Robert Murphy, Agents of the Criminal Investigation Department, I, Tod Cohen, 0565065, United States Air Force, did voluntarily make additional statements, supplementing my original statement made before the above-mentioned agents, concerning features of the case in which I am alleged to be involved * * *" (Def Ex A, R 789)

It was the contention of the defense that Cohen's confession was induced by hope of benefit or fear of injury inspired by Agent Blackman, who posed as a CID agent and gained Cohen's confidence "under a mask of friendship" by means of unfair reference to their mutual religion (R 715-721).

The defense also contended that Blackman's references to perjury with respect to Cohen's first statement amount to a threat and that his promise to return that statement in return for a confession amounts to a promise of immunity from prosecution for perjury.

This argument is untenable in view of Cohen's testimony that he told Blackman that he knew what perjury is and that he had not committed it, and further because he admitted that he agreed to make the new statement before Blackman mentioned perjury.

In determining whether such remarks had the effect of influencing this accused to the extent of causing him to make an involuntary statement consideration must be given to the accused's personality, education, background and experience (MCM 1928, par 114 a, p 116). It is to be conceded that where such a remark is made to an unexperienced and ignorant soldier, a confession would probably be considered as having been involuntarily made. Cohen, however, appears to be intelligent, strong minded, well experienced in administrative matters, and sophisticated in the ways of the world. Such an individual must be presumed to know that no CID agent or officer is "a person competent * * * to effecuate the hope or fear," especially since he repeatedly stated that he knew his rights against self-incrimination.

Although it appears to us that Agent Blackman's methods were in extreme poor taste, it cannot be said that Cohen was induced to make his confession by any of the agent's veiled threats or implied promises. He steadfastly refused to change his original statement in spite of these threats and promises, on the grounds that he did not wish to implicate his confederates. It was only when Blackman showed him that both Sigal and Gaillard had made statements concerning all the circumstances of the alleged offenses, that he agreed to make a full confession. Thus it is obvious, that he was motivated by a desire for revenge against his confederates, and not by any hope of benefit or fear of punishment.

It follows that his confession was voluntary and we are of the opinion that the law member properly admitted it into evidence.

8. Specification 1 under both charges alleges that the two accused, acting jointly, in conjunction with each other and Joseph Sigal, conspired to engage in the business of bringing into France from Egypt and other countries quantities of gold, diamonds, silk, and other commodities for the purpose of sale, barter, exchange, or otherwise dealing therein for their joint and mutual profit and gain, in violation of Articles of War 95 and 96.

A criminal conspiracy at common law is a combination of two or more persons to do any unlawful act or to effect an unlawful object by any means, or to do a lawful act or to effect a lawful object by unlawful means or in an unlawful manner (Pinkerton v. United States, 145 Fed (2d) 252, 254; CM 255975, Ranziger et al, 1 BR (CBI-IBT) 105). Section 37 of the Federal Criminal Code (18 USC 88) has not changed the nature of the offense of conspiracy but has added the requirement that an overt act to effect the object of the conspiracy be charged and proved (CM 273791, Gould, 47 BR 29, 65: Marino v. United States, 91 Fed (2d) 691). Thus in cases falling within the terms of the cited statute, the overt act is more than a mere requirement of proof and becomes an essential element of the crime of conspiracy (Brady v. United States, 24 Fed (2d) 405, 407). The offense of common law conspiracy, then, is not punishable as such by tribunals which can take cognizance only of statutory crimes, if there is no statute adopting the common criminal law (Harrison v. Meyer, 224 Fed 224).

In the instant case, there being no overt act alleged in Specification 1 under both charges there can be no violation of the Federal Conspiracy statute found thereunder, for a failure to plead the essential element of an offense cannot be cured by the proof (CM 319573, O'Brien). The specifications purport to allege, however, a common law conspiracy, which has been held to be a military offense, properly laid under Article of War 96 (CM 112560, 120543 (1918), Dig Op JAG 1912-40, Sec. 454 (24):40; CM 320681, Watcke).

The acts accused are alleged to have committed in this specification are clearly of a nature prejudicial to good order and military discipline and have an obvious tendency to bring discredit upon the military service. Such acts, therefore would constitute a violation of Article of War 96 (CM 307097, Mellinger, 60 BR 109). The specification further implies that the two accused conspired to take undue advantage of their official capacities as officers of the army for their personal gain. Such conduct seriously compromises their character and standing as a gentleman and thus is cognizable as an offense under Article of War 95.

It is a rare occurrence in the trial of conspiracy cases, for the prosecution to adduce direct evidence of the unlawful agreement of the parties. A conspiracy is rarely susceptible of direct proof as conspirators seldom reduce their agreement to writing or make public their unlawful plans (Reavis vs. United States, 106 Fed (2d) 982).

In the instant case however, the testimony of Joseph Sigal, a co-conspirator, that of Captain De Gennaro, a government informer who posed as a co-conspirator, and that of Lieutenant Colonel Kesling, as well as a letter written to Waghy Zaky Bey by Cohen and the letter written to Antoine by La Vielle establish the formation and existence of the unlawful combination by an overwhelming mass of minute and detailed direct evidence.

The evidence shows that prior to the time of the allged offenses the two accused frequently discussed plans for engaging in business enterprises both before and after their separation from the service. Cohen had met a Belgian civilian named Sigal with whom he discussed plans for entering into a legitimate import business after his separation from the service. In preparation for this business Cohen had established a connection with Waghy Zaoky Bey, an Egyptian business man. Gaillard, who was about to be separated from the service frequently expressed his desire to make a substantial profit before returning to the United States.

Early in 1946 the two accused and Sigal discussed the proposition of importing gold from Dakar and essence of perfume from Cairo for resale in France. Sigal knew a man named Jaques LaVielle who had contacts in Africa. It was agreed that Sigal would arrange with La Vielle to communicate with the latter's African contact and the two accused would arrange for air transportation to Africa. Sigal informed the accused that African Occidental francs are necessary to purchase gold in Dakar. Pursuant to this arrangement Gaillard obtained the services of De Gennaro, the Air Inspector of the Istres Air Base who was also a pilot, by outlining to him the somewhat exaggerated plans of a powerful and highly lucrative smuggling syndicate.

After the arrangements were made Sigal expressed reluctance to pursue the venture further and told Cohen that the best way to discourage the venture insofar as Gaillard was concerned was to state that AOF francs could not be obtained. Cohen, however, insisted that Sigal procure a letter from LaVielle to his African contact, Antoine, asking for gold on credit. Although Sigal stated that he did not believe that any African exporter would deliver gold on credit, he obtained a letter intended for Antoine from La Vielle wherein a request for certain commodities was made. He gave this letter to Cohen, who in turn delivered it to Gaillard. The latter gave the letter to De Gennaro along with a letter written by Cohen to Waghy Zaky Bey, in which a request was made that essence of perfume, diamonds, silk, textiles, or narcotics be delivered on credit.

De Gennaro after contacting Criminal Investigation Officers, left for Africa on 16 April 1946 and flew to Dakar on the pretense of inspecting a courier run. He saw Antoine, delivered the letter intended for him, and received from him a letter addressed to La Vielle in which Antoine stated in substance that he would be able to export commodities to France through the pilot only if he received American, British, Swiss or Occidental African currency.

Thereafter De Gennaro saw Waghy Zaky Bey and other Egyptian traders, in Cairo. The Egyptian, likewise, declined to deliver any merchandise to De Gennaro without a cash payment or at least some negotiable security.

In the meanwhile Gaillard attempted to induce Lieutenant Colonel Kesling, the deputy commander at the base, to act as a courier to

Africa on contemplated future trips to Africa for the purpose of smuggling goods into France.

The entire course of conduct clearly shows a conspiracy to perform acts falling within the prohibition contained in the Theater Directive of 4 April 1945 which was introduced in evidence as Prosecution Exhibit 29. In pertinent part the directive provides:

> "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 lay plans to obtain any commercial advantage 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 * * * any kind of property in this theater for present or future personal profit or investment. * * *
>
> "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."

The evidence shows that the two accused undertook to engage in the business of importing merchandise into France from Africa for substantial personal gain, and that they undertook to act as intermediaries or conduits in this illegal import business.

Wrongfully engaging in commercial activities for personal gain has been held to be an offense in violation of Article of War 96 in CM 293926, Haug et al, 20 BR (ETO) 329, CM 297908, Kenney, 19 BR (ETO) 311 CM 307097, Mellinger, 60 BR 199, and CM 318858, Fisher).

It may be noted that the offenses in the Haug case, which occurred prior to the promulgation of the 4 April 1945 directive, were held to be in violation of Article of War 96, on the grounds that engaging in commercial activities in the European Theater under circumstances which render such activity incompatible with the accused's status as officers and which are of a nature tending to interfere and hamper the full and proper discharge of their duties constitute violations of paragraph 2e, AR 600-10, 8 July 1944.

At the trial the defense moved to strike the 4 April 1945 directive (Pros Ex 29) as well as other pertinent directives on the ground that it was not shown that the accused had personal notice of these directives (R 745).

The defense introduced evidence tending to show that during the period when the alleged offenses were committed, the distribution of circulars, regulations and directives of higher headquarters at the Istres Army Air Base was not satisfactory (R 877-882; Def Ex H, R 918). It was shown, however, that accused Gaillard was the executive officer at the air base and that the distribution of directives from higher headquarters to him was good (R 880-881). Consequently, knowledge of these directives on the part of accused Gaillard was properly presumed.

It must, furthermore, be presumed that the directives were released and distributed on or about the date they bear, and that the accused were charged with notice of the prohibitions contained in them. In CM 291176, Besdine, 18 BR (ETO) 181, a case involving the violation of currency directives, the Board of Review stated in part:

> "The prohibition * * * is a matter of importance, directive in nature, and evidently of permanent duration * * * It becomes effective as part of the written military law on the date of its promulgation * * *. In the absence of evidence to the contrary, it may be presumed that the directive was released and distributed on or about the date it bears in the regular course of the performance of their duties by the officers concerned * * * Accused was thus chargeable with notice of the prohibition."

The rule of the Besdine case has been followed in CM 307465, Danker, CM 282694, Andrews, 24 BR (ETO) 11, CM 307097, Mellinger, op cit, and CM 317064, Johns. Accordingly knowledge of the pertinent directive on the part of accused Cohen may also be presumed.

In his brief, counsel for accused Cohen contended that the record affirmately shows that there was no meeting of the minds on the part of the alleged conspirators to engage in business. He relied heavily on Sigal's testimony that he did not wish to pursue the venture further, and that he agreed to procure the letter to Antoine in order to create an impression with Gaillard and De Gennaro that he was cooperating, although he well knew that such letter would prove abortive unless accompanied by negotiable currency, and that Cohen agreed to this subterfuge.

In our opinion the court was amply warranted in inferring that, although Sigal may not have been enthusiastic about continuing the venture, Cohen on the other hand was anxious to pursue the venture to its conclusion and expected that De Gennaro would be successful in

obtaining at least some merchandise from Africa. In spite of Sigal's reluctance, Cohen dispatched a letter to Waghy Zaky Bey and continued as an active participant in the venture. After the mission failed he told Sigal that it was ridiculous that nothing came of the trip (R 107). It would have been a simple matter for Cohen to have withdrawn from the venture at the time Sigal suggested that it would lead to trouble. Instead he actively encouraged the dispatching of a B-17 to Dakar and Cairo. The court was amply warranted in concluding that such an elaborate operation was more than a subterfuge for a graceful withdrawal from the enterprise.

There remains for consideration whether De Gennaro's activities constitute an entrapment.

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 law efforcement officers have no reasonable cause to believe that the accused is a law violator, are improper and exempt the accused from criminal liability on grounds of public policy (Sorrels v. United States 287 U.S. 435; United States v. Echols 253 Fed 862). But where the accused has formed the intent to commit the crime and the informer lays a trap to catch him or even cooperates with him to obtain proof of his guilt, the defense has not been established (CM 236937, Kent, 23 BR 179; CM 252103, Selevitz, 33 BR 395; CM 239825, Wohl, 25 BR 279; CM 296630, Siedentop, 58 BR 191; CM 319194, Austin).

In the instant case the evidence shows that De Gennaro, the informer entered the case at Gaillard's solicitation after the two accused and Sigal had entered into and formulated the conspiracy. Consequently there was no entrapment.

In view of the foregoing reasons we are of the opinion that the evidence amply sustains the findings of guilty of Specification 1 under both charges as to both accused.

9. Specification 2 under both charges alleges that the two accused, acting jointly and in pursuance of a common intent and in furtherance of conspiracy and agreement previously entered into and then existing between them, did at Istres, Cairo, and Dakar wrongfully and unlawfully attempt to obtain from Waghy Zaky Bey, in Cairo, Egypt and from Antoinne Bouvangure in Dakar, Senegal, French West Africa quantities of gold, diamonds, silk, perfume, and other commodities in violation of Articles of War 95 and 96.

The evidence as summarized in paragraph 8 above is equally applicable to the offense now under consideration and need not be repeated.

"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 (Clark).

"An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt * * *

"Soliciting another to commit a crime is not an attempt; nor is mere preparation to do a criminal act". (MCM 1928, par 152c, p 190).

The elements of proof as stated in the Manual are:

"(a) That the accused committed an overt act which if not interrupted by circumstances independent of the doers will would have resulted in the commission of the offense, as alleged; (b) that the accused intended to commit that particular offense (this may usually be shown by the fact and circumstances surrounding the act), and (c) the apparent possibility of committing the offense in the manner indicated" (MCM 1928, par 152c, p 190).

It must first be determined whether the accused or one whose acts are legally attributable to them performed an overt act which if not interrupted by circumstances independent of the doers will, would have resulted in the commission of the offense alleged.

It is of course apparent that if De Gennaro's acts are legally attributable to the two accused, such an overt act would have been established by the flight to Africa, the delivery of La Vielle's and Cohen's letters to Antoine and Waghy Zaky Bey respectively, and De Gennaro's efforts to obtain the desired merchandise.

The evidence, however, shows that De Gennaro had informed the authorities of all that was taking place and that he pretended to be a conspirator only so that he might accumulate evidence against the accused for the government. Having no criminal intent, he was no conspirator (CM 187319, Line, 1 BR 25; CM 296630, Siedentop, op cit). It is well settled that no acts of an agent of the authorities or informer may be imputed to an accused even though done with the accused's knowledge and consent. Where an informer is involved in a criminal transaction undertaken by an accused, the latter can only be convicted if he himself has done everything necessary to constitute the complete offense; if, in order to make out a completed crime, it is necessary to impute to accuse something done by an informer for the authorities, the prosecution must fail (CM 296630, Siedentop, op cit and cases cited therein).

Consequently De Gennaro's acts of flying to Dakar and Egypt, delivering the letters to the African merchants, and urging them to ship merchandise to France, cannot be attributed to the two accused, although those acts were performed at their request and with their full knowledge and consent.

We must next consider whether the acts of the accused and their actual confederates, independent of De Gennaro's acts constitute the overt act contemplated in a criminal attempt. Mere preparation not leading proximately to the consummation of the crime or offense intended does not constitute an attempt, (Wharton's Criminal Law, Vol 1 (12th Ed), Sec 219, and cases cited therein). Preparation has been held to consist in devising means or measures necessary for accomplishment of the desired object or end (State v. Long, 21 Nev. 209).

In Ex Parte Turner, 104 Pacific 1071, it was held that the acts done to constitute the overt act in an attempt must not be merely preparatory, but must reach toward accomplishment sufficiently to be a commencement of the commission.

In his brief counsel for accused Cohen cites the case of People v. Rizzo, 246 NY 234, which appears to be applicable to the question under consideration. In that case the court said:

> "The law however, has recognized that many acts are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to consummation. The law must be practical, and therefore, considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference" (Underscoring supplied).

When De Gennaro's acts are excluded from the acts constituting the alleged attempt there remains only the preparation of the letters to Waghy Zaky Bey and Antoine, their delivery to De Gennaro, and Gaillard's instructions to De Gennaro with respect to the desired import transaction which may be attributed to the accused. Do these acts go beyond the preparation?

In the leading case of People v. Murray, 14 California, 160 (quoted in CM 194441, Mauro, 2 BR 145, 150), the defendant was convicted of attempting to contract an incestuous marriage with a niece. The evidence showed only that he had expressed a determination to contract the marriage, eloped with the niece for that purpose, and requested another to go for a magistrate to perform the ceremony. In discussing the evidence the court said:

> "It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation

consists of devising or arranging means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparation is made * * * but until the officer was engaged, and the parties stood before him ready to take the vow appropriate to the contract of marriage, it cannot be said, in strictness that the attempt was made. The attempt contemplated by the statute must be manifest by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the parties."

Similarly, in the instant case, the evidence establishes conclusively the intent of the accused to commit the offense alleged, (i.e., obtaining gold, diamonds, silk, perfume and other commodities from the alleged African merchants). The preparation of the letters to those merchants, the delivery thereof to De Gennaro with instructions as to procuring the desired merchandise may be compared to the elopement and effort to obtain a magistrate in the Murray case. It must be borne in mind that De Gennaro was not intended to be a mere messenger. Since no negotiable currency was sent to Africa, and in view of the fact that no prior agreement had been made with Waghy Zaky Bey and Antoine, De Gennaro's mission of necessity involved a considerable amount of persuasion to induce those merchants to deliver merchandise on credit. It follows that the accused's acts were only preparatory.

In effect the specification under consideration alleges an attempt to make illegal purchases. It has been stated that a wrongful attempt to sell is completed when an offer is made (CM 194441, Mauro, op cit). Similarly, a wrongful attempt to buy is completed when an offer is made. In the instant case no offer was made until De Gennaro delivered the letters. Since De Gennaro's acts cannot be attributed to the accused, the evidence falls short of establishing an attempt. The acts properly attributable to the accused, fall short of constituting acts which are so near to the accomplishment of the alleged offense that in all probability the crime itself would have been committed but for timely interference.

Accordingly we are of the opinion that the evidence is insufficient to support the findings of guilty of Specification 2 of Charges I and II.

11. Specification 3 under both charges alleges that from about 1 May to about 6 June 1946, the two accused in conjunction with Joseph Sigal, conspired to engage in the enterprise of buying allied military marks and converting them into United States postal money orders for their joint and mutual profit and gain in violation of Articles of War 95 and 96.

The evidence with respect to these specifications shows that sometime in April 1946, Cohen met a Sergeant Mamula in Paris and learned that Mamula was in a position to effect the exchange of allied marks for United States postal money orders in return for a certain commission. Thereafter

De Gennaro returned from his unproductive journey to Africa and complained about the failure of his mission. The two accused and Sigal then proceeded to discuss plans for obtaining negotiable currency which would insure the success of future smuggling enterprises. Among the plans considered was the purchase of military marks at the cheap black market rate of exchange and the redemption of such marks for dollars instruments at the official rate of exchange. A tentative agreement was reached whereby Sigal was to purchase the marks. He, however, became reluctant and did not carry out his part of the scheme. Cohen remonstrated with him on several occasions, and once said, "It is idiotic, you promised, you must keep your promise". Thereafter Cohen borrowed 200,000 francs with which marks were to be purchased, and an arrangement was made whereby Sigal and Cohen were to meet De Gennaro in Brussels. De Gennaro was to effect the actual exchange of marks through Manula. Sigal used Cohen's 200,000 francs and some money he obtained through other sources to purchase 487,000 marks in Brussels. These marks were to be converted to approximately $48,000's worth of money orders by De Gennaro. Sigal, Cohen and De Gennaro spent approximately one day in a Brussels hotel sorting and screening the marks. Thereafter De Gennaro attempted to effect the exchange but was unsuccessful in doing so.

Under the provisions of War Department Circular 64, 5 March 1946, the only foreign currency which may be exchanged for dollars or dollar instruments is currency received by the individual as his pay and allowances. No European Theater currencies may be accepted for exchange except upon presentation of a Currency Control Book issued by the European Theater to the individual who seeks to exchange the currency.

Thus it is clear that the transaction which the accused agreed to effect was prohibited by existing currency control regulations as well as by the Prohibition Against Engaging in Business contained in Circular No. 67, Headquarters, U. S. Forces, European Theater, dated 18 May 1947, and the same prohibition contained in the 4 April 1945 directive. It follows that the agreement to effect the transaction was unlawful and constituted a conspiracy.

In his brief, counsel for accused Cohen argued that the findings of guilty of this specification should be disapproved on the grounds that there was an accumulation of charges. A similar motion was made at the trial by the defense (R 857, 861).

Counsel argued that after 25 February 1946, the commanding officer of both accused was fully informed of the alleged intentions of the accused, but that he failed to act on such information and in fact encouraged the accused, through De Gennaro, to carry out their plans and commit a series of additional offenses. He contends that the government was estopped from prosecuting the accused for any offenses committed after the government officials had actual knowledge of the accused's offenses.

In relevant part the Manual for Courts-Martial provides:

"When it is intended to prefer charges, they should be preferred without unnecessary delay. Anything like an accumulation or saving up of charges through improper motives is prohibited; but when good reason exists (e.g., when in the interest of discipline it is advisable to exhibit a continued course of conduct) a reasonable delay is permissible if the person concerned is not in arrest or confinement" (MCM 1928, par 26).

The present case comes within the latter category. Based on Gaillard's statements to De Gennaro the military authorities had reasonable cause for believing that the accused were members of a well organized and large smuggling syndicate. It was by no means improper to keep them under surveillance so that their activities might disclose evidence implicating other members of the conspiracy. When it became obvious that the accused were not connected with any such combination of law violators, they were promptly placed in arrest and charges were initiated within a reasonable time thereafter.

Accordingly we are of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 3 under both charges.

12. One hundred six pages of record was devoted to a motion by the defense to dismiss all charges and specifications on the grounds that the provisions of Article of War 70 relative to the pre-trial investigation had not been substantially complied with (R 748). After hearing evidence and extended argument, with respect thereto, the law member denied the motion (R 854).

The defense assigned 17 errors with respect to the pre-trial investigation (R 844) which may be grouped and summarized as follows:

a. Major Renfro, the investigating officer appointed pursuant to Article of War 70, was not impartial for the reason that before he was appointed as investigating officer he had assisted the accuser in drafting the charges and that he had conducted a preliminary investigation before the charges were drafted.

b. Only one witness, Captain De Gennaro, was examined by Major Renfro in the presence of the accused.

c. Major Renfro did not apprise the accused that Lieutenant Colonel Kesling would be a witness for the prosecution and he did not consider any of Colonel Kesling's statements in connection with the pre-trial investigation.

d. Major Renfro did not call Mr. Sigal although requested by the accused.

e. He did not record completely the results of De Gennaro's cross-examination by the accused.

f. He did not show the accused all the documents he had in his possession at the time of the investigation, although some of those documents were introduced in evidence.

In considering a similar issue raised in CM 317327, Kathleen Nash Durant, the Board of Review stated:

"Since 1924 the principle has been firmly established that the pre-trial investigation required by Article of War 70, and paragraph 35 of the Manual for Courts-Martial, 1928, is a matter of procedure only and does not affect the jurisdiction of the court. Holdings by the Board of Review to this effect have been uniformly approved by The Judge Advocate General and then by the President, as confirming authority. Non-compliance with the prescribed investigation procedure will constitute fatal error only where accused properly objects thereto at the trial and, considered together with the whole proceedings against accused, such non-compliance amounts to a denial of due process of law (CM 257824, Cox 50 BR 179, 204; CM 229477, Floyd, 17 BR BR 194, 153; CM 273791, Gould 47 BR 29, 57). This construction of Article of War 70 by the officer charged with its interpretation by Congress (AW 50½) is entitled to great weight (Staut v. Hancock, 146 F (2d) 741, 744. Although in the case of Hicks v. Hiatt, 64 F. Supp 238, there is dicta to the effect that the investigation procedure laid down by Article of War 70 is mandatory, we deem that such dicta was unnecessary to the decision in that case, for the court found that there had been a denial of due process of law both in the investigation and the trial."

* * *

"Even if it should be considered that the investigation fell short of meeting the required standards, such defect would have been cured by the events transpiring at the trial. * * *"

In the instant case charges were served on the accused on 2 October 1946. Prior thereto, on 12 August 1946, copies of the charge sheets were given the two accused by Major Floyd, the defense counsel (Charge Sheet). The trial was begun on 5 November 1946 and continued until 21 December 1946.

It is obvious from the record that the defense was given every opportunity to examine all documents in the hands of the prosecution between 10 August and the time of trial. The diligent and vigorous conduct of the defense including the expert cross-examination of the prosecution's witnesses demonstrates clearly that the accused had adequate means of preparing their defense and securing available witnesses. The prosecution, furthermore, was extremely liberal in stipulating as to the testimony of

witnesses who were not readily available.

Accordingly it does not appear from the record as a whole that the substantial rights of the accused were injuriously affected by any error in the conduct of the pre-trial investigation.

13. Personal data of accused:

a. As to accused Gaillard: Accused Gaillard is 35 years of age, married, and a high school graduate. Prior to entering the military service he was chief of the purchasing and supply department of the J. M. Tull Metal and Supply Company, Atlanta, Georgia. He attended Citizens Military Training Camps in 1932, 1933, and 1934. On 14 August 1942, he was given a direct appointment as a second lieutenant, Army of the United States. He was promoted to the rank of first lieutenant on 29 December 1942, to captain on 15 July 1944 and to major on 15 September 1944. Efficiency rating of record show that he was rated 5.4 (Excellent) from 1 July 1944 to 30 June 1945, and 5.9 (Superior) from 1 July 1945 to March 1946.

b. As to accused Cohen: War Department records show that accused Cohen is 41 years of age, married, but separated from his wife. He is a graduate of the University of Pennsylvania where he majored in Finance and Psychology. His civilian occupations were construction supervisor, surveyman, and theater manager. He completed the Army Air Forces Administration Officers Candidate School and was commissioned a second lieutenant, Air Corps, on 28 October 1942. He was promoted to the rank of first lieutenant on 16 August 1943 and to captain on 27 August 1944. He served as an administrative officer with the Army Air Forces in the Mediterranean and European Theaters of Operations. On 16 July 1946 he was awarded the Legion of Honor, in the degree of Chevalier, by the French Government. A formal award of this medal was made in Washington, D. C., on 14 June 1947. Efficiency ratings of record show that accused Cohen was rated "Very Satisfactory" for the period from 1 July 1944 to 31 December 1945. In his review, the Staff Judge Advocate stated that the accused had superior efficiency ratings.

14. Attached to the record of trial is a letter dated 21 December 1946 signed by four members of the court (including the president and the law member), all members of the prosecution and the defense wherein it was recommended that the sentence to confinement adjudged as to accused Cohen be remitted.

As indicated above, consideration has been given to oral argument and to a brief filed on behalf of accused Cohen by Mr. Aronson. Lieutenant Colonel George W. Porter, one of accused Cohen's former commanding officers, appeared before the Board and attested to his excellent character, efficiency, and devotion to duty.

In addition to the foregoing, consideration has been given to communications pertaining to clemency as indicated below:

On behalf of accused Gaillard: Letters from the Honorable Richard B. Russell, Honorable Walter F. George, and Honorable Lister Hill, United States Senate; Mrs. Dorothy Millsop, Atlanta, Georgia, and Mrs. Howard Gaillard, Jr., wife of accused.

On behalf of accused Cohen: Letters from the Honorable Robert F. Wagner, United States Senate, the Honorable James M. Mead, formerly United States Senator, Mr. Francis T. Mulcahey, Buffalo, New York, Mr. Peter J. McManus, Binghamton, New York, Mr. Jacob Billikopf, Philadelphia, Pennsylvania, and Mr. David Cohen, father of accused.

15. The court was legally constituted and had jurisdiction of the persons 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 insufficient to support the findings of guilty of Specification 2, of Charge I and Specification 2 of Charge II, legally sufficient to support the findings of guilty of both charges and of Specifications 1 and 3 thereunder, legally sufficient to support the sentence as to each accused and to warrant confirmation thereof. A sentence to dismissal, total forfeitures, and confinement at hard labor for six months is authorized upon a conviction of violations of Articles of War 95 and 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 320455 1st Ind

WD, JAGO, Washington 25, D. C. SEP 1 - 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, 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 Howard Gaillard, Jr. (0-914835), Air Corps, and Captain Tod H. Cohen (0-565065), Air Corps.

2. Upon trial by general court-martial both accused were found guilty of wrongfully conspiring to engage in the business of bringing into France from other countries quantities of gold, diamonds, silk, essence of perfume and other commodities, in violation of Articles of War 95 and 96 (Spec 1, Chgs I and II), of wrongfully attempting to obtain the above mentioned articles from certain merchants in Cairo, Egypt, and Dakar, French West Africa, in violation of Articles of War 95 and 96 (Spec 2, Chgs I and II), and of wrongfully conspiring to buy allied military marks for the purpose of converting them to United States Postal Money Orders at a profit, in violation of Articles of War 95 and 96 (Spec 3, Chgs I and II). Accused Cohen was also found guilty of wrongfully purchasing allied military marks for the purpose of converting them into United States Postal Money Orders, in violation of Articles of War 95 and 96 (Spec 4, Chgs I and II), and of wrongfully transmitting allied military marks to Germany in furtherance of a conspiracy to convert them to United States Postal Money Orders, in violation of Article of War 96 (Spec 5, Chg I). No evidence of any previous convictions was introduced. Accused Gaillard was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. Accused Cohen 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 months. As to accused Cohen, the reviewing authority disapproved the findings of guilty of Specifications 4 and 5 under Charge I and of Specification 4 under Charge II. He approved the sentence as to each accused 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 insufficient to support the findings of guilty of Specification 2 under both Charges, legally sufficient to support the findings of guilty of both Charges and Specifications 1 and 3 thereunder, legally sufficient to support the sentence as to each accused and to warrant confirmation thereof. I concur in that opinion.

Prior to the time of the alleged offenses the two accused frequently discussed plans for engaging in business enterprises both before and after their separation from the service. Cohen had met a Belgian civilian named Sigal with whom he discussed plans for entering into a legitimate import business after his separation from the service. In preparation for this business Cohen had established a connection with Waghy Zaky Bey, an

Egyptian business man. Gaillard, who was about to be separated from the service, frequently expressed his desire to make a substantial profit before returning to the United States.

Early in 1946 the two accused and Sigal discussed the proposition of importing gold from Dakar and essence of perfume from Cairo for resale in France. Sigal knew a man named Jaques LaVielle who had contacts in Africa. It was agreed that Sigal would arrange with LaVielle to communicate with the latter's African contact and the two accused would arrange for air transportation to Africa. Sigal informed the accused that African Occidental francs were necessary to purchase gold in Dakar. Pursuant to this arrangement Gaillard obtained the services of a Captain DeGennaro, a pilot and the Air Inspector at the Istres Air Base, by outlining to him the somewhat exaggerated plans of a powerful and highly lucrative smuggling syndicate.

After the arrangements were made Sigal expressed reluctance to pursue the venture further and told Cohen that the best way to discourage the venture insofar as Gaillard was concerned was to state that AOF francs could not be obtained. Cohen, however, insisted that Sigal procure a letter from LaVielle to his African contact, Antoine, and ask for gold on credit. Although Sigal stated that he did not believe that any African exporter would deliver gold on credit, he obtained a letter intended for Antoine from LaVielle wherein a request for certain commodities was made. He gave the letter to Cohen, who in turn delivered it to Gaillard. The latter gave the letter to DeGennaro along with a letter written by Cohen to Waghy Zaky Bey, in which a request was made that essence of perfume, diamonds, silk, textiles or narcotics be delivered on credit.

DeGennaro, after contacting Criminal Investigation Officers, left for Africa on 16 April 1946 and flew to Dakar on the pretext of inspecting a courier run. He saw Antoine, delivered the letter intended for him, and received from him a letter addressed to LaVielle in which Antoine stated in substance that he would be able to export commodities to France through the pilot only if he received American, British, Swiss or Occidental African currency.

Thereafter DeGennaro saw Waghy Zaky Bey and other Egyptian traders in Cairo. The Egyptians, likewise, declined to deliver any merchandise to DeGennaro without a cash payment or at least some negotiable security.

In the meanwhile Gaillard attempted to induce Lieutenant Colonel Kesling, the deputy commander at the base, to act as a courier on contemplated future trips to Africa for the purpose of smuggling goods into France.

Sometime in April 1946, Cohen met a Sergeant Mamula in Paris and learned that Mamula was in a position to effect the exchange of allied marks for United States Postal Money Orders in return for a certain commission. Thereafter DeGennaro returned from his unproductive journey to Africa and complained about the failure of his mission. The two accused and Sigal then proceeded to discuss plans for obtaining negotiable currency which would insure the success of future smuggling enterprises. Among the plans considered was the purchase of military marks at the cheap black market rate of exchange and the redemption of such marks for dollar instruments at the official rate of exchange. A tentative agreement was reached whereby Sigal was to purchase the marks. He, however, became reluctant and did not carry out his part of the scheme. Cohen remonstrated with him on several occasions, and once said "It is idiotic, you promised, you must keep your promise." Thereafter, Cohen borrowed 200,000 francs with which marks were to be purchased, and an arrangement was made whereby Sigal and Cohen were to meet DeGennaro in Brussels. DeGennaro was to effect the actual exchange of marks through Mamula. Sigal used Cohen's 200,000 francs and some money he obtained through other sources to purchase 487,000 marks in Brussels. These marks were to be exchanged for approximately $48,000 worth of money orders by DeGennaro. Sigal, Cohen and DeGennaro spent approximately one day in a Brussels Hotel sorting and screening the marks. Thereafter DeGennaro attempted to effect the exchange but was unsuccessful in doing so.

Engaging in business in the European Theater and exchanging allied military marks obtained from sources other than the pay and allowances of the person seeking to effect the exchange was forbidden by applicable War Department and Theater Directives.

The findings of guilty of Specification 2 under both Charges which allege an attempt to obtain merchandise in Africa is not supported by the record because the overt acts necessary to constitute the attempt were performed by an informer for the military authorities whose acts may not legally be attributed to the accused.

4. Attached to the record of trial is a letter dated 21 December 1946 signed by four members of the court (including the president and the law member), all of the members of the prosecution and the defense wherein it was recommended that the sentence to confinement adjudged as to accused Cohen be remitted.

Consideration has been given to a brief filed on behalf of accused Cohen by Mr. Arthur J. Aronson, Brooklyn, New York, Attorney for accused Cohen. Oral argument by Mr. Aronson and accused Cohen were heard by the Board of Review. Lieutenant Colonel George W. Porter, one of accused Cohen's former commanding officers, appeared before the Board and attested to his excellent character, efficiency and devotion to duty.

In addition to the foregoing, consideration has been given to communications pertaining to clemency as indicated below:

On behalf of accused Gaillard: Letters from the Honorable Richard B. Russell, Honorable Walter F. George, and Honorable Lister Hill, United States Senate; Mrs. Dorothy Millsop, Atlanta, Georgia, and Mrs. Howard Gaillard, Jr., wife of accused.

On behalf of accused Cohen: Letters from the Honorable Robert F. Wagner, United States Senate, the Honorable James M. Mead, former United States Senator, Mr. Francis T. Mulcahey, Buffalo, New York, Mr. Peter J. McManus, Binghamton, New York, Mr. Jacob Billikopf, Philadelphia, Pennsylvania, and Mr. David Cohen, father of accused.

5. I recommend that the findings of guilty of Specification 2 under Charges I and II be disapproved and that the sentence as to each accused be confirmed and carried into execution. In view of the fact that the period of confinement adjudged as to accused Cohen has already been served, it is not necessary to designate a place of confinement.

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. 325, 17 Sept. 1947)

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

JAGH - CM 320489

2 JUL 1947

UNITED STATES v. Private First Class CECILIO R. VELASQUEZ (RA 18022272), Company B, 16th Infantry	UNITED STATES FORCES IN AUSTRIA Trial by G.C.M., convened at Vienna, Austria, 21 December 1946. To be hanged by the neck until dead

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Cecilio R. Velasquez, Company B, 16th Infantry, did, at Vienna, Austria, on or about 14 November 1946, forcibly and feloniously, against her will, have carnal knowledge of Ruth Schnaar, Austrian Civilian, XIX Hohe Wartegasse 38, Vienna, Austria.

He pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of any previous convictions was introduced. All the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48 but recommended that that portion of the sentence adjudging that the accused be hanged by the neck until dead be commuted to confinement at hard labor for forty years.

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

Frau Ruth Schnaar, the widow of a German officer who was killed in action, testified that on the evening of 14 November 1946, she left the club of Company A, 16th Infantry, where she was employed as a book checker (R 16) and proceeded to her home on the Hohewartegasse, Vienna, Austria (R 28). At about 2245 (R 28) she was accosted by the accused and another soldier on Hohewartegasse at a corner which was approximately five minutes from her home (R 8) and about one minute's walk from the area of Company B, 16th Infantry (R 19). The accused and the soldier were trying to start a motorcycle. As the witness walked past them, the accused followed her (R 8, 18, 29) and asked her where she lived (R 8, 18, 29). She replied that she lived up the street. The accused put his arm about her waist (R 8, 29) and she pulled away (R 8). She told the accused that she did not want him to go with her (R 17). In the meanwhile accused's companion, whom he called Taylor, came to the place where the witness and accused were standing (R 9, 19, 29). The accused asked her to have intercourse with him but the witness then suggested that both soldiers go home with her (R 18, 39). One of the soldiers thereupon said, "Why not here? We will miss bed check if we go home with you." but the witness said, "Well, right here in the street? Why don't you come home with me?" (R 39). She explained that she suggested that the accused accompany her to her home "because I noticed it would be dangerous and I was hoping I could take him home and wake the whole house up, and get rid of him that way" (R 18). The accused threw his arm around her on two occasions, but she rebuffed him each time (R 8, 19). The witness tried to push the accused away, but the other soldier assisted him. They forced her to her knees on the sidewalk and held her face down. Taylor was leaning or sitting on her and the accused was kneeling behind her and put his finger in her "uterus" (R 9, 19, 30). She screamed once, but Taylor held his hands over her mouth, hit her on the head, and threatened to kill her (R 9, 16-17, 21, 30-31, 41).

Two civilians approached the group at that time, whereupon Taylor picked Frau Schnaar up and told the accused to scare the civilians away (R 9). When released by Taylor the witness approached the civilians and in a very quiet voice said, "For God's sake please help me" (R 9, 19). She was not certain that the Austrians understood her because "I was scared of a beating up so I stayed as quiet as I could." The accused went toward the civilians who thereupon left the scene hurriedly without assisting her (R 20, 32).

The two soldiers then picked her up and forced her to accompany them to the motor pool of Company B, 16th Infantry. The motor pool was about a block away from the point where she had been accosted. When they arrived there the soldiers forced her upon a sloping ground and Taylor attempted to have intercourse with her (R 9, 21, 32). She resisted but stated that she did not scratch because she was wearing gloves (R 22).

Taylor and the accused then picked her up and lifted her into a truck which was parked inside the motor pool (R 9, 20, 22, 34). She was forced to lie down on the floor of the truck. She crossed her legs but one of the soldiers pulled them apart, while the other held her arms (R 34-35). Taylor then lay down upon her and attempted to have intercourse with her (R 10, 35). She heard the accused say, "Hurry up, Kunio! It's 10 minutes to 11" (R 10, 42). Although she heard his voice she didn't know his exact whereabouts, but he seemed to be somewhere in the rear of the truck (R 10, 37).

She stated that she fought Taylor and "with my hands I pushed him away as hard as I could." She also kept shifting the lower part of her body so as to evade his attempts at intercourse (R 10, 23, 35). She was afraid to scream because he kept threatening her "to shut up" or he would beat her up (R 10, 17, 20). She was also afraid that if she cried out the soldiers might drive off to the Vienna woods (R 21). Taylor completed the act of intercourse with her (R 10, 23-24, 36). Before departing, however, he threatened that he would return and beat her up if she cried out (R 25, 38). Before Frau Schnaar could rise the accused seized her and lay upon her (R 12, 37). She did not submit to him and tried to push him away (R 11-12, 24-25). The accused, however, overcame her resistance because she was exhausted and hurt. The act of intercourse continued for fifteen minutes. The sexual act was completed because Frau Schnaar could feel his organ within her "uterus" and because she could feel his emission as he was not wearing a preventive (R 11-12, 24, 37-38). She stated that during the act of intercourse she did not hold on to the accused but she reached over him to hold her leg which pained her because of a cramp (R 37-38). The accused then rose and departed (R 12, 24). In her opinion the accused was sober at the time (R 26).

Frau Schnaar arose with difficulty after a short while and then fled from the motor pool (R 12). After leaving the motor pool she encountered two civilians who appeared to be looking for something with a flashlight (R 12, 26). She was asked if she had seen a motorcycle and replied, "Yes, it was standing on the street when I passed, but I don't know where it is now." She then took refuge in the garden of a nearby house where she remained for about five minutes. The occupants of the house then accompanied her to her home (R 12-13).

Upon arriving at her home she awakened her grandfather and told him, "I was raped and bleeding." She felt ill and vomited, and felt pain in her groin (R 13, 40). She noticed that her coat was dirty and wrinkled and her slip was bloody in the back. Her slip had a hole in the back and one of her stockings was torn (R 40). She did not wear panties on the night of the incident (R 31).

On the following morning she went to the office of a civilian physician because she was bleeding and was afraid that she had contracted a venereal disease. The doctor was not there, but his wife told her to return in the afternoon (R 13-14). She did not, however, return to his office, but instead reported the incident to the military police. They in turn referred

her to Criminal Investigation Division. She was then taken to the 110th Station Hospital where she was examined at about 1700 hours on 15 November 1946 (R 13-14, 41). She further testified that she was examined a few days later in the office of Colonel Tillson and stated that at that time the front of her thighs were covered with bruises. There had been no bruises there prior to the night of 14 November 1946 (R 41).

Frau Schnaar next saw the accused in his company headquarters and she identified him from among a number of Mexican soldiers (R 15, 27, 50). She was positive of the identification because it was not too dark on the night of the incident (R 27, 33) and there was a street lamp at the location where she first encountered the accused (R 28). She also had a good view of the accused while he was having intercourse with her (R 24). At the trial she identified the accused among a group of soldiers in the court room (R 7).

On cross-examination Frau Schnaar testified that she had previously been employed by Company B, 16th Infantry for six weeks (R 17) and was familiar with the manner in which the company area was laid out. She knew the general location of all the billets (R 18). The guard shack was located approximately 50 or 100 meters from the entrance to the motor pool (R 21).

Doctor Heinrich Fitter, a Professor at the University of Vienna and Director of the Institute of Metereology testified that he is Ruth Schnaar's grandfather and that she lives at his apartment in Vienna. At approximately 0100 hours on the morning of 15 November 1946, Ruth Schnaar awakened him. In the limited light of the room she appeared to be pale and was shaking. She told him that she had been attacked by two Americans. He asked her whether she meant that she had been raped. She replied in the affirmative and told him that she was afraid that she might have contracted a venereal disease. She wanted to see a doctor during the night but he suggested that it would be best for her to go to bed (R 43). He asked her whether she had pains to which she replied that she was bleeding and that she was "near her period." He did not notice anything about the condition of her clothing except that her coat was open (R 43-44).

First Lieutenant A. J. Hassett, Medical Corps, 110th Station Hospital, Vienna, Austria, testified that he examined Ruth Schnaar on the afternoon of 15 November 1946 at the 110th Station Hospital at the request of the Criminal Investigation Division. She gave a history of bleeding since the time of the alleged rape. On examination, the witness found a bloody discharge coming from her uterus. This appeared to be the normal discharge occurring during the menstrual period and was not the result of any tear or other damage. Laboratory tests indicated no male sperm. There were no tears or abrasions about the vagina (R 47). Ruth Schnaar told the witness that she was not expecting her menstrual period for about a week. He

stated that menstruation occasionally begins early as a result of shock. He stated that he examined the girl's thighs and hips but found no marks or bruises thereon (R 48). However so-called black and blue marks can appear on the body at any time between two and forty-eight hours after a blow (R 49). In general his examination neither showed that she had intercourse, nor did it negative the possibility that she had intercourse (R 48-49).

Julius D. Skinner, an agent of the Criminal Investigation Division, United States Forces in Austria, testified that on the morning of 16 November 1946, Frau Schnaar identified the accused among a group of three soldiers of Mexican or Indian descent in the orderly room of Company B, 16th Infantry (R 50-51). The accused was then taken to the CID office where the witness interrogated him (R 51).

In a written statement signed on 16 November 1946, which was admitted in evidence as Prosecution Exhibit 1 (R 61) over the objection of the defense that it was obtained by duress (R 60) the accused stated:

"On the 14th Nov. 1946 Pvt Taylor a soldier from my platoon and I left our billets at about 1800 hours and went and pick up two girls that Taylor knows and took them to the Manhattan Club. We stayed at the club drinking and dancing until about 2215 hrs. Me and Taylor and our girl friends got on a street car. Me and Taylor rode to the street to where we usually get off to go to our billets. We got off, the girls stayed on the street car. We started down the street toward our Co. There was a motorcycle on the side of the street, Taylor got on it and I gave him a push and started it. he rode it down the street a little ways and it stoped. I walked down to him he tried to crank it but it wouldn't start. We left it there. About this time a girl come walking down the street. I asked her if I could take her home. I took hold of her arm. She pulled away from me and said No. I got hold of her again. Then Taylor come up and took hold of her too. Taylor said lets fuck her and I said alright. Taylor threw her down on the sidewalk. About this time two civilians (a man and a woman) came up asking about their motor cycle. The girl said something to them in German. I told them to go away and get the fuck out of here or I would beat the shit out of them. They went away. I said to Taylor lets take her to the Motor Pool so we both can fuck her and no one will see us. We both took a hold of her and forced her to go with us to the motor pool which was about a block away. In the Motor Pool we first layed her down on the ground and Taylor started to fuck her - she kept begging him not to. There was a truck with a cover on it nearby so I told Taylor lets put her in the truck it will be better. She trying to get away

and asking as to let her go. but Taylor and I told her to shut up or we would beat her up. We pick her up and put her in the truck. Taylor and me both got in the truck with her. Taylor fuck her first while I sat beside them. I kept telling her to keep quite or I would beat her up she begen crying and begging us to let her go home. After Taylor finished he got out of the truck and he told her to keep quite while I fuck her or would knock her head off. I got on her and fuck her. When I finished I got out of the truck Taylor had gone. I went to our billets. Taylor was sitting on his bed. A officer and the C.Q. come up about this time and told us we were late for bed check. The C.O. took our names. I don't know the officer or the C.Q's name. I don't know where the girl went I left her in the truck. Taylor and I haven't talked about it since because there was always to many G I aroud. On Nov 16 1946 at about 1400 hrs I was taken off of guard and taken to Capt Vaughn's office at Co B. Three other soldiers were also there. we were standing up in front of Capt Vaughn desk. A American civilian told me his name was Mr Skinner and said he was from the C.I.D. come in with a Austrian girl. I recognized her as the girl that Taylor and me took to Co. B. Motor pool and raped last Thursday nite Nov 14 1946. While we were standing she pointed me out and said I was the one. Capt. Vaughn let the other three soldiers go. A few minutes later Mr Skinner took me with him to the CID office where I made this statement. Before I made this statement he explained the 24th A.W. to me."

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

Corporal Washington P. Golightly, a dispatcher, assigned to the motor pool of Company B, 16th Infantry, testified that the only truck ever parked in the motor pool was a 1½ ton truck. It was always parked at a location within 75 feet of one of the platoon billets and within 8 feet of a garage on the second floor of which some Austrian civilians lived. The witness stated that the truck was parked in its usual location on the night of 14 November 1946 (R 64-65). A guard was not maintained at the motor pool (R 64).

After his rights as a witness were properly explained to him by the law member the accused elected to be sworn and took the stand in his own behalf (R 65-66).

He testified that on the evening of 14 November 1946 he and Private Taylor, a soldier who was assigned to his company left their billets to go on a date (R 67, 71, 81). They met their girl friends at approximately 1830 hours and went to the Manhattan Club (R 67, 84). They then ordered

twenty glasses of beer. The accused recalls that three such orders were placed (R 71, 82). Later in the evening they left the club to take the two girls home but left the girls on the streetcar at a point near their billets, and were returning to their billets alone. It was approximately 2245 hours. Taylor and he were drunk (R 67, 80, 82). The accused did not recall whether Taylor remained with him after they left the streetcar together or whether another soldier came along whom he continued to call Taylor (R 80-81, 83).

They saw a motorcycle parked at the curb. Taylor tried to start it, but it would not start. The accused then pushed the motorcycle and it rolled down the hill. The accused chased the motorcycle for a half a block when it stopped. About that time the accused saw a girl walking near the mess hall. The accused left Taylor and grabbed her arm and asked her where she was going. She replied that she was going home and in answer to a second inquiry told the accused that she lived a short distance down the street. She then requested that he turn her loose. He did so but continued to walk at her side. He asked if he might take her home but she said, "No." Taylor than ran up and grabbed the girl's arm. The girl asked him to release her and he complied. The soldiers asked her why she objected to being taken home by them and she replied that her family would not approve (R 67-68). They continued to walk with the girl and accelerated their steps when the girl began to walk fast (R 72). They met an Austrian man and woman who asked whether the accused had seen a motorcycle. He told them it was down the street. At that time the girl was lying on her back and Taylor was lying on top of her. The accused held her arm (R 68).

The accused denied that Taylor had thrown her on the sidewalk (R 73). Upon noticing a girl on the ground, the Austrian lady departed. The accused told Taylor to get up. The girl said something in German to the Austrian in a low tone of voice but the latter did not seem to pay any attention to her. The accused told him to "Get out of here" which he did (R 68, 73, 78). Taylor then got up from the girl and the three began to walk again. The girl attempted to walk rapidly but the two soldiers walked along with her. They approached the company billets and Taylor suggested taking the girl inside (R 68, 74). The accused replied that it was too late and they they would be discovered by the officers taking bed check. Taylor then suggested taking her to the motor pool (R 69). The accused denied that he suggested it. They then started to walk toward the motor pool and the girl slipped and fell on a bank. Taylor then attempted to have intercourse with her as she lay on the ground (R 74).

Accused suggested that they get into a truck so that they wouldn't be seen. They held her by her arms and assisted her into the truck. The girl helped by placing her foot on the bumper and climbing in. The accused denied that they forced her to go to the motor pool or that they

threatened her. She did not try to dissuade them or to escape (R 74-76, 79). When they were in the truck Taylor lay on top of her and proceeded to have intercourse with her. The accused sat nearby in the back of the truck. He did not see Taylor force her thighs apart, strike her, or cover her mouth with his hand (R 70). The accused saw the officer of the day enter his billets to take bed check, so he told Taylor to hurry (R 81). Taylor departed and the accused lowered his trousers, he penetrated her and then proceeded to have intercourse with her for three minutes (R 71, 75, 90). She did not assist him but just lay there. The accused then departed (R 71).

5. Before the accused's confession was received in evidence the accused took the stand for the limited purpose of narrating the circumstances under which his confession was obtained (R 55). He testified that Article of War 24 was read to him before he was questioned at the Criminal Investigation Division Headquarters, but that he didn't understand it (R 56). However, Agent Skinner told him that he would place him in the stockade if he lied. The accused started to dictate the statement. When he was halfway through Agent Skinner stopped and tore up the sheet and said that the accused was leaving out parts of the statement. Agent Skinner repeated this action, and then told the accused to tell the whole truth or the accused would go back to the United States and get a dishonorable discharge. The accused replied that he was too drunk on the night in question and didn't remember what had transpired. Agent Skinner stated that he knew the whole story and recited it to the accused. The accused said, "that he would tell the whole truth that Mr. Skinner said" and "I told him that if he would help me I would tell the same story as before" (R 57, 59-60). The statement was then typed up and the accused went to supper (R 58). When he returned he was taken to another room. The statement was given to him but he only had the opportunity to read one-half of the first page when Agent Skinner turned it over, and he was reading the second page when Agent Skinner took the entire statement from him. Agent Skinner asked the accused if he were through and the accused answered, "Yes, sir." Accused then initialed the paper and Agent Skinner left the room. Another civilian then asked the accused if Agent Skinner had read Article of War 24 and explained it to him. The accused replied that it had been read but not explained. The civilian then asked the accused if he understood it and accused answered, "Yes, sir." The civilian then explained it again and the accused said, "No, sir." He then signed it, but Skinner was not in the room (R 58).

The prosecution traversed the accused's testimony by that of Agent Skinner who categorically denied the testimony of the accused. He testified that on the afternoon of 16 November he explained the 24th Article of War to the accused, showed it to him in the Manual for Courts-Martial, told the accused that he was not required to make any statement which would tend to incriminate or degrade him and further stated that any statement the accused gave could be used in court against him (R 52). The

explanation of the article was made with full cognizance that the accused had only a sixth grade education and in terms which such a person could understand (R 53). No threats were made to the accused (R 53) and the witness did not tell the accused that he would help him (R 62). The accused told the investigator, "I might as well get it off my chest, I did something" whereupon the witness replied, "Velasquez, you don't have to tell me anything if you don't want to. It is entirely up to me to prove this" (R 61). The accused then made a statement which the witness recorded in longhand substantially in the words of the accused. The statement was then typed by a clerk, and was read to the accused. He was then handed the statement to read by a Mr. Steele, another CID agent, who asked him if he fully understood the contents. The accused indicated that he did not wish to add or delete any portion of the statement. He signed the document in the presence of the witness (R 60).

A question of fact was created by the conflicting evidence as to the manner in which accused's confession was obtained, which was the duty and function of the court to resolve. There is substantial evidence that the accused gave his statement freely and voluntarily, and he admits that the 24th Article of War was read, and his rights thereunder explained to him. It was apparently the intention of the defense to show that the accused did not have sufficient intelligence fully to understand the warning given him with respect to his rights under Article of War 24. The agent, however, testified that he explained the accused's rights to him in full cognizance of his limited education. The accused's testimony at the trial including his shrewd answers under cross-examination fully supports the conclusion that he was sufficiently intelligent to understand an explanation of his rights against self-incrimination. Under such circumstances and in the absence of a showing of abuse of discretion, the ruling by the law member that the statement was voluntarily given should not be disturbed by the Board of Review (CM 286135, Bailey et al, 18 BR (ETO) 157, 162; CM 288384, Johnson, 20 BR (ETO) 271, 273-274).

6. The accused stands convicted of a specification which alleges that he "did, at Vienna, Austria, on or about 14 November 1946, forcibly and feloniously, against her will, have carnal knowledge of Ruth Schnaar, Austrian civilian, * * *" in violation of Article of War 92.

Rape is defined by the Manual for Courts-Martial as "the unlawful carnal knowledge of a woman by force and without her consent."

The Manual further provides:

> "Force and want of consent are indispensible in rape; but 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."

The elements of proof as stated in the Manual 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" (MCM 1928, par 148b, p 165).

The fact that the accused, and the soldier referred to as Taylor, had carnal knowledge by effecting a penetration of the genital organs of Frau Schnaar is established by Frau Schnaar and admitted by the accused. After she had been lifted into the truck, Taylor had intercourse with her. The accused then seized Frau Schnaar and also proceeded to have intercourse with her. The sexual act continued for fifteen minutes before it was consummated. The girl stated that she could feel his organ within her "uterus" and could feel his emission.

The only controverted issue presented by the present record involves the question of consent. Concerning the element of consent it has been said:

"Consent, however reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (Wharton's Crim Law, Vol 1, Sec 701, p 942, and cases cited therein).

The evidence in this case presents the not unusual situation of directly conflicting testimony by the prosecuting witness and the accused on the question of consent. This issue of fact was decided by the court against the accused. Although the court's determination does not preclude the Board from reaching an opposite conclusion in cases which require examination before confirmation, as in the instant case, nevertheless, considerable weight must be accorded the court's findings by reason of the superior position it enjoyed in seeing the witnesses and hearing then testify (CM 266302, Brown, 43 BR 221, 227).

There are indications in her own testimony which show that Ruth Schnaar's resistance to the assaults of the accused and his companion was not as vigorous as might have been possible, objective standards considered.

She cried out only once, and not at all when she found herself in the familiar surroundings of the motor pool of Company B. Presumably she knew that troops were billeted within the sound of her voice. She further knew from statements made by the accused that the time was close to bed check and she might have expected officers to be in the vicinity.

She did not remove her gloves so that she might scratch her assailants.

After she had been accosted by the two soldiers and had rebuffed their initial advances, and after she realized that they desired to have intercourse with her, she invited them to her home—presumably that she might arouse the household and get help. Her explanation was logical and was apparently believed by the court, although her remarks might have been construed by the accused as consent.

There is also no evidence in the record that she suffered any physical injury. Her genital organs were not torn or bruised. Her testimony that her body bore bruises two days after the assault is, of course, possible, although not corroborated by the testimony of the medical officer that her body bore no bruises on the day after the assault. Thus there is little evidence in the record of physical violence.

However, in order that rape be committed:

> "It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by other means of duress, or by threats of killing or grievous bodily harm or other injury * * * Absence of free will, or nonconsent, on the part of the female, may consist and appear * * * in her submitting, because in view of the strength and violence of her assailants or the number of those taking part in the crime, resistance must be useless if not perilous" (Winthrop's Military Law & Precedents (1920 Reprint) p 678).

In CM 236801, Smith et al, 23 BR 129 (2 Bull JAG, p 310), it was held that the extent and character of the resistance required of a woman to establish her lack of consent depends upon the circumstances and relative strength of the parties, and not upon the presence or absence of bruises. In that case it was held that additional resistance against six assailants would have been futile as well as impossible. See also CM 261857, Seymour et al 2 BR (A-P) 15, 29; CM 238172, Spear, 24 BR 187; CM 295930, Berger, 20 BR (ETO) 107, 116; CM 236250, Guerriero, 22 BR 359; CM 239239, Mitchell et al, 25 BR 107; CM 317948, Wells.

Although, as indicated above, there is evidence in the record, which would support the conclusion that Ruth Schnaar's resistance was not vigorous, nevertheless there is ample evidence to support the conclusion that she was so cowed and intimidated by the violence and threats of the two soldiers that she submitted without extreme physical resistance, or outcry.

The accused's confession fully supports Ruth Schnaar's testimony as to her nonconsent.

The court may well have believed that she failed to cry out and raise an alarm because she believed such outcry would be in vain, and that it would merely result in further physical violence against her and her would be rescuers. Certainly the flight of the two Austrian civilians despite her pleas for assistance and obvious distress supports the conclusion that no help may normally be expected from civilian sources in occupied Austria against the assaults of members of the occupation forces.

In CM 235407, Claybourne, 22 BR 1, 45-46, in discussing a similar case wherein physical resistance was not great, the Board of Review stated:

> "To say that Miss * * * could have defended herself more vigorously and successfully against accused's assaults under the circumstances in which she found herself would be holding her to a higher degree of responsibility for her welfare than the law requires in such cases. The essential elements of nonconsent, or that the act be against the woman's will, signifies that it be committed against the utmost reluctance and resistance which the woman is capable of making at the time. As heretofore stated, the matter is relative and must be judged in the light of all of the circumstances of the occasion such as * * *, the degree of force employed by the assailant and the uselessness of resistance. Stated differently, the resistance of the female, so as to support a charge of rape, need only be such as to make non-consent and actual resistance reasonably manifest."
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> * * *
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> "While it is not necessary to do so, it should be said, in passing, that the evidence of accused's treatment of Miss * * * prior to and during the first rape might be held to have been of such a character as to create in the mind of his victim a fear for her safety and welfare and a sense of hopelessness so as to suspend her ability to resist the further assaults and therefore dispense with the necessity of positive proof of her continued and constant struggle and resistance in the events which followed.

"When a woman is overwhelmed by circumstances which, to her, seem appalling, it is not only probable but likely that she may, through fear, lose her courage and with it, her normal strength and ability to defend herself and so become practically helpless in the hands of one who has a criminal design which may be more readily accomplished when his victim is reduced to that condition. This principle is recognized by the law in cases of robbery which may be accomplished by violence or by putting in fear; and it may be said to be particularly true and applicable in cases of rape where the assaulted party is the physically weaker one" (Underscoring supplied).

In the instant case the evidence as a whole supports the conclusion that Ruth Schnaar's conduct was characterized by a degree of resistance that was intended to dissuade the soldiers, without exciting them to the point where they would fulfill their threats to "beat her up" or kill her.

In spite of the threats and the acts of violence she begged two passing civilians to help her. This plea was uttered in a quiet voice. This is understandable, on the basis that she wanted her plea to sound as casual as possible so as to conceal the fact that she was asking for assistance. However, the accused threatened the civilians and they departed.

When forced to go to the motor pool and thrown on the ground she resisted Taylor's attempts to assault so successfully that the soldiers decided to put her in a truck to avoid detection.

Frau Schnaar then tried to get away and begged the soldiers to release her. They lifted her into the truck and forced her to lie down. She crossed her legs but they were pulled apart. She began to cry and accused threatened again to bet her up. Taylor then had intercourse with her, but before he departed he threatened to beat her if she cried out. The accused then lay upon her. Frau Schnaar did not submit and tried to push him away, but she was exhausted and hurt by that time so the accused succeeded in violating her. He admitted at the trial that she did not cooperate in the sex act but just lay there (R 71). When he departed, she rose and fled.

No evidence was introduced detrimental to Ruth Schnaar's character. Her background appears to have been eminently respectable. It does not appear that she had been drinking. She had never met the accused. It seems extremely improbable that a woman under the circumstances related, would lie on a well-lighted sidewalk on a public street within a short distance of her home and engage in intercourse with strangers. It also

stretches the imagination to believe that a girl would willingly lie down on a muddy slope on a November night and voluntarily engage in intercourse. It would have been necessary for the court to accept the above situation in order to believe the accused's testimony at the trial, wherein he disavowed his pre-trial statement and denied that she had been thrown on the sidewalk or that he or Taylor had used force or threats to induce her to go to the motor pool and submit to their desire for intercourse.

Ruth Schnaar's testimony was also corroborated by evidence of her prompt complaint to her grandfather and her subsequent complaint to the military police and CID.

> "Whether or not the woman exercised all the resistance within her power under the circumstances, and whether her resistance ceased because it was useless and dangerous or because she ultimately consented is a question for the jury /in the instance, the court-martial/ to decide" (Mills v. United States, 164, U. S. 210, 212; CM 261857, Seymour, op cit).

Under the circumstances presented by the present record, we would not be justified in disturbing the court's determination of this question.

There is some conflict between Ruth Schnaar's testimony and the pretrial statement of the accused as to whether accused or Taylor voiced certain threats, or committed certain violent acts. However, the discrepancy is not significant because both soldiers were joint venturers and the acts of each are imputed to the other. Both are liable as principals inasmuch as the distinction between principals and accessories has been abolished by statute (Sec 332, Fed Crim Code, 18 USC 550).

Although the accused testified that he was under the influence of alcohol during the night in question, his testimony shows that he had sufficient possession of his faculties to remember the events of the evening, to dissuade Taylor from taking the girl into the billets, to suggest putting the girl into the truck to avoid detection, to keep watching for the officer of the day and to warn Taylor as to the time, so that they would not miss bed check. Furthermore Ruth Schnaar testified that the accused was sober. All of the facts indicate that the accused was not so intoxicated as not to know what he was doing. The law is well settled that voluntary drunkenness does not constitute an excuse for the crime of rape and does not destroy the responsibility of the accused for his misconduct (Wharton's Crim Law (12th Ed) Sec 66, p 95; CM 298814, Prairichief, 21 BR (ETO) 129, 134; CM 317526, McClellan).

For the reasons stated the Board of Review is of the opinion that the evidence establishes the accused's guilt of the crime of rape beyond a reasonable doubt.

7. In the Review of the Staff Judge Advocate it is stated:

"The accused is nineteen years of age. He is of Mexican parentage and his home is in Ganado, Texas. His mother and father are both living. His father is a farm laborer. The accused has three brothers, one is older than he and is also a farm laborer. The two younger brothers of the accused are still in school. He has one sister who is a housewife. Due to the straitened conditions at home, the accused has lived with his uncle since he was ten years of age. His uncle is also a farm laborer.

"The accused went as far as the sixth grade in grammar school, at which time he quit at the age of fifteen and went to work as a farm laborer in order that he might pay his own expenses and upkeep. He worked at this job for one year and earned approximately $20 a week. He then went to work in a filling station in the nearby town of Port Lavaca. He earned $100 a month and remained in this job until he entered the Army in November 1945. He took his basic training at Camp Robinson, Arkansas. He was sent overseas and was assigned to the 9th Infantry Division. He remained with this organization for seven months and then joined his present organization. The accused does not have a record of previous convictions and has never received disciplinary punishment under AW 104. The civilian record of the accused is also unblemished. So far as is known, neither he nor any member of his family has ever experienced any difficulty with the civilian authorities."

Therein it is also stated that his AGCT score is 51 in the 3A type of Army classification test.

8. As indicated above the reviewing authority has recommended that the sentence be commuted to dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for forty years.

The Board of Review has given careful consideration to a letter from the Commander, Adjutant, and Chaplain of St. Christopher Post 658, Catholic War Veterans, Port Lavaca, Texas, which was referred to the War Department by the Honorable Joseph J. Mansfied, Representative in Congress to whom it was addressed.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to death or imprisonment for life, is mandatory upon a conviction of a violation of Article of War 92.

_____, Judge Advocate

Waldemar A. Hoff, Judge Advocate

Philip R. Smith, Judge Advocate

JAGH - CM 320489 1st Ind

WD, JAGO, Washington 25, D. C. JUL 21 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 Cecilio R. Velasquez (RA 18022272), Company B, 16th Infantry.

2. Upon trial by general court-martial, this soldier was found guilty of rape of an Austrian woman, in violation of Article of War 92. 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 hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48 but recommended that that portion of the sentence adjudging that the accused be hanged by the neck until dead be commuted to confinement at hard labor for forty years.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. I recommend that the sentence be confirmed, but in view of all the circumstances, including the recommendation of the reviewing authority, the accused's prior good record, his low intelligence, the evidence that he had been drinking, the fact that the victim's resistance, although sufficient to show non-consent, was not vigorous, and the further fact that the victim suffered no physical injury, recommend that it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for 15 years, that the sentence as thus commuted be carried into execution and that a United States penitentiary be designated as the place of confinement.

4. Inclosed is 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 the foregoing recommendation into effect, should it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of Trial
2 - Draft ltr sig USW
3 - Form of action

(G.C.M.O. 311, 28 Aug 1947).

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TITLE

DATE	BORROWER'S NAME	EXT.