OFFICE OF
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GENERAL
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OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 72

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R
16
B63
v.72

R
16
B63
v.72

JUDGE ADVOCATE GENERAL'S DEPARTMENT

BOARD OF REVIEW

Holdings Opinions and Reviews

VOLUME 72 - 124

including

CM 323006 to CM 323971 } 118

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CONTENTS FOR VOLUME NO 72

CM No.	ACCUSED	DATE	PAGE
323006	Paradise	3 Jul 1947	1
323022	Walker	27 Aug 1947	5
323046	Main	15 Sep 1947	13
323083	Davis	19 Aug 1947	23
323089	Gale	12 Sep 1947	41
323108	Rockett	26 Aug 1947	83
323109	Kingery	7 Jul 1947	95
323136	Ligon	26 Sep 1947	101
323161	Lacewell, Moore, Royster	8 Sep 1947	105
323162	Havalda, Harper, et al	29 Aug 1947	115
323168	Kuehnel	27 Aug 1947	131
323188	Hamrick, Bucher, Gibson	21 Oct 1947	141
323197	Abney	22 Aug 1947	149
323234	Mead	16 Oct 1947	165
323244	Nicks, Cole	30 Jun 1947	177
323249	Tonita	23 Jul 1947	185
323254	Guilfoyle	28 Jul 1947	191
323278	Jackson	8 Jul 1947	199
323305	Raabe	7 Jul 1947	205
323306	Kantke	2 Jul 1947	209
323349	Henry	31 Oct 1947	213
323378	Learned, Scharff	10 Oct 1947	225
323397	Tervree	31 Jul 1947	231
323466	Schorr	10 Jul 1947	237

CONTENTS FOR VOLUME NO 72

CONTINUED (2)

CM No	ACCUSED	DATE	PAGE
323470	King	4 Nov 1947	247
323485	Ames	8 Sep 1947	259
323486	Ruckman	21 Aug 1947	267
323488	Pontacy, Santiago	10 Oct 1947	279
323509	Snedeker	24 Jul 1947	291
323574	Green	16 Sep 1947	295
323589	Ward	7 Nov 1947	301
323606	Johnson	12 Sep 1947	317
323619	Lopez, Pimentel	19 Nov 1947	345
323640	Pamintuan	22 Sep 1947	351
323663	DeBartolo	26 Aug 1947	355
323707	Moyer	29 Aug 1947	365
323716	Lubojasky	16 Jul 1947	369
323728	Wester	1 Aug 1947	383
323736	Yost	8 Sep 1947	387
323751	Agerton	16 Jul 1947	393
323764	Mangum	15 Sep 1947	397
323766	Lauigan, Anasco	22 Jul 1947	407
323840	Connolly	14 Nov 1947	413
323850	McLaughlin	16 Sep 1947	421
323887	Christopher	30 Sep 1947	431
323936	Russel	1 Aug 1947	445
323971	Major, Robinson, Maddox	13 Aug 1947	451

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

JAGN-CM 323006

2 July 1947

U N I T E D S T A T E S	)	CONTINENTAL BASE SECTION
V.	)	Trial by G.C.M., convened at Munich, Germany, 23 and 30 April 1947. Dishonorable discharge and confinement for ten (10) years. Federal Reformatory.
Private VALDON C. PARADISE (34756273), 3457 Transportation Corps Truck Company.	)	

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 58th Article of War.

Specification 1: (Nolle prosequi).

Specification 2: In that Private Valdon C. Paradise, 3457 Transportation Corps Truck Company, did, at Munich Germany, on or about 7 August 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Niesbach, Germany, on or about 6 December 1946.

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

Specification: In that Private Valdon C. Paradise, 3457 Transportation Corps Truck Company, then of the 660th Quartermaster Truck Company, did without proper authority absent himself from his organization, at or near Bad Aibling, Germany, from about 16 October 1945 to about 3 January 1946.

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

Specification 1: (Nolle prosequi).

Specification 2: In that Private Valdon C. Paradise, 3457 Transportation Corps Truck Company, having been duly placed in confinement in the 514th Quartermaster Group Stockade, on or about 14 May 1946, did at Flak Caserne, Munich Germany, on or about 7 August 1946, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Valdon C. Paradise, 3457 Transportation Corps Truck Company, did at Auerschmiede, Germany, on or about 22 October 1946, feloniously take, steal and carry away one ¼ ton 4x4 truck of the value of about $1051.00, property of the United States, furnished and intended for the Military service thereof.

CHARGE V: Violation of the 96th Article of War. (Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

He pleaded not guilty to and was found guilty of all Charges and Specifications, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for thirty-five years. The reviewing authority disapproved the findings of guilty of Charge V and the Specification thereunder, and approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, 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 Board of Review holds the record of trial legally sufficient to support all of the findings of the court as approved by the reviewing authority with the exception of the findings of guilty as to Charge IV and the Specification thereunder. Discussion of the evidence will therefore be limited to facts pertaining to the Specification and Charge IV.

Under Charge IV and its Specification accused is charged with the larceny of a ¼ ton truck, value of $1051.00, property of the United States, furnished and intended for the military service thereof.

4. Evidence for the prosecution:

The evidence shows that witness Josef Maier, a German civilian,

was acquainted with accused; that on 22 October 1946 accused, driving a jeep, pushed another jeep, driven by Maier, to the edge of the river near Auerschmiede, Germany, and left it there (R. 20, 20A). A few days later Maier saw the jeep "laying in the river," with the wheels removed. There was a letter "P" on the license plate (R. 20A). On 3 December 1946 witness Fritz Mentenhaus, a German rural policeman, with a United States Army Officer and members of the Constabulary found two jeeps in the river near Auerschmiede, one an Army jeep as it had a "P" license number (R. 25, 26). They then went to the building of Auerschmiede and arrested Maier (R. 25). Maier showed them the way to Irchenberg where accused was arrested in a house (R. 25, 31). Technician Fifth Grade Thomas E. Boyd, 2nd Constabulary Squadron, identified the jeep in the river as an Army jeep as it had an Army license plate on it and a "WL" number on the hood (R. 29). The accused stated that the jeep belonged to him (R. 30). It was stipulated that the vehicle described in the Specification of Charge IV was on 22 October 1946, and is now, the property of the United States and on said date was of a value of about $1051.00 (R. 34).

The accused, after being advised of his rights as a witness, elected to remain silent. No evidence relative to Charge IV was introduced by the defense.

4. Although accused is charged with larceny of government property, to wit a $\frac{1}{4}$ ton 4 x 4 truck, there is no competent evidence in the record of trial that any such vehicle was missing, or had been stolen from the government. To support a conviction of larceny there must be some evidence that the property in question was actually stolen and mere proof, as in this case, of some activity by the accused, under suspicious circumstances involving the vehicle alleged to have been stolen is not sufficient proof of the corpus delicti. Such does not take the place of evidence that the vehicle was actually stolen, and does not relieve the government from proving its loss. The question of the identification of the property as government property is of no importance until the actual commission of a larceny has been shown (Dig. Op. JAG, 1912-40, Sec. 452 (12) citing CM 150100, Bruch, CM 150828, Robles, CM 151502, Gage).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support all the findings of guilty by the court as approved by the reviewing authority with the exception of the finding of guilty of the Specification and Charge IV; legally insufficient to support the Specification and Charge IV, and legally sufficient to support the sentence.

Edward T. Johnson, Judge Advocate.

Joseph L. Brack, Judge Advocate.

Francis K. Boyles, Judge Advocate.

JAGN-CM 323006 1st Ind July 25 1947
WD, JAGO, Washington, D. C.
TO: Commanding General, Continental Base Section, APO 807,
c/o Postmaster, New York, N. Y.

1. In the case of Private Valdon C. Paradise (34756273), 3457th Transportation Corps Truck Company, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that the finding of guilty of Charge IV and its Specification be disapproved. Upon taking such action you will have authority to order the execution of the sentence.

2. The desertion and escape from confinement of which accused was found guilty were aspects of the same act. In view of all the circumstances and in order that the sentence may be brought within the limits of the War Department post-war clemency program, it is recommended that the term of confinement be reduced to six years. Although confinement in a penitentiary is authorized for wartime desertion, it is contrary to War Department policy to confine a deserter in a penitentiary, Federal reformatory or correctional institution. It is recommended that the Branch United States Disciplinary Barracks, Greenhaven, New York, 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 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 323006).

1 Incl
Record of trial

/s/ Thomas H. Green
THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 323022

27 AUG 1947

UNITED STATES	)	1ST INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Grafenwohr, Germany, 18, 21, and 23 April 1947. Confinement at hard labor for six months and forfeiture of fifty dollars per month for like period. Post Stockade.
Private JAMES WALKER (RA 32407649), Headquarters and Headquarters Company, 26th Infantry	)	

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

1. The record of trial in the case of the above-named soldier has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private James Walker, Headquarters and Headquarters Company, 26th Infantry did at Ludwigsburg, Germany, on or about 8 February 1947, with intent to defraud, willfully, unlawfully, and feloniously utter as true and genuine certain whiskey ration tickets in words and figures as follows: "Melody Mansion Whiskey", a writing of a public nature, which might operate to the prejudice of another, which said whiskey ration tickets were, as he, the said Private James Walker, then well knew, falsely ~~made and~~ forged.

Specification 2: (Finding of Not Guilty)

He pleaded not guilty to both specifications and the charge and was found guilty of specification 1 and substitutions, after excepting the words "falsely made and forged" and substituting therefor the word "false", not guilty of specification 2 and guilty of the charge. He was sentenced to be confined at hard labor for a period of six months and to forfeit fifty ($50.00) dollars per month for a like period. The reviewing authority approved the sentence, ordered it executed, and designated The Amberg Post Stockade, Grafenwohr, Germany, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 62, Headquarters, First Infantry Division, dated 16 May 1947.

3. The evidence for the Prosecution pertinent to the findings of guilty is summarized as follows:

The Melody Mansion, a club for enlisted men, located in Ludwigsburg, Germany, issued coupons for the sale of whiskey (R 19, 20). Whiskey was sold only on Saturdays, when each club member was eligible to purchase five whiskey coupons which were sold in strips of five (R 20, 21, 24, 25). During the month of February 1947, the color of the whiskey coupons which were valid at the club was light green (R 20, 22, 35) (Pros. Ex 3). Prior to 13 December 1946 when the club was located in Nurnberg, Germany, blue whiskey coupons were used and were valid (R 20, 24). The blue whiskey coupons, on hand by the club, were burned prior to 8 February 1947 (R 21, 22).

At Nurnberg, the members of the club were given one week's notice by the club manager or his assistant that the blue tickets would become invalid on a certain date (R 21, 23). No official notice of this fact, however, was posted or published (R 23).

On 8 February 1947, accused approached Sergeant Elwood Walsh in the Melody Mansion Club and offered to sell him whiskey coupons. Walsh purchased a strip of ten blue whiskey coupons for two dollars (R 6, 7). Although Walsh is red and green color blind, he identified a strip of ten coupons bluish in color and marked by beer stains (R 9, 12), as being similar to the tickets he purchased from the accused (Pros Ex 1, R 11).

On 8 February 1947, accused sold ten blue coupons to Corporal Hewett for five dollars (R 33, 34). Since the blue coupons were not acceptable as payment for whiskey purchased at the club at that time, Hewett left them on the table at the club (R 35).

On 8 February 1947, the accused gave Private Alden Wright approximately 110 whiskey coupons in payment of a fifteen dollar debt (R. 13, 14). Accused stated that he had obtained the tickets from a "Private Perez" (R 14, 18). After the transaction, the witness noticed that accused had in his possession a block of blue tickets, approximately 1½ inches thick, in strips of ten (R 15, 17, 18). The coupons were slightly different in color from those used at the club at that time. The witness testified that he used about 10 of the tickets and gave about 10 away (R 16). He turned the remaining tickets over to the Inspector General (R 17).

One hundred and ten blue coupons were identified as the ones received from accused (R 17) (Pros Ex 2). The manager of the club testified that the blue coupons were indistinguishable from the valid green coupons except for the color, and he was unable to state that the blue tickets were forged (R 22).

During the evening of 8 February 1947, a number of blue coupons were taken in during the course of business at the club (R 20, 26). A considerable number of blue coupons, in an envelope, were received in evidence as being similar to the blue coupons received by the Melody Mansion on 8 February (R 28, 41, 42) (Pros. Ex 4).

4. After his rights as a witness were explained to him by the court the accused elected to remain silent (R 43). No evidence was introduced by the defense.

5. The accused was charged with wilfully and unlawfully uttering a <u>falsely made and forged instrument with intent to defraud</u>. By exceptions and substitution the court found the accused guilty of uttering a <u>false instrument</u>, apparently because no evidence tending to show that the tickets were in fact forged had been introduced.

6. For the purpose of this opinion, it is assumed, without deciding, that the evidence establishes that the whiskey tickets in question were false and were wilfully and unlawfully uttered by the accused with intent to defraud. With this assumption the only problem presented by the record is whether the offense found is necessarily included in that charged.

In cases where forgery was charged but the evidence failed to show that the instrument in question was not genuine, although made or used with intent to deceive, the courts have drawn a distinction between <u>false instruments</u> and <u>falsely made instruments</u>.

In <u>State</u> v. <u>Young</u>, 46 New Hampshire 266, 41 ALR 232, 234 the defendant, a merchant, entered on his account a charge against a customer for merchandise never purchased. In reversing a conviction of forgery the court stated that the writing in question was false although not a forgery.

In United States v. Moore, (1897) 60 Fed 738, the defendant was indicted for making an affidavit containing false statements in violation of a statute (18 USC 73) which denounced the false making, altering, forgery or counterfeiting of any deed, power of attorney certificate or other writing for the purpose of obtaining the payment of any sum of money from the government. Referring to the statute the court said:

> "It punished one who falsely makes an affidavit and not one who makes a false affidavit. The words of the statute are ejusdem generis and are words usually adapted to describe the crime of forgery. 'False making' may almost be said to be synonymous with forgery."

See also United States v. Cameron (1882) 13 NW 357, 538.

In the leading case of Gaucher v. Nebraska, 204 NW 967, 41 ALR 227, the defendant was found guilty of aiding and abetting a county clerk in the forgery of a county warrant. The evidence showed that the county clerk prepared a warrant directing the county treasurer to pay a sum of money to a certain printing corporation for supplies. The warrant was paid by the county treasurer in due course. It did not, however, represent a valid indebtedness or claim against the county. In reversing the conviction the court said:

> "The statute declares the false making of an instrument as an essential element of forgery * * * There is a distinction between forgery and obtaining property by a false writing. 25 CJ.658, Sec 99; Hage v. First National Bank, 18 Ill, App 51; State v. Stewart, 9 ND 499; 83 NW 869; Comm. v. Sankey, 22 Pa 390; 60 Am Dec 91; Hill v. State, 24 Am Dec 441 * * *
> "A check bearing the genuine signature of the maker, though drawn on a bank in which the maker has no money or credit, with the intention of cheating the payee is not forgery. For the same reason a warrant or a note of a county, if the making is genuine, is not generally a forgery, though the warrant itself be false and intended as a means of defrauding the the county or the payee * * *
> "The instrument itself was shown to be false, but the false making against which the statute was directed is not shown."

The authorities cited above indicate that, whereas falsely made or forged instruments are false, all false instruments are not necessarily falsely made. (See also In re Windsor (1865), 6 Best & S. 522, 122 Eng. Reprint 1288, cited in 41 ALR 232, 237, wherein the court stated that not every false instrument made to defraud is forged.)

The elements of the offense charged are stated in the Manual for Courts-Martial as follows:

"Proof.--(a) That, as alleged in the specification, a certain paper was falsely made or falsely altered; (b) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that the accused, as alleged in the specification, uttered such paper as true and genuine; (d) that the accused, when so doing, knew said paper to have been falsely made or falsely altered, as alleged in the specification; and (e) the facts and circumstances indicating the intent of the accused to defraud or prejudice the right of another." (MCM 1928, par 152c, P 190).

In the instant case it is readily apparent that the only type of false writing alleged to have been uttered is a falsely made whiskey ticket. The indivisible and unexpungeable element of the offense charged is the uttering by the accused of a forged instrument. In the offense found, namely the uttering of a false instrument, it is immaterial whether the instrument in question was initially genuine or not. Thus the uttering of all types of false instruments can not be included in the offense of uttering a falsely made instrument, since the former offense may include genuine but invalid documents used to defraud.

This view is supported by the line of Board of Review opinion which holds that misappropriation and misapplication are not necessarily included in larceny although misappropriation is always an incident of larceny (CM 318499 White et al, involving misappropriation; CM 319857 Dingley, involving misapplication). It is also supported by the line of opinions which hold that wrongful possession is not necessarily included in larceny, although wrongful possession is 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 finding of guilty the convictions in this case are not an offense necessarily included in the offense alleged 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).

In the instant case the court obviously attempted to exclude the uttering of a forged instrument. Forgery being eliminated and the kind of falsity not being specified, it cannot be said that the offense found was necessarily included in that charged.

In Gaucher v. Nebraska, supra, the court stated:

"The decisions are nearly unanimous that the making of a false instrument is not within a criminal statute directed against the false making of an instrument. (Citing Cases). This is not a mere play on words. It is a substantive distinction by which even a knave is protected in prosecutions under legislative enactments authorizing punishments for different species of fraudulent acts * * *"

Similarly in Mann v. People (NY) 15 Hun. 484, affirmed 75 NY 484, 31 Am Rep 482, wherein the defendant was indicted under a forgery statute but where it was shown that the instrument used for the purpose of defrauding was not a forgery, the court in reversing a conviction, stated:

"Whatever his misdeeds, he must not suffer for a crime which he has not committed."

Since it appears to us that the offense found in the instant case, is entirely different from that charged, we are of the opinion that the findings of guilty cannot be sustained.

7. 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.

A. Hottenstein, Judge Advocate

R. McDonald Gray, Judge Advocate

Waldemar A. Solf, Judge Advocate

JAGH - CM 323022 1st Ind

WD, JAGO, Washington 25, D. C. SEP 12 1947

TO: The 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 USC 1522) and Executive Order No. 9556, dated 20 May 1945, is the record of trial in the case of Private James Walker (RA 32407649), Headquarters and Headquarters Company, 26th Infantry.

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 and the sentence be vacated, that the accused be released from the confinement imposed by the sentence in this case, and that all rights, privileges and property of which the accused has been deprived by virtue of said sentence be restored.

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

2 Incls
Record of trial
Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 331, 17 Sept 1947).

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

JAGN-CM 323046

UNITED STATES v. Private First Class JOHN D. MAIN (15207096), Headquarters Battery, 33rd Field Artillery Battalion (Attached to Detachment of Patients, 97th General Hospital.	)	HEADQUARTERS COMMAND EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 2 April 1947. Dishonorable discharge and confinement for two (2) years. Federal Reformatory.

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

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private First Class John D. Main, Headquarters Battery, 33rd Field Artillery Battalion did, at Darmstadt, Germany, on or about 23 December 1946, unlawfully, willfully and feloniously maim himself by shooting himself in the leg with a pistol.

Specification 2: In that Private First Class John D. Main, Headquarters Battery, 33rd Field Artillery Battalion did, at Darmstadt, Germany, on or about 23 December 1946, wrongfully and illegally possess a firearm to wit, Pistol Model 27 Caliber 7.65, in violation of existing directives.

He pleaded not guilty to, and was found guilty of, the Charge and Specifications thereunder. 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 two years. The reviewing authority 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 Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specification 2 of the Charge and of the Charge. For this reason the summary of evidence and the discussion will be limited to matters pertaining to Specification 1 of the Charge and the sentence.

4. Evidence for the prosecution:

On 23 December 1946, Doyle C. Crosby and an unidentified companion found accused lying injured on a road near Darmstadt, Germany. Accused told them he had been shot twice in the leg during a scuffle with a "Kraut." Accused was taken to the "medics" (R. 7). On the following day Crosby returned to the scene with CID Agent Arthur H. Knudson. They found blood spots where accused had been found by Crosby. During a thorough search of the area Knudson found two expended .32 caliber automatic pistol cartridge cases about 3 or 4 feet from the blood spots, and a Czech, model 27, .32 caliber chrome plated automatic pistol about 25 feet from the blood spots (R. 15-16). The cartridge cases were admitted into evidence without objection as prosecution's exhibit 3 (R. 20), and the pistol was similarly admitted as prosecution's exhibit 2 (R. 20).

First Lieutenant Ralph E. deForest, Medical Corps, testified that he examined the accused during the early hours of 24 December 1946; that accused had two holes in the front of his lower left leg and one hole in the back; that accused had a compound fracture of his left tibia; that he operated on the accused and removed a bullet (Pros. Ex. 4) from his wounded leg (R. 34-35). This witness further testified that he last examined the accused on 23 or 24 March and that from his examination he was of the opinion accused had "made very good progress," that he would require further surgery, but that "under normal circumstances" he should have no "permanent incapacity" and "should be fit for full duty" (R. 36).

Captain George R. Bird, having been first qualified as a ballistics expert, testified that from laboratory tests made by him he was of the opinion that the pistol (prosecution's exhibit 2) had fired both expended cartridges (prosecution's exhibit 3) and the bullet (prosecution's exhibit 4) which was recovered by the surgeon from accused's leg (R. 41).

A written pre-trial statement dated 29 December 1946, signed

by accused, was properly admitted in evidence as prosecution's exhibit 5. In this statement accused admitted that on 23 December 1946 he had shot himself twice in the left leg, and gave a detailed account of his actions in so doing.

5. Evidence for the defense:

The accused, having been advised of his rights, elected to testify under oath but only as to the voluntary nature of his statement. He elected to remain otherwise silent and no evidence was adduced on his behalf.

6. Specification 1, of which accused was found guilty, alleges that he

> "* * * did * * * unlawfully, willfully, and feloniously maim himself by shooting himself in the leg with a pitsol." (Emphasis supplied)

in violation of Article of War 96. The word "maim" has been subjected to such a variety of interpretations since it was first used in common-law parlance that we deem it both proper and advisable not only to set out such early usage but to briefly discuss changes therein which have been effected by statutes.

Under the common law, "maim" and "mayhem" are synonymous and equivalent words of singular meaning, the only difference being in their orthography (Winthrop's Military Law and Precedents, Reprint, 1920, page 676; State v. Johnson (Ohio) 51 N.E. 40, 65 Am. St. Rep. 769; Miller on Criminal Law, page 290; and see definitions of the word "maim" in Bouvier's Law Dictionary and Webster's New International Dictionary).

> "Mayhem, maiming, or maim, at common law, is the violently inflicting, upon any part of a man's body, of such an injury as to render him less able to fight or defend himself against his adversary; the gravamen of the offense being that the act permanently disables the person 'to fight in defense of the king and country, and as a soldier protect himself on the field of battle.'" (Winthrop's Military Law and Precedents, Reprint, 1920, page 676; see also par. 149b, MCM, 1928, defining mayhem as a common-law offense) (Emphasis supplied).

According to the common law, the offense of mayhem or maim is limited with respect to the member of the man's body which is subjected to injury, and to the nature and extent of the injury.

> "Thus, while to bite off or disable a hand, an arm, or a leg, or to strike out or blind an eye, was a mayhem

> at common law, to deprive a person of an ear or of his nose was held not to be, since such an injury would disfigure only and not incapacitate for war service" (Winthrop's Military Law and Precedents, Reprint, 1920, page 676).

> "To come within the common-law idea of mayhem, an injury must have been permanent in its effects. 3 Bl. Com. 121; State v. Briley (1839) 8 Port. (Ala.) 472; O'Brien v. State (1908) 31 Ohio C.C. 33; Rex v. Boyce (1824) 1 Moody, C.C. (Eng.) 29; 43 Geo III, chap. 58, sec. 1" (Annotation, 16 ALR 959; and see supplemental annotation, 58 ALR 1320).

The limited common-law offense was broadened in scope by statutes (starting with 5 Hen. IV, chap. 5 and continuing in England to include 22 and 23 Car. II, chap. 1, commonly known as the Coventry Act) until both in England and throughout the United States, the scope of modern statutes includes all malicious disabling or disfiguring injuries to the person, without regard to the combative importance of the member or organ affected. Respecting the effect of such statutory development on the meaning to be given the word "maim"

> "It must be borne in mind that mayhem is now for the most part a statutory crime, and that, in determining whether a particular injury is included therein, regard must be had to the wording of the particular statute involved. It should be observed in this connection that many of the modern statutes discard the term 'mayhem,' in some instances replacing it with the term 'maiming,' and in others merely describing acts of the same general character as those usually included in statutes relating to mayhem, without giving them any distinctive name" (Annotation, 16 ALR 955, 957).

Keeping in mind the connotation of the word "maim" as expressed by the common law and as it has been thus broadened by statute, we must of necessity determine which of such connotations is to be applied in interpreting that word as it is used in Specification 1. If the common-law meaning is used the Specification must be said to require proof that accused <u>permanently disabled</u> his leg. Conversely, if the statutory meaning is used that portion of the Specification may be said only to require proof that accused <u>seriously injured</u> himself.

"Mayhem" is described, in its common-law aspect, in paragraph 149<u>b</u> of the Manual for Courts-Martial, 1928, as an offense properly chargeable under Article of War 93. Such description does not use the word "maim." That word appears in the 1928 Manual only in suggested specification forms numbered 162 and 163 of Appendix 4, and nowhere in

the 1928 Manual is it specifically defined or described either as a term or as a distinct offense. Reference to the 1921 edition of the Manual for Courts-Martial discloses that maiming is therein denounced as a statutory offense, following prefatory remarks:

Paragraph "446. Ninety-sixth Article of War.

* * * * * * *

"III CRIMES OR OFFENSES NOT CAPITAL.

"The crimes referred to in AW 96 manifestly embrace those not capital committed in violation of public law as enforced by civil power (U.S. v. Grafton 206 U.S. 348), the 'public law' here in contemplation being that of the United States; that is, that enacted or adopted by the authority of the Government of the United States. This includes the laws of the District of Columbia and of the several Territories and possessions of the United States as well as all laws of the United States; but it excludes city ordinances and regulations and State statutes, as well as the laws of friendly foreign countries (violations of which are, however, chargeable as conduct of a nature to bring discredit upon the military service. (See, supra, Division II of this paragraph.)

"All crimes or offenses in violation of such public law of the United States, wherever committed, that are not thereby made punishable by death, are excluded [it would appear this word should have been 'included'], except such as are specifically included in some other article.

"Within this description would be a noncapital crime which, although designated by some special enactment for some special purpose, or if committed by some special person or class of persons, or under some special circumstances, with one of the names used, for instance, in the ninety-third article, is not within the general definition of the offense.

"Thus section 90 of the Federal Penal Code of 1910 provides that a failure by an officer to render accounts for public money received by him unless authorized to retain it as salary, pay, or emolument is an embezzlement of such funds. Such an embezzlement not being within the general definition of embezzlement as the term is used in the ninety-third and ninety-fourth articles would be chargeable under the general article.

"The elements of some of the more common crimes that are

chargeable under this article will now be discussed.

* * * * * * *

"(3) Maiming. Section 283 of the Federal Penal Code of 1910 [18 U.S.C. 462] provides:

"Whoever, with intent to maim or disfigure, shall cut, bite, or slit the nose, ear, or lip, or cut out or disable the tongue, or put out, or destroy an eye, or cut off or disable a limb or any member of another person; or whoever, with like intent, shall throw or pour upon another person any scalding hot water, vitriol or other corrosive acid, or caustic substance whatever, shall be fined not more than one thousand dollars or imprisoned not more than seven years, or both.

"This is more inclusive than the common-law mayhem punishable under A.W. 93 (see 'Mayhem,' Division II, par. 443, supra) in that mayhem only includes such hurts as render a man 'less able, in fighting, either to defend himself or to annoy his adversary,' and does not include such injuries as merely disfigure. Injuries of the latter class, therefore, together with such injuries as scalding with hot water, vitriol or other corrosive acid, or a caustic substance, which constitute violations of section 283 of the Federal Penal Code above quoted, should be charged as maiming, under A.W. 96. (See also 'Assault with a dangerous weapon, instrument, or other thing,' Division XIII, par. 443, supra)."

Insofar as Title 18, United States Code, section 462, may be applicable under Article of War 96, this definition is a part of the Manual for Courts-Martial, 1928, by adoption (Introduction, MCM, 1928). However, it is to be noted that the offenses denounced by the statute include only certain acts committed by one person upon the body of another, and do not include any provision making either self-mayhem or self-mutilation an offense. The word "maiming" as used in the 1921 Manual and as adopted in the 1928 Manual, is clearly of statutory derivation, and its connotation, as therein contained, must be confined to the limits of such statute.

Since the word "maim" is a technical word, and since it is not defined by the Manual for Courts-Martial, excepting in the limited application above noted, or by any applicable statute, the common-law definition must be followed in the administration of military justice (Winthrop's Military Law and Precedents, Reprint, 1920, page 671).

An apparently contrary view is expressed in CM 258069, Waters, 4 BR (ETO) 37, 49 (31 January 1944). In that case the pertinent specification was drafted in the language of Form 162, Appendix 4, Manual

for Courts-Martial, 1928, and alleged that accused did

> "willfully maim himself in the head by shooting himself with a pistol, thereby unfitting himself for the full performance of military service"

in violation of Article of War 96. The evidence established the commission of the act as alleged and a resultant permanent, partial, disability to accused's sight and intellect. The Board of Review in sustaining the finding of guilty of the specification and charge said:

> "The offense of self-maiming in violation of Article of War 96 should not be confused with that of mayhem in violation of Article of War 93. A person may be guilty of self-mayhem."

In support of such statement the Board then quoted the definition of mayhem set out in paragraph 149b, Manual for Courts-Martial, 1928, following which they quoted the following definitions of the word "maim":

> "The word 'maim' is used in the popular sense of mutilating, and not as synonymous with the technical word 'mayhem' (Words and Phrases, Perm. Ed., Vol. 26, p. 50).
>
> "'Maim' is defined as 'To mutilate or seriously wound or disfigure; disable'" (Words and Phrases, Perm. Ed., Vol. 26, p. 48).
>
> "MAIM. At common law, to deprive a person of a member or part of the body, the loss of which renders him less capable of fighting; or of defending himself; to commit mayhem * * *.
>
> "But both in common speech and as the word is now used in statutes and in criminal law generally, maim signifies to cripple or mutilate in any way, to inflict upon a person any injury which * * * renders him * * * defective in bodily vigor; to inflict any serious bodily injury" (Black's Law Dictionary, 3rd Ed., page 1142).

Having examined these definitions of the word "maim" as they are set out in Words and Phrases and in Black's Law Dictionary, and having then read the original sources thereof, it appears that the first two definitions were both taken from the case of State v. Deso (Vt.) 1 A 2d 710, and were avowedly based on the wording of the Vermont statute. A similar study of the latter portion of Black's definition discloses he relies, in support thereof, upon eight cases. The first is an English case wherein the court interpreted "maim" as used in a

statute (1 Vict. c. 90, s 2) punishing the maiming of an animal. The remaining cases (State Supreme Court opinions) respectively refer to the word "maim" only as it is used in the statute of the particular State and, in most instances, acknowledge that the statutory definition is not that to be found in the common law.

With respect to this matter the Waters case, supra, has been quoted and cited with approval in CM 268217, Duncan, 44 BR 231, and in CM 272944, Wilburn, 46 BR 361. We are of the opinion that, insofar as such cases hold or imply that the word "maim," as used in charging an offense under any present article of War, is to be interpreted in any manner other than as defined in the common law, they are in error and should not be followed.

7. Returning to Specification 1 of this case and applying the rules of construction and the common-law definition of "maim" as hereinabove discussed, we conclude that it does state the offense of common-law mayhem and that by the language used it alleges in essence that accused did, at a stated time and place, willfully, unlawfully, and feloniously cause permanent disability of his leg by shooting himself in the leg witha pistol. The act, the intent, and the resultant permanent disability of his leg, are all essential elements of the offense charged and must be proven as alleged before the finding of guilty may be legally sustained.

The evidence in the record of trial clearly establishes that accused intentionally shot himself in the leg, but it fails to establish that such act resulted in permanent disability of the leg. The only competent evidence respecting the extent of accused's resulting disability is the testimony of First Lieutenant deForest, the medical officer who examined and surgically treated accused's wounds. He testified, as a prosecution witness, that in his opinion the accused's injuries were not of a permanent character, and that in the normal course of events accused would recover therefrom to an extent which would fit him for "full duty" (R. 26). It therefore follows that the record of trial is not legally sufficient to support the finding of guilty of the offense alleged in Specification 1 of the Charge.

8. The evidence does show that accused willfully caused serious temporary injury to his leg by shooting it with a pistol. Such an act is clearly lesser included within that alleged in Specification 1, of which accused has been found guilty. While such an act, if committed by a civilian, might or might not constitute an offense, depending upon the ultimate motive of the actor, we are of the opinion that in the case of a soldier, whose capability to perform duty at all times is so vital to the service, the willfull commission of such an act, without any further allegation or proof of the ultimate motive, in itself constitutes an extremely serious and highly reprehensible military offense, and is clearly conduct of a

nature to bring discredit upon the military service in violation of Article of War 96.

9. 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 two years in the Federal Reformatory, Chillicothe, Ohio. The offense alleged in Specification 2, of which accused was found guilty, carries an authorized punishment by confinement of not to exceed six months (par. 104c, MCM, 1928), but penitentiary confinement is not thereby authorized (AW 42). For the remaining offense of which accused was legally found guilty, a lesser offense necessarily included within that charged in Specification 1, the additional confinement at hard labor for one and one-half years is authorized (AW 96) and is not excessive (AW 45; par. 104c, MCM, 1928). However, since the act constituting such proven lesser included offense is not denounced as an offense by any "statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia," and since it does not come within any of the other provisions of Article of War 42 authorizing penitentiary confinement, we must conclude that that portion of the sentence designating a Federal reformatory as the place of confinement cannot be legally supported (AW 42).

10. 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 1 as finds that the accused did, at the time and place alleged, unlawfully and willfully shoot himself in the leg with a pistol, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years at a place other than a penitentiary, Federal reformatory or correctional institution.

Edward I. Johnson, Judge Advocate.

Joseph P. Busch, Judge Advocate.

On Leave, Judge Advocate.

OCT 2 1947

JAGN-CM 323046 1st Ind
JAGO, Dept. of the Army, 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 Private First Class John D. Main (15207096), Headquarters Battery, 33rd Field Artillery Battalion (Attached to Detachment of Patients, 97th General Hospital), I concur in the holding by the Board of Review and recommend that only so much of the finding of guilty of Specification 1 of the Charge be approved as finds that the accused did, at the time and place alleged, unlawfully and willfully shoot himself in the leg with a pistol, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 323046).

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 323083

19 AUG 1947

UNITED STATES	)	HEADQUARTERS ZONE COMMAND AUSTRIA
	)	
v.	)	Trial by G.C.M., convened at Salzburg, Austria, 18-27 March 1947. Dismissal and total forfeitures.
	)	
First Lieutenant RENE S. DAVIS (0-1321919), 7831st Station Complement Unit APO 174	)	

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 found guilty by exceptions and substitutions of the following charges and specifications:

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

Specification 1: In that 1st Lt Rene S Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about and between April or May 1946, wrongfully and unlawfully sell to Louis Stockel, Austrian civilian, about 3 bottles of cognac for approximately 450 Austrian schillings, which cognac was intended for distribution to and use by members of the military service of the United States, of a value of $6.00.

Specification 2: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about June 1946 wrongfully and unlawfully sell, barter, and trade to Karl Steinhart and Louis Stockel about 96 bottles of cognac, intended for distribution to and use by members of the military service of the United States, of a value of about $192.00 for one diamond ring of a value of about $550.00.

Specification 3: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about July 1946 wrongfully and unlawfully sell, barter, and trade to Karl Steinhart and Louis Stockel about 300 bottles of cognac, intended for distribution to and use by members of the military service of the United States, of a value of about $600.00, for a diamond brooch of a value of about $180.00.

Specification 4: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about July 1946 wrongfully and unlawfully sell to Louis Stockel 2 bottles of cognac of a value of about $4.00, which cognac was intended for distribution to and use by members of the military service of the United States, for approximately 300 Austrian schillings.

Specification 5: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about August 1946 wrongfully and unlawfully sell, barter, and trade to Karl Steinhart and Louis Stockel about 72 bottles of cognac, intended for distribution to and use by members of the military service of the United States, of a value of about $144.00 for one diamond bracelet of a value of about $1,000.00.

Specification 6: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about October 1946 wrongfully and unlawfully sell to Private First Class Roland F. Anderson, Company A, 63rd Signal Operating Battalion, about 5 bottles of cognac of a value of about $10.00 for $20.00, to the prejudice of good order and military discipline.

Specification 7: (Finding of guilty disapproved by reviewing authority).

Specification 8: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about 30 August 1946, wrongfully and unlawfully attempt to sell to Otto Menzel, Austrian civilian, about 288 bottles of cognac of a value of about $570.00, which cognac was intended for distribution to and use by members of the military service of the United States.

CHARGE II and its specifications: (Finding of guilty disapproved by reviewing authority).

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

Specification 1: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about June 1946 knowingly, wilfully, wrongfully, and without proper authority apply to his own use and benefit one 3/4 ton U.S. Army

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

Specification 2: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about July 1946 knowingly, wilfully, wrongfully, and without proper authority apply to his own use and benefit one 3/4 ton U.S. Army truck of the value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Salzburg, Austria, on or about 30 August 1946 knowingly, wilfully, wrongfully, and without proper authority apply to his own use and benefit one 3/4 ton U.S. Army truck of the value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: In that 1st Lt. Rene S. Davis, 7831st Station Complement Unit, did, at Linz, Austria, on or about 5 July 1946, with intent to deceive the custodian of the Linz USEA Liquor Warehouse, Linz, Austria, officially state to the said custodian that he, Lt. Davis, was authorized to purchase cognac, gin, and liquor for the Officers Club of "A" Company, 63rd Signal Operating Battalion, Salzburg, Austria, which statement was known by the said Lt. Davis to be untrue and that no such officers club existed and that he, Lt. Davis, did not intend nor have authority to purchase the liquor for such an organization.

He had pleaded not guilty to all charges and specifications. No evidence of any previous conviction was introduced. Evidence of imposition of punishment on two occasions under Article of War 104 was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of $1500.00 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 7, Charge I, Charge II and its specifications, and Specification 1 of the Additional Charge. He approved only so much of the findings of guilty of Specification 3 of Charge I as finds that accused did wrongfully sell, barter, or trade the cognac mentioned in the specification to the persons named therein for a brooch of some value. He approved only so much of the sentence as provided for dismissal from the service and forfeiture of all pay and allowances due

er to become due and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On 30 November 1945, Headquarters United States Forces in Austria established a special merchandise warehouse at Linz, Austria. This warehouse was authorized to sell liquor to "units, clubs or sections" upon presentation of "a requisition plus a certificate signed by the unit commander to the effect that the items to be purchased are for the use of the unit, club or section concerned." The price of cognac was listed at four dollars per "liter" according to the official price list and at two dollars per "bottle" according to the price list of the liquor warehouse (R. 121,122; Pros. Exs. 6, 45b).

On 13 May 1946 the Commanding General, Zone Command, Austria, issued a circular limiting the distribution of Class VI supplies (liquor) to one bottle to each officer and man per month (R. 6, Cir. 2).

In 1946 wine and beer were available to Austrian civilians on a ration basis. Beer was rationed to hotels and certain retailers. Wine was very strictly rationed. Alcoholic beverages stronger than wine were not available to the civilian population (R. 169).

In March 1946, the accused asked permission of Mr. Martin Mooshammer, a German civilian and manager of a brewery, to store cognac in his storeroom. Permission was given and the accused brought a truck load (about 25 cases) to the storeroom. The accused was accompanied by a Corporal Forester. Mr. Mooshammer was instructed by the accused to permit Corporal Forester to remove cognac from the storeroom (R. 74-79).

On two separate occasions between May and July, the accused sold to Mr. Louis Stockel, an Austrian civilian, two or three bottles of cognac. Mr. Stockel paid the accused in Austrian schillings. In May and June the price of cognac was fluctuating between 100 and 200 schillings per bottle. Mr. Stockel did not remember the exact amount paid to accused but it was the prevailing price at the time (R. 26,30,31,33).

In June 1946, the accused was in a shop owned by Mr. Louis Stockel and Karl Steinhart, both Austrian civilians. The accused asked if they wanted to buy cognac. Mr. Stockel showed the accused a ring and offered to exchange it for cognac. Four cases of cognac (amounting to 96 bottles) were delivered by Corporal Forester and a Mr. Franz Natta to a garage located at No. 46 "Fuerstenallee," Salzburg, Germany, where it was received by Mr. Karl Steinhart. The delivery was made by a 3/4 ton Government truck. After the cognac was delivered the accused received the ring from Mr. Stockel. This ring was introduced as Prosecution Exhibit 13. It contained 30 diamonds amounting to about 1 carat and was worth 550 Austrian schillings before the war, but at the time of trial its value was 5500 Austrian schillings (R. 26,28,33,35,36, 37,43,66).

In July 1946, the accused agreed to trade Mr. Stockel and Mr. Steinhart cognac for a diamond brooch. Corporal Forester and Mr. Natta, using a 3/4 ton Government truck, delivered 300 bottles of cognac to Mr. Steinhart at No. 46 Fuerstenalle, Salzburg, Germany. Thereafter the accused received the diamond brooch from Mr. Stockel (R. 28,32,33,35,36,37,40,43).

In August 1946, the accused agreed to trade Mr. Stockel and Mr. Steinhart cognac for a bracelet. A 3/4 ton Government truck delivered about two cases of cognac to Mr. Steinhart at No. 46 Fuerstenalle. Thereafter the accused received the bracelet from Mr. Stockel. The bracelet was introduced as Prosecution Exhibit No. 14. It was shown to have a value of 1000 schillings before the war and 10,000 schillings at the time of the trial (R. 29,30,34-37,40,43,65).

Private Roland E. Anderson was called as a witness to testify concerning Specification 6, Charge I. He answered some preliminary questions and then refused to testify concerning the offense charged on the ground that his answers might incriminate him. The trial judge advocate then stated that he desired to impeach the witness (R. 94). The witness was asked if he had made a written statement concerning any dealings with the accused. The witness admitted making such a statement, whereupon Prosecution Exhibit 39, identified as the statement in question by the witness, was admitted in evidence. This statement incriminated the accused. On cross-examination by defense counsel, accused detailed the circumstances surrounding his making the statement. On redirect examination the trial judge advocate asked the witness, "Private Anderson, is this statement the truth?" and the witness replied, "Yes, sir." The witness was excused and the court was closed to all persons except the prosecution, defense and accused, at which time the trial judge advocate stated, "I would like the record to show that when the last question was asked by the prosecution the trial judge advocate was holding Prosecution's Exhibit in Evidence No. 39." Upon reopening the court the president advised the witness as to the penalty for perjury. The president then asked the witness to explain to the court what business he had transacted with Lieutenant Davis which was not of a purely military nature. The witness again refused to testify on the ground of self-incrimination (R. 91-96).

Dr. Otto Menzel testified concerning the offense charged in Specification 8, Charge I. According to Dr. Menzel he became acquainted with the accused in the spring of 1946. During April or May 1946 he sold the accused a miniature for 150 schillings. On 29 August 1946 he was approached by a person (later identified as a CID agent) who asked him (Menzel) for cognac. They agreed to meet on the following day. On 30 August 1946 Dr. Menzel asked the accused to let him have some cognac. The accused told him to come back in the afternoon. Later in the day two CID agents told Dr. Menzel to take them to the place where they could buy cognac. He took them to the vicinity of the office of the accused but did not go to the office or see the accused. When asked to identify CID Agents Arthur V. Miller and John E. Lofters the witness stated that he knew them but "I am very cautious in my answers because I was sharply

attacked by these two men." The trial judge advocate then stated that the witness's evidence was a surprise and asked permission of the court to impeach the witness. Dr. Menzel was then asked to identify statements made by him prior to the trial. He admitted making the statements and they were admitted as Prosecution Exhibits 35 and 38. These statements were at variance with the witness's testimony and incriminated the accused (R. 80-90).

The cognac referred to in the above testimony was shown to be of Italian origin, the bottles bearing the label "Delva cognac." Delva cognac was dispensed by the Linz warehouse (R. 31,40,41,71,125,194,197; Pros. Exs. 2,6).

On 30 August 1946 the accused, accompanied by Mr. Natta and another person, went to Mr. Mooshammer's house and told Mr. Mooshammer that he was going to take the remaining cognac from the storeroom. The accused was driving a 3/4 ton Government truck. Mr. Mooshammer accompanied the accused to the storeroom where the cognac, amounting to ten or eleven cases, was loaded on the truck (R. 44, 74-79). The truck was driven to the 63rd Signal Company Area. It was about 5:30 p.m. and accused instructed Mr. Natta and his companion as follows: "Then Lieutenant Davis told me that we could go to eat and after having eaten we should come back." Mr. Natta and his companion returned to the truck about 6:15 p.m. Within ten minutes a man approached and asked for Lieutenant Davis and Mr. Natta told him that Lieutenant Davis would be there at 6:30. Sergeant Hyman ordered the truck driven to the motor pool which was about 100 meters from where the truck was parked. At the motor pool Natta and his companion were arrested (R. 42-44).

On 3 October 1946 the accused made a voluntary statement to First Lieutenant Howard Kaplan. This statement was identified and introduced into evidence as Prosecution Exhibit 40 without objection by the defense. In this statement the accused stated that on 30 August 1946 he withdrew from the Stiegel Brewery about 11 cases of liquor (cognac and gin) which he had stored there in March. He transported it to his company area and later ordered the truck to the motor pool (R. 104, Pros. Ex. 40).

Two other voluntary statements made by the accused were identified and introduced into evidence. In one statement dated 1 September 1946 the accused said that on 30 August 1946 he had a 3/4 ton weapons carried dispatched to him because there was no driver present. He took two displaced persons and drove to Mr. Mooshammer's house and then to the "Stiegel Keller" where they loaded 11-1/2 cases of cognac. He then drove the truck to the supply room and told Sergeant Hyman to put it in the motor pool (R. 117,135; Pros. Ex. 43). The other statement was not dated. The accused stated therein that the cognac and gin was bought at the Linz Warehouse in March and was part of a larger amount purchased for enlisted men's clubs, officers clubs and officers and men. He removed the liquor from the storeroom in order to store it in the motor pool, after which he was going to contact the club manager and find some way to introduce it into the club (R. 117,135; Pros. Ex. 44).

On 5 July 1946 the accused purchased from the Special Merchandise Warehouse at Linz the liquors set forth in Specification 2 of the Additional Charge. He signed and presented to the warehouse custodian a form showing that the purchase was made for:

> "Off Club A Co, 63rd Sig Opn Bn
> Purchased the following liquors this date for consumption
> of (Unit)"

The warehouse custodian, First Lieutenant James R. Kessler, certified that he had received payment for the merchandise and the accused certified that he paid for the merchandise (R. 13,15,118,120,224; Pros. Exs. 2 and 5). There was no officers club, A Company, 63rd Signal Operating Battalion (R. 97,102,128,129,144).

Lieutenant Roy N. Walker, Assistant Chief of Staff, Headquarters Zone Command, testified that he was in charge of the Inspector General's Section and the Special Service Section. Both of these sections were required to keep records concerning officially approved clubs. All applications for formation of clubs were submitted to him and he either approved or disapproved the applications. He did not know of any officially approved club under the name of Company A, 63rd Signal Battalion (R. 140,143,144).

4. For the Defense

Technical Sergeant Walter C. Hyman, Headquarters Detachment 63rd Signal Operating Battalion, testified that from May 1945 to September 1946 he was storekeeper and driver of the supply section, 132nd Signal Company. He made trips to France for supplies which they left behind when they moved forward. He also made trips to Germany for wine and to Italy for cognac. On one trip to Italy he brought back 15,000 liters of liquor for the Division. Delva cognac was included in the purchases. The liquor was delivered to the Savoy Club in Salzburg and to the 132nd Signal Company supply room. No authority was needed to purchase the liquor and he purchased for clubs, organizations and individuals. Those ordering liquor came to the supply room and picked up their order. The accused was not with the company at the time he made these trips (R. 186-195).

Chief Warrant Officer Phillip S. Griffith, 63rd Signal Operating Battalion, testified that from May 1945 to April 1946 he was with the 42nd Infantry Division. He made several trips to Italy to secure cognac and liquor for use within the division. He received money from various units and he delivered the liquor ordered to the units. Delva cognac was purchased by him on these trips (R. 196-199).

Captain James H. McGuire, Headquarters Zone Command, Austria, conducted an investigation of the Linz Liquors Warehouse in October 1946. His investigation disclosed that the liquor belonged to the Delva Distilleries in Rome

and that it was shipped to the warehouse on consignment for sale to Army units. The warehouse made many "off record sales" to military personnel in that after purchasing for a unit the person making the purchase would also buy additional liquor for himself. Civilian employees of the warehouse stole liquor and sold it "Out the back door to individuals in the street" (R. 200-206).

Warrant Officer Donald P. Wood occupied a billet on Johannstrasse with the accused and other officers. The billet was a private home and normally five to seven officers were quartered there at one time. The accused was the senior officer in the billet and looked after the quarters. They brought liquor to the parlor and mixed drinks from their supply. Their liquor was obtained by monthly ration but if they ran short it was understood that they could obtain liquor through Lieutenant Davis (R. 207-210).

Staff Sergeant Joe C. Findley and Sergeant Ralph St. John each testified that the accused was their platoon leader from about November 1945 to April 1946. They considered the accused a good platoon leader. Lieutenant Davis took care of his men and if they needed liquor he secured it for them. The liquor cost about four dollars a bottle (R. 211,214).

Mr. Stockel and Mr. Steinhart each testified that when they exchanged items of jewelry to the accused for cognac they did not give the accused a bill of sale because they considered it a private transaction inasmuch as the jewelry was their personal property and the cognac was for their own personal use (R. 217,218).

Mr. James O'Hara, formerly a field clerk in Headquarters Command, 42nd Infantry Division, testified that between August 1945 and September 1946 their section obtained liquor from the Linz Warehouse. Sergeant Callahan would call the warehouse and make arrangements for the liquor and a soldier would then go to the warehouse and secure the liquor. It was not necessary for an officer to go for this liquor.

The Accused

The accused was warned of his rights as a witness and elected to testify concerning Charge II and Specifications 1 and 2 of the Additional Charge and no others. He stated that his father had been an officer in the regular Army and his brothers were in the reserve corps. He was attending the University of North Carolina at the time war was declared. Inasmuch as he was taking a pre-medical course he had a deferment from the draft. He enlisted in the regular Army and requested the Infantry. From training he went to officers candidate school at Fort Benning, Upon graduation he was assigned to the 42nd Division and served with the division until it was deactivated. When the Linz warehouse opened he was authorized to draw liquor for his company. He became acquainted with the people in charge of the warehouse and from

then on he "procured liquors for anybody and everybody." Money would be brought to him with a request for certain liquor and he would procure it. Sometimes he was asked to get liquor by military personnel who stated, "I haven't the money now, I will give you the money when I get it." He made purchases with his own money and the persons ordering liquor would be transferred or redeployed before coming for their liquor and he then had the liquor on his hands. Concerning the acts alleged in Specification 2, Additional Charge, he stated that it was customary to use a blank requisition because it was impossible to tell what liquor was for issue. The Linz warehouse filled out the requisition. He told the warehouseman he wanted liquor for some officers and he did not see the warehouseman write down "Officers Club" on the requisition. He did not know the requisition contained the words "Officers Club" until the "CID" opened his safe and asked about it. There was no officers club in A Company of the 63rd Signal Company. The officers living in the billets considered their parlor a club or place where they could entertain their friends (R. 222-226).

5. Specifications 1,2,3,4,5, Charge I.

The evidence in support of these specifications shows that the accused did on or about the dates alleged sell and trade cognac to the persons named and for the consideration alleged. The only remaining questions for consideration are whether or not the cognac so traded was intended for distribution to and use by members of the military service of the United States and whether accused's actions were wrongful and unlawful in violation of Article of War 96.

The evidence discloses that the cognac was "Delva Cognac." Alcoholic liquor, including wine and beer, was rationed to Austrian civilians. Liquor was also rationed to military personnel by order of the Commanding General of the Zone Command, Austria. It was also shown that the military authorities had established a liquor warehouse for the benefit of military personnel and that this warehouse handled "Delva Cognac." The accused had a peculiar opportunity to acquire large supplies of this cognac. It would be highly improbable for the accused to acquire a great amount of cognac from civilian sources because of rationing. Under such circumstances it is a fair and natural inference that the cognac traded and sold by accused was in fact cognac intended for use by the members of the military service (CM 307143, Klingensmith, 1st Ind., 60 BR 379; CM 319591, Pogue).

Regulations and directives issued by proper authority prohibit military personnel from engaging in business enterprises for profit in occupied and liberated countries. The court was requested to and did take judicial knowledge of these regulations and directives. By letter dated 4 April 1945, the Commanding General, European Theater of Operations, issued a directive prohibiting "Engaging in Business," the pertinent parts thereof being:

"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 *** or any kind of property in this theater for present or future personal profit or investment. ***"

This directive was republished in Circular Number 67, Headquarters United States Forces, European Theater, 18 May 1946, and remained in effect in Austria until 26 September 1946 (Section X, Circular Number 6, Headquarters, United States Forces in Austria, 27 January 1947). Paragraph 2e(2), Army Regulations 600-10, 8 July 1944 (same in later changes), prohibits persons subject to military law from engaging in business transactions not directly connected with their military duties which would tend to interfere or hamper in any degree the full and proper discharge of such duties or which would normally give rise to a reasonable suspicion that such participation would have that effect.

The accused sold or traded cognac which cost from two to four dollars per bottle to Austrian civilians and received therefor a remuneration amounting in some instances to as much as 150 schillings per bottle. An Austrian schilling is worth ten (U.S.) cents (par. 15, W.D. Cir. 64, 5 March 1946). Such acts are in contravention of the cited theater directive and Army regulation and constitute, therefore, a violation of Article of War 96 (CM 293926, Haug, 20 BR (ETO) 329,335).

Specifications 6 and 8, Charge I.

In Specification 6 of Charge I it was alleged that the accused sold cognac to Private First Class Roland F. Anderson. Private Anderson refused to testify to any material facts concerning this charge. The prosecution then stated that it desired to impeach the witness. For impeachment purposes the prosecution offered in evidence a former statement made by the witness which statement incriminated the accused.

In Specification 8 of Charge I it was alleged that accused attempted to sell cognac to Otto Menzel. Otto Menzel testified as a witness but his testimony was insufficient to incriminate the accused. In order to impeach this witness the prosecution offered a prior statement made by the witness, which statement incriminated the accused.

The prosecution offered no other testimony in support of these specifications.

Prior statements made out of court by a witness may be used to refresh the witness' memory or to impeach him, but it has been generally held that such prior statements of a witness not the accused, when introduced for impeachment purposes, are not to be considered as substantive evidence against the accused. (CM 297312, Westfield, 18 BR (ETO) 269,281; Ellis v. United States, 138 F. (2d) 612,616; see however Wigmore on Evidence, 3rd Ed., s. 1018.) Before a party may be permitted to impeach his own witness, such party or his counsel must show that he has been surprised by the testimony given by the witness on the stand (CM 258070, Smith, 1 BR (ETO) 377,388). There must be actual, not feigned surprise. The testimony of the witness must be material, prejudicial to the party calling the witness, and in direct contradiction of the witness' prior statements. The witness cannot be impeached if he refuses to testify at all in the case or if his testimony is not material, is not prejudicial, or consists only of a purported failure of memory or of a failure to testify to all the party expected or desired (74 ALR 1064; Langan v. Pianowski, 307 Mass. 149, 29 N.E. (2d) 700,701; People v. Creeks, 141 Col. 529, 75 P. 101; People v. Sliscovich, 193 Col. 544, 226 P. 611, 615; Bryan v. State, 90 Tex. Cr. App., 133,234 S.W. 83; CM 312092, Curry, 61 BR 363,377; CM Smith, Supra, p. 389).

The witness Anderson having refused to testify to any material fact in the case, he was therefore not subject to impeachment. The court erred in permitting the prosecution to "impeach" the witness. Under the guise of impeachment the prosecution succeeded in placing before the court a statement made by the witness prior to trial. This was improper and the statement should not have been admitted in evidence for any purpose.

We are not unaware of the cases of Perry v. Byrd, 280 Mich, 580, 274 N.W. 335, and Breeden v. Martens, 21 S.D. 357, 112 N.W. 960, which hold that a witness may adopt a written statement as his evidence. In Perry v. Byrd, supra, the court stated that where a written statement made by a witness is introduced into evidence for impeachment purposes, so much thereof as a witness may adopt by admission of the truth thereof becomes substantive evidence. In Breeden v. Martens, supra, the facts disclosed that the depositions of Mrs. Moore and Mrs. Brandt were taken at the same time and place. Mrs. Moore testified as to the birth of a named person. Mrs. Brandt, when asked the same question, answered, "So far as I remember, just as Mrs. Moore said." The plaintiff moved to strike the statement of Mrs. Brandt because it was hearsay. This motion was overruled. In sustaining this ruling the court said:

> "It was the same as if, her attention having been called to a letter or other writing, she had said the statement therein was true. She was not testifying as to what Mrs. Moore had told her, but to a fact within her own knowledge, adopting Mrs. Moore's language in place of using her own."

With these cases on their facts we have no controversy. However, they do not apply to the facts in this case. Here the witness Anderson had testified that

he made a written statement concerning certain business dealings had with the accused. On cross-examination, he testified as to the circumstances surrounding the making of the statement. At the conclusion of the cross-examination, and upon redirect examination by the trial judge advocate, he was asked, "Is this statement the truth?" This question could as well have referred to the last statement made by the witness on cross-examination, concerning the method by which the written statement was obtained, as to the written statement itself. The trial judge advocate recognized that his question was subject to such interpretation because immediately after the witness was excused and the court closed to all except the prosecution, defense and accused he stated, "I would like the record to show that when the last question was asked by the prosecution the trial judge advocate was holding Prosecutions Exhibit in evidence No. 39." The court did not rule upon this request and the record fails to show that at the time the question was propounded Prosecution Exhibit No. 39 was exhibited to the witness. Under such circumstances we are unable to say that the witness adopted his prior written statement as his testimony. We are therefore of the opinion that the written statement cannot be considered as substantive evidence against the accused.

The competent evidence adduced by the prosecution with respect to Specification 6 of Charge I failed to support the allegations therein. From what we have said with respect to this specification, it follows that the findings of guilty of Specification 8 of Charge I must likewise be set aside.

Charge III and the specifications thereunder.

These specifications allege that on certain dates the accused applied Government vehicles to his own use in violation of Article of War 94.

The evidence establishes that at the times charged the accused used a 3/4 ton Government vehicle, which had been furnished and intended for military service, to transport certain liquor which the accused was selling and trading for his own benefit. The application of Government property to such an unauthorized use has consistently been held to be a violation of Article of War 94 (CM 242734, Smith, 27 BR 165, 183; CM 296630, Siedentop, 58 BR 191, 197).

The prosecution offered no evidence as to the value of the 3/4 ton trucks used by the accused. The court found the value of each truck to be more than $50.00. Considering the type and size of the trucks and that they were in running order, the evidence is sufficient to establish a value of more than $50.00 (CM 262735, Kaslow, 41 BR 113,126; CM 317327, Durant).

Specification 2, Additional Charge.

The evidence establishes that the accused purchased liquor from the United States Forces, Austria Warehouse, Linz, Austria. In order to make

this purchase he submitted to a person working in the warehouse a statement, on the required requisition form, that the purchase was made on behalf of the officers' club, A Company, 63rd Signal Operating Battalion. The existing regulations authorized sales to clubs, units or sections upon presentation of a proper requisition. Applications to form clubs were required to be submitted through the chief of staff of the command. The regulation authorizing sales to clubs would apply only to clubs officially established. The accused having presented a requisition in the name of an unauthorized club, i.e., a club which did not exist, his requisition was false and the statements therein were intended to deceive the custodian of the warehouse. The accused admits making the purchase but claims that he submitted the signed requisition in blank stating he was purchasing for officers and that some clerk in the warehouse added to the form the words "Off Club, A Co, 63rd Sig. Ops. Bn." It is sufficient to say that the court was not bound to believe his statement.

The requisition, being required in order to purchase liquor from the warehouse, is an official statement by the accused. It became a part of the official files of the warehouse and was a statement to the custodian thereof even if it was presented to a clerk (CM 270061, Sheridan, 45 BR 190; CM 315736, Risoli).

6. After the court reached a finding of guilty the court was opened to receive the personal data concerning the accused as shown on the charge sheet and evidence of previous convictions. The trial judge advocate then read evidence of imposition of punishment on two occasions under Article of War 104. The substantial rights of the accused were not injuriously affected by the admission of this evidence, for the court had already reached a finding of guilty and this evidence could only be considered in fixing the sentence (CM Pogue, supra). The reviewing authority remitted the confinement and the fine adjudged by the court. The offenses shown by the record of trial to be legally established and sufficient to warrant confirmation of the sentence are amply sufficient to warrant the sentence approved by the reviewing authority (CM 252277, Tabb, 2 BR (ETO) 111,116).

7. War Department records show the accused to be 25-9/12 years of age. He graduated from high school and Riverside Military Academy. He attended the University of North Carolina for two years but did not graduate. He entered the Army on 21 October 1942 as an enlisted man and after completion of Officer Candidate School he was appointed and commissioned a temporary second lieutenant, Infantry, on 7 July 1943. On 31 May 1944 he was promoted to first lieutenant. On 29 January 1945 he was awarded the Combat Infantryman's Badge. His efficiency reports are rated "Excellent."

8. The defense counsel submitted a letter recommending clemency. Thereupon three members of the court recommended that accused be permitted to resign, four members recommended that the confinement be suspended, one member recommended that the confinement be reduced to one year while five members recommended that the confinement be reduced to three years.

Rear Admiral J. T. Boone, Brigadier General Alden W. Crawford, Brigadier General J. S. Bragdon, Major General Robert U. Patterson, and Lieutenant General R. A. Wheeler all indicated interest in the case because of their friendship with the father of the accused.

Mrs. William Thornwall Davis, mother of accused, personally requested clemency for her son.

9. The court was legally constituted and had jurisdiction over the accused and the offenses. Except as noted herein 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 of Specifications 6 and 8 of Charge I, but legally sufficient to support Specifications 1,2,3,4,5 of Charge I and Charge I, Specifications 1,2,3 of Charge III and Charge III and Specification 2 of the Additional Charge and the Additional Charge and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 94 and 96.

Robert W. Gilvers, Judge Advocate

(On Leave), Judge Advocate

Gilbert E. Schwegel, Judge Advocate

JAGK - CM 323083 1st Ind

JAGO, Dept of the Army, Washington 25, D.C. OCT 1 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 First Lieutenant Rene S. Davis (O-1321919), Infantry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully selling, trading, or attempting to sell cognac, intended for distribution to and use by military personnel as follows:

Spec.	Date	No. of bottles	Purchaser	Sale Price per bottle
1	May 1946	3	Louis Stockel, Austrian civilian	450 Austrian schillings
2	June 1946	96	Louis Stockel and Karl Steinhart	550 Austrian schillings
3	July 1946	300	Same as above	Some value
4	July 1946	2	Louis Stockel	300 Austrian schillings
5	August 1946	72	Louis Stockel and Karl Steinhart	2000 Austrian schillings
6	October 1946	5	Pfc Roland F. Anderson	20 Austrian schillings
8	August 1946 (attempt to sell)	288	Otto Menzel, Austrian civilian	

all in violation of Article of War 96; of three specifications of knowingly and wrongfully applying to his own use a 3/4 ton Government truck in violation of Article of War 94 (Specs. 1,2,3, Charge III) and of making a false official statement, with intent to deceive, to the effect that he was authorized to purchase liquor for an officers' club, when in fact no such club existed, in violation of Article of War 96 (Spec. 2, Add'l Chg.). (Specification 7, Charge I, Charge II and its specification and Specification 1 of the Additional Charge were all disapproved by the reviewing authority.) 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,

to pay to the United States a fine of $1500.00 and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved findings of guilty of the specifications and charges as set forth above. He approved only so much of the sentence as provided for dismissal from the service and forfeiture of all pay and allowances due or to become due and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specifications 6 and 8 of Charge I alleging the sale of five bottles of cognac to Private First Class Anderson and attempting to sell 288 bottles of cognac to Otto Menzel, respectively, but legally sufficient to support all other findings of guilty as approved and the sentence as approved and to warrant confirmation of the sentence.

The record shows that from May to October 1946 the accused either sold for Austrian schillings or traded for jewelry cognac which was intended for distribution to and use by military personnel to Austrian civilians. The cognac cost between two and four dollars per bottle and the sale price varied to as much as 150 schillings per bottle. On three occasions the accused used a 3/4 ton Government truck to transport the cognac. In July 1946 the accused presented to a Government liquor warehouse a requisition for certain liquors. This requisition stated that the purchase was for the Officers Club, A Company, 63d Signal Operating Battalion. The evidence disclosed that there was no such officers club in existence. The statement was false and by means of this statement the accused acquired a large amount of liquor.

The evidence adduced by the prosecution in support of Specifications 6 and 8 of Charge I was insufficient to establish the offenses charged therein.

4. War Department records show the accused to be 25-9/12 years of age. He graduated from high school and Riverside Military Academy. He attended the University of North Carolina for two years but did not graduate. He entered the Army on 21 October 1942 as an enlisted man and after completion of Officer Candidate School he was appointed and commissioned a temporary second lieutenant, Infantry, on 7 July 1943. On 31 May 1944 he was promoted to first lieutenant. On 29 January 1945 he was awarded the Combat Infantryman's Badge. His efficiency reports are rated "Excellent."

5. Due consideration has been given to the recommendations for clemency by defense counsel and members of the court attached to the record of trial, and to letters from Mrs. William Thornwall Davis, mother of accused; Rear Admiral J. T. Boone, USN; Major General Robert V. Patterson, USA, and Brigadier General J. S. Bragdon, USA, written on behalf of accused. Mrs.

Davis personally requested clemency for her son.

6. I recommend that the finding of guilty of Specifications 6 and 8 of Charge I be disapproved, that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and forfeiture of $100 pay per month for four months, and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

6 Incls
1. Record of trial
2. Form of action
3. Ltrs fr Mrs. Thornwall Davis, 10 June 47 and 6 July 47
4. Ltr fr Rear Adm JT Boone, 6 May 47
5. Ltr fr Br Gen JS Bragdon
6. Ltr fr Maj Gen Robt V Patterson, 15 May 47

(Dept Army, GCMO 8, Oct 13, 1947).

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

JAGH - CM 323089

SEP 12 1947

UNITED STATES	)	TACTICAL AIR COMMAND
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, 18-21 March 1947. Dismissal, total forfeitures, and confinement for two and one-half ($2\frac{1}{2}$) years
Lieutenant Colonel MYRON GALE (0-561064), Air Corps	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, GRAY, and SOLF, 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Lieutenant Colonel Myron Gale, 304th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 28 September 1946, wrongfully solicit Miss Ollie Mae Fagan to commit acts of prostitution for hire or reward with an unnamed person to be directed to her by the said Lieutenant Colonel Gale.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: In that Lieutenant Colonel Myron Gale, 304th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 8 October 1946, wrongfully solicit Mrs. Beryl M. Crowell to commit acts of prostitution for hire or reward with an unnamed person to be directed to her by the said Lieutenant Colonel Myron Gale.

Specification 6: In that Lieutenant Colonel Myron Gale, 304th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 18 October 1946, wrongfully solicit Mrs. Lola Lassiter to commit acts of prostitution for hire or reward with unnamed persons to be directed to her by the said Lieutenant Colonel Myron Gale.

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

Specification 1: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, did, at Dover, Delaware, on or about 21 January 1946, with intent to deceive the War Department, officially state on WD AGO Form Number 62, Application for Commission in the Regular Army, that he had attended Brown University for four years, and that he graduated therefrom in 1935 with the degree of Bachelor of Arts in Economics, which statement was known by the said Lieutenant Colonel Myron Gale, alias Myron Goldberg, to be untrue in that he had never been a student at Brown University.

Specification 2: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, did, at Dover, Delaware, on or about 21 January 1946, with intent to deceive the War Department, officially state on WD AGO Form Number 62, Application for Commission in the Regular Army, that he had attended the University of Michigan for one year, 1936, with Merchandizing as his major subject, which statement was known by the said Lieutenant Colonel Myron Gale, alias Myron Goldberg, to be untrue in that he had never been a student at the University of Michigan.

Specification 3: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, did, at Dover, Delaware, on or

about 21 January 1946, with intent to deceive the War Department, officially state on WD AGO Form Number 62, Application for Commission in the Regular Army, in answer to question 20 on said WD AGO Form Number 62, relating to civilian employment, that he had been employed as Merchandise and Sales Manager for Hart, Schaffner and Marx, Chicago, Illinois, during the period 1935-1942, which statement was untrue and known by the said Lieutenant Colonel Myron Gale, alias Myron Goldberg, to be untrue, in that he had not been employed by the said Hart, Schaffner and Marx, Chicago, Illinois, during the period indicated.

Specification 4: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, did, at Langley Field, Virginia, on or about 30 September 1946, with intent to deceive the War Department, officially state on his Supplemental Information for a Commission in the Regular Army, WD AGO Form Number 62, dated 1 September 1946, in answer to question 19 on said form relating to civilian employment, that he had been employed by the Atlanta Hub Company, Incorporated, 242 Fourth Avenue, New York City, during the period 1936 to 1942, as road Merchandise and Sales Manager for 32 retail men's stores, during which time he supervised the work of 500 employees, which statement was untrue and known by the said Lieutenant Colonel Myron Gale, alias Myron Goldberg, to be untrue in that he was not employed by the said Atlanta Hub Company, Incorporated, during the whole period 1936 to 1942 as road Merchandise and Sales Manager for 32 retail men's stores, during which time he supervised the work of 500 employees, but was employed by the said Atlanta Hub Company, Incorporated, only during the period January 1941 to January 1942, in the position of Credit Manager at one store.

Specification 5: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, did, at Langley Field, Virginia, on or about 30 September 1946, with intent to deceive the War Department, officially state on his Supplemental Information for a Commission in the Regular Army, WD AGO Form Number 62, dated 1 September 1946, in answer to question 18 on said form, that he had never been arrested, indicted, or convicted of any civil offense other than minor traffic violations, which statement was untrue and known by the said Lieutenant Colonel Myron Gale, alias Myron Goldberg, to be untrue in that on 15 September 1938, he was convicted of petit larceny in the Court of Special Sessions, of the city of New York, County of Kings.

Specification 6: (Finding of not guilty).

Specification 7: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, did, at AAFRS No. 5, Greensboro, North Carolina, on or about 15 November 1945, in giving data for a new WD AGO Form Number 66-2 to replace a lost WD AGO Form 66-2, willfully, wrongfully, and fraudulently officially state, for the purpose of recording on said WD AGO Form Number 66-2, in answer to question 17, Education, that he had attended Brown University, Providence, Rhode Island, for four years, graduating therefrom in 1935 with a degree of Bachelor of Arts in Accounting, and the University of Michigan for one year, 1936, with Merchandizing as his major subject, which statement was untrue, and known by the said Lieutenant Colonel Myron Gale, Alias Myron Goldberg, to be untrue in that he had never attended either one of the Universities mentioned.

Specification 8: (Finding of not guilty on motion by the defense).

Specification 9: (Finding of not guilty).

Specification 10: (Finding of not guilty).

Specification 11: (Finding of not guilty).

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

Specification 1: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, then being the Officer in charge of the Officers' Mess, Langley Field, Virginia, did, at Langley Field, Virginia, on or about 15 September 1946, feloniously embezzle by fraudulently converting to his own use $200.00, proceeds from the sale of six slot machines, property of the Officers' Mess, Langley Field, Virginia, entrusted to him by the said Officers' Mess.

Specification 2: (Stricken on motion of the defense).

Specification 3: In that Lieutenant Colonel Myron Gale, AC, 304th Army Air Forces Base Unit (Base Services), alias Myron Goldberg, then being Officer in charge of the Officers' Mess, Langley Field, Virginia, did, at Langley Field, Virginia, on or about 15 August 1946, feloniously embezzle by fraudulently converting

to his own use, $100.00 from the Petty Cash Fund of the Langley Field Officers' Mess, entrusted to him by the said Langley Field Officers' Mess.

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: (Stricken on motion of the defense).

Specification 3: (Stricken on motion of the defense).

On motion by the defense Specification 2, Additional Charge II, and Specifications 2 and 3, Additional Charge III were stricken by the law member (R 25, 26). The accused then pleaded not guilty to all Charges and Specifications (R 26). At the close of the prosecution's case a motion for a finding of not guilty of Specification 8, Additional Charge I was sustained (R 145). The accused was found guilty of Charge I and Specifications 1, 5, and 6 thereunder; guilty of Additional Charge I and Specifications 1, 2, 3, 4, 5, and 7 thereunder; guilty of Additional Charge II and Specifications 1 and 3 thereunder; not guilty of Specifications 2, 3, and 4 of Charge I, Specifications 6, 9, 10, and 11 of Additional Charge I; Specifications 4 and 5 of Additional Charge II, and Specification 1 of Additional Charge III and Additional Charge III. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two and one-half 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 pertinent to the findings of guilty is summarized as follows:

The accused was detailed as officer in charge of the Officers' Mess at Langley Field, Virginia, on 15 July 1946 (R 113-114; Pros Ex 36), and was relieved of this assignment on 14 November 1946 (R 114; Pros Ex 37).

<u>As to Specification 1, Charge I:</u>

Miss Ollie Mae Fagan testified that on 28 May 1946, she was interviewed by the accused in his office in connection with her application for employment as a cashier in the officers' mess (R 48). At that time the accused asked her if she was married, whether she had been married, whether she was

"going steady with some man" and where she lived. She further testified:

> "After that, he said that the job he had for me wasn't a large paying job, but there was the possibility and chance of me making money on the side. I said for instance, and he said there were several officers who came in several times during the week and they had rooms upstairs and would like girls to stay with them. He said I could make $50 a week. I told him I wasn't interested."

The accused then mentioned a Colonel, whose name he did not disclose, who came to the mess every week, and for whom the accused procured girls. Miss Fagan continued:

> "Then he said after a second thought that I was too nice a girl for someone else, and he would like to have me for himself * * *. He then asked me if I used a diaphragm, and I told him I had no need for one. Then he gave me my money and I went to work" (R 49).

She stated that she took the job at the club "to get some money to go back to Richmond on". She continued to work at the club as a cashier at the rate of $20 per week until 7 October 1946 when she was discharged by the accused who told her that he had to cut down expenses at the club and that he had no further need for her, although the accused had appeared to be pleased with her work (R 50).

On cross-examination she testified that she had never seen the accused before the first interview (R 52). Although his remarks were very obnoxious to her (R 53) she continued to work at the club to earn enough money to get back to Richmond. Her mother lived at Newport News at that time. The bus fare to Newport News from Langley Field was ten or fifteen cents (R 54). She was asked if she had remarked that she was going "to get" the accused at the time she was discharged, to which she replied "I might have said it, but I don't recall it" (R 53) and she further testified that she would not deny having made such a remark. She denied, however, that she had used a vile epithet in connection with that remark (R 54). After being discharged, she wrote a letter to the War Department complaining of accused's acts (R 55).

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

Mrs. Dora Madeline Crowell testified that she was employed as a cashier at the Officers Club from 7 October 1946 until about Christmas 1946. On 8 October the accused called her into his office and told her that there was a lieutenant colonel who did not get along with his wife and he desired a bedmate. He stated that this officer was interested in meeting Mrs. Crowell. She answered that she was not interested in his offer and was not there for that purpose. Accused then suggested that it might be better for her to work in the dining room since she was an older lady and the younger girls were getting familiar with the officers. He further stated

that he realized that she was working for a mere pittance and that he would try to raise her salary. He also stated that although she would probably be approached by officers, he felt that she would know how to conduct herself. Shortly before Christmas she resigned her job and left as soon as a replacement was found (R 67, 68). Her salary was increased from $80 per month to $100 per month while she was employed at the club (R 69).

On cross-examination the witness stated that on 29 October she was interrogated by Lieutenant Colonel Orr at the Chapel relative to the incident to which she had testified. She admitted that at that time she had testified as follows (R 69, 70).

> "* * * Question: 'Mrs. Crowell, how many conversations have you had privately with Colonel Gale?' Answer: 'Just the one--- the day that he asked me to go into the dining room.' Question: 'Will you think closely to every part of that conversation and tell me exactly in your own words, from the time you entered his office until you left his office what happened?' Answer: 'Well, it was just as I told you, he said they were not having any cashier in the back, would I go in the dining room as hostess and cashier. He asked me did I think I could handle it all right and I told him I would do it to the best of my ability. Oh, yes, he did say about the younger girls--he wanted an older person in there.' Question: 'In this interview, Mrs. Crowell, did Colonel Gale ask you any embarrassing questions?' Answer: 'No, he asked my age.' Question: 'Did he ask you if you were married?' Answer: 'Yes.' Question: 'Did he ask you if you had ever been divorced?' Answer: 'No, I told him I had a son here at the field * * * My husband is dead'" (R 69-70)

> "' * * * Yes, he asked my age and I answered 41. That's when he proceeded to say he wanted an older woman because he thought they would be more serious about their job, position, or whatever you call it. That's really about all he said except the younger ones were more interested in the officers than in the work.'* * *

> "* * *'Mrs. Crowell, did Colonel Gale ever approach you with any kind of an offer involving more money if you would sleep with him or any other officer?' 'No'. 'Are you certain of this, Mrs. Crowell?' 'Wait a minute - but now that you mention it he said something about some Colonel, an older Colonel, that wanted an introduction, nothing was said about pay, I just said I wasn't interested.' * * * Question: 'Mrs. Crowell, please take a little time and think closely concerning that conversation and tell me if there is anything that you left out?' I don't think there is Colonel, because I didn't really like it too well and I just let him understand so and that's all there was to it and he knew it. I haven't said much to him since.'" (R 70)

" * * * 'I remember he said I might be approached by some of the officers and to the effect that I would know how to take care of myself, more or less, but my answer to him was that I believed that I could take care of myself and would be diplomatic in an answer.'" (R 71)

As to Specification 6, Charge I.

Mrs. Lola Lassiter testified that on 18 October 1946, she was employed by the accused to work at the information desk at the Officers Club (R 77). On 19 October 1946 the accused spoke to the witness in his office and asked her why she was working. She replied that she needed the money. The accused then asked her if she would like to make $15.00 a week extra. She answered that she would, whereupon the accused said something about some rooms upstairs and that some officers had asked about her already. The witness "didn't know exactly what he meant at the time, but * * * figured it wasn't anything good". She then told the accused that she "didn't need money that bad". The accused told her to keep his conversation confidential and that she should not tell her husbnad, whereupon she replied that she did not keep secrets from her husband (R 78). She left the club on 20 October because of the conversation with the accused (R 79).

On cross-examination the witness admitted making a pre-trial statement wherein she had stated her reasons for leaving the club as follows: "One of the reasons * * * was that my husband wanted me to stay home with the baby. I had a colored girl staying with the children, but he thought I should stay at home." She stated, however, that the real reason she left was the conversation with the accused. In answer to a question as to why she did not leave immediately after that conversation, she replied "I just - - I don't know, Sir" (R 79).

As to Specifications 1, 2 and 3, Additional Charge I.

It was stipulated that on 21 January 1946, the accused executed an Application for Commission in the Regular Army, WD AGO Form 62, at Dover Field, Dover (R 111, Pros Ex 25) wherein he stated among other things, that he attended Brown University for four years and that he was graduated therefrom with an AB degree in Economics in 1935; that he attended the University of Michigan for one year post-graduate study in 1936 majoring in Merchandising; and that his civilian experience included employment as "Merchandise and Sales Manager for national chain of men's wear stores. Started in merchandising capacity - later transferred to sales which included hiring and firing of personnel and placing people in positions for which they were best fitted 1935-1942. Hart Shafner & Marx, Chicago."

It was stipulated that the accused never attended Brown University, that he never received a degree of any kind from said University; and that he never attended the University of Michigan or studied Business Administration or Merchandising at that University (R 111, Pros Ex 29).

It was further stipulated that the accused was not employed by Hart, Shafner and Marx, Chicago, Illinois during the period 1935 to 1942 (R 128).

As to Specifications 4 and 5, Additional Charge I.

It was stipulated that the accused executed a Supplemental Information for Commission in the Regular Army, WD AGO Form 62, at Langley Field, Virginia, on 30 September 1946 (R 111; Pros Ex 26), wherein he stated, among other things, that he had been employed by the Atlanta Hub Company, 242 4th Avenue, New York City from 1936 until 1942 as "Road Merchandise and Sales Manager for 32 Retail Men's Stores" and that he supervised the work of 500 employees. In this form the accused entered a negative answer to question number 18 which asks "Have you ever been arrested, indicted, or convicted of any civil offense other than a minor traffic violation?" (Pros Ex 26).

Mr. Lucien Brownstone, the President of the Atlanta Hub Company, Inc., New York, N. Y., testified by deposition that the records of that company show that accused was employed by that company from 20 January 1941 until 3 January 1942 as credit manager supervising the work of 5 or 6 employees. He was never employed by that company as Merchandise and Sales Manager, and never supervised the work of five hundred employees (R 116-118; Pros Ex 40).

A certificate and record of birth showing that the accused was born on 28 August 1914, in Brooklyn, New York, the son of Jacob and Anna Goldberg was received in evidence by stipulation as Prosecution's Exhibit No. 30 (R 112). Documentary evidence introduced by stipulation shows that on 8 September 1938, the accused, as Myron Goldberg, was arraigned before the Court of Special Sessions of the City of New York, County of Kings, on a charge of petit larceny of a Hoover Vacuum cleaner of a value of $96.00, property of the Hoover Company. He pleaded guilty to the charge and on 15 September 1938 he was sentenced to the workhouse for two months (R 110-114, Pros Ex 23, 24, 31, 32, 33, 34, 35). According to the complaint which, was objected to on the grounds of materiality and relevancy (R 112) accused had been employed as a vacuum cleaner salesman and was entrusted on 6 May 1937 with a vacuum cleaner which he sold. Thereafter he appropriated the money he received in payment for the said cleaner to his own use and benefit (R 112, Pros Ex 31, 32).

As to Specification 7, Additional Charge I.

An AAF Officers' Qualification Record, WD, AGO Form Number 66-2 pertaining to the accused was prepared at AAFRS #5, Greensboro, North Carolina, on 15 November 1945. Entries on this form show that the accused attended Brown University for four years, graduating in 1935 with a BA degree and with accounting as a major subject, and that he attended the University of Michigan for one year in 1936, majoring in merchandising. The completed form also shows that no 66-1 or 66-2 was available at Greensboro at the time the form was completed (R 111, Pros Ex 28).

As indicated above, the falsity of the pertinent entries was established by stipulation (R 111, Pros Ex 29).

As to Specification 1, Additional Charge II.

At a special meeting of the Langley Field Officers' Mess Board of Governors held on 15 August 1946, a resolution was passed directing that eight slot machines be sold to a dealer for a sum of not less than $200 (R 115, Pros Ex 39). Pursuant to this resolution the accused sold six slot machines owned by the club to Harry P. Fisher on or about 15 September 1946 and received $200 in cash (R 129). Mr. Fisher did not obtain a receipt and testified that the slot machines were sufficient receipt for him (R 130).

Colonel Edward W. Gwynn, a senior accountant, who was Chief of the Budget and Fiscal Section of the Tactical Air Command testified that between 23 November 1946 and sometime in January 1947 he conducted an audit of books of the Langley Field Officers Mess covering the period from 31 July 1946 to 4 November 1946. He testified that books and records of the club were voluminous (R 133).

In part he further testified:

"In the process of the audit, or I should say, in the examining of the Minutes of the Officers' Club on the 15th of August, it was found that authority was given them by the Board of Governors to sell eight slot machines. * * * We found that six slot machines had been sold, but I could find no place where the money had been turned in for the sale of these slot machines. I examined everything that could be found in the books thoroughly myself - - and could find no record of it -- in the officers club -- of the receipt of the money from the sale of the six slot machines." (R 133)

On cross-examination the witness stated:

"In the course of an audit, you look into everything you can think of. You inquire into every source available. In the event there is something that looks suspicious, that indicates that records are not being kept, in our opinion, in an adequate manner, you inquire into every source possible." (R 135)

Nevertheless, although he knew that Miss Ruby Mater, who was the cashier at the time of the incident involved, could be located in Hampton, Virginia (R 133), he made no effort to communicate with her, for she was not an employee of the club at the time of the audit (R 133-134). He explained his failure to contact Miss Mater as follows:

"The cashier is not the bookkeeper. The bookkeeper only handles the records -- What's sent up to her on slips for posting * * * The bookkeeper wouldn't get the cash -- all she would get would be a form " (R 134).

When asked:

"In inquiring into every source available, even though you knew that Ruby Mater was available to get information from her, you didn't get in touch with her, did you?" (R 135)

The witness replied:

"No sir, I don't want to be disrespectful, but accounting is a science. We look at what is on the books and we certify what is there and to the absence of what should be there. My conversation with Miss Mater would not have put the $200 there." (R 135-136)

As to Specification 3, Additional Charge II:

Acting on behalf of the Langley Field Officers' Club, accused executed a contract 31 July 1946 with Joe Sudy and his agent, Music Corporation of America, by Jimmy Tyson, under the terms of which Joe Sudy and his orchestra agreed to play an engagement at Langley Field, Virginia, 16 August 1946, for the sum of $400.00, $200.00 of which was to be paid "upon signing of this contract" and the balance to be paid "by no later than 10 PM, on night of engagement". It was further provided in the contract that "the amount paid to the Leader includes the cost of transportation * * *" (R 46, 72, Pros Ex 4). Under this contract $200.00 was paid Music Corporation of America, 7 August 1946, by check number 6241, drawn on Merchants National Bank, Hampton, Virginia, by Langley Field Officers' Mess, by accused as secretary-treasurer (R 75, Pros Ex 6; R. 91-92, Pros Ex 16). Joe Sudy and his orchestra played the engagement 16 August 1946, and that night accused gave Joe Sudy a check drawn on the account of Langley Field Officers' Mess, dated 16 August 1946, in the sum of $200.00 covering the balance on the contract price (R 45, 46, 91, Pros Exs 3 and 17). On 15 August 1946, accused had drawn a check on the account of Langley Field Officers' Mess in the amount of $100.00 and payable to "Petty Cash Fund, to reimburse Petty Cash for $100.00 to pay part of transportation for Joe Sudy as per Agreement" (R 91, 92, Pros Ex 7 and 18). The voucher supporting this transaction was a receipt also signed by accused, dated 15 August 1946, and evidencing the receipt by him of $100.00 from Officers' Mess, Langley Field, Virginia, and carrying the following entry under the heading "Explanation: To reimburse Petty Cash to pay part of Transportation for Joe Sudy as per agreement" (R 91, 92, Pros Ex 19). When called upon by his commanding officer by letter, dated 6 January 1947 to explain the transaction, accused replied by indorsement that Mr. Tyson told him before the contract was entered into that he could supply -

"a terrific band at a very low figure but with one catch. He was supplying us with bands at ridiculously low figures anywhere from 40-60% of their usual pay for a one-night engagement. Mr. Tyson said that for this he wanted $100.00. He said no check but cash, because his concern would not tolerate what he was doing and he wanted no way for anyone to check up. * * *" (R 127, Pros Ex 42).

The total amount Joe Sudy received from accused on the night his orchestra played was $200.00, the balance of the contract price, and he never received any other money (R 46). Jimmy Tyson testified that he did not phone accused after the contract was entered into and demand more money for Joe Sudy to play and the only money received either by Jimmy Tyson or Music Corporation of America was the $200.00 deposit made under the terms of the contract (R 72-75).

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

As to Specification 1, Charge 1:

Second Lieutenant Paul W. Leonard testified that he was Assistant Club Officer from July to November 1946 and that Miss Fagan was discharged for inefficiency because she was not dependable in showing up for work, was sometimes not at her proper station and received too many telephone calls. (R 165-166)

As to Specifications 1, 2, 3, 4, 5, and 7, Additional Charge I:

After being advised as to his rights as a witness the accused elected to take the stand as a witness in his own behalf (R 173). He testified that he was born 25 August 1914 at Brooklyn, New York, and lived there until he was five years old. His family then moved to Hartford, Connecticut, and later back to Brooklyn and still later to Providence, Rhode Island, where accused entered high school and graduated in 1931. The family then moved back to Brooklyn and accused worked a year and a half with dance bands and in 1933 registered at St. Johns University in Brooklyn. He ran out of funds and was asked to leave after four and one-half months. After working as a musician for a short while, he obtained work with a film laboratory where he met a girl, whom he later married. At this time he was nineteen and one-half years of age, and after a week or ten days he was discharged because "they cut down on their employees", and he again returned to employment as a musician but left because his wife did not like his being out every night. He next went to work in New York as a vacuum cleaner salesman. His wife then became pregnant and was confined and finding himself without funds, accused sold a vacuum cleaner to pay for her hospital bill. For this he was tried in Magistrate's Court and sentenced to two months confinement. Upon leaving the workhouse, accused changed his name to Gale in order "to blot out my past" and went to Florida where his father was, at the time, living because of his health and where he worked for two years as a salesman. His wife had left him when she found out about the vacuum cleaner episode and later obtained a divorce. His next work was as a credit manager for Atlanta Hub Company. He worked in one of their stores in Jacksonville, Florida, for a while, then in another in Washington, and was employed in another in Memphis, Tennessee, until 5 January 1942, when he was drafted (R 173, 174).

Accused further testified that as an enlisted man he worked in Quartermaster warehouse and "handled a dance band" and was, for a time, a drill instructor. He made three or four applications for Officer Candidate Schools but was rejected, he was told, because of his height and weight. Finally he was accepted and, after twelve weeks, was, on August 5, 1942, commissioned a Second Lieutenant in the Air Corps (R 174). Thereafter, he served as

Squadron Executive Officer of a bomb squadron in Louisiana, Africa, and Corsica. He was later A-1 of a bomb wing in Italy, and after the cessation of hostilities, worked in an office in Italy, disposing of surplus property, where he was the senior officer for one month, being subsequently replaced by a civilian. He returned to the United States 23 October 1945 after 32 months overseas, reporting to Greensboro, North Carolina, 8 November 1945 (R 175), was reassigned to Dover, where he served as Base S-1 and was subsequently transferred to Tactical Air Command at Tampa, Florida. He served as chief of separations branch of that command until 10 July 1946, when he was assigned as officer in charge of Officers' Club, being relieved from the latter assignment 15 or 16 November (R 175). He was promoted to First Lieutenant in January 1943, was promoted to Captain in Africa, to Major in Corsica, and to Lieutenant Colonel on 17 May 1945. Accused further testified that he was authorized to wear nine battle stars, the Presidential Unit Citation and Cluster, and the Bronze Star; and that all his efficiency ratings had been superior or its numerical equivalent except that since 30 August 1946 he had been twice rated unsatisfactory (R 176, 177).

Accused further testified that he was married and supported his wife's child by a former marriage; that he was the sole support of this child and of his wife; and that he also contributed $125.00 per month to the support of his parents (R 177, 178).

On cross-examination the accused admitted that statements made by him in his application for officer candidate school regarding his civilian employment and education were false (R 188).

As to Specification 1, Additional Charge II:

Ruby M. Mater, formerly employed as cashier of Accounts Receivable at the Langley Field Officers' Mess, testified that she recalled the occasion of the sale of six slot machines, although she did not recall the date or see the transaction. She received $200.00 from accused, who told her that it was from the sale of slot machines (R 147, 148), and she placed it in an envelope, put it in the safe, but could not recall how it was marked. (R 157) She gave him no receipt (R 156). She did not recall the date of the sale (R 157) or how long the envelope stayed in the safe but supposed the money may have been entered in the books of the Mess under the heading "Amusement Devices", which included receipts from slot machines and gambling (R 149, 158) in which case it would be impossible to trace it on the books (R 156, 158). She did not know whether she made any entry in her books because she did not know to which account the money should be credited (R 156). Miss Mater further testified that on one occasion, the Officers' Mess lost $1400.00 in backing games on the weekly "Staff Night", which was held on a Thursday night, and that she "had to furnish the bank with $1400.00 out of the money I had in the cash box. If there was a loss, my cash had to be refunded and the only way to do it was to take it out of Amusement Devices." (R 149-151, 157)

On cross-examination the witness admitted that on 5 February 1946 she had a conversation with Miss Bott, the bookkeeper, but she denied having told Miss Bott, that she had no recollection of any $200.00. It was shown that on 5 February 1946, the witness made a statement to Lieutenant Summers, the investigating officer, wherein she stated that the accused had handed

her $200.00 for the sale of slot machines (R 152, Def Ex D).

As a witness in his own behalf the accused admitted that he sold the six slot machines to Mr. Farris and received the $200.00 in return (R 178, 191) but that he gave it to Miss Mater, the cashier, telling her that it was for the sale of slot machines and denied ever receiving the money back (R 178, 179, 181). He testified also that the club was closed from 15 September, which was a Saturday, and reopened with a cocktail dance and buffet supper 28 September, during which period there was very little activity at the club and consequently very little playing of the slot machines. Accused had examined the books of the club with respect to income from amusement devices, which included receipts from gambling and slot machines, and that these entries showed income of $937.15 on 9 August 1946; $720.30 on 15 August; $735.00 on 22 August; $1447.00 on 31 August; $912.00 on 5 September; $1001.90 on 13 September; and $476.20 for 14, 15, and 28 September (R 180, 181). The $476.20 was not a normal sum for the slot machines to take in for the period indicated because they usually netted $800.00 to $850.00 per week and this could be explained on the basis that there was little activity at the club, no gambling, and very little playing of the slot machines (R 180, 181). Again accused testified that "the only place that $200.00 can possibly be is in slot machine receipts, where it was lumped in with these proceeds. Receipts from gambling or receipts from slot machines would not show on the books as such. The only way it could have been handled was for it to have been put in with slot-machine returns, because I considered it illegal too" (R 181)

<u>As to Specification 3, Additional Charge II:</u>

Mr. Glenn Rigel had a conversation with accused sometime in July or August 1946 in which accused advised him that -

> "* * *he had made the expenditure of the sum of $100.00 or $50.00* * *. He got it from the change of the petty cash fund at the Club, and he asked me if it had been handled as it should have been. I told the Colonel to protect himself he should have a receipt signed by the receiver of the money showing why the money was expended." (R 160)

Accused showed him a slip for $100.00 from the petty cash fund representing an expenditure to an orchestra leader which Mr. Rigel did not consider a sufficient voucher but he did not mention the transaction in his report (R 162-164).

Second Lieutenant Paul W. Leonard testified that he entered accused's office sometime in July or August and that it "was obvious that he was talking long-distance." He heard accused ask, "how can I get $100.00 -- I know the club won't allow the money to do it" and "yes, yes," and "all right I will try and see what I can do." Accused then turned to him and said "One of these Joe's from New York wants money on the side for bringing a band down here" (R 167).

Accused testified that he had a telephone conversation with Mr. Tyson in which the latter told him that he could furnish Joe Sudy's band for $400.00, which was very cheap, if accused would pay him $100.00 in cash on the side to which accused said he would be willing to make the contract for the band, but that he could not pay the $100.00. Thereafter, he talked to Mr. Rigel who told him that if he thought it was a good buy he could show it for transportation or hotel bills for the band and that he could put in a voucher for it. He thereafter drew $100.00 on 15 August but did not pay Mr. Tyson until 16 September because the latter told him by telephone that he thought he would be down from New York on the night Joe Sudy was to play but did not arrive and later told accused on the telephone to "hold the loot" because he would be coming down soon, although he did not do so, and that at Mr. Tyson's later request accused took the money with him on a trip to New York and paid it to him in his office (R 182, 183).

On cross-examination the accused admitted that after drawing the $100.00 from petty cash, 14 August 1946, he kept such money in his desk drawer until he went to New York and gave it to Mr. Tyson 16 September 1946 (R 191). He obtained no receipt from Mr. Tyson (R 192). After the incident involving the appearance of Joe Sudy's orchestra, he continued to use orchestras furnished by Jimmy Tyson because he felt that such orchestras were still "good buys" (R 188-191).

5. Rebuttal testimony for the prosecution pertinant to Specification 1, Additional Charge II is summarized as follows:

A certificate signed by the accused and two other officers on 30 September 1946 shows that the amount of money taken from coin operated amusement devices for 14, 15, 28, 29 and 30 September 1946 was $476.20 (R 197, Pros Ex 45).

6. The testimony for the court pertinent to Specification 1, Additional Charge II is summarized as follows:

Miss Esther Bott, the bookkeeper at the Langley Field Officers' Club testified that under the bookkeeping system in operation at that club all money received was handled by the cashier who made up a Daily Cash Report which went up to the bookkeeper who posted the amounts in the ledger. Money was never received by the bookkeeper, but was kept by the cashier until it was deposited in the bank. If money was received, a slip was made out and sent up to the bookkeeper in order that the transaction could be recorded and if an item of club furniture were to be sold the Daily Cash Report would show the source of the money in order to credit the proper account in the books. If slot machines were sold, the bookkeeper would enter a credit in "miscellaneous income" and make "an adjusting entry to reduce furniture and fixtures in my ledger". "Miscellaneous Income" comprised all income for which there was no separate account. The proceeds of the operation of slot machines was entered under the "Amusement Device" account (R 198, 199). Slot machines had always been carried as "furniture and fixtures" (R 201).

The bookkeeper asked Miss Mater on or about 5 February 1947 (She could not recall the date) about the $200.00 which was purportedly turned over to her from the sale of slot machines and she said that she did not remember it (R 199, 202). The bookkeeper could find no record of the $200.00 being turned in to her (R 199) although she checked to see whether it may not have been entered under the wrong account. She talked with Miss Mater and asked her to come to Langley Field and help look for it but Miss Mater did not do so (R 199).

7. In our deliberations upon the record careful consideration has been given to a brief filed by Mr. Irvin Waldman, attorney for the accused, who also appeared as counsel for the accused at the trial. Oral argument by Mr. Waldman was heard by the Board of Review. Numerous assignments of error have been made and argued at length, all of which have been considered. Only those requiring further comment, however, are discussed below.

8. At the outset of the trial counsel for the accused examined all the members of the court as to their conception of the degree of proof necessary to warrant a conviction in criminal cases (R 4-12). During the voir dire examination of Colonel Jacob J. Brogger, the record shows the following colloquy:

"Q. Will you give us some modicum of what degree of evidence is sufficient, in your own mind, to find a man guilty?
A. You mean this business of 'beyond a reasonable doubt'?
Q. You may call it a 'business' if you like, but I call it a very serious matter---is that what you term it ---'business'?
A. Well, I said that because it's a pretty commonly used statement. I usually feel that a man is guilty or not guilty beyond a reasonable doubt.
Q. What do you mean by 'beyond a reasonable doubt'?
A. I mean that in my own mind I am sure that he is guilty.
Q. And just how do you arrive at that?
A. Well---by mental processes.
Q. Just how do your mental processes arrive at such a determination?
A. Well--
Q. What do you use in arriving at the conclusion that a man is guilty---do you scale the evidence---weigh the evidence of one side as arrayed against the evidence of the other side?
PROSECUTION: I object---
PRESIDENT: I feel that this line of questioning is out of order--- you are making the Court hostile toward the defendant. We resent questions like this---at least I'm sure I do. I've been in the military service a long time, and I just can't see this---I don't get the point of all this questioning at all.
DEFENSE: If the Court please, I was in the military service myself for a number of years, during which time I tried many cases and appeared before many courts, and it has been my very sad experience that---

PROSECUTION: I object to the Colonel's experience!
LAW MEMBER: Sustained.
PROSECUTION: May I be heard, if the Court please. Col. Brogger has no objection to answering any kind of reasonable questions--- he has answered the Colonel three or four different times in three or four different ways that he has asked him the same question. We object to his pursuing that line of questioning any further. If there have---if there are any other aspects he wishes to inquire into, I have no objection, but this Court could go on all day just like it has thus far.
DEFENSE: Did I hear an objection sustained without my having an opportunity to present all of the circumstances?
LAW MEMBER: The objection was sustained a few minutes ago.
DEFENSE: If the Court please, it has been my experience that when an objection is sustained and a further statement has been made by one side, that a statement should be made by the other side. Does that mean that I can't question Col. Brogger any further? Am I precluded from making any further statement ---is that your ruling?
PRESIDENT: Go ahead, but it seems to me that you are on the wrong course.
DEFENSE: I don't feel that I am on the wrong course at all. I think this matter is an extremely important matter---there's no question about that. It's not merely the question of a man's liberty being at stake, but a man's honor as well as his future, and honor, to me and to most men, is tantamount to life. Life without honor is not worth anything. I feel that it's very important to process all of the members of the Court in the light of the experience they have had. It has been my sad experience to find on the courts I have appeared before, and on which I have served as Law Member, that the members of the Court pay no regard to the principles of military justice when weighing the evidence against the accused, but their decisions are motivated by what is conceived to be desire of higher authority---and because of the fact that they don't want to offend higher authority because it might interfere with their own advancement. In justice to the accused, and without any thought or desire to incur the hostility of the Court, I want to make certain that this Court, when it is sworn, will carry on its functions in accordance with the conception of military law and military justice as I conceive them to be.
PRESIDENT: You may proceed with your questioning.
DEFENSE: In view of the fact that the objection to my questioning Col. Brogger along these lines was sustained--although in my opinion his answers have been extremely unsatisfactory, either because I have not understood them, or else because to me they were the representation of phrases which, in themselves, are correct, but which may have no personal meaning as far as he is concerned.

PROSECUTION: If it please the Court, we have no objection to the Colonel's further questioning of Col. Brogger --- it was just because I felt that the reasonable doubt angle had been inquired into long enough and that's what I objected to.

PRESIDENT: You are not precluded from further questioning of Col. Brogger. The objection was to the personal theories and repetition. That's what the TJA objected to. There's no objection to your questioning the members of the Court, whatsoever." (R 8-9)

In his brief, counsel for accused argued that the court's resentment of his voir dire examination among other errors created a doubt as to its impartiality which necessitates a reversal of the findings of guilty and the sentence.

The president's remarks as to his resentment of the line of questions propounded by counsel for the defense and his statement "you are making the court hostile toward the defendant" were serious errors. They cast grave doubt as to the president's impartiality and established grounds for challenging the president for cause. Nevertheless, after such full and frank disclosure of his attitude, the defense did not challenge the president for cause, and exercised its peremptory challenge against another member (R 12). The defense further stated that the accused had no objection to any other member then present (R 12-13).

Under the circumstances it appears that the defense waived any grounds for challenge against the president. In view of the fact that the accused was represented by extremely able and zealous counsel, we must presume that the defense was fully aware of the grounds for challenge and waived the same advisedly. Accordingly, we are of the opinion that the error complained of did not adversely affect the accused's substantial rights.

9. Under Specification 1, Charge I the accused stands convicted of wrongfully soliciting Miss Ollie Mae Fagan to commit acts of prostitution for hire with an unnamed person in violation of Article of War 95.

Miss Fagan testified that at the time accused interviewed her with a view toward her employment as cashier at the officers' mess, he suggested that she might supplement her income by $50.00 per week by "staying" with certain officers who "had rooms upstairs and would like girls to stay with them". He also mentioned a Colonel who came to the mess every week and for whom the accused procured girls. Miss Fagan stated that she was not interested in the accused's proposition. She accepted employment at the club and remained there until she was discharged for inefficiency on 7 October 1946. She stated that she accepted employment despite accused's obnoxious remarks because she needed money to go to Richmond.

On cross-examination she admitted that her mother lived in Newport News, Virginia, at the time and that bus fare to Newport News from Langley Field was ten or fifteen cents. She also stated that she would not deny having threatened "to get" the accused at the time she was discharged although she denied having used a vile epithet in connection with that remark. Thereafter she mailed a complaint concerning accused to the War Department.

Although it appears strange that a respectable girl would accept employment under the circumstances described, merely to earn sufficient money for transportation from Langley Field to Richmond, especially when there are close relatives nearby who might be expected to assist her, nevertheless, if the court elected to believe her, her testimony may be sufficient to support a conviction in the absence of prejudicial error. We do not regard the proof strong, however, in view of Miss Fagan's obvious bias and prejudice against the accused as brought out in cross-examination, and because her testimony was not corroborated in any way.

There remains for consideration whether the finding of guilty of this specification can be sustained in view of the errors committed with respect thereto.

a. The law member committed error in improperly limiting the defense's cross-examination of Miss Fagan with respect to her credibility.

After the witness had testified, on cross-examination, that she had accepted employment at the club in order to earn money to go to Richmond and after she had admitted that her mother and aunt lived in Newport News, Virginia (R 54), the following colloquy occurred:

"Q. You couldn't go to your Mother or Aunt for the money?
A. Yes Sir, I could have, but I didn't want to.
Q. Weren't you on speaking terms with your Mother and Aunt?
A. Yes Sir, I always have been.
PROSECUTION: If the Court please, I object to this line of questioning.
LM: I can see nothing in this line of questioning---as to why she didn't go. She said she didn't want to.
DEFENSE: It seems to me, assuming that I were in the same position she was in---and the only reason why I wanted to work was to get a paltry sum of money to take me to Richmond---if that's all I wanted---and if a man made offensive propositions to me that she says he made to her, I would have slapped him in the jaw and walked out. I would have turned on my heel and walked out, and would have gotten the money from my Mother or Aunt to go to Richmond. I am trying to test the credibility of this witness. Her memory as to using a vile ephithet is very certain, but she can't remember, although she vaguely admitted it --- threatening Col. Gale---threatening 'to get' Col. Gale. I think, under those circumstances---
LM: The objection is sustained." (R55)

The evidence which the defense sought to elicit had an obvious tendency to impeach the credibility of the witness. A showing that the witness was on friendly terms with her mother and aunt would tend to show the absurdity of her testimony that she accepted employment at the club merely to earn money for her return to Richmond when she could have borrowed the small sum involved from her mother or aunt.

> "* * * As one purpose of cross-examination is to test the credibility of the witness, he may always be cross-examined as to matters bearing upon his credibility, for instance, he may be interrogated as to his relationship to the parties and the subject matter of the case, his interest, his motives, inclinations, and prejudices, his means of obtaining a correct and certain knowledge of the facts about which he testified, the manner in which he has used those means, his power of discernment, memory and description." (MCM 1928, par 121b, pp 126, 127)

> "Opportunity should be allowed for a thorough and sifting cross-examination, which should neither be unduly restricted or abridged. The denial of fair latitude on cross-examination is a denial of a substantial right and a withdrawal of one of the safeguards essential to a fair trial." (Wharton's Criminal Evidence, Eleventh Ed. Vol. 3, sec. 1294, pp 2165, 2166)

> "A witness may be asked on cross-examination any question that affects his credibility * * * And any question which would test his accuracy, no matter how irrelevant to the fact in issue, or how disgraceful to the witness is permissible, unless the answer would expose him to criminal prosecution." (Wharton, supra Sec. 1318) (It is to be noted however, that under the provisions of Article of War 24 the witness may decline to answer any question not material to the issue which might tend to degrade him.)

In our opinion the law member committed error in restricting the cross-examination of the witness.

b. In referring to the specification under consideration as well as other similar offenses under Charge I, the Assistant Trial Judge Advocate in his closing argument commented on the accused's silence with respect thereto and assumed facts which were not in evidence.

In commenting on the interview with Miss Fagan, the Assistant Trial Judge Advocate stated:

"Such questions as these, by Colonel Gale, were prompted through his desire to insure himself that only girls of high caliber were employed in the club. Such a reason is so ridiculous as to be laughable" (R 214)

The record fails to show that the accused or any other witness offered any testimony as to the accused's reasons for the alleged remarks of the witness. Neither does it appear that counsel for the accused in his argument suggested any such theory of defense.

It would thus appear that the Assistant Trial Judge Advocate sought to create the impression that the defense had inferentially admitted the conversation to which Miss Fagan had testified.

c. Thereafter referring to the specifications under Charge I the Assistant Trial Judge Advocate commented:

"I should like to call the court's attention to the fact and again it is a very indisputable fact, that although counsel has used every conceivable method to prevent the presentation of the truth, objecting to any and all questions which might conceivably bring the truth out, not the slightest attempt has been made to refute the damaging testimony of the witnesses testifying in regard to these specifications of Charge I. As a result, I think, the findings of the court must be apparent" (R 215) (Underscoring supplied)

It is, of course, elementary, that the prosecution may not comment on the accused's failure to testify as to any offense concerning which he has not testified in his own behalf. (MCM 1928, par 77, p 62).

Ordinarily a comment that the prosecution's evidence was not contradicted is not improper.

"Lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell" (Lefkowitz v. United States, 273 Fed 664, 668; Baker v. United States, 115 Fed (2d) 533, 544).

In the instant case, however, it is obvious that the conversation between Miss Fagan and the accused took place in the privacy of the latter's office. The only witness who could testify thereto were the accused and the complainant. Under the circumstances, the Assistant Trial Judge Advocate's remark that "not the slightest attempt has been made to refute the damaging testimony of the witnesses to these specifications of Charge I," can only be construed as an improper comment on accused's silence with respect to these specifications.

In CM 273830 Nuttman, 8 BR (ETO) 111, 116 the Board of Review, in considering a similar situation stated:

"The further statement that the defense has not in anyway denied the alleged offense * * * is equivocal and is subject to a double inference. If it be interpreted as a comment that the prosecution's evidence was uncontradicted, it was not improper * * *

"If the assertion had reference to accused's election to remain silent, the trial judge advocate committed a gross error, as he was particularly prohibited from commentation upon accused's failure to take the stand (MCM 1928, par 77, p. 62; AW 24). Since the statement was made in the face of a plea of not guilty and was part of an argument containing other improper remarks, it is not unreasonable to interpret it as referring to accused's failure to take the stand as a witness. In that light it was not only improper, but prejudicial to the accused."

In view of the Nuttman case we are of the opinion that the Assistant Trial Judge Advocate's remarks in the instant case amount to gross error.

It is the general rule that the prejudicial effect of improper remarks by a member of the prosecution is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which evidence for the prosecution is contradicted or explained consistently with innocence by evidence on behalf of the accused. A conviction should not be set aside where the evidence of guilt is of compelling effect and the improper remarks could not therefor reasonably have affected the result (CM 273830, Nuttman, supra, and cases cited therein). On the other hand where the evidence of guilt is not strong, such improper remarks on the part of the prosecution amount to prejudicial error (CM 275792, Blair et al, 48 BR 151).

Since the findings of guilty of Specification 1, Charge I are based entirely upon the uncorroborated testimony of a witness whose credibility has been seriously impeached, we are of the opinion that the findings of guilty of that specification cannot be sustained in view of the prejudicial effect of the Assistant Trial Judge Advocate's improper remarks.

10. Under Specification 5, Charge I, the accused stands convicted of wrongfully soliciting Mrs. Beryl M. Crowell to commit acts of prostitution for hire or reward with an unnamed person to be directed to her by the accused, in violation of Article of War 95.

Mrs. Crowell testified that on 8 October 1947, one day after she was employed as cashier at the officers' club, the accused called her into his office and told her that a Lieutenant Colonel who did not get along with his wife and who desired a bed mate was interested in meeting her. Nothing was said about any remuneration. Mrs. Crowell indicated that she was not interested, whereupon the accused told her that a woman of her age and stability would be more desirable in the dining room than the younger girl he had there. She was transferred to the dining room and her salary was increased. (R 68)

On cross-examination she admitted that in spite of a searching interrogation by an investigating officer on 24 October she first was unable to recall any embarrassing conversations with the accused and later recalled only that the accused told her that a Colonel wanted an introduction to her.

Prostitution is common lewdness of a woman for gain; the act or practice of a woman who permits any man who will pay her price to have sexual intercourse with her (United States ex rel Mettler v. Curran, 18 Fed (2d) 355, 356).

Considered in its most inculpatory aspects the evidence for the prosecution does not show that the accused solicited Mrs. Crowell to engage in acts of intercourse for gain. Furthermore her pre-trial statement made approximately two weeks after the alleged conversation completely destroys the probative effect of her testimony on direct examination. Accordingly we are of the opinion that the findings of guilty of Specification 5, Charge I cannot be sustained.

11. Under Specification 6, Charge I, the accused stands convicted of wrongfully soliciting Mrs. Lola Lassiter to commit acts of prostitution for hire or reward with unnamed persons to be directed to her by the accused in violation of Article of War 95.

Mrs. Lassiter testified that on 19 October 1946, the day after she was employed at the Officers' Club, the accused asked her if she wished to earn an extra $15.00 per week. "I (the witness) said sure and he said something about some rooms upstairs and that some officers had asked about me already. I didn't know exactly what he meant, at the time, but I figured it wasn't anything good." After the witness told the accused that she "didn't need money that bad," he asked her to keep his conversation confidential. She stated that she left the club 3 days later because of her conversation with the accused.

Although on cross-examination Mrs. Lassiter admitted that she had previously stated that she left the club for other reasons, we are of the opinion that the court may reasonably have inferred that the accused committed the alleged offense. Since, however the witness was at least partially impeached, and since her testimony was not corroborated it does not appear that the evidence of guilt is compelling. In view of the errors committed by the prosecution in attempting to create an impression that the accused had inferentially admitted the conversation with the woman concerned in all specifications of Charge I (See subparagraph 9 b above) and in commenting improperly on accused's silence with respect to the specifications of Charge I (See subparagraph 9c above), we are of the opinion that the record is not legally sufficient to support the findings of guilty of the specification.

12. Under Specification 1, 2, 3 and 4, Additional Charge I the accused stands convicted of having made false official statements, knowing the same to be untrue, concerning his civilian employment and educational background, in his application for commission in the Regular Army, dated 21 January 1946 and on the Supplemental Information for a Commission in the Regular Army form, 1 September 1946. Under Specification 5, Additional Charge I, the accused was found guilty of having falsely stated on the Supplemental Information for a Commission in the Regular Army Form that he had never been arrested, indicted or convicted of any civil offense other than a minor traffic violation which statement was untrue and known by accused to be untrue in that on 15 September 1938 he had been convicted of petit larceny in New York, all in violation of Article of War 95.

It was fully established by stipulated evidence that the statements in question were made by the accused as alleged and that those statements were in fact false. The falsity of these statements was also freely admitted by the accused in his sworn testimony. Accordingly, we are of the opinion that the accused's guilt of the offenses alleged in Specifications 1, 2, 3, 4 and 5 of Additional Charge I was established by clear and compelling evidence.

At the trial it was urged by counsel for the defense that since the false statements alleged to have been made under Specifications 1, 2, and 3 were all made on the same application for a Regular Army commission, those offenses should have been charged in one specification. He argued that the three statements were substantially part of the same transaction and that the allegations of three separate specifications amount to an unreasonable multiplication of charges (R 22). A similar argument was made with respect to Specifications 6 and 7 of Additional Charge I (23).

Although it is true that the charges and specifications upon which the accused was arraigned represent the types of multiplication of charges which the Manual for Courts-Martial seeks to discourage (MCM 1928, par. 27, p. 17) not only because some represent substantially the same transaction (Charge I: Specs 1, 2; Additional Charge I: Specs 1, 2, 3; Specs 4 and 5; Specs 6 and 7) but also because serious offenses are joined with minor derelictions (Additional Charge I: Specs 8, 9, 10, 11; Additional Charge III: Spec 1). Nevertheless such needless multiplication did not adversely affect the accused's substantial rights. The court found the accused not guilty of the mentioned minor offenses and the punishment for the false statements in violation of Article of War 95, which arose out of the same transaction cannot be increased by reason of a finding of guilty of several specifications all of which are laid under that Article.

It has been held that the rule against multiplicity of charges is neither jurisdictional nor substantive, but merely procedural as far as the findings are concerned (CM 273879 Simpson, 47 BR 99, 109; CM 275547, Garrett, 48 BR 77, 103). Since a finding of guilty of any one of the specifications laid under Article of War 95 would support a sentence to dismissal it does not appear that accused's substantial rights were adversely affected. Accordingly, we are of the opinion that the record is legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4, and 5 of Additional Charge I.

13. In Specification 7, Additional Charge I, it is alleged that the accused, in giving data for a new WD AGO Form Number 66-2 to replace a lost Form 66-2, at Greensboro, North Carolina, on or about 15 November 1945, made certain false official statements concerning his civilian education, which statements were known by the accused to be untrue in violation of Article of War 95.

The falsity of the pertinent entries was established by stipulation. The only question presented by the record with respect to this specification is whether the evidence shows that the accused made the alleged statements at the time and place alleged.

To establish the making of the alleged statements, the prosecution introduced the accused's Form 66-2 made at Greensboro, North Carolina. Entries on the form show that the accused attended Brown University and the University of Michigan. The form also contains a statement that no form 66-1 or 66-2 was available at Greensboro at the time the form was completed. The form bears accused's signature and that of Captain Ronald F. Sheppard, Air Corps, the Classification Officer (Pros Ex 28). It was shown on the cross-examination of the accused that at the time he made application for Officer Candidate School in 1942 he similarly misrepresented his educational background (R 186-188).

No evidence was introduced by the prosecution, however, that the accused actually stated his educational background at the time the form in question was prepared on 15 November 1945. Although no similar form may have been available to the classification officer, it does not follow that the entries on the form were based on statements made by the accused at that time. It is not inconceivable that the classification officer may have prepared the form from other records available to him, which might be found in accused's personnel file. It is true that the accused misrepresented his educational background at the time he applied for Officer Candidate School in 1942 and at other times, but he was not charged with that misrepresentation. In the absence of a showing that the accused personally made the alleged false statements at the time his 66-2 was prepared, the finding of guilty of Specification 7, Additional Charge I cannot be sustained.

14. Under Specification 1, Additional Charge II the accused stands convicted of embezzlement of $200.00, the proceeds of the sale of six slot machines, property of the Officers' Mess, Langley Field, Virginia, in violation of Article of War 93.

The evidence pertinent to the specification shows that the accused sold six slot machines for $200.00 pursuant to a directive from the Board of Governors of the Officers' Mess. He testified that he turned the proceeds of the sale over to Miss Ruby Mater, the cashier at the club. Miss Mater also testified, as a witness for the defense, that she received the money from the accused. The accused and Miss Mater indicated that the $200.00 might have been lumped with proceeds from slot machines and other gambling proceeds under the heading of "Receipts from Amusement Devices". On an occasion when the club lost money as a result of gambling activities, the cashier furnished money from her cash to pay the club's losses. The cash was reimbursed from subsequent "Receipts from Amusement Devices". The accused testified that the books showed income from this source of $937.15 on 9 August 1946; $720.30 on 15 August 1946; $735.00 on 22 August 1946; $1447.00 on 31 August 1946; $912.00 on 5 September 1946; $1001.90 on 13 September 1946; and $476.20 for 14, 15 and 28 September 1946. He suggested that the $200.00 might be in the $476.20 item for 14, 15 and 28 September.

Under the bookkeeping system in operation at the club, all money received was handled by the cashier who made a daily cash report which was sent to the bookkeeper who posted the amounts in the ledger. Money was never sent up to the bookkeeper, but was kept by the cashier until it was deposited in the bank. If money was received by the cashier, a record of the transaction was to be made by the cashier and sent to the bookkeeper for posting. Slot machines were carried under the "furniture and fixtures" account. The bookkeeper testified that she had no record pertaining to the receipt of $200.00. Colonel Gwynn, a finance officer who audited the books of the club, after testifying that the records were quite voluminous, testified that he found no entry pertaining to the receipt of the proceeds of the sale of the slot machines.

It is apparent from the record of trial that the system of bookkeeping at the club, insofar as it pertains to the receipts from gambling and slot machines was extremely loose and likely to be inaccurate. In the circumstances we are of the opinion that evidence of wrongful conversion of funds based upon an interpretation of such books and records by an auditor is insufficient to sustain a conviction of embezzlement in the face of the positive testimony of the cashier that she received the money in question from the accused. If the books reflect that the funds in question were missing, Miss Mater's testimony indicates that it was not the accused who embezzled them. Accordingly, we are of the opinion that the evidence does not establish beyond a reasonable doubt that the accused is guilty of the offense charged.

15. Under Specification 3, Additional Charge II, the accused stands convicted of the embezzlement of $100.00 from the petty cash fund of the Officers' Mess, Langley Field, Virginia, on or about 15 August 1946 in violation of Article of War 93.

It was proved that the accused as officer in charge of the Officers' Mess entered into a contract with representatives of an orchestra booking agency which provided for the appearance of Joe Sudy and his orchestra at the mess on 16 August 1946 for the total price of $400.00. One-half of this sum was paid on 7 August 1946 and the remainder was paid on the evening of the engagement. On the day preceding the engagement the accused withdrew $100.00 from the petty cash fund and in order to account for the withdrawal, he drew a check on the mess fund "to pay part of Transportation for Joe Sudy as per agreement" signing the check and supporting voucher himself. He did not deny getting the $100.00, but stated that he gave it to Jimmy Tyson, the agency's representative "on the side" pursuant to a verbal agreement at the time the contract was being negotiated, because the orchestra was being supplied at a cheap price and that was the only basis upon which Tyson would agree to furnish the orchestra. Tyson denied that he demanded or talked about any money in addition to the contract price or that he ever received the money from the accused. Joe Sudy also denied receiving any money in excess of that prescribed in the contract. A civilian auditor employed at the field testified that he had a conversation with the accused sometime in July or August concerning the withdrawal from the petty cash fund and that he told accused he should obtain a receipt from the receiver showing why

the money was expended. This was not done by the accused with respect to the transaction in question, although it was apparently done with respect to a similar offense alleged under Specification 4, Additional Charge II of which accused was found not guilty.

The accused testified that he did not actually pay the money to Tyson until he went to New York, a month after the withdrawal, and that he kept the money in a drawer in his desk in the meanwhile.

Lieutenant Leonard testified, for the defense, that he heard the accused, apparently talking long distance on the telephone, saying something about $100.00, and that after concluding the telephone conversation accused told the lieutenant that "one of those Joes from New York wants money on the side for bringing a band down here." The evidence for the prosecution establishes prima facie that the accused fraudulently converted the sum in question to his own use.

Embezzlement is defined in the Manual for Courts-Martial as

> "The fraudulent appropriation of property by a person to whom it has been entrusted on into whose hands it has lawfully come. (Moore vs U. S., 160 U.S. 268)" (MCM 1928, par 149h)
>
> "Any adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, can not complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence.
> "An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority can not complain if the natural presumption that he has made away with them outweighs any uncorroborated explanations he may make, especially if his explanation is inadequate and conflicting." (Dig. Op. JAG, 1912-1940, Sec. 451 (17))

See also to the same effect, CM 204879, Fleischer (1936), VIII BR 121 at page 139; CM 202137, Jack V BR 370. The effect of this rule was to place on accused the duty to either produce the money or make a satisfactory explanation of where it went.

The court was free to disbelieve the accused's explanation. Lieutenant Leonard's testimony tending to corroborate the accused's explanation was, of course, based on self-serving declarations made by the accused himself. Standing by itself the evidence pertinent to this specification appears to be sufficiently strong to support a conviction. The accused's explanation, however, is given some corroboration by the evidence pertinent to Specifications 4 and 5 of Additional Charge II which involve similar alleged offenses.

With respect to those specifications the prosecution introduced letters to accused from the Base Command, dated 6 January 1947, requiring the accused to reply by indorsement why $50.00 was withdrawn from petty cash to pay "Bob Chester for Hotel Bill" in addition to a payment of $600.00, whereas the contract with the orchestra leader provided for a total payment of $600.00, and also why $100.00 was withdrawn from petty cash to provide for payment in excess of the contract price to an orchestra leader named Dean Hudson. In reply to both letters the accused replied by indorsements, dated 9 January 1947, that the band leaders had refused to play at the club at the contract price and had insisted on additional remuneration. He stated that he was well aware that the demands were what is known as a "hold up" but felt that the club was getting a "good buy" even at the higher price (R 127, 141-142; Pros Ex 43 and 44). The accused in testifying reiterated the substance of his indorsements (R 182-6). Both Hudson and Chester testified that they did not receive any payment in excess of the contract price (R 27-28; 38). Mr. George Thompson, Chester's manager also denied receiving any payment in excess of the contract price (R 42).

As to Specification 4, Additional Charge II, involving the embezzlement of $100.00, which accused stated he had paid to Hudson, a receipt for $100.00 for "Hotel Bill for band" signed by Hudson, was introduced by the prosecution as part of prosecution's Exhibit 44 (R 127).

As to Specification 5, Additional Charge II, involving the embezzlement of $50.00, which accused stated he had paid to Thompson, Bob Chester's manager, Lieutenant Leonard testified, for the defense, that he was present when that payment was made and saw the accused hand $50.00 to "the chap who was with Bob Chester" (R 168).

Apparently the court gave considerable credence to the accused's explanation with respect to the payments to Hudson and Chester, respectively, because of the corroboration inherent in the signed receipt and Lieutenant Leonard's testimony.

It would thus appear that it was not an uncommon practice for personnel connected with orchestras playing at Langley Field to extort remuneration in excess of the stated contract price.

In view of the evidence tending to establish such extortionate practices on the part of persons connected with orchestras, it cannot be said that accused's explanation is not corroborated by credible evidence. Accordingly, although the evidence is legally sufficient to support the findings of guilty in the absence of prejudicial error, it cannot be said that the proof of guilt is established by compelling evidence. There remains for consideration whether the findings of guilty of the specification can be sustained in view of the errors committed with respect thereto. These errors are enumerated and discussed below:

a. The law member erroneously sustained an objection by the prosecution to the interrogation of a defense witness, who had obviously surprised the defense, as to an inconsistent pre-trial statement. Mr.

Glenn Rigel, an auditor employed in the Budget and Fiscal Office at Langley Field was called as a defense witness. He testified that he made monthly audits of the books of the Officers' Mess except for the months of October and November 1946 (R 159).

The record shows that during the course of direct examination of Mr. Rigel, the following occurred:

"Q. Mr. Rigel, do you recall having a conversation with Col. Gale sometime during the month of July or August, 1946, approximately August 1946---in reference to monies paid by him to orchestra leaders or orchestra managers or other people whom he had booked, in addition to the monies called for by the contracts of the bands?
A. Yes Sir.
Q. About when was that conversation?
A. I can't recall when it was.
Q. I don't mean the precise date ---approximately when was it?
A. I don't recall the exact month---I imagine it was in July or August.
Q. Will you tell the Court just what happened?
A. Col. Gale asked me if---well, he had made the expenditure of the sum of $100.00 or $50.00---I believe it was $100.00. He got it from the change of the petty cash fund at the Club, and he asked me if it had been handled as it should have been. I told the Colonel to protect himself, he should have a receipt signed by the receiver of the money showing why the money was expended.
Q. Did he tell you what the money was expended for?
PROSECUTION: I object:
DEFENSE: If the Court please---
LM: The objection is sustained.
DEFENSE: If the Court please, I don't want to be obstreperous---
LM: I have ruled on the questioning and I don't care to hear anything further.
DEFENSE: I want to read from the Manual, if the Court please---
LM: No, the ruling has been made, and that settles it.
DIRECT EXAMINATION CONT'D:
Q. Have you told us the entire conversation?
A. Yes Sir, as I recall it.
Q. As you recall it. Did you have a conversation with me a few days ago?
A. Yes sir.
Q. Where was that conversation had?
A. At the Officers' Club.
Q. Don't you recall making a statement to me at that time as to what Col. Gale had spoken to you about? Don't you recall telling me in connection with the hiring of the bands that he was being held up, Mr. Rigel---that the Club was being held up in having to pay this money out?

PROSECUTION: I object!
LM: Objection sustained.
DEFENSE: If I find---after calling a witness to the stand---and he makes a certain statement to me, and I call this witness to the stand for the purpose of bringing out what he told me, you mean I can't insist that he give the whole statement on the stand? I can't refresh his recollection?
LM: When I sustain an objection, that's the rule. I have ruled on the question." (R 160)

"DEFENSE: As far as I can see it, the effect, as far as a fair witness is concerned has been destroyed. And the Court won't permit me to explore this matter of the conversation I had with this witness---it won't let me go into the other testimony he may have given me and which I want to bring out.
LM: Let's let the Counsel be sworn and testify, if he has something to bring out.
DEFENSE: You know that I am not going to take the stand and be sworn ---you know I can't impeach my own witness!
LM: How do you propose to do it---by remarks to the Court and opinions and arguments? This is not the time for that.
DEFENSE: I only insist on my rights under the Manual---would the Court like me to read from the Manual?
LM: No--the Court is familiar with the Manual. You may continue with your examination.

DEFENSE: I will do the best I can---the only thing I can hope for is that higher authority can realize the injustice done the accused--that's all I can hope for. As far as the Law Member is concerned, the accused cannot possibly have a fair trial." (R 182)

"Q. I show you Prosecution's Exhibit #42 and the attached matter, which is a part thereof---this petty cash voucher for $100.00, dated 15 August 1946, on the Sudy orchestra---was that the one you had the conversation in respect to?
A. I can't recall whether it was Sudy or Hudson.
Q. You said it could have been Hudson---it might have been Sudy too, might it not?
A. I don't recall, Sir.
Q. Doesn't this refresh your recollection?
PROSECUTION: I object!
LM: Sustained." (R 163, 164)

It was serious error on the part of the law member to sustain the prosecution's objection to the interrogation of Mr. Rigel as to his out of court conversation with counsel for the accused. It was obvious that the defense was surprised by Rigel's failure to testify as to portions of the conversation he, as an auditor, had with the accused with respect to the reasons why it was necessary to withdraw $100.00 from the petty cash fund.

That surprise or entrapment of counsel, forms an exception to the rule which prohibits the impeachment of one's own witness is acknowledged by practically all authorities:

> "* * * Where a party is compelled to call a witness whom the law, or the circumstances of the case makes indispensible, or where a witness proves unexpectedly hostile to the party calling him, such party is permitted to impeach the witness. In the latter case it must first appear that the witness is hostile and that the party calling him has been surprised by the evidence given by the witness. The witness may then be asked if he has made inconsistent statements out of court, the time, place, and circumstances of the statement being described to him in detail, and upon his denial witnesses may be called in proof that he did make them. While a party surprised by the hostile evidence of his own witness may impeach such witness as indicated above, the party is not permitted to attack the reputation of such witness by showing that his general character is bad". (MCM 1928, par 124b, p 133)

> "* * * A witness who unexpectedly gives testimony at variance with statements made to a party or counsel before the trial may properly have called to his attention his former statements in order to refresh his memory and move him to speak the truth by probing his conscience, thus inducing him to correct his testimony or explain the apparent inconsistency, or to enable the party calling him in some way to neutralize his testimony * * *" (3 Wharton's Criminal Evidence, Sec 1392, p. 2278; Wigmore's Code of Evidence, Sec 825; 70 CJ Sec. 1227, p 1032; CM 258070 Smith, 1 BR (ETO) 377, 3870388)

Rigel's hostility may be inferred from the fact that he is a civilian employee in the Budget and Fiscal Section of Langley Field, whose Chief, Colonel Gwynn, was the principal witness for the prosecution with respect to the audits upon which the prosecution sought to establish the alleged embezzlements. Consequently counsel should have been permitted "to refresh his memory and move him to speak the truth by probing his conscience". It is readily apparent that had Rigel testified that the accused consulted him in his capacity as auditor with respect to the extortionate demand of the orchestra personnel and the proper methods for handling payment in excess of the contract price, the accused's explanation with respect thereto would have been at least partially corroborated. Furthermore, the law member's ruling denied the defense an opportunity to lay a foundation for impeaching the witness. In our opinion the law member's rulings were prejudicial to the accused's substantial rights.

The law member's intemperate invitation to counsel that the latter take the stand in impeachment of his own witness (R 162) was also highly improper. Furthermore, his refusal to permit the defense to refresh Rigel's recollection by means of the petty cash voucher which he had examined as auditor was also serious error.

b. The prosecution committed error in cross-examining the accused with respect to the accused's conviction of petit larceny in 1938 after that matter was no longer in issue in view of the stipulation to that effect, and in referring to that conviction in closing argument in connection with the specifications alleging embezzlement.

It was admitted in evidence on stipulation that in 1938 accused had been convicted of petit larceny for selling a Hoover vacuum cleaner belonging to his employer and converting the proceeds of $96.00 to his own use (R 112, 113, Pros Ex 31, 32, 33).

On cross-examination of the accused, the trial judge advocate asked him:

> "I ask you, as a matter of fact, how it was that there was $595.25 worth of unaccounted stock belonging to the Hoover Vacuum Cleaner Company? * * *" (R 188)

Although the defense's objection to this question was sustained, the trial judge advocate repeated the question (R 189).

Since the defense had freely admitted the prior conviction insofar as it was pertinent to Specification 5, Additional Charge I (false official statement), the only possible purpose of the cross-examination with respect thereto was to show that the accused was a chronic embezzler and thus establish a likelihood that he was guilty of the specifications alleging embezzlement for which he was now on trial.

In referring to the accused's conviction of petit larceny in his closing argument, the trial judge advocate commented:

> "* * * He didn't intend to do anything wrong when he sold the Hoover vaccum cleaner. He was in destitute circumstances - - his back was to the wall--don't hold that against him. I don't ask you to hold that against him now --I don't ask you to judge him on that now, but I do ask you to judge him on the false statement he has made. <u>The leopard doesn't change his spots.</u> From the very time the accused submitted his application for OCS, and his application for a commission in the regular army --- those two - - right down to his 66-2, he falsified straight down the line. He didn't miss a lick." (R 234) (Underscoring supplied)

This reference to the prior conviction, although it appears to us to be sarcastic and intemperate, may be considered as a proper comment concerning the credibility of the accused. It also pertains, strictly speaking, to the specifications alleging false official statements, although the remark, "The leopard doesn't change his spots" is suggestive of an inherent tendency on the part of accused to commit offenses similar to embezzlement.

That the latter innuendo was intended is shown by the trial judge advocate's further remark, pertaining particularly to the specification now under consideration:

> "According to the accused's statement, Jimmy Tyson must have been starving to death in New York because he didn't have the $100.00 - - - judging by the number of telephone calls that were made asking Colonel Gale about the 'loot' and to bring 'the loot' up there * * * like the accused when he sold the vacuum cleaner" (R 235)

It is well settled that evidence of previous similar offenses is not admissible to create an inference of guilt of an offense for which an accused is on trial, except as set forth below.

In relevant part the Manual for Courts-Martial provides:

> "A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference to former specific offenses or other misconduct, whether he has or has not ever been tried and convicted of their commission.
>
> "There are certain exceptions to this rule, among them the following:
>
> * * *
>
> "If the accused takes the stand as a witness, his reputation for truth and veracity may be shown. * * *
>
> "When criminal intent, motive, or guilty knowledge in respect of the act is an element in the offense, charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive, or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged. The court should not consider evidence so offered as bearing in any way on accused's character.
>
> "The following are illustrations of the rule and the exceptions:
>
> * * * *
>
> "On a charge of assaulting a fellow soldier with intent to wound, a former assault on another soldier six months before and under entirely different circumstances would not be admissible, having no bearing on the intent in the case charged.
>
> * * * *
>
> "On a charge of falsification of accounts of stores, the fact that the accused had embezzled some of the same stores, if offered as evidence of a motive for concealing the embezzlement by falsifying accounts, would be admissible; but evidence of a conviction of falsification before enlistment in a totally distinct transaction would be inadmissible, since such evidence bears solely upon his general moral character and not upon his present intent or motive. (MCM 1928, par 112 b. pp 112-113) (Underscoring supplied)

"Evidence of the conviction of any crime is admissible for the purpose of impeachment where such crime either involves moral turpitude or is such as to affect the credibility of the witness. * * * Before introducing such proof, the witness must first be questioned with reference to the conviction sought to be shown, in order that he may have an opportunity of denying or of admitting and explaining it. If the witness admits the conviction, other proof is unnecessary." (MCM 1928, par 124b, p 133) (Underscoring supplied)

It was, of course, proper to admit evidence of accused's prior conviction to show that accused had falsely stated that he had never been arrested, indicted, or convicted of any civil offenses. A statement, in closing argument, limited in its application to the offense alleged in Specification 5, Additional Charge I would have been proper. Under the circumstances it would have been good practice for the law member to instruct the court that the conviction of petit larceny should not be considered by the court in connection with the specifications alleging embezzlement, although the absence of such an instruction may not be error.

Nevertheless, it is obvious that the importance attached to the conviction by the prosecution in cross-examination, and in closing argument in connection with the alleged embezzlements had a strong tendency to induce the members of the court to attach improper inculpatory probative value thereto with respect to the similar offenses with which the accused was charged.

In our opinion the cross-examination of the accused and the remarks made in closing argument went beyond the scope of legitimate impeachment or legitimate comment with respect thereto.

In Vanderpool v. State, (211 N.W. (Neb) 605, 607) the defendant was cross-examined on details on a prior conviction. The appellate court, in reversing the conviction said:

"It is quite apparent that the line of inquiry after the question above quoted (whether defendant had ever been convicted of any felony) was not intended for the purpose of laying a foundation for impeaching the witness, but really for the purpose of showing that defendant was prone to acts of violence. Defendant having admitted his previous convictions, the further inquiry upon the subject was improper. It is a well recognized doctrine in criminal law that, ordinarily, previous convictions cannot be received in evidence as tending to establish the guilt of the offense for which accused is being tried * * *"

The erroneous cross-examination and undue emphasis on accused's prior conviction was prejudicial to the substantial rights of the accused, since the legal evidence of guilt was not such as to practically compel in the minds of reasonable men a finding of guilty (CM 114908, Dig Op JAG 1912-40, Sec 395 (7); CM 257634 Friend, 37 BR 193, 196 and

cases cited therein).

In view of the prejudicial errors enumerated above we are of the opinion that the findings of guilty of Specification 3, Additional Charge II cannot be sustained.

16. Among the many errors assigned by counsel for the accused in his brief is an allegation that the convening authority and his staff judge advocate had demonstrated a preconceived opinion of accused's guilt, and that the staff judge advocate had expressed his desire to convict the accused prior to the trial. It was argued that the convening authority was disqualified as reviewing authority by reason of his lack of impartiality and interest in the case.

The matters alleged by counsel in support of his assignment of error with respect to the convening authority's interest in the case are not reflected by the record of trial to which our consideration of the case is limited under the provisions of Article of War 50½ (CM 315052 Lemus Wood, 1st Ind). It does not appear from the record that the convening authority was disqualified under the provisions of Article of War 8 as being either the accuser or the prosecutor, or that his interest in the case was anything other than official (MCM 1928, par 5a).

With respect to counsel's allegations against the staff judge advocate the record shows that Miss Lilly McLaughlin, a witness for the prosecution, who testified with respect to Specifications 8, 9, and 10 Additional Charge I (Obscene remarks in violation of Article of War 95 of which accused was found not guilty) (R 81-88), stated on cross-examination that she had made a pretrial statement to the staff judge advocate and that the latter told her that charges were being brought against the accused. She also stated that he asked her whether she could furnish any evidence which would help in obtaining a conviction (R 86).

Defense counsel argued, at the trial and in his brief, that the staff judge advocate was disqualified from writing the review in this case (R 86).

The staff judge advocate did not have an opportunity to rebut the witness's testimony. It is also noted that the staff judge advocate's review was actually prepared by an assistant staff judge advocate. In this connection it is noted that in concurring in the reviewer's review the staff judge advocate commented in part:

> "With reference to my having taken the statement of the witness, Lillie McLaughlin, I did this when I found that she was leaving Langley Field permanently the following morning. Her original statement was rambling and extremely verbose and I

shortened it, reminding her that only the bare facts should remain. I put no words into her mouth as to what Colonel Gale had said to her, to Captain Wassum, or to Corporal Beshear, WAC.

"As to defense counsel's insistance that I am not eligible to review the case, both Article of War 70 and the Manual for Courts-Martial require me specifically to examine into the evidence before a case is sent to trial. I would not be doing my duty if I sent a case to trial not believing the available evidence to indicate that the accused is guilty of every charge and specification set forth on the charge sheet."

It is not inherently improper for a staff judge advocate to assist in the investigation of offenses which come to his attention officially. The provisions of Article of War 70 and paragraph 35b, Manual for Courts-Martial, 1928, require a reference to the staff judge advocate before the appointing authority may direct the trial of any charge by a general court-martial. When charges are so referred, it becomes the duty of the staff judge advocate to examine the charges and accompanying papers, to ascertain if the charges and specifications are properly drawn, that they have been properly investigated, and that there is sufficient evidence to warrant trial. If it appears that the investigation is inadequate he may recommend the return of the papers for further investigation. Conceivably, to save time, he may assist in such further investigation or personally interview witnesses to ascertain whether the evidence warrants trial.

It would be unrealistic to assume that during the course of his examination of the charges and accompanying papers the staff judge advocate will not form at least a tentative opinion as to the merits of the case. It is to be assumed, however, that he will not permit his personal opinion to exercise any undue influence in connection with his further processing of the case both before and after trial or to interfere with his objectivity with respect thereto.

It may also be reasonable to assume that the members of the court are familiar with the provisions of Article of War 70 and that they realize that the staff judge advocate and the appointing authority have arrived at the opinion, that there is sufficient evidence available to warrant trial and to establish a prima facie case, but not that the accused is guilty. Such knowledge on the part of the court is presumed not to affect their presumption of the accused's innocence. It must also be presumed, prima facie, that the court tried the case according to the evidence pursuant to its oath (AW 19). Great care must be exercised that no suggestion of the appointing authority's or the staff judge advocate's personal opinion as to the merits of the case come to the attention of the court (MCM 1928, par 41d, p 32, CM 125676, Dig Op JAG, Sec 395 (53); CM 260478 Mankowski, 39 BR 277; CM 291499 Thorne, 7 BR (NATO - MTO) 287; CM 318664 Lapada, 6 Bull JAG 122)

In the instant case, a purported suggestion of the staff judge advocate's views came to the attention of the court upon the cross-

examination of a witness for the prosecution. This information was elicited by the defense.

It does not appear, from the record as a whole, that the staff judge advocate's purported expression of his personal opinion, influenced the court in arriving at its findings. The accused was found not guilty of many specifications including those concerning which Miss McLaughlin testified.

In those cases where the issue as to accused's guilt or innocence is in delicate balance, error of the kind asserted by the defense would affect the legal sufficiency of the record. In our opinion any possible error in disclosure to the court of the matters complained of may be cured in the instant case by confirming action in disapproving the findings of guilty which, as indicated above, are not supported by clear and compelling evidence of guilt.

17. The accused is 33 years of age, married, and supports his mother and father and his wife's child by a former marriage. A summary of his testimony with respect to his civilian background and experience may be found in paragraph 4 above. War Department records show that he was inducted into the military service on 5 January 1942. After successfully completing the Army Air Forces Administrative Officer Candidate School he was commissioned as a Second Lieutenant, Army of the United States on 5 August 1942. He was promoted to First Lieutenant on 15 January 1943; to Captain on 5 June 1943; to Major 12 February 1944; and to Lieutenant Colonel on 17 May 1945. He served in North Africa and Italy from June 1943 until August 1945. His War Department Personnel file shows that he was awarded the Bronze Star Medal on 9 November 1944. On 5 July 1944 he was reprimanded under the provisions of Article of War 104 for refusing to comply with the orders of a British Military Policeman who was in the execution of his office. Efficiency ratings available in the War Department show that he was rated Superior from 1 January 1944 until August 1945. He was not rated from August 1945 until 31 December 1945. He was again rated Superior from 1 January 1946 until 29 August 1946. Thereafter he was rated Unsatisfactory by the Commanding Officer, 304th AAF Base Unit.

18. As indicated above, consideration has been given to oral argument and to a brief filed on behalf of accused by Mr. Irvin Waldman. In addition thereto consideration has been given to letters, dated 2 and 14 April, addressed to the Secretary of War from Mrs. Clarice Gale, wife of accused.

19. The court was legally constitued and had jurisdiction of the person and the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specifications 1, 5 and 6 thereunder; legally sufficient to support the findings of guilty of Additional Charge I and Specifications 1, 2, 3, 4 and 5 thereunder; legally insufficient to support the findings of guilty of Specification 7, Additional Charge I; legally insufficient to support the findings of guilty of Additional Charge II and Specifications 1 and 3 thereunder; legally sufficient to support only so much of the sentence as provides for dismissal and legally sufficent to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 95 and no other punishment is authorized upon such conviction.

On Leave, Judge Advocate

T. McDonald Gray, Judge Advocate

Walbemar A. Self, Judge Advocate

JAGH-CM 323089 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C. OCT 1 - 1947
TO: Secretary of the Army

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 Lieutenant Colonel Myron Gale, O-561064, Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully soliciting certain women employees at the Langley Field Officers Mess to commit acts of prostitution (Charge I, Specs 1, 5, 6); of making false official statements with respect to his educational and civilian employment background, and of falsely concealing a civilian conviction for petit larceny, in connection with his application for a Regular Army commission and in supplying data for a WD AGO Form 66-2 (Additional Charge I, Specs 1, 2, 3, 4, 5, 7), all in violation of Article of War 95; and of embezzling a total amount of $300.00, property of the Langley Field Officers Mess, in violation of Article of War 93 (Additional Charge II, Specs 1, 3). 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 two and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specifications 1, 5 and 6 thereunder (solicitation for prostitution); legally sufficient to support the findings of guilty of Additional Charge I and Specifications 1, 2, 3, 4 and 5 thereunder (false official statements in connection with application for a commission in the Regular Army); legally insufficient to support the findings of guilty of Additional Charge I, Specification 7 (false official statement in furnishing data for a WD AGO form 66-2); legally insufficient to support the findings of guilty of Additional Charge II and Specifications 1 and 3 thereunder (embezzlement); and legally sufficient to support only so much of the sentence as provides for dismissal, and to warrant confirmation thereof. I concur in that opinion.

On 21 January 1946 the accused executed an application for commission in the Regular Army and on 1 September 1946 he executed a Supplemental Information form for a Commission in the Regular Army. On these forms the accused stated that he had attended Brown University for four years and had been graduated with a Bachelor's Degree in Economics; that he had taken a one year post-graduate course at the University of Michigan, majoring in Merchandising; that he had been employed by Hart-Schaffner and Marx from 1935 until 1942 as merchandise and sales manager;

that he had been employed by the Atlanta Hub Company, New York City as Road Merchandise and Sales Manager for thirty-two stores supervising the work of 500 employees; and that he had never been arrested, indicted, or convicted of any civil offense other than a minor traffic violation. Stipulated evidence showed that accused had never attended either Brown University or the University of Michigan; that he had never been employed by Hart Schaffner and Marx; that he had been employed by one store of the Atlanta Hub Company as a credit manager supervising the work of five or six employees; and that in 1938 he had been convicted of petit larceny of $96.00, the proceeds of the sale of a Hoover Vacuum cleaner, in the Court of Special Sessions of the City of New York, County of Kings.

Misrepresentations as to accused's educational background appeared on accused's WD AGO form 66-2 which was prepared at Greensboro, North Carolina, on 15 November 1945. There was, however, no evidence that the accused made any misrepresentations at the time and place alleged. He had made similar misrepresentations in connection with his application for Officer Candidate School in 1942. For all that appears in the record, the classification officer who prepared the form 66-2 may have obtained the data from records appearing in accused's personnel file.

With respect to the findings of guilty of Charge I and Specifications 1 and 6 thereunder which involve the alleged solicitation of various women to commit acts of prostitution, the credibility of the witnesses for the prosecution was seriously impeached on cross-examination and the prosecution commited prejudicial error by commenting improperly on accused's silence with respect to those specifications. With respect to a similar offense alleged in Specification 5 of Charge I there was a complete failure of proof.

Under Specification 1 of Additional Charge II the accused was alleged to have embezzled $200.00, the proceeds of the sale of six slot machines. The slot machines were sold on 15 September 1945, pursuant to the resolution of the Board of Governors of the Langley Field Officers Club, of which club the accused was the officer in charge. Both the accused and the cashier of the club testified that the accused turned the money over to the cashier but the books of the club did not show any entries pertaining thereto. The books of the club with respect to the proceeds of gambling winnings were kept in an extremely loose manner. Both accused and the cashier testified that the proceeds of the sale of the slot machines could have been, and probably were included in funds reported and entered on the books as "Receipts from Amusement Devices." Under the circumstances, it does not appear that the evidence establishes beyond a reasonable doubt the accused's guilt of the embezzlement alleged.

With respect to the finding of guilty of Specification 3, Additional Charge II, involving the embezzlement of $100.00, the proof is not strong. Prejudicial error in not affording the defense an opportunity to impeach a hostile witness and improper arguments by the prosecution

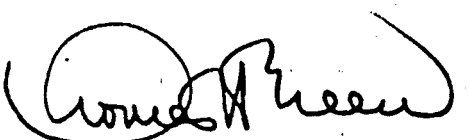
necessitate the disapproval of the findings of guilty of that specification.

4. The accused is 33 years of age, married and supports his mother and father and his wife's child by a former marriage. War Department records show that he was inducted into the military service on 5 January 1942. After successfully completing the Army Air Forces Administrative Officer Candidate School he was commissioned as a Second Lieutenant, Army of the United States, on 5 August 1942. He was promoted to First Lieutenant on 15 January 1943; to Captain on 5 June 1943; to Major 12 February 1944; and to Lieutenant Colonel on 17 May 1945. He served in North Africa and Italy from June 1943 until August 1945. His War Department Personnel file shows that he was awarded the Bronze Star Medal on 9 November 1944. On 5 July 1944 he was reprimanded under the provisions of Article of War 104 for refusing to comply with the orders of a British Military Policeman who was in the execution of his office. Efficiency ratings available in the War Department show that he was rated Superior from 1 January 1944 until August 1945. He was not rated from August 1945 until 31 December 1945. He was rated Superior from 1 January 1946 until 29 August 1946. Thereafter he was rated Unsatisfactory by the Commanding Officer, 304th AAF Base Unit.

5. Consideration has been given to a brief filed by Mr. Irvin Waldman, attorney for accused, and to oral argument by Mr. Waldman in behalf of the accused. Consideration has also been given to letters, dated 2 and 14 April respectively, addressed to the Secretary of War from Mrs. Clarice Gale, wife of accused.

6. I recommend that the findings of guilty of Charge I and Specifications 1, 5 and 6 thereunder, Specification 7, Additional Charge I; and Additional Charge II and Specifications 1 and 3 thereunder be disapproved; that only so much of the sentence as provides for dismissal be approved, and that the sentence as thus modified be confirmed and carried into execution.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(Dept Army, GCMO. 27 , 22 Oct 1947).

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

JAGH-CM 323108

26 AUG 1947

UNITED STATES v. Major JAMES D. ROCKETT (0-436538), Air Corps	TECHNICAL DIVISION, AIR TRAINING COMMAND SCOTT FIELD, ILLINOIS Trial by G.C.M., convened at Boca Raton Army Air Field, Boca Raton, Florida, 27 May 1947. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, GRAY and SOLF, 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. Accused was tried on the following Charges and Specifications:

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

Specification 1: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, did, without proper leave, absent himself from his station at Keesler Field, Mississippi, from about 5 January 1947 to about 13 January 1947.

Specification 2: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), did, at Boca Raton Army Air Field, Boca Raton, Florida, on or about 4 February 1947, fail to repair at the fixed time to the properly appointed place of duty for instruction in Class 01067-2B.

Specification 3: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), did, at Boca Raton Army Air Field, Boca Raton, Florida, on or about 5 February 1947, fail to repair at the fixed time to the properly appointed place of duty for instruction in Class 01067-2B.

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

Specification 1: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, being indebted to Messrs M. S. Millikin, M. L. Reynolds, and E. W. Hollar, jointly, in the sum of $950. for money lost in a dice game with the said Messrs Millikin, Reynolds and Hollar, which amount became due and payable on 17 July 1946, did, at Boca Raton, Florida, from 17 July 1946 to 7 March 1947, dishonorably fail and neglect to pay said debt.

Specification 2: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, being indebted to Captain John N. Buckley in the sum of $5.00, for cash borrowed from said Captain John N. Buckley on 11 December 1946, which amount became due and payable on 20 December 1946, did, at Boca Raton, Florida, from 20 December 1946 to 12 February 1947, dishonorably fail and neglect to pay said debt.

Specification 3: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, being indebted to Major Albert Criz in the sum of $20.00 for money borrowed from the said Major Albert Criz, on or about 15 December 1946, did, at Boca Raton, Florida, from 20 December 1946 to 12 February 1947, dishonorably fail and neglect to pay said debt.

Specification 4: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, being indebted to Captain Alexander Y. Mitchell), in the sum of Forty Dollars ($40.00), for cash borrowed from the said Captain Mitchell, which amount became due and payable on or about 1 December 1946, did, at Boca Raton, Florida, from about 1 December 1946 to about 18 March 1947, dishonorably fail and neglect to pay said debt.

Specification 5: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, being indebted to John A. Inayer in the sum of $200. for house rent which became due and payable 8 March 1947, did, at Boca Raton, Florida, from 8 March 1947 to 16 April 1947, dishonorably fail and neglect to pay said debt.

Specification 6: In that Major James D. Rockett, attached unassigned Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, being indebted to John A. Thayer in the sum of $200. for house rent which became due and payable 8 April 1947, did, at Boca Raton, Florida, from 8 April 1947 to 16 April 1947, dishonorably fail and neglect to pay said debt.

Specification 7: In that Major James D. Rockett, attached unassigned, Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, did, at West Palm Beach, Florida, on or about 18 November 1946, with intent to defraud, wrongfully and unlawfully make and utter to Burdine's West Palm Beach, Florida, a certain check in words and figures as follows, to wit:

ATLANTIC NATIONAL BANK O.K.

W. PALM BEACH, FLA NOV 18, 1946 NO____

PAY TO THE ORDER OF ----------BURDINE'S ---------- $ 28.95

- Twenty-Eight Dollars and 95/100 ---------- DOLLARS

ADDRESS Morrison Field /s/ JAMES D. ROCKETT MAJ AC 0436538

(Endorsement on back of check)
PAY TO THE ORDER OF
ATLANTIC NATIONAL BANK
OF WEST PALM BEACH, FLORIDA
BURDINE'S INC

and by means thereof, did fraudulently obtain from said Burdine's, merchandise of the value of $28.95, he, the said Major James D. Rockett, then well knowing that he did not have and not intending that he should have sufficient funds in the Atlantic National Bank of West Palm Beach, Florida, for the payment of said check.

Specification 8: In that Major James D. Rockett, attached unassigned, Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, did, at Palm Beach, Florida, on or about 31 December 1946, with intent to defraud, wrongfully and unlawfully make and utter to Ted Stone, Manager of TA-BOO Liquor Store, a certain check in words and figures as follows, to wit:

No _____ Dec 31, 1946.

ATLANTIC NATIONAL BANK
WEST PALM BEACH, FLA.

PAY TO THE ORDER OF ——— TA-BOO

——— Five ——— 00/XXX DOLLARS

$ 5 00/xxx /s/ JAMES D. ROCKETT
MAJ AC 0436538

(Endorsement on back of check)
PAY TO THE ORDER OF
THE FIRST NATIONAL BANK
IN PALM BEACH, FLA
TED STONE
TA-BOO, INC
OPERATING ACCOUNT

and by means thereof, did fraudulently obtain from said Ted Stone, merchandise of the value of $5.00, he, the said Major James D. Rockett, then well knowing that he did not have and not intending that he should have sufficient funds in the Atlantic National Bank of West Palm Beach, Florida, for the payment of said check.

Specification 9: In that Major James D. Rockett, attached unassigned, Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, did, at Palm Beach, Florida, on or about 1 January 1947, with intent to defraud, wrongfully and unlawfully make and utter to Ted Stone, Manager of TA-BOO Liquor Store, a certain check in words and figures as follows, to wit:

No ____ Jan 1 1947.

ATLANTIC NATIONAL BANK
W. PALM BEACH FLA.

PAY TO THE ORDER OF TA-BOO

SEVENTY DOLLARS & oo/100 ——— DOLLARS

$70.00 /s/ JAMES D. ROCKETT
MAJ AC 0436538

(Endorsement on back of check)

PAY TO THE ORDER OF
THE FIRST NATIONAL BANK
IN PALM BEACH, FLA
TED STONE
TA-BOO, INC
OPERATING ACCOUNT

and by means thereof, did fraudulently obtain from said Ted Stone, merchandise of the value of $70.00, he, the said Major James D. Rockett, then well knowing that he did not have and not intending that he should have sufficient funds in the Atlantic National Bank of West Palm Beach, Florida, for the payment of said check.

Specification 10: In that Major James D. Rockett, attached unassigned, Squadron K-1, 3501st Army Air Forces Base Unit (Radar Technical School), Boca Raton Army Air Field, Florida, being indebted to Ted Stone, in the sum of $78.35, for goods had and delivered, which amount became due and payable on or about 26 December 1946, did, at Boca Raton, Florida, from 26 December 1946 to 12 February 1947, dishonorably fail and neglect to pay said debt.

He pleaded guilty to all the Specifications of Charge I and Charge I, not guilty to all the Specifications of Charge II and Charge II. He was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial under Article of War 48.

3. The following evidence was introduced as to Charge I and the Specifications thereunder.

For the prosecution:

Accused absented himself without leave from his proper station from 5 January 1947 to 13 January 1947 (R. 7, Pros. Ex. 1). Accused failed to repair at the fixed time to the properly appointed place of duty for class instruction on 4 February and again on 5 February 1947 (R. 9, Pros. Ex. 2).

For the defense:

Accused pleaded guilty to the Charge and the three specifications thereunder, and in extenuation testified that while on leave he suffered with hemorrhoid trouble which prevented him from traveling, thus causing his absence without leave. He did not report to a doctor (R. 23, 24, 25). He testified that he was again bothered with hemorrhoids on 4 and 5 February 1947, and for that reason failed to repair to scheduled classes. He did not get a medical excuse to cover his absences from class (R. 26). He testified that he had formerly had hemorrhoid trouble and had had an operation therefor. On 23 April 1947 accused was given a physical and neuropsychiatric examination, at which time he was found to have a moderate hemorrhoid condition (R. 32).

4. The following evidence was introduced as to Charge II and the Specifications thereunder:

Specification 1: The prosecution introduced depositions by Mr. Hollar and Mr. Reynolds (R. 10, Pros. Ex. 3, 4), the substance of which was that on or about 17 July 1946, accused was playing in a dice game with them and a third party, in Hickory, North Carolina. During the course of the game accused wrote checks in the amount of $950.00 to cover his losses and gave them to Hollar, Reynolds, and Millikin. The checks were drawn on the Atlantic National Bank, West Palm Beach, Florida, and were returned by the bank because payment had been stopped. No reimbursement therefor was made to any of the three men.

Accused admitted that he voluntarily engaged in the dice game to which reference has been made, and that he had played with the other participants on previous occasions (R. 26). He admitted issuing six checks in the total sum of $950.00 during the course of the game (R. 27, 28, 29, Pros. Ex. 15, 16, 17, 18, 19, 20). He stated that the dice game was illegal in North Carolina; that he had reason to believe that the game was crooked, and that when a spectator thereto expressed the same belief he, the next morning, stopped payment on the checks (R. 24).

Specification 2: The prosecution introduced Captain Brickley, who testified that on 11 December 1946, at the request of the accused, he paid for accused a $250 loss in a bridge game, and that soon thereafter, at the request of the accused, he loaned him another $2.50. Accused was to repay the $5.00 by 20 December 1946, when Christmas leave started. He did not see accused again until 13 January 1947, at which time he did not mention the debt. He never saw accused again but the loan was repaid by money order shortly before the trial (R. 11, 12).

Accused admitted that he borrowed the $5.00, and stated that he fully intended to repay the loan but was unable to do so before 20 December 1946, on which date he left Keesler Field very hurriedly (R. 23, 29).

Specification 3: Prosecution introduced Major Criz, who testified that on or about 15 December 1946, he loaned accused, who lived next door to him in Bachelor Officers' Quarters, $20.00, at which time accused mentioned repaying him, he "believed" on 18 December when Criz was to leave for Christmas vacation (R. 12). There was no specific agreement as to the time of repayment. Witness stated that he was not available at all times prior to going on Christmas leave, as he was quite busy getting ready to depart (R. 13).

Accused admitted the loan and stated that he had full intentions of paying it (R. 23, 29). He did not see Major Criz from 19 December 1946 until the day of the trial, due to the fact that he left Keesler Field very suddenly. He stated that he repaid Major Criz after commencement of these proceedings (R. 30).

Specification 4: Prosecution introduced Captain Mitchell as a witness, who testified that on 25 November 1946, when accused reported to Keesler Field, he loaned accused $40.00, which accused "was supposed to pay me (Mitchell) as soon as he received his travel pay" (R. 13). He stated that accused did not repay him until shortly before trial, and that he did not see accused after the loan was made (R. 14).

Accused admitted the loan, and stated that he fully intended to repay it, but that he did not do so until 13 May 1947 because he just didn't have the money. Accused made no attempt to reach or contact Captain Mitchell (R. 23, 30).

Specifications 5, 6: These specifications charge that accused dishonorably neglected and failed to pay John A. Thayer $200.00 for rent due and payable on 8 March 1947 and a like amount due 8 April 1947. Prosecution introduced Thayer who testified that on 8 February 1947, as agent for the owner, he rented an apartment to accused and that $200.00 per month rental was to be paid in advance. The accused moved into the apartment on 8 February. He testified further that accused was dilatory in paying the rent for the first month, but paid it during March. As far as Thayer was concerned, on 16 April 1947, accused owed a total of $400.00 for rent for the two monthly periods beginning 8 March and 8 April, but he did not know whether accused paid the rent to the landlord (R. 14, 15). Thayer testified that he had been told by the landlord that accused had paid the rent for the period up to 8 April 1947 (R. 16).

Accused admitted renting the apartment at the rental terms stated, and that rental for the month beginning 8 February was paid after the due date. He stated that on or about 15 April he paid the landlord for the month beginning 8 March (R. 24, 30). He had made an agreement with the landlord to the effect that he didn't have to pay the rent in advance. She told him that she would "go along" with him until he collected his flying pay, which he had not been able to collect since he lost his Form 5 (R. 30).

Specifications 7, 8, 9: These specifications charge that accused, with intent to defraud, wrongfully made and uttered three several checks in the sums of $28.95, $5.00, and $70.00, knowing that he did not have sufficient funds in drawee bank, Atlantic National Bank, West Palm Beach, Florida, for payment of said checks.

Prosecution introduced the credit manager of Burdine's to whom the $28.95 check was given for merchandise received who testified that the check had been returned from the bank marked "insufficient funds" (R. 17, Pros. Ex. 6). Burdine's had never received any money or payment on the check, or any reply to letters written to the accused on the subject of payment on 20 November 1946, 17 January 1947, and 15 April 1947. The last-mentioned letter was forwarded by registered mail, and a return receipt signed by accused was received by Burdine's (R. 17, 18, Pros. Ex. 7, 9).

Accused admitted that he made and uttered the check to Burdine's, and stated that he believed he had enough money in the bank to cover it (R. 24, 31). He had received no correspondence from Burdine's, probably because of his frequent changes of station, until the registered letter reached him on 24 April 1947 (R. 24, 31, Pros. Ex. 9). Since that date he had not had sufficient money with which to pay it (R. 31).

Prosecution introduced as a witness Mr. Stone, operator of TA-BOO, a kind of eating establishment and night club, who testified that on 31 December 1946 he cashed a $5.00 check for accused (R. 19, Pros. Ex. 10). On the same night or the following day he cashed a $70.00 check for accused. Accused received cash for both checks and both checks were returned by the bank marked "insufficient funds" (R. 19, 20, Pros. Ex. 11, 12). Mr. Stone testified that on 28 January 1947, he wrote to accused informing him of the return of the two checks, and that accused replied by telegram dated the same day asking for a complete bill so the account could be settled (R. 21, Pros. Ex. 14). Since that time he had had no further correspondence with accused, but accused had discussed the matter with him several times and the whole thing was on a friendly basis. During his last conversation with accused, the latter said he hoped to take care of the matter within a few weeks (R. 21). The accused had frequently dined at TA-BOO, and Stone's previous dealings with him were very satisfactory (R. 22).

Accused admitted cashing the two checks at TA-BOO. He stated that an officer from Morrison Field was supposed to have deposited $130.00 to accused's account on or before 31 December 1946; that he wrote the checks believing the $130.00 had been deposited and the checks would be honored (R. 23). Accused further stated that he had asked the Trial Judge Advocate to subpoena this officer from Morrison Field and that the subpoena was served, but that he received information on the day of the trial that the officer could not attend because of difficulties at home (R. 23).

Specification 10 charges that accused did dishonorably fail and neglect to pay a debt of $78.35 to the aforementioned Mr. Stone from 26 December 1946 to 12 February 1947. Prosecution introduced Mr. Stone who stated that the debt was incurred on 26 December 1947 for food and liquor consumed by accused and his wife, and that no payment had been made. He had requested payment on 28 January, had subsequently thereto, on various occasions, discussed the matter with accused, and that during the last discussion the accused said that he hoped to take care of the matter in a few weeks. He stated that he did not doubt this statement (R. 20, 21, 22, 23, Pros. Ex. 13). Mr. Stone did not recall whether accused had ever had a charge account with TA-BOO prior to the time this debt was incurred, but accused had been in there many times (R. 22). The accused admitted the indebtedness charged (R. 23).

5. After having been warned of his rights by the law member, accused elected to be sworn and testified that he returned to the United States in May 1946, after almost four years in the European Theatre (R. 23). Upon his return from recuperation leave, he reported to Morrison Field (Florida).

On 20 June 1946 his fiancee (later his wife) arrived in New York from England by air. She was from a wealthy family and was accustomed to have quite a bit of money, but could bring only $300.00 with her. She lived in various hotels in New York and Florida and had heavy expenses. After he was married he took an apartment in Palm Beach, where he lived until November 1946, when he was transferred to Keesler Field for a meteorology course, leaving his wife in Palm Beach. When he went on Christmas leave he lavishly entertained his wife at the TA-BOO and other places. It was during the period from June to December 1946 that he borrowed the money, wrote the checks, and requested the $130.00 loan (to which reference has been made above). He stated that his absence without leave and his failure to repair to scheduled classes was occasioned by hemorrhoid trouble. He moved his wife to Keesler Field but before he could locate an apartment he was transferred to Boca Raton Field for an Engineering and Survey course. Orders for the latter move were not received until 18 or 19 January to report for classes on 20 January. In the consequent hurry to depart he did not pay his obligations, and left his Form 5 and his clothes at Keesler Field. He stated that his expenses at Boca Raton Field were very high because he had to keep his wife in a hotel while "the season was in full swing." His pay was reduced $160.00 for being absent without leave at Keesler Field, and this was a financial blow to him, particularly because he did not have his Form 5 and so could not collect flying pay. The remainder of the pertinent testimony of accused has been set forth in the preceding paragraph (R. 23, 24).

6. As to Specifications 1, 2, and 3 of Charge I and Charge I, the evidence clearly establishes the guilt of the accused. He admitted the necessary facts and pleaded guilty to the Charges and Specifications. Accordingly, it is the opinion of the Board of Review that the findings of guilty are supported by clear and compelling testimony as well as by the plea.

7. As to Charge II and the Specifications thereunder:

Under Specification 1 accused was convicted of dishonorably failing and neglecting to pay debts in a total amount of $950.00 for money lost in a dice game. The accused admitted writing checks totalling that amount, delivering same to the persons named, and stopping payment thereon. The accused testified, without contradiction, that the dice game was illegal in North Carolina, the situs of the game. Under the laws of that state, the debt was void and was not a legal obligation of accused (sec. 2142, N. C. Code of 1939; Gooch vs Faucett, 29 S. E. 362). Furthermore, the accused disputed the fairness of the game in which he incurred the debt, and explained the grounds for his belief that the game was "crooked." Accused's testimony in this respect is uncorroborated. But there is no presumption that a gambling game conducted in violation of law is fair. Under these circumstances, the Board of Review is of the opinion that the evidence did not establish beyond a reasonable doubt that the failure of accused to pay these debts was wrongful and dishonorable (CM 203609, Upton, 7 BR 241, 261).

Under Specifications 2, 3, and 4, accused was convicted of dishonorably failing and neglecting to pay debts in the sums of $5.00, $20.00, and $40.00 to three several Army officers. The debts were freely admitted. The times set for payments were rather indefinite. In two of the cases the specifications allege nonpayment for less than two months after due date. In the other case payment was to be made when accused received his travel pay. There is no evidence that the accused ever received this travel pay. During the periods of default charged, two of the creditors never saw the accused; the other creditor saw him but once. No demand was made for the payment of any of the debts. All were paid before trial. The gravamen of the offenses charged in these three specifications lies in the dishonorable character of his failure to pay the debts, arising from circumstances which so characterize it, not from the default (CM 246776, Dittmer, 30 BR 157, 170; CM 270400, Lawson, 45 BR 257; CM 232882, Koford, 19 BR 229). It is the opinion of the Board of Review that the record of trial is legally insufficient to characterize the failure to pay these debts as dishonorable, and to support the findings of guilty under Specifications 2, 3, and 4 of Charge II.

Under Specifications 5 and 6 the accused was convicted of dishonorably failing to pay John A. Thayer, an agent for the landlord, amounts due for rental of an apartment on 8 March 1947 and 8 April 1947. These debts were past due for 39 days and 8 days respectively. The accused testified that he had not paid the rent in advance, as provided in the rental agreement, but stated that he had explained his predicament to the landlord, had actually paid the March rent on 15 April, and that the landlord had agreed to go along with accused until he collected his flying pay. Thayer testified that the accused had subsequently paid directly to the landlord the rent due 8 March, and that he did not know whether the rent due 8 April had been paid or not. It is therefore undisputed that accused was dealing directly with the landlord, and no evidence was introduced to contradict accused's statement as to a waiver by the landlord of that portion of the rental agreement relating to payment in advance. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him (CM 235676, Davis, 22 BR 201, 209). The record discloses no false representation, fraud, deceit, or dishonorable conduct in connection with the accused's delay in the payment of these debts. His defaults, although only for brief periods, are not commendable, but certainly could not be deemed dishonorable and particularly so when, as in this case, the officer had been in financial straits for some months (CM 248934, Murray, 31 BR 389, 399). The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty under Specifications 5 and 6 of Charge II.

Under Specifications 7, 8, and 9, accused was convicted of wrongfully and unlawfully making and uttering, with intent to defraud, three several checks well knowing that he did not have, and not intending that he should have, sufficient funds in drawee bank for payment of same. One check (to Burdine's) for $28.95 was written on 18 November 1946.

Accused testified that at the time this check was written he believed he had sufficient money in the bank to cover it. No evidence was introduced as to the actual condition of his account at the time this check was written, though it was shown that two days later the check had been returned for insufficient funds. There is no evidence that accused received notice that the check had been returned until 24 April, approximately a month before the trial. During the period from shortly before the check was written until accused received notice of the return of the check, accused lived in various hotels and apartments in West Palm Beach, Morrison Field, Keesler Field, Boca Raton Field, and Delray Beach. It is not incomprehensible that during such a period he would fail to receive his bank statements or the notice from Burdine's. After accused was informed that the two checks written to TA-BOO had been returned, he had various conferences with payee about them, and the matter was being handled on a friendly basis.

There is no evidence, as to the Burdine check, that accused did not intend that there should be sufficient funds to meet it, or that he wrote the check with intent to defraud, or as to the actual condition of his account at the time the check was written. As to the two checks written to TA-BOO, however, he knew that he personally had not deposited sufficient funds to cover them. He stated that another officer had agreed to deposit to his account, on or before 31 December, the sum of $130.00. That same evening he wrote checks in a total amount of $75.00. Such action on the part of the accused was certainly not sound business practice. But the record discloses that accused requested the Trial Judge Advocate to subpoena that officer, who might corroborate accused's statement; that the subpoena was served, but that this officer did not appear at the trial. The fact that accused requested the subpoena to issue, however, lends credence to accused's uncontradicted statement to the effect that he believed that he had sufficient money credited to his account to meet the checks issued against it. The Manual for Courts-Martial (1928 Ed. as corrected to 20 Apr. 1943, par. 151) states that an instance of violation of the 95th Article of War is "giving a check on a bank where one knows or reasonably should know that there are no funds to meet it, and without intending there should be" (underscoring supplied). The Board of Review is of the opinion that the evidence does not support the element of fraudulent intent beyond a reasonable doubt.

Nevertheless, as a matter of military law, the utterance of checks, without maintaining sufficient funds on deposit to provide for payment upon presentation, in itself constitutes conduct discreditable to the military service in violation of Article of War 96, regardless of intent to defraud or guilty knowledge (CM 249232, Norren, 32 BR 95, 102-103, 4 Bull JAG 341; CM 320578, Himes). As to Specifications 7, 8 and 9, the Board of Review is of the opinion that the record of trial is legally sufficient to support only the lesser included offense of wrongfully failing to maintain a sufficient bank balance to meet issued checks, in violation of Article of War 96 (CM 248031, Raquet, 31 BR 81; CM 260073, Gross, 39 BR 133; CM 275488, Wagner, 48 BR 45, 51).

Under Specification 10, the accused was convicted of dishonorably failing and neglecting to pay a debt of $78.35 to TA-BOO. The owner of that establishment testified that on various occasions accused had discussed the matter with him, that his previous dealings with accused were very satisfactory, and that he did not doubt accused's statement to him that accused would take care of the matter within a few weeks. There was nothing fraudulent involved in the creation of the obligation. There was no conduct on the part of accused with reference to this obligation that could be characterized as dishonorable, and no evidence that he evaded payment, or practised any fraud or deceit upon Mr. Stone. For these reasons the Board of Review is of the opinion that the findings of Specification 10 of Charge II are not legally sustained by the record of trial (CM 261964, Brophy, 40 BR 371, 376; CM 276250, Harvey, 48 BR 239, 248; CM 221992, Moore, 49 BR 153, 167).

9. The accused is 28 years of age, and married. Before enlisting for cadet training on 12 July 1941 he completed three years of college. He was commissioned second lieutenant 13 February 1942 and after serving for several months on patrol duty in California and Iceland, he was sent to the European Theatre of Operations and served there until returning to the United States in May 1946. He has been awarded the Bronze Star, European Theatre and American Theatre medals, and is authorized to wear seven overseas bars. No evidence of prior court-martial convictions was introduced, and the file does not disclose any civilian criminal record or delinquencies prior to his entry into the service.

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 the three specifications thereunder; legally insufficient to support the findings of guilty of Specifications 1, 2, 3, 4, 5, 6, and 10 of Charge II; legally sufficient to support only so much of the findings of guilty of Specifications 7, 8, and 9 of Charge II as find the accused guilty of making and uttering the checks respectively described therein at the time and places and to the person alleged and of obtaining by means thereof respectively the property as alleged, and wrongfully failing to maintain sufficient funds in the drawee bank alleged to provide for payment of said checks when presented for payment in due course, in violation of Article of War 96; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61 or 96.

A. Hartenstein, Judge Advocate

N. McDonald Gray, Judge Advocate

Hudson A. Self, Judge Advocate

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

JAGN-CM 323109

UNITED STATES v. Private OZIE J. KINGERY (35430163), 9223 TSU-TC, Casual Detachment, Staging Sections Command.	SAN FRANCISCO PORT OF EMBARKATION Trial by G.C.M., convened at Camp Stoneman, California, 22 May 1947. Dishonorable discharge and confinement for five (5) years. Penitentiary.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ozie J. Kingery, 9223 Technical Service Unit-Transportation Corps, Casual Detachment, Staging Sections Command, did, at Camp Stoneman, California, on or about 9 October 1942 desert the Service of the United States and did remain absent in desertion until he surrendered himself at Fort Hayes, Columbus, Ohio, on or about 20 January 1947.

He pleaded not guilty to the Charge and Specification but guilty to the lesser included offense of absence without leave from 9 October 1942 until 14 January 1947 in violation of the 61st Article of War. He was found guilty of the Charge and Specification and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence but remitted that portion thereof adjudging confinement in excess of five years, 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. No witnesses testified, and the only evidence introduced by either prosecution or defense consists of two morning report extract copies. The first of these, introduced as Prosecution's Exhibit 1, reads as follows:

"Kingery Ozie J 35 430 163
(Last name) (First Name) (Middle initial) (Army serial number)

Pvt Code No 9189-A Cp Stoneman Calif
(Grade) (Company, regiment, and arm or service)

EXTRACT COPY OF MORNING REPORT OF —

Code No 9189-A Cp Stoneman Calif
(Company, troop, battery, or detachment)(Regiment or other organization)

Entry for October 9 1942

Dy to AWOL 1800

/s/ S G Asbill

/t/ S G ASBILL
Major Vet Corps

Code No 9189-A Camp Stoneman California
(Complete designation of command) (Station) (Date)

I, Stephen G Asbill, certify that I am the commanding
(Name, grade, and arm or service)
officer of Code No 9189-A and official custodian
(Complete designation of command)
of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Cp Stoneman California for the dates indicated
(Station)
in said copy which relates to

Kingery Ozie J 35 430 163 Pvt
(Full name, Army serial number, grade and organization of person)

Code No 9189-A Cp Stoneman California
referred to in extract copy)

/s/ S G Asbill
(Signature)

S G ASBILL MAJOR VET CORPS
(Grade and arm or service)

True Copy /s/ Charles A. Lagrand
Capt TC"

The second, introduced as Prosecution's Exhibit 2, reads as follows:

"EXTRACT COPY OF MORNING REPORT

LAST NAME - FIRST NAME - MIDDLE INITIAL		
KINGERY	Ozie	J

ARMY SERIAL NO.	GRADE
35430163	Pvt

COMPANY, REGIMENT, AND ARM OR SERVICE

EXTRACT COPY OF MORNING REPORT OF

COMPANY, TROOP, BATTERY, OR DETACHMENT
2116th ASU, Cas Sec, Ft Hayes, Ohio

REGIMENT OR OTHER ORGANIZATION

14 Jan 47
Kingery, Ozie J 35430163 Pvt
(Atchd) 0819 as AWOL fr Cp Stoneman
Calif since 1942 (EM surrendered to Post PM Office Ft Hayes Ohio)

21 Jan 47
Kingery, Ozie J 35430163 Pvt (Atchd
Unasgd* reld atchd dropped fr rolls
& returned Cp Stoneman Calif par 10
SO 15 Hq Ft Hayes Ohio departed 1400
21 Jan 47

COMPLETE DESIGNATION OF COMMAND
2116th ASU, Cas Sec

STATION	DATE
Fort Hayes, Ohio	5 May 47

I CERTIFY that I am the commanding officer of the above designated command and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Fort Hayes, Ohio for the dates indicated in said copy which relates to the person referred to in extract copy.

SIGNATURE

John H. Perkins

TYPED NAME, GRADE, AND ARM OR SERVICE

JOHN H PERKINS, Capt. CMP"

4. There is nothing in evidence in this record upon which the court could legally base its finding.

The evidentiary value of Prosecution's Exhibit 1 is limited to the words:

"Entry for October 9, 1942

Dy to AWOL 1800"

The omission of the name of the accused from the body of the exhibit, as distinguished from the certification thereof, is such as to render it of no probative value in this case (CM 318685, Sustaite, VI Bull. JAG 61).

Prosecution's Exhibit 2 is legal evidence that the accused reported in at Fort Hayes on 14 January 1947. The remark "as AWOL from Camp Stoneman California since 1942" is obviously hearsay.

The unauthorized absence of accused is thus established solely by his plea of guilty to that lesser included offense. But accused in his plea expressly denied the intent to desert and "in the absence of some evidence, however slight, to indicate his intention not to return, the presumption that the accused intended not to return arising from unauthorized absence much prolonged and established only by the accused's plea, is not sufficient to overcome the express denial of the accused contained in his plea." (Dig. Ops JAG 1912-40 par. 416 (8) and cases cited therein).

In view of accused's plea, and Prosecution's Exhibit 2, the record of trial is legally sufficient to support a finding of guilty of the

lesser included offense of absence without leave in violation of Article of War 61. Since such offense was committed on 9 October 1942 the maximum authorized punishment therefor is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months (par. 104c, MCM, 1928) in some place other than a penitentiary, Federal reformatory or correctional institution (AW 42).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings as finds the accused did, at Camp Stoneman, California, on or about 9 October 1942, without proper leave absent himself from the service of the United States and did remain absent until he surrendered himself at Fort Hayes, Columbus, Ohio, on or about 14 January 1947, and only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for six months in a place other than a penitentiary, Federal reformatory or correctional institution.

Edward F. Johnson, Judge Advocate.

Joseph P. Brack, Judge Advocate.

Samuel L. Decker, Judge Advocate.

JUL 17 1947

JAGN-CM 323109 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, San Francisco Port of Embarkation,
Fort Mason, California.

1. In the case of Private Ozie J. Kingery (35430163), 9223 TSU-TC, Casual Detachment, Staging Sections Command, I concur in the 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 finds that accused did, at the time and place alleged, absent himself without proper leave from the service of the United States and did remain absent until he surrendered himself at Fort Hayes, Columbus, Ohio, on or about 14 January 1947, in violation of the 61st Article of War, 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 six months in a place other than a penitentiary, Federal reformatory or correctional institution.

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 323109).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

LAW LIBRARY
JUDGE ADVOCATE GENERAL

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323136

26 September 1947

UNITED STATES v. Private ALBERT LIGON (44094759), 624th Port Company.	PHILIPPINES-TYUKYUS COMMAND Trial by G.C.M., convened at APO 358, 17 and 27 February 1947. Dishonorable discharge and confinement for two (2) years. Federal Reformatory.

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Albert Ligon, 624th Port Company, (APO 75), did, at Manila, Philippine Islands, on or about 6 December 1946, knowingly and willfully misappropriate one hundred and twenty-one (121) cases of Boneless Beef, of a value of about three hundred and sixty three dollars ($363.00), and forty (40) cases of Balogna, of a value of about sixty dollars ($60.00), of a total value of about four hundred and twenty-three dollars ($423.00), property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and its 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 for two years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty, and the only question presented here is the propriety of the designation of a Federal Reformatory as the place of confinement.

4. The term "penitentiary" as used in Article of War 50½ is construed to include the term "Federal reformatory." (CM 316516, Resor, (1946)). Thus it follows that a Federal reformatory may be properly designated as a place of confinement only where penitentiary confinement is authorized under the provisions of Article of War 42.

The offense of willful misappropriation, denounced by Article of War 94, is similar to but is not one of the offenses denounced by Title 18, United States Code, section 87, which provides for penitentiary confinement. Neither is it an act recognized as an offense of a civil nature made punishable by penitentiary confinement for more than one year by any other statute of the United States of general application within the United States (excepting section 289, Penal Code of the United States, 1910) or by the law of the District of Columbia (AW 42; CM 319499, Smith, (1947)).

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

Signed, Judge Advocate.

Signed, Judge Advocate.

On leave, Judge Advocate.

JAGN-CM 323136 1st Ind October 8, 1947
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Philippines-Ryukus Command, APO 707,
c/o Postmaster, San Francisco, California.

1. In the case of Private Albert Ligon (44094759), 624th Port Company, I concur in the foregoing holding by the Board of Review and 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 two years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 323136).

/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 323161

8 SEP 1947

UNITED STATES v. Privates First Class JAMES D. LACEWELL (13239283), HERBERT E. MOORE (45046523), both of Company "B", 822d Engineer Aviation Battalion, APO 239, and ELD A. ROYSTER (15238373), Headquarters and Headquarters Service Company, 822d Engineer Aviation Battalion, APO 239	FIRST AIR DIVISION Trial by G.C.M., convened at APO 239, 28 April 1947. EACH: To be hanged by the neck until dead.

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

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

2. Accused were tried upon the following Charges and Specifications:

Lacewell

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class James D. Lacewell, Company "B", 822d Engineer Aviation Battalion, did, at Koza, Okinawa, on or about 23 March 1947, forcibly and feloniously, against her will, have carnal knowledge of Gushiken Tsuru, a native Okinawan woman.

Moore

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Herbert E. Moore, Company "B", 822nd Engineer Aviation Battalion, did, at Koza, Okinawa, on or about 23 March 1947, forcibly and feloniously, against her will, have carnal knowledge of Gushiken Tsuru, a native Okinawan woman.

CHARGE: Violation of the 92nd Article of War

Specification: In that Private First Class Eld A. Royster, Headquarters and Headquarters and Service Company, 822d Engineer Aviation Battalion, did at Okinawa APO 239, on or about 23 March 1947, forcibly and feloniously, against her will, have carnal knowledge of Gushiken Tsuru, a Native Okinawan woman.

Each pleaded not guilty to and was found guilty of the Charge and pertinent Specification. No evidence of any previous convictions was introduced. All the members present at the time the vote was taken concurring, each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence as to each accused, and forwarded the record of trial for action under Article of War 48.

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

Gushiken Tsuru, an Okinawan woman, testified that in the late evening of 23 March 1947, she was on her way to the home of her aunt, accompanied by her husband (R 7), when they were joined by three Okinawan men whom she had never seen before (R 7, 9). As they were proceeding down a path, three negroes jumped out from the bushes, two in front of them and one in back of them (R 7, 9). She had no chance to run away (R 9), and though many people used the path she did not cry out because she "had four men beside her and had no chance to pass the negroes" (R 9). The negroes whom she identified as the accused Moore, Royster and Lacewell (R 7, 9), searched each of her companions, and then searched her (R 7, 9). She stated further that after one of the accused told her companions to "get away" by saying "hubba-hubba", the accused Moore twisted her hand and dragged her into the bushes (R 7). Her husband tried to get to her, but the accused motioned to him to get back (R 7), and she tried to run away but accused Moore "twisted harder" and she could not help but follow him (R 11). She stated that at no time, on the path, did she indicate her consent by shaking her head "yes" (R 11). At this time accused Royster had a knife, about four inches long in his hand (R 7, 10-11), and he also made a motion and "put his hands inside pocket of coat." She thought he was going to draw a gun, for she thought that all American soldiers carried guns (R 10). She stated that accused Moore took her into a small cave about forty feet from the path, and motioned to her to take off her pants but that she refused (R 8, 11). She did not cry out while she was in the cave because she was afraid that accused Moore might kill her (R 11). She stated that the other two accused then came near the cave and a conversation ensued, after which accused Moore took her from the cave, passed through a potato field, about twenty feet from the path and while twisting her arm, dragged her into a tomb (R 8, 13). On the way to the tomb she tried several times to sit down, but accused Moore twisted her arm "harder". The other two accused did not assist Moore in taking her from the cave to the tomb (R 13). She stated that when she reached the tomb accused Moore again twisted her hand and motioned for her to take off her pants (R 8), and when she did not do so, he grabbed her and pulled her pants down

(R 8, 12). She struggled for awhile, but "I am not strong enough and he raped me" (R 8, 13). She crossed her legs and pushed him, but accused Moore put his hands between her legs (R 12-13), and actually penetrated her body (R 15). She stated that before accused Moore finished he called another man, and accused Royster came down, pushed her feet apart and "came" on top of her. She struggled again but was not strong enough, and he held her feet apart and succeeded in actually penetrating her body (R 8, 14-15). She stated that before accused Royster got through he called another man, and accused Lacewell "came" on top of her. She, however, had a chance to put her feet together and although accused Lacewell made an effort to penetrate her body, he failed to do so because of her resistance (R 8, 14-15). At that time a "CP" arrived, whereupon defendant Lacewell and she got up, and while putting on her pants she found cigarettes in her pockets, which she threw on the ground. She found more cigarettes near her handbag (R 8, 14), though none of the accused had given her any cigarettes (R 13). She stated that she made what she thought to be an honest effort to resist the three accused (R 14a).

Makishi Kaka was sworn and testified that on the evening of 23 March he was walking with his wife and three men from Sonda when three negroes came out of the bushes (R 15). He said that they never asked him for a geisha girl nor did they say "many cigarettes" (R 17). They searched him and said "hubba hubba" (R 15). He identified the three negroes as the accused Moore, Royster, and Lacewell. He said that accused Moore held his wife's hand and that accused Royster had a knife (R 16). He stated that he tried to follow his wife, but accused Royster slapped him, and made a motion toward his pocket and he thought accused Royster had a pistol, so he went to call the CP (R 15-16). He found the CP at the hospital and then went back to the area, where he saw the negroes with their hands in the air. His wife was in the tomb, her hair was "bushy", and she was crying (R 16).

Azama Eihan was sworn and testified that on the night of 23 March he and two friends met Gushiken Tsuru and her husband, and were walking along a path with them when three negroes came out, one in the front of them and two in the back (R 17-18). He identified one of the negroes as the accused Lacewell. He stated that the negroes searched each of his party and that one of the negroes held Gushiken Tsuru, but he did not see any of the men offer her cigarettes. He and his male companions ran when the negroes chased them away, because one put his hand in his pocket and Azama Eihan thought he had a pistol. The husband tried to follow the girl, but the negro raised his hand and the husband ran. He then ran to the hospital and informed the CP that the girl was "caught" by the negro (R 18).

Nakayama Sukemasa was sworn and testified that he was by occupation a CP. On the night of 23 March, the preceding witness and one Hega Kaka came to him and informed him that a girl was taken by a negro, and asked his

assistance. He and another CP went to the area and searched. In the tomb he saw two negroes (identified as the accused Lacewell and Royster). The accused Lacewell was on the girl, making an up and down motion, and the accused Royster was at one side (R 19-20). He did not think the girl was crying and he would not say she was struggling (R 20) but she was pale and didn't appear happy (R 21). He saw her pick up her pants (R 20), and saw four packages of cigarettes on the ground near her bag (R 20). Another CP found a carton of cigarettes (R 21).

4. The rights of the accused were explained to them by the law member, and the accused Moore and Royster desired to remain silent (R22). The accused Lacewell desired to take the stand and make an unsworn statement, which in pertinent part was as follows:

At about 5:30 that afternoon he and the accused Royster and Moore were looking for Okinawan prostitutes. When the Okinawans came up Moore talked to the man and woman, showed them cigarettes and asked the woman about "push-push" and the woman shook her head indicating "yes". Moore took her arm and started down into a cave, but there was no place to lay down in the cave, and then the three accused and the girl went to the tomb. The accused Moore and the girl went inside and when Moore had finished he called Royster. After the latter had been there for about five minutes, Lacewell went into the tomb where he found Royster standing up and the girl squatting, with her pants folded and lying on the ground. He asked her about "push-push", and she said "cigarettes push-push", so he gave her four packages of cigarettes. She said "one more" and patted his pockets, but when he told her he had no more cigarettes she said "okey" and laid down. He stated that he then got between her legs, but his "nature would not rise", so she was playing with his penis when the CP walked up (R 22).

5. Each of the accused stands convicted of a specification which alleges that he "did at Okinawa, APO 239, on or about 23 March 1947, forcibly and feloniously, against her will, have carnal knowledge of Gushiken Tsuru, a native Okinawan woman," 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 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 Moore and Royster had carnal knowledge by effecting a penetration of the body of Gushiken Tsuru is established by the latter. The general rule of law is that in order to sustain a

conviction of rape, the testimony of the prosecutrix must be corroborated by facts and circumstances established by other competent evidence (Wharton's Crim Law, Vol 1, Sec 725, pp 972, 973, and cases cited therein). It is considered by the Board of Review that the testimony of the husband, and Nakayama Sukemasa (the CP who found two of the accused in the tomb) is more than adequate for this purpose.

It is shown that accused Lacewell did not effect a penetration of the body of Gushiken Tsuru, although he made an effort to do so. The entire evidence, including the unsworn statement of accused Lacewell, discloses a joint venture by the three accused to indulge in sexual intercourse. At no time was there a termination of this joint venture, and the acts of each are imputed to the others. All three are equally liable as principals inasmuch as the distinction between principals and accessories has been abolished by statute (Sec 332, Fed Crim Code, 18 USC 550; CM 320489, Velasquez).

It is considered, therefore, that 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 * * * Nor is it necessary that there should be force enough to create 'reasonable apprehension of death.'"
>
> * * *
>
> "While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show that the woman opposed all the resistance in her power, if her resistance was honest, and was the utmost, according to her lights, that she could offer" (Wharton's Crim Law, Vol 1, Sec 701, pp 942-944, and cases cited therein).

The evidence in this case presents the not unusual situation of directly conflicting testimony under oath by the prosecution witness and the unsworn statement of the accused Lacewell. 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 them testify (CM 266302, Brown, 43 BR 221,227; CM 320489, Velasquez).

There are indications in the testimony of the woman which lend credence to the unsworn testimony of the accused Lacewell that the act was a business transaction, and that the woman did not honestly resist to the limit of her power.

There is the uncontradicted testimony that when she arose to put on her pants she found cigarettes in the pockets thereof, and that she found more cigarettes near her handbag. Another carton of cigarettes was found in the tomb. This is at least circumstantial evidence in corroboration of the unsworn assertion that the affair was a business transaction.

While on the path, which many people used, she did not try to run or cry out. Although a knife was displayed, there is no evidence that she was threatened with it. While in the cave with the accused Moore, she did not cry out because she said that she was afraid he might kill her. She did, however, struggle with him in spite of her alleged fear of being killed.

In going from the cave to the tomb, approximately forty feet away and only twenty feet from the road, she did not cry out.

It was only after two of the accused had had intercourse with her that she was able to cross her legs and prevent penetration.

There is no evidence in the record that she suffered any physical injury. Though her husband said she was crying at the time he found her in the tomb, the CP didn't remember that she was. She did not cry out when the CP came in and found accused Lacewell on top of her. Indeed, the evidence indicates that she was thoroughly rational and self-possessed.

Although, as indicated above, there is evidence in the record which would support the conclusion that Gushiken Tsuru's resistance was not as vigorous as it might have been, nevertheless there is ample evidence to support the conclusion that under all the attendant circumstances her resistance was real and all that could have been expected under the circumstances.

In CM 236801, Smith et al, 23 BR 129, 132, 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) 13, 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 320489, Velasquez.

The court may well have believed that she failed to cry out and raise an alarm because she believed her outcries would have been in vain. Certainly the four male Okinawans with her were of no material assistance. The flight of these men despite her obvious distress supports the conclusion that little help could normally be expected from Okinawan civilians.

In CM 235407, Claybourn, 22 BR 1, 45-46, in discussing a case where the physical resistance was not great, the Board of Review stated:

"* * * 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 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." (Underscoring supplied).

In the instant case the evidence as a whole supports the conclusion that the woman's conduct was characterized by resistance from the time of the encounter on the path until the acts were consummated in the tomb. She testified that she repeatedly struggled with all three of the accused, and that she actually succeeded in preventing accused Lacewell from effecting penetration. She testified that she was afraid to try to put accused Lacewell's eyes out; that she was afraid to yell for fear that accused Moore would kill her.

"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 this instance, the court-martial) to decide" (Mills v. United States, 164 US 210).

Under the circumstances presented by the present record, we would not be justified in disturbing the court's determination of this question.

For the reasons, stated the Board of Review is of the opinion that the evidence establishes, beyond a reasonable doubt, the guilt of each of the accused of the crime of rape.

6. On 27 May 1947, subsequent to the trial, and attached as a part of the record thereof, defense counsel filed a Request for Clemency, citing the reasons therefor. All the reasons expressed in said request are non-legal matters of opinion, save the following which requires comment from the Board of Review and which is quoted in full:

"4. The defense was unable to introduce evidence pertaining to the character of the prosecutrix due to the ruling of a law member. The defense took this ruling of the law member as a ruling to preclude any attack on the woman's character, thus the entire field of her previous character was closed. It is the defense's contention that the law member was erroneous and his ruling constituted a substantial prejudicial error under AW 37. In support of its contention the defense cites from Wharton's Criminal Law, Volume 1, Section 737 - Rape, page 1005:

'Defendant has a right to prove assent, aside from the woman's testimony, by any circumstances from which assent can be inferred, and among these circumstances is the fact that the prosecutrix was a woman of low character, etc.'

"The number of cigarettes that were found upon her person and in her bag definitely raises the presumption of payment and it is common knowledge that cigarettes are the medium used in bartering with these women."

The above protest and the ruling complained of is evidently the same as that set forth on page 14A of the record of trial, where the defense counsel, on cross-examination asked the prosecutrix the following question: "Can you have children * * * are you capable of having children?" The prosecution objected to the question on the grounds that it was immaterial, and the law member sustained the objection. The defense counsel took exception and read from "Criminal Law - Volume I - Page 737." Patently, this citation is the same as that cited in that portion of the Request for Clemency which has been cited above.

In a prosecution for common law rape, or assault with intent to commit rape, any evidence, otherwise competent, tending to show the unchaste character of the prosecutrix is admissible on the issue of the probability of her having consented to the act charged and on the question of her credibility, and for this purpose her lewd habits, ways of life or associations and her specific acts of illicit sexual intercourse or other lascivious acts with accused or others are all relevant (CM 318548 Bul JAG Vol VI, No. 2 page 67; see CM 300091, King et al (1945), 26 BR (ETO) 133, 147; CM 295675, Anderson et al, 30 BR (ETO) 145, 150).

However, during the trial, the defense counsel asked but the one question to which an exception was sustained, e.g., "can you have children * * * are you capable of having children?" The Board of Review is of the opinion that the question was immaterial. Regardless of the answer thereto, it would have had no bearing as to the character of the woman. It is our opinion that even though the defense counsel had the right to attack the woman's character, or pursue any legitimate cross-examination with a view to showing the woman's reputation for chastity, or that the alleged act was but a business transaction with a prostitute, the only question that he asked had no bearing on these matters, and the ruling sustaining the objection to the question was not prejudicial error. Such ruling did not preclude the defense from attacking the character of the prosecutrix.

7. The record of trial reveals the following information about the accused:

That Private First Class Lacewell is 30 years of age, and had no military service prior to his enlistment in the Regular Army at Fort Meade, Maryland, for a period of two years on 4 April 1946.

That Private First Class Royster is 19 years of age, and had no military service prior to his enlistment for a period of three years on 5 June 1946.

That Private First Class Moore is 24 years of age and served from 19 April 1946 to 20 June 1946 prior to his enlistment for three years on 21 June 1946.

8. The Board of Review has given careful consideration to the following letters: From Mrs. Wilhelmena Lacewell, wife of the accused Lacewell, to the President; from Mrs. E. E. Barnes of Bowie, Texas, to Honorable Tom Connally, United States Senate; and from Mrs. Lorena Moore, mother of accused Moore, to the President.

9. The court was legally constituted and had jurisdiction of the persons and the offenses. 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.

A. Gottenstein, Judge Advocate

R. McDonald Gray, Judge Advocate

Waldemar A. Solf, Judge Advocate

(114)

JAGH-CM 323161 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C. OCT 3 1947
TO: Secretary of the Army

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 Privates First Class James D. Lacewell (13239283), Herbert E. Moore (45046523), both of Company "B", 822nd Engineer Aviation Battalion, APO 239, and Eld A. Royster (15238373), Headquarters and Headquarters Service Company, 822nd Engineer Aviation Battalion, APO 239.

2. Upon trial by general court-martial, each of these soldiers was found guilty of rape of an Okinawan woman, in violation of Article of War 92. No evidence of any previous convictions was introduced. Each accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48.

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 as to each accused. I recommend that the sentence as to each accused be confirmed, but in view of all the circumstances recommend that each sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for 25 years, that the sentences 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 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 - Dft. of ltr. for sig. Sec. of Army
3 - Form of Action

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

JAGQ - CM 323162

29 AUG 1947

UNITED STATES v. Privates First Class CARL J. HAVALDA (46061457), RUSEY W. HARPER (15202907), Corporals WILLIAM L. GROOMS (45027503), GEORGE E. CRAIG (45027504), and Private EDWARD W. SMITH (44188012), all of 987th Air Engineering Squadron, 13th Air Service Group, APO 704.	FIFTH AIR FORCE Trial by G.C.M., convened at Tokyo, Japan, 2-4, 8-12, 14, 15, 17 and 18 April 1947. As to Harper, Grooms, Craig and Smith: Dishonorable discharge and confinement for life. Penitentiary. Havalda: to be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, 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 and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, at Asakawa-machi, Tokyo Prefecture, Japan, on or about 31 January 1947, with malice afrethought, wilfully, deliberately, feloniously, unlawfully and with pre-meditation kill one Masao Kaneko, a human being, by striking him on the head with a club.

Specification 2: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, on the highway near Asakawa-machi, Tokyo Prefecture, Japan, on or about 31

January 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with pre-meditation kill one Tsuguo Komiyama, a human being, by striking him on the head with a club.

Specification 3: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, on the highway near Asakawa-machi, Tokyo Prefecture, Japan, on or about 31 January 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with pre-meditation kill one Tomonori Hosaka, a human being, by striking him on the head with a club.

Specification 4: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith, and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, at Chigira-mura, Kanagawa Prefecture, Japan, on or about 31 January 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with pre-meditation kill one Kenichi Saito, a human being, by striking him on the head with a club.

Specification 5: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith, and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did at Chigira-mura, Kanagawa Prefecture, Japan, on or about 31 January 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with pre-meditation kill one Takashi Arai, a human being, by striking him on the head with a club.

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

Specification 1: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, on the highway near Asakawa-machi, Tokyo, Prefecture, Japan, on or about 31 January 1947, with intent to do him bodily harm, commit an assault upon Kaichi Ishibashi by striking him on the head with a dangerous thing, to wit, a club.

Specification 2: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, on the highway near Asakawa-machi, Tokyo Prefecture, Japan, on or about 31 January 1947, with intent to do him bodily harm, commit an assault upon Yoshitomi Higuchi by striking him on the head with a dangerous thing, to wit, a club.

Specification 3: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, at Chigira-mura, Kanagawa Prefecture, Japan, on or about 31 January 1947, with intent to do him bodily harm, commit an assault upon Takayoshi Kaneko by striking him on the head with a dangerous thing to wit, a club.

Specification 4: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, at Chigira-mura, Kanagawa Prefecture, Japan, on or about 31 January 1947, with intent to do him bodily harm, commit an assault upon Tadataka Arai by striking him on the head with a dangerous thing, to wit, a club, and bodily throwing the said Tadataka Arai over a cliff.

Specification 5: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, at Asakawa-machi, Tokyo Prefecture, Japan, on or about 31 January 1947, with intent to do him bodily harm, commit an assault upon Eiichi Sato by striking him on the head, face and arm with a dangerous thing, to wit, a club.

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

Specification 1: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, at Hachioji, Tokyo Prefecture, Japan, on or about 31 January 1947, wrongfully and maliciously damage the eating stall of Mokichi Kudo by overturning such and smashing the tableware therein, to the prejudice of good order and military discipline.

Specification 2: In that Private First Class Carl J. Havalda, Corporal Willard L. Grooms, Private First Class Rusey W. Harper, Private Edward W. Smith and Corporal George E. Craig, all of 987th Air Engineering Squadron, 13th Air Service Group, acting jointly and in pursuance of a common intent, did, at Chigira-muri, Kanagawa Prefecture, Japan, on or about 31 January 1947, wrongfully and maliciously damage the restaurant of Shiro Takahisa by breaking windows and shattering a chandelier therein, to the prejudice of good order and military discipline.

Specification 3: (Nolle Prosequi).

Specification 4: (Finding of Not Guilty).

Each accused pleaded not guilty to all Charges and Specifications. Each accused was found not guilty as to Specification 4, Charge III, and guilty of all remaining Charges and Specifications with the exception that the words "on the head with a club" in Specification 5 of Charge I were changed to read "with a truck ¼ ton, 4 x 4, commonly referred to as a jeep." One previous conviction was introduced as to Havalda and Harper. All members of the court concurring, Havalda was sentenced to be hanged by the neck until dead. Each of the other four accused was sentenced individually 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 sentences and in the case of Craig, Grooms, Harper, and Smith he designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial under Article of War 50½. In the case of Havalda the record of trial was forwarded for action under Article of War 48.

3. The five accused were all charged with committing the same offenses, "acting jointly and in pursuance of a common intent," and each accused consented in open court to a joint trial (R. 4e).

About 1930, 31 January 1947, five American soldiers over-turned an eating booth across from the railroad station at Hachioji, Tokyo Prefecture. The booth belonged to one Kodu Mokichi; dishes were scattered and three gallon jugs of sake were broken (R. 33-34). A Japanese policeman in uniform hurried to the scene, was attacked by the five soldiers, and was struck and knocked to the ground by one of them. The soldiers departed in a jeep in the direction of Asakawa (R. 20, 28). It was dark and the policeman could not recognize his assailant but believed accused Havalda was one of the five soldiers (R. 21, 28).

Approximately 30 minutes later, a jeep backed into an alley in the vicinity of Asakawa (R. 37, 45), about four miles from Hachioji railroad station (R. 426). As Miyamoto Yoshio and Masao Kaneko entered this alley on the way to their homes, they were attacked by "six or seven" soldiers. Yoshio escaped and when the jeep left (R. 51) he returned and found Kaneko unconscious and bleeding from nose and ears (R. 37-38). A broken club, three to four feet long and two inches thick, was found near his body (R. 37). He was carried away and died at 1030 the following morning from a fractured skull and brain hemorrhage (R. 6e, 38, and Ex. 3). Yoshio was unable to identify any of the soldiers involved (R. 44) but another witness thought Havalda looked like one of them (R. 53).

Approximately 20 or 30 minutes later (R. 56) an Army jeep going from Asakawa to Yoski (R. 79) was seen passing a group of 13 Japanese who were trying to pull a truck out of a ditch (R. 63, 65, 92). The location was at Kobotoge Pass (R. 79) on the highway between Tokyo and Kofu, about four miles west of the incident described in the previous paragraph (R. 147, 426). Five or ten minutes after the jeep passed three or four American soldiers approached the group of Japanese (R. 63, 79, 93) with their hands behind their backs (R. 110). One soldier climbed into the truck and clubbed Hosaka Tomonori from behind (R. 56-58). Another soldier hit Harai

Tadashi about five times with a club 2½ feet long and four inches thick (R. 66). Two soldiers walked up to Higuchi Yoshitomi, the foreman, pushed him, and then Havalda struck him from behind with a club 3-feet long and 2½ inches thick (R. 80, 85). He became dizzy but escaped and was then unconscious (R. 80). Kaichi Ishibashi saw two soldiers advance toward him; he turned and ran but was caught, struck and knocked unconscious (R. 87-88). No one saw anyone strike Tsuguo Komiyama but after the soldiers departed, he was found lying beside Kaichi Ishibashi (R. 82). Komiyama died at 2350 the same night from a large contusion on the left side of the skull, brain concussion, and hemorrhage (R. 6f, Ex. 5). Tomonori Hosaka died at 2045 the next night from a brain concussion and swollen right temple (R. 6d, Ex. 1). Ishibashi required medical care; he had a four-inch bruise on his face, his left ear drum had "caved in" resulting in deafness, and he suffered from dizziness and ringing in his ears (R. 6i, Ex. 10). Yoshitomi had a five-centimeter and a ½-centimeter bruise on his head, a seven-centimeter bruise on his cheek, and a fractured left forearm (R. 6h, Ex. 9). At the time of trial, he had a scar on his cheek and his head still ached constantly (R. 81). Tomizo Watanabe saw Craig push Yoshitomi (R. 92) and also recognized Craig as the soldier who hit him (Watanabe) in the temple with a rock (R. 92, 135). Havalda was also identified as being one of the group of soldiers (R. 70) swinging a club (R. 136-7). Yoshitaro Mizoguchi was struck twice in the back by Havalda (R. 96-98). Mizoguchi also saw Grooms swinging a tire chain and Harper chasing one of the Japanese (R. 98). Mizoguchi had difficulty walking for a couple of days but was not injured otherwise (R. 104). Before leaving, the soldiers pushed another truck into the ditch (R. 111) and then departed toward the top of the pass (R. 119, 137). A jeep engine was heard starting and driving off in the direction of Kofu (R. 138-139).

About 2050, the same evening, an Army jeep passed a civilian automobile parked on the Kofu highway near Hotel Soun Kaku in Chigira-mura, Kanazawa Prefecture (R. 155, 161), about one-half mile beyond the incident described in the previous paragraph (R. 426). After the jeep disappeared around a turn in the road, four or five American soldiers approached the civilian car and told its two occupants to "come on" (R. 156). Kenichi Saito left the car first and was beaten by Havalda with a club 2½ feet long, 1½ inches thick. Takayoshi Kaneko, the other occupant, tried to escape but he too was beaten and knocked unconscious. As he regained consciousness, he saw the group of soldiers pushing the car downhill toward Kofu (R. 158, 160). He ran to the Hotel for help, returned and found Saito lying on the ground and bleeding from both ears. Saito was carried to the Hotel and died at 2220 that same night as a result of a seven-centimeter fracture behind his left ear which exposed a part of his brain (R. 6d, Ex. 2). Kaneko, who was 16 years old, was hospitalized for a week (R. 160). He had a four-inch bruise on the top of his head from which a blood clot formed nine days later and an operation was required (R. 6g, Ex. 6). The automobile mentioned above was found "tipped against a cherry tree, hanging over a cliff about 35-40 feet from hotel" (R. 174).

About 0715, 1 February 1947, the body of Arai Takashi was found at a point in the Tokyo-Kofu highway about three-fourths of a mile from the previous incident (R. 182-183; 426). It was determined that he had been dead about ten hours which placed his death about midnight, 31 January 1947. Death was the result of a fractured skull, exposed brain, and bleeding from eyes and nose (R. 6e, Ex. 5).

The Tenkachaya Hotel at Chigira-mura, Kangawa Prefecture, Japan, is about 30 meters down a steep, winding footpath from the Tokyo-Kofu highway (R. 231). It is about 4 miles from the place where Arai's body was found as described in the previous paragraph (R. 426). About 2100, an Army jeep with "UTL 17" and "5" on its bumper backed into a 7-foot path along the highway, about 200 meters from the hotel (R. 231-233).

About 2130, Harper, Smith and Grooms entered the Tenkachaya Hotel and restaurant with clubs, pushed the occupants around, broke 20 glass doors, 4 paper doors, 4 chandeliers, and numerous light bulbs. Seventy or eighty separate glass panes were broken. The soldiers remained about 15 minutes and then departed (R. 202-205, 213, 216). The Tenkachaya Hotel and restaurant was the property of Shiro Takahisa (R. 212).

About 2130, Arai Tadataka crossed the Tokyo-Kofu highway and started down a steep, winding path to the Tenkachaya Hotel (R. 189). He saw a soldier (subsequently identified as Havalda) walking up the path and as they met, this soldier struck him across the head with a club about 1 meter long and 8 centimeters thick (R. 189-190). Tadataka lost consciousness and when he came to, he found himself five or six feet below the footpath (R. 192). He was bleeding, felt pain all over his body, and could not get up (R. 192). He called for help (R. 192). The manager of the nearby Tenkachaya Hotel responded (R. 205), and he was taken to a hospital where he remained for 13 days. An X-ray revealed a cracked rib and dislocated spine. He was put in a hip-to-shoulder cast and also had three or four stitches taken in his head (R. 6h, 193-194, Ex. 8). At the date of trial, he was still in a cast and still suffered pain in his back and head (R.194).

About 2130, one person was heard running back to the jeep where it was parked in the 7-foot path as described above. The jeep stopped on the main highway, others who were waiting entered the jeep, and then started off at "terrific speed" in the direction of Asakawa. The jeep went about 300 meters before its lights were turned on (R. 234, 239, 242, 244).

Eiicho Sato was living alone in a house in Hachioji on a road that connects with the Tokyo-Kofu highway (R. 250) approximately 8 miles from the Tenkachaya Hotel (R. 276). About 2200, 31 January 1947, he saw three American soldiers going through his yard, followed by some knocking on the front door (R. 249). He recognized Havalda through the glass door (R. 254) and Smith as one of the three men in the yard (R. 254). Sato asked what they wanted and when they started breaking the glass door, he jumped out the window and ran (R. 260). Two soldiers chased him and beat him over the head and arm with a club (R. 250, 252). He escaped down a steep bank and was taken to the hospital (R. 252). He had a gash in his forehead and his wrist was broken. At the date of trial, he had lost his sense of smell and was rapidly losing his eyesight (R. 252-3).

Over objection of the accused, the court received in evidence written and oral statements made by each accused to the investigating officer (R. 390-391, 412-23, Exs. 25, 26, 27, 28 and 29). The court was duly warned that these statements could be considered only against their individual makers and were not evidence against other persons named therein (R. 390).

All five accused admitted being together on the night in question. They all remembered pushing over the fish shack across from the Hachioji railroad station (R. 412, 415, 419, 421, 422). All except Harper remembered parking in the alley and attacking the two Koreans who entered (R. 412, 416; Exs. 26 and 27). All five accused remembered the several assaults where the trucks were parked (R. 413, 417, 419, 421, 422). All five also recalled the incident when the two Japanese were pulled from a parked car, assaulted, and the auto pushed over a cliff (R. 413, 417, 420, 423, and Ex. 29). Smith, Craig, and Grooms remembered their jeep sideswiping a Japanese pedestrian (R. 414, 420, Ex. 29). All five recalled the destruction at the Tenkachaya Hotel (R. 418, Exs. 25-29, inclusive). Craig, Grooms, and Havalda recalled the assault on the pathway near the Tenkachaya Hotel (R. 423, Exs. 26 and 29). All but Harper recalled the assault of the old man who ran out of his house near Hachioji (Exs. 25, 26, 27, 29).

Individual participation was admitted by each accused as follows:

Smith admitted that he helped over-turn the fish shack (R. 412); that in connection with the truck incident he hit one of the Japanese, knocked him down and then chased him (R. 413 and Ex. 25); that he helped push the civilian car down the hill (R. 414); and that he broke some lights and windows at the Tenkachaya Hotel (Ex. 25).

Craig admitted that he helped "push over" the fish shack (R. 415); that he clubbed both of the Koreans in the alley at Asakawa (one of whom died) (R. 416; Ex. 28); that he clubbed a Japanese at the truck incident (two Japanese were killed here) (R. 417, 429; Ex. 28); that he threw the civilian car out of gear, steered it and jumped out while it was rolling down the hill (R. 417; Ex. 28); and that he broke some windows at the Tenkachaya Hotel (Ex. 28).

Grooms admitted that he helped over-turn the fish shack (R. 419); that he hit "a couple of gooks" at the truck incident (two were killed here) (R. 419); that he helped push a civilian car down a hill (R. 420); that while he was driving the jeep, he intentionally drove the jeep into a pedestrian, striking him with the door handle (this man was killed)(R. 420); that he broke a door in the Tenkachaya Hotel (Ex. 26).

Harper admitted that he helped "push over" a fish shack and hit a Japanese policeman (R. 421); that he wrestled with a Japanese at the truck incident, struck him across the back with a club four times (two men were killed at this truck incident) (R. 421; Ex. 29); and that he wrestled with a Japanese in front of a civilian car (this man was killed)(R. 422).

Havalda admitted that he helped "push over" the fish shack (R. 422); that he chased one of the Koreans out of the alley at Asakawa (Ex. 27); that he crawled into a truck and clubbed a Japanese from behind (this man was killed) and clubbed another Japanese (R. 422, 423; Ex. 27); that he jerked two Japanese out of a civilian car, started fighting with them, and hit one over the head with a club (one of these two men died)(R. 423; Ex. 27); that he broke some windows at the Tenkachaya Hotel (Ex. 27); that he met a Japanese on the pathway from the hotel and hit him with a club (R. 423); and that he hit an old man who came running out of a house (Ex. 27).

4. The defense offered character testimony as to each accused. Four officers and four enlisted men testified that all five accused were well-liked, that they never engaged in fights or gave any trouble (R. 458, 460, 486, 487, 490, 492, 501).

Evidence was also offered that Havalda and Smith got drunk on the morning of 31 January 1947 (R. 467) and remained in that condition the rest of the day (R. 462, 467).

Expert testimony was offered to the effect that alcohol is "probably the same as a general anesthetic" and that individuals tend to become unrestrained, but outward effects and reactions depend on the individual (R. 479-483).

Defense announced that each accused desired to make a sworn statement but when the law member advised them of their rights in open court, they consulted with their counsel and each made unsworn statements as follows:

Havalda was sort of celebrating on 31 January 1947 because he was going back to the States. He consumed two quarts of liquor with Smith and Private Nicodemus before noon, "ate chow," and drank some more at the Motor Pool. He remembered getting a bottle of Kinsey Whiskey from Private Juday and a quart from Nicodemus. He also remembered pushing over a building near the Hachioji railroad station and going from there to the Uenohorra Hotel (not involved in any charges). He woke up the next morning, having slept all night with his clothes on. He found $77 in his pocket which indicated he had been paid the previous day, but he had no recollection thereof. When he was questioned by Criminal Investigation Division (CID) agents several days later he told them that he had been drinking and did not know where he had been or what he had done on the evening of 31 January 1947. He was threatened by the CID agents and told that it was best to remember because the others had confessed. The CID agent dictated the statement "from incident to incident" and the next morning he signed it (R. 513-517).

Smith recited almost continuous drinking during the morning and afternoon of 31 January 1947. He remembered pushing over a building at Hachioji and hitting somebody there; also breaking a lamp and some windows and having a hard time getting up a steep path to the highway. He remembered seeing a truck somewhere and hitting a Jap with his fist — "not very hard" — he got up and ran away. He also recalled "an auto somewheres" and walking on the road "somewheres"; then the jeep turned around and returned to base. The next morning he woke up in his barracks in bed "with quite a headache." He tried to remember what had happened. When he told the CID agents that he could not remember anything else, they told him he was lying. He insisted he could not make a statement because he "didn't know exactly what went on the night of the 31st." He then dictated a statement covering the things he was able to remember. The next day CID agents filled in details to this first statement and told Smith that he should dictate a complete statement, including the details of which he had just been reminded, so he dictated and signed a statement as he was told to do (R. 520-525).

Grooms had several drinks after 1700. He recalled pushing over a building at Hachioji. He remembered passing some trucks and stopping but did not remember hitting anyone. He recalled pushing an auto over a hill and going down a winding path to a hotel where he kicked out one of the doors. He also recalled that on the way back to Hachioji, they turned off the main road, stopping by a steep bank, and broke a glass door. They then returned to base, ate a "late chow," and woke up the next morning at base refueling where he worked. He did not remember stopping between the fish shack incident and the truck incident (R. 513, 514).

Craig started drinking about 1800. He remembered pushing over a building at Hachioji, continuing on to a little town where they met two people. He hit both of these men; the second one was knocked down but he got up and ran. He did not know why he hit these men. He recalled stopping near some trucks and he hit one of the Japanese behind one of the trucks. He recalled a civilian car starting over a hill and hearing it crash. He recalled going down a winding path to a hotel where he broke a glass door. He remembered turning off the highway on the way back to Tachikawa but could not remember what happened. He recalled eating "late chow" and going to bed (R. 511).

Harper had about six drinks of whiskey and remembered pushing over "a little house" at Hachioji, He recalled stopping near some trucks and he hit a Japanese two or three times. He remembered "going down a winding path to a hotel" where he broke a window glass. He also recalled breaking some windows in a house, and returning to base. The additional information contained in his written statement was furnished by the CID agents — he did not remember throwing a shovel at a Japanese or wrestling with him (R. 505-509).

5. a. Murder is the unlawful killing of a human being with malice aforethought, without legal justification or excuse. The malice may exist when the act is unpremeditated. It may mean that preceding or coexisting with the act by which death is caused, the accused had knowledge that the act which causes death would probably cause death or grievous bodily harm. 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 (Par. 148a, MCM, 1928).

The five murders charged in this case are all alleged to have been committed by the five accused "acting jointly and in pursuance of a common intent." Since the murders are alleged to have been accomplished by group action, proof that the fatal blows resulted from the concerted action of the group is sufficient to sustain the findings of guilty as to each accused. The principle involved is discussed at some length in the case of CM 248793, Beyer, et al, 50 BR 37, 42, which is quoted, in part, as follows:

"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 said:

> '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 1919 in the court-martial case of Cook, et al., CM 123414, the Board of Review in reviewing the record of the trial of nineteen general prisoners tried for a murder committed in the United States Disciplinary Barracks, in which some but not all of the accused participated in the final fatal attack, said:

> 'In the present case, 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 evidence, including the statements by all accused, clearly shows that Massao Kaneko, Tsuzuo Komiyama, Tomonori Hosaka, and Kenichi Saito (Specs. 1, 2, 3 and 4, Chg. I) met violent deaths as a result of unprovoked beatings by one or more of accused, acting jointly and in pursuance of a common intent. The evidence is also clear that each of the accused accompanied all of the others upon the fatal night for the purpose of destroying property and assaulting and clubbing Japaneses Nationals wherever they might be found and regardless of whether death resulted.

Under the authorities cited above, each death must be legally regarded as a result of the act or acts of all accused.

The evidence relating to the murder of Takashi Arai (Spec. 5, Chg I) is mainly circumstantial. His body was not found until the following morning along the road over which the five accused had travelled the previous night. Medical testimony indicated that he had died, about 2400, 31 January 1947, as a result of a fractured skull (Ex. 4). Grooms admitted that he intentionally drove the jeep into a pedestrian in the vicinity where Arai's body was found. The victim was struck with the door handle. Someone called to Grooms to "Back up" and he saw the victim sitting in the road (R. 420-421). There was no admissible evidence connecting any of the accused with a man being struck over the head near this place. The court apparently realized the inadequate character of the evidence and made a finding that the victim was struck by a jeep, instead of "on the head with a club" as charged, but there is no evidence that death resulted from the injuries inflicted by the jeep. The Board of Review is of the opinion that the evidence in the instant situation (Spec. 5, Chg I) is not sufficient to support this finding of guilty.

5. b. The five assaults to do bodily harm with a dangerous weapon (Specs, of Chg II) were all established by competent evidence, including admissions by the accused. The principles of joint responsibility apply to these charges in the same manner as discussed in paragraph 5a of this opinion.

5. c. The wrongful and malicious damaging of the fish shack (Spec. 1, Chg III) and the Tenkachaya Hotel (Spec. 2, Chg III) were clearly established and were the only offenses admittedly remembered by all five accused.

5. d. A concerted effort was made by the defense to show that the five accused committed the various offenses while under the influence of intoxicating liquor. While voluntary intoxication is not a defense in a prosecution for the commission of a crime, unless the intoxication was of such degree that it would clearly negative a required specific intent, such a defense must always be considered with care and caution. It is clear that all five accused consumed a considerable quantity of liquor on 31 January 1947 and there are repeated references in their oral and written statements that they could not remember certain things that occurred on the night in question. On the otherhand, the clarity of parts of their statements show that their minds were not so befogged with liquor that they did not recall numerous pertinent details of the events in which they were the prime actors; in fact, their statements indicate that they were in full possession of their mental faculties at the time the crimes were committed, and various witnesses were positive that the accused were not drunk at the scene of the incidents.

5. e. Defense counsel submitted a so-called "Petition of Error", setting forth two alleged errors as follows:

(1) That the court was required to convict accused by a three-fourths vote rather than a two-thirds vote, inasmuch as the

mandatory punishment upon conviction required a three-fourths vote. That question was settled in the case of Stout v Hancock, 146 Fed. (2) 741 and need not be considered further in this opinion.

(2) That the court erred in its instruction to the accused as to their rights as witnesses in stating that each would be subject to cross-examination as to the activities of all accused.

Paragraph 121b, MCM, 1928, states:

"When the accused testifies in denial or explanation of any offenses, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination."

Inasmuch as all accused were charged jointly, the knowledge of each as to the activities of the co-accused would have a direct bearing on his own guilt or innocence and the instructions given to accused by the court was both fitting and proper.

6. Accused Havalda is single and was born 10 May 1927 at Owosso, Michigan. After finishing eight years of elementary school, Havalda attended Owosso High School for two years but did not graduate. He worked on his father's farm and as a machine operator. He was originally inducted into the Army on 5 November 1945 and on 18 January 1946 enlisted for a period of 18 months. His AGCT score was 79. There is evidence that he was sentenced to three months in a Reform School in 1940 for auto theft. He has one special court-martial conviction for striking another soldier.

Accused Grooms is single and was born 30 June 1927 at West Union, Ohio. After graduation from elementary school (1941), he spent one year in High School at West Union and was thereafter employed on his father's farm and as a truck driver. He enlisted on 5 November 1945 for 18 months - his AGCT score was 80. He was promoted to the grade of corporal on 13 January 1947.

Accused Craig is single and was born 28 June 1927 at Olive Hill, Kentucky. After completing elementary school (1943) he attended High School at Olive Hill for one year. He was employed on his father's farm and enlisted on 5 November 1945 for 18 months. His AGCT score was 82. He was promoted to the grade of corporal on 1 December 1946. He has a brother who is a first lieutenant, presently stationed in Japan with the 25th Division.

Accused Harper is single and was born 21 October 1928, at Acorn, Kentucky. He finished the eighth grade of elementary school (1944) and attended the first semester of junior high school. He worked on his father's farm and for a construction company. He enlisted on 5 November 1945 for 18 months - his AGCT score was 64. He was convicted by a summary court-martial for speeding.

Accused Smith is single and was born on 31 October 1927 at Tillman, South Carolina. He completed the 9th grade in 1943 and worked thereafter as a garage helper, pipe fitter, and farmer. He was inducted on 29 March 1946. His AGCT score was 65. He has no court-martial convictions and his character was rated as "good."

7. Petitions for clemency signed by a large number of people in the communities of each accused have been received and considered. Reverend Kodo Sesso, a high Buddhist priest, Abbot of Fudoin Temple at Edozaki, Inashiki County, Ibaraki Prefecture, Japan, has also submitted a long and moving petition for clemency signed by hundreds of Japanese Nationals. Attached to this petition are letters from the mother of Kenichi Saito who was killed by this group of accused and from Tadataka Arai who was seriously injured by them and whose father suffered death at their hands.

Five members of the court also submitted petitions for clemency for one or more of the four accused sentenced to life imprisonment, recommending that the sentences be reduced as follows:

	Smith	Harper	Craig	Grooms
Col. Yeager (President)	15 yrs	10 yrs	10 yrs	20 yrs
Col. Haneke	(General Recommendation-not specified)		*	*
Lt. Col. Strickler	10 yrs	*	*	20 yrs
Maj. Guy (Law Member)	*	50 yrs	*	*
Capt. Zelman (MD)	10 yrs	15 yrs	15 yrs	10 yrs

* No recommendation made as to these accused.

Hearings were held by the Board of Review as follows:

(a) A Citizens' Committee from Owosso, Michigan, pointed out that Havalda had been somewhat of a problem child in his home community but he had never been in serious trouble. He came from a good family of hard-working people and has rehabilitation possibilities. It was pointed out that there is no death penalty in Michigan and if Havalda had killed five Americans in that State, the maximum punishment would have been life imprisonment.

(b) Colonel Arthur Pierpont, JAGD Reserve, appeared as attorney for accused Havalda and his family.

(c) Congressman Edward O. McCowen (Ohio), Attorney James W. Lang, and Mrs. Grooms appeared before the Board of Review, requesting clemency on behalf of accused Grooms and Craig.

8. The court was legally constituted and had jurisdiction of the persons and the subject matter. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated above, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 5, Charge I, but is legally sufficient to support the finding of guilty of all remaining Specifications and Charges, and the sentences, and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the United States Code.

W A Johnson Jr, Judge Advocate

E J Schenck, Judge Advocate

Andrew J Kane, Judge Advocate

JAGQ - CM 323162 1st Ind

WD, JAGO, Washington 25, D. C. SEP 11 1947

TO: The Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the Opinion of the Board of Review in the case of Private First Class Carl J. Havalda et al (RA 46061457), 987th Air Engineering Squadron, 13th Air Service Group.

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 of Specification 5, Charge I, but legally sufficient to support the findings of guilty of the remaining Charges and Specifications alleging four murders, five assaults with intent to do bodily harm with a dangerous weapon, and two charges of willfully damaging private property, and legally sufficient to support the sentence and to warrant confirmation of the sentence.

3. The charge sheet shows that accused was born 10 May 1927. He finished two years of high school. His AGCT score was 79 at the time of his induction into the Army on 5 November 1945. There is evidence in his Army records that he was convicted by a civilian court in 1940 for auto theft and sentenced to three months in the Reform School. He enlisted for 18 months in the Regular Army on 18 January 1946 and has had only one special court-martial conviction for striking another soldier.

4. Numerous letters and petitions have been received requesting that clemency be extended to this soldier. Letters have been received from the Honorable Arthur E. Vandenberg, the Honorable Chapman Revercomb, and the Honorable Allen J. Ellender, United States Senate; from accused's parents, from Owosso Council 1139 of the Knights of Columbus; from the Veterans Committee of Local 599, UAW, CIO, Flint, Michigan; and numerous individuals. Reverend Kodo Sesso, a high Buddhist priest, Abbot of Fudoin Temple at Edozaki, Inashiki County, Ibaraki Prefecture, Japan, has submitted a petition for clemency signed by many Japanese Nationals. Separate letters requesting clemency are attached thereto from the mother of Kenichi Saito who was killed by accused and his fellow soldiers and from Tadataka Arai who was seriously injured by them and whose father suffered death at their hands.

5. I recommend that the sentence be confirmed but in view of all the circumstances, the youth of the accused, his apparent drunkenness at the time of the commission of the offenses, and the several pleas for clemency, I recommend that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, and that the sentence as thus commuted be carried into execution. I further recommend that a United States Penitentiary be designated as the place of confinement.

(130)

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls.
1. Record of trial
2. Draft letter for sig SW
3. Form of Exec. action

(D.A. , GCMO 1, 25 Sept 1947).

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

JAGH - CM 323168

27 AUG 1947

UNITED STATES	)	SECOND ARMY
v.	)	Trial by G.C.M., convened at Fort Benjamin Harrison, Indiana, 1 May 1947. Dismissal, total forfeitures, and confinement for one (1) year
First Lieutenant LEONARD A. KUEHNEL (0-32342), Quartermaster Corps	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that 1st Lieutenant Leonard A. Kuehnel, attached unassigned, Headquarters Section, Station Complement, 2117th Area Service Unit, Fort Benjamin Harrison, Indiana, with intent to defraud, did, at APO 312, care of Postmaster, New York, New York, at an unknown date between 1 January 1945 and 10 March 1945, falsely indorse a certain United States Postal Money Order by writing on the back thereof the name "John Q. Martin, 1584482, 3918 Q. M. Gs Co", which money order is substantially in the following words and figures to wit: Money Order #45548, identification required, January 1, 1945, APO 312 Br., New York, P. M. at New York, N. Y., pay amount stated above, 100 dollars and no cents, to order of payee named (John Q. Martin) in attached coupon, signed Albert Goldman, Postmaster, and indorsed on the back as follows: To transfer ownership the person in whose favor this order is drawn must sign on lower line, writing the indorsee's name on the top line. More than one indorsement is prohibited by law. Bank stamps are not regarded as indorsements. Pay to E. W. Darenkamp, Captain, F. D., John Q.

Martin, Payee, 1584482, 3918 Q. M. Gs. Co., which money order was a writing of a private nature which might operate to the prejudice of another.

Specifications 2, 3, and 4 are identical to Specification 1, except as to the Serial Number of the United States Postal Money Orders alleged to have bean falsely endorsed by the accused. These variations are tabulated as follows:

Specification No.	Money Order No.
2	45549
3	45550
4	45551

He pleaded not guilty to, and was found guilty of, the Charge and all Specifications thereunder. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

In January 1945 the accused was the platoon leader of the First Platoon, 3918th Quartermaster Gas Supply Company (R 17-18) located at Publange, France (R 23).

Mr. John Quincy Martin testified that he had been an enlisted man in accused's company and that he went overseas as Platoon Sergeant of accused's platoon (R 17-18). On or about 1 January 1945 he received from the mail orderly four (4) one hundred dollar money orders payable to himself which he had authorized the mail orderly to purchase for him (R 19). Martin identified Postal Money Orders Numbered 45548, 45549, 45550, and 45551 as being the money orders purchased by him through the mail orderly on or about 1 January 1945 (Pros Ex 2, 3, 4, 5; R 20-22).

Each of the money orders is indorsed as follows:

"Pay to E. W. Darenkamp, Captain FD
/s/ John Q. Martin PAYEE
1584482 3918 QM S Co"
Pay to the order of
CENTRAL DISBURSING OFFICER (UK)
APO 413
E. W. DARENKAMP, CAPTAIN FD

On or about 3 January 1945, Martin was injured in an accident. Before being evacuated to a hospital he gave the money order and other personal possessions to the accused for safekeeping until such time as he would write the accused where to mail his property (R 22). Early in February 1945 Martin wrote the accused from Oxford, England, and requested that his personal effects including a wallet which contained the money orders be mailed to him (R 23-24, 26). He received a handwritten reply from the accused, which was received in evidence as prosecution's Exhibit 6 (R 27), after the witness testified that he was familiar with the accused's handwriting (R 23-24). In this letter dated 9 February 1945 the accused wrote in part: "I sent your stuff this afternoon and registered the billfold in a small package."

The money orders were never received by Martin (R 28) and he testified that he did not indorse prosecution's Exhibits 2 to 5, inclusive, and that he did not at any time authorize the accused or anyone else to indorse them in his behalf (R 29, 35-36). Approximately 60 days before the trial the post office reissued four money orders to the witness who thereupon cashed them (R 30).

Lieutenant Colonel Ray C. Neuendorf, Inspector General, 7th Infantry Division, testified by deposition (Pros Ex 7, R 38) that on or about 25 September 1946, he interrogated the accused at the headquarters of the 7th Infantry Division. After his rights under the 24th Article of War were read and explained to him, the accused admitted that four money orders had been left in his custody by Staff Sergeant John Q. Martin. At first the accused stated that the money orders had been mailed to Martin, but on further questioning he admitted that the indorsements thereon were in accused's handwriting, although he did not remember signing them. He also admitted that the Army Serial Number appearing below the signatures was the accused's serial number as an enlisted man. He stated that he could have indorsed the money orders while on a "cognac binge." A specimen of the accused's handwriting consisting of the words and figures contained in the indorsements repeated ten times was identified by Colonel Neuendorf as having been made by the accused in his presence and was attached by him to the deposition.

A "Certificate for Longevity" prepared by the accused in his own handwriting and identified by Edna M. Willie, a civilian employee, before whom it was executed, was introduced into evidence as a specimen of accused's handwriting (Pros Ex 1, R 15-16).

Mr. Harry M. Ashton, a Post Office Inspector, whose duties involve the examination of questioned documents, was qualified as a handwriting expert (R 39-40). He testified that he examined and compared the postal money orders alleged to have been indorsed by the accused (Pros Exs 2, 3, 4, and 5) with the known specimen of the accused handwriting (Pros Exs 1, 6, and Inclosure to Pros Ex 7). In his opinion the person who wrote the

handwritten matter contained in prosecution's Exhibits 1, 6, and the inclosure to prosecution's Exhibit 7 was the same person who wrote the indorsement to the money orders in question (R 40). He further testified that he examined specimen of John Q. Martin's handwriting and that in his opinion the indorsements were not written by Martin (R 42).

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

Mr. Frank L. Kirkoff, a Post Office employee, testified that postive identification is required before a money order may be cashed (R 43).

John Q. Martin, recalled as a witness for the defense testified that he had given the accused authority to sign the witness's name for the purpose of obtaining Post Exchange supplies (R 45). In mitigation he testified that the accused had at one time saved the witness's life and also saved the platoon in combat. On examination by the court he stated that his Army Serial Number had been 35933042 (R 46).

After he was fully apprised of his rights as a witness by the law member, the accused elected to remain silent (R 47).

5. Each of the four specifications of the Charge alleges that the accused did "with intent to defraud * * * falsely indorse a certain United States Postal Money Order by writing on the back thereof the name 'John Q. Martin, 1584482, 3918 QM Gas Co' * * * which money order was a writing of a private nature which might operate to the prejudice of another" in violation of Article of War 93.

In discussing the crime of forgery the Manual for Courts-Martial provides in relevant part:

> "Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice (Clark).
>
> "Some of the instruments that are subjects of forgery are checks, indorsements, orders for delivery of money or goods * * *. A false writing may be made by * * * signing an instrument already written.
>
> "The writing must be false - must purport to be what it is not. Thus, signing another's name to check with intent to defraud is forgery as the instrument purports on its face to be what it is not * * *" (MCM 1928, par 149i, pp 175-176).

The evidence relevant to the elements of proof as stated in the Manual for Courts-Martial are discussed below:

"(a) That a certain writing was falsely made * * * as alleged;"

The falsity of the indorsements on the money orders was established by the payee's testimony that he did not make the indorsements himself and that he did not authorize the accused or anyone else to do so. This fact is further corroborated by the testimony of the handwriting expert who testified that he has examined Martin's handwriting and that the indorsements could not have been written by Martin.

"(b) that such writing was of a nature which would, if genuine, * * * impose a legal liability on another, or change his legal liability to his prejudice;"

The court was warranted in taking judicial notice of the fact that the indorsement of the payee of a postal money order will serve to impose upon the government a legal obligation to cash the money order at its face value. It is also obvious that the indorsements in question prejudiced Martin's interests.

"(c) that it was the accused who so falsely made * * * such paper; and"

The accused's opportunity to make the false indorsement was established by Martin's testimony that he entrusted the money orders to the accused on or about 3 January 1945 prior to being evacuated through medical channels. In his pre-trial statement the accused admitted that the indorsements were in his handwriting and that the Army Serial Number appearing below the forged signatures was his serial number as an enlisted man. Furthermore the handwriting expert's testimony that the indorsements in question were written by the same person who wrote certain writings known to be in accused's handwriting, establishes conclusively that it was the accused who falsely wrote the indorsements.

"(d) the facts and circumstances of the case indicating the intent of the accused thereby to defraud or prejudice the right of another person."

Although the accused admitted, in his pre-trial statement, that the signature on the money orders was in his handwriting, he stated that he did not recall having signed the money orders, and that he must have signed the papers while on a "cognac binge." Nevertheless, the court was amply warranted in inferring the accused's fraudulent intent from

Martin's testimony that he did not receive the money orders from the accused as he had requested, although in his letter dated 9 February 1945 (Pros Ex 6) the accused had stated that he had mailed Martin's wallet by registered mail, thus intimating that the money orders which were in the wallet had also been mailed. The false indorsement and the subsequent indorsements, showing that the money orders had been cashed by an Army disbursing officer, show that the instruments were uttered and cashed, thus further tending to establish the accused's intent to defraud.

For the reasons stated, we are of the opinion that the accused's guilt of forgery as alleged was established by clear and compelling evidence.

5. At the outset of the trial the defense challenged Major James L. Nolan, JAGD, the law member on the grounds that he had expressed an opinion as to the accused's guilt and that he would review the record of trial as Staff Judge Advocate (R 3). After hearing argument and testimony of the challenged member the court did not sustain the challenge (R 6).

On voire dire examination the challenged law member testified that he is assigned as an Assistant to the Chief of the Military Justice Section in the Second Army Judge Advocate's Office (R 4, 6). His duties involve the examination of charge sheets for legal sufficiency and the preparation of reviews in general courts-martial (R 4). He did not recall having seen any of the papers connected with the instant case, although, since hundreds of cases pass through the office in which he is assigned, there is a possibility that he might have seen them. He has never discussed the merits of the case and the only discussion he has ever had pertaining to the case involved the arrangements for the time of trial and the seating of the court (R 5). He also stated that he did not know the accused and had no present knowledge of the case (R 6).

It is obvious that the law member had formed no prior opinion of the case. His mere assignment in the Military Justice Section of the Staff Judge Advocate's Office does not warrant an inference that the challenged member had expressed an opinion as to the case or that he was in any way biased or prejudiced against the accused. Accordingly we are of the opinion that the court's action in not sustaining the challenge was proper.

6. The accused is 33 years of age, married and the father of five children. He is a high school graduate and attended the University of Minnesota for two years. War Department records show that prior to induction he was a warehouse foreman, a janitor in a Post Office, and a warehouse superintendent. He was inducted on 10 May 1942. After being graduated from the Quartermaster Corps Officer Candidate School he was commissioned as a second lieutenant, Quartermaster Corps, Army of the United States on 11 December 1942. He was promoted to the rank of first

lieutenant on 1 November 1944. On 17 July 1946 he accepted an appointment as a first lieutenant, in the Regular Army. He served in the European Theater of Operations from March 1944 until October 1945 and in Korea from August 1946 until January 1947 when he was returned to the United States for trial. All of the efficiency ratings of record show that he was rated Superior by the rating officer. For the period from 1 July 1946 to 31 December 1946, the indorsing officer, however, recommended a numerical rating of 2.75 (Very Satisfactory).

7. The Board of Review has given consideration to a photostatic copy of a letter from the accused dated 9 May 1947, which letter was referred to The Judge Advocate General's Office by the Inspector General to whom it was addressed, wherein the accused complained of various alleged irregularities in connection with his trial, restraint and other matters. The alleged irregularities in connection with the trial pertained to the court's failure to sustain the defense's challenge of the law member. As indicated above, we are of the opinion the record of trial indicates that the court's action in not sustaining the challenge was proper.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures, and confinement at hard labor for one year is authorized upon a conviction of a violation of Article of War 93.

D. Weinstein, Judge Advocate

D. McDonald Gray, Judge Advocate

Waldemar A. Solf, Judge Advocate

JAGH - CM 323168 1st Ind SEP 26 1947

JAGO, Dept. of the Army, Washington 25, D. C.

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Leonard A. Kuehnel (0-32342), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of forgery of the indorsement of the payee on four United States money orders each in the amount of $100.00 in violation of Article of War 93 (Specs 1-4, Charge). No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the 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.

In January 1945, the accused was in command of the 1st Platoon, 3918th Quartermaster Gas Supply Company in France. On 3 January 1945 Sergeant Martin, an enlisted man in his command who was about to be evacuated through medical channels because of injuries sustained in an accident, entrusted to accused a wallet containing four $100 Postal Money Orders payable to Martin. About one month later Martin wrote to accused and asked that the money orders be sent to him at Oxford, England. Accused replied that he had sent the wallet to Martin by registered mail, but Martin did not receive it. The money orders, indorsed by what purported to be Martin's signature, were cashed by an Army Disbursing Officer. In a voluntary pre-trial statement, accused admitted that the indorsements were in his handwriting and that an Army serial number which appeared on the indorsement was his serial number as an enlisted man, but he stated that he did not recall making the indorsement. He further stated that he must have been drunk when he signed Martin's name. The indorsements were also shown to be in accused's handwriting by a handwriting expert who testified that the indorsements were written by the same person who had written certain other documents known to be in accused's handwriting.

Martin testified that accused had once saved his life and had also saved his platoon in combat.

4. Accused is 33 years of age, married, and the father of five children. He is a high school graduate and attended the University of Minnesota for two years. War Department records show that prior to induction he was a warehouse foreman, a janitor in a post office, and a warehouse superintendent. He was inducted on 10 May 1942. After being graduated from the Quartermaster Corps Officer Candidate School he was commissioned as a second lieutenant, Quartermaster Corps, Army of the United States, on 11 December 1942. He was promoted to the rank of first lieutenant on 1 November 1944. On 17 July 1946 he accepted an appointment as a first lieutenant in the Regular Army. He served in the European Theater of Operations from March 1944 until October 1945, and in Korea from August 1946 until January 1947 when he was returned to the United States for trial. All of accused's efficiency ratings of record are "Superior." For the period from 1 July 1946 to 31 December 1946, the indorsing officer, however, recommended a numerical rating of 2.75 (Very Satisfactory).

5. Consideration has been given to a photostatic copy of a letter from accused dated 9 May 1947 which was referred to my office by The Inspector General to whom it was addressed, wherein the accused complained of various alleged irregularities in connection with his restraint, trial, and other matters.

6. In my opinion there are no mitigating circumstances in the case. Accordingly, I recommend that the sentence be confirmed and carried into execution and that an appropriate United States disciplinary barracks be designated as the place of confinement.

7. Inclosed is a form of action designed to carry the foregoing recommendation into effect, should such 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. 11, 16 Oct 1947).

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D.C.

21 October 1947

JAGV CM 323188

UNITED STATES v. Privates EUGENE B. HAMRICK (13238060), Squadron TM-2, VAN S. BUCHER (16201892), Squadron B, and HAROLD G. GIBSON (15207779), Squadron TM-1, all of 463d Army Air Forces Base Unit.	)	TECHNICAL DIVISION, AIR TRAINING COMMAND Trial by G.C.M., convened at Geiger Field, Washington, 9 May 1947. Dishonorable discharge and confinement for one (1) year for each. Each: Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, Judge Advocates

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that, Private Harold G. Gibson, Squadron TM-1, 463d Army Air Forces Base Unit, Private Van S. Bucher, Squadron B, 463d Army Air Forces Base Unit, and Private Eugene B. Hamrick, Squadron TM-2, 463d Army Air Forces Base Unit, acting jointly and in pursuance of a common intent, did, at the Base Guardhouse, Army Air Base, Geiger Field, Washington, on or about 3 April 1947, with intent to do him bodily harm, commit an assault upon Corporal Willie Breaux, by willfully and feloniously striking the said Corporal Willie Breaux on the head with a dangerous instrument, to wit, a sock filled with coal.

Each accused pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of one previous conviction was introduced as to accused Bucher and Hamrick, and evidence of two previous convictions was introduced as to accused Gibson. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentences, designated the Branch United States Disciplinary

Barracks, Fort Knox, Kentucky, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. a. The evidence for the prosecution shows that on 3 April 1947 the three accused were prisoners in the Guardhouse, Geiger Field, Washington (R. 22). Corporal Willie Breaux was a turnkey in the Guardhouse (R. 9). He was relieved about 2400 hours (2 April 1947) and, as he was leaving his post, was accosted at the foot of a flight of stairs by the accused Hamrick, who asked for a cigarette (R. 8,9). After a brief conversation, Hamrick grabbed Breaux by the sleeve and, at the same time, Breaux was struck a severe blow on the head (R. 7,8). Breaux did not see who struck the blow and recalled nothing thereafter until he found himself in the turnkey's office (R. 8,9). His head hurt and he was examined by a medical officer the following day (R. 10). The medical officer testified that he had a small area of swelling over the right temple (R. 10).

Private Bobbie L. Terry, a prisoner, saw Hamrick talking to Breaux at the foot of the flight of stairs (R. 13). He also observed the accused Bucher step out from behind a door and swing a sock in an overhand motion at Breaux. He did not see the sock hit Breaux and heard no blow. Gibson was standing immediately beside the witness when this occurred. Breaux then went upstairs to the turnkey's office (R. 14,15).

Captain Bernard J. Kingery, who was Base Officer of the Day, was called to the guardhouse shortly after 2400 hours, 2 April 1947. On arrival, a guard told him that something had been thrown over the fence a short while before. He directed the Sergeant of the Guard to retrieve the object. The Sergeant went around the fence and returned with a sock filled with coal (R. 19,20).

First Lieutenant Vincent J. LaFlamme, in investigating the case on the morning of 3 April 1947, explained to the accused Bucher and Gibson their rights under the 24th Article of War by telling them that they could make a sworn statement, unsworn statement, or remain silent. Bucher said that he understood his rights (R. 16). Lieutenant LaFlamme then questioned them and Bucher signed a statement which was admitted in evidence (Ex. A, P. 17). The trial judge advocate showed Lieutenant LaFlamme a document for the purpose of refreshing his memory, and the latter identified it as a statement which Gibson refused in writing to sign. The document was not introduced in evidence. Lieutenant LaFlamme testified that Gibson orally admitted that he made the coal filled sock and that it was the object used to strike the turnkey (R. 18). Lieutenant LaFlamme received the coal filled sock from Captain Kingery but the latter gave him no other information (R. 28). The names of the suspects and a general outline of what occurred were given him by Lieutenant Shelton and others (R. 29).

Staff Sergeant Peter J. DuBell, an investigator at the Provost Marshal's Office, interviewed the accused Hamrick. He asked Hamrick whether he knew his rights under the 24th Article of War and understood that he did not need to make any statement. Hamrick said he did. Hamrick then signed and swore to a written statement before Lieutenant LaFlamme. The statement was admitted in evidence (Ex. C, R. 23).

The statements signed by Bucher (Ex. A) and Hamrick (Ex. C) admit in substance that the attack on Breaux was part of a plan to escape from the guardhouse. Hamrick admitted "stalling" Breaux by asking for a cigarette, and Bucher admitted hitting Breaux on the head with the coal filled sock.

b. Evidence for the defense.

Captain Kingery, called as a witness for the defense, testified that when he was called to the guardhouse shortly after 2400 hours, 2 April 1947, Breaux, in his presence, identified Hamrick as the man to whom he was talking when he was struck. Hamrick was then questioned but had nothing to say. Captain Kingery announced to all the prisoners, "before I leave here I want the information," and indicated there was a possibility the investigating officer would recommend leniency if they confessed. The 24th Article of War was not read to them (R. 25,26). The prisoners were kept at parade rest and attention until 0445 hours in the morning. They were told they would stand there until Captain Kingery "got to the bottom of the investigation" (R. 27,28). Bucher came forward during the course of the investigation and gave a story of what happened, but Captain Kingery did not believe him and told him to go back until he thought he had the story straight. Gibson was also questioned. Captain Kingery turned the general information so obtained over to the investigating officer for his investigation (R. 26), but he did not tell the investigating officer that the accused admitted their guilt (R. 27).

4. It clearly appears that the accused were not warned of their rights before being questioned by Captain Kingery, that they were coerced by being compelled to stand in formation for a considerable period, and that it was at least implied leniency would be shown those who admitted their participation in the assault. Each of the accused was questioned and made incriminating statements to Captain Kingery. Shortly thereafter, the accused were somewhat inadequately warned of their rights and questioned by Lieutenant LaFlamme and Sergeant DuBell. So far as the record discloses, this questioning was merely a continuation of the inquisition conducted by Captain Kingery and, except for the evidence as to the warning, there is no reason to believe that the statements obtained in the process of the interrogation by the investigating officer were not the result of

the improper influences brought to bear in the initial investigation by Captain Kingery.. In connection with the confessions of Bucher and Hamrick, the warning at this stage of the proceedings may be considered as little more than a frivolous concession to the requirements of the law. The influence of third-degree methods cannot be so easily dismissed. (CM (ETO) 1486, 3 Bull JAG 227). It was incumbent on the prosecution to rebut, by clear and convincing evidence, the presumption that "the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible." (2 Wharton, Criminal Evidence, sec 601, pp 998-1002). This the prosecution failed to do. It is, therefore, the opinion of the Board of Review that the confessions of Bucher and Hamrick should have been excluded as evidence. (par 114a, MCM, 1928).

5. Gibson's statement that he made the coal filled sock is an admission against interest as it is not in itself a complete acknowledgment of guilt. It is, however, highly inculpatory, almost tantamount to a confession, as but for it and the testimony as to Gibson's presence at the scene, there is no evidence connecting him with the assault. In any event, considering the statement only as an admission against interest, there are ample grounds for excluding it from evidence. The Manual for Courts-Martial, 1928, prescribes that should it be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement (par 114b, MCM 1928). The evidence not only shows that Gibson, like Bucher and Hamrick, was coerced and that hope of benefit was held out to him, but, in addition, it discloses that he refused to sign a written statement which apparently had been prepared on the basis of his interrogation by Lieutenant LaFlamme. His refusal to sign the written statement, when considered in connection with the improper influences that were brought to bear on him, strongly indicates that the oral statements which composed it may have been false. It follows that the court might properly, on these grounds, have excluded or disregarded all evidence of Gibson's admission. However, another and more compelling reason appears for excluding his statement. As previously indicated, the trial judge advocate showed Lieutenant LaFlamme a document for the purpose of refreshing his recollection. The witness identified the document as, "a statement, sworn to before me, which Private Gibson refused to sign." He then proceeded to testify, apparently by reference to the document, that Gibson identified the coal filled sock and stated that he made it. The document was not introduced in evidence but it is included in the miscellaneous papers with the record of trial. It is obviously a transcript of Lieutenant LaFlamme's interrogation of Gibson and it bears Gibson's signature with the statement, "I refuse to sign." Examination of the document shows that Gibson's replies to Lieutenant LaFlamme's questions constitute a confession, for Gibson admitted not only the making of the weapon but also his participation

in planning the attempted escape. Evidence of this confession, like the evidence of the confessions of the other two accused, was inadmissible because of its manifestly involuntary nature. It is well established that if, for any reason, a confession is inadmissible in evidence, isolated admissions taken from that confession are inadmissible (CM 162155, sec 395(3), Dig Op JAG 1912-40; CM 187610, Williams, 1 BR 67). Gibson's statement that he made the mentioned weapon was an isolated admission from his inadmissible confession and, therefore, was itself inadmissible.

6. The admission in evidence of the coal filled sock, the alleged weapon, was also improper, particularly in view of the inadmissibility of the extra-judicial statements of the accused. Except for the mentioned statements, the only evidence tending to identify the weapon is found in the testimony of Captain Kingery to the effect that he was told something was thrown over the guardhouse fence and that a sergeant, whom he sent to search, returned with the coal filled sock. This evidence was for the most part hearsay and, excluding the hearsay, wholly irrelevant. No convincing evidence remains as to the allegedly dangerous nature of the weapon used in the assault. The fact that Breaux suffered a slight swelling over the right temple and was momentarily stunned has no probative value in establishing the weapon's dangerous character as such injuries might have been inflicted by a fist or other instrument of a non-lethal type. It follows that so much of the findings as pertain to a dangerous instrument is not supported by the evidence.

7. Excluding Gibson's admission that he made the alleged weapon, there is no competent evidence indicating that he participated in the assault; in fact, the only evidence as to him shows that he was a mere onlooker. It follows that the record of trial is legally insufficient, for want of evidence, to support the findings and sentence as to Gibson.

8. The rule is that the erroneous admission of incompetent evidence does not affect the substantial rights of the accused where guilt is established by other compelling convincing evidence properly in the record (CM 254423, Gonzales, 35 BR 243). (Also see CM 243384, Rowley, 27 BR 356; CM 255774, Ware, 36 BR 187; sec. 395(2)(10), Dig. Op. JAG 1912-40). There is in this case compelling, convincing, and uncontradicted competent evidence that Hamrick held Breaux' attention and held his arm while Bucher struck him on the head with an unknown object. The simultaneity of their acts evidences that they were joint actors. That the assault was with intent to do bodily harm, albeit not with a dangerous weapon, is to be inferred from the fact that it was launched with the obvious purpose of physically overcoming the turnkey so as to permit escape, that a weapon of some nature was used, and that the turnkey was in fact bruised and stunned by the blow. It is, therefore, the view of the Board that the record of trial is legally sufficient to support findings of guilty, as to Hamrick and Bucher, of assault with intent to do bodily harm.

9. The accused Hamrick was eighteen years of age when charges were preferred. He enlisted 31 May 1946, and had no prior service. Bucher was eighteen and seven-twelfths years of age when charges were preferred. He enlisted 9 November 1945, and had no prior service.

10. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings and sentence as to the accused Gibson, and legally sufficient to support only so much of the findings of guilty of the Specification of the Charge as to the accused Hamrick and Bucher as involves findings that each accused, acting jointly and in pursuance of a common intent, at the time and place alleged, with intent to do him bodily harm, committed an assault upon Corporal Willie Breaux by striking him on the head with an unknown instrument, and legally sufficient to support the sentence as to the accused Hamrick and Bucher.

Wilmot T. Baughn, Judge Advocate

John J. O'Brien, Judge Advocate

George S. Springstee, Judge Advocate

NOV 19 1947

JAGV CM 323188 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C.

TO: The Commanding General, Technical Division, Air Training Command, Scott Field, Illinois.

1. In the case of Privates Eugene B. Hamrick (13238060), Squadron TM-2, Van S. Bucher (16201892), Squadron B, and Harold G. Gibson (15207779), Squadron TM-1, all of 463d Army Air Forces Base Unit, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence as to the accused Gibson be disapproved, and that only so much of the findings of guilty of the Specification of the Charge as to Hamrick and Bucher be approved as finds that they, acting jointly and in pursuance of a common intent, did, at the time and place alleged, with intent to do him bodily harm, commit an assault upon Corporal Willie Breaux by striking him on the head with an unknown instrument. Upon taking such action you will have authority to order execution of the sentence as to accused Hamrick and Bucher.

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 323188).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

057090

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

JAGK - CM 323197

22 AUG 1947

UNITED STATES v. Sergeant WILLIAM ABNEY (RA 33083663), 897th Quartermaster Laundry Company	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters, PHIBCOM, PHILRYCOM, APO 358, 12 February 1947. To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant William Abney, 897th Quartermaster Laundry Company, did, at or near Manila, Philippines, APO 75, on or about 7 December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technical Sergeant Nevaina Mills, a human being, by shooting him with a carbine.

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 hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On the morning of 7 December 1946, Private First Class Ernest L. Hicks, 897th Quartermaster Laundry Company, was in the company orderly room performing his duties as company clerk. Somewhere between 9:00 and 9:30 a.m. accused entered the orderly room and asked Acting First Sergeant Nevaina Mills for relief from a "detail." Sergeant Mills refused and accused left the orderly room. The conversation between accused and Sergeant Mills was held in a normal tone of voice and no "strong words" passed between them. About ten or twenty minutes later accused returned to the orderly room armed with a carbine. Accused aimed his carbine at Sergeant Mills and proceeded to fire

it at him. After the first shot, Private Hicks fled from the orderly room. He heard other shots being fired as he left. When he later returned to the orderly room he saw Sergeant Mills lying face down on the floor. Accused did not appear to be under the influence of alcohol at the time of the shooting. Accused had guard duty "sometimes every other day." Private Hicks knew of no "bad feelings" existing between accused and Sergeant Mills (R. 13-17).

Private Eugene Henderson was also in the company orderly room on the morning of 7 December 1946. Accused entered the orderly room and Sergeant Mills asked accused why he had not attended the non-commissioned officers' meeting the night before. Private Henderson did not hear accused's reply. Sergeant Mills then told accused to take out a detail to police the company area and to report back to him. When accused later reported back, Sergeant Mills asked him why he had not picked up certain tents and put them in the supply room. Accused then received instructions to move the tents and again left the orderly room. He returned in about half an hour and "began to fire" at Sergeant Mills with a carbine. Private Henderson left the orderly room after the first shot. He did not hear accused say anything before firing the first shot and "couldn't tell" whether accused had been drinking (R. 17-19).

Sergeant Bonny P. Byrd and Corporal Charles H. Fisher also saw accused fire a carbine at Sergeant Mills in the company orderly room on the morning of 7 December 1946. After the first shot was fired Corporal Fisher saw Sergeant Mills fall to the side of his desk and the corporal then left the orderly room to get a truck to take Sergeant Mills to the hospital. Sergeant Byrd thought that from nine to twelve shots were fired, accused and Sergeant Mills being about five yards apart at the time. Sergeant Byrd had been present during a conversation between accused and Sergeant Mills held earlier that morning and Sergeant Byrd himself had spoken to accused. Accused appeared to be perfectly normal and Sergeant Byrd "couldn't remember" smelling liquor on accused's breath (R.20-23).

On the morning of 7 December 1946, Sergeant Eugene Schuler, who had been Sergeant of the Guard the preceding night, was trying to take a "nap" in the company supply room. Hearing a group of shots he went to the door of the supply room and noticed "everybody in the company" running through the area. He stopped a corporal and learned from him that Sergeant Mills had been shot in the orderly room. When Sergeant Schuler arrived at the orderly room, he saw accused standing by the desk as though he were about to make a telephone call. Sergeant Schuler "slipped behind" accused and seized him. A carbine was lying on the desk. Sergeant Schuler did not smell liquor on accused's breath. The sergeant placed accused under guard and then assisted in laying Sergeant Mills on a mattress and putting him in a truck. He accompanied the truck to the 2007th Station Hospital where Sergeant Mills was left with a doctor. Sergeant Mills did not speak on the way to the hospital (R. 10-13).

Doctor Faustino P. Sunico, a qualified physician, and a pathologist at the 10th Medical General Laboratory, performed an autopsy on the body of a soldier on 7 December 1946. The doctor identified three photographs, admitted in evidence without objection by the defense as Prosecution Exhibit B, as being photographs of the body upon which he had performed the autopsy (R. 6,7,8,9). Private Hicks and Sergeants Byrd and Schuler each testified that the body of the person shown in these photographs was that of Sergeant Mills (R. 11,14,15,23). Doctor Sunico found that not less than twelve bullets had entered Sergeant Mills' body and that death had been caused by loss of blood resulting from gunshot wounds of the right lung and liver. The results of the autopsy were set forth in detail in an "Autopsy Protocol," dated 7 December 1946, purporting to relate to one Technical Sergeant Navaina Mills, 897th Laundry Company, who had been admitted to the 2007th Station Hospital. It was there stated that the cause of death was determined to be due to severe internal hemorrhage as a result of multiple traumatic lacerations of the right lung and liver. A carbon copy of this autopsy protocol was accepted in evidence as Prosecution Exhibit A over objection of the defense. The copy was signed by First Lieutenant Felix A. Siegman, who was chief of the Pathology Department, 10th Medical General Laboratory. The original of this document had been sent to the "Washington" Institute of Pathology. Attached to and apparently intended to be made a part of Exhibit A was a "Case History," signed by the chief of the surgical service of the 2007th Station Hospital, in which the following statement appears:

> "Sgt MILLS, NEVANIA
>
> "Patient dead on arrival. He was shot with a carbine about 0900 hours 7 December 1946, in the orderly room of 897th Laundry Company at San Juan, Manila, Luzon, P.I. He was said to have been shot by another Sgt. in the outfit because of an argument that had arisen between the two.
>
> "Patient seen at 0920 hours and pronounced dead. There is a gun shot wound chin with fracture compound comminuted with a large defect. 3 gunshot wounds of left chest anterior and 1 gunshot wound of right chest anterior." (R. 7,8, Pros. Ex. A)

Evidence for the Defense

Accused, having been informed of his rights as a witness, elected to testify under oath in his own behalf. He stated that on the night of 6 December 1946 he had imbibed a quart of gin and some beer and that on the morning of 7 December he drank a pint of gin before reveille and another immediately thereafter. As a result of this drinking he became quite "dizzy" and although he remembered being "in camp" he did not remember being put on a detail by Sergeant Mills. He did recall that as he was talking on the telephone that morning "someone came from behind" and he "was carried out." Sometimes after drinking excessively he would have a "black spell" and his memory would fail him. When he first went on duty in the company he was assigned as sergeant of the guard every day and believed that he was doing

guard duty more often than he should. On one occasion while he was talking to Sergeant Mills, he was knocked down from behind by the then first sergeant, Sergeant Scott. He thought he had been knocked down because he "was trying to fix some of the things that were happening in the company" and, being the sergeant of the guard in the company, had spoken "for all the men around and myself of what the troubles are." At this time he had made the remark, "Why was the Tech Sergeant also a Company Clerk." He thought Sergeant Mills had been "fixing" him but he was not "mad" with the sergeant (R. 30-37).

Captain George A. Roberts was company commander and as such was responsible for the company guard. Each sergeant in the organization had guard duty approximately once every eight days. According to the duty roster, accused had been detailed for guard duty but "not very frequently." Accused had asked to be transferred to another organization (R. 25,26).

Captain Fred E. Lawrence, Medical Corps, chief of the Neuropsychiatric Section of the Tenth General Hospital, had been appointed president of a pretrial sanity board to inquire into the mental condition of accused. He identified the report of the board's proceedings, which report was admitted in evidence as Defense Exhibit 1. From this report it appeared that the board had found that accused was, at the time of the alleged offense, so far free from mental defect, disease or derangement as to be able concerning the particular act charged to distinguish right from wrong and to adhere to the right and that, at the time of the examination, accused was able to intelligently cooperate in his own defense. It also appeared that accused was born on 6 February 1910 in Columbia, South Carolina. His family was one of marginal economic stability and his father deserted the family while accused was still a child. Accused did not drink excessively until 1945 while he was on New Guinea. There, he frequently drank as much as a quart of whiskey a day when he could get it. At the present time he still drinks heavily when he can get liquor. Accused described himself at the mental examination as follows: "I used to think I was a pretty good man. Now I don't. I can't believe I did this, but from what they tell me I've got to believe it" (R. 26-29; Def. Ex. 1).

4. Accused was found guilty of the murder of Technical Sergeant Nevaina Mills. Murder is defined in the Manual for Courts-Martial, 1928, as "the unlawful killing of a human being with malice aforethought." In discussing the term "malice," the Manual lays down the following principles:

> "Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by wish that it may not be caused; intent to commit any felony. ***" (MCM, 1928, par. 148a).

Justice Holmes, while Chief Justice of the Supreme Judicial Court of Massachusetts, had occasion to say,

"Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification" (Commonwealth v. Chance, 174 Mass. 245,252).

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

"Thus it has been held that where a deadly weapon is used in a manner likely to cause death and death actually results from such use, the law will presume malice from the act ***."

In the instant case, there can be no doubt that accused took the life of Sergeant Mills by shooting him with a carbine and we are of the opinion that malice aforethought may be inferred from the circumstances of this shooting (CM 270716, Kinlow, 3 BR (NATO-MTO) 249,253). Accused did not appear to be intoxicated at the time and the conversation held between him and his victim about half an hour before the homicide was not attended by any sign of abnormality. The court was, therefore, clearly warranted in refusing to accept accused's defense of drunkenness (CM 284389, Creech, 16 BR (ETO) 249,259; CM 289378, Rowell, 28 BR (ETO) 193). Moreover, whatever provocation may have existed in accused's mind as a result of his general dissatisfaction over the administration of his unit and his suspicion that deceased had been "fixing" him was certainly insufficient to excuse the killing or to mitigate it to voluntary manslaughter (CM 301544, Miranda, 5 BR (ETO) 381,387; CM 258068, Cobb, 1 BR (ETO) 211,215; CM 247055, Mason, 30 BR 249,253; CM 237827, Green, 1 BR (ETO) 345,364; CM Creech, Supra, p. 260).

Although the evidence of accused's guilt, aliunde Prosecution Exhibit A (autopsy protocol), is complete and compelling to such an extent that any question of the admissibility of this document would have no bearing

on our decision herein (AW 37), we feel that the objection of defense counsel to its acceptance in evidence merits some discussion. The autopsy protocol contains, in addition to an identification and detailed description of the corpse upon which the autopsy was performed, the usual clinical and pathological diagnoses and concludes with a statement of the physical cause of death. Attached to the protocol is the "case history" quoted above. If this exhibit, or any part thereof, is to be considered admissible in evidence at all, such admission must obviously be based on an exception to the hearsay rule. The only exceptions material to our discussion here are those relating to public documents and to entries made in the usual course of business.

Referring to official writings, 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 or events, each such record, including a permanent record compiled from mere notes or memoranda, is competent (i.e., prima facie) evidence of such facts and events ***" (MCM, 1928, par. 117a; underscoring supplied).

In CM 320957, Boone, the Board of Review had occasion to construe this language of the Manual as follows:

> "The Manual, then, as well as the common law exception to the hearsay rule, 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 the 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 Federal business entry statute is set forth in 28 U.S.C. 695 as follows:

> "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 as evidence of said act, transaction, occurrence, or event, if it

shall appear that it was made in the regular course of any 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. ***" (underscoring supplied).

Army Regulations prescribe the content and processing of autopsy reports. Paragraph 19d, AR 40-590, 21 January 1946, provides:

"(1) An autopsy will be performed upon the body of any person dying in the military service when the commanding officer of the hospital or the surgeon of a station or command deems such procedure necessary in order to determine the true cause of death, and to secure information for the completion of military records. ***

"(2) Complete records of autopsies performed will be kept. A copy of the records of each case will be forwarded direct to the Curator, Army Medical Museum. See AR 40-410". (Underscoring supplied.)

And AR 40-410, 7 June 1946, provides:

"7. *** The material (surgical and biopsy material required to be sent to the Army Institute of Pathology) will be accompanied by an Autopsy Protocol *** containing the patient's name, grade, organization, Army serial number, and an abstract of the clinical history ***. The records and material will be permanently filed at the Army Institute of Pathology. ***

"8. *** The original protocol, and not a carbon copy, of all autopsies performed in the military service will be forwarded to the Director, Army Institute of Pathology, where the diagnosis will be reviewed and a reply rendered. A permanent file of such documents and material will be maintained for the Army by the Institute. The protocols will be accompanied by an abstract of the clinical history and the other information and material stated in paragraph 7. *** In cases of violent death or sudden death there will be a statement in the clinical history covering the circumstances of death, namely: Homicide, suicide, accident, etc. ***" (underscoring supplied).

The identification and description of the corpse, the clinical and pathological diagnoses and the statement as to the physical cause of death found in the autopsy protocol here under consideration were thus required to be inserted therein by the above quoted regulations. The "case history" was obviously attached to the protocol in compliance with the requirement that there be included an abstract of the clinical history containing a statement covering the circumstances of the violent death.

From the foregoing, it appears that Prosecution Exhibit A is, generally speaking, both a public document and a record made in the usual course of business (CM 312023, Schirmer). It does not follow, however, that all the entries therein are admissible in evidence, for only those entries which can be considered a record of a fact, act, transaction, occurrence or event are admissible as exceptions to the hearsay rule under either of the doctrines here under discussion. It is to be noted that an entry of opinion is not included. In what is said hereinafter, we shall use the word "event" as including the words "act," "transaction" and "occurrence" and as being included within the meaning of the word "fact."

In Hadley v. Ross (195 Okl 89, 154 P. (2d) 939,941), the court, in holding that the report of a highway patrolman as to the cause of an accident was not admissible, said:

> "All the authorities cited by the parties to this action indicate that all courts recognize the existence of an exception to the hearsay rule in certain instances as applied to records required to be kept by public officers. *** The principle which seems fairly deducible from most of the authorities cited, as well as numerous others, is that a record of primary facts made by a public officer in the performance of official duty is or may be competent prima facie evidence of the existence of such primary facts, but expressions of opinion or conclusions or statements involving the exercise of judgment and discretion made by public officers, voluntary or pursuant to requirements of law, are not admissible in evidence though a part of a public record" (Underscoring supplied).

The Federal business entry statute has been similarly construed with respect to expressions of opinion (New York Life Insurance Co. v. Taylor, 147 F.(2d) 297,303).

Properly speaking, a statement of opinion cannot be considered a statement of fact, for an opinion necessarily exists apart from the phenomena or events which allow, or bring about, at least, its formulation. The qualifications required by the courts before one is allowed to express an opinion vary with the complexity of the subject matter, from ordinary observation with regard to commonly encountered human reactions, such as fear, drunkenness, etc., to scientific experience with regard to the relatively more abstruse matters lying within the various fields of scientific knowledge. In either case, however, an opinion is a summation, an impression upon the mind brought about by an accumulation of facts, "facts" being limited to those phenomena or events by which the human senses are directly activated without the intervention of conscious mental deliberation. Nevertheless, it is often difficult as a practical matter to draw the line between what is opinion and what is fact and some assertions based on trained observation which, strictly speaking, might be considered statements of opinion so closely

approximate statements of fact as to permit the courts to place them in the latter category rather than the former and to admit a record of them without appreciable risk of doing an injustice because of lack of opportunity to cross-examine.

Thus, in Long v. United States (59 F. (2d) 602,603) the court, in holding that a diagnosis of tuberculosis contained in a report of Government physicians was admissible as an official writing said,

> "The diagnosis *** approximates a statement of fact, being in reality what the physician observes when he views the insured with the trained eye of an expert. It gives meaning, moreover, to the statements as to physical facts observed, and serves as a check upon these statements, precluding the drawing of inferences therefrom which the physician did not intend."

In Reed v. Order of United Commercial Travelers (123 F. (2d) 252), the court admitted in evidence as a business entry under the Federal statute a statement in a hospital record containing a diagnosis of drunkenness, apparently employing the same theory as was announced in the Long case. A hospital record showing a diagnosis of a psychoneurotic state was excluded in New York Life Insurance Co. v. Taylor, supra, on the ground that such a diagnosis involved conjecture and opinion, a careful distinction being drawn, however, between this and less complex forms of diagnoses.

We are of the opinion, therefore, that the clinical and pathological diagnoses found in the autopsy protocol in question were properly accepted in evidence as official writings or as business entries under the Federal statute, and further that the statement as to the physical cause of death, the determination as to such cause being merely a form of diagnosis and being required to be made by regulation in the regular course of the pathologist's business, was likewise admissible (Norwood v. Great American Indemnity Company, 146 F. (2d) 797; Hunter v. Derby Foods, 110 F. (2d) 970; CM 294698, Tanner, 23 BR (ETO) 285,289; CM 320307, Robinson; see for irreconcilable conflict of authorities on this question, 96 ALR 324 and 75 ALR 378; compare New York Life Insurance Co. v. Taylor, supra, and Buckminster's Estate v. Commissioner of Internal Revenue, 147 F. (2d) 331,334).

The entries in the protocol which relate to the identification of the individual upon whose body the autopsy was performed and to the physical facts found to exist with respect to the corpse are clearly admissible within the principles discussed above (CM 300953, Herbert, 25 BR (ETO) 223,225; Long v. United States, supra).

It is immaterial, even under the test of admissibility of the official writing rule, that the chief of the pathology department who signed the autopsy protocol may not have had personal knowledge of the matters therein stated, the parts thereof which we have held competent being clearly based on the personal knowledge of his subordinates (CM Boone, supra; CM Robinson, supra). Although Prosecution Exhibit A was a carbon copy of the protocol,

it was a signed carbon copy and thus primary evidence equally with the signed ribbon copy. Both copies were "originals" (CM 204778, Conley, 31 BR (ETO) 367,370; CM 262042, Pepper, 5 BR (ETO 125,152).

Some of the statements in the "case history," however, stand upon quite a different footing than the other entries in Prosecution Exhibit A and this is so even though under the cited regulations a clinical history, generally compiled by a medical officer other than the pathologist signing the autopsy protocol, properly accompanies the protocol as part of the record. Although it is required that the clinical history accompanying an autopsy protocol contain a statement covering the circumstances attending a sudden or violent death, with a conclusion as to whether it was the result of homicide, suicide or accident, it can hardly be supposed that it was intended by this regulation to fix upon the pathologist or other medical officer submitting such a report the duty to know that any particular death was caused by homicide as distinguished from suicide or accident or, indeed, to even inquire into the truth of whatever purported circumstances surrounding the instant of demise may have been reported to him and upon which he may have based his conclusion. Consequently, the statements in the "case history" referring to the manner in which Sergeant Mills met his death (last two sentences in first paragraph) may not be admitted in evidence on the theory that they are official writings within the meaning of paragraph 117a of the Manual for Courts-Martial (CM 318685, Sustaite; CM 318467, Johnson). Nor, we believe, are these statements admissible under the Federal business entry statute. In construing this statute and holding that a report of accident made by a railroad engineer was inadmissible, the Supreme Court of the United States, in the case of Palmer v. Hoffman (318 U.S. 109, affirming 128 F. (2d) 976), said:

> "We may assume that if the statement was made 'in the regular course' of business, it would satisfy the other provisions of the Act. But we do not think that it was made 'in the regular course' of business within the meaning of the Act. The business of the petitioners is the railroading business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule - restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous. *** It was that problem which started the movement towards adoption of legislation embodying the principles of the present Act. *** And the legislative history of the Act indicates the same purpose.
>
> "The engineer's statement which was held inadmissible in this case falls into quite a different category. It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it

affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statments in the class of records made 'in the regular course' of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of day to day operations of a business would be forgotten as the basis of the rule. *** Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability ** *** acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met. ***

"The several hundred years of history behind the Act *** indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. <u>But 'regular course' of business must find meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."</u> (Underscoring supplied.)

It is obviously not the business of a pathologist or other medical officer to deal with that part of the res gestae of the occurrence of death not observable in the

DEPARTMENT OF THE ARMY

~~WAR DEPARTMENT~~

WASHINGTON

October 20, 1947

The President

The White House

Dear Mr. President:

Herewith transmitted are the record of trial, the opinion of the Board of Review and the views and recommendation of The Judge Advocate General in the case of Sergeant William Abney (RA33083663), 897th Quartermaster Laundry Company.

Upon trial by general court-martial, accused was found guilty of the murder of Technical Sergeant Nevaina Mills, in violation of Article of War 92. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

About 9 o'clock on the morning of 7 December 1946, at Manila, P.I., accused entered the orderly room of the 897th Quartermaster Laundry Company to see the acting first sergeant, Sergeant Nevaina Mills. Sergeant Mills asked accused why he had not attended the noncommissioned officer's meeting the night before and then told him to take out a work detail to police the company area. Accused then left the orderly room and when he reported back to Sergeant Mills shortly thereafter he was told to move some tents which had been left in the company area to the supply room. Accused again went out of the orderly room and when he returned about half an hour later he brought with him a loaded carbine which he immediately fired at Sergeant Mills. Some twelve bullets entered Sergeant Mills' body and he died that day through loss of blood resulting from perforations of the right lung and liver. Accused did not appear to be intoxicated and the conversations between accused and Sergeant Mills prior to the shooting were held in a normal tone of voice.

Accused testified in his own behalf at the trial. He stated that the night before the shooting he had drunk a quart of gin and some beer and that on the morning of 7 December he drank a pint of gin before reveille

and another immediately thereafter. As a result of this drinking he became "dizzy" and did not remember shooting Sergeant Mills. He believed that he was doing more guard duty in the company than he should and that Sergeant Mills was "fixing" him.

A board of medical officers examined accused before the trial and found that at the time of the homicide he knew the difference between right and wrong and could adhere to the right. They also found that accused had sufficient mental capacity to cooperate in his own defense.

Accused is thirty-seven years of age and has no allotments to dependents. He was inducted into the military service on 18 June 1941 and served in this country and in New Guinea and the Philippines. He was discharged from the Army of the United States in December 1945 and thereupon enlisted in the Regular Army to serve for three years.

The murder was committed by accused deliberately and The Judge Advocate General is of the opinion that the imposition of the death penalty is justified. He recommends that the sentence be confirmed and carried into execution.

I concur in the recommendation of The Judge Advocate General and inclose a form of action designed to carry it into effect should it meet with your approval.

Respectfully yours,

Secretary of the Army

3 Incls
1 Record of trial
2 Op Bd Rev w/JAG Ind
3 Form of Ex action

JAGK - CM 323197 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 2 3 1947

TO: The Secretary of the Army

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 Sergeant William Abney (RA 33083663), 897th Quartermaster Laundry Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to a letter, dated 7 July 1947, written on accused's behalf by his aunt, Mrs. Rebecca Robinson, 3102 South 16th Street, Philadelphia, Pennsylvania.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1 Record of trial
2 Drft ltr sig S/A
3 Form Ex action
4 Ltr fr Mrs Rebecca Robinson, dtd 7 July 47

(GCMO: 38, D.A., 29 Oct 1947).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323234

U N I T E D S T A T E S	)	MEDITERRANEAN THEATER OF OPERATIONS
	)	
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 11-12 March 1947. Fine of $25,000, dishonorable discharge and confinement for thirteen (13) years. Disciplinary Barracks. Fine of $500 and confinement for thirty (30) days (suspended).
General Prisoner RALPH V. MEAD.	)	

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

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

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

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

Specification 1: In that General Prisoner Ralph V. Mead, attached 7103 Disciplinary Training Company (Overhead), then 6677 Disciplinary Training Company (Overhead), did, at or near Pisa, Italy, on or about 2 September 1945, desert the service of the United States and did remain in desertion until on or about 2 March 1946.

Specification 2: In that General Prisoner Ralph V. Mead, * * *, did, at or near Pisa, Italy, on or about 7 June 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Pisa, Italy, on or about 3 December 1946.

Specification 3: In that General Prisoner Ralph V. Mead, * * *, did, at or near Pisa, Italy, on or about 19

December 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Pisa, Italy, on or about 25 December 1946.

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

Specification 1: In that General Prisoner Ralph V. Mead, * * *, having been duly placed in confinement in the MTOUSA Disciplinary Training Center on or about 2 March 1946, did, at or near Pisa, Italy, on or about 7 June 1946, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that General Prisoner Ralph V. Mead, * * *, having been duly placed in confinement in the MTOUSA Disciplinary Training Center on or about 3 December 1946, did, at or near Pisa, Italy, on or about 19 December 1946 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, to pay a fine of $25,000 and to confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to thirteen years and designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. Five fines of $100 each and confinement for thirty days was imposed upon accused by the court for contempt of court on five separate occasions. Each fine of $100, totaling $500, and the confinement for thirty days imposed by the court upon accused as punishment for contempt were approved by the reviewing authority but the execution thereof was suspended pending, but not dependent upon, final action upon the Charges and Specifications for which the accused was tried and out of which trial such punishments for contempt were adjudged. Branch United States Disciplinary Barracks, Greenhaven, New York, was designated as the place of confinement for serving the sentence to confinement for contempt. The record of trial was forwarded for action pursuant to Article of War 50½.

3. In view of the reviewing authority's action pertaining to the fines adjudged against accused for contempt of court, the legality of the fine is not before the Board of Review for consideration at this time and no further reference will be made thereto. The paramount question presented in the record of trial concerns the court's ruling denying the defense motion for continuance of trial in order to permit accused to procure civilian counsel for his defense, and in view of the

Board's holding, as hereinafter expressed, a summary of evidence relating to the merits of the Charges and Specifications is deemed unnecessary.

4. The Charges in this case were served on the accused on 21 February 1947 while he was in confinement in the 7103 Disciplinary Training Company, Italy, as a general prisoner under sentence of general court-martial. The court convened for the purpose of trying accused at 1415 hours, 11 March 1947, at Leghorn, Italy. Accused was asked whom he desired to introduce as defense counsel, and the assistant defense counsel replied that accused desired to introduce one of the firm of Martin Brothers, attorneys of Tampa, Florida (R. 3). Neither one of the Martin Brothers, attorneys, was present in court and, as far as accused knew, they were still in Florida. During organization of the court, accused challenged for cause the law member, trial judge advocate and the assistant defense counsel who was then acting as his defense counsel (R. 6-8, 11-12). He stated that he wanted to make a plea to the court in order to state his reasons why he wanted a civilian lawyer from the States. As grounds of challenge for cause he said,

> "* * * these three members have been together on other trials and men have not got justice, have been framed up in court. That is why I want to take the stand and make my plea. That is why I have kept my statement" (R. 11).

With reference to the challenge of his appointed defense counsel accused stated,

> "* * * I object to him being my defense counsel because I have not accepted him, nothing has been prepared before we come to this courtroom other than stating that I have sent for my mother to get my civilian lawyer and it can be proved that I have sent for her" (R. 12).

At this point the following colloquy ensued:

> "Law Member: Does the accused know of any officer in this theater of operations that he would prefer to have as defense counsel rather than the present defense counsel?
>
> Accused: Due to the present, right now, that I have been tried once before and got a raw deal out of my trial, that I would rather get some member not a member of military defense, but a civilian lawyer to defend me, not that he will be working for the Army and working with the court, so as to — I cannot get a fair trial.

Law Member: Then, as I understand it, you have no person in this theater of operations in the military or a civilian in this theater of operations that you desire as counsel other than the present assistant defense counsel, Captain Robieson?

Accused: I have had not the chance that I could get another.

Law Member: Will you answer the question 'yes' or 'no'; is there anyone in this theater, either civilian or military, that you would rather have as your defense counsel than Captain Robieson?

Accused: Is there another member in this theater?

Law Member: In this theater, yes.

Accused: If nothing else, if I not know of any member, I would prefer to get me an Italian lawyer.

Law Member: Do you have one in mind?

Accused: I can get one, I can send and get one.

Law Member: How long has the accused been confined?

Prosecution: In confinement?

Law Member: I mean on this charge —

Prosecution: There is no confinement under these charges in view of the fact that the accused is already a general prisoner.

Law Member: When were the charges served on the accused?

Prosecution: On the 21st day of February 1947, and — may I add a further statement — at which time the accused was asked by the trial judge advocate if there was anyone in this theater, military or otherwise, that he desires as attorney, at which time the accused stated to me that he desired to send to the States and get a civilian lawyer, at which time the trial judge advocate told him that he would have the regularly appointed defense counsel come to see him, that he could state to him anybody he desires as counsel, which has been done.

Defense: And at this time the defense counsel says that he has made two separate and independent trips to the MTOUSA Disciplinary Training Center and made an attempt to counsel with the accused and given the accused an opportunity to put before him any of his case; again gave him pencil and paper, gave him a full half-hour by the watch and he wrote exactly nothing, saying that he would confide in no one in PBS. The defense counsel returned last Sunday and presented the accused with the same opportunity -- strike it out please, returned the second time and presented the accused with the same opportunity and he utterly refused and he has given the defense counsel nothing upon which to prepare his case and all the defense counsel knows of his case is what has been obtained here in court and the lack of cooperation with the accused which this court has now seen is all that the defense counsel met with over a period of approximately two full clock hours" (R. 12-13).

After hearing accused's testimony with regard to the above challenges for cause (R. 15-17) and the testimony of the law member in refutation of the challenge against him (R. 17-18) the court denied the foregoing challenges and proceeded to arraignment (R. 18).

The defense entered a plea in bar of trial which was denied by the court (R. 22-28), but for reasons hereinafter stated, consideration thereof will be omitted.

Before pleading to the general issue, the defense entered a motion for continuance to procure individual defense counsel from the United States (R. 28). In support of its motion the defense showed through the testimony of the accused (R. 29-34) and that of Private Robert C. Rowe, prisoner guard at the MTOUSA Disciplinary Training Center (R. 34-35) that accused was served with the instant charges on 21 February 1947. On the same day he wrote a letter to his mother at Ocalla, Florida, directing her to employ civilian counsel to represent him at the trial. The following day accused handed this letter to the assistant prison officer for mailing and "They" (presumably prison attendants) told him that the letter was mailed on 25 February 1947. On 4 March accused prepared a cablegram, again directing his mother to employ a civilian lawyer for him, which he handed to a prison guard and requested it be sent out for him. Private Rowe testified that this cablegram was retained in the hands of officials for about six days and that he had sent it out on 10 March 1947. Accused received a receipt for the cablegram on 11 March as he left the Disciplinary Training Center on his way to court the day of trial.

In presenting its motion the defense requested that the trial be continued for only a reasonable time because a reply to the cablegram

should be forthcoming by 15 March. The prosecution suggested to the court that, in view of the circumstances, the motion for continuance be granted at the request of accused for a period of seven days to find out if reply to the accused's cablegram was forthcoming. The court ruled that the defense motion for continuance was denied and then proceeded to trial (R. 36).

5. Article of War 17 provides in part as follows:

> "* * * The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. 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" (Emphasis supplied).

The Manual for Courts-Martial further provides:

> "For a proper reason (e.g., preparation of another case) the court, if in session, otherwise the president, may with the consent of the accused excuse from attendance during the trial such of the personnel of the defense as will not be required" (par. 43a, MCM, 1928; Emphasis supplied).

When charges were served on accused by the trial judge advocate, Captain Clarence W. Burks, on 21 February 1947, the trial judge advocate advised accused that Lieutenant Colonel Clyde W. Wellen, the regularly appointed defense counsel, would be his defense counsel and would be out to see him at the Disciplinary Training Center in the near future (R. 15). While the trial judge advocate stated that "The accused is present, together with the regularly appointed defense counsel" (R. 4) it is affirmatively shown in the record that Lieutenant Colonel Clyde W. Wellen, the regularly appointed defense counsel, was "Absent, excused, VOCG, on official business" (R. 3). Nowhere in the record of trial does it appear that accused consented to the absence of the regularly appointed defense counsel or that he consented to or accepted the appointed assistant defense counsel in lieu of the regularly appointed defense counsel. To the contrary, accused expressly objected to being represented by the assistant defense counsel and repeatedly objected to being tried in the absence of individual counsel of his own selection. It is obvious on the face of the record of trial that the mandatory provisions of Article of War 17 and of paragraph 43a, Manual for Courts-Martial, 1928, were not complied with and thus seriously impaired accused's substantial rights.

The Manual for Courts-Martial further prescribes:

> "Immediately upon charges being referred for trial to the court he (defense counsel) will inform the accused of that fact and of his rights as to counsel, and will render the accused any desired assistance in securing and in consulting counsel of his own selection. Unless the accused otherwise desires the defense counsel will undertake the defense without waiting for the appointment or the retaining of any individual counsel" (par. 43b, MCM, 1928; p. 34; Emphasis supplied).

It must be observed that when the Charges were served on accused he was under the necessary handicap of being required to conduct or assist in the preparation of his defense while in confinement. Thus it is recognized he was not free to go personally in search of special counsel at will. This necessary prison restriction likewise affected his ability to get in communication with and retain desired individual counsel, either in nearby towns or from the United States. Although it was the prescribed duty of the defense counsel to render the accused any desired assistance in securing and consulting counsel of his own selection at the time Charges were served, this service does not appear to have been extended or offered by the defense counsel, as under the particular circumstances of this case, they were most needed. Nevertheless, the record of trial discloses that accused used due diligence, and the only means at his disposal, in attempting to secure individual counsel by writing a letter to his mother immediately upon receipt of the Charges, requesting her to procure civilian counsel for him. The accused gave this letter to the assistant prison officer on 22 February but it was not mailed for approximately four days. Upon learning of this delay, which in the light of the urgency of the subject matter appears unwarranted, accused submitted a cablegram of similar import to the prison authorities on 4 March 1947, the transmission of which was likewise delayed for about six days and in effect was not forwarded to its addressee until the date of trial. In view of the fact that at the time the Charges were served on accused he expressed a desire to have civilian counsel defend him, and that the trial judge advocate advised accused he would have the regularly appointed defense counsel come to see him, and that he could then tell the defense counsel who he desired as counsel (R. 13), it must be assumed that the assistant defense counsel likewise learned of accused's desire to have civilian counsel prior to trial and that thus he was enjoined to render to accused necessary assistance in securing counsel of his selection pursuant to paragraph 43b, Manual for Courts-Martial, 1928, supra. However, it appears that the assistant defense counsel failed to take timely notice of his prescribed duties.

Considering the aforementioned derelictions, accused's

expressed objections to the appointed assistant defense counsel and his apparently bona fide efforts to engage special counsel, it remains to be determined whether the denial of the defense motion for continuance in order to afford accused sufficient time to procure individual counsel of his own selection was within the bounds of justice under the circumstances.

In this connection it is significant to note defense counsel's statement that because of accused's lack of cooperation with him, the defense counsel was utterly unprepared to present his case to the court (R. 13). Obviously and without reflection upon the competence of Captain Robieson, assistant defense counsel, since the accused was so insistent in his demand for a civilian lawyer to defend him and since he expressly objected to having Captain Robieson represent him, as was his legal prerogative regardless of the merit of his objection, no duty rested on accused to divulge matters pertaining to preparation of his defense to him. Nevertheless, despite a patent showing of such unpreparedness the accused was obliged, by the denial of his motion for continuance, to proceed with the trial.

In CM 245664, Schuman, 29 BR 225, 232, the Board of Review declared:

> "The right to prepare for trial is fundamental. To deny this right is to deny a fair trial. Article of War 70 provides 'In time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.' This does not mean that during war an accused may be deprived of the right to prepare his defense. It means rather that, during war, he may be tried as soon, after service of charges, as he has had a reasonable time to advise with counsel and prepare his defense. Such period will of course, vary with the facts and circumstances involved in each particular case. In some, a matter of hours will suffice; in others - even in time of war - the peacetime minimum of five days may be less than reasonable. The suspension, during war, of this peacetime limitation for which the statute, by implication, provides, was not designed to deprive accused persons subject to military law, of the fundamental right to prepare and present a defense in good faith, even in time of war."

To the same effect were the decisions of the Board of Review in CM 231119, Lockwood, 18 BR 139, and CM 236323, McClain, 22 BR 379.

The Supreme Court of the United States in Powell v. Alabama, 287 U. S. 45, 56, stated:

"The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."

In the instant case the court was faced with undisputed evidence of the following facts: that accused was not duly represented by the regularly appointed defense counsel to whose services he was justly entitled and to whose absence he had not consented; that he objected to and refused the services of the appointed assistant defense counsel; that he steadfastly maintained a desire to have civil counsel, either from the United States or from the theater of operations; that he had employed the only means of expediency available to him as a prisoner to procure special counsel but through the laxity or dereliction of his superiors, neither personal opportunity or sufficient time inured to accomplish his prerogative before the bar of justice; and of particular importance, that because of the hiatus created under these circumstances, the regularly appointed assistant defense counsel was unable and unprepared to render service to the accused. Notice must also be taken of the fact that the prosecution interposed no objection to the defense motion for continuance but apparently, in recognition of the anomalous position of the defense, suggested to the court that a continuance of seven days be granted.

On the state of these facts it appears to the Board of Review that to ignore such predominant and fundamental rights of accused is to deny him due process under our judicial system. As was stated in CM 268281, Bingham et al, 44 BR 276, "It is unnecessary to speculate upon what additional materials, pertaining either to the facts or to the law, may have been acquired for use in defending the accused had the requested continuance been granted. To so speculate would be to enter the field of conjecture." We are therefore of the opinion that, under the circumstances of this case, the failure of the court to grant the requested continuance was an abuse of its discretion, which injuriously affected the substantial rights of the accused.

"Although the provision in the Manual for Court-Martial that the refusal by a court to grant a continuance where a reasonable cause is shown will not nullify the proceedings, but may be good ground for directing a rehearing (MCM, 1928, par. 52b), will normally vest full discretion in the court, yet where it clearly appears that an accused has been deprived of the fundamental right to prepare and present a defense made in good faith, by the action of a court in denying a reasonable continuance,

the conviction should be held illegal" (CM 236323, McClain, 22 BR 382).

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

[signature], Judge Advocate.

Frank C. Alfred, Judge Advocate.

[signature], Judge Advocate.

OCT 30 1947

JAGN-CM 323234 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Mediterranean Theater of Operations,
APO 512, c/o Postmaster, New York, N. Y.

1. In the case of General Prisoner Ralph V. Mead, I concur in the foregoing holding by the Board of Review and 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 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 323234).

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.

JUN 30 1947

JAGQ - CM 323244

UNITED STATES v. Privates THOMAS F. NICKS (15205502), 1518th Engineer Construction Company and ALEXANDER COLE (38059770), 1519th Engineer Construction Company, both of 559th Engineer Service Battalion.	CONTINENTAL BASE SECTION EUROPEAN COMMAND Trial by G.C.M., convened at Mannheim, Germany, 9 May 1947. Each: Dishonorable discharge. Nicks: Confinement for thirty (30) years. Cole: Confinement for life. Each: Penitentiary.

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

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

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

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

Specification: In that Private Alexander Cole, 1519th Engineer Construction Company, 559th Engineer Service Battalion, and Private Thomas F. Nicks, 1518th Engineer Construction Company, 559th Engineer Service Battalion, acting jointly, and in pursuance of a common intent, did, at Weingarten, Germany, on or about 22 January 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Franz Biel, a human being by shooting him with a pistol.

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

Specification: In that Private Alexander Cole, 1519th Engineer Construction Company, 559th Engineer Service Battalion, and Private Thomas F. Nicks, 1518th Engineer Construction Company, 559th Engineer Service Battalion, acting jointly and in pursuance of a common intent, did, at Mannheim, Germany, on or about 20 January 1947, by force and violence

and by putting him in fear feloniously take, steal, and carry away from the person of Lutz Adam, a German civilian policeman, a police pistol, the property of the German Police Force, value about $35.00.

Accused Cole was tried alone upon the following Charge and Specification:

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

Specification: In that Private Alexander Cole, 1519th Engineer Construction Company, 559th Engineer Service Battalion, having been duly placed in confinement in the 559th Engineer Service Battalion Stockade on or about 16 February 1947, did, near Mannheim, Germany, on or about 10 March 1947 escape from said confinement before he was set at liberty by proper authority.

Each accused pleaded not guilty to, and was found guilty of the Specification of Charge I and Charge I; the Specification of Charge II and Charge II. Accused Cole pleaded guilty to and was found guilty of the Specification of Charge III and Charge III. No evidence of previous convictions was introduced as to accused Cole and evidence of one previous conviction by general court-martial for escape from confinement was introduced as to accused Nicks. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for life. The reviewing authority approved the sentence as to each accused, but reduced the period of confinement to thirty years in the case of accused Nicks, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused and forwarded the record of trial pursuant to Article of War 50½.

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

4. The evidence clearly establishes that the accused, while acting jointly with intent to rob, accosted two German civilians late at night and after searching them at the point of a gun, accused Cole shot and killed the victim. The facts are admitted by each accused except they deny an intent to rob, stating that they merely stopped the Germans to ask the time, and defend the shooting on the theory that accused Cole was too drunk to be legally responsible for his acts.

However, the evidence as to all the circumstances attending the shooting indicates a design by the two accused jointly to hold up the

deceased and his companion and to rob them of their valuables. The testimony of accused Nicks that he and accused Cole dismounted from the truck and accosted the deceased and his companion in order to ascertain the hour was decidedly tenuous and implausible. The accused Nicks also testified that at the time of the killing accused Cole was drunk to such a degree that he had to be assisted back into the truck after the shooting. On the other hand, Ernst Enderle, the companion of the deceased, an eyewitness, testified that neither of the accused showed signs of drinking. The Manual for Courts-Martial provides that voluntary drunkenness is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense (MCM, 1928, par. 126a, p. 136). There is ample competent evidence in the record of trial from which the court could reasonably infer that accused Cole was not intoxicated to the degree that he could not possess the specific intent to kill.

In addition, an intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out that purpose. In CM 306769, Leatherberry, 5 BR (ETO) 103, p. 113, the Board of Review stated:

> "Robbery inherently involves the element of violence upon the person and it is a probable, natural and reasonable consequence of an attempt to commit a robbery that a human life will be destroyed".

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. If accused, by threats or menaces puts his victim in such fear that he is warranted in making no resistance, the offense is robbery. The fear must be a reasonably well-founded apprehension of present or future danger, and the property taken while such apprehension exists (MCM, 1928, par. 149f).

The offense of robbery (Spec., Charge II) is likewise proved beyond any reasonable doubt. The testimony of each accused substantiates the story of the victim; specifically identifies the pistol which was the subject of the robbery and relates in detail how they pursued the victim into his house and forcibly took the gun from him. The specification alleges that the gun in question was "the property of the German Police Force, value about $35.00". There is no evidence in the record establishing either the ownership or value of the weapon. However to

establish the offense of robbery it is not necessary to prove ownership of the property in the person from whom it was taken; it is sufficient if he has custody or possession that is paramount to the right of the taker (par. 149f, MCM 1928). Although there was no evidence of ownership it is obvious that the pistol which was the subject of the robbery belonged to the German Police Force and was rightfully in the possession of the victim, a member of that organization. A failure to prove ownership does not invalidate the conviction. The gist of robbery is the taking by force and violence, or by putting in fear, of property which does not belong to accused. These vital elements were proved (CM 234601, Blankenship and Giardina, 21 BR 73). Value of the property taken is not an element of the offense. In the case of CM 235258, Smith, 21 BR 355 (366), it was stated:

> "The value of the articles of which Day was robbed is not shown, but proof of value, although alleged in the Specification, is not a necessary element of proof in order to sustain a conviction of robbery.
>
> > 'As the offense of robbery does not depend upon the value of the property taken, the fact that the sums stolen were not testified to with exact nicety is immaterial, it being sufficient to show that the sums were shown to be approximately as alleged' (Dig. Ops. J.A.G., 1912-30, sec. 1589).
>
> The court in this case undoubtedly took notice that the automobile, camera, watch and rings possessed some property value. There is evidence that the watch was pawned for $5. The fact that the items mentioned in the Specification under the Additional Charge were stolen and carried away from Day's possession by the accused by force and violence is established by a preponderance of the credible testimony."

The offense of escape from confinement with which accused Cole was charged separately is clearly proved by his plea of guilty and the testimony of the guard who was in charge of the prisoners when the escape occurred.

5. The charge sheet shows accused Cole to be 30 years of age. He was inducted at Fort Sam Houston, Texas, 10 November 1941. Accused Nicks is 20 years of age and enlisted in the Army 18 September 1945 for three years.

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 as to each accused and the sentences as approved by the reviewing authority. 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

Joseph J Stern, Judge Advocate

C E Schenck, Judge Advocate

W. D., J. A. G. O. Form No. 34
(Revised July 1, 1940)

WAR DEPARTMENT

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

JUN 30 1947

Board of Review

CM 323244

UNITED STATES v. Privates THOMAS F. NICKS (15205502), 1518th Engineer Construction Company and ALEXANDER COLE (38059770), 1519th Engineer Construction Company, both of 559th Engineer Service Battalion.	CONTINENTAL BASE SECTION EUROPEAN COMMAND Trial by G.C.M., convened at Mannheim, Germany, 9 May 1947. Each: Dishonorable discharge. Nicks: Confinement for thirty (30) years. Cole: Confinement for life. Each: Penitentiary.

HOLDING by the BOARD OF REVIEW

JOHNSON, STERN and SCHENKEN, Judge Advocates

The record of trial in the case of the soldiers named above has been examined and is held by the Board of Review to be legally sufficient to support the sentences.

W H Johnson Jr, Judge Advocate.

Joseph J Stern, Judge Advocate.

E G Schenken, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. JUL 11 1947 To the Commanding General, Continental Base Section, European Command, APO 807, c/o PM, New York, N. Y.

1. In the case of Privates Thomas F. Nicks (15205502), 1518th Engineer Construction Company and Alexander Cole (38059770), 1519th Engineer Construction Company, both of 559th Engineer Service Battalion,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentences.

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

(CM 323244).

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

JAGN - CM 323249

23 July 1947

UNITED STATES

v.

Private TOSHIO T. TONITA (30117684), Company M, 350th Infantry Regiment.

88TH INFANTRY DIVISION

Trial by general court-martial convened at Gorizia, Italy, 29 April 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Private Toshio T. Tonita, Company M, 350th Infantry Regiment, did, at Laipacco, Italy, on or about 16 March 1947, feloniously and unlawfully kill Ennio Mansuitti, a child about 11 years of age, by giving him alcoholic liquor to drink, to wit: cognac.

He pleaded not guilty to, and was found guilty of, the Charge and Specification thereunder. 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 one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution

Accused came off guard duty about 0800, 16 March 1947, secured a bottle of cognac from the company area and came back out on the street (R. 14, 16, 17). He offered cognac to two Italian boys, one about 5 or 6 years of age, the other about 11. Ennio Mansuitti was identified as the older boy from a photograph taken two or three hours after his death (R. 8, 14; Pros. Ex. 1). He was actually 10 years and 3 months old when he died (R. 6). The deceased

took at least two drinks of the cognac, staggered around, and looked drunk (R. 15, 17). Albina Cortello Mansuitti went out to get the deceased, and found him in a sitting position (R. 12). She called him by name, he got up, took several steps, and "then didn't walk anymore" (R. 12). The accused then carried the deceased home and gave him to his father (R. 12-18).

First Lieutenant Reed S. Andrus, Medical Corps, testified that he examined the deceased at about 1500, 16 March 1947; that the boy was in a coma from what he believed the result of "excessive intake of alcohol"; that he was told it was approximately six hours after he had taken the alcohol which led him to believe the boy was in a maximum state of intoxication, and should improve; that he advised the mother to keep the boy warm, to administer stimulants and keep him awake and that if he did not come out of the coma within three or four hours an Italian physician should be called (R. 19, 20). He further testified that he examined deceased again at about 2200 to 2230; that the boy was still in a coma, was very much worse; that he had developed fluid within his lungs; that he was having difficulty breathing which was due to pulmonary edema; and that the boy was immediately sent to a hospital at Udine (R. 20).

Alberto Zilio, a doctor, testified that the deceased was brought into the hospital at Udine at 11:45 p.m. in a coma (R. 23). It was acute intoxication (R. 24). At about 4:00 a.m. he appeared better but afterwards his heart condition became worse. At about 7:00 a.m. the boy's father insisted on taking him home. His chances of living at that time were "Little chances, but they existed. There were chances" (R. 24). "The boy had a slight chance of saving himself. Few chances, but he had them. Taking the boy home, he lost every chance" (R. 28). The deceased died on the way home (R. 7). According to the father's testimony it would cost more to bring the boy back from the hospital if he died there (R. 7).

Doctor Zilio saw the boy after death. In his opinion the boy died of failure of the lungs and the heart caused by "acute intoxication of alcohol" (R. 25). Lieutenant Andrus saw the deceased at about 4:00 p.m., 17 March 1947, and it was his impression that deceased died from complications resulting from "excessive intake of alcohol" (R. 20). Deceased was moderately undernourished at the time of the incident (R. 22).

The accused, after being advised of his rights as a witness, elected to remain silent (R. 28). No evidence was introduced for the defense.

4. Accused was charged with and convicted of involuntary manslaughter, caused by his giving intoxicating liquor, to wit cognac, to the deceased, a boy of about 11 years of age, which resulted in his death. At the outset it is recognized, and it has so been held, that the giving of intoxicating liquor is not inherently criminal, and is not an act directly or naturally dangerous to life. (People vs Pavlic 227 Mich. 562; 199 NW 372). Also it has been held that death is not the usual or even probable result of over-indulgence in intoxicating beverages. (State vs Rutze 86 NJL 407, 92 Atl 576). Further, conviction of an accused based on the giving of intoxicating liquor to deceased cannot be sustained unless such giving was under

circumstances showing an intent to inflict injury on deceased, or a showing that the act was in reckless disregard for the safety of the deceased. (People vs Pavlic supra).

It is possible that the giving of intoxicating liquor to an individual under some peculiar or unusual circumstances may be sufficient to constitute involuntary manslaughter. Such circumstances, as previously stated, must be such as to show an intent to inflict injury on the deceased, or show a reckless disregard for the safety of the deceased. If the liquor which the accused furnished the deceased was dangerous for use as a beverage, or if it was of greater potency than ordinary liquor, or if it contained poisonous ingredients, as in the case of some self-distilled moonshine liquor where accused would be charged with a knowledge of its dangerous character, the accused could well be guilty of involuntary manslaughter. (People vs Pavlic, supra). The burden of proving such intent or recklessness rests on the prosecution and failure to meet this burden is fatal. There is no such proof in this case.

The record of trial merely establishes that accused offered cognac to an Italian boy of about 11 years of age; that the boy took "at least two" drinks thereof; that according to the medical testimony the boy was moderately undernourished; and that the boy died as a result of complications caused by his drinking the liquor. There is no showing that the liquor consumed was dangerous as a beverage. On the contrary it appears that accused, and another Italian boy of about the age of 5 years, also drank some of the same liquor with, so far as the record shows, no ill effects. Likewise there is no showing that accused was aware of the undernourished condition of the deceased or had reason to anticipate any such condition. Further it is not shown that the act of giving the liquor to the 11 year old boy was unlawful. Under all the facts and circumstances of this case the Board of Review is of the opinion that the giving of the liquor to the deceased was not, as a matter of law, such an act, even though death unfortunately resulted, as will sustain a charge of involuntary manslaughter. (See Theide vs State, 106 Neb. 48; 182 NW 570; 15 A L R 237 and annotation at 244).

The act of accused, however, of giving the deceased, a boy of about 11 years of age, intoxicating liquor was, without doubt, to the prejudice of good order and military discipline in violation of Article of War 96, an offense closely related to a disorder, denounced by Article of War 96 for which the maximum punishment is confinement at hard labor for a period of four months and forfeiture of two-thirds pay per month for a like period. (Par 104c, MCM 1928).

5. 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 Charge and Specification as finds that accused did at the time and place alleged give intoxicating liquor, to wit cognac, to Ennio Mansuitti, a boy of about 11 years of age, 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 four months and forfeiture of two-thirds pay per month for a like period.

Edward J. Johnson, Judge Advocate

Joseph T. Brock, Judge Advocate

James N. [illegible], Judge Advocate

AUG 1

JAGN CM 323249 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, 88th Infantry Division, APO 88, c/o Postmaster, New York, New York.

1. In the case of Private Toshio T. Tonita (30117684), Company M, 350th Infantry Regiment, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of the Charge and its Specification be approved as finds that the accused did at the time and place alleged, wrongfully give alcoholic liquor, to wit cognac, to Ennio Mansuitti, a child about 11 years of age, in violation of Article of War 96; and that only so much of the sentence be approved as provides for confinement at hard labor for four (4) months and forfeiture of two-thirds pay per month for a like period.

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 323249)

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.

JAGK - CM 323254

28 JUL 1947

UNITED STATES	)	UNITED STATES ARMY MILITARY GOVERNMENT IN KOREA
v.	)	
First Lieutenant JAMES F. GUILFOYLE (O-1182373), Field Artillery	)	Trial by G.C.M., convened at Seoul, Korea, 4 and 5 June 1947. Dismissal.

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 First Lieutenant James F. Guilfoyle, Field Artillery, Signal Office, Headquarters, United States Army Military Government in Korea, APO 235 Unit 2, was, at Seoul, Korea, on or about 27 April 1947, in a public place, to wit, the 7th Division Artillery Club, drunk and disorderly while in uniform.

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

Specification: In that First Lieutenant James F. Guilfoyle, ***, was, at Seoul, Korea, on or about 27 April 1947, drunk and disorderly in the 7th Division Artillery Club.

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

3. <u>For the Prosecution</u>

At approximately 1300 hours on Sunday afternoon, 27 April 1947, First Lieutenant Edward P. Crovo, FA, and Miss Grace J. Anger, an American Red Cross representative, were at the Officers Club, Headquarters 7th Division, located at Seoul, Korea. While at the club they observed the accused, apparently in a drunken stupor, asleep in a chair in front of the bar. They left the club and

took some pictures, returning thereto at about 1600, and they again noticed accused still seated as upon their departure. Lieutenant Crovo and Miss Anger took seats near the fireplace, the officer having his back to accused and Miss Anger facing accused. They were examining a light meter when suddenly Miss Anger arose and hurriedly left the room. Not understanding the reason for her sudden exit, Lieutenant Crovo overtook her and requested an explanation. She explained. He went back into the club room and observed accused standing by his chair and urinating on the floor. Lieutenant Crovo, angered by such behavior, ordered accused to get out and not to return to the club (R. 9-11).

Miss Anger testified that accused was intoxicated, "his speech was not coherent and that he was following people around making insane remarks" and again "his mouth was open and he was sitting in a chair and could not walk. He stood up and could not walk and that is why he did what he did" (R. 12).

Lee, Chai Moon, a civilian employee of the Officers Club, testified through the interpreter that the accused came to the club at about 1200 hours on the day in question, that he was intoxicated at that time, that he had a few more drinks and at about 1600 he "urinated under the table and on the floor" (R. 13-15). It was stipulated that on the afternoon of 27 April 1947 the accused was dressed in uniform (R. 15).

4. For the Defense

Captain Morton Jacobs, MC, 34th Station Hospital, a qualified physician and psychiatrist, stated that he had made a psychiatric examination of accused. The defense offered the report of Captain Jacob's examination in evidence which was received as Defense Exhibit A (R. 16). The report is as follows:

> "1. 1st Lt. James F. Guilfoyle, 01182373, FA, has been given a neuropsychiatric examination.
>
> "2. It is my opinion that this officer suffers from an Acute Situational Maladjustment, Severe. He was only married for three months before being sent to Korea. Because of the fact that wives of other officers with less overseas time than her husband were now in Korea, and changes in the system for sending dependents overseas, she became severely upset. She felt that she could not go on, her letters became more infrequent, and she felt that her husband did not want her over here. There were also indications that she was going out with other men. Under these circumstances, as is natural, he became severely disturbed, tense, and somewhat depressed. It is under the circumstances of this severe distress that he became intoxicated and committed the offense for which he is charged.
>
> "3. It is my opinion that this officer has the capacity to distinguish right from wrong. In the situation of acute distress that he has felt, unpredictable and erratic actions are to be expected, and his capacity to adhere to the right may be considered to be impaired.

"4. He is considered capable of conducting his defense with the aid of counsel, of understanding the nature of the proceedings against him, and of doing that which is necessary to present his defense." (Def. Exhibit A)

In response to a question by the court as to whether accused's actions were of a voluntary or involuntary character, Captain Jacobs stated:

"One thing is the impairment if his ability by alcohol, and his actions due to stress may be manifested in various ways. One of the ways in which it is expressed in children is by wetting. It may be that urinating is an expression of hostility. However, I can't say that is true in this case. On the other hand, it may be that he was just in a stuperous state. Apparently he was not conscious and don't remember what happened, and, due to pressure of a full bladder, automatically relieved himself." (R. 17)

Captain John J. Hill, Motor Section, U. S. Army Military Government in Korea, testified that he had known accused since February 1946, having been in the same unit with him at Fort Bragg, North Carolina. He roomed with accused in their present assignments and knew of accused's domestic difficulties. He never had occasion to question accused's character as an Army officer and had always considered him to be a temperate drinker (R. 18-19).

First Lieutenant Joseph G. Turley, FA, stated that he was a fellow officer with accused in the 324th Field Artillery Battalion serving with him in England, France and Germany. He stated that accused's character and reputation were excellent (R. 20).

There was received in evidence a stipulation that if Lieutenant Colonel Charles Meyers, CMP, were present he would state that he had known accused for approximately eight months, that accused was willing and cooperative in carrying out his assigned duties, that in his (Lt. Col. Meyers') opinion, accused's character and general reputation were of the highest order and that he had never seen accused acting in an ungentlemanly manner or in such manner as to disgrace the uniform (R. 21, Def. Ex. C).

The accused, at his own request, was sworn as a witness in his defense, and stated that he entered the military service in October 1942, was stationed at Fort Bragg, North Carolina, attended the Field Artillery School at Fort Sill, Oklahoma, and joined the 334th Field Artillery Battalion at Fort Jackson, South Carolina. He served during the war with the 334th Field Artillery Battalion in France, Germany and Luxembourg. He returned from overseas, and completed the Military Government Orientation Course at Carlisle Barracks. In July 1946 he married and two months later he was sent to Korea. When he reported for duty in Korea he was No. 6 on the priority list for the transportation of dependents and his wife was planning to join him. Due to a change in the priority system his status was reduced to the number "about

200" on the list. He informed his wife of such change. She misconstrued the situation, stating that he did not desire that she be permitted to join him. She also stated in a letter that she could not "go on much longer the way things were going." Her letters had become sporadic and in his depressed state of mind he had on 27 April gone to the 7th Division Officers Club and become over-intoxicated. He did not remember any of the details of the alleged incident at the club (R. 212-225).

On motion of the defense a copy of the W.D.A.G.O. Form 66-1 relating to accused was received in evidence as Defense Exhibit B (R. 20).

5. The Specification to Charge I alleges that the accused was drunk and disorderly while in uniform in a public place, the 7th Division Artillery Club. The Specification to Charge II, although omitting the allegations that the club was a public place and that accused was in uniform, denounces the identical acts referred to in the Specification to Charge I. This does not constitute an illegal multiplication of charges inasmuch as the same facts and circumstances may give rise to two or more offenses, even though the separate offenses stem from the same set of facts. (McRae v. Henkes, 273 Fed. 108; CM 281663, Hindmarsh, 22 BR (ETO) 223,229.)

An officers club is a public place within the contemplation of paragraph 151, Manual for Courts-Martial, 1928, wherein instances of violation of Article of War 95 are set forth and discussed (CM 269105, Kolick, 45 BR 1,5; CM 315105, Rochon).

The evidence shows, without dispute, that the accused was drunk at the club on the afternoon in question and that he committed the indecent act shown by the evidence. The defense testimony tends to show that accused's antisocial behavior was not willful and malicious on his part but the result of a drunken stupor wherein he was totally oblivious to his environment. We think the contention of the defense in this regard is both the reasonable and proper inference to be drawn from the evidence. However, voluntary drunkenness in itself has always been considered an offense and the fact that the disorder or misconduct may be attributed to such drunkenness will not excuse the offender (MCM, 1928, par. 136a, p. 135).

6. War Department records show that accused is 31 years of age and married. He completed high school and was employed by a retail bakery store upon his induction into the Army as a private in 1942. He was commissioned a second lieutenant, AUS, at Fort Sill, Oklahoma, on 27 May 1943. During the European Campaign the accused was assigned to the Headquarters Battalion, 87th Division Artillery. His efficiency reports average "Excellent."

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 Article of War 96.

(On Leave), Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stephens, Judge Advocate

JAGK - CM 323254 - 1st Ind

WD, JAGO, 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 First Lieutenant James F. Guilfoyle (O-1182373), Field Artillery.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place, to-wit, 7th Division Artillery Club, at Seoul, Korea, on 27 April 1947, in violation of Article of War 95, and of being drunk and disorderly at the same time and place in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved 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.

At about 1300 hours on Sunday afternoon, 27 April 1947, First Lieutenant Edward P. Crovo, FA, in company with his friend, Miss Grace J. Anger, a Red Cross field representative, observed accused sitting in a chair near the bar of the 7th Division Artillery Officers Club at Seoul, Korea. He appeared to be in a drunken stupor. Lieutenant Crovo and Miss Anger left the club and returned at about 1600 hours taking seats near the fireplace. The officer sat with his back to accused and Miss Anger was seated facing accused. Suddenly Miss Anger arose and hurriedly left the room. Lieutenant Crovo followed her and requested an explanation. She explained. The officer returned to the room and saw accused standing beside his chair and urinating on the floor. He was drunk and, according to the testimony, unable to walk. Lieutenant Crovo ordered accused to leave the club and to not return thereto.

The defense showed by medical evidence that accused was suffering an "Acute Situational Maladjustment, Severe." He had gone through the European campaign with the 87th Division and was considered a valuable and conscientous officer. Upon being returned to the States after the campaign in Europe he attended the Military Government School at Carlisle Barracks and became married. Two months after his marriage he was ordered to Korea. His marital relations had not become stable and when he arrived in Korea, upon requesting that his wife be authorized to join him, in accordance with the then existing priority rights, he was sixth in the order of priorities. He advised his wife of such

fact and she planned to join him at an early date. The system of setting up priorities was subsequently changed, placing him below about 200 officers on the list. His wife expressed doubt that he was sincere in his desire for her to join him and stated that she could not "go on." He became despondent, depressed and sought relief by becoming over-intoxicated. Testimony of officers including his superiors indicate that accused has a clear civilian and military record. He was always trusted and considered to be a gentleman.

4. I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $100 of accused's pay per month for two months, and that as thus commuted the sentence be carried into execution.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 278, 22 Aug. 1947).

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

JAGQ - CM 323278

JUL 8 1947

UNITED STATES	)	2D ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 11 June 1947. Dismissal and total forfeitures.
First Lieutenant CLIFTON L. JACKSON (O-1594251), 4005th Area Service Unit.	)	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant Clifton L Jackson, 4005th Area Service Unit, did, at Waco Army Air Field, Waco, Texas, on or about 16 February 1947, knowingly and willfully apply to his own use and benefit five tires, value of about $44.55, five tubes, value of about $7.45, and one battery, value of about $8.65, of a total value of about $60.65, property of the United States, furnished and intended for the Military Service thereof.

Accused pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and Specification, except the words "about $60.65" substituting therefor the words "less than $50.00 and more than $20.00", of the excepted words not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. This is a trial upon rehearing. At the original hearing the accused was convicted upon a Charge and Specification identical with those

set forth herein. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority, upon advice of his staff judge advocate disapproved the sentence and ordered a rehearing before another court.

4. Evidence for the Prosecution.

Accused received possession of a 1942 United States Army Ford Sedan, No. W-114521 on 8 July 1946 from the Ordnance Section, Camp Hood, Texas (Pros. Ex. 1; R. 7). While the vehicle was still in the custody of accused four new tires and four used tubes were placed on it by the Ordnance Motor Pool, Camp Hood, Texas, on 25 November 1946 at the request of accused (R. 12, 15, 18-20). These tires and tubes were the property of the United States (Pros. Ex. 3; R. 11). On 27 February 1947 accused returned the vehicle to the motor pool and was issued a "turn in" slip for same (Pros. Ex. 2; R. 8).

A routine check of the vehicle was made by an inspector of the Ordnance Department of Camp Hood on the day it was "turned in" by accused and he found that the vehicle was then equipped with "worn, slick, unserviceable tires" which had recently been "put on" the rims (R. 21-24). He also noticed that the car had a "small size" battery which did not fit the carrier and was of a make that was not Government issue. Thereafter on 1 April 1947 the military police with the consent of accused removed from his personal car five tires and tubes. A battery was also removed from his car by the military police some ten days later (R. 31-37).

On 10 April 1947 accused after being duly warned of his rights under Article of War 24 made the following sworn statement:

> "At the time I exchanged tires on Staff Car W-114521, I also exchanged the battery of the Staff car and placed it in my personal car. The battery in my car had gone down and it was necessary to use the one in the Staff car. I had my personal battery charged but failed to re-transfer the battery back to the Staff car. My intentions were to turn in the battery and tires at the same time. I failed to get another battery and still had the one out of Staff Car W-114521 when CID Agents picked it up. The make of this battery is Autolite CF 2-17, 17-plates. The battery I had in my car was a Wizzard." (Pros. Ex. 11).

The value of the tires, tubes and battery in question was stipulated to be "less than $50.00 but more than $20." (Pros. Ex. 12).

5. Evidence for the Defense.

Accused was duly advised of his rights as a witness and elected to testify under oath (R. 42) that he was Surplus Property Officer at the Waco Army Air Field from October 1946, to 28 February 1947, which position entailed much traveling to surrounding camps and towns. The Government vehicle assigned him was in poor condition and in several instances he paid money out of his own pocket for repairs on this vehicle in order to proceed with his work. He was never reimbursed for these personal expenditures. Unable to get the car repaired by the Camp Hood Ordnance Repair Shop or to get a replacement, he realized he was going to have to use his own personal car in order to close the field by 28 February 1947, the "deadline" given him by the Fourth Army, so he put the Government tires and battery on his car since he was using his own personal car for Government use. He finished his work on time and turned in the Government vehicle on 27 February 1947. Having a 30-day leave effective 1 March 1947, he drove his car to Hearne, Texas, and left it in the garage for overhauling while on leave. He did not use the Government tires, tubes and battery while on leave those 30 days, and fully intended to return them when he returned to Camp Hood after the termination of his leave.

When he returned the car to the motor pool on 27 February 1947 he did not mention the matter of the tires and battery because he still had Government work to perform which required him to use his personal car. Stipulations of three former Government employers were introduced in evidence to the effect that accused was a "conscientious, hard-working" officer; that the Government car issued to him was unsatisfactory, constantly "breaking down" and had to be repaired at the expense of accused and that he used his personal car frequently while on official business.

6. The offense of willfully applying Government property to his own use and benefit was proved beyond a reasonable doubt. The evidence is uncontradicted and in fact admitted by accused that he did remove the property in question from the Government car, place it on his personal car and use the latter vehicle as his personal property. The mere fact that he used his car to some extent for official business is no defense. The evidence also shows that he drove his car, equipped with the tires, tubes and battery, from the Post when he went on thirty days leave and when he returned the Government car, he made no mention of the property being placed on his car. His intent to do wrong is further shown by the fact that ten days elapsed between the time the tires were removed from his personal car by the military police and the date the battery was discovered. He was present each time and gave no indication that any additional Government property was on his personal car.

The Board of Review is of the opinion that each element of the offense was clearly established beyond a reasonable doubt by competent evidence.

7. War Department records show that accused is 28 years of age and married. He graduated from high school in Fort Worth, Texas, and attended the University of California for one year and Texas Christian University for three months. He enlisted in the Army in November 1940 and attended officer candidate school at Camp Lee, Virginia, from which he graduated 16 July 1943 and was commissioned a Second Lieutenant, Q.M.C. on that date. He was promoted to First Lieutenant 15 July 1944. His efficiency reports show numerical ratings of 4.1, 4.2 and 3.5. No evidence of previous court-martial convictions or civilian criminal record is shown.

8. The court was legally constituted and had jurisdiction of the accused and the offense charged. No errors injuriously affecting the rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94.

Joseph B. Stern, Judge Advocate

W H Johnson Jr, Judge Advocate

E J Schubert, Judge Advocate

JAGQ - CM 323278 1st Ind

WD, JAGO, Washington 25, D. C. JUL 16 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 Clifton L. Jackson (0-1594251), 4005th Area Service Unit.

2. Upon trial by general court-martial this officer was found guilty of willfully applying to his own use and benefit 5 tires, 5 tubes and a battery, property of the United States, of a value of less than $50.00 but more than $20.00 in violation of Article of War 94. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that accused received possession of a Government vehicle from the Ordnance Section, Camp Hood, Texas on 8 July 1946 for use in his official capacity as Surplus Property Officer. On 25 November four new tires and four used tubes were placed on the vehicle at the accused's request. While the car was still in his possession, accused on or about 16 February 1947, removed five tires and tubes and the battery from the Government vehicle and exchanged them for the tires, tubes and battery on his personal car. Thereafter the Government car was returned to the motor pool at Camp Hood on 27 February 1947 by accused who was issued a "turn in" slip therefor. He then departed on a thirty day leave taking his personal car with him.

On 1 April 1947, after an ordnance inspector had noticed the worn tires and small battery on the Government vehicle, the military police removed the five Government tires and tubes from the personal car of accused, while he was present and with his consent. At this time accused did not disclose the fact that the Government battery was in his personal car. Later on 10 April 1947 the military police also removed the battery.

Accused admitted exchanging the property in question and gave as the reason for his action that it was necessary for him to have transportation to fulfill his official duties; that the Government car assigned to him was unsatisfactory; a replacement could not be obtained and that he had it repaired at his own expense several times. Consequently he exchanged the property in question and used his personal car in his official duties. He did not mention the matter when he "turned in" the Government car because he was still using his personal vehicle in his capacity as Surplus Property Officer.

Four members of the court and the defense counsel requested clemency for accused because of his previous excellent record.

5. War Department records show that accused is 28 years of age and married. He graduated from high school in Fort Worth, Texas and attended the University of California for one year and Texas Christian University for three months. He enlisted in the Army in November 1940 and attended officer candidate school at Camp Lee, Virginia, from which he graduated 16 July 1943 and was commissioned a Second Lieutenant, Q.M.C. on that date. He was promoted to First Lieutenant 15 July 1944. His efficiency reports show numerical ratings of 4.1, 4.2 and 3.5. No evidence of previous court-martial convictions or civilian criminal record is shown.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 257, 23 July 1947).

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

JAGN-CM 323305

UNITED STATES	)	HEADQUARTERS ATLANTIC DIVISION AIR TRANSPORT COMMAND
v.	)	Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 21 May 1947. Dishonorable discharge and confinement for three (3) years and seven (7) months. Disciplinary Barracks.
Sergeant RICHARD K. RAABE (14064473), Attached Unassigned Squadron E, 1103d Army Air Forces Base Unit, Atlantic Division, Air Transport Command.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Sergeant Richard K. Raabe, attached-unassigned Squadron E, 1103d Army Air Forces Base Unit, Atlantic Division, Air Transport Command, Morrison Field, West Palm Beach, Florida, formerly of Squadron C, 1103d Army Air Forces Base Unit, Atlantic Division, Air Transport Command, Morrison Field, West Palm Beach, Florida, did, at Morrison Field, West Palm Beach, Florida on or about 13 June 1946 desert the service of the United States and did remain absent in desertion until he was apprehended at Davenport, Iowa on or about 4 February 1947.

ADDITIONAL CHARGE I: Violation of the 69th Article of War.

Specification: In that Sergeant Richard K. Rabbe, attached-

unassigned Squadron B, 1103d Army Air Forces Base Unit, Atlantic Division, Air Transport Command, Morrison Field, West Palm Beach, Florida, having been duly placed in confinement in the Post Guardhouse, Morrison Field, West Palm Beach, Florida, on or about 22 February 1947, did, at Morrison Field, West Palm Beach, Florida on or about 11 April 1947, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Sergeant Richard K. Raabe, attached-unassigned Squadron B, 1103d Army Air Forces Base Unit, Atlantic Division, Air Transport Command, Morrison Field, West Palm Beach, Florida, did without proper leave, absent himself from his organization and station at Morrison Field, West Palm Beach, Florida, from about 11 April 1947 to about 25 April 1947.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years and seven months. The reviewing authority approved the sentence, designated the 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court as approved by the reviewing authority. The only aspect of the case requiring consideration is the legal sufficiency of the record to support the sentence.

Accused was found guilty of a violation of Article of War 58 for which, under the circumstances of this case, the maximum authorized sentence to confinement under the Table of Maximum Punishments is two and one-half years (par. 104c, MCM, 1928).

Accused was also found guilty of Additional Charge I, escape from confinement, in violation of Article of War 69; and guilty of Additional Charge II, absence without leave, in violation of Article of War 61. The escape from confinement was concurrent with the initial absence without leave, to wit, 11 April 1947. The two offenses are but different aspects of the same act (Bull. JAG, Vol. V, p. 203; CM 313554 (1946)). For the purpose of punishment they must be construed together and are punishable only in the more important aspect thereof. The maximum authorized punishment for the absence without leave is confinement at hard labor for 42 days and forfeiture of two-thirds pay for 28

days; the maximum authorized punishment for escape from confinement is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year (par. 104c, MCM, 1928). Therefore as between the two offenses the latter constitutes the more important aspect of the act of accused and with reference to these two offenses punishment can be imposed only as to the escape.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty as approved by the reviewing authority and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and six months.

Edward J. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

[illegible], Judge Advocate.

(208)

JUL 17 1947

JAGN-CM 323305 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Headquarters Atlantic Division, Air Transport Command, Fort Totten, Long Island, New York.

1. In the case of Sergeant Richard K. Raabe (14064473), Attached Unassigned Squadron E, 1103d Army Air Forces Base Unit, Atlantic Division, Air Transport Command, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the 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 and six months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 323305).

1 Incl
Record of Trial

THOMAS H. GREEN
Major General
The Judge Advocate General

2nd Ind.

HQ ATLANTIC DIVISION, ATC, Fort Totten, L.I., New York 30 JUL 1947

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

1 Incl: n/c

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

JAGN-CM 323306

UNITED STATES v. Private JULIUS A. KANTKE (36775757), Headquarters & Headquarters Company, 7782nd Special Troops Battalion.	HEADQUARTERS BERLIN COMMAND OFFICE OF MILITARY GOVERNMENT FOR GERMANY (US) Trial by G.C.M., convened at Berlin, Germany, 2 May 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Julius A. Kantke, Headquarters and Headquarters Company, 7782nd Special Troops Battalion, Berlin Command, Office of Military Government for Germany (US), APO 742, US Army, formerly a member of Battery "A", 563rd AAA, AW, APO 230, US Army, did, at APO 230, US Army on or about 1 August 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Karlshorst, Germany, on or about 20 March 1947.

He pleaded not guilty to, and was found guilty of, the Charge and Specification thereunder. 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 five years. The reviewing authority approved the sentence but reduced the period of confinement to three years, 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. A statement of the evidence is deemed unnecessary inasmuch as the only aspect of the case requiring consideration is whether or not the accused's right to counsel of his own choice has been violated.

The record of trial shows that upon being served with a copy of the charge sheet accused requested that he be defended by Captain L. B. White and when later advised that Captain White would not be available for such duty he asked that Lieutenant Patterson defend him. As to the availability of Lieutenant Patterson the defense counsel stated bluntly: "He could not be located," and "I told the accused." At the opening of the hearing the trial judge advocate was handed a written request by accused stating that he wished to be defended by Captain J. M. Hammond (R. 3, 4).

The following then transpired:

"PRESIDENT: The court is beginning to feel that these people have ample time to get counsel. Every time we meet it is a matter of new counsel, yet the case was that the man had ten days.

PROSECUTION: The accused in many of these cases discuss it with other prisoners in the stockade, who sprung who. As soon as they are served, they become apparent of the fact and they just request everybody.

DEFENSE: I can further add to that. I was present in the hospital, in which Private Kantke was confined at the time, and I informed him I was the regularly appointed defense counsel, in so far as Captain White was not available. When I say he requested Lieutenant Patterson, the request wasn't actually from himself. Another prisoner recommended Lieutenant Patterson to him, and I took that as the fact that Kantke wanted Lieutenant Patterson.

PROSECUTION: As a matter of fact, the accused doesn't know any of the counsels that he has requested.

The court was closed.

The court was opened.

PRESIDENT: It is the opinion of the court, the charges having been served on 23 April, ample time has expired for the accused to obtain special defense counsel. This has not been done; therefore, it is considered by the court that special counsel is not available. Inasmuch as the regularly appointed defense counsel is prepared to defend the accused, the court will proceed with the regularly appointed defense counsel" (R. 4).

4. Under the provisions of Article of War 17, "* * * The accused shall have the right to be represented in his defense before the court, by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article of War 11."

There is no showing whatever that Captain Hammond was contacted relative to his acting as defense counsel, nor apparently was any effort made to ascertain Captain Hammond's availability for such duty. As indicated by the court certain practical difficulties may have been involved but there is no place in the American system of justice for the consideration of mere practical difficulties where liberty is at stake (CM 318704, Whiteside et al, 1947). The record shows that except as to the request for Captain White no attempt was made to substantially comply with the provisions of Article of War 17, and without such a showing of substantial compliance there is no basis for the application of the provisions of Article of War 37 that the error complained of did not injuriously affect the substantial rights of the accused.

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

Edward T. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

James A. Fellows, Judge Advocate.

(212)

JUL 16 1947

JAGN-CM 323306 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, Berlin Command, Office of Military Government for Germany (US), APO 742, c/o Postmaster, New York, N. Y.

1. In the case of Private Julius A. Kantke (36775757), Headquarters & Headquarters Company, 7782nd Special Troops Battalion, I concur in the foregoing holding by the Board of Review and for the reasons stated therein 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 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 323306).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

201 (BCJA) Kantke, Julius A (Enl) 2d Ind

Headquarters, Berlin Command, Office of Military Government for Germany (US), Berlin, Germany, APO 742, US Army, 4 AUG 1

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

In compliance with paragraph 2 of 1st Ind., there are inclosed GCMO No. 82, Headquarters, Berlin Command, Office of Military Government for Germany (US), 30 July 1947 and Record of Trial.

FOR THE COMMANDING OFFICER:

1 Incl: n/c
1 Incl added: GCMO No. 82

George P. Warner

GEORGE P. WARNER
Lt. Col.
Adjutant General

RECORDED

Registered BE
No AG 3205

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323349

U N I T E D S T A T E S v. Private R. L. HENRY (34931369), 3027th Ordnance Base Engine Rebuild Company, 143rd Ordnance Base Automotive Maintenance Battalion.	)))))))))	CONTINENTAL BASE SECTION Trial by G.C.M., convened at Munich, Germany, 15 May 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Pvt. R. L. Henry, 3027th OBER Company, having been duly placed in arrest at Munich, Germany, on or about 12 April 1947, did at Munich, Germany, 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 Pvt. R. L. Henry, 3027th OBER Company, did, at Munich, Germany on or about 18 April 1947 with intent to do him bodily harm, commit an

assault upon Pfc Jessie E. Davis, Co "B", 508 MP Bn., APO 407-A, by shooting at him with a dangerous weapon, to wit, a fire arm.

Accused pleaded not guilty to, and was found guilty of, both Charges and the Specifications thereof. 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 five years. The reviewing authority approved the sentence, but reduced the period of confinement to three years, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification. The only questions to be determined are the legal sufficiency of the record of trial to support the findings of guilty of Charge II and its Specification, and to support the sentence.

4. The evidence in the record of trial is limited to the oral testimony of Private First Class Jessie B. Davis and Private Herman A. Walmsley, each called as a witness for the prosecution. On the night of 12 April 1947, Davis and Walmsley were on duty in Munich as military police. At about 2300 hours they were returning, by vehicle with a German driver, to their headquarters, when they noticed a 2½ ton bus and a 6 x 6 truck parked to their right (R. 6, 11).

Private First Class Davis testified, in essence, as to the events in question, as follows:

> "* * * I pulled in front and noticed a fight going on and I told the German driver to turn around. He shines the headlight on the bus. On the right hand side of the bus was one soldier and two other soldiers were on top of him beating him up. When my driver descended from the vehicle I went there and pulled the two soldiers off and pushed one against the bus; one ran and I grabbed him and brought him back. Henry was standing on the side, but he didn't do anything to assist the fight. I placed the three of them under arrest and sent the driver to get the MP's and to get the ambulance; for the soldier was unconscious on the sidewalk. I took a handkerchief from my pocket and bent down to help Webb. He, Henry, got in the door of the bus from the right hand side and crossed over. I ran to the other side of the street and saw Henry running. I gave the command, hollered, 'Stop' twice, and was going to give the command the third time and the shots were fired at me.

Q: At the time the shots were fired at you where was Webb?
A: I was behind the statue.

* * *

Q: In what direction did he [accused] run?
A: He ran from the left of the bus to the PX.

Q: Did he run towards the statue?
A: Yes, sir. And after two shots were fired at me I fired four shots. On the third my driver came by and gave chase in a six by six. We chased Henry to a bombed out building and we couldn't find him. We took Webb to Headquarters and notified the SIS and they brought in two soldiers.

* * *

Q: What time was it when Henry ran away as you described to the court?
A: It was five to ten minutes after I placed him under arrest.

Q: You said Henry ran towards the statue and two shots were fired when you called to him to halt?
A: Yes, sir.

Q: From what direction did they come?
A: They came from the direction from which he ran.

Q: Did you see the fire from the gun?
A: No, sir, I didn't see the fire, but the first bullet went to the left; the next time close to my head.

Q: You heard the gun go off?
A: Yes, sir.

Q: How far away was it when the gun went off?
A: Fifty to fifty-five yards.

Q: From the direction in which Henry ran?
A: Yes, sir.

Q: Was anyone else on the street besides Henry?
A: No, sir, there wasn't.

Q: Did you chase him to find out if you could catch him?
A: Yes, sir.

Q: Did you see anybody on the street?
A: One T/Sergeant from the 508th.

Q: In the vicinity of where the shots were fired?
A: Yes, sir.

Q: Who?
A: A T/Sergeant walking with his girl friend.

Q: That was the only person walking on the street?
A: Yes, sir.

Q: Did the shots come close to you?
A: Yes, sir, very close.

* * *

CROSS EXAMINATION

* * *

Q: You saw Henry run towards the statue?
A: Yes, sir.

Q: What statue?
A: The statue on Ludwigstrasse, the statue going to the PX.

Q: Do you know what that statue is?
A: No, sir, I can't recall now.

Q: How far did this fight take place from the statue?
A: Right across the street, directly in front.

Q: How many feet?
A: I would say close to fifty feet, sir.

Q: Could you see Henry at the time the shots were fired?
A: No, sir.

Q: Actually you don't know if he fired them or not?
A: No, sir.

Q: Did you see Henry after he got past the statue?
A: No, sir.

Q: You never saw him after that?
A: No, sir.

Q: You don't know if he stopped or not?
A: No, sir.

Defense: The defense has no further questions.

QUESTIONS BY THE COURT

Q: Did you see the flash from the arm?
A: No, sir.

Q: You could not see the accused at the time the shot was fired?
A: No, sir.

* * *

Q: Across the street?
A: Directly across, sir.

Q: How far away was he when he fired?
A: Anywhere from fifty to seventy-five yards, sir. The statue is on the sidewalk.

Q: I know the location of the ground, but you say seventy-five yards away?
A: Feet, sir.

Q: That would put him in the middle of the street on the other side?
A: Yes, sir.

Q: The other side, the west side?
A: Yes, sir.

Q: But you didn't see any flash?
A: No, sir, I didn't see no flash.

Q: What became of the other two men?
A: They were in the bus when the fight started, they got in the front bottom of the bus.

Q: When the shooting started they laid down in the bus?
A: Yes, sir.

Q: You fired four shots?
A: Yes, sir.

Q: In which direction?
A: In the direction that the shots were fired at me, sir.

Q: Did you see a gun on the accused when you first saw him?
A: I didn't shake him down, sir.

Q: Did you ever see him with a gun?
A: No, sir.

* * *

Q: Davis, do you know if the SIS got a gun off of Henry the next morning?
A: Sir, they said, no.

Q: They didn't find a gun?
A: No, sir.

Q: Were there any empty cartridge cases found in the general direction where the shots were fired?
A: We looked all over the area and couldn't find them, sir" (R. 6-10, 14).

Private Walmsley testified, in essence, as to the events in question, as follows:

"There was a bus sitting on the right hand side. We passed the bus and saw one soldier on the ground and two soldiers on top. We backed up and went to break it up, and we got them off him the other guy, of the Karlsfeld Ordnance, and Private Henry, and the one which ... he was still on the ground. We spoke to the driver of the bus and we put him under arrest, and I went to the MP Headquarters.

* * *

Q: And Henry was standing by?
A: Yes, sir.

Q: You placed Henry and DelaFuente and the other soldier under arrest?
A: Yes, sir.

Q: What was done after they were placed under arrest?
A: Jesse B. Davis put Henry in the bus and sent me to Headquarters to get other men to come down and help us.

* * *

Q: How far is it to the MP Headquarters from this place where the fight occurred?
A: Approximately one-half block...around the corner.

Q: Did you go to the Headquarters?
A: Yes, sir.

Q: Did you hear any shots on that occasion?
A: As I was leaving the Headquarters and coming to the scene again.

Q: You heard them?
A: Yes, sir.

Q: How many?
A: Six shots.

Q: From what direction did they come from?
A: I could not tell as it was back of me.

* * *

Q: Did you return to where Davis was with these people under arrest?
A: I returned to it in my jeep.

* * *

Q: Did you see the accused Henry any further on this night?
A: No, sir.

Q: Did you make any effort to find him?
A: Yes, sir.

Q: What?
A: Gave chase to a bombed out building. I looked till twelve o'clock, my whole tour of duty, on the street and could not find him. I believe it was the SIS who picked him up at his outfit" (R. 11-12).

5. By the Specification of Charge II accused is alleged to have assaulted Davis by shooting at him with "a firearm" with the intent to do him bodily harm. Assault has been defined as "an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark and Marshall)" (par. 149l, MCM, 1928). The proof required to support conviction of the offense here charged is set out in paragraph 149m, Manual for Courts-Martial, 1928, as follows:

> "Proof. - (a) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and (b) the facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm."

In this case it may be said that the evidence directly establishes that two shots were fired by someone other than Davis; that the trajectory of the bullets brought them somewhere near Davis; that the accused was then in flight from arrest by Davis; and that accused was, at that time, in the vicinity of the shooting. In making its findings the court must, of necessity, have inferred that the shots were fired at Davis; that they were fired by the accused; and that they were fired with the intent to do bodily harm. Since the conviction rests upon inferences of fact it is the duty of the Board to determine whether there is in the evidence a reasonable basis for that inference (CM 238972, Lowry, 25 BR 12; CM 212505, Tipton, 10 BR 244).

The testimony is filled with conclusions and uncertainties, many of which were never clarified in any manner. This becomes increasingly apparent in any effort to reconstruct the events surrounding the alleged offense as well as its geographical and structural scene, but an attempt to accomplish such reconstruction is deemed necessary to any reasonable evaluation of the remaining evidence.

It appears that Davis and Walmsley were proceeding in an easterly direction along Ludwigstrasse, and that as they approached a point where that street widens to encircle a statue they saw to their right a truck and bus stopped in the street with a struggle between soldiers in progress beyond the bus. They caused their vehicle to turn around in the street so that its lights would shine on the affray, stopped, dismounted, and separated the combatants. The accused was found at the scene of the struggle but was not a participant. Walmsley proceeded to the Military Police Headquarters, some distance to the east of the statue. Davis then "placed" the accused "under arrest," ordered him to enter the cab of the bus, and gave his attention to one of the participants of the struggle who was lying "unconscious on the sidewalk." The accused entered the bus cab on the side nearest Davis, crossed over, left the cab from the other side and ran in an easterly direction toward the statue which was about fifty feet away. As the accused reached the statue and continued past it Davis started in pursuit calling upon the accused to halt. Davis did not see the accused after the latter passed the statue. As Davis approached the statue in his pursuit he heard two shots fired. The testimony of Davis concerning these shots follows:

> "I gave the command, hollered, 'Stop' twice, and was going to give the command the third time and the shots were fired at me.
>
> Q: At the time the shots were fired at you where was Webb?
> A: I was behind the statue.
>
> * * *
>
> Q: You said Henry ran towards the statue and two shots were fired when you called on him to halt?
> A: Yes, sir.
>
> Q: From what direction did they come?
> A: They came from the direction from which he ran.
>
> Q: Did you see the fire from the gun?
> A: No, sir, I didn't see the fire, but the first bullet went to the left; the next time close to my head.
>
> Q: You heard the gun go off?
> A: Yes, sir.

Q: How far away was it when the gun went off?
A: Fifty to fifty-five yards.

Q: From the direction in which Henry ran?
A: Yes, sir.

* * *

Q: Did the shots come close to you?
A: Yes, sir, very close.

* * *

Q: Could you see Henry at the time the shots were fired?
A: No, sir.

* * *

Q: Actually you don't know if he fired them or not?
A: No, sir.

* * *

Q: How far away was he when he fired?
A: Anywhere from fifty to seventy-five yards, sir. The statue is on the sidewalk.

Q: I know the location of the ground, but you say seventy-five yards away?
A: Feet, sir.

Q: That would put him in the middle of the street on the other side?
A: Yes, sir.

* * *

Q: But you didn't see any flash?
A: No, sir, I didn't see no flash."

Davis further testified that at the time the shots were fired the unconscious participant of the earlier affray was still lying on the sidewalk; the other two participants therein "were in the bus when the fight started, they got in the front bottom of the bus"; and that "one T/Sergeant from the 508th" was "walking with his girl friend" in "the vicinity of where the shots were fired"; but that no other persons were walking on the street. Davis also stated that he returned the fire by firing four shots "in the direction that the shots were fired at me."

With reference to whether accused was in possession of a firearm at that time Davis testified:

"Q. Did you see a gun on the accused when you first saw him?
A: I didn't shake him down, sir.

Q: Did you ever see him with a gun?
A: No, sir.

* * *

Q: Davis, do you know if the SIS got a gun off of Henry the next morning?
A: Sir, they said, no.

Q: They didn't find a gun?
A: No, sir.

Q: Were there any empty cartridge cases found in the general direction where the shots were fired?
A: We looked all over the area and couldn't find them, sir."

Walmsley's testimony substantiates that of Davis respecting events prior to his leaving the scene to return to Headquarters. He testified that as he was leaving Headquarters to return to the scene he heard six pistol shots but could not fix the direction from which they came. He further testified that after his return to the scene a search was made for the accused in that area but that he was not found there.

6. The only evidence that anyone fired any shots <u>at Davis</u> is his own testimony that the bullets sounded as if they passed close to him. At the time the shots were fired Davis establishes his location as being in the center of an open street area "behind the statue," after dark in the city of Munich. He admitted that at the time the shots were fired he could not see the accused and there is no evidence that he could hear him. He did not see the flash of the gun as it fired the two shots but only heard the reports and the sounds of passing bullets. From that state of circumstances he testified to the bald conclusions: that the shots were fired from the direction in which the accused had previously run; that they were fired from a point fifty to fifty-five yards (if we choose to believe his testimony as reported on page 7 of the record) or fifty to seventy-five feet (if we choose to believe his testimony as reported on page 10 of the record) away from him; and that they were fired at him. Even if we accept this evidence as sufficient to prove the corpus delicti the only circumstances in evidence tending to connect the accused with the offense are his presence at some unknown point in the vicinity and the fact that at the time he was in flight from an arrest made apparently because of his presence in the vicinity of a fight between other soldiers. In order to support a reasonable inference that accused fired upon Davis by the mere fact of his presence in the vicinity it must appear that he was the <u>only</u> person present who could have fired the shots. There can be no question that accused was somewhere in the vicinity of Davis, although when last seen by the latter he was apparently departing as rapidly as possible, but Davis admitted seeing two other persons, in the area from which he thought the shots were fired, who are not otherwise accounted for, and

the fact that he could not see the accused when the shots were fired points to the inescapable fact that he could not competently testify affirmatively as to the presence or absence of others in the vicinity. A motive for such an offense might be established where it appears that flight is from an arrest or attempted arrest on a serious charge, but from the evidence in this case, we can only conclude that accused was arrested by Davis because he was standing in the vicinity of and was obviously a witness to an affray between other soldiers. From the evidence concerning the arrest it is highly unreasonable to even attempt to spell out a conclusion that to escape such arrest accused would resort to gun fire directed against his pursuer.

Where, as in the instant case, the only competent evidence is circumstantial it must, in order to support conviction, be of such a nature as to exclude every reasonable hypothesis except that of accused's guilt (CM 317430, Veronko (1947); CM 260828, Parker, 40 BR 34; CM 238485, Rideau, 26 BR 272). A conviction cannot be sustained on suspicion, surmise or conjecture (CM 317430, Veronko (1947); CM 274812, Tracy, 47 BR 337).

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its Specification, legally sufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

Edward I. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

Joseph T. Brack, Judge Advocate.

JAGN-CM 323349 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Bremerhaven Port of Embarkation, APO 69, c/o Postmaster, New York, N. Y.

1. In the case of Private R. L. Henry (34931369), 3027th Ordnance Base Engine Rebuild Company, 143rd Ordnance Base Automotive Maintenance Battalion, I concur in the holding by the Board of Review and 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 three months and forfeiture of two-thirds pay per month for a like period. Upon taking such action you will have authority to order the execution of the sentence.

2. It is noted that accused has been returned to the United States and in order to insure prompt action dependent on change in his status it is requested this office be advised by radiogram of the date and substance (verbatim) of your final action in the case.

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 323349).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323378

UNITED STATES v. Private First Class ARLAND E. LEARNED (46003321), and Private CARL SCHARFF (38086959), both of 3rd Special Service Company.	UNITED STATES AIR FORCES IN EUROPE Trial by G.C.M., convened at Wiesbaden, Germany, 23 May 1947. Learned: Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks. Scharff: Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Arland E. Learned, 3rd Special Service Company, APO 633, US Army, and Private Carl Scharff, 3rd Special Service Company, APO 633, US Army, acting jointly and with common design, did, at Assmanshausen, Germany, on or about 20 April 1947, wrongfully take and carry away without consent of the owners, one (1) cigarette lighter, the property of Technician Third Grade Frank G. Lilley; one (1) pair of binoculars, two (2) steel watchbands, one (1) silver ring, four (4) cartons of cigarettes, twelve (12) packages of tobacco, two (2) pairs of shoes, and one (1) Argus camera, all the property of Technician Fifth Grade Lenn W. Holloway; one (1) yellow gold wristwatch and one (1) Pontiac Paris

folding camera, both the property of Technician Fourth Grade George F. Beard; one (1) Echophone Radio and one (1) Eastman Kodak folding camera, both the property of Technician Fifth Grade Charles W. Chamberlain; and one (1) Voigtlander camera, property of Technician Fifth Grade William G. Holshue, all of a total value of over fifty dollars ($50.00).

Each accused pleaded not guilty to, and was found guilty of, the Charge and Specification "except the words one (1) cigarette lighter, the property of Technician Third Grade Frank G. Lilley, and one (1) pair of binoculars, and one (1) silver ring, and four (4) cartons of cigarettes and twelve (12) packages of tobacco, of the excepted words not guilty." Accused Learned 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 a period of one year. Accused Scharff 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 the accused Learned the reviewing authority approved the sentence, ordered its execution, suspended execution of the dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement. As to the accused Scharff the reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. In view of the action taken by the reviewing authority respecting the sentence of accused Learned the Board of Review will here only consider the legal sufficiency of the record of trial to support the findings as to value, and the sentence, as to the accused Scharff. The accused was found guilty of wrongfully taking personal property without the consent of the owner in violation of Article of War 96, an offense lesser included within and punishable as larceny (CM 208699, Crowder, 9 BR 27; par. 104c, MCM, 1928). The only question requiring consideration is whether the legal evidence in the record will support the findings of the court as to the value of the property taken to the extent necessary to support a sentence to confinement in excess of six months. Only so much of the evidence in the record of trial as is pertinent to value will be summarized in this holding.

4. The accused was found guilty of wrongfully taking without the consent of the owners, certain described articles of personal property. The persons alleged and proven to be the owners of such items were Technician Fifth Grade Lenn W. Holloway, Technician Fourth Grade George F. Beard, Technician Fifth Grade Charles W. Chamberlain, and Technician Fifth Grade William G. Holshue. The total values of the items

alleged to have been taken were alleged and the court, in its findings, made no exceptions or substitutions respecting such values.

The only evidence as to the values of these items is found in the testimony of the respective owners, which may be summarized in pertinent part as follows:

Technician Fifth Grade Holloway testified that his two "watch bands" cost him "fifty cents or a dollar apiece. I can't say. It was last year" (R. 24). His pair of "Army low cut" shoes had a value of "I think it is four dollars" (R. 25). His pair of civilian low cut shoes had been sent him by his mother and had a value of "about six dollars" (R. 25). He purchased his Argus A-2 camera in the United States over a year before and paid $22 for it (R. 27).

Technician Fourth Grade Beard testified that he received his "Octo" wristwatch as a gift, that such watches were sold at the post exchange where he worked, and that the list price in the post exchange at that time [no actual date given] was $48.50 (R. 33). The band on the watch "costs around eight dollars approximately in Switzerland" (R. 33). His Pontiac Paris camera "would be only worth two dollars at the most" to him (R. 35).

Technician Fifth Grade Holshue testified concerning the value of his Voigtlander camera: "I don't know the exact value, but I value it at fifty dollars" (R. 40).

Technician Fifth Grade Chamberlain testified that he bought his Echophone radio at a post exchange in Beyreuth [date of purchase not given] for $31.50. He bought his Eastman Kodak camera "from a staff sergeant here in Wiesbaden about thirteen months ago" for "approximately" $20.00 (R. 49).

5. It has been long established that except as to distinctive articles of Government issue, 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 is market value; that is, what it is worth in the open market at the time and place of the offense (CM 323640, Pamintuan (1947); CM 217051, Barton et al, 11 BR 193; TM 27-255, par. 100b). The value of the "Army low cut" shoes is stated in Quartermaster lists as $4.54 and the court could take judicial notice of that value. In order for the testimony of the owners to be considered in determining value it must appear that they were qualified by knowledge and experience as expert witnesses in that regard. While it does appear that Technician Fourth Grade Beard worked in the post exchange, where watches similar to his were sold, there is no showing what services he performed there, or that he had any knowledge or experience which would qualify him to competently testify as to the market value of such watches after they had been used. Other than the above mentioned circumstances

respecting Beard there is nothing whatever in the record to show that any of the owners were qualified to testify competently as to the value of the items of property taken from them (CM 323640, Pamintuan (1947)).

The fact that the items in question were physically in evidence before the court does not cure the deficiency in proof since the market value of the alleged items is not a matter of such fixed and common knowledge as to justify the court in taking judicial notice of their value (CM 213952, Mayers, 10 BR 296). To permit the court on its inspection alone to find specific market values for articles of this nature "would be to attribute to the members of the court technical and expert trade knowledge which it cannot be legally assumed they possessed" (CM 208481, Ragsdale, 9 BR 14). However, as provided by paragraph 149g, MCM, 1928, page 173, the court was autherized to find, from its visual inspection of the articles, that they had some value not exceeding $20.00. It follows that so much of the findings as pertain to the total value of the stolen articles in excess of $20.00 cannot be sustained. In view of such opinion it is not necessary to determine the propriety, under the facts of this case, of including the theft of all of the alleged articles within the same Specification.

Wrongful taking, without the consent of the owner, of property of a value of $20.00 or less will support a maximum sentence to confinement of not more than six months (par. 104c, MCM, 1928).

6. For the reasons above stated, as to the accused Scharff, 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 finds accused Scharff did at the time and place and in the manner alleged, wrongfully take without the consent of the owners alleged, the property alleged of a total value not to exceed $20.00 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 at hard labor for six months.

Edward T. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

Joseph T. Brack, Judge Advocate.

JAGN-CM 323378 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, United States Air Forces in Europe, APO 633, c/o Postmaster, New York, N. Y.

1. In the case of Private First Class Arland E. Learned (46003321), and Private Carl Scharff (38086959), both of 3rd Special Service Company, I concur in the holding by the Board of Review and recommend that as to accused Scharff only so much of the finding of guilty of the Specification of the Charge relating to value be approved as involves a finding of some value not to exceed $20.00; and that only so much of the sentence as to accused Scharff be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

2. The above holding is limited in its application to the legality of the sentence of accused Scharff. It does not appear that a General Court-Martial Order has been published promulgating the sentence of accused Learned, which was ordered executed with suspension of the dishonorable discharge. It appears, however, that the error noted by the Board of Review has an equal effect in legal principle upon the findings and sentence as to accused Learned. For this reason it is recommended that upon publication of the General Court-Martial Order promulgating Learned's sentence, the period of confinement in his case be reduced to six months. In the event the sentence of Learned has already been promulgated by General Court-Martial Orders it is recommended that that portion of the sentence adjudging confinement in excess of six months be remitted, and that the record of trial be returned to this office together with six copies of any order effecting such remission.

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 323378).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

207164

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D.C.

31 JUL 1947

JAGV CM 323397

UNITED STATES v. Private BERNARD E. TERVREE (46028590), Assigned Squadron A, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot.	)	HEADQUARTERS FIRST AIR FORCE Trial by G.C.M., convened at Camp Kilmer, New Jersey, 12 June 1947. Dishonorable discharge and confinement for two (2) years and six (6) months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, 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 58th Article of War.

Specification: In that Private Bernard E. TerVree, Assigned Squadron A, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot, Camp Kilmer, New Jersey, then assigned Squadron W, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot, Greensboro, North Carolina, on or about 26 July 1946, desert the service of the United States and did remain absent in desertion until he was apprehended and returned to military control on or about 21 April 1947.

Accused pleaded guilty to 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 to the Charge but guilty of the violation of the 61st Article of War. He was found guilty of the Specification and the Charge and 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 and one-half years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The period of accused's absence without leave is admitted by his plea of guilty under Article of War 61, and the court was warranted in inferring an intent to desert from the length of absence and the circumstances thereof, as admitted by the accused as a witness in his own behalf. The only question requiring discussion pertains to the legality of the sentence as determined by whether the desertion was terminated by apprehension or surrender. The sentence to two and one-half years confinement is excessive if termination was by surrender (par 104c, MCM 1928).

4. The evidence of the prosecution with respect to termination is as follows:

a. It was stipulated between the prosecution and defense that if Sergeant Gerald Vanderbeek of the Police Department, Holland, Michigan, were present he would testify that Prosecution's Exhibit 3 was made by him, that all the facts related therein are true, and that the document was signed by him (R. 7). The mentioned exhibit (SXSC Form 5) is entitled "Statement of Apprehending Officer" and shows in substance that the accused was apprehended by the subscribing officer on 20 April 1947 at Holland, Michigan.

b. There was admitted in evidence an extract copy of morning report with entry of 21 April 1947 showing accused from absence without leave to confinement at Post Guardhouse, Fort Custer, Michigan, on that date (R. 6, Pros. Ex. 2).

c. There was admitted in evidence a statement in question and answer form signed by accused, in pertinent part as follows:

"Q. What made you surrender yourself?

"A. I felt I was doing an injustice to myself and to the army and wanted to get it over with." (R. 4, Pros. Ex. 4.)

5. The accused, having elected to be sworn as a witness, testified to the effect that he went absent to help his mother and father who were ill and that he stayed home, married, got a job, and worked until he turned himself in in April. He further testified as follows:

"Q. Where did you turn yourself in?

"A. I went to the Holland Police Station. Sergeant Vanderbeek was on duty. I told him that I was turning myself in. He told me that they were going to come and get me soon anyway. I stayed in jail overnight and then they took me to Fort Custer."

"Q. Who made out the report of apprehension?

"A. Sergeant Vanderbeek told Ollie Werndon-he is a patrolman- to fill it out. Vanderbeek is the only sergeant and he takes the credit for everything. It is only a small town with only a few policeman. The chief was not on duty because it was Sunday." (R. 11)

* * *

"Q. Did you ever make a statement to Sergeant Vanderbeek?

"A. I just told him I was AWOL and that I wanted to turn myself in. I didn't sign anything." (R. 14)

6. It is obvious from accused's testimony that he contended that he surrendered and was not apprehended. This contention is wholly inconsistent with so much of his plea of guilty and the somewhat inartfully introduced stipulation as to the expected testimony of Sergeant Vanderbeek as indicated that he was apprehended. It appears therefore that both the plea of guilty and the stipulation were entered through lack of understanding by accused of their meaning and effect in connection with the proof of termination and the measure of the sentence. No explanation was made to the accused by the court after the inconsistency was disclosed and he was not afforded an opportunity, as required by paragraphs 70 and 126b of the Manual for Courts-Martial, 1928, to withdraw or amend the plea and stipulation. Therefore, so much of the plea and stipulation as pertained to apprehension was improperly permitted to stand or remain in evidence and should not have been considered by the court as proof of termination by apprehension. The conclusion here reached is fortified by the fact that as initially drawn the Specification alleged desertion terminated by surrender, later changed to apprehension, apparently on the basis of the check mark "x", indicating apprehension, made on the form submitted by Sergeant Vanderbeek. As there was no proof, aliunde the plea and stipulation, that the desertion was terminated by apprehension, termination must be considered to have been in a manner unknown and to be punishable as desertion after an absence of more than sixty days, terminated by surrender. (CM 155103, Dig Op JAG 1912-40, Sec. 416(7); CM 160766, Dig Op JAG 1912-40, sec 416(15); CM 236914, 2 Bull. JAG 270)

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 the Specification and Charge as involves a finding of guilty of desertion for the period alleged, terminated in a manner unknown, and only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one and one-half years.

Wilmot T. Baughn, Judge Advocate

John G. O'Brien, Judge Advocate

Leonard S. Springstead, Judge Advocate

AUG 7 1947

JAGV CM 323397 1st Ind

WD, JAGO, Washington 25, D.C.

TO: The Commanding General, First Air Force, Fort Slocum, New York.

1. In the case of Private Bernard E. TerVree (46028590), Assigned Squadron A, 106th Army Air Forces Base Unit, Army Air Forces Overseas Replacement Depot, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding of guilty of desertion by accused at the place and for the period alleged, terminated in a manner unknown, and only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one and one-half years, which holding is hereby approved. Upon approval of only so much of the finding of guilty of the Specification as indicated above, and approval of only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years, you will have authority to order the execution of the sentence as 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 323397).

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

1 Incl
Record of trial.

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

JAGQ - CM 323466

10 July 1947

UNITED STATES v. Lieutenant Colonel DONALD M. SCHORR (017654), 1st Cavalry Brigade, 1st Cavalry Division.	1ST CAVALRY DIVISION Trial by G.C.M., convened at Camp Drake (Tokyo) Japan, 28 March 1947. Dismissal.

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

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

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

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

Specification: In that Lieutenant Colonel Donald M. Schorr, 1st Cavalry Brigade, did, without proper leave, absent himself from his duties at Headquarters, 1st Cavalry Brigade, from about 17 December 1946 to about 19 December 1946.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Lieutenant Colonel Donald M. Schorr, 1st Cavalry Brigade, on 6 December, 17 December and 18 December, 1946, did wrongfully conduct himself by consuming quantities of liquor which rendered him grossly drunk and incapable and incompetent to carry out his duties as an officer, said conduct being unbecoming of an officer and a gentleman.

Specification 3: (Withdrawn by direction of the appointing authority).

Specification 4: In that Lieutenant Colonel Donald M. Schorr, 1st Cavalry Brigade, did, on or about 23 December 1946,

after receiving a lawful written order from his Commanding General to report for duty, willfully and wrongfully render himself incapable of carrying out such order and his duty as an officer by consuming excessive quantities of liquor.

Specification 5: In that Lieutenant Colonel Donald M. Schorr, 1st Cavalry Brigade, was at Camp Drake (Tokyo) Japan, on or about 1800 hours, 19 January 1947, drunk in uniform in a public place, to wit: In the Field Officers' Mess Hall and in the Officer's Club House, Camp Drake (Tokyo) Japan.

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

Specification 1: In that Lieutenant Colonel Donald M. Schorr, 1st Cavalry Brigade, having received a lawful and written order from Brigadier General William B. Bradford, Commanding General of the 1st Cavalry Brigade, to present himself daily at Headquarters, 1st Cavalry Brigade, said Brigadier General William B. Bradford, being in the execution of his office, did, at Camp McGill, Japan, on or about 23 December 1946, fail to obey the same.

Specification 2: In that Lieutenant Colonel Donald M. Schorr, 1st Cavalry Brigade, having received a lawful and written order from Brigadier General William B. Bradford, Commanding General of the 1st Cavalry Brigade, to place his name on sick report when he became ill, the said Brigadier General William B. Bradford, being in the execution of his office, did, at Camp McGill, 1st Cavalry Brigade, on or about 23 December 1946, fail to obey the same.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Charge II and guilty of all remaining Charges and Specifications except that Charge II was changed to a violation of Article of War 96 and minor substitutions were made in the wording of Specification 1, Charge I, and Specifications 2 and 4, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and published a General Court-Martial Order directing its execution. (This publication was unauthorized; AW 48 requires confirmation by the President before a sentence to dismissal may be carried into execution. Instructions have been dispatched to the reviewing authority to revoke the aforementioned GCMO as being null and void ab initio).

3. The Executive Officer, 1st Cavalry Brigade, telephoned to accused's office on 17 December 1946 and was told he had gone to one of the clubs (R. 13). At that time accused was Assistant Executive Officer,

Information and Education Officer and Club Officer (R. 16). Accused could not be located that day (R. 14, 18) and the Executive Officer gave a memorandum to Lieutenant Colonel Eldridge, accused's roommate, ordering accused to report to him at his office on the following day, 18 December. Accused did not report as directed (R. 14).

Accused received the Executive Officer's memorandum on the morning of 18 December and he asked Colonel Eldridge to tell the Executive Officer that he was indisposed and would report to him on the following morning (R. 10). At that time, there was a "thickness" in accused's speech (R. 11). At 1500 and 2000 on 18 December, accused was under the influence of alcohol with a blood test showing .38 milligrams of alcohol per cubic centimeter of blood (R. 22-23, 28).

Accused reported to the Commanding General, 1st Cavalry Brigade, on 19 December 1946 and was given written instructions to be present at his office during duty hours each day and if sick, to place his name on the sick report (R. 19; Ex. A). Accused was again absent from duty on 23 December and failed to place his name on the sick report (R. 20, 31). The regimental surgeon (12th Cav.) again found him drunk in quarters at 1400 that date and had him admitted to the mental ward at the 361st Station Hospital at Tokyo (R. 24-25).

During the evening meal hour (1800) on 19 January 1947, accused while in uniform entered the Field Officers' Mess at the 1st Cavalry Officers Club under the influence of alcohol, "ready to pass out". A blood alcohol test showed ".34 milligram per cent." (R. 32-33, 35-36).

4. First Lieutenant Erwin J. Franco testified that he drove accused to work on 17 December and left him at the unit school at 0750 (R.39).

The balance of the evidence offered by the defense related to accused's mental condition.

Subsequent to accused's last offense, he was given a thorough psychiatric examination and a board of medical officers recommended on 7 February 1947 that accused be returned to the Zone of the Interior for further hospitalization and treatment and that current charges be suspended until he had recovered sufficiently to permit him to cooperate in his own defense (Def. Ex. 3). This recommendation was not followed and on 7 March 1947, he was released from the hospital but because of his depressed state of mind, it was found necessary to place him under the constant supervision of a medical corpsman (R. 63; Def. Exs. 1 and 2).

Three doctors testified that accused was suffering from a neurosis and was mentally incapable of adhering to the right in that segment of his behavior which has to do with alcohol. One doctor summarized accused's history as follows:

"It started, again, eight years ago when he ran into domestic difficulties at home, and was divorced, at which time he took to drinking. That was the first step from the history. He ran into mostly upset domestic difficulties, and he turned to alcohol. It was so severe at that time that he was forced into an institution for alcoholism. It was not an institution run by the Army. I do not believe. It seems to me it was a civilian institution he went to, trying to relieve himself, by medical care, medical treatment. In the history I received from him, he did recover. He returned to a fairly stable life, drinking only small quantities of alcoholic beverages, mainly beer. He was perfectly all right until he was ordered to the POE and his family—he remarried and has a family of three children, I believe—he was ordered to the POE and they had no place to go. Once again, the man ran into a situation which he was unable to cope with, and it got him all upset. Then he started drinking at that time. He returned once again to his old habits of finding relief from anxiety and from worry by turning to alcoholism. He came over here and as I understand it, his assignments—he felt his assignments were a demotion in that he thought he would be with line troops and he felt that was another slap, and he kept on drinking. Then when his charges were preferred against him, that was another hit, and every time he has been hit, he has been getting worse and worse. Those are the traumatic instances I can recall, that have brought on this neurosis. As you can see, it is merely a question of the man running into a situation he was not able to cope with. Perhaps you could cope with it, but it was just his emotional makeup that he could not, so he turned to alcohol. Many people can cope with such a situation, but there is a certain percentage of the population that is emotionally unstable, so to speak, and seek their release in alcohol." (R. 64).

Accused was advised of his rights as a witness and he elected to remain silent (R. 67).

5. The evidence relating to accused's mental condition is of primary importance because an accused cannot legally be convicted where a reasonable doubt exists as to his mental responsibility for the offense charged (MCM, 1928, par. 78).

This provision places the burden of ultimate persuasion on the issue of mental responsibility on the prosecution and recognizes the fundamental principle that all men are deemed innocent until proven guilty beyond a reasonable doubt.

"If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well-founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demands that the accused shall have the benefit of the doubt." (Davis v. U.S., 160 U.S. 469; CM 260194, Collett, 50 BR 233-4).

In the present case, three medical witnesses testified at the trial at considerable length concerning the disability affecting the mental condition of accused. Each testified that he was suffering from a neurosis which made him mentally incapable of adhering to the right in that segment of his behavior concerning the use of alcoholic liquors. The prosecution offered no rebuttal to this testimony.

All the medical testimony resulted from examinations immediately subsequent to accused's last offense and none of the three doctors stated exactly when accused developed an inability to adhere to the right, insofar as intoxicants were concerned. Lieutenant Posin testified a person could become emotionally upset in a week (R. 51). Captain Parmley testified that he could not state unequivocably that accused's condition existed on 18 December or 23 December, but he "could say the probability was great" (R. 62), that his condition "began eight years ago and continued ever since, off and on" (R. 55).

Although none of the doctors testified positively as to accused's mental condition on 18 December, 23 December, or 19 January, the evidence is impelling that accused was not mentally accountable for his acts and clearly raises a reasonable doubt as to whether accused at the time of the alleged offense, was "so far free from mental defect, disease, or derangement, as to be able concerning the particular acts charged * * * to adhere to the right", and since there is no other evidence in the record to overcome that reasonable doubt, the prosecution in our opinion in the light of the controlling principles stated above, failed to discharge its burden of proof on the vital issue of the accused's mental responsibility.

The Board of Review is therefore of the opinion that the evidence is legally insufficient to support the findings of guilty.

It is pertinent to note that although the reviewing authority approved the sentence, the Staff Judge Advocate, 1st Cavalry Division, recommended in his review that the findings and sentence be disapproved for the same reasons expressed in this opinion: that the medical testimony created a reasonable doubt as to accused's ability to adhere to the right and the prosecution failed to overcome that doubt.

5. The accused is 41 years old, married, and has three small children. He graduated from the United States Military Academy in 1929, was promoted to First Lieutenant, November 1934, to Captain, February 1941 (as of June 1939); to Major, October 1941, and to Lieutenant Colonel, 1 February 1942. He was recommended by Major General John S. Wood, for promotion to Colonel on 29 October 1945 but this recommendation was disapproved because of personnel regulations in effect at that time. He served in England and Ireland for eight months in 1942. While in Ireland, he suffered an upper respiratory infection and was returned to the United States. In August 1944 he was placed on temporary limited duty because of bronchial troubles and attendant symptoms. He was re-examined in February 1945 and October 1945 and continued on limited duty. In May 1946, he was returned to general duty and in July 1946, he arrived in Japan and was assigned to the First Cavalry Division. On 26 September 1946, he was reprimanded under Article of War 104 for being drunk. From July to November 1946, this officer was twice treated for bronchial ailments. On 16 January 1946, this officer was awarded the Army Commendation Ribbon for meritorious services at the Armored Replacement Training Center, Fort Knox, Kentucky, during the period from 13 October 1945 to 10 January 1946.

The January 1944 edition of the Official Army Register shows accused's service as follows:

> "Schorr, Donald M. (017654). B-NJ 3 Oct 05. A-M.A.,N.J. B.S., U.S.M.A., 29. Grad.: Cav. Sch., Regular Course, 35."

This officer also graduated from the 17th General Staff course at Command and General Staff School on 30 March 1944. During the period from his appointment in 1929 to the end of 1938, this officer received ratings as follows: 4 Excellent (covering a total of 11 months), 2 Very Satisfactory, 21 Satisfactory, and 3 Unsatisfactory. During 1938, he was twice convicted by general courts-martial and sentenced once to a reprimand and then to suspension from promotion for 2½ years and forfeitures of $50 per month for 6 months. In November 1938, he took leave and entered a private institution to be treated for alcoholism. Class "B" Board proceedings were instituted, which Board found him unfit for retention as an officer in the Army. On 5 December 1939, action on these proceedings were suspended by the President for one year. Efficiency ratings dating from 1 January 1939 showed "phenomenal" improvement — 13 Superior, 3 Excellent, and one (covering overseas period involved in the current case) was Unsatisfactory. In December 1940, the sentence of suspension from promotion was remitted and this officer was immediately promoted with rank dating back to the date he originally qualified therefor - 13 June 1939.

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.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 323466 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 8 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 Lieutenant Colonel Donald M. Schorr (RA 017654), 1st Cavalry Brigade, 1st Cavalry Division.

2. Upon trial by general court-martial in Japan, this officer was found guilty of being absent without leave on 17 and 18 December 1946 (Spec., Charge I), in violation of the 61st Article of War; of wrongfully consuming quantities of liquor on 18 December 1946, which rendered him incapable and incompetent to carry out his duties (Spec. 2, Charge II); of wrongfully rendering himself incapable of carrying out a lawful order of a superior officer to report for duty on 23 December 1946, by consuming excessive quantities of liquor (Spec. 4, Charge II); of being drunk in uniform at Field Officers' Mess on 19 January 1947 (Spec. 5, Charge II); of failing to obey orders of his Commanding General to present himself daily at Headquarters, 1st Cavalry Brigade, and to place his name on sick list when he became ill (Specs. 1 and 2, Charge III), all in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence, upon the ground that the prosecution failed to carry the burden of proof upon the issue of accused's mental responsibility. I do not concur in that opinion.

4. The evidence showed that the accused could not be found at his usual places of duty on 17 December 1946. He was directed to report to his executive officer at 0800 18 December but failed to do so, sending word that he was "indisposed." A medical officer was sent to accused's quarters and diagnosed his case as "alcoholism, acute, moderately severe." Accused reported to the Commanding General of the First Cavalry Brigade on 19 December 1946 and was given written instructions to be present at his office during duty hours each day and if sick, to place his name on the sick report. Four days later, he was again absent and his name was not placed on the sick list. The regimental surgeon again found accused drunk in quarters (19 December 1946) and had him admitted to the mental ward at the 361st Station Hospital at Tokyo. One month later (19 January 1947) accused appeared at the Field Officers' Mess, 1st Cavalry Officers' Club in a drunken stupor.

5. The defense produced three Army doctors who testified that accused was suffering from a neurosis which made him mentally incapable of adhering to the right insofar as intoxicants were concerned. None of these doctors testified as to the specific date on which accused became irresponsible. The Board of Review is of the opinion that the medical testimony created a reasonable doubt as to accused's mental responsibility on the dates of the offenses charged against him.

The medical testimony offered by the defense is not convincing to me in the light of the whole review and the nature of the offenses. The net effect of the testimony offered by the defense upon the issue of sanity was not to create a reasonable doubt as to the sanity of accused, in a legal sense but was merely to the effect that accused is a chronic alcoholic, without the moral character to control his propensity for intoxicants.

In order to avoid any possibility of injustice to accused, however, I caused the convening of a board of medical officers at Madigan General Hospital under the provisions of AR 600-500. This board, after an examination of accused and after considering the record of trial and the clinical records of the 361st Station Hospital and the Madigan General Hospital, found no evidence of neurosis or psychosis with respect to accused's mental responsibility. It was the Board's opinion that at the time of the alleged offenses, accused was able to distinguish between right and wrong and to adhere to the right, and that he was able to intelligently conduct or cooperate in his defense. This report which is attached fully supports my opinion and the findings of the court.

In my review of this case consideration has been given to letters from Congresswoman Mary T. Norton (New Jersey), from Major General Charles L. Scott (Retired), and from the mother of this officer. General Scott commended accused very highly for his outstanding work at Fort Knox and stated:

> "From Schorr's letter, I think the medicos who examined him have his case sized up about right — in that case, he should be retired physically — not dismissed in disgrace."

6. War Department records show the accused is 41 years old, married, and has three small children. He graduated from the United States Military Academy in 1929, was promoted to First Lieutenant, November 1934; to Captain, February 1941 (as of June 1939); to Major, October 1941; and to Lieutenant Colonel, 1 February 1942. He was recommended for promotion to Colonel on 29 October 1945 but this recommendation was disapproved because of personnel regulations in effect at that time. He served in England and Ireland for eight months in 1942. While in Ireland, he suffered an upper respiratory infection and was returned to the United States. In August 1944 he was placed on temporary limited duty. In May 1946, he was returned to general duty and in July 1946, he arrived in Japan and was assigned to the First Cavalry Division. On 26 September 1946, he was reprimanded under Article of War 104 for being drunk on duty. From July to November, this officer was twice treated for bronchial ailments. On 16 January 1946, this officer was awarded the Army Commendation Ribbon for meritorious services at the Armored Replacement Training Center, Fort Knox, Kentucky, during the period from 13 October 1945 to 10 January 1946.

The January 1947 edition of the Official Army Register shows accused's service as follows:

> "Schorr, Donald M. (017654). B-NJ 3 Oct 05. A-M.A., N.J. B.S., U.S.M.A., 29. Grad.: C. and G.S. Sch., 17 G.S.Cl., 44, Cav. Sch., Regular Course, 35."

During the period from his appointment in 1929 to the end of 1938, this officer received ratings as follows: 4 Excellent (covering a total of 11 months), 2 Very Satisfactory, 21 Satisfactory, and 3 Unsatisfactory. During 1938, he was twice convicted by general courts-martial and sentenced once to a reprimand and then to suspension from promotion for 2½ years and forfeitures of $50 per month for 6 months. In November 1938, he took leave and entered a private institution to be treated for alcoholism. Class "B" Board proceedings were instituted, which resulted in findings that this officer was unfit for retention as an officer in the Army. On 5 December 1939, action on these proceedings was suspended by the President for one year. Efficiency ratings dating from 1 January 1939 showed "phenomenal" improvement — 13 Superior, 3 Excellent, and one (covering overseas period involved in the current case) was Unsatisfactory. In December 1940, the sentence of suspension from promotion was remitted and this officer was immediately promoted with rank dating back to the date he originally qualified therefor - 13 June 1939.

7. I recommend that the sentence be confirmed, but in view of all the circumstances recommend that it be suspended during good behaviour. If this recommendation meets with your approval, action will be initiated by this office to the end of causing this officer to be separated from active service by administrative processes. The Assistant Chief of Staff, G-1, Army Ground Forces, has informally concurred in the proposal for separation of the officer from active service.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Report of board of medical officers.

(GCMO, 60, 24 Nov. 1947)

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323470 4 NOV 1947

UNITED STATES	)	SECOND MAJOR PORT
	)	
v.	)	Trial by G.C.M., convened at Yokohama, Japan, 8 May 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Staff Sergeant WILBUR K. KING (33810605), 289th Army Ground Forces Band.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, ALFRED and BRACK, 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 94th Article of War.

Specification: In that Staff Sergeant Wilbur K. King, 289th Army Ground Forces Band, APO 503, did, at Yokohama, Honshu, Japan, between 1 November 1946 and 31 December 1946, wrongfully and knowingly sell forty sheets, value about $52.40, property of the United States furnished and intended for the military use thereof.

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

Specification: In that Staff Sergeant Wilbur K. King, 289th Army Ground Forces Band, APO 503, did, at Yokohama, Honshu, Japan, between 1 November 1946 and 31 December 1946, wrongfully sell to Japanese Nationals two cases of cigarettes, value about $65.00, and twenty-four boxes of chocolates, value about $28.80, of a total value of about $93.80, in violation of Circular #39, General Headquarters, United States Armed

Forces, Pacific, 23 April 1946.

He pleaded not guilty to and was found guilty of all Charges and Specifications. 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 five years. The reviewing authority approved the sentence but reduced the period of confinement to three years and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, except as to the number and value of sheets sold and legally sufficient to support the findings as to Charge II and its Specification. The only question presented is whether, under the Specification of Charge I, so much of the findings as pertain to the number and value of sheets alleged to have been wrongfully sold, is supported by the evidence, and whether the legal findings will support the sentence.

4. The evidence material to this question reveals the following facts: During the period of 1 November 1946 to 31 December 1946, accused was the supply sergeant of the 289th Army Ground Forces Band Unit. Around the middle part of November 1946, he directed Shiro Oda, a Japanese civilian employed by the said unit, to sell a quantity of Government sheets for him. Shiro Oda sold a total of 32 sheets and gave the proceeds of sale to accused (R. 9-12). On 15 December 1946, accused directed Masayuki Iisumi, another Japanese civilian employed by accused's unit, to sell some Government sheets for him. Masayuki sold a total of 10 sheets and turned over the proceeds of this sale to accused (R. 7-9).

In an extra-judicial statement, admitted in evidence as prosecution's exhibit 1, accused stated that Shiro and Iizumi sold about 20 sheets from the supply room for him and that he received the proceeds from the sales for himself (R. 16; Pros. Ex. 1).

It was stipulated that sheets used by the Army of Occupation in Japan are of a value of about $1.25 (R. 17).

5. It is to be noted that while the Specification of Charge I purports to allege but one offense, the evidence discloses that the 40 sheets alleged to have been sold consist of two smaller sales which were actually consummated on two separate occasions within the alleged period. The first sale occurred around the middle of November 1946 when 32 sheets were sold through one agent, and the second sale on 15 December 1946, approximately a month later, when 10 sheets were sold through another agent. Where, as in this case, the maximum

punishment for an offense involving property is governed by its value, the findings, with respect to quantity and value, must be particularly scrutinized to determine whether the allegations charged in the Specification correspond with the proof.

In general, one specification should not allege more than one offense (par. 29b, MCM, 1928) and if it does, it is bad for duplicity (Winthrop, op., cit. p. 145; 31 CJ 758). Duplicity, as applied here, is defined as:

> "The union of more than one cause of action in one count or writ" (Bouvier's Law Dict.).

While duplicity in pleading was objectionable as a fatal defect at common law, and although the joinder of two or more distinct offenses in one count of an indictment [specification] is faulty pleading, yet where the acts imputed or alleged are component parts of the same offense the pleading was held not to be objectionable for duplicity (Farrell v. State, 54 N.J.L. 416, 24 Atl. 723) nor was it so when one of the two offenses charged was insufficiently set out (State. v. Henn, 39 Minn. 476, 40 N.W. 572). Owing to statutory changes in forms of pleading and under our military rules, duplicity is no longer considered to be a fatal defect in pleadings, an abbrogation of the common law rule, but the ultimate effect of a duplicitous pleading must be considered when it appears to prejudice the substantial rights of an accused or when it contravenes principles of justice (CM 268259, Stevens, 44 BR 254; A.W. 37; MCM, 1928, par. 87b, p. 74).

Since the Specification of Charge I alleges but a single offense it cannot be said to be duplicitous. Nevertheless, in view of the evidence which reveals that two separate and distinct offenses were in fact included in the single offense alleged, it must be determined whether the two offenses thus charged were components of the one offense alleged, and if not, whether the maximum limit of punishment may be governed by the aggregate values of the two separate offenses. If the separate acts shown by the evidence are components of the single offense alleged and constitute a course of conduct upon which the single charge is predicated, then, obviously, the pleading comes within the exception to the rule against duplicity because it is the continued course of conduct, including each alleged act involved, for which accused is being tried and no prejudice to his substantial rights can be raised provided the specification sufficiently apprises him of each act or offense constituting such conduct.

Discussing the exception to the general rule that one specification should not allege more than one offense, the Board of Review, in the Stevens case, supra, stated:

"However, there are recognized limitations upon that rule. There are offenses having the quality of duration, where ordinary rules do not apply as to specific designation of time. Such may be the continued nonpayment of a debt, charged as dishonorable conduct under Article of War 95 (Winthrop, op. cit., page 139), unlawful cohabitation (CM 211260, Grochowick, 10 BR 43), or the neglect or malfeasance of a continuing duty (CM 238266, Campbell, 24 BR 215). Such cases do not raise the question of duplicity, as there is a single offense, 'continuing' in a true and absolute sense. There are other cases where repetition, or succession of events, lends a continuing quality to a course of conduct otherwise composed of separate acts. There duplicity is a real factor, if the separate acts constitute offenses, and such is the instant case, but certain exceptions are recognized.

"Speaking of particularity in specifying time, Colonel Winthrop said:

> 'In some cases the offense committed is of a continuing character, extending over a considerable period of time or exhibiting a general habit or course of conduct, In such cases where distinct acts cannot readily be separated and attributed to particular dates, it is allowable to charge the misconduct * * *' (specifying the period). (Winthrop,op. cit., page 139).

"Speaking of duplicity, the same authority says:

> 'This rule, however, does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction, and substantially completes a single occasion of offence. Thus it has been held that assault and battery and false imprisonment, when committed together or in immediate sequence, may be laid in the same count without duplicity, since "collectively they constitute but one offense." So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place' (Winthrop, op. cit., page 143).

"That time, or singleness of occasion, is not the only unifying factor in considering a succession of acts as a course of conduct is well recognized, even in cases of larcenous character. Thus, asportations over a period of time

have been dealt with collectively not only in such cases as tapping a gas line, where the asportation was constant over a stated period, but also in cases of working a coal vein, cutting timber from the land of another over successive days, and otherwise where successive taking were all pursuant to a single sustained guilty impulse and in the execution of a general sceme or design (Wharton's Criminal Law, 12th Ed., Sec. 1171; 36 CJ 798). It is no far cry from those cases to successive invasions of the same cold storage warehouse as a source of food supply.

"How much unity of purpose, singleness of transaction, or adherence to scheme, plan or design must be established to justify the collective specification of a series of wrongful acts must depend upon the facts and circumstances of the case."

The principles enunciated in the Stevens case, supra, are fairly indicative of the facts which must be shown to span the gap of duplicitous pleadings in order to establish several acts as a continuing offense.

In the instant case, the Specification of Charge I is not patently objectionable for duplicity since only one distinct offense is alleged therein. No objection on that ground was raised or could properly have been raised in view of the singleness of the pleading. However, inasmuch as the latent quality of the Specification, as revealed by the evidence, presents but another aspect of the problem involved in duplicitous pleadings, that is, the offense charged represents a number of acts purporting to comprise a single offense, application of the theory underlying the rule against duplicity appears proper in this case to determine the legality of the findings and sentence.

In view of the findings of guilty, we can reasonably assume that the court considered the two wrongful sales of sheets as component parts of a continuing offense. To sustain such a contention, however, the evidence must show that the two individual acts were of such a repetitious and associated character, extending over a considerable period of time, and exhibiting such a general habit or course of conduct, from which it could be reasonably inferred that the several acts constituted, in essence, but one offense. The Board of Review in considering the element of time which intervened between the two sales, the limited number of sales, and the manner in which the sales were accomplished, is of the opinion that the two separate sales constituted two distinct offenses entirely unrelated to each other, and that the contention that they constituted a continuing offense is not warranted by the evidence. Accordingly, it follows that the total value of the

sheets sold in November 1946 and the total value of sheets sold on 15 December 1946 cannot be aggregated for the purpose of supporting increased punishment. Furthermore, since accused is charged with the commission of only one offense, the punishment must be limited to that authorized for one offense notwithstanding the fact that more than one offense was proved to have been committed during the period of time alleged. To hold otherwise would be to deny to the accused equal protection under our fundamental doctrine of jurisprudence —

> "that every wrongful fact, with each particular modification thereof, which in law, is required to be taken into account in determining punishment upon a finding of guilty, must be alleged in the indictment /specification/" (Bishop's New Criminal Procedure, Vol. 1, page 59).

Obviously, this doctrine as adopted by the common law and as expressed in Article VI of our United States Constitution, which reads;

> "In criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of accusation; * * *,"

was conceived upon the basis of pure reason and justice. Commenting on the inviolability of this doctrine, Bishop states in his work, supra, at page 60:

> "And it makes no difference that in fact he (accused) is guilty of more than is charged, or that more is proved. Though what is set down against him is a part of a larger crime, still, if the indictment is silent as to the remaining part, he can no more be punished for the whole than if no part of it had been alleged. To punish him for all, where he is not charged with all, is to punish him without accusation."

In Volume 2, at page 439, of the same work, supra, Bishop further comments on the subject of "What will guide the Court in its Sentence," as follows:

> "Every Act and Intent - on which in matter of law the punishment of an offense depends, * * * is required to be set down * * * as a guide to the court in its sentence."

And again in Volume 1 at page 62, he states:

> "The result is that in every case, with no exception, the common law requires each individual thing which

itself or a statute has made an element in that wrongful aggregation out of which the punishment proceeds, to be alleged in the indictment. The court, in adjudging the punishment, - or the jury, in assessing it, as is done in some of our States, - can take into its consideration nothing except what is specifically charged." (Citing Lacy V.S., 15 Wis. 13; Koster V.P., 8 Mich. 431; S.V. Farr, 12 Rich 24; U.S. v. Fisher, 5 McLean, 23; Rex v. Marshall, 1 Moody, 158; Vogel V.S., 31 Ind. 64; 71 Am. D. 480).

It remains to be determined which one of the two separate offenses, proven to have been committed under the Specification of Charge I, is to be considered as a legal basis of punishment. In this regard, a search of the cases in the Judge Advocate General's Department failed to uncover any adjudication of this problem. However, the following procedure is provided by the Federal and other civil rules of practice in such instances:

"Where the charge is such that it would be sustained by proof of any one of a number of similar offenses the court should not allow them all to be proved and submitted to the jury, but should at the proper time require the prosecuting officer to elect upon which act he will rely. This question frequently arises in prosecutions for unlawful sale of intoxicating liquors. By the weight of authority, the prosecuting officer cannot go to the jury on proof of a number of separate and distinct sales, either one of which would sustain the charge; but should, when the evidence discloses several sales be required to elect upon which sale he will rely" (Clark's Criminal Procedure, 2nd Ed., page 329-330).

State v. King, 66 Miss. 502, 6 So 188;
State v. Crimmins, 31 Kan 376, 2 Pac 574;
State v. Chisnell, 36 W. Va. 659, 15 S.E. 412;
Tebkovitz v. State, 113 Ind. 26, 14 N.E. 363, 597.

It is observed that this practice does not preclude admission of evidence of several sales, but merely requires an election after the several sales have been disclosed (State, v. Chisnell, supra).

Application of the foregoing rule, authorizing election between charges in a single count (analagous to election between separate offenses within a single specification), is recognized in practice before our Federal courts as an ancillary power, incident and necessarily inuring to its discretionary powers where the joinder tends to embarrass accused in his defense or otherwise prejudice his substantial rights (Pointer v. U. S., 151 U. S., 396, 36 L. Ed. 208) under operation of

the provisions of 18 USC 557, or Rule 8 (a), Rules of Criminal Procedure For The District Courts of the United States, which reads as follows:

> "(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 scheme or plan."

Although invocation of this ancillary power as incidental to the recognized joinder of offenses in military procedure is unknown in our courts-martial procedure, recourse thereto is authorized pursuant to paragraph 111, MCM, 1928, which provides:

> "So far as not otherwise prescribed in the 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."

Since the rule compelling election between proven offenses to support the Charge is basically an implement of interlocutory nature imposed subject to the discretionary powers of the trial court, it becomes pertinent to consider the propriety of invoking its operation at this phase of the case notwithstanding the fact that no motion for compelling such election was made by the defense. Obviously, the purpose of the rule is intended to cure such defects appearing in pleadings as are disclosed by the evidence. Thus, invocation of the rule must necessarily depend upon the degree of proof introduced and can only be invoked at such time as the defect becomes apparent. Its ultimate aim is to preserve the substantial rights of the accused and to preclude prejudice in his defense or punishment. It has been held that "Any error in denying a motion to compel election may be rendered harmless by the sentence (Astwood v. U.S., 1 Fed. 3d 569; Mills v. U.S., 294 Fed. 77) and a failure to compel election at all cannot be reasonably considered to render any greater harm if the defect in the findings can be cured prior to final approval of the sentence provided the sentence, as approved, obviates the defect. Since the defect under consideration is before the Board of Review pursuant to Article of War 50½ and prior to approval of the findings and sentence, we are of the opinion that the defect in the pleading as detected in the evidence cannot prejudice accused's substantial rights insofar as no objection was raised thereto and insofar as it is curable by the sentence as hereinafter considered.

The rulings of civil tribunals where this principle of procedure has been invoked are digested and commented upon by Clark in his text on criminal procedure at page 342, as follows:

"EFFECT OF MISJOINDER

A few of the cases hold, or seem to hold, that felonies arising from distinct transactions, even though they may be of the same nature — as, for instance, where several counts charge distinct larcenies — cannot be joined without making the indictment bad as a matter of law. By the great weight of authority, however, an indictment is never bad, as a matter of law, because of the joinder of several separate and distinct offenses in different counts, where they are of the same general nature, and where the mode of trial and the nature of the punishment is the same. An indictment may, therefore, join several distinct felonies or several distinct misdemeanors, without being bad as a matter of law. Since such a joinder does not render the indictment bad as a matter of law, it is no ground for demurrer, motion in arrest of judgment, or writ of error. The only way in which the objection can be raised is by motion to quash the indictment, or to compel the prosecutor to elect upon which count he will proceed."

However, when the effect of a duplicitous pleading goes to the degree of punishment, the operation of the rule is unrestricted with reference to the findings and sentence. Thus Clark continues as follows at page 344:

"If offenses for which the punishment is different are joined, it would seem that a demurrer will lie, for, in case of a general verdict of guilty the court could not know what punishment to impose; and, after a general verdict of guilty, such a misjoinder is ground for motion in arrest of judgment. But judgment will not be arrested if the verdict specifies upon which count the defendant is found guilty, nor where the verdict is general, if one of the counts is insufficient, for, as we shall see, the verdict will be referred to the good count. (James v. State, 104 Ala. 20, 16 South, 94; Adams v. State, 55 Ala 143; State v. Montague, 2 McCord (S.C.) 257; Davis v. State, 57 Ga. 66)."

Accordingly, we conclude that in view of the fact that the findings of guilty of the Specification of Charge I, relative to the total number of sheets sold and as to the total value thereof, are dependent upon proof of two separate offenses not within the chain of a continuing offense, thus affecting the degree of punishment, only so much of said findings can be sustained as involves the number of sheets shown to have been wrongfully sold on only one of the two occasions, of a value computed according to proof of value. In this respect, election of one of the two proven

offenses, in the most serious aspect, is authorized and deemed reasonable pursuant to Article of War 37.

The evidence indicates that 32 sheets were sold around November 1946 while only 10 sheets were sold on 15 December 1946, all of a stipulated value of $1.25 per sheet. Since the number of sheets sold in November exceeds the number sold in December it follows that it is the more serious of the two offenses constituting a wrongful sale of 32 sheets of a value of $40.00.

The maximum punishment authorized by paragraph 104c, Manual for Courts-Martial, 1928, for the offense of which accused was convicted under Charge I is dishonorable discharge, total forfeitures and confinement at hard labor for one year. The maximum punishment, so authorized for the offense of which accused was convicted under Charge II is dishonorable discharge, total forfeitures and confinement at hard labor for six months.

6. For the reasons above 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 finds that the accused did, at the time and place alleged, wrongfully and knowingly sell 32 sheets, value about $40.00, property of the United States furnished and intended for the military use thereof; legally sufficient to support the findings of guilty of Charge I; legally sufficient to support the findings of guilty of Charge II and its Specification; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

Edward D. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

Joseph T. Brack, Judge Advocate.

JAGN-CM 323470 1st Ind
JAGO, Washington 25, D. C.
TO: Commanding General, Second Major Port, APO 503, c/o Postmaster, San Francisco, California.

1. In the case of Staff Sergeant Wilbur K. King (33810605), 289th Army Ground Forces Band, I concur in the holding by the Board of Review and recommend that only so much of the finding of guilty of the Specification, Charge I, be approved as finds that the accused did, at the time and place alleged, wrongfully and knowingly sell 32 sheets, value about $40.00, property of the United States furnished and intended for the military use thereof; 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 and one-half years. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 323470).

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 323485

8 SEP 1947

UNITED STATES	HEADQUARTERS THIRTEENTH AIR FORCE
v.	Trial by G.C.M., convened at Fort William McKinley, P.I., APO 719 22 April 1947 and 24 April 1947. Dismissal and fine of $1500.00
First Lieutenant Donald F. Ames (O-739604), Air Corps	

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

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

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

CHARGE: Violation of the 94th Article of War

Specification: In that First Lieutenant Donald F. Ames, Detachment 60, 141st Airways and Air Communications Service Squadron, APO 900, did, at APO 900, on or about 6 October 1946, knowingly and willfully misappropriate P183.00, lawful currency of the Republic of the Philippines, of the value of about $91.00, money of the United States intended for the military service thereof.

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 dismissed the service and to pay to the United States a fine of Fifteen Hundred ($1500.00) Dollars. The reviewing authority approved the sentence, withheld execution thereof, and forwarded the record of trial for action pursuant to Article of War 48.

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

The first seven witnesses, Messrs. Diffin, Davis, Nugent, Novak, Rogers, Sloneker, and Wendt, all civilians, each testified that he was a member of the "Hype" project, and thus entitled to and did eat at the Officers' Mess for Detachment 60, 141st AACS Squadron during the time the accused was

"Supply Officer" therefor; that he paid for his meals at the rate of twenty-five (25) cents per meal; that during the first part of October 1946 he paid his mess bill for the preceding month to the accused or to Pedro Santiago, his assistant, and received a receipt therefor (none of the receipts was produced in court), in approximate amounts as follows:

Mr. Diffin	$12.50 (R 6)
Mr. Davis	$12.50 (R 8)
Mr. Nugent	$17.50 (R 9)
Mr. Novak	$21.00 (R 10)
Mr. Rogers	$12.50 (R 12)
Mr. Sloneker	$15.00 (R 13)
Mr. Wendt	$22.50 (R 14)

Mr. Pedro Santiago, an employee of Detachment 60, testified that he worked for accused and on his orders collected money from civilian employees who ate in the mess, and gave them receipts therefor (R 15). He stated that he made out the receipts in duplicate, signed accused's name thereto, and later gave the duplicate receipts and the money to the accused (R 16).

First Lieutenant James M. Dennis testified that when he was investigating officer for the purpose of investigating charges against the accused for the embezzlement of government funds, the accused, after being warned of his rights under the 24th Article of War made a statement which was turned over to accused's company commander and, subsequently thereto, lost (R 18,19). He stated that thereafter the charges were again referred to him for investigation, but had been changed from embezzlement to misappropriation, and the accused made another sworn statement (R 18, 19), which also was lost. Both charges grew out of the same offense (R 19). To the best of witness' memory, accused said in his statement that he was appointed Mess Officer sometime in May 1946, that in the performance of this duty he collected mess charges from civilians at the rate of twenty-five (25) cents per meal; that shortly after he began such collections the question arose as to what to do with the money. He discussed this matter with the Commanding Officer of the Detachment, Captain Morgan, and the Adjutant, and the latter was instructed by Captain Morgan to investigate and to find out what to do with the money (R 19). On a later date, accused mentioned to Captain Morgan that the money might be used to buy food in the civilian market for the mess. Captain Morgan neither agreed nor disagreed, and never did instruct him what to do with the money (R 20). Accused said that he, and others authorized by him, did buy food for the mess. He continued to collect money from civilians and to give them receipts, but kept no books and did not turn the money in to "Finance" (R 20).

It was stipulated that during the months of September and October 1946 accused was Mess Officer for Detachment 60, 141st AACS Squadron, and was at that time custodian of the Mess Fund (R 21), and that if the Finance Officers of the 4th Air Depot and of the Paranaque Replacement and Disposition Center, and the Chief, Accounting Section, PHILRYCOM, were present, each of these three officers would testify that after making a

thorough search of all the retained accounts of his respective office, no records were found of collections deposited by the custodian, Mess Fund, Detachment 60, 141st AACS Squadron, for the month of October (R 21).

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

During September and October 1946, Mr. Manuel Ponce de Leon, a baker in Paranaque, sold to the accused more than seventy-two loaves of bread, at a price of three loaves for one peso (R 21, 22).

Mr. Jose P. Pangan, who was storekeeper and mess steward for both the officers' and enlisted men's messes during September and October 1946, testified that during those months the accused gave him money with which to purchase, and he did purchase, vegetables and condiments in the civilian market, for use in the two messes, at a price of approximately one hundred eighty-five pesos (R 24, 25, 26).

The accused, after having his rights as a witness explained to him by the president of the court, was sworn, and testified as follows:

When he was appointed mess officer, Captain Morgan gave him no definite instructions as to what he should do with the money collected and, though he discussed this matter with Captain Morgan, they arrived at no definite agreement (R 27). Captain Morgan gave him to understand that he (accused) would take care of the mess fund (R 32), and he collected from the civilians who ate in the mess fifty centavos per meal; but that he did not know how much money he collected from them (R 30), since he did not keep any books (R 28). He thought it was in the neighborhood of one hundred and seventy-five dollars per month (R 31). He and Captain Morgan decided that he would use this money to supplement the mess, and he (and others authorized by him (R 31)), with Captain Morgan's full knowledge (R 28), spent the money for condiments and vegetables, as he thought this expenditure was the best use of the money for all concerned (R 27, 34). His messes were inspected by various officers, but they never inspected the fund (R 27, 28). He asked the First Sergeant to get regulations on the disposition of the funds, and inquired in Headquarters as to this matter, but did not ask any Finance Officers, though they were available, or the Commissary Sales Officer, or the various inspectors as to how he should dispose of the funds (R 28). When Captain Gould, who had the same problem in Okinawa, told him that the money should be turned in, he stopped spending the money (R 27, 29), and on 31 January 1947, he turned in $445.50 to Captain Gould (R 32, Def Ex A). Accused stated that he did not know whether the Government was furnishing these meals to civilians free of charge; that he knew nothing about their contract with the Government, and that he had never seen any regulations about such civilians (R 33, 34).

5. The accused was charged with knowingly and wilfully misappropriating one hundred eighty-three (183) pesos, of the value of ninety-one dollars ($91.00), money of the United States intended for the military service. The uncontradicted evidence shows, and it was admitted by the accused, that he, as mess officer, collected from various civilians sums greatly in excess of this amount, and that in October 1946, he turned over to his mess steward one hundred eight-five (185) pesos of the money he had collected, for the purchase of vegetables, salad oil, and other items, for use in the mess (R 25, 30, 31, 34). There is evidence that other sums of the money he had collected were applied to the same purpose (R 22, 27, 34).

Misappropriating means devoting to an unauthorized purpose; it need not be for the benefit of the accused (MCM, 1928, par 150i; CM 243287 Poole, 27 BR 521, 524; CM 260737, Lillis, 39 BR 395, 404). The sole question presented by the record, therefore, is: Was the accused authorized to spend for the purpose of supplementing the mess, monies collected from civilians who were permitted to eat therein?

Section IV, AR 35-6660, provides the procedure for turning in all cash collected from the sale of meals to civilians authorized to eat in Army messes (par. 42). It does not permit the expenditure of such funds for the purchase of supplemental rations for the mess. While the prosecution did not introduce these regulations, the court could take, and it is assumed that it did take, judicial notice of them (CM 278034, Carey et als, 11 BR (ETO) 293). The proof is clear and convincing that the money in question was devoted to an unauthorized purpose.

6. The defense objected strenuously to the testimony of Lieutenant Dennis, the officer who investigated the charges, as to the contents of accused's statements. This testimony was competent and properly admitted (par 114b, MCM 1928, p 116, 117), but even if it were not competent, the testimony did not affect the substantial rights of the accused, who later admitted all the statements of substantial value testified to by Lieutenant Davis.

7. The accused was over 27 years of age at the time of the offense, unmarried, and prior to his entry into the military service had attended college for a portion of one academic year. He enlisted in the Army on 12 August 1940, and had advanced to the grade of Sergeant by April 1942 when he was selected to be an aviation cadet. He completed bombardier training and on 6 March 1943 was commissioned Second Lieutenant AUS. On 27 March 1945 he was promoted to First Lieutenant AUS. His efficiency rating was "Excellent" during the period, 1 July 1945 to 30 June 1946, and "Very Satisfactory" for the period 1 July 1946 to 31 December 1946.

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

A sentence of dismissal and a payment of a fine are authorized upon conviction of a violation of Article of War 94.

[illegible], Judge Advocate

R. McDonald Gray, Judge Advocate

Valentine A. Wolf, Judge Advocate

JAGH - CM 323485 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C.

TO: The Secretary of the Army

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 Donald F. Ames (0-739604), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of misappropriating one hundred eighty three (183) pesos, of the value of ninety-one dollars ($91.00), money of the United States intended for the military service, in violation of Article of War 94. He was sentenced to be dismissed the service and to pay a fine of fifteen hundred dollars ($1500.00). 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 and the sentence, and to warrant confirmation thereof. I concur in that opinion.

Between May 1946 and February 1947 accused was mess officer for Detachment 60, 141st AACS Squadron in the Philippine Islands. During that period he made collections at the rate of twenty-five cents (25¢) per meal from civilians who were authorized to eat at the mess. Early in October, 1946, about 185 pesos were so collected. He did not deliver the money to a finance officer as required but had it used to purchase non-issue supplies for the mess. He did the same with other monies so collected. He testified that he did not know that his acts were wrongful. Accused's diversion of the funds was wrongful and amounted to a misappropriation.

4. The accused was over 27 years of age at the time of the offense, unmarried, and prior to his entry into the military service had attended college for a portion of one academic year. He enlisted in the Army on 12 August 1940, and had advanced to the grade of sergeant by April 1942 when he was selected to be an aviation cadet. He completed bombardier training and on 6 March 1943 was commissioned second lieutenant, AUS. On 27 March 1945 he was promoted to first lieutenant, AUS. His efficiency rating was "Excellent" during the period, 1 July 1945 to 30 June 1946, and "Very Satisfactory" for the period 1 July 1946 to 31 December 1946.

5. In the absence of any degree of moral turpitude or self-gain I do not believe dismissal is required.

6. I recommend that the sentence be confirmed, but in view of all the circumstances recommend that it be commuted to a reprimand and forfeiture of $100.00 of accused's pay, and that as thus commuted the sentence 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

*----------
(GCMO 5, D.A. 13 Oct 1947)

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

JAGK - CM 323486

21 AUG 1947

UNITED STATES	)	ATLANTIC DIVISION AIR TRANSPORT COMMAND
v.	)	Trial by G.C.M., convened at Topeka Army Air Field, Topeka, Kansas, 1 May 1947. Dismissal and total forfeitures.
First Lieutenant JAMES R. RUCKMAN (O-793850), Air Corps	)	

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

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

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant James R. Ruckman, Squadron "A", 594th Army Air Forces Base Unit, did, at Topeka Army Air Field, Topeka, Kansas, on or about 16 March 1947, feloniously take, steal, and carry away about $42.00, lawful money of the United States, the property of the Officer's Mess, Topeka Army Air Field, Topeka, Kansas.

He pleaded not guilty to and was found guilty of the specification and charge. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the Prosecution

At about 0250 hours on Sunday morning, 16 March 1947, Captain Gerald P. Knutson, Air Corps, the officer in charge of the Topeka Army Air Field Officers' Mess (generally referred to as "club" in the record) closed and locked the club for the night. As had been the custom, several lights in the building were left burning but Captain Knutson made sure that all windows were drawn and latched and that all doors were locked. As he departed from the club the captain was accompanied by the accused who was

the only other person therein at the time of closing. The club contained a number of slot machines of the five, ten and twenty-five cent variety which were in operation and which, as is generally the case, were filled with money of the respective denominations. These machines and the contents thereof were the property of the club (R. 67-70). Upon their departure from the building, each of the officers proceeded to his automobile which was parked nearby and Captain Knutson, finding a parking ticket on the windshield wiper of his car hesitated for several minutes before driving to the bachelor officers' quarters where both he and accused resided. When he left the area he noticed that accused had turned on the lights of his car but the car did not move from its parked position. At the officers' quarters, Captain Knutson met Captain Fred L. Suther, Jr., AC, who had also been at the club on the evening in question (R. 75,82). Captain Suther testified that he left the club at about 0235 hours and that while returning to his quarters he noticed accused's car parked near the club with lights burning and the right door open. He did not see the accused however (R. 82,83).

Mr. Orlie R. Duff, a fireman employed at the Topeka Army Air Field was charged with the duty of locking the kitchen door of the officers' mess when the club was closed. At about 0310 on the date in question, Duff checked the club and saw someone wearing what appeared to be an officer's uniform who "got up on something and turned the lights off south of the doors." The fireman concluded that the club was being closed for the night and he locked the kitchen door and departed (R. 48-54).

At about 0730 hours the following morning James Henderson, the club janitor, entered the building and noticed that no lights were burning, the blinds were closely drawn and there was broken glass on the floor around the slot machines. He made immediate report of what he found to Captain Herman F. Hamilton, the officer of the day (R. 26-31). Captain Hamilton went to the club, found the north door unlocked, an office window broken, light bulbs which had been removed from their sockets, a broken ginger ale bottle on the floor and the glass windows of the "jack-pots" on three twenty-five cent and two ten cent slot machines broken out and the money removed therefrom (R. 35-37).

Major Erwin G. Haack, AC, the photographic officer of the Topeka Air Field, identified and there were received in evidence as Prosecution Exhibits 1 to 4 inclusive photographs showing the condition of the club and its contents as heretofore set forth (R. 40-43, 63-66).

The club officer, Captain Knutson, testified he had charge of the operation of the machines, had regularly removed money therefrom, and that the amount which had been taken from the jack-pots of the machines on the night in question could not be definitely determined but he made estimates based on the normal operation of the machines and asserted that the total amount would be about $140 to $150 (R. 70,73,78).

Captain Elmer E. Bryan, the base provost marshal, acting under orders from Lieutenant Colonel Lawrence S. Lightner, commanding officer of the air base, made a preliminary investigation "concerning a break in at the officers' club on 16 March." He observed a broken window with blood stains on the glass and a trail of blood stains leading from the window "out around the north door, there was blood and on around the end of the club going out the north door to the west side." He learned that accused was the last person seen near the club after it had been closed on the night before and he thereupon proceeded to accused's quarters where, after some difficulty, he observed that accused had a jagged cut on his right hand (R. 88-100). A search was made of accused's quarters and a shirt found therein contained twenty dimes, two of which were stained with blood (R. 102-104). The accused was placed in arrest and about five days later he requested, through the provost marshal, to be given a conference with Lieutenant Colonel Lightner, his base commander. Permission was granted and Colonel Lightner testified that accused came to his office and expressed a desire to make a statement regarding the incident at the club. Accused voluntarily related "that he was involved in this incident that occurred at the club, although he didn't believe he was the only one." He further stated that he must have returned to the club after it was closed, started drinking the liquor remaining in the glasses after the party, tried to play some pool and also played the slot machines. Accused asserted that he ran out of money but always seemed to have some. He remembered the broken glass but his mind was hazy concerning details. He then stated that about $41.00 of the money was in his car, parked just outside the office. Colonel Lightner thereupon called Lieutenant Donald J. Kundinger and directed him to accompany accused to his car and get the money. The colonel watched from his window as accused and Lieutenant Kundinger went to accused's car, removed a brown paper bag from the trunk and brought it back into his office. The bag was opened and found to contain $29.00 in quarters and $13.00 in dimes. This bag of money was produced in court and a recount of the money showed a total of $28.75 in quarters and $13.00 in dimes, or $41.75 (R. 112-121).

4. For the Defense

The defense introduced First Lieutenant Donald J. Kundinger, AC, as a witness who stated that he saw accused at the officers' club party on the night of March 15-16 and that as the evening advanced "Lt Ruckman made a remark to me and I noted that his manner of speech was very slurring, hard to understand and he wasn't very coherent" (R. 124).

Captain Elmer E. Bryan testified that accused sat at his table at the club on the evening of 16 March and that there was considerable drinking among the persons present but he could not express an opinion as to accused's sobriety (R. 127-130). Captain Knutson was also called by the defense and refused to express an opinion whether accused was drunk or sober when he closed the club. He did state however that accused moved about with a reasonable amount of control (R. 131). Defense counsel announced that he

had explained accused's rights and requested the court to make further explanation, after which the accused would "take the stand and give testimony under oath on two things - one he is going to explain the cut which he got on his hand and he is going to testify as to his sobriety" (R. 132). The law member explained to accused in detail his testimonial rights, whereupon he was duly sworn and stated that he had several cuts on both hands; that on Saturday morning, 15 March, he was working on a model airplane and his hand slipped and was caught in the propeller. He wore the same clothes during the evening that he was wearing when this accident occurred. Concerning his sobriety on the evening in question accused asserted that he was drunk and could not remember "everything that happened that night" (R. 133-134). On cross-examination accused stated that on Saturday he spent most of the day working on model airplanes and that he also cut his hand "on this sharp razor edge knife" (R. 135-136). On recross-examination accused stated that he could not remember whether he had received "that cut on Saturday night" (R. 137). No further material testimony was presented by either side.

5. Plea in Bar of Trial

Prior to pleading to the general issue in this case the defense entered a plea in bar of trial on the ground that there "was not a fair and impartial investigation conducted before this trial and the defense is willing to take testimony on that fact at the present time." Counsel then stated as follows:

> "I have been awaiting this opportunity. The investigation which I hold before me includes a copy of such investigation, one copy of the charge sheet, a letter dated 4 April appointment of investigating officer by order Lt. Col Lightner, in which it lists four enclosures, the charge sheet, summary of expected testimony, evidence of previous convictions and the Provost Marshal's report. Then follows the pre-trial investigating officers report, second endorsement signed by Col. Lightner, first endorsement by Major Green, four enclosures, no change, then statement William N. Griggs, then the accuser's summary of evidence, which lists as witnesses, Lieutenant Colonel Lightner, Major Haack, Captain Bryan, Captain Hamilton, Captain Suther, Captain Knutson, Corporal Griggs, Holcy M. Pence, William H. Myers, James T. Henderson and Orlie R. Duff, then previous conviction sheet, and then there is a statement of Col. Lightner, and a statement by Corporal Griggs.
>
> "The investigation under AW 70 consists of two statements, Lawrence S. Lightner and William N. Griggs, and as enclosure has the Provost Marshal's report. This AW 70 investigation is not classified, shows included with AW 70 investigation matter which is confidential. That is irregular, this should have been classified and wasn't, it isn't material, but this Provost Marshal's investigation was an investigation which had nothing to do with the 70 Article of War. Moreover, this took place 16 March to 21 March, 1947 and

the investigating officer wasn't appointed by this letter until 4 April 1947.

"Now, the investigating officer I talked to the other day, and I would be willing to put him on the stand and ask him these questions, assured me he did not question any witnesses who were interrogated and whose statements appear on the Provost Marshal's investigating report. On the basis of that he made his finding that the accused should be tried by court-martial for larceny. Considering the fact the Provost Marshal's report was made up more than a month before, three weeks before, he was appointed investigating officer, and he never bothered to interview these witnesses, that is certainly not a fair and impartial investigation. He had a chance to read this and probably did, I admit, but the Court Martial Manual says on page 24 in Paragraph 35-A 'all available witnesses who appear to be reasonably necessary will be called and examined in the presence of the accused'. That was not done in this case. Two witnesses were called in the presence of the accused. That is not a fair and impartial, complete investigation as required by Article of War 70." (R. 7-8)

The prosecution vigorously resisted the plea and argument of counsel and with permission of the court read into the record a written statement made by accused to the investigating officer as follows:

"HEADQUARTERS TOPEKA ARMY AIR FIELD
Topeka, Kansas

4 April 1947

SIGNATURE FORM FOR ACCUSED

Ruckman, James R.	O-793850	1st Lt	Sq A, 594th AAF BU
(Name of Accused)	(ASN)	(Grade)	(Organization) (3rd MAT Gp) ATLD-ATC

"I, the undersigned, accused in the above captioned matter as per Charge Sheet and Specifications heretofore completed hereon, do hereby acknowledge that I have been fully informed of the following:

The Offense or offenses charged against me: the names of the accusers and witnesses, as far as now known to the Investigation Officer; the fact that the Charges are about to be investigated; my right to cross examine witnesses against me if they are available and to present anything I may desire in my own behalf, in defense or mitigation; my right to have the investigating officer examine available witnesses requested by me; my right to remain silent and make no statement,

oral or written; my right to make or submit a statement in any form, subject to the risk of having such statement used against me; that I am not required to answer any questions the answers to which might incriminate me; and that I have been offered no threat, promise, inducement or coercion for such statement as I am making. Any statement I am making I am giving voluntarily and of my own free will.

"I also acknowledge that I have been advised by the Investigating Officer that I am entitled to have all available witnesses called and examined in my presence.

"I have read the above and foregoing material, and understand it, and I hereby sign it voluntarily, without any undue influence, promises of leniency, guarantees, or threats, this ____ day of April 1947.

/s/ James R. RUCKMAN
JAMES R. RUCKMAN, 1st Lt, AC" (R. 10)

After considerable debate by counsel the court overruled the plea in bar of trial, whereupon the defense offered to proceed with the trial if the prosecution would stipulate as fact the allegations he had made regarding the investigation and more specifically that the investigating officer had failed to properly perform his duties. The trial judge advocate declined to so stipulate and defense moved to reopen the case with regard to the sufficiency of the investigation under Article of War 70. The court permitted the defense to introduce the accused as a witness for the sole purpose of testifying concerning the investigation. He stated that Major Franklin T. Green investigated the charge against him under the provisions of Article of War 70, that two witnesses were interviewed in his presence and that, with regard to the other named witnesses,

"We decided, the investigating officer and myself, we decided that we wouldn't call them in that they were not available and didn't have much bearing on the case then. The two of us agreed we wouldn't call them" (R. 14).

Major Franklin T. Green, AC, was called as a witness for the defense and stated that he conducted the investigation in accused's case, however, he did not interrogate all the witnesses whose statements of expected testimony appeared in his report (R. 20-21). The court thereupon repeated its ruling that the plea in bar was overruled and accused pleaded not guilty to the general issue (R. 22).

We might dispose of the defense contention that the investigation was inadequate, upon accused's own statement that he agreed with the investigating officer not to interview witnesses other than the two mentioned. However, the foregoing matters are set forth in considerable detail, not for the purpose of showing that there had been sufficient compliance with the provisions of Article of War 70 to vest the court with jurisdiction to try accused, but

to illustrate the widespread misconception of the purpose and intent of Article of War 70. It is not the function of the court-martial, once a case has been referred to it for trial, to try and determine whether the appointing authority, in the exercise of his power to refer a case for trial, has breached the bounds set forth by Article of War 70. The pertinent part of the Article reads, "No charge will be referred to a general court martial (by the referring authority) for trial until after a thorough and impartial investigation thereof shall have been made" (parenthetical remark supplied). It does not say, "No general court-martial shall have power to try an accused until after a thorough and impartial investigation of the charge shall have been made." If an accused feels that he is not being given a fair and impartial investigation, that is a matter properly to be brought to the attention of the appointing authority before trial of the case, with such request as the accused deems appropriate. In other words, the sufficiency of the investigation is a matter of primary and vital concern to the accused and to the authority directing such investigation. If accused believes he is the victim of capricious and ill founded charges, he can invoke the provisions of Article of War 121 directing his complaint, through channels, even to the War Department.

> 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. We conclude, therefore, that it was not error for the court to overrule the plea in bar when originally made and this without regard to the testimony which we have noted and which conclusively shows that the investigation was both adequate and satisfactory to the accused.

6. By competent and convincing evidence it is shown that when the Topeka Army Air Field Officers' Club was closed in the early morning hours of 16 March 1947 the property of the club was intact and the slot machines, which had been in operation, were in working order and contained an unknown but substantial amount of money. The accused was the last person seen in the vicinity of the club and no witness saw him leave the area. After the club was closed the fireman saw someone in officer's uniform turning off the lights which were usually left burning. The following morning the machines were found to have been rifled, broken glass was about the room, and money was missing from the machines. Blood was found on the ~~floor and~~ near a broken window. After it was discovered that accused had a cut or gash on one of his hands, he voluntarily admitted to his commanding officer that he was involved in the theft of the money and produced $41.75 in quarters and dimes which he inferentially admitted came from the slot machines. Such incriminating evidence, including accused's admissions, leave no doubt but that he broke into the building and stole the money from the slot machines. The prosecution, by the best evidence obtainable, proved that about $140 was missing. The specification as amended alleges larceny of about $42, this being the approximate amount returned by accused. No prejudice to accused's rights occurred by pleading the larceny of an amount lesser than and included in the greater amount reasonably proven to have been stolen. This action was most favorable to accused. (AW 42; CM 259545, Rowe, 38 BR 365-366.)

The specification originally alleged larceny of about $41.00. On motion

of the trial judge advocate the court permitted the specification to be amended to read "about $42.00." The objection of defense to the amendment on the ground that it increased the authorized punishment is without merit, and the procedure followed is authorized by the Manual for Courts-Martial, 1928, paragraph 73, page 57.

The ultimate defense of accused is that he was drunk at the time of the offense and could not remember all the details. Although evidence of drunkenness is generally admissible for such consideration as may be deemed proper in effecting the issue to be tried or the quantum of punishment to be imposed, as the Board of Review has consistently held, voluntary drunkenness is not an excuse for crime committed while in such condition (MCM, 1928, par. 126b, p. 136).

7. War Department records show that accused is 32 years of age, married and the father of one child. He completed high school and is reputed to be an accomplished free-lance artist and pianist. He was an enlisted soldier in the U.S. Army from 1933 until 1937. In 1941 he enlisted in the Royal Canadian Air Force, attended flying school, was later transferred to the U.S. Army Air Force and commissioned a second lieutenant, AUS, on 10 November 1942. He was promoted to first lieutenant on 19 October 1943.

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

Charles F. Gilbert, Judge Advocate

(On Leave), Judge Advocate

Gilbert B. Ackroyd, Judge Advocate

1st Ind

WD, JAGO, Washington 25, D. C. SEP - 5 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 First Lieutenant James R. Ruckman (O-793850), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of about $42 lawful money of the United States, property of the Officers' Mess (Club), Topeka Army Air Field, Topeka, Kansas, in violation of Article of War 93. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

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

4. The evidence shows that the accused attended a party held Saturday evening, 15 March 1947, at the Officers' Club of the Topeka Army Air Field, Topeka, Kansas. He remained at the club until about 0250 hours on the following morning when he left with Captain Gerald P. Knutson, the club officer, who closed the club, fastened the windows, and locked the doors. Captain Knutson went to his quarters but accused returned to the club, gained entrance by breaking the glass in a window and rifled five slot machines taking the money from the "jack pot" containers. Three of the machines were of the 25¢ type and two were of the 10¢ variety. They were the property of the club or mess, were in operation, and contained an unknown amount of money when the club was closed. The amount of money removed from the machines was estimated to be about $140 to $150. Blood was found on the floor and on particles of glass near the broken window. Several days after the incident the accused was observed to have a cut or gash on his right hand. A shirt found in his room contained twenty dimes and there was blood on the shirt and on two of the dimes. When confronted by the provost marshal he requested a conference with his commanding officer to whom he voluntarily confessed participation in the breaking and larceny, stating that he was drunk, and believed that others were also involved in the commission of the offense. He then delivered to his commanding Officer a paper sack containing $41.75 in quarters and dimes which he admitted had been taken from the slot machines.

5. On 8 February 1944 the accused was convicted by general court-martial of two offenses of being drunk and disorderly in uniform in violation of Article of War 96. He was sentenced to forfeit $122.23 per month for three months and to be suspended from promotion for one year.

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

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

(GCMO 329, 17 Sept 1947).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323488

10 OCT 1947

UNITED STATES v. Privates EULOGIO PONTAOY (10326207), and ALFREDO SANTIAGO (10326009), both of Headquarters Battery, 70th Antiaircraft Artillery Group, Antiaircraft Artillery Training Center, APO 74.	)	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at San Marcelino, Zambales, P.I., 29 March 1947. Each: Dishonorable discharge and confinement for two (2) years. Federal Reformatory.

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

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

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

Pontaoy

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

Specification: In that Private Eulogio Pontaoy, attached unassigned Headquarters Battery, 70th Antiaircraft Artillery Group, in conjunction with Private Alfredo Santiago, attached unassigned Headquarters Battery, 70th Antiaircraft Artillery Group, did, at San Marcelino, Zambales, Philippine Islands (APO 74), on or about 16 January 1947, feloniously take, steal and carry away, from the S-4 Supply Point, Antiaircraft Artillery Training Center, three lanterns, gasoline, value of Twenty-four dollars and twenty-four cents ($24.24); fifty (50) pounds lard,

value of twenty dollars ($20.00); one wheel, truck ¼ ton, with rim, tire and tube, value of nineteen dollars and five cents ($19.05); three parts, truck, headlight, value of eight dollars and sixty-four cents ($8.64); nine sets bearings, roller, value of eleven dollars and sixty-one cents ($11.61); two planes, carpenter, value of five dollars and forty cents ($5.40); of the total value of about eighty-eight dollars and ninety-four cents ($88.94); property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 86th Article of War.

Specification: In that Private Eulogio Pontacy, attached unassigned Headquarters Battery, 70th Antiaircraft Artillery Group, being on guard and posted as a sentinel at the Antiaircraft Artillery Training Center, San Marcelino, Zambales, Philippine Islands (APO 74), on or about 16 January 1947, did leave his post before he was regularly relieved.

Santiago

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

Specification: In that Private Alfredo Santiago, attached unassigned, Headquarters Battery, 70th Antiaircraft Artillery Group, in conjunction with Private Eulogio Pontacy, attached unassigned Headquarters Battery, 70th Antiaircraft Artillery Group, did, at San Marcelino, Zambales, Philippine Islands (APO 74), on or about 16 January 1947, feloniously take, steal and carry away from the S-4 Supply Point, Antiaircraft Artillery Training Center, three lanterns, gasoline, value of Twenty-four dollars and twenty-four cents ($24.24); fifty (50) pounds lard, value of twenty dollars ($20.00); one wheel, truck ¼ ton, with rim, tire and tube, value of nineteen dollars and five cents ($19.05); three parts, truck, headlight, value of eight dollars and sixty-four cents ($8.64); nine sets bearings, roller, value of eleven dollars and sixty-one cents ($11.61); two planes, carpenter, value of five dollars and forty cents ($5.40); of the total value of about eighty-eight dollars and ninety-four cents ($88.94); property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 86th Article of War.

Specification: In that Private Alfredo Santiago, attached unassigned Headquarters Battery, 70th Antiaircraft Artillery Group, being on guard and posted as a sentinel at the Antiaircraft Artillery Training Center, San Marcelino, Zambales, Philippine Islands (APO 74), on or about 16 January 1947, did leave his post before he was regularly relieved.

Each accused pleaded not guilty to and was found guilty of all respective Charges and Specifications. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of two years. As to each accused the reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification as to each accused. The only question requiring discussion is the legal sufficiency of the record to support the findings of guilty of Charge I and its Specification as to each accused, and to support the sentence as to each accused. The resume of evidence will be limited to that portion related to Charge I and its Specification as to each accused.

4. Evidence for the prosecution:

It was stipulated that Francisco Mercado (at the time in question a Private) if present in court would testify as follows:

"I was detailed as a guard in the 4th Searchlight Battalion area on the night of 15-16 January 1947, from 0200 to 0600 hours, in the Post Number 2.

"At about 0210 hours I saw Alfredo Santiago carrying a sack together with Pontacy, Eulogio with three lamps going out of the fence which is near my post. I immediately called the Sergeant of the Guard, and told him of what I saw. So we hurriedly run after them. We found Private Alfredo Santiago and Private Pontacy Eulogio with three lamps, one jeep tire, and two cans inside these empty tents near the road. After that we took them to the Guard House" (Pros. Ex. 1).

Private Francisco Capulso testified: that he was a member of the 54th Antiaircraft Artillery Searchlight Battery stationed at San Marcelino, Zambales, APO 74; that he was sergeant of the guard on the night of 15-16 January 1947; that the accused were both in his guard

detail but on separate reliefs; that the area guarded was inclosed by a fence with the guard posts within such fence; that during that night he arrested the accused together outside the fence in possession of certain items of property which he identified in court and which were then introduced and admitted in evidence as prosecution's exhibit 2, described as:

"One (1) Wheel, Complete w/rim, Tire, & Tube,
for One Quarter Ton Truck, 4 x 4.
Nine (9) Sets Roller Bearings.
Two (2) Twenty-five pound cans service Lard.
Three (3) Gasoline Lanterns.
Three (3) Truck Headlights.
Two (2) Eight-inch Carpenter Planes." (R. 7-9; Pros. Ex. 2).

Private Alfredo Mergallo, corporal of the guard, testified concerning events during the night of 15-16 January 1947:

"Q. After posting the guard, what did you do?
A. I went to the guardhouse. I heard Private Mercado called the corporal of the guard and then the sergeant of the guard and I went to Post No. 2 to see what is wrong. And it so happened that we saw Santiago carrying two large cans of lard.

Q. Was there anyone with him?
A. With Private Pontacy, sir.

Q. Did they go through the fence?
A. Yes, sir.

Q. What did you do to them?
A. We followed them because they were going towards the barracks outside the searchlight area, until we reached the empty barracks.

Q. Did you find anything there?
A. Yes, sir, a box of bearings, a jeep tire, and two cans of lard.

Q. Do you recognize these items? (TJA pointing to Exhibit Number 2).
A. Yes sir, those are the ones" (R. 11).

It was stipulated that the items of property listed in prosecution's exhibit 2 were "property furnished and intended for the military service of the United States," and had stated values.

5. Evidence for the defense:

Accused Santiago, having been advised of his rights, made the following unsworn statement:

"I was assigned as private of the guard. I was in the third relief and that was from 2:00 o'clock to 6:00 o'clock in the morning. The sergeant of the guard took me from the guardhouse when they posted me to Post No. 1. Then he saw me, he saw me with one box of apples. He investigated me near the fence. Mercado saw me there go with his companion. He investigated me. That was when I went to the other barracks to put the apples there on the ground. But the sergeant of the guard did not see me. I put the apples on the corner then I went back to my post. When I went to the guardhouse, I met the sergeant of the guard. The sergeant of the guard said, 'where have you been'? And then said, 'I have already gone to your post but you were not there'. Then I went to my post. When morning came, they went to the barracks and they saw a tire, two cans of lard, then they placed it in the guardhouse, but they did not investigate me. Then when morning came, they took the stuffs and brought it to the Post Overhead Detachment Orderly Room. Then they called me at the orderly room and the First Sergeant shouted at me inside the orderly room and tried to find out from me where I got the stuffs" (R. 14).

Accused Pontacy, having been advised of his rights testified under oath as follows:

"A. I went to the guardhouse and stayed there. After two minutes passed, I went back to relay the special guard orders to Mercado. And I saw Alfredo Santiago carrying one box of apples.

Q. Where was he at that time?
A. In the No. 2 building, sir. And when I saw him, I investigated him. He said, 'I got this in my Post No. 1, in a refrigerator'. I asked him, 'Where did you pass'? He said, 'up'. He put the apples in a flour sack. And then Mercado arrived and saw us. He did not say anything. Then he went to the guard house.

Q. When the sergeant of the guard inspected, did he see that Santiago was carrying apples?

A. When I went back I saw Alfredo Santiago was there only.

I saw the stuff in the empty building over to No. 2 barracks near the road. When I saw them, the sergeant of the guard said to the corporal of the guard, 'Let's go and see the stuff with Mercado'. The corporal of the guard and I went to see the stuffs. After we went there, we met them carrying the stuffs of Alfredo Santiago. But they did not tell me anything or to Santiago. After this Santiago went back to his post. After that, when we reached the building with the stuffs, with the apples, we carried them to the guardhouse. After we brought it to the guardhouse, they did not say anything, and in the morning, they brought the stuffs over to the Post Overhead Orderly Room and at 8:00 o'clock in the morning, Major Langfitt called me and told me that I was under arrest and they brought me to the guardhouse. That's all sir.

* * *

Q. Did you see Santiago?
A. Yes, sir, at one minute passed 2:00 o'clock.

* * *

Q. Where was he at the time?
A. Near the trash can, sir.

Q. Was he inside the fence or outside?
A. Inside, sir.

Q. Did you watch him?
A. Yes, sir.

Q. Where did he go?
A. Mercado came there to, I run after him and I saw Santiago there holding the apples.

Q. Did you see him through the fence?
A. No, sir.

Q. When the sergeant of the guards and Mercado came and said, 'Let's go and see the stuff', you met Santiago outside the fence and went with the sergeant of the guards to see the stuff?
A. Yes, sir.

Q. Did you get the stuff?
A. Yes, sir. We two with the sergeant of the guard.

Q. Are these the things? (TJA pointing to Exhibit Number Two).

A. Yes, sir.

* * *

Q. When you saw him carrying the box of apples, did you follow him?

A. No, sir. Later when the sergeant of the guard arrived, I went with them and found these stuffs (pointing to Exhibit Number Two) in an empty building. Then Private Mercado said, 'Let's go and bring these stuffs'. We went to get the stuffs from the empty building. When we were going towards the place, we met Santiago coming out from that building with these stuffs, passing the guardhouse and going to his post" (R. 15-17).

6. Evidence for the prosecution in rebuttal:

Private Francisco Capulso was recalled as a witness and testified:

"Q. Did the man Private Pontaoy ever come to you during the evening you were sergeant of the guard and then take you to an empty building?

A. Yes, sir.

PRESIDENT TO WITNESS: Are you sure you understood that question?

WITNESS: Yes, sir.

Questions by the court:

Q. Did Private Pontaoy report to you if anything was stolen?

A. Yes, sir.

Q. You testified that you arrested Private Pontaoy and Private Santiago?

A. Yes, I arrested them, sir.

Q. Were they together when you arrested them?

A. They were together, sir.

Q. Where, in the third building, or no?

A. There beside the tent, sir.

Q. Did they have anything on their hands when you saw them?

A. They had the box of bearings, sir.

that the property alleged to have been stolen was "furnished and intended for the military service of the United States" and there is sufficient legal evidence in the record from which the court could infer that the property was found in the joint possession of the accused in the early morning hours of 16 January 1947 in or adjacent to the area of the 4th Searchlight Battalion, at San Marcelino. The circumstances surrounding the possession of these articles by the accused are only vaguely presented by the evidence but we are unable to discover any evidence to show where the property came from, that it was stolen, or that its possession by the accused was in any specific way wrongful. Although the evidence does tend to create an impression that such possession was probably wrongful in some respect "mere suspicion and conjecture do not satisfy the established requirements of legal proof" (CM 208895, Zerkel, 9 BR 62, Dig. Ops. JAG, 1912-40, page 338). Proof of possession by an accused of property alleged to have been stolen, without evidence that such property was in fact stolen, is not sufficient to support a conviction of larceny (Dig. Ops. JAG, 1912-40, pars. 451(37) and 452(10)).

The corpus delicti may, of course, be established by circumstantial evidence, and such possession by the accused, when taken in conjunction with other evidence of the surrounding circumstances, might be sufficient to accomplish such proof, as was held in CM 202712, Sastre (1934). However, we are of the opinion that in this case the evidence as to the surrounding circumstances is not of the clear and convincing nature that is necessary to establish the corpus delicti.

8. Each accused was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor in the Federal Reformatory, El Reno, Oklahoma, for two years.

The maximum authorized punishment for the offense of leaving post while a sentinel, before being regularly relieved therefrom, of which each accused has been legally found guilty, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. (par. 104c, MCM, 1928).

Since the findings of guilty of Charge I and its Specification as to each accused must be disapproved, and since the period of confinement to which each accused may be sentenced in this case cannot exceed one year, confinement in a penitentiary or Federal reformatory is not authorized (AW 42).

9. For the reasons stated the Board of Review as to each accused holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification; legally sufficient to

support the findings of guilty of Charge II and its Specification; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal reformatory or correctional institution.

Edward T. Gibson, Judge Advocate.

Frank C. Alfed, Judge Advocate.

Joseph T. Brack, Judge Advocate.

JAGN-CM 323488 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Philippines-Ryukyus Command, APO 707, c/o Postmaster, San Francisco, California.

1. In the case of Privates Eulogio Pontacy (10326207), and Alfredo Santiago (10326009), both of Headquarters Battery, 70th Antiaircraft Artillery Group, Antiaircraft Artillery Training Center, I concur in the foregoing holding by the Board of Review and recommend that as to each accused the findings of guilty of Charge I and its Specification be disapproved and that only so much of the sentence as to each accused 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 in a place other than a penitentiary, Federal reformatory or correctional institution.

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 323488).

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.

JAGQ - CM 323509

JUL 24 1947

U N I T E D S T A T E S v. EVERETT H. SNEDEKER, U. S. Civilian War Department Employee, a person serving with the Armies of the United States in the Field.	))))))))	UNITED STATES AIR FORCES IN EUROPE Trial by G.C.M., convened at Wiesbaden, Germany, 14 February, 29-30 April and 1, 2, 5, 6 and 7 May 1947. Total Forfeitures and confinement for life. Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Everett H. Snedeker, US Civilian War Department Employee, a person serving with the Armies of the United States in the Field, did, at Wiesbaden, Germany, on or about 13 December 1946, with malice aforethought, willfully, deliberately, feloniously and with premeditation, kill one Eileen L. Grubb, a human being, by shooting her with a pistol.

Accused 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 forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of facts 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, 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death. An intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life.

The evidence clearly establishes a deliberate and vicious killing. On the night in question the victim entered her room and a few minutes thereafter five or six shots were heard by the other residents of the hotel. The manager entered the room immediately and found accused therein with the deceased lying on the floor. Accused stated that he "had shot her" and had thrown the gun "out of the window". The motive for the killing was shown to be accused's jealousy of deceased. Every element of the offense of murder was proved by clear and compelling evidence.

The issue of accused's sanity was raised at the trial and the court directed an inquiry on that subject at the request of defense. The two psychiatrists who observed and examined accused testified that at the time of the killing he was able to distinguish right from wrong, adhere to the right, and that he was able at the time of the trial to cooperate intelligently in his defense. The fact that a German civilian psychiatrist testified that in his opinion accused was in a "dream state" at the time of the act and consequently was unable to distinguish between right and wrong merely raised an issue to be determined by the court. The Board of Review is of the opinion that the evidence amply sustains the court's finding that accused was sane and responsible for his acts.

The evidence is also conflicting as to the degree of accused's intoxication on the evening in question but considered in the light most favorable to accused it falls far short of proving that he was so drunk that he did not fully realize the consequences of his actions.

5. The charge sheet shows that accused is 30 years of age and single. He served in the Army in both an enlisted and commissioned status from 10 August 1943 to 15 July 1946, when he was released from active duty as a Second Lieutenant, to accept employment with the Army in a civilian capacity. There is no record of any convictions in civilian life.

6. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of

Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the United States Code.

W. H. Johnson Jr, Judge Advocate

T. McDonald Gray, Judge Advocate

E. J. Johnson, Judge Advocate

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

JAGN-CM 323574

UNITED STATES v. Private MAX C. GREEN (38343261), alias Staff Sergeant John H. Wilson, alias Staff Sergeant Tex C. Broman, attached unassigned 3rd Replacement Depot.	))))))))))	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Marburg, Germany, 1 April 1947. Dishonorable discharge and confinement for one (1) year and nine (9) months. Disciplinary Barracks.

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

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

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

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

Specification 2: In that Private Max C. Green, alias Staff Sergeant John H. Wilson, alias Staff Sergeant Tex C. Broman, attached unassigned 3d Replacement Depot, did, at Lohmar, Germany, on or about 22 July 1946, feloniously take, steal and carry away 18 Reichmarks, of the value of about $1.80, one fountain pen of the value of about $1.80, one pair of mens pants, of the value of about $0.90, one pair of socks, of the value of about $0.20, of a total value of about $4.70, the property of Guido Jauernig; and one fountain pen, of a value of about $0.30, two skirts of the value of about $2.50, three blouses, of the value of about $2.10, one knitted jacket, of the value of about $2.00, three pullovers, of the value of about $3.00, one windblouse, of the value of about $1.00, two pairs of stockings, of the value of about $0.60, 2 girdles, of the

value of about $1.50, one bathing suit, of the value of about $1.25, two garments underwear, of the value of about $2.00, four bloomers and four chemises, of the value of about $1.60, two petticoats, of the value of about $1.20, six towels, of the value of about $0.90, 500 gr of knitting wool, of the value of about $1.50, two necklaces, one gold, one ivory, of the value of about $2.00, two rings, one gold and one silver, of the value of about $0.50, two bracelets, silver, of the value of about $0.60, fifteen pounds of assorted foods, of the value of about $0.60, of a total value of about $25.15, the property of Elisabeth Hoeck.

CHARGE III: Violation of the 94th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 3: In that Private Max C. Green, alias Staff Sergeant John H. Wilson, alias Staff Sergeant Tex C. Broman, attached unassigned Third Replacement Depot, did, at Dusseldorf, Germany, on or about 25 June 1946, wrongfully represent himself to be a staff sergeant for the purpose of deceiving military authorities.

Specification 4: In that Private Max C. Green, alias Staff Sergeant John H. Wilson, alias Staff Sergeant Tex C. Broman, attached unassigned Third Replacement Depot, did, at Dusseldorf, Germany, on or about 24 June 1946, unlawfully carry a concealed weapon, viz: a pistol.

Prior to arraignment, the following Charges and Specifications were withdrawn from trial by direction of the appointing authority, to wit; Specification of Charge I and Charge I, Specifications 1 and 3 of Charge II, and Specifications 1 and 2 of Charge IV. After arraignment the prosecution entered a nolle prosequi to so much of Specification 2 of Charge II as reads from and including the words, "18 Reichmarks" to and including the words "of Guido Jauernig; and." Accused then pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification of Charge III and of Charge III, 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 for one year and nine months. The reviewing authority

approved only so much of the findings of guilty of the Specification of Charge II and of Charge II "as involves a total evaluation of $25.15, and not the respective evaluations alleged for each item," approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Specifications 3 and 4 of Charge IV and of Charge IV. The only question requiring discussion is the legal sufficiency of the evidence to support the findings of guilty of Specification 2 of Charge II and the sentence. The subject of inquiry relates entirely to proof of the alleged stolen articles and to their respective values, and therefore, a summary of the evidence is limited thereto.

4. The evidence relative to the alleged stolen articles is contained in the testimony of Rudolph Knodt, accused's accomplice, and in the testimony of Elisabeth Hoeck, the alleged owner of the stolen items. The witness Knodt testified generally that the accused and he took "clothes" from the Hoeck home and also certain other items not specifically alleged in the Specification (R. 13). Of all the alleged items, the only ones which were specifically described by Mrs. Hoeck as missing after the theft are a fountain pen, two skirts, three blouses, three pullovers (sweaters), two necklaces, two rings, fifteen pounds of food, and "my underwear" (R. 17). It was orally stipulated that the value of the items listed in the Specification is $25.15 (R. 19).

After being advised of his rights as a witness, the accused elected to remain silent and no evidence was adduced by the defense.

5. The accused was found guilty of the larceny of all items listed in Specification 2 of Charge II, of a total value of $25.15. The only alleged items shown by the evidence to have been stolen are those specifically described by Mrs. Hoeck as a fountain pen, two skirts, three blouses, three pullovers (sweaters), two necklaces, two rings, fifteen pounds of food, and "my underwear." These constitute but a portion of the items listed in the Specification and consequently, the findings of guilty as to the alleged items other than those described by the witness Hoeck, which were not established by the evidence, and the finding as to the total value of the stolen items, cannot be sustained.

The record of trial contains no competent evidence to prove that any of the alleged items had a specific value although the value of the items listed was stipulated to be $25.15. The stipulation referred to all items listed in the Specification and thus it can be reasonably inferred that each of such items was admitted to be of some value. Since the evidence shows that only a portion of the alleged items were proven to have been stolen, it follows that the record of trial is only sufficient to support a finding that those items were of some value not to exceed $20.00.

Larceny of property of a value of $20.00 or less will support a maximum sentence to confinement of not more than six months (par. 104c, MCM, 1928). The maximum sentence to confinement authorized by the Table of Maximum Punishments for an offense of carrying concealed weapons (Spec. 4, Chg. IV) is three months. No limit of punishment is prescribed in the Table of Maximum Punishments and none is provided by any statute of the United States for an offense of wrongfully representing oneself to be an officer or noncommissioned officer (Spec. 3, Chg. IV). It therefore remains to be determined what the maximum authorized sentence to confinement is for this offense.

Specification 3 of Charge IV alleges that the accused wrongfully represented himself to be a staff sergeant for the purpose of deceiving military authorities. The evidence shows that the alleged offense is based on a deceitful oral statement made by the accused to a British military policeman who lawfully questioned accused's identity in connection with the policeman's official military police duties. Such an act has been denounced as an offense in violation of Article of War 96 (CM 229977, Proctor, 17 BR 271, CM 190611, Maszeski, 1 BR 214). In the Maszeski case, supra, the accused was convicted of denying his identity as a soldier to a military policeman who was then acting in the performance of his official police duties. In determining an appropriate punishment for said offense the Board of Review held that while no maximum punishment is prescribed by paragraph 104c, MCM, 1928, for offenses of this kind, that paragraph does prescribe a maximum punishment for a closely related offense, namely, the making of a false official report by a soldier knowing it to be false, which is confinement at hard labor for one month and forfeiture of two-thirds pay per month for a like period. The nature of the misrepresentation practiced by the accused upon the military policeman in the instant case is but another form of the deceit found in the Maszeski case, and is closely analagous thereto. Thus, we are of the opinion that the maximum authorized punishment to confinement for this offense of which accused was properly convicted is one month.

6. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge II as finds that the accused did at the time and place alleged, feloniously take, steal and carry away one fountain pen, two skirts, three blouses, three pullovers, two garments underwear, two necklaces, two rings, one gold and one silver, and fifteen pounds of assorted foods, all of some value not to exceed $20.00, the property of Elisabeth Hoeck, legally sufficient to support the findings of guilty of Charge II and of all other Charges and Specifications and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for ten months.

Edward D. [illegible], Judge Advocate.

Joseph T. Brack Judge Advocate.

_____, Judge Advocate.

JAGN- CM 323574 1st Ind OCT 9 1947
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, United States Constabulary, APO 46,
c/o Postmaster, New York, N. Y.

1. In the case of Private Max C. Green (38343261), alias Staff Sergeant John H. Wilson, alias Staff Sergeant Tex C. Broman, attached unassigned 3rd Replacement Depot, I concur in the holding by the Board of Review and recommend that only so much of the finding of guilty of Specification 2 of Charge II be approved as finds that the accused did at the time and place alleged, feloniously take, steal and carry away one fountain pen, two skirts, three blouses, three pullovers, two garments underwear, two necklaces, two rings, one gold and one silver, and fifteen pounds of assorted foods, all of some value not in excess of twenty dollars, the property of Elisabeth Hoeck, 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 ten months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 323574).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGH - CM 323589

7 NOV 1947

UNITED STATES	WESTERN PACIFIC WING PACIFIC DIVISION - AIR TRANSPORT COMMAND
v.	Trial by G.C.M., convened at Haneda Army Air Base, Haneda, Japan, 18, 22-26 April 1947. Dismissal, total forfeitures, and confinement for two (2) years
Captain JOHN D. WARD (0-827096), Air Corps	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, 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. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 93rd Article of War (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

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

Specification 1: In that Captain John D. Ward, 1539th Army Air Forces Base Unit, Western Pacific Wing, Pacific Division, Air Transport Command, did, in violation of General Headquarters, U. S. Armed Forces, Pacific, Circular 39, dated 23 April 1946, on various occasions from about 23 October 1946 to about 12 January 1947, wrongfully and unlawfully use government transportation for the transportation from Manila, P.I. and from Okinawa, Ryukyus, to Haneda Army Air Base, Japan, and from Johnson Field, Japan, to Haneda Army Air Base, Japan, and disposal thereof for financial gain, of the following property to wit: 59 cases of whiskey, 50 cartons of cigarettes, and 2 cans of lighter flints.

Specification 2: In that Captain John D. Ward, 1539th Army Air Forces Base Unit, Western Pacific Wing, Pacific Division, Air Transport Command, did, at or near Tokyo, Japan, from about 15 October 1946 to about 15 January 1947, wrongfully and unlawfully sell to Staff Sergeant L. D. Johnson, an

enlisted man, about 708 bottles of intoxicating liquor, to wit: Whiskey, value about $1400, for the sum of about $5,510, lawful money of the United States.

Specification 3: In that Captain John D. Ward, 1539th Army Air Forces Base Unit, Western Pacific Wing, Pacific Division, Air Transport Command, did, in violation of Regulation No. 110-1, Headquarters, Pacific Division, Army Air Forces, Air Transport Command, dated 3 October 1944, at Tokyo, Japan, on or about 19 October 1946, wrongfully and unlawfully sell to Shozo Iwasawa, a Japanese national, about 1,000 cigarette lighter flints, at a price of about ¥10,000, lawful money of Japan, which said flints were known by the said Captain John D. Ward to have been transported upon military aircraft for the purpose of sale at a profit.

Specification 4: In that Captain John D. Ward, 1539th Army Air Forces Base Unit, Western Pacific Wing, Pacific Division, Air Transport Command, did, in violation of Regulation No. 110-1, Headquarters, Pacific Division, Army Air Forces, Air Transport Command, dated 3 October 1944, at Tokyo, Japan, on or about 19 October 1946, wrongfully and unlawfully sell to Japanese nationals, whose names are unknown, about 6,000 cigarette lighter flints, at a price of about ¥60,000, lawful money of Japan, which said flints were known by the said Captain John D. Ward, to have been transported upon military aircraft for the purpose of sale at a profit.

Specification 5: In that Captain John D. Ward, 1539th Army Air Forces Base Unit, Western Pacific Wing, Pacific Division, Air Transport Command, did, in violation of Regulation No. 110-1, Headquarters, Pacific Division, Army Air Forces, Air Transport Command, dated 3 October 1944, at Nakajima Laundry, in or near Kamata-Ku, Japan, during or about the first week of November 1946, at a profit wrongfully and unlawfully sell to Japanese nationals, whose names are unknown, about 50 cartons of cigarettes at a price of about ¥10,000, lawful money of Japan, which said cigarettes were known by the said Captain John D. Ward to have been transported upon military aircraft for the purpose of sale at a profit.

He pleaded not guilty to all the Specifications and Charges. He was found not guilty of the Specifications of Charge I and Charge I; guilty of Specification 1, Charge II, except the figures "59" and "50," substituting therefor, respectively, the figures, "45" and "40," of the excepted figures not guilty, of the substituted figures guilty; guilty of Specification 2 of Charge II, except the figures "$1,400" and "$5,510," substituting therefor, respectively, the figures, "$1,800"

and "$5,500," of the excepted figures not guilty, of the substituted figures guilty; guilty of Specifications 3, 4, and 5 of Charge II, and guilty of Charge II. 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 two (2) years. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3. The evidence for the prosecution pertinent to the findings of guilty is substantially as follows:

Accused was identified as being in the military service (R 6, 71, 104). His organization was the 1539th AAF Base Unit, Western Pacific Wing, Pacific Division, Air Transport Command (R 6). The 1539th AAF Base Unit was stationed at Haneda, Japan, during the months of October, November, and December 1946, and January 1947 (R 119, Pros Exs 72a, b, 73a, b, 74a, b, c, d, and e).

On the 18th, 19th, or 20th of October 1946 Kumio Moriya received some lighter flints from accused and accompanied by him went to the home of Iwasawa Shozo. Moriya sold 1000 of the flints to Shozo for 10,000 yen. The proceeds of the sale were turned over to accused (R 73-75). The remaining flints were sold to a store called Midoria in Nihonbashi (R 81). Also during October accused accompanied by Moriya went to the Nakajima Laundry and sold "forty some odd cartons" of cigarettes to the interpreter or owner of the laundry, receiving 28 yen a package (R 89). Mr. Iwata Hikoshiro, one of the proprietors of the Nakajima Laundry denied knowing accused (R 94).

About the last of October or the first of November T/4 L. D. Johnson, 217th Air Engineer Dump Truck Company, stationed at Haneda, Japan, met accused at the Nakajima Laundry, and purchased a case of whiskey from accused for $89.50 (R 39). In the latter part of October 1946 accused had a conversation with Mr. Frank P. Kreiger at the City Ticket Office in Tokyo (R 121-122). Accused mentioned the availability of whiskey at Johnson Field and inquired of Kreiger if he wanted any (R 122). Kreiger told accused he would take about 30 cases and paid the entire amount or "the majority of the amount required to cover the cost of the 30 cases," which "at $25.00 per case" would be "about $750" (R 123). About the first week in November 1946 a large shipment of whiskey from Johnson Field was received at Haneda Army Air Base (R 7, 54, 123). Kreiger loaded 50 cases of the whiskey on a 2½ ton truck (R 54, 123). Thirty cases belonged to Kreiger and the other 20 belonged to accused (R 123). The 50 cases were then taken and stored in a room at the City Ticket Office (R 123). Later Kreiger was told by the accused that an enlisted man, Ruppe, would be in to pick up some of the whiskey (R 123-124). Ruppe, who was an enlisted man in the same organization as accused,

had a conversation with accused in the middle of November (R 6, 54). Accused told Ruppe at the time that he (accused) had sold a case of whiskey to a colored outfit and had received about $90.00 for it. Later accused told Ruppe where the latter could deliver five cases of whiskey, offered the five cases to Ruppe for $60.00 a case, and informed Ruppe that if he delivered the whiskey he would receive $90.00 a case. Ruppe purchased the whiskey from accused on the terms stated and sold it to Sergeant Johnson at $90.00 a case (R 55). The 5 cases of whiskey involved were from the Johnson Field Pool (R 55). Ruppe had subsequent transactions with accused and Sergeant Johnson and delivered approximately 60 or 70 cases of whiskey to Johnson. In December after a discussion with accused concerning a shortage of assets at the Officers' Club of which Ruppe was steward and accused club officer, Ruppe delivered 5 cases of whiskey to Johnson and received "some where" between $90.00 and $110.00 a case. Ruppe turned over to the accused the money received from the sale (R 57). Johnson testified that in all he received 59 cases of whiskey (12 bottles in a case (R 42)) from accused and Ruppe and paid approximately $5500.00 for the whiskey (R 41). It was stipulated that "about 708 bottles of intoxicating liquor of the type referred to in Specification 2 of Charge II, was at the times and place in question of the value of about $1800.00" (R 43). On the first 5 or 10 cases of whiskey Ruppe "made" $30.00 a case and on the other $10.00 a case. The reduction was brought about because accused believed Ruppe was making too much and he (accused) was taking all the risk. Twenty or twenty-five of the cases of whiskey were, at accused's direction, picked up from Kreiger at the City Ticket Office by Ruppe. When Ruppe picked up the liquor he gave Kreiger money to hold for accused (R 56, 123-124). As to the origin of the liquor which he delivered to Johnson, Ruppe testified on direct examination:

"Q. This liquor which you delivered to Sgt. Johnson, would you mind telling where that came from?
"A. When was that, Sir?

"Q. About when did you start delivering to Johnson?
"A. Around the middle of November, Sir. Somewhere around the second week in November.

"Q. And during that period, do you know where the whiskey came from?
"A. Part of it came from Johnson Field and part of it, the other part, came from Manila.

"Q. Did you see the airplane with it? Did you help unload?
"A. Yes, sir. I was steward from the club and I was supposed to unload the whiskey.

"Q. Do you know who piloted that plane?
"A. Capt. Ward piloted the plane to Johnson, and he was pilot - or at least he was on the ship from Manila.

"Q. Was he on the ship?
"A. Yes, sir."

* * *

"Q. This trip to Johnson, when was that?
"A. The first part of November.

"Q. Did you unload?
"A. Yes, sir. No, sir, I didn't unload the whiskey because I didn't even work for Capt. Ward at that time. I was working at the in-flight lunch and he wanted me to store the whiskey, and I said, 'Yes, sir.'

"Q. This shipment in January, did you unload that?
"A. Yes. I unloaded all but that from Johnson." (R 58).

On re-cross examination he testified:

"Q. You stated that part of the whiskey came from Johnson and part from Manila. How do you know where this whiskey came from?
"A. You mean all the whiskey?

"Q. Did somebody tell you?
"A. I unloaded the whiskey off the ship.

"Q. On all of it?
"A. I didn't unload it on the Johnson ship.

"Q. Then how did you know that whiskey came from Johnson?
"A. That was where it presumably came from. It was told to me.

"Q. Actually, of you own knowledge you don't know where it came from?
"A. They told me from Johnson Field, and I had two cases of whiskey ordered for myself. Any enlisted man can do that."

* * *

"Q. Who told you that it came from Johnson?
"A. Well, sir, they had a big pool —

"Q. By 'they' who do you mean?
"A. The officers and enlisted men. Col. Moss had a pool. It evidently was OK'd by Col. Moss. An airplane was supposed to go to Johnson and pick up so much whiskey and bring it back to the base, and part of it was supposed to have been delivered - before it came back the enlisted men could order two cases of whiskey, they said, from Johnson Field, and the officers could order four cases. I had two cases ordered. Presumably, it must have come from Johnson." (R 67-68).

In December after returning from Manila accused asked Kiyoshi Nakamoto to dispose of some lighter flints (R 99). Subsequently Nakamoto introduced accused to Tsuyuki Kaizo at the club at Haneda Airfield (R 95-98, 100). When Kaizo left the field he was carrying a small heavy package and was furnished transportation off the field at accused's instructions (R 98-99).

A pre-trial statement of accused was introduced in evidence over objection by the defense (R 119, Pros Ex 71). In pertinent part accused stated that he had been found in a compromising situation by a Major Beekman. Beekman threatened accused that he would inform accused's wife unless accused assisted Beekman in the latter's black market activities. Prior to a trip to Manila by accused Beekman arranged that accused should purchase 2 cans of lighter flints and 30 cases of whiskey. Accused made the purchase but on his return from Manila was informed of Beekman's death. Accused had Kiyoshi Nakamoto dispose of the flints for him but never received payment. The whiskey was disposed of with the assistance of Ruppe and the sum of $3,000 in military currency notes was received in payment. This sum was divided equally between Ruppe and accused. On another occasion while making purchases from the Johnson Field Liquor Fund for the Haneda Base Liquor Pool accused brought 25 extra cases on his own account. Of this 25 cases an undisclosed person sold 5 cases. Accused sold 15 cases to Staff Sergeant L. D. Johnson at $90.00 a case, and the remainder was sold to Ruppe at $80.00 a case. Accused believed that Ruppe sold this whiskey to Johnson for $90.00 a case. On a subsequent trip to Manila accused purchased a can of lighter flints for $100.00 and 30 cartons of cigarettes for $25.00. With the assistance of Kumio Moriya accused sold 1000 of the flints to Iwasawa Shozo for 10,000 yen and the balance of the flints to a department store for 60,000 yen. Most of the cigarettes were sold to the Nakijima Laundry for 10,000 yen. Accused claimed that the proceeds from the cigarettes were used to make purchases for the Officers' Club of which accused was club officer, and that he had not reimbursed himself for the cost of the cigarettes.

In relation to the voluntariness of accused's pre-trial statement Lieutenant Colonel James W. Luker initiated an investigation of accused and others on or about 28 January 1947. Accused was not available until early the following morning. At the time Colonel Luker did not give accused any warning (R 104). On 3 February Colonel Luker read the 24th Article of War to accused and subsequently accused made several different statements (R 105-106). Finally on 4 February in the presence of Colonel Luker, Mr. Hanson and Mr. Welch accused made the statement which was introduced in evidence (R 106). Accused was in an arrest of quarter status and prior to signing the statement asked: "There will be no need for me to remain in arrest of quarter after this is signed, will there?" Colonel Luker replied, "I know of no reason why not" (R 109). Colonel Luker also emphasized that "it was entirely up to the Commanding Officer." (R 110). At the time of this colloquy the statement had already been made and was in the process of being reduced to writing (R 109). On

re-cross examination Colonel Luker admitted that after midnight of the night preceding the taking of the statement two officers and a Japanese were sent to accused's quarters and that the questioning of accused preceding his statement was started "about or before daylight—possibly around four o'clock" (R 110-111).

First Lieutenant James K. Snoddy testified that around two o'clock in the morning "on or about the 3rd of February 1947," he, accompanied by the Assistant Provost Marshal, and a Japanese, went to accused's quarters and awakened accused for the purpose of having the Japanese identify accused (R 72).

Daniel E. Welch, Special Agent, CID, testified that during the latter part of January or early part of February he participated in an investigation of accused, and, in the course of the investigation, questioned accused after warning him of his rights under the 24th Article of War. Welch denied that he made any threats or promises to accused, or that he used any physical violence. Accused made a statement to Welch on 4 February 1947. Welch identified prosecution's Exhibit 71 as that statement (R 111-112). On cross-examination Welch testified that his questioning of accused on 4 February had started at 9:00 o'clock in the morning, and the statement was made that afternoon (R 113). Accused did not appear to be drunk and Welch did not recall accused saying he was drunk or that he had been taking sedatives (R 114). After accused had completed his statement but prior to his signing it he inquired concerning the possibility of being released from confinement (R 114). Accused signed his statement in the presence of Colonel Luker, Captain Davis, Mr. Clerk, Lieutenant Elliot and Welch (R 114).

Accused testified concerning the circumstances under which he made his pre-trial statement. He claimed that for about two or three days during the investigation he was confined to his room, and was drinking "very frequently." He had "a great deal of difficulty finding a way to go to sleep," and Dr. Olson had him take two seconal capsules each evening. He had been drinking the day before the confession was signed and "had been up practically the whole night before," and had almost "passed out" (R 115-116). Colonel Luker promised him that he would be released from quarters if he signed the statement (R 115). On cross-examination he admitted that Colonel Luker read the 24th Article of War to him but it had never been read to him before and he did not understand it (R 116). He did not ask for further explanation (R 116). He was under the influence of alcohol when he signed the statement but believed he knew what he was doing (R 117). On re-direct examination he retracted the admission that he knew what he was doing when he signed the statement (R 118). On re-cross examination he admitted that Welch told him that anything he said might be used against him (R 118). He believed that his "AGCT" score was about 150 (R 119).

4. Evidence for the defense:

Accused elected to testify in his own behalf as to Charge I and the Specifications thereunder, of which he was acquitted. Three other defense witnesses also testified pertinent to the offenses charged in Charge I and the Specifications thereunder. In view of accused's acquittal of these offenses it is not necessary to set forth the defense testimony pertaining thereto.

Captain Herbert C. Link testified that he had known accused since August 1946 and worked at the same place as accused. He observed accused quite frequently during this period and believed that accused was fulfilling his work as a soldier. The witness did not know of any illegal acts performed by accused and never had any doubt as to accused's ability, honesty, and integrity (R 152-153).

Mr. William C. Salyer testified that he had known accused for a period of approximately eight months and during that period had daily contact with accused, and that as to accused he "could have no higher opinion of any officer I know."

5. Accused was found guilty of using government transportation for transporting 50 cases of whiskey, 40 cartons of cigarettes, and two cans of lighter flints for the purpose of sale for financial gain in violation of Circular 49, General Headquarters, U. S. Armed Forces, Pacific, dated 23 April 1946, during the period and at the place alleged (Spec 1, Chg II). The circular alleged to have been violated provides:

> "I. PURPOSE.—1. The purpose of this circular is to curb black market activities by prohibiting illegal importation, transportation, sale, barter, and exportation of goods into, within and from this theater, and prevent wrongful use of United States mail, and means of communication and transportation furnished by the United States."
>
> * * *
>
> "V. IMPORTATION, TRANSPORTATION, SALE, BARTER AND EXPORTATION.—6. No persons who are members of the United States Forces and/or any United States Governmental agency subject to military control nor any others subject to military law shall:
>
> "a. Use any 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 to import, transport, or cause to be imported or transported, either on his own behalf or for or through others, directly or indirectly, except as

specifically authorized, into this Theater and/or between any geographical points within this Theater, any article, merchandise, material or equipment not needed for official or personal use.

"b. Sell or barter any article, merchandise, material, or equipment imported or transported under paragraph a above. (This shall not be construed so as to bar non-profit sales or barters of personal items by and between members of the United States Forces and/or any Governmental agency subject to military control nor any others subject to military law.)

"c. Use any 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, except as specifically authorized, to export, transport or cause to be transported, either on his own behalf or for or through others, directly or indirectly, out of this Theater and/or between any geographical points within this Theater, any articles, merchandise, material or equipment for commercial purposes. This will include sending to United States or other places, for private use or ownership, items of United States property issued or intended for issue in United States service."

The uncontradicted evidence of record shows that during the period alleged various shipments of liquor were received at Haneda Airfield in Japan. As to some of the shipments direct evidence shows that the shipments were received by plane, and as to all of the shipments the fact that they were received at an airfield supports the inference that they were received by plane and that the planes involved in all the shipments were military aircraft of the United States. The pretrial statement of accused shows that he procured at Johnson Field, Okinawa, and at Manila for his own account, at least 45 cases of whiskey and that this whiskey was included in the shipments received at Haneda Airfield during the period alleged. This whiskey was later sold by accused at a financial profit.

The pre-trial statement of accused also shows that that at different times accused purchased 3 cans of lighter flints and 50 cartons of cigarettes at Manila and brought them back to Haneda. The mode of transportation was not specified but the circumstances support an inference that it was United States Government transportation. Other evidence shows that the flints and cigarettes were disposed of at a financial profit by accused.

The gist of the offense charged in Specification 1, Charge II, is that accused used government transportation to transport the whiskey, flints, and cigarettes with the purpose of selling these articles for

profit. There is no evidence outside accused's pre-trial statement that the flints and cigarettes were transported by government transportation of any kind. Evidence that accused sold cigarettes and flints, otherwise undescribed, and with no showing that their origin was non-Japanese, does not establish the probability that these articles were transported by government transportation for the purpose of resale at a profit. As to the whiskey there is, however, substantial evidence, aside from accused's statement, that the provisions of the circular were violated. The record of trial, therefore, is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II as finds that at the time and place alleged accused wrongfully and unlawfully used government transportation for the transportation of 45 cases of whiskey and disposed of it for financial gain in violation of Circular 39, General Headquarters, U. S. Armed Forces, Pacific, dated 23 April 1946.

Accused was found guilty of selling 708 bottles of intoxicating liquor to Staff Sergeant L. D. Johnson, an enlisted man, at a profit of $3700. at the place and during the period alleged (Spec 2, Chg II). The evidence shows that accused during the period alleged sold one case (12 bottles) of whiskey to Johnson. Thereafter accused met Ruppe another enlisted man and agreed to sell whiskey to Ruppe, telling Ruppe that he could in turn sell the whiskey to Johnson at $90.00 a case. Ruppe agreed to the proposition, purchased some whiskey from accused at $60.00 a case and some at $80.00 a case and in turn sold the whiskey thus purchased to Johnson at $90.00 a case. During December Ruppe delivered another 5 cases of whiskey to Johnson receiving $90.00 to $110.00 a case and turned the proceeds of the sale over to accused. In this instance Ruppe had not previously purchased the whiskey from accused. There was substantial proof that Johnson had purchased 59 cases of whiskey in all. It is apparent, therefore, that of the 59 cases of whiskey alleged to have been sold by accused to Johnson, 53 of them were, in fact, sold to Ruppe. The fact that Ruppe in turn sold these 53 cases of whiskey to Johnson, pursuant to information furnished him by accused, does not constitute Ruppe as accused's agent in the sale to Johnson. Ruppe, in relation to the 53 cases of whiskey, was not accused's agent but a "Bona Fide purchaser for value," and his sale of the whiskey to Johnson was his own act in relation to his own property. Accused had divested himself of all title in the 53 cases of whiskey by the sale to Ruppe and no longer could direct its disposition.

As to the 5 cases delivered by Ruppe to Johnson in December, there was no sale by accused to Ruppe and the proceeds of the sale were received by accused. In this transaction, the court could properly find that Ruppe was accused's agent, and that the sale of these 5 cases was chargeable to accused. It was stipulated that the value of the 708 bottles of whiskey mentioned in the specification was $1800. It follows that the value of 72 bottles (6 cases) of the same was about $180.00. The record of trial,

therefore, supports only so much of the finding of guilty of Specification 2, Charge II, as finds that during the period and at the place alleged, accused did, wrongfully and unlawfully sell to Staff Sergeant L. D. Johnson, an enlisted man, 72 bottles of intoxicating liquor, to wit: whiskey, value about $180.00, for the sum of about $540.00. The conduct of an officer in selling whiskey to an enlisted man under the circumstances of this case is conduct to the prejudice of good order and military discipline (CM 313445, Shirley). In this case the offense was aggravated by the unconscionable profit exacted by accused.

Accused was also found guilty of selling lighter flints on two occasions (Specs 3, 4; Chg II) and cigarettes (Spec 5, Chg II), at the times and places alleged, knowing that the flints and cigarettes had been transported by military aircraft for the purpose of resale, in violation of Regulation No. 110-1, Headquarters Pacific Division, Army Air Forces, Air Transport Command, dated 3 October 1944.

It is not necessary in our view of the case to discuss the provisions of the regulation alleged to have been violated. Accused's pre-trial statement shows that accused purchased the flints and cigarettes outside of Japan and transported the items to Japan for the purpose of resale. The evidence otherwise shows that accused sold the items in question at an exorbitant profit. There is, however, nothing in the evidence aliunde accused's statement to show that the origin of the items was other than Japanese and there is nothing to establish the probability that the items were transported by military aircraft. Even in accused's statement the assumption of the latter must be based upon inference. The essence of the offenses charged is the sale for profit of items transported by military aircraft and there must be some evidence other than accused's statement, which shows the likelihood that the items were so transported. That evidence is lacking and it is, therefore, the opinion of the Board of Review that the record of trial does not support the findings of guilty of Specifications 3, 4, and 5 of Charge II.

6. The defense objected to the admission in evidence of accused's pre-trial statement. Accused testified that the evening before the day on which he made his statement he had been drinking and had also taken two seconal tablets prescribed by a physician. It does not appear that at the time he made his statement that accused was unconscious of what he was saying, and in the opinion of the only witness, who was questioned concerning accused's sobriety, accused was normal. It does not appear that accused was incompetent at the time the confession was made (CM 228891, Robnett, 16 BR 359, 363).

The evidence shows that at approximately 2:00 o'clock in the morning of the day on which accused made his statement he was awakened in order that he might be identified by a Japanese witness. Subsequently, at about daybreak or 4:00 a.m., a military superior, Colonel Luker commenced interrogating him, and at approximately 9:00 a.m. a CID agent,

Welch, commenced to interrogate him. The statement was made that afternoon. Prior to making the statement the 24th Article of War was explained to accused. Whether these conditions were such as to compel accused to make his pre-trial statement was properly a question for the court to decide (CM 252086, Kissell, 33 BR 331, 343).

Accused also claimed that before signing his statement Colonel Luker promised him that he would be released from arrest in quarters. By accused's own testimony, he had made his statement at the time the purported promise was made. Accused's statement would be admissible against him if never signed as a signature is not a prerequisite to the completion of a statement (CM 273879, Simpson, 47 BR 99, 110). A promise made subsequent to a confession may not be said to have inspired the confession (CM 265538, Pamplin, 43 BR 63, 65). The Board is of the opinion that accused's pre-trial statement was properly admitted in evidence.

7. The records of the Department of the Army show that accused is 29 years of age, married, and the father of two children. He is a graduate of high school and the Rutgers University School of Husbandry. In civilian life he worked as a machinist. He had enlisted service from 28 February 1943 until 4 July 1943, when he became an aviation cadet. He was commissioned a second lieutenant 12 March 1944 and was subsequently promoted to first lieutenant and captain. While a member of the 15th Air Force in Italy, he flew 66 missions and 35 sorties. He has been awarded the Distinguished Flying Cross and Oak Leaf Cluster and the Air Medal with four Oak Leaf Clusters. Efficiency ratings of record show that he has been rated as excellent for the following periods: 1 July 1944 to 31 December 1944; 1 July 1945 to 31 December 1945; and 1 July 1946 to 31 December 1946.

The Board of Review has considered the following communications pertaining to clemency on behalf of accused: Letter to Colonel John P. Dinsmore, Special Assistant to Chief, Legislative and Liaison Division, from Mr. James A. Pike, Acting Captain of Detectives, Department of Police, Atlantic City, New Jersey, dated 2 August 1947; letter to The Adjutant General from the Honorable T. Millet Hand, Member of Congress, dated 7 August 1947.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial other than as discussed above. In the opinion of the Board the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1, Charge II, with respect to the property alleged as involves 45 cases of whiskey; only so much of the finding of guilty of Specification 2, Charge II, as finds that during the period and at the place alleged, accused, did, wrongfully and unlawfully sell to the person alleged 72 bottles of intoxicating liquor, to wit: whiskey, value about $180.00, for the

sum of about $540.00; legally insufficient to support the findings of guilty of Specifications 3, 4, and 5, Charge II; legally sufficient to support the finding of guilty of Charge II, and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures, and confinement at hard labor for two (2) years is authorized upon conviction of a violation of Article of War 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate.

JAGH - CM 323589 1st Ind NOV 28 1947

JAGO, Dept. of the Army, Washington 25, D. C.

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John D. Ward (0-827096), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully and in violation of regulations using government transportation to transport 45 cases of whiskey, 40 cartons of cigarettes, and two cans of lighter flints for the purpose of selling the same in Japan at a financial profit, in violation of standing orders (Spec 1, Chg II); of wrongfully and unlawfully selling to an enlisted man 708 bottles of whiskey at a profit of $3700.00 (Spec 2, Chg II); and of wrongfully and unlawfully selling cigarettes and lighter flints at a financial profit knowing the same to have been transported upon military aircraft for the purpose of resale in violation of standing orders (Specs 3,4, and 5, Chg II); all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II as pertains to the transportation of whiskey; only so much of the finding of guilty of Specification 2, Charge II, as finds that accused sold 72 bottles of whiskey to the named enlisted man at a profit of about $360.00; legally insufficient to support the findings of guilty of Specifications 3,4, and 5, Charge II; and legally sufficient to support the finding of guilty of Charge II and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

Accused was on duty at Haneda Army Air Base Japan and during the period from October 1946 through January 1947 evidence independent of his pre-trial statement shows that he transported at least 45 cases of whiskey by military aircraft and subsequently sold the same at a profit. It was alleged that during this period 59 cases of whiskey were sold by accused to Staff Sergeant L. D. Johnson. The proof, however, shows that but six cases were sold to Johnson by accused and the

remainder were, in fact, sold to another enlisted man. The cost of the six cases to accused was about $180.00 and he realized approximately $540.00 on his sales to Johnson. In his pre-trial statement accused admitted purchasing lighter flints and cigarettes in Manila and subsequently selling them at a profit in Japan. It could be inferred from the statement that the lighter flints and cigarettes were transported by accused from Manila to Japan in military aircraft. The essence of the offenses with which accused was charged in relation to the lighter flints and cigarettes was the violation of an order prohibiting the resale for profit of items transported by military aircraft. In the opinion of the Board there was no evidence aliunde accused's pre-trial statement, of the transportation by military aircraft or other government transportation of the lighter flints and cigarettes, and for that reason the findings of guilty of the offenses based on these transactions are not supported by the evidence.

4. The records of the Army show that accused is 29 years of age, married and the father of two children. He is a graduate of high school and of the Rutgers University School of Husbandry. In civilian life he was employed as a machinist. He had enlisted service from 28 February 1943 until 4 July 1943, when he became an aviation cadet. He was commissioned a second lieutenant on 12 March 1944 and was subsequently promoted to first lieutenant and captain. While a member of the 15th Air Force in Italy he flew 66 missions and 35 sorties. He has been awarded the Distinguished Flying Cross and Oak Leaf Cluster, and the Air Medal with four Oak Leaf Clusters. Efficiency ratings of record show that he has been rated as excellent for the following periods: 1 July 1944 to 31 December 1944; 1 July 1945 to 31 December 1945; and 1 July 1946 to 31 December 1946.

Consideration has been given to the following communications which recommend clemency on behalf of accused: A letter to Colonel John P. Dinsmore, Special Assistant to Chief, Legislative and Liaison Division, from Mr. James A. Pike, Acting Captain of Detectives, Department of Police, Atlantic City, New Jersey, dated 2 August 1947; letter to The Adjutant General from the Honorable T. Millet Hand, Member of Congress, dated 7 August 1947.

5. I recommend that the findings of guilty of Specifications 3, 4, and 5 of Charge II be disapproved; that so much of the findings of guilty of Specification 1, Charge II, be disapproved as involves the use of government transportation to transport cigarettes and lighter flints; and that only so much of the findings of guilty of Specification 2, Charge II, be approved as involves a finding that at the place and time alleged accused did wrongfully and unlawfully sell to the person alleged 72 bottles of intoxicating liquor, to wit, whiskey, value about $180.00, for the sum of about $540.00. I recommend that the sentence be confirmed

but in view of the prior excellent service of accused which included extensive combat duty recommend that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

6. Inclosed is a form of action designed to carry 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

(GCMO 88, 18 Dec 1947).

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

JAGK - CM 323606

12 SEP 1947

UNITED STATES	PHILIPPINES-RYUKYUS COMMAND
v.	Trial by G.C.M., convened at Headquarters PHILRYCOM, APO 707, 21-30 April 1947. Dismissal and confinement for two years.
First Lieutenant BENJAMIN J. JOHNSON (0-1335297), Transportation 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 95th Article of War.

Specification: In that 1st Lt Benjamin J Johnson, TC, Exchange Officer, Branch Exchange #379, 3448th Quartermaster Truck Co., APO 900, did, at Manila, P I, on or about 4 November 1946, with intent to deceive, officially report to the Army Exchange Sv, that the strength to be served by Branch Exchange #379, 3448th Quartermaster Truck Co, was 2170, which report was known by the said 1st Lt Benjamin J Johnson to be untrue.

Specification 2: In that 1st Lt Benjamin J Johnson, TC, ***, did, at Manila, P I, on or about 13 November 1946, with intent to deceive, officially report to the Army Exchange Sv., that the strength to be served by Branch Exchange #379, 3448th Quartermaster Truck Co., was 2,593, which report was known by the said 1st Lt Benjamin J Johnson to be untrue.

Specification 3: In that 1st Lt Benjamin J Johnson, ***, did, at Manila, P I, on or about 2 December 1946, with intent to deceive, officially report to the Army Exchange Sv., that the strength to be served by Branch Exchange #379, 3448th Quartermaster Truck Co., was 2,934, which report was known by the said 1st Lt Benjamin J Johnson to be untrue.

Specification 4: In that 1st Lt Benjamin J Johnson, ***, did, at Manila, P I, on or about 5 December 1946, with intent to deceive,

officially report to the Army Exchange Sv., that the strength to be served by Branch Exchange #379, 3448th Quartermaster Truck Co., was 3,220, which report was known by the said 1st Lt Benjamin J Johnson to be untrue.

Specification 5: In that 1st Lt Benjamin J Johnson, ***, did, at Manila, P I, on or about 6 January 1947, with intent to deceive, officially report to the Army Exchange Sv., that the strength to be served by Branch Exchange #379, 3448th Quartermaster Truck Co., was 2,877, which report was known by the said 1st Lt Benjamin J Johnson to be untrue.

Specification 6: In that 1st Lt Benjamin J Johnson, ***, did, at Manila, P I, on or about 4 February 1947, with intent to deceive, officially report to the Army Exchange Sv., that the strength to be served by Branch Exchange #379, 3448th Quartermaster Truck Co., was 2,709, which report was known by the said 1st Lt Benjamin J Johnson to be untrue.

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

Specification 1: In that 1st Lt Benjamin J Johnson, ***, having been appointed Branch Exchange Officer for the Branch Exchange #379, 3448th Quartermaster Truck Co., did, grossly neglect his official duties by failure to provide proper supervision over the Exchange and the accounts thereof, from on or about 1 November 1946, to on or about 14 February 1947.

Specification 2: In that 1st Lt Benjamin J Johnson, ***, did distribute "bonuses" to the civilian employees of Branch Exchange #379, 3448th Quartermaster Truck Co., in violation of AFWESPAC Regulations 76-5, from on or about 1 November 1946, to one or about 14 February 1947.

Specification 3: In that 1st Lt Benjamin J Johnson, ***, having been appointed Branch Exchange Officer for Branch Exchange #379, 3448th Quartermaster Truck Co., did, fail to make proper accounting of monies rightfully belonging to the Army Exchange Sv., by failing to turn over to the Army Exchange Service, monies accumulated as overages, from on or about 1 November 1946, to on or about 14 February 1947.

He pleaded not guilty to all charges and specifications. He was found guilty of all charges and specifications, excepting the figures and word "14 February 1947" in Specification 2 of Charge II, substituting therefor, respectively, the figures and word "31 January 1947." No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct

for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

It was agreed and stipulated by the parties, the accused specifically joining therein, that the following documents would be received in evidence without objection, viz:

Pros. Ex. 1, AFWESPAC Regulations No. 76-5 "Army Exchange Service" dated 19 March 1946.

Pros. Ex. 2, Certified true copies of the strength reports submitted by accused as Post Exchange Officer, 379th Branch Exchange to Headquarters Philippine-Ryukyus Command Army Exchange Service Division for 4 November 1946, 13 November 1946, 2 December 1946, 5 December 1946, 6 January 1947 and 4 February 1947.

Pros. Ex. 3, Extract copies of morning reports of units served by Branch PX No. 379 for 4 November 1946, 13 November 1946, 2 December 1946, 5 December 1946, 6 January 1947 and 4 February 1947.

Pros. Ex. 4, Letter, Subject: "Assignment of Units," Hq Philippine Base Service Command, 14 December 1946, showing reassignment of 2107 TC Truck Co. (PS) (Prov) as of 16 December 1946.

Pros. Ex. 5. Section III, General Orders No. 230, Hq US Army Forces Western Pacific, dated 23 October 1946. Inactivating 24th Quartermaster Refrigerator Platoon, PHIBCOM, effective 10 November 1946.

Charge I and its Specifications

Mr. Fernando P. de Tagle, Kawit, Cavite, an administrative assistant at the Army Exchange Service's main exchange testified that during all the times mentioned in the record he had charge of the issuance of post exchange supplies to the branch exchanges and that such supplies were issued in accordance with the number of men shown on the strength reports submitted by the post exchange officers. Beer was authorized to be issued at the rate of two cases per month per man, cigarettes at the rate of five cartons per month per man. 13,000 cartons of cigarettes and 4600 cases of beer were issued to Post Exchange 379 for the month of December. 20,000 cartons of cigarettes were issued for the month of January 1947. Mr. de Tagle identified accused as exchange officer of Post Exchange No. 379 from November 1946 to February 1947 (R 8-11). Accused drew about three-fourths of the authorized supplies based on his strength reports (R 16). The actual unit strength as shown by the Morning Reports and the strength certified by the accused are set forth hereinafter

as follows:

4 November 1946

Unit	Actual Strength (Morning reports)	Strength certified by accused	
3448th TC Trk Co.	226		339
3526th TC Trk Co.	222		348
3693rd TC Trk Co.	179		368
3775th TC Trk Co.	250		337
Hq & Hq Det 221st QM	205		408
		Hq Disp	47
		24th Ref	221
		281 QM	102
Totals	1082		2170

13 November 1946

3448th TC Trk Co.	180		339
3526th TC Trk Co.	154		349
3693rd TC Trk Co.	149		366
3775th TC Trk Co.	214		338
Hq & Hq Det 221st QM	186		408
		Hq Disp	47
		24th Ref	221
		281st Qm Bn	525
Totals	883		2593

2 December 1946

3448th TC Trk Co.	174		339
3526th TC Trk Co.	129		349
3693rd TC Trk Co.	138		366
3775th TC Trk Co.	199		338
Hq & Hq Det 221st Qm	183		408
		Hq Disp	47
		24th Ref	221
		281 QM Bn	525
		576 Eng Dp Tr Co.	341
Totals	823		2934

5 December 1946

3448th TC Trk Co.	174		339
3526th TC Trk Co.	129		349
3693rd TC Trk Co.	138		366
3775th TC Trk Co.	199		338
Hq & Hq Det 221st QM	184		408
2106 TC Trk Co.	110		127
2107 TC Trk Co.	110		126
		Hq Disp	47
		24 Ref	221
		281 QM Bn	525
		576 Dp Tr Co	341
		2108 TC Trk Co	127
Totals	1044	3220	3314

6 January 1947

3448th TC Trk Co.	169		343
3693rd TC Trk Co.	147		330
3775th TC Trk Co.	212		359
Hq & Hq Det 221st QM	159		419
508 TC Trk Co.	110	2106 TC Trk Co	156
510 TC Trk Co.	110	2107 " " "	192
		2108 " " "	174
		Hq Disp	48
		24th Ref	271
		570 Eng Dp Co	293
		576 " " "	289
Totals	907	2877	2874

4 February 1947

3448th TC Trk Co.	148		363
3693rd TC Trk Co.	136		359
3775th TC Trk Co.	182		391
508th TC Trk Co.	98		225
510th TC Trk Co.	97		238
Hq & Hq Det 221st QM	145		418
Batt "C" 539 FA	100		328
		24 Ref	337
		Hq Disp	50
Totals	906		2709

No extract copies of morning reports appear in the record for units listed by accused in his strength reports as "Hq Disp," "24th Ref," "281st Qm Bn," "576 Engr Dp Tr Co."

Prior to 28 February 1947 Major S. J. Covell was commanding officer of the 221st Quartermaster Battalion. He testified that the 24th Refrigerator Platoon was deactivated on 10 November 1946, but the personnel of such unit were reputed to have remained in the vicinity of the 221st Quartermaster Battalion and had access to the 379th Branch Exchange. The 570th and 576th Dump Truck Companies were not a part of the 221st Quartermaster Battalion, although the personnel of these units may have used the post exchange (R 36-37). Major Covell never heard of the 281st Quartermaster Battalion but the other units listed in the strength reports had on occasion been located in the vicinity of the aforementioned post exchange. The consolidated strength of all the units was never as great as that shown in the reports submitted by accused (R 37-43). The battalion had a capacity for about 400 casual troops and during December 1946 and January 1947 several hundred casuals arrived and departed, some staying two or three days and others remaining for a week or longer. In December 1946, Major Covell verbally instructed accused to sell post exchange supplies to military personnel only, and not to sell to civilians. He later gave to accused a written order to the same effect. This was done because the major noticed civilians with cigarettes which obviously came from the post exchange. In the early part of January, Major Covell received a letter relative to the operation of the post exchange. He directed his executive officer, Captain Kinsella, to make a preliminary investigation. Shortly thereafter the battalion commander closed Branch Exchange 379 (R 30-31).

Captain Harry F. Kinsella testified that he was commanding officer of the 3448th TC Truck Company and adjutant of the 221st Quartermaster Battalion. He identified Prosecution Exhibit No. 3 as being the certified true copies of the morning reports of the units comprising the 221st Quartermaster Battalion, and stated that they showed the exact strength of the units for the periods shown thereon. Prior to and during June or July of 1946 the accused had procured the strength of the units from the records of his office but he had not made request of him for the strength of the units since such date. Captain Kinsella identified the 281st Quartermaster Battalion as a unit of the 8th Army located in Japan which could not have been served by Branch Exchange No. 379 (R 58). The witness had no knowledge that men of the 570th and 576th Dump Truck Companies ever used Branch Exchange 379 and except for 50 men who stayed in the area about a week there were only two groups of casuals assigned to the battalion and these casuals stayed in the area for not more than six hours. No civilian transportation company was ever assigned to the battalion and Captain Kinsella had not known the source of the numbers used by accused in making his post exchange strength reports (R 70-72).

Charge II and its Specifications

Branch Exchange 379 was a field exchange. Paragraph 10b(1), AFWESPAC Regulations dated 19 March 1946 (Pros Ex 1) provides that the exchange officer of a field exchange will perform the same duties and functions prescribed for the exchange officer of a base or unit exchange in paragraph 10a(3),(4),(6),(7),(8),(9), (10),(12),(14),(15),(16), and (17). Paragraph 10a(4), (8) and (12) read as follows:

"(4) Insure that an accumulation of funds is not permitted in the exchange office at any time in excess of the requirements of the business or as dictated by the accessibility or limitations of banking facilities, and apply to the commanding officer for adequate guard to protect any substantial accumulation of funds in the exchange.

* * *

"(8) Be responsible that the combination of each safe in the exchange is known only to two persons, other than himself, who will be accountable for the funds safeguarded therein and that the safe combination is changed when the responsibility for funds is transferred from such persons to other persons, and that a copy of the combination of each safe is deposited in a sealed envelop with the adjutant of the base or other command.

* * *

"(12) Be responsible that no officer charged with any duty in connection with the exchange receives any extra remuneration therefor and that no officers or employees accept or receive any gift, privilege or perquisite from the exchange or from vendors or vendees of the exchange."

Mr. Vincente del Rosario testified that he was the accountant of the main exchange service, PHILRYCOM, who handled the accounts of Branch Exchange 379. At the first of each month an inventory of the exchange was made. The amount of supplies drawn during that month was added to this inventory and the result determined the total debit for such month. The amount of money "turned in" by the post exchange officer during the month and the stock and cash on hand would then be subtracted from such debit and the difference would determine the shortage or overage. For the month of November 1946 accused turned in ₱39,628.08, which, according to the records, constituted a shortage of ₱364.78. For December there was a shortage of ₱369.85 and for January 1947 a shortage of ₱338.75. The accounts for February 1947 had not been completed. Regulations allowed a shortage or overage of not to exceed 1% of the gross sales. By referring to the Army Exchange Service price lists the witness testified that the following retail prices were authorized for the periods stated:

(a) Beer, Nov 1946 to Feb 1947 incl twenty centavos per can (.20) or four pesos and 80 centavos (4.80) per case

(b) Toddy, Nov 1946, twenty centavos (.20) per can
Dec to Feb 1947 twenty-five centavos (.25) per can

(c) Cigarettes, Nov 1946 to Jan 1947, twelve and one-half centavos (.125) per package. In January 1947 the price was changed to one peso and forty centavos per carton "but they are allowed to sell it at fifteen centavos."

The witness listed authorized prices of other items not necessary to be set forth in detail here (R. 19-22). On cross-examination Mr. Del Rosario stated that accused's shortages were always within the one percent rule (R 25).

It has heretofore been stated that after a preliminary investigation, Major S. J. Covell, Commanding Officer of the 221st Quartermaster Battalion, on 14 or 15 February 1947 closed Branch Exchange 379 and together with other officers who were present with him, took over the physical assets and the records. He told accused that an investigation was being made and the exchange would remain closed until the investigation was completed. The major then stated that he wanted to see where accused kept the post exchange money and told him that he wanted to see "all the money." In response thereto the accused opened a safe in the room where he slept and said, "There it is." An examination of the safe revealed that it contained ₱35,837.70. Some of the money was U.S. currency but most of it was Philippine money. Major Covell took this money and deposited it in a special account at the 172nd Finance Office (R 31-33). On cross-examination the witness was asked if he did not know that the money referred to was all or nearly all the money due the Army Exchange Service for February. He replied, "All I know is that Lt Johnson said that was the Post Exchange money" (R 35).

Captain Harry F. Kinsella, the battalion adjutant, testified that prior to the closing of Post Exchange 379 he made an inspection of the exchange on orders from the battalion commander. He found that cigarettes were being sold to "GI's" for one peso and fifty centavos (₱1.50) per carton. He purchased a carton and was charged one peso forty centavos (₱1.40) per carton. Captain Kinsella called this matter to accused's attention and the clerk said she was confused as to the price. The accused explained the prices to the clerk. On the next day Captain Kinsella made another inspection and again found that cigarettes were being sold for one peso and fifty centavos per carton. He invited accused's attention to this circumstance and the clerk was given some further instructions by accused. On cross-examination of the witness, ten February sales slips showing cigarette sales at ₱1.50 per carton were identified and received in evidence without objection as Prosecution Exhibit 6. Some of these slips refer to the number of packages in the cartons and some refer to the number of cartons (R 52-55). Captain Kinsella was with Major Covell when the post exchange was closed on 14 February 1947. Between thirty-five thousand and thirty-six thousand pesos were found in two safes in the exchange. The parties went into the main office where the large safe was located and Captain Kinsella asked accused what the safe contained. Accused replied, "Post Exchange Money." The safe was opened and the officers started counting the money which they found in cigar boxes and envelopes. One envelope contained ₱16,000. Lieutenant Joiner, Mr. Foster and Captain

Kinsella did the counting. At about 2200 hours Captain Kinsella noticed a smaller safe in a room across from the office and which was used as sleeping quarters by the steward, Sergeant Smith. The captain asked Smith what was in that safe. Upon objection by the defense, the response of Sergeant Smith was stricken as being hearsay. This safe was opened and found to contain several cigar boxes filled with money. The accused was given a receipt for all the money found in both safes and a guard was placed at the door. The accused made no statement regarding these revelations other than to say, "Post Exchange Money" (R 56-58).

On re-cross examination Captain Kinsella stated that he, Captain Mann, and Lieutenant Joiner were members of the board of officers appointed by the battalion commander to investigate Branch Post Exchange 379. The board had taken statements from about 200 witnesses and received accused's explanation of all the alleged irregularities. By agreement of the parties, there was admitted into evidence Prosecution Exhibits 7,8,9 and 10 (R. 76). Prosecution Exhibit 7 is a statement of accused dated 18 February 1947 and addressed to the board listing ten persons for whom it is stated that accused "held personal money" in the post exchange safe. It is stated that among that held was ₱2,850 for Staff Sergeant John H. Smith. Prosecution Exhibits 8 and 9 are the alleged receipts accused gave to Lieutenant Vincent Talbot, who was also listed as a depositor in Exhibit 7. Prosecution Exhibit 10 is a sworn statement by Staff Sergeant John H. Smith that on or about 1 February 1947 he was gambling with enlisted men and won ₱2100; that he placed ₱1500 of this in the safe for which he alone carried the key and that he did not have a receipt from the post exchange officer (R 76).

In February 1947 Mr. Eugenio Reyes, a professor of accounting at the Far Eastern University, Manila, P. I., made an audit of the accounts of Branch Exchange 379. This audit revealed that sales for the period 1 to 14 February amounted to ₱11,000 in "round figures." The only records found were "Form 1-A," daily sales report, some cash receipts and sales slips. The cash receipts did not tally with the total daily sales reports. Merchandise in the exchange was not completely departmentalized as is required in the manual of system of accounts of the Army Exchange Service and, according to the records, no money had been turned in to the Army Exchange Service for the period covered by the audit. The Army Exchange Service was located about ten miles from Branch Exchange 379 (R 86-89). On cross-examination the witness stated that items such as ice cream, popcorn and Coca-Cola sales were non-accountable but were included in the audit (R 89). On redirect examination the witness stated that the exact sales figures were ₱11,222.29, of which ₱107.85 represented sales of cost items. On recross examination the witness testified that his audit showed an exact shortage in the accounts of the exchange amounting to ₱8,890.98 (R 94). In response to questions by a member of the court the auditor stated that although the records of Branch Exchange 379 showed a total sales amounting to ₱11,000 for the period stated, of which ₱8,890.98 constituted a shortage, however if the ₱36,000 found in the safe were considered as cash credited to the

exchange account there would be a considerable overage (R 95-96).

First Lieutenant Ordie P. Taylor, Jr., 3775th TC Truck Company, testified that on or about 1 December 1946 he checked the prices being charged at Branch Exchange 379 and discussed the matter with the accused who admitted to him that the prices were marked up in excess of the Army Exchange Service prices in order to make up for shortage (R 106). On cross-examination the witness stated that he had been challenged by accused as a member of a board of officers which had been appointed to investigate the exchange and that after such challenge he stated to the board that he did not desire to be called as a witness (R 106-115).

Candida Rosal, 540 Mayhaligue, Santa Cruz, Manila, testified that she had boarded in the house of Mr. del Rosario, the accountant for the Army Exchange Service, and that upon his recommendation the accused employed her on 25 January 1946, as a clerk in Branch Post Exchange 379. He agreed to pay her sixty-two centavos (.62) per hour, but stated that "for that one week trial he will pay me for the overprices that they are making in the post exchange." Candida never received any pay for her first week at the exchange. No price list was posted and she worked under Miss Eugenia at the toiletry department to learn the prices. The witness stated, "It is an order from Lt Johnson that I should charge the real price to the officers when they are the ones buying and I am going to charge the enlisted men the prices Gene gave me" (R 130-131). In accordance with these instructions Candida stated that for Fitch's shampoo she charged the enlisted men one peso and eighty centavos (₱1.80) and officers one peso and sixty centavos (₱1.60); Kleenex, thirty centavos (.30) to enlisted men and twenty centavos (.20) to officers; Kreml shampoo, one peso (₱1.00) to enlisted men and eighty centavos (.80) to officers. The accused came to her counter and observed the prices she was charging. All the receipts were placed in the cash register and at the close of the day's business the money was turned over to Sergeant Smith, the steward. She received tips on occasion which she also placed in the cash register with the other money. Candida asserted that post exchange supplies were sold to civilians and that Mr. del Rosario bought post exchange merchandise. The accused transported the employees, including the witness, to their homes after working hours. Post exchange merchandise would be loaded in the weapons carrier or jeep used for such transportation and accused would deliver this merchandise, consisting of cases of toddy, beer, Kleenex, soap and other items, to Mr. del Rosario's house. The driver would place the supplies in the cellar of the house. Mr. del Rosario had a refreshment and "sara-sari" store in downtown Manila, "below the Cosmopolitan College High School Department." Candida had visited this store and observed post exchange merchandise on sale. Toddy was priced at ₱.70 per can. The witness stated that she purchased one can of toddy. Beer, soaps, Kleenex and candies were also sold. After the accused was "arrested," Gene and Mr. del Rosario had been to see the witness regarding the case. On cross-examination the witness stated that she worked in the exchange on Highway 54, which was established as a part of Branch Post

Exchange 379 "located on Espana." When questioned specifically regarding prices of various other articles sold at the exchange the witness stated that she could not remember. She did not remember the number of times she rode home in the vehicle with accused, however, she repeated her former testimony regarding the delivery of merchandise to Mr. del Rosario and the sale of similar items in his store. On further cross-examination the witness asserted that the prices shown in the sales slips she had made out did not come from an "SI & I" but were dictated to her by "Gene." The witness explained certain discrepancies shown in the sales slips by stating that the accused ordered that the "over-prices" be not placed in the sales slips because investigators might learn that the clerks were receiving extra pay (R 133-154).

Miss Remedios Rodriguez, referred to as "Remy," testified that she was employed as a clerk in Branch Post Exchange 379 from December 1946 until it was closed 14 February 1947. After the exchange was closed the accused visited her and promised her a job if she would testify for him. During her employment she handled the beer, toddy and Coca-Cola section. She sold beer for ₱.25 per can and ₱6.00 per case; toddy, ₱.30 per can; Coca-Cola, ₱.15 per bottle. She did not know the authorized post exchange prices for these items and no Army Exchange Service price list was ever posted. She sold about five cases of beer per day to civilians. This was in accordance with instructions she had received from accused. During February the accused gave her a cash "bonus" of ₱15, which was in addition to her regular monthly salary which she received by check. Remy stated that she received many complaints that the prices were too high. She advised accused of these complaints. He stated that the ₱.05 overcharge was for ice - and would be added even though the beer was sold by the case. The witness had not been discharged by the post exchange but ceased work when it was closed (R 156-159). On cross-examination the witness stated that during December and January the prices she charged were posted. She worked in the "Highway 54 Post Exchange" and did not work "on Espana." The exchange was divided into different sections and each clerk had a section. Sergeant Smith was in charge of the exchange when accused was absent. Upon redirect examination Remy was shown a sales report for 4 February which indicated an overage of ₱4.90. She stated that this was her tip but that she did not get it. All the money was turned over to the accused. A member of the court requested the witness to state the substance of her conversation with accused at the time he asked her to give him a statement. Her response was, "He told me to please make a statement to the attorney that he was not overpricing" (R 160-167). Miss Rodriguez was recalled to the stand by the prosecution and stated that she rode home from work in a weapons carrier provided by the accused. Two or three times a week the vehicle carried "Toddies, beer, chocolates, Post Exchange supplies" to Candida's house. Candida roomed with Mr. del Rosario (R 171).

Candida Rosal was recalled to the witness stand by the prosecution, reminded that she was still under oath, and asked to state whether the accused had talked to her since his arrest. She stated that at the first

instance she was not at home but subsequently he talked to her "at the camp" and that "He was convincing me to make a statement testifying on behalf of him and that if I would do it, he will give me money and he will give me a nice job" (R 172). On cross-examination the witness admitted that she was now working in Branch Exchange 379 under Lieutenant Quinanola.

Victorina S. Solis, 128 Rodriguez Areas, San Miguel, was employed as a clerk in the cigarette department, Branch Exchange 379, from 1 July 1946 to 5 February 1947. Prior to November 1946 she sold cigarettes at ₱1.30 per carton. She became assistant manager and on orders from accused she sold cigarettes at ₱1.50 per carton. The "SI and I" price list from the Army Exchange Service which she had in her possession at the time showed the authorized sales price to be ₱1.25. Miss Solis also stated that she sold beer and critical items to civilians. The "SI and I" price on beer was ₱4.80 per case. She received ₱10.00 per case for the beer sold to civilians. The receipts were turned over to accused. On the night of 18 January she remained at the post exchange after the other girls had departed for home and the accused sold 400 cases of beer to a civilian buyer at ₱10.00 per case. The witness asserted that she sorted out the money, retaining an amount equal to ₱4.80 per case. She identified a receipt for ₱1,923 dated 19 January 1947 and signed by the accused which she stated was for the beer and a cigarette lighter which was sold for ₱3.00. This receipt was received in evidence without objection as Prosecution Exhibit 11 (R 186). On cross-examination the witness asserted that in addition to her salary she received ₱80.00 in December which the accused "called" a bonus. Victorina stated further that she had a disagreement with accused in February and quit work to take a vacation. The disagreement arose because "he (accused) embarrassed us in front of people. He ordered us to overcharge GIs and when they complained, he'd deny it." She had gotten mad and torn up some papers when she left and had also written a letter concerning the operation of the exchange. Before trial, the witness had gone over a prepared list of questions and answers with some captain who was assisting the trial judge advocate. The witness was then cross-examined vigorously concerning statements she was alleged to have made before the board of officers concerning beer sold to the Cosmocrat Club. Victorina could not understand all the questions, became confused and answered that she did not remember, however, she did not retract any of her testimony in chief. She stated that the civilian buyer of the 400 cases of beer was Mr. Ben Tambunting. The witness stated that she had charge of critical items which were supposed to be raffled. Some of these were raffled but the most of them were sold to civilians. When she quit work at the exchange she tore up the papers regarding the raffles "because there were so many Filipino Scouts who had signed their names and there were not enough of the items to sell" (R 182-211).

Dolores Vera, 124 Nakar Street, a school teacher by profession, was employed as a bookkeeper in Branch Exchange No. 379 from December 1946

until 1 February 1947. She was also working in the exchange at the time of the trial. The January 1947 financial report of the exchange had been prepared by her and she had assisted in taking the inventory. The exchange had an overage of about ₱4,000.00 for this month. She explained the overage as follows:

> "Well, what I did was to take the beginning accountability for the month of January and added the stock issues and invoices that were issued to us by the Army Exchange Service and then I took the ending inventory for the month of January and added all the cash receipts. Then I compared this and have found the ending inventory to exceed the accountability charged to us by the Army Exchange Service for about ₱4,000.00" (R 213).

Miss Vera stated that she showed the report to accused and advised him of the overage. He took the paper from her and told her to make no mention of it to anyone except "Vicky," who was already advised. The witness stated that she knew that the prices charged in the exchange were in excess of the authorized Army Exchange prices and that accused instructed the employees to overcharge. The beer was charged to "Vicky." At night cases of beer would disappear. On the following morning the accused would pay "Vicky" for the missing cases. When complaints were made, accused "called the girls in and then the girl who overcharged the price, and then he escorts the girl in front of the complainer and tells the complainer he never ordered the girl *** to overcharge" (R 216). The witness was positive that all the critical items were not raffled because she saw them in the cabinet in her office when the raffle "is over." Miss Vera stated that in addition to her salary the accused paid her ₱40.00 in December. This was a cash payment and the accused took the money from the safe in the witness' presence (R 214-219). On cross-examination the witness stated that she had talked to "Vicky" and Lieutenant Taylor about the case. She asserted that accused did not tell her the extra pay was for overtime but that it was because they were "doing good business" (R 222).

The prosecution rested and the defense moved for a finding of not guilty of Charge I and its specifications and Specification 1 of Charge II. After argument of counsel the motion was overruled (R 234-235).

4. <u>For the Defense</u>

Seventy exhibits were introduced by the defense and received into evidence. Some of these exhibits were introduced upon cross-examination of the prosecution's witnesses, the remainder upon testimony in chief of defense witnesses. For clarity we will discuss briefly these exhibits en masse, as follows:

<u>Defense Exhibit</u>

<u>A</u> WDAGO Form 66-1 of 1st Lt Ordie P Taylor, the Adm and Executive Officer of 3693rd QM Truck

	Co. The purpose of this exhibit was to show that Lt Taylor had written the company commander's initials after an efficiency rating of 6.5 for the period 2 July to 15 Aug 1946 (R 109).
B1,B2,B3	Sales slips for PX merchandise executed by the witness Candida Rosal (R 139).
C1,C2,C3	Stock records kept by Miss Rosal (R 139).
D1-16	Sales records of Miss Rosal (R 141,142,177-179).
E	Sales records of the witness, Remedias Rodriquez concerning beer, toddy and Coca-Cola (R 160).
F	Sales records of Miss Rodriguez (R 162).
G, 4-5	Sales records of Miss Delores Vera (R 222-232).
P, 1-6	Receipts for money allegedly held by accused for safe keeping (R 252-254).
P, 7	Statement dated 27 Feb 1947, and signed Gregario Lopez stating that accused held ₱78.40 of his pay (R 255).
P,8	Sworn statement, dated 12 Mar 1947, signed 1st Lt Kenneth L. Vinson, TC, 3448th TC Truck Co. and asserting that on 7 Feb 1947 Vinson gave accused ₱250.00 to place in the PX safe for safe keeping (R 255).
P,9	Receipt dated 15 Dec 1947 signed Benjamin J. Johnson asserting that the signer has received ₱7170.00 from Angelica Rito for deposit in the U.S. for safe keeping (R 257).
R, 1-7	Sales books, Maria C. Rodil (R 310-311).
S, 1-6	Sales records of Miss Rodil and receipts from Sgt John H. Smith, the PX steward (R 318-320).
T	Inventory sheet identified by Maria C. Rodil (R 319).
U,1	Accountability record, Br PX 379, dated 24 Mar 1947 and signed V. L. del Rosario Sr. Accountant (R 327).
U,2	Transfer of account dated 10 Mar 1947, Lt Benjamin J Johnson to Lt Cornelio Quinanola (R 329).

U,3	Accountability record or balance sheet prepared by Mr. del Rosario for the period 25 Feb to 25 March (R 330).
V	Sales slips of Eugenia Gomez (R 356).
W, 1-13	Sales books used at the Exchange (R 356-359).
X	Charge out record Eugenia Gomez (R 359)
Y, 1-2	Papers and ₱40.00 found by Miss Gomez and Sgt. Smith in cash register of Miss Solis when the latter ceased working at the Exchange (R 360).
Z, 1-4	List of merchandise issued by Sgt. Smith to Miss Gomez (R 362).
AA,1-6	Certified extract copies of the morning reports of Hqs and Hqs Co. 78th Qm Base Depot, Manila, P.I. for 6 Nov, 13 Nov, 3 Dec, 5 Dec 1946 and 6 Jan, 4 Feb of 1947. Strength averages approximately 236 men.

The defense called as its first witness Master Sergeant David M. Clay, Signal Depot APO 900, who stated that on one occasion he requisitioned some beer, toddy and Coca-Cola from the accused's post exchange for a party at the Signal Depot. The total amount of supplies purchased amounted to ₱220.00 and the witness stated that he paid the authorized price. On cross-examination the witness stated that the signal depot had a post exchange located about the same distance as Branch 379, but when "you have drawn your quota you are not allowed to draw any more" for the month. He paid ₱4.80 per case for beer, ₱6.00 per case for toddy and ₱2.40 for Coca-Cola (R 236-244).

Captain Wayne G. Mann, commanding officer of the 221st Quartermaster Battalion, stated that he, Captain Kinsella, Lieutenant Joiner and Lieutenant Taylor were appointed members of a board of officers to "investigate certain charges concerning Lt Johnson's Exchange" (R 245). The board examined about 25 or 30 witnesses in open session and about the same number "not in open session." With respect to Charge I and its specifications the witness stated:

> "We found that Lieutenant Johnson had turned in strength reports which were not in conformance with the morning reports, but we could find no ulterior motive or intent to deceive, nor could we find enough evidence to support a charge, to substantiate the charge that he conducted himself in a manner unbecoming to an officer under the 95th Article of War." (R. 248)

With regard to Charge II and Specification 1 thereof the witness asserted that: "We found him guilty of mismanagement, imprudent acts, but not of gross neglect."

With reference to Specification 2 of Charge II the witness stated that the Board found, "That he was not guilty of distributing bonuses as such, but compensation for extra work by the PX employees who put in extra hours to earn it."

Captain Mann was the accuser in the case and stated that he did not believe the accused guilty when the board forwarded its recommendation that the case be "closed," viz, on 13 March 1947, that he did not believe the accused guilty when he signed the charge sheet as accuser and that he did not believe the accused guilty at the time of trial. The board had reached its conclusion,

> "By examination of the witnesses, both in regular session and our own unofficial examination, by observing their demeanor, and the veracity of their statements, prejudice of some of the witnesses, and upon information that various members of the board had obtained through their own efforts in perusal of the facts, and talking to the various witnesses. I think that covers it." (R. 247)

Without objection, the witness then related "evidence" that had been presented to the board by the accused and other witnesses and identified exhibits which had been received by the board. With reference to the persons whose names appeared on Prosecution Exhibit 7, Captain Mann stated that the Board had questioned these persons but that none of them were presently located in the battalion area. Some were in the United States. Defense Exhibits P,1 to 9, inclusive and Q,1 and 2 were identified by the witness as matters considered by the board. He also identified statements made by Miss Solis and described a letter she had written to Major Covell. This statement tended to show that Miss Solis had a grievance against accused (R 244-267). On cross-examination the witness denied that he was sworn when he signed the charges as accuser and stated that so far as he was concerned "the whole thing was false." He modified this answer by stating that he referred to the charges. He was not given a direct order to sign the charges but was told that as battalion commander, "that in order for Lt Johnson to clear his name, that it was entirely permissible for me to sign those charges even though there are statements that I did not concur in" (R 268). Captain Mann stated on further cross-examination that he noticed that the alleged receipts for money given by accused to Lieutenant Vincent Talbot (Pros Exs 8 and 9) dated 5 December 1946 and 15 January 1947 "fit perfectly together" and that he thought this circumstance very peculiar. He had questioned Talbot about it and Talbot admitted that he had lied about it, that they both were made out at the same time. The witness could not enlighten the court as to when the receipts were actually executed or how many receipts were obtained after the post exchange was closed and the accused placed in arrest of quarters (R 269-270). By reference to the sales inventory

and report Captain Mann stated that the total sales for the period 1 February to 14 February were ₱11,115.15 but that the sales on 14 February increased the total to ₱19,340.00 or a total sales of ₱8,000.00 on 14 February. He explained this by asserting that the sales fluctuated (R 277).

Douglas A. Gaskins, CWO, 151 Quartermaster Bakery, testified that he was custodian of the Cosmocrat Club, 651 Colorado Street, Manila. On 9 September 1946 he purchased for the club 200 cases of beer from Branch Exchange 379 and in January he purchased 100 cases from the same exchange. For the December purchase he paid accused ₱427.20 on 31 December 1946 and ₱532.80 on 31 January 1947. He paid accused ₱480.00 on 1 February 1947 for the January purchase. The price was ₱4.80 per case as authorized. On one occasion the witness sent a civilian truck for delivery of the beer and on the other occasion he procured a Quartermaster truck. In November the Army Exchange Service had stopped selling the club beer. Mr. Tambunting often visited the club but as far as the witness knew he did not sell anything (R 287-298).

First Lieutenant Charles A. Harris, MAC, testified that the accused was considered as an excellent officer of superior character rating (R 302).

Maria C. Rodil, Malate, Manila, testified that she had been employed as a sales clerk at the post exchange "in Espana and Highway 54". The accused was the post exchange officer and he had instructed her "that we must not overcharge." Sheused the Army Exchange Service prices and kept these prices on a post card. She asserted that Lieutenant Taylor had accused her of overcharging because she would not give him a date and had caused her to be fired. She was later restored to duty when the accused learned that she was not guilty. Sales books of the witness showing the prices for various items are referred to heretofore as Defense Exhibit R, 1-7 (R 308-312). Miss Rodil stated on cross-examination that she received a ₱30.00 bonus from accused in September, ₱40.00 in October, ₱30.00 in November, ₱40.00 in December, ₱30.00 in January and ₱30.00 in February. She got her salary by check but the bonus was "because we worked long hours" (R 314). All the receipts were turned in together and the bonus came from tips "when we kept the change." Cigarettes sold for ₱1.50 per carton. Sometimes they sold cigarettes to civilians (R 315-317). In response to a question by the court the witness stated that she usually collected about ₱10.00 daily over each day's sales receipts and that she turned all of the money over to the steward and let it accumulate. In a month it amounted to ₱30.00. The witness was further questioned and stated that she did not understand, that there was usually an overage of ₱50.00 per month in her accounts. She did not know what became of the money in excess of the bonus paid to her (R 321-324).

First Lieutenant William J. Schultz, Jr., CAC, Assistant Accounting Officer, Army Exchange Service, testified that based on Mr. del Rosario's audit, to which he had certified in the regular course of business, Branch

Exchange 379 showed a shortage of ₱19,205.35 plus ₱113.16 for cooperage for the period 25 February to 25 March. The records showing such shortage were identified as Defense Exhibit U,1-2 (R 328-329).

Mr. Augusto Tambunting, an auditor for the Army Exchange Service, testified that on one occasion he was authorized by accused to purchase a few items at Branch 379, but he did not know of accused being guilty of illegal or improper conduct. Mr. Tambunting stated that he has a brother named Ben who is engaged in the importing business, "selling merchandise which he orders from the States." He and his brother visited the Cosmocrat Club on one occasion (R 332-336).

Captain John J. Haskins, 3254th Quartermaster Service, stated that he was accused's commanding officer (3448th TC Truck Co.) from November 1946 through February 1947. In addition to his duties as post exchange officer the accused had performed duties as Class A Agent for the finance officer, company "A and R" officer, "I and E" officer, VD control officer, recruiting officer, and numerous other duties which were stipulated to by the prosecution. On several occasions during the holidays an enlisted men's club had purchased beer from Branch 379. The witness believed about fifty cases were purchased during Thanksgiving and about an equal number during the Christmas holidays. Captain Haskins never heard anyone cast aspersions upon accused's character as an officer and gentleman (R 336-340). On cross-examination Captain Haskins verified the strength of the 3448th TC Truck Company as shown by the morning report of 4 November 1946 and stated that the strength could not be as much as 300 men (R 341).

First Lieutenant Roy W. Burley, TC, succeeded accused as post exchange officer of Branch Exchange 379. He stated that the accused helped him to locate post exchange merchandise not covered in the audit. Lieutenant Burley believed that accused served between 1800 and 3000 men at the post exchange. The accused had always conducted himself as an officer and gentleman and he had the best post exchange in that area which catered to colored troops (R 343-348).

Miss Pura Modica was librarian in the area served by Branch Exchange 379. During January and February 1947, she worked until 8 p.m. and rode home with the post exchange workers in their weapons carrier. The witness testified that she never saw any post exchange supplies being transported in the truck. Miss Rosal and Miss Rodriguez did not always ride in the truck with her (R 353).

Eugenia Gomez, 1146 Dart, Manila, P.I., worked for six months as a clerk at Branch Exchange 379 during the time accused was post exchange officer. She stated that the accused gave her the "SI and I" prices and instructed her to not overcharge. On one occasion she and Sergeant Smith inspected the cash register used by Miss Solis and found ₱40.00 wrapped

in some papers (Def Ex Y,1-2) at the back of the register. The witness identified the sales slips and books (Def Exs V,W,1-12) as those used by herself and the clerks. Miss Gomez rode home in the evening with the other clerks but she never saw any goods belonging to the post exchange being transported therein. She identified Defense Exhibits Z,1-4, as merchandise issued to her by Sergeant Smith. She received a bonus for November, December and January. This money came from overages such as tips. The witness sold cigarettes at ₱1.50 per carton because she was selling them at ₱.15 per package. At Christmas she and all the girls received a case of toddy as a present from accused. The Tambunting brothers had been at the exchange but Miss Gomez did not know if they purchased any merchandise. A member of the court observed that on various sales slips of this witness different kinds of cigarettes were listed and sometimes as many as 20 cartons on a single slip. The witness explained that there was a limit to a customer but if the one buying was a sergeant or had charge of a company exceptions would be made. One sales slip carried the notation "IOU." This appeared "because Lt Johnson would tell me that I must give it to this Lieutenant, a certain lieutenant, and he would pay me, because those articles would belong to the company." She sold five fountain pens at ₱17.50, "the prices Vicky left." The accused told her the "real" price was ₱15.60 and for her to refund the overcharge. Other discrepancies in prices were shown the witness. She offered various explanations and asserted that mistakes were made. The accused had reprimanded her for making mistakes. On further cross-examination the witness stated that prices on all the merchandise were posted under the articles sold but she still made the mistakes (R 253-273).

Vincente del Rosario, a previous witness for the prosecution, was called as a witness for the defense. He was cautioned as to his rights against self-incrimination and stated that the Criminal Investigation Division had questioned him since his prior testimony. The witness repeated that on one occasion he had purchased minor items including a case of toddy from accused, that these items were for home consumption and not for sale. Miss Candida Rosal had been a boarder at his house but was ousted by his father-in-law for breaking the rules. The witness stated that his mother-in-law had a store in Manila but did not have Kleenex or toddy to sell. The witness stated that he had a transportation business (R 374-380). On cross-examination there was received in evidence as Prosecution Exhibit 12 a sworn statement given to the CID by Mr. del Rosario. In this statement the witness asserted that on one occasion he procured Miss Rosal to deliver a case of toddy and some minor items to his home. He knew this was illegal (R 381; Pros. Ex 12).

Private First Class Francis Van Buren, Headquarters Company, 78th Quartermaster Battalion, stated that his outfit, formerly the 24th Refrigerator Company, consisting of 80 men, used Branch Exchange 379. Another enlisted man from the same company corroborated Private First Class Van Buren's testimony concerning the use of the post exchange but thought the strength of his company was between 100 and 200 men (R 383-386).

Captain Eddie J. Lee, 39th Quartermaster Laundry, stated that it was customary for the post exchanges to add a few centavos to the price of beer to pay for ice when they were serving cold beer. He saw men from the "375th and 97th" Philippine Scouts buying beer at Branch 379 (R 387-391).

Chaplain Ernest L. Harrison, 79th Engineer General Service Battalion, testified that he had met the accused at the Cosmocrat Club. He explained to the court that he did not want to appear as "condoning misuse of an office" but that adequate post exchange supplies constituted a morale factor among troops. From September 1946 to February 1947 he was chaplain of the 1315th Engineers. The strength varied from about 200 to 1200 men. They had no post exchange of their own and he sent the men sometimes to the Ayala Bridge Post Exchange and on other occasions to Branch 379. The accused was well thought of among the men and the chaplain knew nothing "against him" (R 392-394).

The defense offered in evidence statements alleged to have been made by Sergeant Joseph Lacky to the Board of Officers which had investigated Branch Exchange 379 and stated that the sergeant had died prior to the trial. The prosecution objected and the court sustained the objection (R 395).

Technical Sergeant Floyd H. Benson, 3775th TC Truck Company, traded at Branch 379. Cigarettes originally sold at ₱1.00 per carton and then they went up to ₱1.25. The men complained and he went to the accused who explained the prices were those fixed by the Army Exchange Service. He belonged to the Cosmocrat Club when it was in operation and the club had purchased beer at ₱4.80 per case from accused. He saw a price list on the bulletin board in the Branch Exchange 379 on Espana (R 397-399).

Pedro Gavino, a farmer residing in Camiling, Tarlac, testified that he worked in Branch Exchange 379 selling beer, coke and ice cream. He charged ₱.25 per can for cold beer, ₱.10 for Coca-Cola, ₱.30 for one "dip" of ice cream and ₱.60 for the "double dip." This was in accordance with his instructions from accused (R 400). Private First Class James B. McGown was the non-commissioned officer in charge of the theater located near Branch Exchange 379. Weekly attendance at the theater ran close to 1500 and after the performances the men would visit the post exchange. At the request of accused he acted as an observer in the exchange watching for "unauthorized civilians" and to see if the girls overcharged. On one occasion he saw an overcharge but the soldier protested and the accused corrected the sale (R 402). Staff Sergeant Joseph B. Cole, 3448th TC Truck Company, traded at Branch Post Exchange 379. In addition to the battalion personnel he saw Filipino Scouts trading at the post exchange and assumed that all the white customers were from the refrigerator company. Sergeant Cole stated that he paid ₱1.20 for cigarettes in November, ₱1.30 in December and ₱1.50 in February (R 403-405).

Staff Sergeant John H. Smith, 3775th TC Truck Company, was steward at Branch 379 and slept in a room about 30 feet from the store. There was a small safe in his room and he carried the key. The accused did not have a key thereto but had ordered him to keep all critical items in this safe. He complied with this order. Cigar boxes in the safe contained money he had "taken up from the girls on the daily sales." When the post exchange was closed Sergeant Smith had ₱1500.00 in the safe which was his personal property. The rest of the money belonged to the post exchange. As steward, Sergeant Smith watched the girls to see that they did not overcharge. The accused instructed him to do this. The witness stated that he never saw anyone "outside the battalion" use the post exchange, excepting however some carpenters and military police from "B" Company, 738 MP Battalion (R 406-410).

On cross-examination the witness stated that he did not know of any instance whereby accused was requested to hold money for individuals for safe keeping and repeated that all the money in the small safe in his room excepting ₱1500.00 was post exchange funds. He also had about 30 watches and other critical items in the safe. "SI and I" prices were the prices authorized by the Army Exchange Service. Sergeant Smith stated that he never saw "SI & I" price lists posted in the Post Exchange. He had told the accused that he had ₱1500.00 in the safe. When the accused took post exchange receipts to the Army Exchange Service he had to come to the witness in order to get the safe opened (R 414).

Angelica Rito, a student at the Philippine University, testified that she had known the accused for a year and that in December she turned over to him ₱7,170.00 for the purpose of finishing her education in the United States. The money was earned through buying and selling goods back and forth to the provinces (R 418-419). After the arrest of accused a Captain Jagoe came to her and stated that the accused was going to marry another girl. Miss Rito thereupon gave him a statement because this made her angry. The statement was to the effect that she had never turned any money over to the accused but it was false because she had given him the money. She still has confidence in him. On cross-examination she stated that she had worked at the post exchange but terminated her employment because accused stated that inasmuch as they were lovers it did not look nice. She stated that she had no intentions of marrying accused. The receipt, Defense Exhibit P,9, was given to her in January because accused was busy at the time she gave him the money. (R 420-422)

First Lieutenant John R. Joiner, 221 Quartermaster Battalion, testified that he was a member of the board that investigated Branch Exchange 379. On the night of 14 February 1947 he helped count the money in the large safe. They found about ₱35,000.00 in this safe and the witness remembered that some of the money which was in the boxes, envelopes and bags had names of persons written thereon (R 432).

After being advised of his rights as a witness the accused elected

to remain silent (R 433).

5. Specifications 1 to 6 inclusive of Charge I are identical except as to the dates and the total strength alleged. It is averred in each specification that, with intent to deceive, the accused officially reported to the Army Exchange Service that the strength to be served by Branch Exchange 379 was a number shown to be equal to the total strength of units which he listed, the report being known by the accused to be untrue. By comparison of these certified strength reports with the morning reports of the units listed it is conclusively shown that the certified strength was far in excess of the actual strength of the units and one of the units listed, the 281st Quartermaster Battalion, was not even located in the Philippine Islands. The certified strength being admittedly false, the defense contended vigorously that even though this be true there was no intent to deceive inasmuch as Branch 379 served transients and personnel of other units, located within the general area of the exchange. It is noted that the morning reports carried attached troops. However, assuming that men from organizations not listed did use the exchange at various times, and that the number of these persons was not susceptible of any definite determination, the accused did not certify that any such persons were "to be served" by his post exchange. The quantity of merchandise allowable to the exchange was governed by the strength certified to be served. Even though the accused may not have drawn the total amount of merchandise allowable on such falsely certified strength reports, the strength certified in every case is so greatly in excess of the actual strength as to leave no doubt but that these reports were executed, as the court found, with the intent to deceive. And further, they appear to have achieved such deception. We find no other motive for falsely certifying the strength of these units than to deceive the Army Exchange Service, thereby procuring excessive supplies. These reports were official statements and the deception accomplished by means thereof under the facts shown was in each instance a violation of Article of War 95 (CM 252281, Claros, 2 BR (ETO),299,306; CM 208545, Polk, 9 BR 15).

Specification 1 of Charge II alleges in substance that accused grossly neglected to provide proper supervision over the exchange and its accounts. Paragraph 10a(4), Section II, AFWESPAC Regulations No. 76-5, heretofore set forth in detail,provided that the exchange officer would not permit an accumulation of funds in the exchange office in excess of business requirements. When the exchange was inspected on 14 February 1947 there was found in the large safe about ₱35,000.00 which the accused asserted were Post Exchange funds. No deposits had been made for two weeks prior thereto although the Army Exchange Service was located ten miles from Branch 379 and accused appears to have had adequate transportation. Paragraph 10a(8), Section II, of the above cited regulation, provided that the exchange officer would be responsible that the combination of each safe in the exchange "is known only to two persons, other than himself, who will be accountable for the funds safeguarded therein ***." The evidence shows

that accused himself did not have access to the safe in Sergeant Smith's room wherein critical items and receipts from the exchange were deposited. Paragraph 10a(12), Section II, of the same regulations, provided that the exchange officer would be responsible that no officer or employee of the exchange accepted or received any gift, privilege or perquisite from vendors or vendess of the exchange. The evidence conclusively shows that the employees accepted "tips" as they described the practice, by keeping the change. According to some of the witnesses, this was done with consent of the customer or at his behest. Others stated that the overall scheme was to overcharge except in the case of officers and non-commissioned officers who were suspected of knowing the "real" price. The accused undoubtedly knew of this practice to accept tips and to overcharge because he and Sergeant Smith collected the money. That no effort was ever made to segregate the excess at the close of the day's business is but further evidence that the practice was to collect all the money, ascertain as near as possible the accountability for the month, deduct the allowable one per cent shortage, or thereabouts, turn in the accountability and retain the balance. We conclude therefore that accused's neglect to properly supervise the exchange was of a willful nature and amounted to gross neglect (CM 257824, Cox, 50 BR 179,202).

Specification 2 of Charge II alleges that accused distributed bonuses to the civilian employees in violation of the quoted regulations. Witnesses for both the prosecution and defense testified to receiving bonuses of ₱30.00 or ₱40.00 per month. This was paid by the accused in cash and was in addition to the regular salaries which were paid by check. The defense witnesses explained that the bonus was for long hours or extra work. Victoria Solis testified that she remained after hours to help accused sell and deliver 400 cases of beer to a civilian at ₱10.00 per case. She retained ₱4.80 per case as post exchange receipts for the beer which had been charged to her and the accused retained the balance of the sale price. If this be the kind of overtime employment engaged in, we understand, as did the court, the function of the "bonus" in the scheme of operation of the post exchange. But whatever the purpose may have been, to reward the faithful or otherwise the payment to the employees of money over and above their salaries was illegal, being in direct violation of the regulations.

Specification 3, Charge II, alleges that accused failed to properly account by failing to turn over to the Army Exchange Service monies accumulated as overages from about 1 November 1946 to about 14 February 1947. We have examined the sales books and slips and find ample evidence of overcharges, although we realize, as the court must have been convinced by the evidence, that the plan of operation did not contemplate listing on the sales slips the price actually collected. As one witness stated, such listing would reveal the overcharges. And further, the payment of bonuses and giving of presents from the assets of the exchange would tend to indicate that overcharges were being made. When the post exchange was closed on 14 February 1947 accused pointed to the money in the safe as being post exchange

funds. The accounting revealed a shortage of ₱8,890.98 exclusive of the funds in the safe. The safe contained about ₱36,000.00 or an overage of about ₱21,000 when considered as funds of the exchange. On more mature consideration, and by his representations made to a board of officers, it was contended that a major portion of this money was being held in trust by the accused for safekeeping or other purposes.

The court-martial, after hearing all the witnesses and scrutinizing all the so-called receipts which were admitted in evidence, concluded that the funds in the safe over and above the accountable shortage were overages accumulated from time to time belonging to the exchange and should have been turned in. Whether this money be construed as an accumulation of tips, which it is shown was illegal to accept; overcharges made against unsuspecting purchasers; or the proceeds from black market transactions as some of the evidence indicates, it was acquired in the operation of the exchange and with regard to the parties collecting such money, it was an overage properly accruing to the Army Exchange Service. This is true unless, however, the court accepted the testimony tending to show that the money was being held in safe keeping for others. Miss Rita asserted that she gave accused ₱7,170.00 to deposit in the United States for her education and that the money was earned selling goods in the provinces. Although she stated that she did not intend to marry the accused, when told by the CID that he intended to marry another she disavowed giving him any money. The court was not compelled to resort to mathematics in order to give proper weight to her testimony. We have examined the alleged receipts which Captain Mann testified were presented to his board of officers. In the light of all the testimony, the court appears to have not been favorably impressed by these documents. We conclude, as did the court, that the funds in the post exchange safe in excess of the stated shortage were overages accumulated at various times within the period alleged. This would include at least such funds in the small safe which Sergeant Smith stated were post exchange receipts collected from the employees.

Captain Mann, the accuser, testified that he was not sworn and did not believe accused guilty of the charges and specifications. He was not given a direct order to prefer the charges but was told that it was appropriate for him to prefer the charges. The fact that Captain Mann was not sworn and that he indicated his disbelief in the truth of the allegations do not operate to invalidate the proceedings. (The Jurisdiction of the court is not predicated upon compliance with the provisions of Article of War 70 relating to the preferring of charges. Such provisions are administrative and directory in character and it was the function of the court-martial to determine the question of the guilt or innocence of the accused.) (CM 210612, Maddox, 9 BR 277-281; CM 268240, Closson, 44 BR 235,238; CM 280385, Warnock, 17 BR (ETO), 163,180.)

6. War Department records show that accused is 34 years of age and unmarried. He graduated from Arkansas State College in 1939 and received

a Master of Arts Degree from Indiana University in 1942. He was commissioned a second lieutenant, AUS, at Fort Benning, Georgia, on 19 May 1945. Efficiency reports for the year 1945 rate him "Excellent" and for the year 1946 "Superior."

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

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Cole, Jr., Judge Advocate

(342)

JAGK - CM 323606 1st Ind SEP 26 1947

JAGO, Dept of the Army, Washington 25, D.C.

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 First Lieutenant Benjamin J. Johnson (O-1335297), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of making six false official reports with intent to deceive the Army Exchange Service regarding the strength of units to be served by his post exchange, in violation of Article of War 95; grossly neglecting to supervise the exchange and the accounts thereof, distributing bonuses to the employees and failing to turn over to the Army Exchange Service monies accumulated as overages, all in violation of Article of War 96. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

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

From November 1946 to February 1947, inclusive, the accused was the exchange officer of Branch Post Exchange 379 located near Manila, P.I. The exchange was established for the convenience of the personnel of the 221st Quartermaster Battalion, which was composed of colored troops located in the area, but it was patronized by some white troops, Filipino Scouts and civilians. Army Exchange Service regulations provided that supplies would be issued to the branch or field exchanges on the basis of the strength of the units served, as certified by the exchange officer. Beer was issued at the rate of two cases per month per man and cigarettes at the rate of five cartons per month per man.

On 4 November 1946 accused certified in writing to the Army Exchange Service that the strength of the units to be served, which units he listed, was 2170; on 13 November, 2593; on 2 December, 2934; on 5 December, 3220; on 6 January, 2877; on 4 February, 2709. He drew supplies based on these reports. One of the units he listed was in Japan and could not have been served by his post exchange. The morning reports of the units actually in existence in the area and which he listed showed a total strength as follows: 4 November, 1082; 13 November, 883; 2 December, 823; 5 December,

1044; 6 January, 907; 4 February, 906 (Charge I and its specifications).

The evidence shows that accused instructed the civilian employees of the post exchange to and that they did overcharge persons, including enlisted men and civilians, for merchandise purchased. Some of the exchange supplies were sold by accused to unauthorized persons at excessive prices. The employees collected "tips" by keeping change on sales. This was with the knowledge and consent of accused. In addition to their regular salaries accused paid the employees cash bonuses varying in amount from ₱30 to ₱40 per month. He also gave them Christmas presents from the stocks of the exchange. On 14 February 1947 an inspection was made of Branch Exchange 379 and about ₱35,000.00 were found in the exchange safe. The accused stated that this was money belonging to the exchange. An inventory and accounting which did not cover the ₱35,000.00 showed a shortage of about ₱8,000.00 (Charge II and its specifications).

The accused did not testify at the trial. After the post exchange was closed he appeared before a board of officers and produced alleged receipts and statements signed by him tending to indicate that about ₱16,000.00 of the money found in the safe belonged to various persons whom he named and that it was being held by him for safe keeping. The court-martial, after hearing all the evidence concluded that the money found in the safe was in fact, as accused originally stated, property of the post exchange.

Exchange funds and critical items were found in another safe to which only the exchange steward, a sergeant, had access. This was in violation of Army Exchange Service regulations, as was the overcharging, collecting of "tips," selling to unauthorized persons and the paying of bonuses to the employees.

4. The accused is an intelligent, well educated colored officer. He operated a flourishing, well stocked post exchange and had the reputation among his fellow officers as being efficient and honest. However, the conclusion is inescapable that he executed the false strength reports intending to deceive the Army Exchange Service, thereby obtaining a vast amount of merchandise in excess of that allowable and that by sales at illegal prices and to unauthorized persons he accumulated overages which were not being credited to the exchange. He was not charged with peculations or with realizing personal profit.

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

5. On 14 July 1947 Mr. Franklin H. Williams of New York, attorney for the N.A.A.C.P., appeared before the Board of Review in behalf of accused and filed a paper alleged to be a certified true copy of an affidavit of one Anita Cerdon stating that she gave the accused ₱22000.00 in 1946 on his

promise to marry her. Mr. William H. Quasha, Manila, P.I., special defense counsel, appeared before the Board of Review prior to the receipt of the record, made oral argument and filed a brief.

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

3 Incls
1. Record of trial
2. Form of action
3. Brief filed by special defense counsel

(GCMO, (DA) 6, 13 Oct 1947).

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323619

UNITED STATES v. Privates GRACIANO LOPEZ (10330071), and JOSE M. PIMENTEL (10328712), Headquarters & Headquarters Company, 25th Replacement Depot (PS).	)	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at APO 707, 28 March 1947. Both: Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.

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

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

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

CHARGE I: Violation of the 84th Article of War.

Specification: In that Private Jose M. Pimentel and Private Graciano Lopez, Headquarters and Headquarters Company, 25th Replacement Depot (Philippine Scouts), acting jointly in pursuance of a common intent, did, at or near Alabang, Rizal, Philippine Islands (APO 900-2), on or about 7 December 1946, wrongfully dispose of two (2) tires of the value of about $65.00, issued for use in the military service.

<u>As to accused Pimentel only</u>:

Charge II: Violation of the 96th Article of War. (Disapproved by the Reviewing Authority).

Specification: (Disapproved by the Reviewing Authority).

Accused Pimentel pleaded not guilty to and was found guilty of both Charges and Specifications. Accused Lopez pleaded not guilty to and was found guilty of Charge I and its Specification. Accused Pimentel 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. Accused Lopez was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involves a finding that the accused did, at the time and place alleged, wrongfully dispose of two tires of some value, issued for use in the military service, disapproved the findings of guilty of Charge II and its Specification, approved the sentences, but reduced the period of confinement as to each accused to six months. The Branch United States Disciplinary Barracks, Camp Cooke, California, was designated as the place of confinement and the record of trial was forwarded for action pursuant to Article of War 50½.

3. Second Lieutenant Diogenes Hasal, Provost Marshal of the 25th Replacement Depot, testified that on 7 December 1946, he received a telephone call from a Sergeant Pizan, the motor pool Sergeant, who reported that one of the tires on a 1½ ton truck was changed (substituted for a civilian tire) and that the accused were suspected (R. 8). As a result of information obtained from the accused through their admissions, which were excluded from evidence, Lieutenant Hasal went out to the residence of a civilian who was named by the accused, investigated the tires that were in the civilian's possession, made a note of the serial numbers on the tires, checked them and found out that the tires, reported to him as missing, were on the civilian truck (R. 8-9).

An extra-judicial statement signed by the accused Pimentel was admitted into evidence as Prosecution's Exhibit 3 (R. 11). In this statement, Pimentel confessed, in pertinent part, that at about 0300 hours, 7 December 1946, he took a 1½ ton truck out of the Motor Pool of the 25th Replacement Depot (PS) on a false trip ticket made by himself; that he then went to Alabang, Rizal, contacted a civilian and offered to trade the new tires which were on the 1½ ton truck for the old tires which were on the civilian's truck, for 28 pesos; that the civilian accepted the offer and he (accused) made the trade and accepted the 28 pesos; that when he (accused) returned to the 25th Replacement Depot Motor Pool at 0600 hours, he was instructed to report to the Provost Marshal for investigation (Pros. Ex. 3).

An extra-judicial statement of accused Lopez was properly admitted into evidence in which he confessed, in pertiment part, that at 0300 hours, 7 December 1946, he accompanied accused Pimentel to Alabang, Rizal; that at Alabang, Pimentel traded two tires that were on their truck for tires that were on a civilian's truck; that when they returned

to the Motor Pool at 0600 hours, he was instructed to report to the Provost Marshal for investigation (Pros. Ex. 4).

First Lieutenant Milton Terry, Company Commander of Company "B", 50th Military Police Battalion, APO 707, testified that the size of the tire that goes on a 1½ ton vehicle is 900 x 16 and that the value of such a tire is shown in an official price guide issued by Ordnance (R. 15).

After being advised of their rights as witnesses, each accused elected to remain silent (R. 13).

4. It is to be noted that the Specification of Charge I, in which both accused were charged jointly with wrongful disposition of two tires issued for use in the military service, in violation of Article of War 84, and upon which charge both accused were convicted, does not specify the manner in which the disposition of the tires was effected. However, for the purpose of this holding and for the reasons hereinafter set out, the legal sufficiency of the Specification will be assumed.

5. With respect to the evidence, an important question presented by the record is, whether there is sufficient proof of the corpus delicti outside of the confession. The Manual for Courts-Martial, 1928, paragraph 114a, provides:

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. * * * In a case of alleged larceny 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 the rule."

Aliunde the confessions and admissions of accused the only purported evidence even remotely related to proof of the corpus delicti is to be found in the following testimony of Second Lieutenant Hasal:

> "* * * Sgt Pizan, the motor pool sergeant, called me on the phone and reported to me that one of the tires was changed from the truck, a 1½-ton * * *.
>
> * * *

"TJA: Lieutenant Hasal, when you found out that two tires were gone from a vehicle, did you check on those tires?
WIT: I took down the serial numbers of the tires, the one that was pointed out by Felix, the civilian, and the rest of the tires that was in the possession of that civilian, we checked their serial numbers.

* * *

"I went there [civilian residence in Alabang] personally and the civilian, Felix, pointed the tire that was changed.

* * *

"Q. And when you went out there, you found that the tires were missing on Felix's truck?
A. Yes, sir.
Q. And you checked that by means of the serial numbers?
A. Yes, sir" (Emphasis in each instance supplied).

It is obvious that the personal knowledge of the witness was limited to his inspection of tires found in the possession of a civilian. Beyond that point his statements are relegated to hearsay as based upon what was told him by others respecting the origin and identity of the tires. To permit the treatment of such testimony as evidence would be to deprive the accused of his right to cross-examination of the person making the original statement (Dig. Ops. JAG, 1912-40, Sec. 395 (22)). Upon elimination of the testimony which is hearsay, and that which is conclusion obviously based on hearsay, there remains no legal evidence in the record, sans the accused's confessions, to establish or even tending to establish, that the tires found in the possession of the civilian, Felix, were taken from the possession of the Government or that they were ever "issued for use in the military service."

In the absence of any competent proof of the probable commission of the offense alleged, consideration of the confessions was improper and the evidence is not legally sufficient to support the findings of guilty (CM 215241, Scott, 10 BR 378; CM 211261, Sedlak, 10 BR 55, and cases cited therein).

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

Edward T. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

Joseph T. Brack, Judge Advocate.

NOV 26 1947

JAGN-CM 323619 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Philippines-Ryukyus Command, APO 707, c/o Postmaster, San Francisco, California.

1. In the case of Privates Graciano Lopez (10330071), and Jose M. Pimentel (10328712), Headquarters & Headquarters Company, 25th Replacement Depot (PS), I concur in the holding by the Board of Review and recommend that the findings of guilty and the sentence as to each accused 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 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 323619).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323640

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
v.	)	Trial by G.C.M., convened at APO 707, 3 May 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private SABAS PAMINTUAN (10336349), 8131st Service Detachment (PHILRYCOM PP & PD).	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Sabas Pamintuan, 8131st Service Detachment (PHILRYCOM PP & PD), did, at 8131st Service Detachment (PHILRYCOM PP & PD), APO 900 on or about 9 April 1947, feloniously take, steal and carry away one Spartan Radio, Serial No. 505928, value about $23.25, the property of Technician Fifth Grade George Abdou and one Spartan Radio, Serial No. 507247, value about $23.25, the property of Technician Fifth Grade Wilber D. Starcher, total value of $46.50.

He pleaded not guilty to, and was found guilty of, the Specification and 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 for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks,

Camp Cooke, California, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The only question requiring consideration is whether the evidence is legally sufficient to support a finding that the stolen property had a specific value of $46.50, and whether the findings of guilty are legally sufficient to support the sentence.

4. The accused was found guilty of stealing two radios, each of the alleged value of $23.25, and of a total alleged value of $46.50. The only evidence submitted as to the value of the radios is the testimony of Technician Fifth Grade Wilbur D. Starcher who stated that he purchased his radio at the "PX" and paid 46.50 pesos for it which was the standard price (R. 8). Both radios were admitted in evidence as exhibits and were before the court (R. 7, 17; Pros. Ex. A and C).

5. It has been long established that except as to distinctive articles of Government issue 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 is market value; that is, what it is worth in the open market at the time and place of the offense (CM 217051, Barton et al, 11 BR 193; TM 27-255, par. 100b). Proper evidence of market value is the testimony of someone who, by virtue of his knowledge and experience, knows what that value is. It does not appear that Technician Fifth Grade Starcher was qualified or presented as an expert witness for the purpose of testifying to the market value of his own radio. His testimony as to the purchase price of his radio prior to the theft but without indicating the date of the purchase, is of no probative value in determining the market value of the radio at the time and place of the taking. In view of the insufficiency of evidence as to the specific value of either radio, no reasonable basis was established upon which the court could legally predicate a finding that either radio had a specific value in excess of $20.00 or that both radios had an aggregate value in excess of $20.00. The fact that the radios were physically in evidence and before the court does not cure the deficiency of proof since the market value of a used radio is not a matter of such fixed and common knowledge as to justify a court in taking judicial notice of such value (CM 213952, Meyers, 10 BR 296). To permit the court on its inspection alone to find specific market value of an article "would be to attribute to the members of the court technical and expert trade knowledge which it cannot be legally assumed they possessed" (CM 208481, Ragsdale, 9 BR 14). However, under paragraph 149g, MCM, 1928, page 173, the court was authorized to find, from its visual inspection of the radios and from its experience, that the radios had some value less than $20.00. It follows that so much of the findings as pertain to the total value of both radios in excess of $20 cannot be sustained.

Larceny of property of a value of $20.00 or less will support a maximum sentence to confinement of not more than six months (par. 104c, MCM, 1928).

6. For the reasons above 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 as finds that the accused did, at the time and place alleged, feloniously take, steal and carry away one Spartan radio, serial number 505928, of some value, the property of Technician Fifth Grade George Abdou, and one Spartan radio, serial number 507247, of some value, the property of Technician Fifth Grade Wilbur D. Starcher, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of six months.

Edward T. Johnson, Judge Advocate.

Joseph T. Brack, Judge Advocate.

On Leave

_____, Judge Advocate.

JAGN-CM 323640 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Philippines-Ryukyus Command, APO 707, c/o Postmaster, San Francisco, California.

1. In the case of Private Sabas Pamintuan (10336349), 8131st Service Detachment (PHILRYCOM PP & PD), I concur in the holding by the Board of Review and recommend that only so much of the finding of guilty of the Specification be approved as finds that the accused did, at the time and place alleged, feloniously take, steal and carry away one Spartan radio, serial number 505928, of some value, the property of Technician Fifth Grade George Abdou, and one Spartan radio, serial number 507247, of some value, the property of Technician Fifth Grade Wilbur D. Starcher, total 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 six months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 323640).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGN-CM 323663

UNITED STATES	)	PORT OF LEGHORN
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 22-24 April 1947. Dishonorable discharge and confonement for ten (10) years. Disciplinary Barracks.
Private MICHAEL A. DeBARTOLO (31308121), 61st Station Hospital.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Michael A. DeBartolo, 61st Station Hospital, then of 429th Replacement Company, 29th Replacement Battalion, did, at or near San Leucio, Italy, on or about 15 October 1944 desert the service of the United States and did remain absent in desertion until he surrendered himself at Rome, Italy, on or about 11 November 1946.

The accused pleaded not guilty to, and was found guilty of, the Charge and its 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 for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The only question which it is necessary to discuss in this case is the action of the court in denying a defense motion for a continuance. For the reason that in the opinion of the Board of Review such action must be held in this case to have prejudiced the substantial rights of the accused, it is not necessary to set out all the evidence in full detail, and the evidence is therefore summarized briefly only so far as is necessary for consideration of the court's action.

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

An extract copy of a morning report for 15 October 1944 of the 429th Replacement Company, 29th Replacement Battalion, 7th Replacement Depot, was introduced in evidence as Prosecution Exhibit 1. The entries thereon included a delayed entry showing accused as having gone absent without leave as of 30 May 1944 and a current entry showing accused as in an absence without leave status and dropped from the rolls on 15 October 1944.

Captain Kenneth C. Anderson testified that on 11 November 1946 at about 1800 hours he saw accused at the Provost Marshal's Office in Rome. Accused was then dressed in civilian clothes and had been brought to his office by Corporal Hiesonik, a military policeman. The witness ordered accused confined (R. 14, 15).

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

Captain Peter Borak, M.C., testified that he was Chief of Neuropsychiatry at the 61st Station Hospital near Leghorn, Italy (R. 18, 19). He examined the accused about 8 February 1947, which consisted of a physical examination and a neuropsychiatric direct examination (R. 19). Based upon the examination, and the history of the case from statements of the accused only, it was his opinion that accused was responsible for his acts at the time he went absent (R. 20), and was able to adhere to the right (R. 21). The physical examination showed accused had been wounded on the right elbow (R. 22). This wound could have led to the amnesia condition claimed by the accused (R. 23). From the history given by accused, it was the witness' opinion that accused was not suffering from amnesia, but there is a remote possibility he may have been (R. 23). The type of amnesia indicated by accused's story usually lasts only a few weeks and it would be an exceedingly unusual case to last two and one-half years (R. 24), or that accused would recover within a period of 15 or 20 minutes after such a long period (R. 26). If during the period of the alleged amnesia the accused knew his name, corresponded with relatives in the United States, did normal physical labor and found relatives in Italy, this would indicate that accused was not suffering from amnesia (R. 24). The functional type of amnesia could not be determined by a physical or neurological direct examination and it is that type that is precipitated by unusual stress or physical or emotional demands (R. 30).

This witness further testified that it was his opinion, and only an opinion, that accused did not have amnesia, and that he could not prove that accused did or did not have amnesia as that would depend upon evidence "produced" at the period of his amnesia which evidence he did not have. The witness agreed with the statement in a written report of another examination of accused by Captain Milloff, a former chief of Neuropsychiatry at the 61st Station Hospital, that "It is impossible for me to say whether this soldier did or did not have an amnesic episode" (R. 32).

The accused, having been duly informed of his rights, elected to be sworn as a witness and testified in his own behalf. He stated that he was inducted in April 1943, went overseas in September 1943, landing in Bizerte, North Africa, and went from there to Italy. Around December of 1943 his unit went into action near Venefro, Italy, and accused was wounded in the right elbow (R. 34, 35). The unit went into action at midnight and accused was wounded about dawn (R. 117, 118). He was treated at a "rear line" hospital and then sent to a hospital at Oran, Africa. He was there until after New Years 1944, and then was returned to Italy (R. 34-36). He remembers returning on the boat but does not remember getting on or off the boat. The last thing he remembers was walking among a group of tents in Naples. This was about February or March of 1944 (R. 37, 40). The next thing he remembers is walking the streets of Rome. He did not see any soldiers and he stopped a civilian and asked where the nearest American Unit was. He was directed to the UNRRA building and he went in. He was taken to the Director who telephoned Rome Headquarters and the military police came and took him to jail (R. 40-41). This occurred on 11 November 1946 (R. 43). During the period from his walking among the tents in 1944 to November 1946 he remembered nothing that happened, he did not recall seeing any relatives or friends (R. 43), and did not know whether he received any mail from home. Three of the prosecution's witnesses, Luigi Vallarelli, Pasqua DeBartolo, and Francesco DeLucia, who were called later in rebuttal, were brought into the court room and accused stated he did not know them. He also stated he did not know whether or not he was ever in Bari or Terlizzi, Italy (R. 44, 45, 47). His stepmother's name is Helen DeBartolo and she runs a beauty shop named Connie's Beauty Shop in Dorchester, Massachusetts (R. 48).

6. The evidence for the prosecution in rebuttal is summarized as follows:

Seven Italian witnesses who had known the accused during the period of his claimed amnesia were called by the prosecution. Aldo Leuzzi, testified that in November 1945, while he was in Rome visiting an aunt, he and accused met in a bar and introduced themselves. He remembered accused's last name as DeBartolo. Though he saw him three or four times, they only spoke the first time, on which occasion they exchanged a few words on the economic situation of Italy. Accused appeared

normal (R. 50, 54). The other witnesses had known accused at Terlizzi and at Bari, towns in Southern Italy, from sometime in the summer of 1946 through September and October of 1946. Luigi Vallarelli was a friend of the accused and met him in Terlizzi in August 1946 (R. 6). Pasqua DeBartolo was accused's aunt and accused visited her three times at Bari, in the company of Vallarelli, or accused's cousin, also named Michael DeBartolo (R. 108). Lucia DiBaria was a maid in the house of Michael DeBartolo, the cousin of accused, at Terlizzi, with whom accused lived from the summer of 1946 through October 1946 (R. 95, 96). Francesco DeLucia employed accused for about two weeks in a quarry near Terlizzi, and though not sure of the year, he said it was in 1945 (R. 77, 78). Lucia DiBaria placed the date of this employment as 1946 when she worked for the cousin (R. 100). Vallarelli also placed this in 1946 (R. 62). Tommaso DeBartolo, no relative of accused, also knew accused in Terlizzi, and accused wrote a letter in English for Tommaso to Tommaso's father in the United States (R. 81, 82). Bobbo Bartolomeo, a son-in-law of the witness Pasqua DeBartolo, and who lives in Bari, received a money order from accused's father in the United States, amounting to 11,000 lire, or $50, payable to him, but for Pasqua DeBartolo (R. 114, 146). Of this sum Pasqua gave 1200 lire to accused (R. 110). Some of these witnesses stated that accused used, or was introduced to them by, his own name, Michael DeBartolo (R. 81, 95, 108). Vallarelli said accused was introduced to him as "Mike" and he just learned his last name "lately" (R. 60). Vallarelli stated accused spoke of his mother in the United States and stated that his father lived in Squantum (R. 65, 164). Accused also told Vallarelli that accused's cousin, Michael DeBartolo, had gone to Salerno and brought the accused to Terlizzi (R. 63). In September 1946 Vallarelli advised accused to surrender himself and accused said that he would, and that he would "try to look like a man affected by amnesia." Accused stated his mother told him to do this (R. 70, 72). Accused referred to his mother in the United States as "Connie" (R. 65, 66). Francesco DeLucia just knew accused as "Mike" (R. 77). Bobbo Bartolomeo said he did not know accused (R. 146). Accused was always dressed in civilian clothes (R. 52, 60, 77, 92, 108). Accused told Vallarelli he received cablegrams, packages and mail from America (R. 61, 62) and letters addressed to Michael DeBartolo from the United States were received at the house of the cousin, Michael, where accused lived in Italy (R. 104). Lucia DiBaria testified that accused was sick in bed for two weeks in the fall, 1946 (R. 100), and was dreamy eyed and absent minded (R. 103). The aunt stated he looked "like a foolish man" and was pale (R. 111). Tommaso DeBartolo also stated accused appeared pale and had a dreamy look in his eyes (R. 84).

7. In sur-rebuttal, the defense called to the stand two other Italian civilians from Terlizzi who had known accused in September and October of 1946 and who had been brought to court by the prosecution, but not called to testify. One of the two, Tambone Biagio, testified that accused appeared "like a person sleeping," talked very little, was

pale and thin and did not appear normal (R. 171, 172) and the witness thought accused was "a little unbalanced mentally" (R. 175). The other witness, Niccolo D'Elia, stated accused looked "like a half stupid person" and did not look well (R. 178). Tambone Biagio further testified that when he was questioned by a CID agent he began to tell about accused's ill condition and was stopped, the CID agent saying "Don't bother about those things" (R. 173, 174). The accused was recalled by the defense and testified that he did not know any of the Italian witnesses who testified (R. 180).

8. During presentation of the prosecution's rebuttal evidence, the defense, at the opening of the session of the court on 23 April, the second day of the trial, made a motion for a continuance, requesting two weeks (R. 87, 88). After argument by both sides, the court postponed its decision until after the witnesses for the prosecution were heard (R. 94), at which time the court denied the motion (R. 169).

There can be no question but what, as a matter of law, the granting of accused's motion was a matter for the discretion of the court, and the only question now to be determined is whether the action of the court in refusing to grant it was an abuse of such discretion. If it was then the findings and sentence of the court cannot be sustained (CM 236323, McClain, 22 BR 379).

We do not here attempt to determine the sufficiency of the evidence actually in the record to support the findings and sentence but it may certainly be said from an examination of such evidence that the question of whether or not accused was suffering from amnesia during the period of his absence was not conclusively settled.

9. In support of the motion for a continuance, the defense counsel, Lieutenant Colonel Weller, stated that the defense was surprised by the testimony of prosecution's witnesses. The accused was not advised by the investigating officer or anyone else about the Italian witnesses, Aldo Leuzzi, Luigi Vallarelli, Francesco DeLucia and Tommaso DeBartolo, and did not even then (i.e. at the time of this argument) know how many more similar witnesses the prosecution might have. He further stated that before the trial, on the preceding Friday (18 April) the trial judge advocate had informed the defense that the prosecution would produce the officer from Rome to whom accused was turned over, and a morning report. At that time defense counsel informed the trial judge advocate that they would produce the doctor (Captain Borak) and the accused. Consequently the defense had been surprised by the prosecution's witnesses and urged that the defense should be given the opportunity of at least fourteen days to make an investigation at Terlizzi, where the evidence then showed that accused spent considerable time, and that they should have an opportunity to find out who the witnesses of the prosecution were (R. 87, 88).

The trial judge advocate admitted he had told the defense only that he was going to put in evidence the morning report to establish the original absence, and the testimony of the officer to establish the return to military control, but stated the prosecution was not "bound to anticipate" the defense of amnesia. He stated that the Italian witnesses were obtained subsequent to the formal investigation under Article of War 70 (R. 89). The assistant trial judge advocate stated that they were obtained "by the efforts and the work of the prosecution in this case in an effort that we, as the prosecution, could produce to this court in rebuttal a true picture of the witnesses that we had secured in the case that we are now trying" (R. 89). In addition, he stated, "There are no funds afforded an investigating officer to make witnesses available for cross-examination by an accused when he has to go probably all over Italy to secure those witnesses, if he knows anything about them."

The trial judge advocate did not formally object to a continuance, but stated he did not see what would be gained by it (R. 88). The court requested the defense to state what it expected to prove by any witnesses that might be found in the event of a continuance, so that the court might determine the materiality of the evidence, or afford the trial judge advocate an opportunity to stipulate (R. 91, 92).

Defense counsel pointed out that the defense of amnesia had been known for many months, but that the defense knew nothing of the surprise Italian witnesses, and had been able to get no information through the accused except what he had stated in his testimony, and had no other way of getting any information (R. 88). They had never heard of the town of Terlizzi until they heard the testimony of prosecution's witnesses in rebuttal (R. 90).

10. With respect to the element of surprise to defense, it is noted that the Charge Sheet does not list any of the prosecution's witnesses except Captain Anderson, who testified concerning the surrender of accused, and Technician Fourth Grade Hiesonik and Captain Milloff, who did not testify. The record indicates that T/4 Hiesonik was the military policeman to whom the UNRRA director actually turned over the accused upon his surrender, and that Captain Milloff was a doctor who examined accused after his surrender and who, at the time of trial, had returned to the United States. The Charge Sheet also lists the morning report for 15 October 1944 of accused's organization at the time of his absence. It is noted that the investigating officer's report, in the accompanying papers, is silent as to any other evidence. It is also noted that the order appointing the court is dated 20 April 1947 and that the trial commenced on 22 April 1947.

11. It is implied in the Review of the Staff Judge Advocate that the Italian witnesses were purposely not made known to the accused. It is stated in the review that, "It appears that accused was among friends

and relatives during the time he was in desertion. Had the accused known that the Government had located witnesses, he might have made it difficult to have them at the trial." While keeping these witnesses under cover may have been desirable and justifiable for the reasons indicated, the effect, in this case, was to preclude any knowledge of the whereabouts of accused during his absence from coming to the defense. If accused was telling the truth, obviously he was not able to give any information to his counsel. To deny that he was, was to prejudge his case. He was entitled to a fair trial, and his counsel were entitled to adequate opportunity to prepare his defense. This includes the opportunity to investigate or examine the evidence against him and to seek evidence in his behalf from any known source. Such opportunity was denied prior to trial. Although this temporary concealment of witnesses may have been justified, it does not follow that reasonable opportunity should not have been given after the prosecution had produced its witnesses.

What the defense would have accomplished if a continuance had been granted is of course not known, but it is so only because no opportunity was afforded the defense to find out what it could. It is noted in this connection that civilian counsel for the accused argued this case before the Board of Review and at that time submitted to the Board an affidavit, dated 13 May 1947 at Terlizzi, Italy, by a Doctor Giuseppe Tarlani, stating that in June 1946, he visited and observed the accused "because he was affected with pleuro-pneumonia, left lumbar, and from cerebral amnesia." Some of the prosecution's own witnesses, on cross-examination, stated accused had been sick, looked dreamy, or foolish, and like a person sleeping.

The importance of all facts about the accused during his period of absence is revealed by the following testimony of Captain Borak. On page 30, the record showed he was asked if he had made physical tests of the accused and he replied that he had. He was then asked, "Did you find any of the results of the physical tests which would confirm or tend to confirm the subjective symptoms related by the accused?" In reply, he stated, "There is only one thing that we cannot determine through a physical or a neurological direct examination, and that is the functional type of amnesia." On page 32 the record shows that he was asked if he agreed with the statement in Captain Milloff's report that "It is impossible for me to say whether this soldier did or did not have an amnesic episode." In reply, Captain Borak stated, "Yes, I do agree with that statement. It is a very important statement in respect to the psychiatric evaluation. The former statement was an opinion in respect to whether he had amnesia or not, <u>but whether I can prove that he had amnesia or not will depend entirely on the</u> evidence produced at the period of his amnesia. That I did not have at the time of the psychiatric evaluation" (Underscoring supplied). This testimony emphasizes the necessity of as complete an investigation as possible into the facts of accused's life between his absence and his return.

The record discloses sufficient facts with respect to the reasonableness of the request for a continuance so that the Board of Review is compelled

to the opinion that in its denial of the motion for continuance the court abused its discretion and its action was prejudicial to the substantial rights of the accused. It is true that in a case where amnesia is claimed as a defense, neither side may know where accused was during his absence. Of necessity, such a case must be tried on the available evidence. But in this case, the prosecution did know where accused had been, at least a part of the time, and concealed this knowledge from the defense. After the necessity for such concealment, if such there was, was gone, the defense should have been granted a reasonable opportunity, denied to it previously, to prepare its case. We do not mean to imply in this case that it is not proper to call witnesses who were not listed on the Charge Sheet nor called in the investigation under Article of War 70. Nor do we mean to assert that merely because there are such witnesses an accused is necessarily entitled to a continuance. We do mean that, on the basis of facts of this particular case, the effect of holding back such information as the prosecution had and the subsequent denial of the continuance by the court was to deny to the defense any opportunity of properly preparing its case by investigation of a known and obviously important source of evidence.

The Manual for Courts-Martial states:

> "The refusal by a court to grant a continuance where a reasonable cause is shown will not nullify the proceedings, but may be good ground for directing a rehearing" (MCM, 1928, par. 52b, P. 41).

While, in accordance with this provision of the Manual and as stated above, normally full discretion with respect to a continuance rests in the court, where it clearly appears, as in the opinion of the Board it does in this case, that an accused has been deprived of the fundamental rights to prepare and present a defense in good faith, by the action of the court in denying a reasonable continuance, the conviction should be held illegal (CM 236323, McClain, 22 BR 379).

12. For the foregoing reasons the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Edward I. Johnson, Judge Advocate.

Joseph J. Brack, Judge Advocate.

Philip R. Smith, Judge Advocate.

SEP 9 1947

JAGN-CM 323663 1st Ind
WD, JAGO, Washington, 25, D. C.
TO: Commanding General, Port of Leghorn, APO 512, c/o Postmaster, New York, N. Y.

1. In the foregoing case of Private Michael A. DeBartolo (31308121), 61st Station Hospital, I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be vacated. Upon vacation of the findings of guilty and the sentence you will have authority, under Article of War 50½, to direct a rehearing.

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 323663).

1 Incl
Record of trial

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

RECEIVED
9 SEP 1947
Judge Advocate
Section

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAGV CM 323707 29 August 1947

UNITED STATES V. Private First Class HARVEY T. MOYER (13211572), 507th Engineer Service Company, APO 65.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Fulda, Germany, 18 April 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SPRINGSTON, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Harvey T. Moyer, 507th Engineer Service Company, did, at Linden Strasse, Fulda, Germany, on or about 1930 hours on 13 February 1947, with intent to do her bodily harm, commit an assault upon Miss Dorothea Schafer, by willfully and feloniously striking and knocking her down to the ground.

The accused pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and guilty of the Specification except the words "striking and knocking" substituting therefor the word "forcing." He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record for action under Article of War 50½.

3. The evidence for the prosecution shows that on the night of 13 February 1947 the accused encountered Dorothea Schafer, a German woman,

and attempted to converse with her as the two walked abreast down a street in Fulda, Germany. Arriving at Lindenstrasse No. 10, Miss Schafer opened the garden gate, entered, "slammed" the gate behind her and told the accused to stay out (R. 6,8,9). Before she could ring the bell at that address, which was the home of her sister, the accused, according to Miss Schafer,". . .grabbed me and threw me on the ground and fell on top of me . . . He kept pressing me to the ground. I tried to get up but he kept pressing, and he tried to pull my pants down . . . When I first started crying he held his hand over my right eye, and when I started to call for help he clasped his hand over my mouth . . . First he pressed into my eye, and then when I started yelling for help he put his hand over my mouth." (R. 6,7) Miss Schafer's screams attracted several German civilians, a German policeman and several Americans whereupon the accused "got up and ran away." He was apprehended while attempting to leave the garden and turned over to the military police (R. 7,8,10,11,13-15).

During the examination of Miss Schafer by the prosecution, following are questions and answers pertinent to the character of the assault:

"Q Did he injure you at the time he was holding his hand over your face?
A No, he did not hurt me.

. . . .

Q Was he striking you at any time?
A He was constantly throwing me back down to the ground because I was squirming so hard to get away.

. . . .

Q At any time during the struggle, did he strike you or cause any bodily injury to you?
A No, nothing except my right eye was a little swollen - otherwise nothing but my stockings.

Q Did you have any indication of what caused your eye to be swollen?
A Because he grabbed into my eye slightly; it hurt me a bit."

Josef Mahr, a German policeman who first apprehended the accused, testified that a few days after the occurrence he noticed that Miss Schafer ". . . did have a slight discoloration of one eye but otherwise no injury" (R. 11).

4. For the defense, evidence was adduced on cross-examination to the effect that the accused did not strike Miss Schafer but instead merely pushed her to the ground (R. 8).

Master Sergeant Paul J. Eck, a defense witness, testified that the accused was not identified as the assailant from an identification parade

in the organization orderly room on 14 or 15 February 1947 (R. 16,17).

The accused elected to remain silent.

5. The Manual for Courts-Martial defines assault with intent to do bodily harm as:

> ". . . an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. . ." (para. 149n, MCM 1928).

In determining whether or not the above legal requisites for conviction of an assault with intent to do bodily harm, as above defined, exist in the present case, it is not the function of the Board of Review to weigh the evidence or to decide controverted questions of fact (AW 50½). Since the findings of guilty insofar as the element of ". . . specific present intent to do bodily harm . . ." (Para. 149m, MCM 1928) rests upon an inference of fact, however, it is the duty of the Board of Review to ascertain whether there is in the evidence a reasonable basis for the inference (CM 238972, Lowry, supra). In this connection the testimony adduced in the instant case shows, and the court has, as evidenced by its findings, concluded that the accused did not commit the assault upon Miss Schafer by striking her and knocking her to the ground, but rather committed whatever incursion may have taken place by forcing her down to the ground. It is clear that at no time did the accused strike Miss Schafer, and the most that can be said with respect to his act of forcing her to the ground is that, in so doing, he may have pressed his hand against her eye and placed his hand over her mouth to prevent further outcry (R. 7-11). There were no expressions of intention by the accused to do Miss Schafer bodily harm and no resulting physical injuries of any consequence. Thus the evidence does not disclose, and the findings do not reflect, any acts or manifestations by the accused which would warrant the legal inference that he intended to do bodily harm. The offense of assault and battery is, however, established by the evidence adduced (CM 229366, Long; CM 238970, Hendley).

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 as involves an assault and battery 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 two-thirds pay per month for six months.

Wilmot T. Baughn, Judge Advocate.

John G. O'Brien, Judge Advocate.

George B. Springston, Judge Advocate.

JAGV CM 323707 1st Ind 22 September 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 Harvey T. Moyer (13211572), 507th Engineer Service Company, APO 65, I concur in the foregoing holding by the Board of Review and recommend that only so much of the findings of guilty be approved as involves findings of guilty of an assault and battery in the manner found and at the time and place and upon the person alleged, in violation of Article of War 96, and that only so much of the sentence be approved as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months. Upon taking such action you will have authority to order 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 in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 323707).

1 Incl
Record of Trial

/s/ Thomas H. Green.
THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGQ - CM 323716

JUL 16 1947

UNITED STATES	)	EUROPEAN DIVISION AIR TRANSPORT COMMAND
v.	)	Trial by G.C.M., convened at Wiesbaden, Germany, 14-16 April 1947. Dismissal.
Captain JUSTIN C. LUBOJASKY (0-420612), Air Corps.	)	

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

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

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

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

Specification: In that Captain Justin C. Lubojasky, Air Corps, 1252d Army Air Forces Base Unit, European Division, Air Transport Command, Army Post Office 194, United States Army, did at or near Casablanca, French Morocco, on or about 9 January 1947, feloniously embezzle by fraudulently converting to his own use, United States Postal Money Orders of the value of three hundred dollars ($300.00); eighty-three thousand three hundred and twenty-two French Morocco Francs (MF83,322) of the official United States Army exchange value of seven hundred dollars and forty cents ($700.40); and Military Payment Certificates of the value of thirty-nine dollars and forty-four cents ($39.44) all of a total value of ten hundred thirty-nine dollars and eighty-four cents ($1039.84), the property of the Officers Club Fund, The Cazes Army Air Base Officer's Club, entrusted to him in the capacity of Custodian of the Officers Club Fund, The Cazes Army Air Base Officer's Club.

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

Specification: In That Captain Justin C. Lubojasky, Air Corps, 1252d Army Air Forces Base Unit, European Division, Air Transport Command, Army Post Office 194, United States Army, while acting in the capacity of Custodian and Club Officer of Officers Club, The Cazes Army Air Base Officer's Club, did at or near Casablanca, French Morocco, on or about 9 January 1947, with intent to deceive the Officers Club, Cazes Army Air Base, Casablanca, French Morocco, wrongfully and unlawfully officially execute a "Non-Appropriated Fund Voucher" for the said Officers Club Fund, The Cazes Army Air Base Officer's Club, in the following words and figures, to wit:

OFFICERS CLUB

1252nd AAF BU, WATB (P) EURD-ATC.

APO 524
U. S. ARMY
JAN 9 - 1947
(Date)

NON-APPROPRIATED FUND VOUCHER

I certify that I have this date (paid to) ~~(received from)~~ _____

2 Tangiers Firms

the sum of One Thousand Eighty Five Dollars 42/100 ($1085.42)
(words and figures)

FOR Payment of attached bills		@ 03636	$284.26
R D : Entertainment (Door Prizes)	676.89	@ .08658 ea	
Purchases (Liquor)	408.53	@ .09242 ea	
R C : Cash on hand		160.21	1085.42
Totals:		1085.42	1085.42

/Sgd/ JUSTIN C. LUBOJASKY
JUSTIN C. LUBOJASKY
CAPTAIN, AIR CORPS
(Custodian)

I hereby acknowledge (receipt) (~~payment~~) of above amount and do certify that payment has not been previously (received) (~~paid~~).

VOUCHER NO. 25
DATE JAN 9 1947
CHECK NO. Cash
AMOUNT $1085.42

ENTERED
CR page
DJ "
PJ " 4 W
SJ "
GJ "

Receipt attached.

(Payee)

TIRTHDAS KHUBCHAND DASWANI

65, Siaghins
TANGIER

Importer of all kinds, watches pens and lighters wholesale & retail

Tangier, 9th January 1947

SR. Al Contado Debe:

		Pesetos	
1	Watch "Dogma" 18 K.T. gold	975	00
1	" "Nonnana" 18 K.T. gold	825	00
2	" "Fell" plaque orc650	1300	00
1	" "Dogma" 18 K.T. gold	850	00
2	" "Omega" 840 pts.	1680	00
1	Chrometre "Orator"	616	00
1	" "Beaume & Mercier"	672	00
1	Watch "Siglo XX "Watt. S.centr	450	00
1	Watch "Dogma" stell	450	00
		7818	00

289.27

Fr 80,525.

Paid

7848.00

PE 1 2d = $676.89

On Reverse Side

10.30 fr - 100 pts.

1030 fr
800 pts
82,400 fr. Paid

80,525 Frs.=
Cost

8000
7818
184 Pts. rec'd in change.

EDWARD'S STORES S.A.

Mr. Cash Sale Officers Club Øca Dr
Tangier, 9th January 1947

			Frs.	Cts.	Ptas	Cts.
2	Cs	Gronosse Whisky			2600	—
1	C	King Imp. Whiskey			1000	—
1	G	Martini			295	—
1	G	Madiri Wine Dry			525	—
					4420	

(10.996) P 48.600 = $408.53

which voucher was known by him to be untrue, in that he did not pay the sum of one thousand eighty-five dollars and forty-two cents ($1085.42) of the funds of the Officers Club Fund, The Cazes Army Air Base Officer's Club, to two Tangiers Firms for the said purchases.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification of Charge I, except the words "and Military Payment Certificates of the value of thirty-nine dollars and forty-four cents ($39.44)," and the words "of a total value of ten hundred thirty-nine dollars and eighty-four cents ($1039.84)", substituting therefor the words and figures "of a total value of one thousand dollars and forty cents ($1000.40)". Of the excepted words not guilty, of the substituted words guilty, and guilty of both Charges and remaining Specification. No evidence of any previous convictions was introduced. He was sentenced to be dismissed from the Army of the United States. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Accused was custodian of the Officers' Club Fund, Cazes Army Air Base, Casablanca, French Morocco, and in such capacity on 9 January 1947 took $1050 in money orders and approximately $6.92 in cash from the club funds to purchase liquor and watches in Tangiers for use by the club. He flew to Tangiers, exchanged money orders in the amount of $750.00 and $6.92 in cash for Spanish pesetas at the rate of 27.25 per dollar and then exchanged the pesetas for French Moroccan francs at the rate of 10.3 per peseta, obtaining 212,449 French Moroccan francs

for the $756.92 (R. 13, 91). At the same time accused gave the three remaining $100.00 Money Orders to Captain DiMartini in exchange for three similar money orders belonging to Captain DiMartini which had been improperly indorsed and therefore were not negotiable in Tangiers (R. 13, 20). In presence of Captain DiMartini he then purchased a number of watches from the Tangiers firm of Tirthdas Khubchand Daswani, obtaining a receipt figured at pesetas 7818 or Francs 80,525. Captain DiMartini figured the rates of exchanges roughly on the rear of the bill (R. 15, 17 Exh. to Pros. Exh. #3). Accused later in the day purchased liquor of various types from the firm of Edward's Stores, the bill being figured at 48,600 francs (Exh. to Pros. Exh. #3). He returned to Casablanca that same evening with the two receipts totaling 129,125 francs, the Money Orders indorsed by Captain DiMartini in the amount of $300.00, and 83,324 francs which at the official rate of exchange were of the value of $700.40 in United States currency.

On 10 January accused delivered the two receipted bills to Mr. Sommers, the club manager, who figured the cost of the liquor and watches at $.008406 per franc, which was the official rate (W.D. Cir #64, 1946) and prepared club voucher #35 (Pros. Exh. #3) showing the cost of the purchases as $1085.42. The high cost of the purchases was called to accused's attention when he signed the voucher and he stated, "This was actually what he had expended but that he had become somehow confused, mixing club funds and his personal money" (Pros. Exh. 2).

The high cost of the merchandise purchased as reflected on voucher number 35 was brought to the attention of the Base Commander who ordered an audit of the club assets (Pros. Exh. 11). The audit was made on 15 January and when the cash was counted in the presence of accused he signed a certificate "that there are no other assets in form of cash or checks, held by the fund" (Pros. Exh. 11; R. 36). The cash counted was composed of treasury checks, Moroccan francs, pesetas and military certificates but did not include the 83,322 francs and $300.00 in money orders of club funds which accused had brought back from Tangiers (R. 140). Thereafter a board of officers was appointed to determine if there was a loss of club funds between 1 October 1946 and 19 January 1947. Accused appeared before the board as a witness on 22 January 1947 and after his rights under Article of War 24 were explained to him he made the following statement:

> "Q. Do you remember these questions in reference to voucher 35, Prosecution's Exhibit 3? Question - 'This voucher represents the expenditure of this amount of dollars for merchandise and the amount of the voucher is greater than the receipt you received, than what you received in the cash dollar?' Answer - 'That is correct.'

Question - 'The cost of goods shown on this voucher amounts to $1085.42. By turning in the Francs would more than redeem the receipt you received?' Answer - 'That is correct. At Tangiers I must have used some of my own money.' Do you remember those questions?

"A. Yes, sir." (R. 51).

Thereafter (about 3 March) he made the following unsworn statement to the officer who investigated the charges:

"* * * If I had known the Inventory was to be made because the voucher #35 was believed to be incorrect, I would have immediately completed some recapitulation of cost of goods I had been working on, and would have thereby completed determination as to whether or not I were holding-in-wait any of the Club's rightful funds. Between 16 January and 19 January the recapitulation I finally determined as that of exchanging and purchasing which must have taken place and could only have taken place, in Tangier, indicated that evidently I was retaining-in-wait approximately $289.00 of funds which could only be funds of the Club and that is arrived at in this manner. The money order dollar cost of 126,051 Francs (which purchased wrist watches, scotch and vermouth) was $449.10. The money order dollar cost of 86,395 Francs paid out by the Club from 1 January thru 18 January 1947 was $307.82. This gives a total of $756.82, eleven dollars (American money) of which was my own money and which bought Francs of approximately #35.42 legal rate value to the Club. I took to Tangier #1050.00 in U.S. Postal Money Orders and approximately #6.92 of Script (M.P.Cert.). Figures:

$449.10	cost of goods		
307.82	" " Francs	300.00	
756.92		11.00	my own money
300.00	Money orders returned to Base	289.00	being held-in-wait
1056.92			

Since the surprise Inventory of 15 January I have not been allowed to make any deposit or entry on any receipt voucher for this #289.00. Any other amount of money is unknown to me.", (Pros. Ex. 14).

On 31 March 1947, accused delivered a treasury check to Colonel McCollum, Budget and Fiscal officer, Air Transport Command, in the amount of $1039.84, stating that:

"Q. Will you please relate to the court this conversation? What took place?

A. Captain Lubojasky came into my office, Budget and Fiscal, and stated that he had a sum of money which belonged to the Officers' Club at Casablanca, that he wished to turn in to me. I asked him what form it was in, and he stated 'scrip.' I then answered that if it was to be picked up as residue of money belonging to the Officers' Club, since their club had been inactivated, I would have to have it in the form of a treasurer's check, made out to the Custodian, USFET Central Welfare Fund, said custodian being the final recipient of any inactivated non-appropriated fund in ATC. He then stated that he would do so. The next day he brought in a treasurer's check made out to the Custodian, USFET Central Welfare Fund, which I picked up on a voucher.

"The prosecution then showed a document to the defense.

"Q. Colonel, I hand you Prosecution's Exhibit 8 for identification. Tell the court what that is?

A. This is a treasury check (holding up in hand) made out in the sum of $1039.84 to credit of — to the order of Custodian, Central Welfare Fund, EUCOM, exchange for cash for Officers' Club fund, 1252d AAF Base Unit." (R. 39).

4. Evidence for the Defense.

The accused having been advised of his rights as a witness (R. 125, 126) testified under oath that he took $1050.00 in Money Orders and approximately $7.00 in American currency to Tangiers on 9 January 1947. At one money exchange store he changed approximately $400.00 in Money Orders into pesetas and the pesetas in turn into French Moroccan Francs (R. 127). At another money exchange store he transferred approximately $359.00 into Moroccan francs directly. He recalled the rates of exchange obtained were 27.25 pesetas per dollar, and 10.3 Moroccan francs to the peseta (R. 134). He made the purchases as stated and returned to Casablanca with Captain DiMartini's three $100.00 Money Orders, goods with receipts, and the residue of the francs which he anticipated using for club expenditures and the payment of local

employees (R. 127). Immediately upon return he placed 58,000 francs in a separate envelope in the club safe, but not in the cash-box, and retained the DiMartini Money Orders in his billfold. The next day he cashed the DiMartini money orders at the post office, receiving Military Payment Certificates of $300.00 which he placed for safekeeping in his own billfold. Several days later he commingled the 58,000 francs with the club funds in the cash-box, at the same time withdrawing from club funds the legal value of $480.00 in Military Payment Certificates and placing them in an envelope marked "To be opened by Captain Lubojasky only". This envelope he left in the club safe but not in the cash-box (R. 127, 129). On 12 or 13 January, Mr. Sommers, the club manager prepared Voucher No. 35 (Pros. Exh. #3) showing an expenditure of $1085.42 for merchandise in Tangiers (R. 131, 132), Accused discussed the high cost of the goods with Mr. Sommers and instructed Mr. Sommers to use the legal rate of exchange (R. 134). Later the Budget and Fiscal Officer and others called his attention to the fact that Voucher #35 did not reflect the entire transaction, but the Budget and Fiscal Officer offered no substantial help or made any suggestions and he thought no more about it because he knew he had till the end of the month to make any changes in the voucher (R. 135, 143). While at Tangiers he had approximately $200.00 to $300.00 of his own money, about half of which he exchanged for Moroccan francs (R. 137). At a subsequent time after he computed the exact amount of francs retained by him in the amount of 25,000 additional, he likewise placed them in the cash-drawer and withdrew the equivalent in Military Payment Certificates from the club assets which he also placed in the envelope marked "To be opened by Captain Lubojasky only". (R. 148).

> "Q. You had 83,000 francs, Moroccan francs, left over after your purchase of the liquor and the watches. You testified that there was between 57,000 and 58,000 Moroccan francs placed in an envelope in the safe, which you later replaced by scrip. There is a differential there of 25,000 francs. Where was the 25,000 francs?
>
> A. Sir, that was put into the fund because of the need of francs, about the — I think it was immediately before or immediately after — yes, it was immediately before the second inventory.
>
> "Q. Where was it all this time, this 25,000 francs?
>
> A. I don't recall where it was. I had computed - I had some francs of my own and I had computed by that time the rates forward and backward for my dealings in Tangiers, and I knew then what the balance was; what the gain on exchange was, so I deposited the balance of francs." (R. 148).

On the 15th, when Captain Young made his cash inventory, accused signed the statement certifying there were no other cash assets of the fund to be counted without reading the certificate (R. 140). At that time he had $300.00 in Military Payment Certificates in his wallet and Military Payment Certificates of over $400.00, in the envelope which were not included in the inventory (R. 140).

Accused further testified that this was the first time he had ever been custodian of a fund, and he felt that he was permitted to carry the entire fund in his personal possession if he wished (R. 135).

After his return from Tangiers, he had been too busy at the club to figure out the actual gain that he made from the exchange (R. 143, 144). However, he did know the actual amount involved before 22 January, when the Board held its final hearing. At no time did he tell Captain Young, the Budget and Fiscal Officer, the Board, or the Commanding Officer of the post what that actual figure was (R. 144, 149, 151).

Captain Engberg, president of the Board of Officers which investigated the loss involved, testified in rebuttal that at the cash inventory made on the morning of 19 January, accused "presented the cash-box" as containing the only money belonging to the fund, that no other money in the safe was counted on that occasion (R. 153, 154).

5. The offense alleged in Specification of Charge I is that of embezzlement which is properly charged under Article of War 93 and which is defined as "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268)" (MCM, 1928, par. 149h). The evidence is uncontradicted that the $1056.92 which accused took to Tangiers were club monies and entrusted to him in his capacity as custodian of the club fund. Nor is there any conflict in the testimony as to his actions in dealing with the balance of the club funds in the form of $300.00 in money orders and 83,324 francs with which he returned to Casablanca. He exchanged the money orders for military certificates and placed them in his wallet. He then placed 58,000 francs in the cash box in the club safe, withdrew $480.00 in military certificates from the club funds and placed them in an envelope in the safe marked, "To be opened by Captain Lubojasky only". At some later date he repeated this procedure with the residue of the 83,324 francs, placing the military certificates which he withdrew from the club funds, in the same envelope.

The only issue in the case is whether from the evidence the intent of accused to convert the money to his own use and benefit is proved beyond a reasonable doubt. The fact that he made restitution on 31 March 1947 is of course no defense if the requisite intent were in fact present

when he failed to account for the balance of the club funds which he brought back with him from Tangiers. The Board of Review is of the opinion that such intent was proved beyond any reasonable doubt from all the facts and circumstances in the case. Accused had no reason to segregate this balance and place it in his wallet or personal envelopes in the safe. His certification that the cash counted at the inventory on 15 January (only five days after his return from Tangiers) constituted all of the funds of the club, when he alone knew that the 83,324 francs and $300.00 in military payment certificates were not included; the fact that the high cost of the purchases were called to his attention immediately, and his surreptitious dealings with the francs leave no doubt but that his intent was to convert the money to his own use. In addition, it is extremely difficult to understand why an officer who was present when an audit was in process and later when a board of officers was held to determine the loss in question, could not if he so desired, state exactly where the money was and his reasons for the segregation of that amount. Accused merely intimated that it was possible he possessed "some club funds" and in his statement to the investigating officer on 23 January he limited the amount of club funds which he then held to $289.00 when in fact he reimbursed the fund on 31 March in the amount of $1039.84. It is inconceivable that this amount of money could have been "overlooked" by accused under these circumstances.

The offense of executing a false voucher was also proved by competent evidence. Accused knew he was entrusted with $1056.92 of club funds and that he only expended at the rate of exchange used, some $460.00 of that amount on his two purchases. War Department Circular 64 (1946) and paragraphs 90 and 92, TM 14-506 (15 May 45) clearly state that vouchers will be charged at the exchange rate used in obtaining the foreign currency which was used in payment. Consequently, for him to execute a voucher to the effect that the cost of the goods in question was $1085.42 must have been willful and intentional. He only exchanged $150.00 of his personal money into francs and accordingly for him to believe that the 83,324 francs of club funds with which he returned was his personal money is obviously incredible. His knowledge that the voucher was false is also shown by the fact that at the very time he signed it his attention was called to the high cost of the merchandise purchased.

From all the facts and circumstances in the case the Board of Review is of the opinion that the findings of guilty are supported by the evidence beyond any reasonable doubt.

It is noted that accused was sentenced to be "dismissed from the Army of the United States". While the proper form of sentence is "to

be dismissed the service", such error is formal only. Winthrop states that the phrase "to be dismissed" without more is a proper form of sentence (Winthrop's Military Law and Precedents, Reprint 1921, page 406). In CM 268795, Baker, 44 BR 341 (348) the Board of Review held that a sentence "to be dismissed from the service of the United States Army" was a legal sentence as the words "of the United States Army" may be considered mere surplusage.

6. War Department records show that accused is 27 years of age and single. He graduated from high school in 1938 and immediately enlisted in the Army. After training as a flying cadet he was appointed a Second Lieutenant (Air-Res) on 11 July 1941 and entered on active duty 12 July 1941. He was promoted to First Lieutenant 2 June 1942 and to Captain 16 February 1943. He has been awarded the Air Medal with two Silver Oak Leaf Clusters and the Distinguished Flying Cross. His efficiency reports show ratings of 4.3, 5.0, 3.5, 4.8 and 4.8. No record of previous military convictions or difficulties with the civil authorities is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 93 and 96.

W. H. Johnson, Jr., Judge Advocate

[illegible], Judge Advocate

On Leave, Judge Advocate

(380)

JAGQ - CM 323716 1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Justin C. Lubojasky (0-420612), Air Corps.

2. Upon trial by general court-martial in Germany this officer was found guilty of embezzlement of officer club funds in the amount of $1000.40, in violation of Article of War 93, and of executing a false voucher in his official capacity as custodian of the officers' club fund, in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that accused in his capacity as custodian of the club fund, Cazes Officers' Club, Casablanca, Morocco, was entrusted with club funds in the amount of $1050.00 in money orders and $6.92 in cash, for the purpose of purchasing watches and liquor for the club. On 9 January 1947 he flew to Tangiers, converted the cash and $750.00 of the money orders into French Moroccan Francs at an exchange rate whereby he received 212,449 francs for the $756.92. He purchased liquor and watches for which he paid 129,125 francs and returned to Casablanca that evening with his purchases and club funds in the form of $300.00 in money orders and 83,324 francs, which at the official rate of exchange, were of the value of $700.40 in United States currency. The following day the club manager prepared a voucher showing the cost for the purchases of liquor and watches in dollars and francs (figured at the official Army value of French Moroccan Francs) and the total thus computed was 129,125 francs or $1085.42. He gave the voucher to accused to sign, stating that the cost of the purchases appeared excessive. Accused signed the voucher saying that the amount was what he had actually expended.

On 15 January the commanding officer of the base ordered an audit of the club funds because of the excessive cost of the purchases as shown on the voucher. The cash was counted in accused's presence and he signed a certificate that "there were no other assets in form of cash or checks, held by the fund", although the cash thus counted did not include the club funds of $300.00 in money orders or the 83,324 francs which he had brought back with him from Tangiers as the residue of the $1056.92 which had been entrusted to him on 9 January. Thereafter at a hearing before a Board of Officers appointed to investigate the loss of club funds accused stated that he might have some club monies commingled with his own. On 3 March he stated to the officer investigating the charges that he had $289.00 of club funds which he had "not been allowed" to deposit but "any other amount of money is unknown to me". On 31 March he delivered a check to the Air Comptroller, Air Transport Command, in the amount of $1039.84, stating that this was the amount of club funds he had held during the investigation.

Accused testified that upon returning from Tangiers he cashed the $300.00 in money orders, receiving military certificates therefor, which he placed in his wallet. Thereafter he put some 58,000 francs in the cash box in the club safe and withdrew $480.00 in military certificates, placing them in an envelope in the safe marked "To be opened by Captain Lubojasky only". Sometime later he repeated this procedure by putting some 25,000 francs in the club funds and withdrawing the equivalent in military certificates which he placed in the same envelope. He testified that the Board of Officers would not allow him to make a deposit to the club fund during its investigation, but that he never informed them of the amount he desired to deposit.

5. War Department records show that accused is 27 years of age and single. He graduated from high school in 1938 and immediately enlisted in the Army. After training as a flying cadet he was appointed a Second Lieutenant (Air-Res) on 11 July 1941 and entered on active duty 12 July 1941. He was promoted to First Lieutenant 2 June 1942 and to Captain 16 February 1943. He has been awarded the Air Medal with two Silver Oak Leaf Clusters and the Distinguished Flying Cross. His efficiency reports show ratings of 4.3, 5.0, 3.5, 4.8 and 4.8. No record of previous military convictions or difficulties with the civil authorities is shown.

6. In view of all the facts and circumstances in the case I recommend that the sentence be confirmed and carried into execution.

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

(GCMO 276, 22 Aug 1947).

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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

JACK - CM 323728

1 August 1947

UNITED STATES	)	THE ARTILLERY CENTER
v.	)	Trial by G.C.M., convened at Fort Sill, Oklahoma, 19 June 1947.
Technician Fourth Grade Floyd S. WESTER (RA 35257389), Headquarters Battery, 969th Field Artillery Battalion.	)	Sentence: To be reduced to the grade of private, to be confined at hard labor, at such place as the reviewing authority may direct, for four (4) months, and to forfeit twenty dollars ($20.00) per month for a like period. Post Guardhouse.

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

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1. The record of trial in the case of the above-named soldier has been examined 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 93rd Article of War.

Specification: In that Technician Fourth Grade Floyd S. Wester, Headquarters Battery 969th Field Artillery Battalion, did, at Lawton, Oklahoma, on or about 11 May 1947, with intent to do him bodily harm, commit an assault upon Private First Class Joseph Morris, Battery B, 969th Field Artillery Battalion, by cutting him on the neck with a dangerous instrument, to wit: a knife.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification except the words and figures, "did" and "with intent to do him bodily harm, commit an assault upon Private First Class Joseph Morris, Battery B, 969th Field Artillery Battalion, by cutting him on the neck with a dangerous instrument, to wit, a knife," substituting therefore, respectively, the words and figures, "was" and "disorderly in a public place, to wit, the Blue Front Cafe, under such circumstances as to bring discredit upon the military service," of the excepted words and figures, not guilty, of the substituted words and figures, guilty. He was found not guilty of the charge but guilty of a violation of the 96th Article of War. No evidence of any previous conviction was introduced. He was sentenced "to be reduced to the grade of

private," to be confined at hard labor at such place as the reviewing authority might direct for four months and to forfeit $20 per month for a like period. The reviewing authority approved the sentence and ordered it executed and designated the Post Guardhouse, Fort Sill, Oklahoma, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 45, Headquarters, The Artillery Center, Fort Sill, Oklahoma, 2 July 1927.

3. The only question presented for our consideration is whether the offense of which accused was found guilty may be considered as lesser than and necessarily included in the offense for which he was arraigned. Charged with having committed a felonious assault upon Private Morris, accused was found guilty of having been disorderly in a public place under such circumstances as to bring discredit upon the military service. Although it may be said that every assault is a breach of the peace and thus a disorder, it certainly does not follow that every disorder involves an assault. Hence, under the specification as redrafted by the court, even if we exclude therefrom the words "in a public place," accused may have been found guilty of some disorder not necessarily extending to or included in an assault.

From this case may be derived the rule that the particular offense found in order to be properly considered a lesser included offense of that charged must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not contained in such offense. It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM, 1928, par. 78c).

Moreover, the redrafted specification herein is not worded in such a way that the Board of Review may cut down the offense there found to one which would be necessarily included in the felonious assault charged, for, since we may not resort to the proof for this purpose but must stay within the terms of the specification, we have no means of determining the type or kind of disorder of which the court may have intended to find accused guilty (CM 316182, DeMoss, dissent, 1st Ind.; see for converse of this proposition, CM 316193, Holstein). The findings of guilty of the substituted specification and the sentence based thereon must, therefore, be set aside.

4. For the foregoing reasons, 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.

(On Leave), Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Rathkopf, Judge Advocate

JAGK - CM 323728 1st Ind

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

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724, 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Technician Fourth Grade Floyd S. Wester (RA 35257389), Headquarters Battery, 969th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 306, 28 Aug 1947).

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

JAGH - CM 323736

8 SEP 1947

UNITED STATES v. First Lieutenant Albert C. Yost, 0415915, 533 M. P. Service Company	HEADQUARTERS UNITED STATES CONSTABULARY Trial by G.C.M., convened at Heidelberg, Germany, 27 May 1947. Dismissal, total forfeitures, and confinement for two and one-half years.

OPINION of the BOARD OF REVIEW

HOTTENSTEIN, GRAY and SOLF, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that First Lieutenant Albert C. Yost, Detachment 39, Ground Forces Replacement Center, did, at Etampes, France, on or about 16 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France on or about 8 December 1946.

He pleaded not guilty to the Charge and Specification and was found guilty of the Charge, and guilty of the Specification, except the words "Detachment 39" and "at Etampes, France" substituting therefor the words "in the vicinity of Etampes, France". 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 two and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

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

A duly authenticated extract copy of the morning report of Detachment 39, Ground Forces Reinforcement Command, Etampes, France, for 17 March 1945 showed that the accused absented himself without leave on 16 March 1945 (R 6, Pros Ex 1). It was stipulated that the accused was apprehended at Paris, France, on 8 December 1946 (R 6).

It was further stipulated that the accused voluntarily made a sworn statement in Paris, France, on 8 December 1946 which statement was received in evidence as Prosecution's Exhibit 2 (R 6). In his pre-trial statement the accused said:

> "I was a member of Co 'K', 15th Inf. 3rd Division, APO 3. I can't recall when I left the 3rd Div. I had been in the 164 Gen Hosp., Cherbourg Pennisula, France and did not return to my organization from the Hospital after I had been discharged. I knocked around in France, Germany and Belgium until the time of my apprehension. During the time I had been AWOL, I've always worn the uniform of the U.S. Army and never had intentions to desert the service. I was at the 787 MP Battalion Bar on the night of 7 December 1946 and met a soldier who gave me a blanket. My conversation with this soldier was about a trench coat that was stolen from me and he offered me a blanket which I took. I had been drinking rather heavily and don't believe I could recognize the soldier who gave me the blanket. I had not stolen the blanket. I was apprehended for suspected theft of blanket and not for being AWOL and told the Investigator interrogating me that I was AWOL under my own volition."

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

An extract copy of the morning report of Detachment 39, Ground Forces Reinforcement Command, for 6 March 1945 shows that the accused was attached unassigned to the Second Replacement Depot, APO 776, for return to his former organization, 15th Infantry Regiment, 3d Infantry Division (Def Ex 1). An extract copy of morning report, Second Replacement Depot, for the same day, indicates processing of the accused by the Second Replacement Depot, the accused being enroute from the 64th General Hospital to the 3d Infantry Division (Def Ex 2). An extract copy of a second morning report Second Replacement Depot of 7 March 1945 sets forth orders moving accused to the 232d Reinforcement Company (Def Ex 3).

Defense Exhibit 4 is a written statement by Captain James K. McCaslin, dated 5 January 1947, admitted without objection, wherein he attests to the proper performance of duties by accused when he was attached to the 540th MP Service Company prior to trial (R 7).

Captain Edward L. Muhm testified that he had known the accused since 6 January 1947, when he was transferred to Third Army Stockade commanded by witness, that the accused's character was good the entire time witness had known him, and that the manner of his performance of duties had been excellent (R 7-8).

5. In rebuttal, the prosecution introduced in evidence, without objection, an extract copy of the morning report of Detachment 39, Ground Forces Reinforcement Command, for 17 April 1945, which showed that the accused was administratively dropped from the rolls of the Army as an absentee (R 8, Pros Ex 3).

6. The evidence for the prosecution establishes that accused absented himself without leave from his organization at Etampes, France, on or about 16 March 1945 and that he remained absent until he was apprehended and returned to military control on or about 8 December 1946. The long period of absence of approximately twenty-one months warranted the court in finding the accused guilty of desertion.

7. It was improper to receive in evidence an extract copy of a morning report showing that accused had been administratively dropped from the rolls as an absentee. The morning report entry, however, was merely accumulative of other proof of accused's absence without leave, and therefore does not prejudicially affect the accused's substantial rights.

8. Accused is 32 years of age, single, and has completed two years in college. He enlisted on 19 September 1940 and was commissioned Second Lieutenant, Army of the United States (Infantry) on 10 May 1941. On 22 June 1942 he was promoted to the rank of First Lieutenant, Army of the United States. His unit was committed to combat in the European Theater of Operations on or about 9 January 1945. On 26 January 1945 he was wounded in action and hospitalized for approximately one month. He was released from the hospital and assigned to a Replacement Depot at Etampes, France, from which latter unit he deserted on or about 16 March 1945.

Subsequent to his apprehension and prior to trial he was examined by a board of medical officers on 14 April 1947. A copy of the board proceedings is attached to the file. The board found that the accused was, at the time of the offense, so far free from mental defect, disease or derangement as to be able, concerning the particular act charged, to distinguish right from wrong, to adhere to the right and that at the time of the examination he was able intelligently to conduct and cooperate in his defense.

9. The Board of Review has given careful consideration to letters dated 8 January 1947 and 12 June 1947 addressed to The Judge Advocate General by Mrs. C. A. Yost, mother of the accused, wherein she urged clemency on his behalf.

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. The Board of

Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation thereof. A sentence to dismissal, total forfeitures and confinement at hard labor for two and one-half years is authorized upon conviction of a wartime violation of Article of War 58.

R. Hettinstein, Judge Advocate

Wm. McDonald Gray, Judge Advocate

Walter A. Dey, Judge Advocate

JAGH - CM 323736 1st Ind

WD, JAGO, Washington 25, D. C. SEP 12 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 Albert C. Yost (O-415915), 533rd Military Police Service Company.

2. Upon trial by general court-martial this officer was found guilty of desertion in violation of Article of War 58. No evidence of previous convictions was submitted. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence is contained 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 evidence shows that accused absented himself without leave from his organization at Etampes, France, on or about 16 March 1945. He remained absent, "knocking around in France, Germany and Belgium" until he was apprehended at Paris, France, on or about 8 December 1946, and returned to military control.

4. Accused is 32 years of age, single, and has completed two years in college. He enlisted on 19 September 1940 and was commissioned Second Lieutenant, Army of the United States (Infantry) on 10 May 1941. On 22 June 1942 he was promoted to the rank of First Lieutenant, Army of the United States. His unit was committed to combat in the European Theater of Operations on or about 9 January 1945. On 26 January 1945 he was wounded in action and hospitalized for approximately one month. He was released from the hospital and assigned to a Replacement Depot at Etampes, France, from which latter unit he deserted on or about 16 March 1945.

5. The Board of Review has given careful consideration to letters dated 8 January 1947 and 12 June 1947 addressed to The Judge Advocate General from Mrs. C. A. Yost, mother of the accused, wherein she urged clemency on his behalf.

6. I recommend that the sentence be confirmed and carried into execution, and that a Branch United States Disciplinary Barracks be designated as the place of confinement.

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

CM 323,736

2 Incls
Record of trial
Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 14, 16 Oct 1947).

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

JAGQ - CM 323751

JUL 16 1947

UNITED STATES	)	6TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Taegu, Korea, 8 May 1947. Dishonorable discharge and confinement for life. Penitentiary.
Staff Sergeant THOMAS M. AGERTON, JR. (12260392), Company "K", 1st Infantry Regiment.	)	

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 Charge and Specification:

CHARGE: Violation of Article of War 92.

Specification: In that Staff Sergeant Thomas M. Agerton Jr, Company "K", 1st Infantry Regiment, APO 6, did, at APO 6, on or about 20 April 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Staff Sergeant Henry W Serrano, Company "K", 1st Infantry Regiment, APO 6, a human being by shooting him with a rifle.

Accused pleaded guilty to the Specification except the words "with malice aforethought, deliberately and with premeditation", not guilty of the Charge but guilty of a violation of Article of War 93 and was found guilty as charged. 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 at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence for the Prosecution.

Accused entered the supply room of Company "K", 1st Infantry Regiment, at approximately 2030, 20 April 1947, said, "I want a weapon" and

obtained an M-1 rifle and ammunition stating that he was "going to shoot up the NCO club" (R. 8, 12, 19, 24, 25, 31). Accused had a cut on his face, "was in a very excitable condition" and stated that two "non-coms had jumped him" (R. 23, 30). Another witness described accused as being "in quite a rush", had blood on his face and "smelled of alcohol" (R. 31). Accused stated to him that "he had a fight over in the NCO club — he and Serrano — apparently with someone else" and when witness tried to stop him accused pointed the rifle at witness saying "Don't try to stop me" and went toward a nearby fence calling "Oh Shima, Oh Shima" (R. 31).

While accused was in the supply room Corporal Bradley ran to the First Sergeant's quarters and informed him and deceased of accused's actions (R. 9). Deceased said, "Let me go; I can stop him" so they "took out" toward the supply room. Sergeant Serrano was in front of witness and as they approached the supply room witness saw "a vision of a man standing there, and the next thing I saw was a gun blast out of the muzzle of a rifle, and I hit the ground." He then saw Sergeant Serrano "stagger, wobble a little bit and fall" (R. 9).

Immediately after the shots were fired accused was observed standing near the fence in the vicinity of the supply room and when asked "what the shooting was" he stated that he "had dropped the weapon over the fence * * * get it and put it in the arms room or hide it" (R. 32). The M-1 rifle was found near the fence, approximately five feet from where accused was standing. The officer of the guard who placed accused in arrest after the shooting testified that accused had been drinking and "had some cuts on his face, like he had been in a fight" (R. 36, 37).

The battalion surgeon testified that deceased was taken to the hospital immediately but he was dead upon arrival. The cause of death was gunshot wounds in the chest, arm and thigh (R. 40; Pros. Ex. #3).

4. Evidence for the Defense.

Accused and deceased were good friends and were often seen together both on and off duty (R. 42). Three witnesses including accused's company commander testified that he was a good soldier, with excellent character and efficiency ratings (R. 43).

After his rights as a witness were explained to him accused elected to remain silent.

5. 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.

While accused's statement that he "was going to shoot up the NCO club" did not indicate an intention to kill deceased nevertheless the testimony is clear and uncontradicted that when accused saw deceased approaching him he pointed the rifle in that direction and fired six or seven rounds, three of which struck the victim, causing his death. Deceased was unarmed and in the past at least, had been on friendly terms with accused. The evidence leaves no doubt but that accused obtained the weapon with the intention of using it against someone and under such circumstances his intentional shooting of deceased constitutes the offense of murder. Every element of the crime is proved by competent and compelling evidence. Accused pleaded guilty to voluntary manslaughter but the testimony fails to disclose facts sufficient to establish legal provocation for the killing. It is true that accused had been drinking, was in a highly excitable condition and had been involved in a fight with "someone" immediately prior to the shooting of deceased. While these facts tend to explain the reason for accused's actions and may be considered as mitigating circumstances they are insufficient as a matter of law to establish provocation for the killing.

6. The charge sheet shows that accused is 24 years of age and single. He enlisted in the Regular Army, 4 September 1946, for eighteen months after completing four years and nine months as an enlisted man in the Marine Corps. There is no evidence of a civilian criminal record.

7. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement 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

C H Cheatham, Judge Advocate

On Leave, Judge Advocate

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

JAGK - CM 323764

15 SEP 1947

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
v.	)	Trial by G.C.M., convened at Hq PHIBCOM, PHILRYCOM, APO 358, 8, 10 and 11 April 1947. "Dishonorable discharge," total forfeitures and confinement for two (2) years.
First Lieutenant LAWRENCE H. MANGUM (0-1110633), Corps of Engineers.	)	

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 charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that, Lawrence H Mangum, 1st Lt, CE, 745th Engineer Heavy Shop Company, APO 900, did, at Manila, Philippine Islands, APO 900, on or about 14 January, 1947, feloniously embezzle by fraudulently converting to his own use money, of the value of about $106.78, unit fund of 745th Engineer Heavy Shop Company, property of the said company, of which he was the custodian.

Specification 2: In that Lawrence H. Mangum, 1st Lt, CE, 745th Engineer Heavy Shop Company, APO 900, did, at Manila, Philippine Islands, APO 900, on or about 14 January,1947, feloniously embezzle by fraudulently converting to his own use funds, of the value of about $1832.25, property of the Army Exchange Service, entrusted to him for operation of Branch Exchange Number 204 by the Army Exchange Service.

Specification 3: In that Lawrence H Mangum, 1st Lt, CE, 745th Engineer Heavy Shop Company, APO 900, did, at Manila, Philippine Islands, APO 900, on or about 14 January, 1947, feloniously embezzle by fraudulently converting to his own use the enlisted men's club fund of the 745th Engineer Heavy Shop Company, of the value of about $250.00, property of the said enlisted men's club, entrusted to him for safekeeping by said club.

Specification 4: In that Lawrence H Mangum, 1st Lt. CE, 745th Engineer Heavy Shop Company, APO 900, did, at Manila, Philippine Islands, APO 900, on or about 14 January 1947, feloniously embezzle by fraudulently converting to his own use money, of the value of about $390.00, the property of Lt William T Hoch, entrusted to him by the said Lt Hoch.

He pleaded not guilty to and was found guilty of the charge and 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 and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On 4 September 1946 the accused became Company Commander of the 745th Engineer Heavy Shop Company, relieving First Lieutenant John A. Noble. Lieutenant Noble transferred to the accused the company fund and the enlisted men's club fund. About the 1st of October 1946 Lieutenant Noble also transferred the post exchange and its funds to the accused (R. 7, 8). The post exchange operated by the 745th Engineer Heavy Shop Company was Branch No. 204 of the Army Exchange Service (R. 32, 33). The accused was the custodian of these funds until late in January 1947. Captain Robert F. Hillbrant relieved the accused as Company Commander of the 745th Engineer Heavy Shop Company on 10 January 1947. No transfers of funds were made at this time. The funds were to be transferred from the accused to Captain Hillbrant and an officer was designated to make the transfer on 17 January 1947. Captain Hillbrant asked the accused about the company fund and the accused replied that he did not have it. Captain Hillbrant found the council book in the commanding officer's desk. The council book showed a balance in the company fund of ₱213.00 and some centavos. He was unable to locate the money belonging to this fund. Charges were preferred (20 January 1947) against the accused and thereafter and during the month of January 1947 the accused delivered to Captain Hillbrant the money due the company

fund as shown in the council book (R. 11, 12, 13, 14).

At the end of November 1946 Branch No. 204 of the Army Exchange Service operated by the 745th Engineer Heavy Shop Company was short ten centavos on its merchandise account and even on its cooperage (R. 57). The branch did not submit an inventory for the month of December 1946. An inventory made on 21 January 1947 showed a shortage of ₱3664.05 in the merchandise account and an overage of ₱0.44 on the cooperage account (R. 56). Branch exchanges are considered to have good accountability when they have a shortage of 1% or less of their total sales during each month (R. 58).

Technician Fifth Grade Philip J. Giacobbe was appointed post exchange steward by the accused on 2 January 1947. He replaced Private Marquardt as post exchange steward. His job was to draw supplies, make daily sales at the exchange, and account for the money. On 12 January 1947 the accused directed him (Giacobbe) to take a complete inventory on the money and merchandise on hand. He made this inventory and left it on the accused's desk. The inventory showed a shortage of ₱60.00. About 2 p.m. on 13 January the accused told T/5 Giacobbe that he (Mangum) would "put forward" the amount of the shortage and ask no questions. He also directed T/5 Giacobbe not to gamble. About 7 p.m. on 13 January the accused told T/5 Giacobbe that he wanted ₱1000.00. T/5 Giacobbe went to the post exchange, secured the money and took it to the accused's quarters. They then checked the inventory and corrected some mistakes. T/5 Giacobbe then asked the accused to take all of the post exchange money on hand as shown by the sales slips. The accused agreed to take the money and Giacobbe again went to the post exchange and secured an additional sum of ₱117.00 and the sales slips for ₱1117.00 and delivered them to the accused. Sales slips were required to be delivered to the main exchange when money was turned in (R. 18, 19, 20). T/5 Giacobbe kept the receipts of the post exchange in the post exchange safe and not the safe which was in the orderly room of the company (R. 22). The accused was the responsible post exchange officer (R. 20).

Technician Fifth Grade John P. Flanagan was club steward and secretary-treasurer of the enlisted men's club of the 745th Engineer Heavy Shop Company. He purchased supplies, provided entertainment and operated a bar. The club money was kept in the company safe which was in the orderly room of the company (R. 24). Keys to the company safe were held by the post exchange steward and T/5 Flanagan. The accused did not have a key to this safe until early in January 1947 when he received a key from the post exchange steward (R. 26). Late in November or early in December 1946 T/5 Flanagan reported to the accused, "I told him there was an amount of money that I could not account for." The accused replied that in the near future they would have a free party and thereby get rid of the excess money. Sometime thereafter the accused ordered T/5 Flanagan to deliver this money to him. The money amounting to

₱339.00 was delivered to the accused and the accused gave Flanagan a receipt therefor (Pros. Ex. C). The accused also stated that he wanted to make a total of ₱500.00 in order to buy bar whiskey and directed T/5 Flanagan to withhold ₱161.00 from the club books during December 1946. This was done and the additional sum of ₱161.00 was delivered to the accused. The accused gave Flanagan a receipt for ₱500.00. This receipt bore the notation "to purchase bar whiskey" (R. 27, 28, 29; Pros. Ex. D). The club never received the bar whiskey (R. 25).

About 1 p.m. on Christmas Day 1946 the accused went to the orderly room, opened the safe and took "a stack of bills," approximately 3 inches in thickness, therefrom. He placed this money in his billfold and after locking the safe left the room (R. 45, 46).

On 31 December 1946 Second Lieutenant William T. Hoch placed ₱780.00 in the safe of the 745th Engineer Heavy Shop Company for safekeeping. The company safe was opened by T/5 Flanagan in order to permit this money to be placed therein. This money was in a brown envelope which bore Lieutenant Hoch's name and the word "Personal." On 6 January 1947 Lieutenant Hoch requested T/5 Flanagan to open the company safe in order that he might recover his money. The safe was opened, at which time they found the envelope open and the money gone. A note saying, "I am using this for change. Will return it about 8 January," was found in the safe. This note bore the signature of the accused (R. 30, 31).

4. For the Defense

Technical Sergeant Amil P. McDermott was acting First Sergeant of the 745th Engineer Heavy Shop Company from 12 October 1946 to 12 January 1947. During this time the company orderly room contained a safe. Keys to this safe were in the possession of Private Marquardt as post exchange steward and T/5 Flanagan. On 4 January 1947 Private Marquardt was transferred home and he delivered the keys in his possession to the accused. The accused was the commanding officer and could have ordered that the keys be delivered to himself at any time (R. 61, 62).

Technician Fourth Grade James K. Taylor was company clerk of the 745th Engineer Heavy Shop Company. Keys to the company safe were in possession of Private Marquardt and T/5 Flanagan. The accused had T/5 Flanagan open the safe on several occasions. In December 1946 some of the men in the company were paid with pesos which did not have the word "Victory" printed on the back. They were informed that this type of money would not be usable after the first of January. Lieutenant Mangum took this money to exchange for "good" money. The exchange of money was completed on the 2nd or 3rd of January 1947.

By the accused

The accused was sworn as a witness for himself and testified that he had six years of service and had never been tried by court-martial. In January 1947 he was the commanding officer and only officer assigned to the 745th Engineer Heavy Shop Company and as such he was in possession of certain funds. He had in his possession funds belonging to the post exchange, laundry, enlisted men's club, and company fund, all of which were kept in the company safe. He did not have any of his personal money in the safe (R. 66, 67, 68, 69). On 4 January 1947 he removed all money from the safe, amounting to about ₱4300.00, and took it to his quarters "to be straightened, sorted and binded." While checking the various funds he was informed that he was wanted in the orderly room. He placed all of the money in a cigar box and left it on his table. Upon his return to his quarters, some two hours later, he locked the cigar box in his footlocker. He did not look inside the cigar box. On 6 January 1947 he took the cigar box from his locker and found it to be empty. He did not report the loss to anyone at that time (R. 69, 70).

The company fund was turned over to Captain Hillbrant sometime after the original investigation of charges against him (R. 71).

T/5 Marquardt was the post exchange steward and had a key to the safe. T/5 Marquardt was returning to the United States and on 3 January 1947 he (Marquardt) placed about ₱2500 belonging to the post exchange in the safe and delivered the key to accused. This was the first time he had a key to the safe (R. 67). About 12 January 1947 he ordered T/5 Giacobbe to make a complete inventory of the post exchange and to deliver to him all money on hand. He received ₱1117.10 from Giacobbe. He kept this money in his footlocker and at the officer's club. He offered to deliver this money to the officer investigating these charges (R. 71, 72, 73).

Concerning money belonging to Lieutenant Hoch accused testified that Lieutenant Hoch did not give him any money but he knew that Lieutenant Hoch had an envelope in the safe which contained ₱20.00 notes. In exchanging money for enlisted men he needed eighteen ₱20 notes with the word "Victory" printed thereon in order to make change. He knew that Lieutenant Hoch's money was "Victory" money so he took the money belonging to Lieutenant Hoch from the envelope and "put a note inside saying I am using this for change will return it prior to the 8th." Lieutenant Hoch's money was part of the money stolen from his quarters. He never returned Lieutenant Hoch's money (R. 68, 69, 70, 78).

Concerning the ₱500.00 received from T/5 Flanagan and belonging to the enlisted men's club he testified that he received the money and was to use it to buy bar whiskey. He was unable to buy the whiskey because

there would not be an "out-going" voucher and nothing to cover the funds in the book. This money was with other funds in the safe and was also stolen (R. 68, 69).

Lieutenant Mangum also stated that he never intended to deprive any individuals or organizations of their money and he was willing to make restitution of all funds stolen from him and offered ₱117.10 to the court as being the post exchange money he had obtained from T/5 Giacobbe (R. 72, 78).

The 66-1 form pertaining to accused was identified and introduced into evidence as Defense Exhibit 2. This form contains data relative to the service of accused and shows that his efficiency reports were excellent.

5. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (Moore v. U. S. 160 U. S. 268; par. 149h, MCM, 1928).

The accused was charged in Specification 1 with the embezzlement of $106.78 from the company fund of the 745th Engineer Heavy Shop Company. The accused was custodian of this fund amounting to an excess of 213 Philippine pesos, and when required to deliver it to his successor he was unable to do so. Philippine pesos are valued 50 cents United States money under the official rates of exchange. This failure to deliver the fund as required established a prima facie case of embezzlement (CM 251409, Clark, 33 BR 229, 233).

The embezzlement of $1832.25 from the Army Exchange Service was established by an audit of the post exchange operated by the accused, which audit showed a shortage of 3664.05 Philippine pesos. This money the accused was also unable to deliver to the proper authorities.

In Specification 3 the accused was charged with embezzling $250.00 from the enlisted men's club. The evidence establishes that the accused was given 500 Philippine pesos belonging to the club for the purpose of purchasing whiskey. The whiskey was not purchased and the money was not returned to the club by the accused.

Specification 4 alleges an embezzlement of $390.00 property of Lieutenant William T. Hoch. The evidence in support of this specification established that the accused was the company commander of the 745th Engineer Heavy Shop Company. The company maintained a safe in the orderly room. This safe was under the custody of the accused, even though he permitted two enlisted men to have keys to the safe. One of these enlisted men permitted Lieutenant Hoch to place an envelope containing 780 Philippine pesos in the safe. This envelope was marked as personal property of Lieutenant Hoch and sealed. The accused removed the contents of this envelope and used the money. He also left a note

saying that he would replace the money before the 8th of January. Under the facts in this case the accused was in lawful custody of the money placed in the safe by Lieutenant Hock and his unauthorized use thereof constituted embezzlement. The fact that the accused intended to replace the money is no defense (CM 244621, Morrison, 28 BR 355,362).

The accused did not deny that he was in possession of the funds alleged to have been embezzled in the various specifications but defended upon the theory that all the funds, except 1117.10 Philippine pesos which was a portion of the funds alleged to have been embezzled from the Army Exchange Service in Specification 2, had been stolen from him. The accused testified that he kept the 1117.10 Philippine pesos belonging to the post exchange in his footlocker and at the officers' club. He tendered this money to the court. On 4 January 1947 he removed the other funds from the company safe in order to segregate them. He placed them in a cigar box on his desk and later placed the cigar box in his footlocker. When he opened his locker the funds had been stolen. He did not know when or how the funds were taken.

Evidence on behalf of the prosecution established that the accused removed a large amount of money from the company safe on Christmas day 1946. 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 the 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 (CM 276435, Meyer, 48 BR 331,338; CM 301840, Clarke, 24 BR (ETO), 203,210; CM 262750, Splain, 4 BR (ETO) 197,204; CM 320308, Harnack). The evidence of carelessness and theft by others testified to by the accused is not convincing. A person in charge of trust funds who fails to respond with or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 251225, Johnson, 33 BR 177,181; CM 251409, Clark, supra).

In this case the court by its finding of guilty resolved these controverted issues of fact against the accused and the reviewing authority did not, nor do we, find any reason to disturb such findings.

Repayment or tender of repayment of funds previously embezzled is not a legal defense to a charge of embezzlement (CM 275342, Dobbs, 48 BR 31,37).

The accused testified that he kept 1117.10 Philippine pesos belonging

to the post exchange in his footlocker and at the officers' club and that during the investigation he tendered this money to the investigating officer. He also tendered this amount to the court. No explanation was made by accused as to why this money was not retained in the exchange or company safe. The court by its findings of guilty disbelieved the accused's contention that he had been in possession of this money at all times. The court apparently considered, as we do, that the accused was merely tendering repayment of money previously embezzled.

6. The court sentenced the accused to be "dishonorably discharged the service." Since accused was an officer this part of the sentence was inappropriate. However, it was not illegal and the irregularity in form may be cured by the action of the confirming authority (CM 249921, Maurer, 32 BR 229; CM 316809, Pardee).

7. War Department records show the accused to be 32-7/12 years of age and married. He is a high school graduate. Prior to his entry into the service he was a machinist. He entered the Army 4 June 1941 and was a sergeant prior to being sent to Officers Candidate School. He was commissioned a temporary second lieutenant, Corps of Engineers, on 7 February 1943. On 31 May 1945 he was promoted to first lieutenant. On 15 April 1946 he was separated from the service. He was again ordered to active duty on 14 June 1946 and stationed at Fort Belvoir before being sent to the Philippines. His efficiency reports are "Excellent."

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of an officer of a violation of Article of War 93 and confinement in a penitentiary or other correctional institution is authorized upon conviction of embezzlement of property of $50.00 or more.

Walter E. Gibson, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Lloyd, Judge Advocate

JAGK-CM 323764 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C. OCT 3 1947
TO: Secretary of the Army

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 Lawrence H. Mangum (O-1110633), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of four offenses of embezzlement in violation of Article of War 93. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board 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. I also concur in the opinion of the Board of Review that that portion of the sentence imposing dishonorable discharge, while inappropriate in form in the case of a commissioned officer, is the equivalent of dismissal.

The record shows that the accused was a company commander and as such had custody of the company fund, the enlisted men's club fund, and post exchange fund. When relieved of command and ordered to turn the funds over to his successor he was unable to produce the company fund amounting to $106.78. After charges had been preferred he paid this amount to his successor. An inventory of the funds of the post exchange operated by accused disclosed a shortage of $1832.25. At the time of trial accused tendered to the court $558.55 of this money. In December 1946 the accused was given $250.00 by the steward of the enlisted men's club in order to purchase whiskey for the club. The whiskey was not purchased and the money was not returned. Lieutenant Hoch placed $390.00 in the company safe of the company commanded by accused, for safekeeping. The accused took this money and according to his testimony used it in making change for enlisted men in his company. He did not return the money. There is evidence in the record showing that accused removed a large amount of money from the company safe on Christmas day 1946. The prosecution did not show what disposition was made of the missing money by the accused. The accused testified that he left most of the money on a table unattended in his quarters for several hours and it was stolen. He could offer no

corroboration of his testimony and the court evidently did not believe him.

4. The accused is 32-7/12 years of age and married. Prior to his entry into the service he was a machinist. He entered the Army 4 June 1941 and was a sergeant prior to being sent to Officers Candidate School. He was commissioned a temporary second lieutenant, Corps of Engineers, on 7 February 1943. On 31 May 1945 he was promoted to first lieutenant. He was separated from the service on 15 April 1946. On 14 June 1946 he was ordered to active duty and stationed at Fort Belvoir before being sent to the Philippines. His efficiency reports are "Excellent."

5. I recommend that the sentence be confirmed and ordered executed. I recommend that a 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

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

(GCMO 3, D.A. , 13 Oct 1947).

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

(407)

JAGQ - CM 323766

JUL 22 1947

UNITED STATES v. Second Lieutenants ESTANISLAO LAUIGAN (O-890499) and HILARION ANASCO (O-890547), both of 58th Engineer Combat Battalion, Base "M", Unit 2, APO 74.	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters Base "M" Unit 2 APO 74, 2 April 1947. Each: Dismissal and total forfeitures.

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

1. The record of trial in the case of the above named officers 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, in a common trial, upon the following Charges and Specifications.

(As to accused Lauigan).

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Estanislao Lauigan, 58th Engineer Combat Battalion, Base "M", Unit 2, APO 74, did at Mountain Province, Luzon, Republic of the Philippines, from September to November 1946, having a duty as witnessing officer for payment of about $179,184.72, funds entrusted to Hilarion Anasco, Class "A" Agent Officer, wrongfully, willfully and with neglect, fail to properly execute his duties as witnessing officer, this to the discredit of the Military service.

(As to accused Anasco).

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Hilarion Anasco, 58th Engineer Combat Battalion, Unit 2 APO 74, then of

> the 2006th Engineer Combat Battalion, Unit 2 APO 74, a duly appointed Class "A" Agent Finance Officer, having been entrusted the amount of about $179,184.72 by Major Ambrocio Baday, Finance Officer, Headquarters Base M, APO 74-2, did, at Mountain Province, Luzon, Republic of the Philippines between 14 September 1946 and 18 November 1946, wilfully and with neglect, wrongfully fail to properly disburse the said funds entrusted to him, this to the discredit of the military service.

Accused pleaded not guilty to the Charge and Specification. Each accused was found guilty of the Charge and guilty of the Specification except the word, "willfully". No evidence of any previous convictions was introduced. Each accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentences but recommended in view of the prior service, the mitigating and extenuating circumstances and the absence of criminal intent that the sentence as to each accused be remitted, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

On 20 July 1946 accused Lauigan was appointed witnessing officer and accused Anasco Class "A" agent to pay claims of civilian workers in Northern Luzon, Philippine Islands (Pros. Exh. #2). Anasco's duty was to pay the claimants and Lauigan was to witness each payment (R. 8). Each accused was orally instructed by Major Baday that payments were to be made only to the individuals named on the pay rolls and that no funds were to be delivered to third persons (R. 30, 31, 32). The accused were entrusted with $179,000 and departed from Base M for the purpose of accomplishing the above mission (R. 33).

After accused had been in the Mountain Province for some time Major Baday dispatched Lieutenant Doyle to check on them (R. 9). The three officers returned to Base M and it was learned that instead of paying the persons listed on the pay rolls individually in accordance with the instructions received, accused had delivered "lump sums" to foremen, chiefs and "heads of pay rolls" and allowed them to make the individual payments to the claimants (R. 13; Pros. Exs. 3, 4, 5 and 11).

Lieutenant Doyle testified that accused did not possess the qualities requisite for this mission and that he had so informed Major Baday prior to the departure of accused (R. 16).

4. Evidence for the Defense.

Major Baday testified that accused accounted for all the money delivered to them, some of which was returned (R. 37, 40).

After their rights as witnesses were explained to accused, Lieutenant Lauigan elected to remain silent but Lieutenant Anasco testified under oath that the only instructions he received from Major Baday were to pay those claimants who were living and to return to the finance office that money which could not be disbursed because of the death of the designated claimants (R. 42). He further testified that Major Baday authorized him to pay "lump sums" to third parties who in turn were to pay the individual claimants (R. 43).

5. The evidence establishes that accused did not follow their original instructions but there is no evidence of dishonesty on their part. They were entrusted with a large amount of money and told to disburse it only to designated persons. Instead, when confronted with the almost impossible task of contacting each person they, in turn, entrusted the money to "capataz" and other native leaders and officials, who were to pay the appropriate individuals. Lieutenant Anasco was supposed to pay individual claimants and Lieutenant Lauigan was to witness each payment. This they did not do and consequently their dereliction of duty in this respect constitutes a violation of Article of War 96.

However there are extenuating circumstances in the case. Lieutenant Doyle told Major Baday that the accused were not proper persons for such an undertaking and Major Baday does not deny this. Both of the accused have been in Army service for a long period of time and have been commissioned officers for about five years. Both of them are over 40 years of age with no previous convictions. It was a mistake to assign this difficult task to them. The accused did not embezzle any of the money. The evidence does not indicate any dishonesty. The failure to comply strictly with the letter of regulations in the performance of a most difficult task under the most adverse conditions is at most a technical violation. The two accused may not have performed their duties in as capable a manner as some other officer with more education, training and experience. The Government has suffered no pecuniary or other loss from the conduct of these accused.

6. War Department records show that accused Lauigan is 40 years of age and married. He was a corporal in the Philippine Scouts on 1 December 1941 and served with the 102nd Infantry Regiment during combat on Mindanao. He was discharged on 20 April 1942 to accept commission as a Second Lieutenant, Army of the United States, on 21 April 1942. He was a prisoner of war from 10 May 1942 to 21 January 1943. He returned to

military control on 18 February 1945 at Manila, P.I. His efficiency reports show numerical ratings of 2.8, 4.7, 3.8 and 5.2.

Accused Anasco is 44 years of age and married. He served as an enlisted man in the Philippine Scouts during combat on Bataan. He was discharged to accept a commission as Second Lieutenant (AUS) on 20 April 1942. He was a prisoner of war for a short time but escaped and joined a "guerrilla" force. He returned to military control 10 August 1945. His efficiency reports show numerical ratings of 3.5, 4.3 and 4.4.

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

W. H. Johnson Jr., Judge Advocate

McDonald Gray, Judge Advocate

C. E. Johnson, Judge Advocate

JAGQ - CM 323766 1st Ind

WD, JAGO, Washington 25, D. C. AUG 18 1947

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and opinion of the Board of Review in the case of Second Lieutenants Estanislao Lauigan (0-890499) and Hilarion Anasco (0-890547), both of 58th Engineer Combat Battalion, Base "M", Unit 2, APO 74.

2. Upon trial by general court-martial each of these officers was found guilty of a violation of Article of War 96: Anasco of wrongfully failing properly to disburse funds entrusted to him; and, Lauigan of wrongfully failing to execute properly his duties as a witnessing officer at such disbursements. Each accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentences but recommended, in view of prior service, the mitigating and extenuating circumstances and the absence of criminal intent, that the sentence as to each accused be remitted, 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 sentences and to warrant confirmation of the sentences. I concur in that opinion.

4. The evidence shows that on 20 July 1946 accused Lauigan was appointed witnessing officer and accused Anasco Class "A" agent to pay claims of civilian workers in Northern Luzon, Philippine Islands. Anasco's duty was to pay the claimants and Lauigan was to witness each payment. Each accused was orally instructed by the Finance Officer that payments were to be made only to the individuals named on the pay rolls and that no funds were to be disbursed to third persons. They were entrusted with $179,000. They did not follow their instructions but there is no evidence of dishonesty on their part. When confronted with the almost impossible task of contacting each claimant they, in turn, entrusted the money to "capataces" and other native leaders, officials, and "heads of pay rolls" and allowed them to make the individual payments to the claimants. The Assistant Finance Officer testified that accused did not possess the qualities requisite for the mission, and that he had so informed the Finance Officer prior to their departure. The accused accounted for all the money. There was no loss to the Government.

5. War Department records show that accused Lauigan is 40 years of age and married. He was a corporal in the Philippine Scouts on 1 December 1941 and served with the 102nd Infantry Regiment during combat on Mindanao. He was discharged on 20 April 1942 to accept a commission as a Second Lieutenant, Army of the United States, on 21 April 1942. He was a prisoner of war from 10 May 1942 to 21 January 1943. He returned to military control on 18 February 1945 at Manila, P.I. His efficiency reports show numerical ratings of 2.8, 4.7, 3.8 and 5.2. No record of previous convictions is shown.

(412)

Accused Anasco is 44 years of age and married. He served as an enlisted man in the Philippine Scouts during combat in Bataan. He was discharged to accept a commission as a Second Lieutenant, Army of the United States, on 20 April 1942. He was a prisoner of war for a short time but escaped and joined a "guerilla" force. He returned to military control 10 August 1945. His efficiency reports show numerical ratings of 3.5, 4.3 and 4.4. No record of previous convictions is shown.

6. There was no criminal intent and no loss to the Government. The offense was purely a failure to comply with administrative instructions. In view of these facts and of the recommendation of the convening authority that the sentences be remitted, I recommend that the sentence as to each accused be confirmed but remitted.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 301, 27 Aug. 1947).

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 323840 14 November 1947

UNITED STATES v. Private JOHN P. CONNOLLY (32792852), Army Ground Forces Unassigned, Attached Unassigned to Detachment of Patients.	)	AIR DEFENSE COMMAND Trial by G.C.M., convened at Mitchel Field, New York, 11 and 13 June 1947. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Private John P. Connolly, Army Ground Forces, Unassigned, attached unassigned to Detachment of Patients, AAF Regional Station Hospital, Mitchel Field, New York, having taken an oath in a trial by Special Court-Martial of United States vs. Pvt. John P. Connolly, before 1st Lt. John C. Cummins, Trial Judge Advocate, a competent officer that he would testify truly, did at Mitchel Field, on or about 18 April 1946 willfully, corruptly and contrary to such oath, testify in substance that "He had never been in any trouble in the army before", which testimony was a material matter and which he did not then believe to be true.

CHARGE II: Violation of the 96th Article of War.
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

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

Specification: In that Private John P. Connolly, Squadron H (Hq & Hq Sq) 104th AAF Base Unit (BS) Mitchel Field, New York did, at Mitchel Field, New York on or about 17 June 1946 desert the service of the United States and did remain absent in desertion until he was apprehended at New York City, New York on or about 18 April 1947.

He pleaded not guilty to all Specifications and Charges. He was found guilty of Charge I andits Specification, not guilty of Charge II and its Specification and guilty of the Additional Charge and its 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 for five years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of the Additional Charge and its Specification. The only question presented concerns the sufficiency of the evidence to support the findings pertaining to the Specification of Charge I and the sentence. In view thereof, the following resume of evidence will be limited tothat relating to the latter Specification.

4. Aliunde the record of trial, it appears that the accused had been previously tried by special court-martial convened at Mitchel Field, New York, on 18 April 1946, for violation of Article of War 61 (absence without leave), (Reference; prosecution's exhibit #12b (SCMO) which was ruled inadmissible in evidence (R. 59-61)).

John C. Cummins, a witness for the prosecution, testified that on 18 April 1946 he was the Trial Judge Advocate of a special court at Mitchel Field which tried the accused on that date for an offense of absence without leave. Having been asked the question: "Was this court-martial proceeding a judicial process, in accordance with the Articles of War?" witness was allowed to answer, over objection by the defense counsel "Yes" (R. 11). Continuing his testimony the witness stated that in the course of such trial the accused had elected to testify under oath in his own behalf; that witness had administered the oath of accused; and that being under oath, accused "made a statement in response to a question [asked by his then defense counsel], that he had never been in trouble in the Army before" (R. 12).

The pertinent testimony of Marie Washabaugh, a prosecution witness, is summarized as follows: On 18 April 1946, she was the court reporter at the special court-martial trial of the accused and recorded all the testimony verbatim but did not record all the preliminary matters verbatim (R. 17,18). When asked, "In the course of that trial, did the accused make any statements?", the following objection was interposed by the defense:

> "Captain Phelan: I object, if it please the court, this witness is here as official reporter at this trial; the prosecution is trying to question her about facts; yet the record of this trial is not in evidence -- the previous trial -- there is no record here; this young lady takes down the proceedings, in the case, but she does not listen to the case. Any reporter knows that; I believe the court knows that. I don't think it is proper in the proceedings of this case, before the record of this trial is produced in evidence."

Over the defense objection, witness testified that accused took the witness stand and, as far as she remembered, he made a sworn statement (R. 18), and that the trial judge advocate, Lieutenant Cummins, placed him under oath (R. 18-19). So much of the witness' stenographic notes as related only to the accused's testimony in the special court-martial case of 18 April 1946 were admitted in evidence as prosecution's exhibit #1 over objection by the defense and read into evidence, in pertinent part, as follows:

> "Marie Washabaugh: (Reads from notebook); The defense has explained his rights to the accused, and he wishes to take the stand and make a sworn statement. John P. Connolly, 32792852, attached unassigned, Detachment of Patients, AAF Regional Station Hospital, Mitchel Field, New York. Direct Examination:
>
> Question: Have you ever been in trouble in the Army before?
> Answer: No sir" (R. 22-23).

Over objection by defense counsel several records of courts-martial cases were introduced into evidence as Prosecution's Exhibits 4-12a, inclusive, from which it appears accused had been convicted of various offenses prior to his alleged sworn testimony of 18 April 1946.

At the conclusion of prosecution's case, the defense made a motion that the Specification of Charge I and Charge I, alleging perjury in violation of the 93rd Article of War, be dismissed, stating as grounds for said motion that the prosecution had failed to establish a

prima facie case of perjury and that it had failed to prove the necessary elements of perjury. The court denied the motion (R. 63-69).

5. The accused, having been advised of his rights as a witness, elected to make an unsworn statement through his associate defense counsel which, in pertinent part, is summarized as follows:

> "At the time of the trial on the 18th of April 1946, had the accused been asked the question: Have you been convicted before a military court? Or, had a sufficient further examination been had by the counsel for the defense, or through cross-examination by the trial judge advocate to indicate to the accused precisely what was meant by the question: Have you been in trouble before? The accused would have given a different answer. There was nothing, either in the cross-examination -- either in the direct examination -- and there was no cross-examination, to give to the accused a fair indication of exactly what was meant by that question. Had the accused been asked: Have you had any previous convictions? The answer would have been: Yes.
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> * * *
>
> "At the trial of the 18th of April 1946, the accused pleaded guilty to the charge of absence without leave. He did not, at that time attempt to evade the responsibility for his act, or the punishment, which he knew was about to be meted out to him" (R. 75-76).

6. By the Specification of Charge I it is alleged, in essence, that accused, "having taken an oath in a trial by Special Court-Martial" did "willfully, corruptly and contrary to such oath, testify in substance that 'He had never been in any trouble in the army before,' which testimony was a material matter and which he did not then believe to be true." Paragraph 149i, Manual for Courts-Martial, 1928, provides, that the essential elements of perjury which must be proved to establish the offense are:

> "(a) That a certain judicial proceeding or 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; * * *."

One of the essential allegations and elements of the crime

of perjury is that the false testimony in question must have been given "in a judicial proceeding or course of justice" (par. 149i, MCM, 1928). Here the offense is alleged to have been committed in a judicial proceeding, in a trial by special court-martial. The prosecution, then, had the burden of proving that accused gave false, material testimony under oath before a special court-martial which had been duly constituted and had jurisdiction over the person of accused and over the offense for which he was on trial. In this regard it should be noted that a court-martial is a court of limited, not general, jurisdiction. It gains its judicial powers only by being called into existence by appropriate orders, by taking an oath before embarking upon the trial of each case and by having before it an accused arraigned upon Charges and Specifications setting forth a cause it is empowered to hear and determine (CM 218150, Hinman, 11 BR 377; CM 319573, O'Brien, CM 321643, Rowell (1947)).

A fundamental rule of evidence underlying all legal proceedings is that each essential element of an offense must be proven by the best available evidence by which such fact or question in issue is susceptible of proof (Wharton's Crim. Ev., Vol. I, p. 620). In this connection, legal evidence is classified as either primary or secondary evidence. Primary evidence is that evidence, which on its face, shows that there is no better evidence of the fact in question. Secondary evidence is that which is only admissible when the primary evidence is not available, and which, owing to this fact, is the best evidence which can be adduced. Secondary evidence is inadmissible unless, and until, the absence of the primary evidence is accounted for, assuming that proper objection thereto is made by the party against whom such evidence is sought to be admitted (Wharton's Crim. Ev., Vol. I, sec. 388).

Obviously, the best evidence of the facts in issue in the instant case must be found in the record of trial of the court in which the alleged false statement was given since only that record, taken in its entirety, reflects the ultimate and true fact surrounding the legal establishment of the court, the proceedings which transpired before it and any inferences or conclusions that might be drawn from the testimony. Consequently, the authenticated record of trial of the special court-martial, or a duly certified copy thereof, constitutes the best evidence of the facts required to be proven and should have been produced to establish them. It follows, that unless it is otherwise satisfactorily shown by the prosecution that such record could not be produced because of its loss, destruction, unavailability, etc., the testimony of the witnesses Cummins and Washabaugh and the partial transcription of the court reporter's notes of the special court-martial record pertaining to accused's testimony at the former trial was secondary evidence and incompetent upon proper objection being made thereto (pars. 116a, 117a, MCM, 1928; CM 205604, Mickey, 8 BR 203; CM 160345, Carter, Dig. Ops. JAG, 1912-40, Sec. 395(25), and cases therein cited).

The record of trial indicates that the defense made timely objection to the testimony of the witnesses Cummins and Washabaugh, relating to the special court-martial proceedings, on the ground that such testimony was not proper before the record of trial of the special court-martial was produced as evidence, and on the ground that it merely expressed a conclusion of the witnesses. While the defense objection is couched in inartful language and was not specifically and technically directed to the incompetency of the testimony as secondary evidence, it did, undoubtedly, raise before the court the question of the improper introduction of secondary evidence under the best evidence rule insofar as the defense stated that it was improper to introduce such testimony before the former record of trial was produced in evidence. Thus there was no waiver of the objection to the secondary evidence nor to the failure of the prosecution to lay proper foundation for introduction of secondary evidence.

Since neither the charge sheet, record of trial, nor court-martial order, pertaining to the alleged special court-martial proceedings was introduced into evidence, the testimony of the witness Cummins, which was admitted over objection, to the effect that it was a judicial process in accordance with the Articles of War, represented a bare conclusion of the witness and was incompetent to establish the first essential element of proof of perjury. There being no evidence of the official order appointing the special court-martial, there is no proof that the alleged court was duly constituted or that it ever existed in legal contemplation. This being so, there is likewise a failure of proof that the purported special court had jurisdiction over the person of accused and the offense he allegedly committed, for the entire proceedings of a court-martial which has not been duly constituted are null and void (CM 321643, Rowell (1947); CM 324396, Redmon (1947); CM 302975, Machlin, (59 BR 343, 346).

7. For the reasons above stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification; legally sufficient to support the findings of guilty of the Additional Charge and its Specification; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for a period of two and one-half years.

Singed., Judge Advocate.

(Sick in Quarters), Judge Advocate.

Signed., Judge Advocate.

JAGN-CM 323840 1st Ind November 24, 1947
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Air Defense Command, Mitchel Field, New York.

1. In the case of Private John P. Connolly (32792852), Army Ground Forces, Unassigned, Attached Unassigned to Detachment of Patients, I concur in the holding by the Board of Review and recommend that the findings of guilty of Charge I and its Specification be disapproved and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 323305).

1 Incl
Record of trial

/s/ Thomas H. Green.
THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGQ - CM 323850

16 September 1947

UNITED STATES v. Second Lieutenant THOMAS J. McLAUGHLIN (O-1998509), Attached Detachment of Patients, Station Hospital, Fort George G. Meade, Maryland.	)	SECOND ARMY Trial by G.C.M., convened at Fort George G. Meade, Maryland, 6 June 1947. Dismissal, total forfeitures and confinement for two (2) years. Disciplinary Barracks.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that, Second Lieutenant Thomas J. McLaughlin, Attached Detachment of Patients, Station Hospital, Fort George G. Meade, Maryland, then Attached Station Hospital, Fort George G. Meade, Maryland, did, at Fort George G. Meade, Maryland, on or about 10 February 1946, desert the service of the United States and did remain absent in desertion until he surrendered himself at Chicago, Illinois, on or about 28 January 1947.

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

Specification 1: In that, Second Lieutenant Thomas J. McLaughlin, attached Detachment of Patients, Station Hospital, Fort George G. Meade, Maryland, then attached Station Hospital, Camp Pickett, Virginia, did, at Mitchell Field, New York, on or about 31 October 1945, make a claim against the United States by presenting to Lieut. Colonel John B. Marian, Finance Officer, at Mitchell Field, New York, an officer of the United States, duly authorized to approve, allow and pay such claim, in the amount of Six hundred fifty-eight dollars and eleven cents ($658.11), for services alleged to have been rendered to the United States by him, the said Second Lieutenant Thomas J. McLaughlin, which

claim was false and fraudulent, in that he, the said Second Lieutenant Thomas J. McLaughlin had theretofore on or about 16 December 1944, authorized a Class "E" Allotment in the amount of One hundred ($100.00) Dollars per month for an indefinite period payable to Mrs. Anna McLaughlin, 1580 Broadway, Brooklyn, New York and did fail to subtract said Class "E" Allotment for September and October 1945 in the amount of two hundred ($200.00) Dollars; included longevity pay for over nine years service instead of for over six years service from 1 September to 31 October 1945 in the amount of sixteen dollars and sixty-eight cents ($16.68), and included pay and allowances for the period 1 August to 31 August 1945 in the amount of three hundred three dollars and seventeen cents ($303.17), making a total of Five hundred nineteen dollars and eighty-five cents ($519.85), in that said claim purported to cover a sum of money then due and owing, and did receive on said claim the sum of Five hundred nineteen dollars and eighty-five cents ($519.95) more than the amount to which he the said Second Lieutenant Thomas J. McLaughlin was entitled to receive for services from 1 August 1945 to 31 October 1945, which said claim was then known by the said Second Lieutenant Thomas J. McLaughlin to be false and fraudulent.

Specification 2: In that Second Lieutenant Thomas J. McLaughlin, attached Detachment of Patients, Station Hospital, Fort George G. Meade, Maryland, did, at Fort George G. Meade, Maryland, on or about 28 February 1946, make a claim against the United States by presenting to Major S. Gaddis, Finance Officer at Fort George G. Meade, Maryland, an officer of the United States, duly authorized to approve, allow and pay such claim, in the amount of Twelve hundred and twelve dollars and two cents ($1212.02), for services alleged to have been rendered to the United States by him, the said Second Lieutenant Thomas J. McLaughlin, which claim was false and fraudulent, in that said claim included pay and allowances for the period 1 September to 31 October 1945 in the amount of Six hundred four dollars and ninety-four cents ($604.94); included longevity pay for over nine years service instead of for over six years service in the amount of Fourteen dollars and eighteen cents ($14.18) and in that he, the said Second Lieutenant Thomas J. McLaughlin had theretofore on or about 16 December 1944, authorized a Class "E" Allotment in the amount of One hundred ($100.00) Dollars per month for an indefinite period payable to Mrs. Anna McLaughlin, 1580 Broadway, Brooklyn, New York and did fail to subtract said Class "E" Allotment for November 1945, December 1945, January 1946 and February 1946 in the amount of Four hundred ($400.00) Dollars, making a total of One thousand and nineteen dollars and twelve cents ($1019.12), in that said claim purported to cover a sum of money then due and owing, and did receive on said claim the sum of One thousand and nineteen dollars and

twelve cents ($1,019.12), more than the amount to which the said Second Lieutenant Thomas J. McLaughlin was entitled to receive for services from 1 September 1945 to 28 February 1946, which said claim was then known by the said Second Lieutenant Thomas J. McLaughlin to be false and fraudulent.

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

Specification: In that, Second Lieutenant Thomas J. McLaughlin, attached Headquarters and Headquarters Company, 2101st Area Service Unit, then attached Detachment of Patients, Regional Hospital, Fort George G. Meade, Maryland, did, at or near Brooklyn, New York, on or about 18 May, 1946, with intent to defraud, falsely indorse a certain check or draft by writing on the back thereof the name "Kathryn Conway Smith" which check is in the following words and figures, to wit:

"NAVY CLEVELAND, OHIO 37,752,937
Bureau of
Supplies and Accounts TREASURER OF THE UNITED STATES
THROUGH FEDERAL RESERVE BANK OF 6-1
CLEVELAND
APR 30 1946
PAY $**37 DOLLARS OOCTS. FOR APRIL
TO THE
ORDER OF — KATHRYN CONWAY SMITH
4307 CLARENDON ROAD
BROOKLYN 26 N Y
716 56 76

Object For Which Drawn:

FAMILY
ALLOWANCES

IDENTIFICATION PROCEDURE
When cashing this check for the individual payee, you should require full identification and endorsement in your presence, as claims against endorsers may otherwise result.

Unless this check is presented for payment within the year beginning July 1, next, after date of issue (U.S. Code, Title 31, Section 725t), it should be sent by the owner direct to the Secretary of the Treasury with request for payment after settlement of account.
The payee should endorse below in ink or indelible pencil.
If the endorsement is made by mark (X), it must be witnessed by two persons who can write, giving their places of residence in full.

/s/ Kathryn Conway Smith
/s/ Thomas McLaughlin
/s/ Frank P. O'Brien

which check was a writing of a private nature which might operate to the prejudice of another.

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

Specification: In that Second Lieutenant Thomas J. McLaughlin, attached Headquarters and Headquarters Company, 2101st Area Service Unit, then attached Detachment of Patients, Regional Hospital, Fort George G. Meade, Maryland, did, at Union Springs, New York, on or about 18 May 1946, with intent to defraud, willfully, unlawfully, and feloneously utter as true and genuine a certain check or draft in words and figures as follows:

"NAVY CLEVELAND, OHIO 37,752,937
Bureau of
Supplies and Accounts TREASURER OF THE UNITED STATES
THROUGH FEDERAL RESERVE BANK OF CLEVELAND 6-1
APR 30 1946
PAY $**37 DOLLARS OOCTS. FOR APRIL
TO THE
ORDER OF — KATHRYN CONWAY SMITH
4307 CLARENDON ROAD
BROOKLYN 26 N Y
716 56 76
Object For Which Drawn:

FAMILY
ALLOWANCES

IDENTIFICATION PROCEDURE
When cashing this check for the individual payee, you should require full identification and endorsement in your presence, as claims against endorsers may otherwise result.

Unless this check is presented for payment within the year beginning July 1, next, after date of issue (U.S. Code, Title 31, Section 725t), it should be sent by the owner direct to the Secretary of the Treasury with request for payment after settlement of account.
The payee should endorse below in ink or indelible pencil.
If the endorsement is made by mark (X), it must be witnessed by two persons who can write, giving their places of residence in full.

/s/ Kathryn Conway Smith
/s/ Thomas McLaughlin
/s/ Frank P. O'Brien

a writing of a private nature which might operate to the prejudice of another, which said writing was, as he the said Second Lieutenant Thomas J. McLaughlin then well knew, falsely made and forged.

Accused pleaded not guilty to the Specification of the original Charge and the Charge but guilty to absence without leave in violation of the 61st Article of War. He pleaded guilty to Additional Charge I and the two Specifications thereof but not guilty to Additional Charges II and III and the Specifications thereunder. He was found not guilty of the Specification of the original Charge and the Charge but guilty of absence without leave from 11 March 1946 to 28 January 1947, in violation of the 61st Article of War and guilty of all remaining Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence but reduced the period of confinement to two years, designated the Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

On 10 February 1946 while accused was a member of the detachment of patients, Regional Hospital, Fort George G. Meade, Maryland, he absented himself without leave from his station (Pros. Ex. 1, R. 11) and remained in that status until he surrendered himself to the military police in Chicago, Illinois, on 28 January 1947 (Pros. Ex 2, R. 11).

On 31 October 1945, accused presented his pay voucher for pay and allowances from 1 August 1945 to 31 October 1945 to the Finance Officer at Mitchel Field, New York, in the sum of $658.11 and received cash in that amount (Pros. Ex 4, R. 12). The sum claimed by accused on this voucher was $519.95 in excess of the amount justly due him for pay and allowances for the period in question because he failed to show on the voucher a Class E allotment which had been in effect since 16 December 1944 in the amount of $200.00; included a claim for pay and allowances for the period of 1 August 1945 to 31 August 1945 in the amount of $303.17 which had been previously paid to him on a prior voucher; and included a claim for nine years longevity pay when he was only entitled to six in the amount of $16.68 (Pros. Ex 4, 6; R. 12, 16).

On 28 February 1946 accused presented his pay voucher for pay and allowances from 1 September 1945 to 28 February 1946 to the Finance Officer at Fort Meade, Maryland, in the sum of $1212.02 and received cash in that amount (Pros. Ex 5, R. 12). The sum claimed by accused on this voucher was $1019.12 in excess of the amount justly due him for pay and allowances for the period in question because he failed to show on the voucher the Class E allotment in the amount of $400.00; included a claim for pay and allowances for the period of 1 September 1945 to 31 October 1945 in the amount of $604.94 which had been previously paid to him on a prior voucher (Pros. Ex 4); and included a claim for nine years longevity pay when he was only entitled to six in the amount of $14.18.

It was stipulated that the name "Kathryn Conway Smith" was endorsed by accused on the check described in the Specifications of Additional Charges II and III, a photostatic copy of said check being admitted in evidence as Pros. Ex 7. It was further stipulated that if Kathryn Conway Smith were present she would testify that she did not execute the endorsement on Prosecution's Exhibit 7; did not give anyone authority to endorse her name thereon (Pros. Ex 8, R. 13); and that if Frank P. O'Brien were present he would testify that he cashed the check for accused and gave him $37.00 in cash therefor (Pros. Ex 9, R. 13).

4. Evidence for the Defense

Accused, having been duly informed of his rights as a witness, elected to testify under oath to the effect that: (R. 14-25, 26-27).

He was wounded in the head during the Battle of the Bulge and was evacuated to the United States in March, 1945. He was placed in the psychiatric ward in the hospital at Camp Pickett, Virginia, and sent before a disposition board but was not separated from the service. There was no assignment available for him, he suffered from headaches so he "took off" and went to Boston. He returned to Fort Meade, was hospitalized and was told "nothing would happen" to him. He "waited around", went before a Disposition Board, "shoved off" and "stayed absent" until he surrendered at Chicago, Illinois. During his absence he stayed with friends at Buffalo, Syracuse and Union Springs, New York. He did not stay with his mother in Brooklyn because he thought the Military Police or CID "would be looking for him", and he did not want to worry her. He intended to return to the Army after "a month or two", but failed to do so through fear of being hospitalized again. During part of his absence he lived with his cousin, Kathryn Conway Smith. He loaned her $87.00 with the understanding that she would "turn over" two allotment checks aggregating that amount when she received them. When one check was received in the amount of $37.00 accused took it from Mrs. Smith's room without her permission, endorsed her name to the check without her authority, and negotiated it to one Frank O'Brien from whom he received cash in exchange.

It was stipulated that if Kathryn Conway Smith were present in court and sworn as a witness, she would testify that the accused loaned her $87.00 "which she was to repay upon receipt of checks from the United States Government." (Def Ex A, R. 25)

The testimony of Captain Albert B. Eisenstein, MC, Chief, Neuropsychiatric Section, Station Hospital, Fort George G. Meade, Maryland, was received in evidence by stipulation as follows:

> "I have examined Thomas J. McLaughlin, O-1998509, 2nd Lt., in neuropsychiatric clinic at the Station Hospital, Fort George G. Meade, Md. The charges against this officer are for being absent from this hospital without authorized leave for a period of eleven months.

"At the time, the above named officer left this installation he was hospitalized with a diagnosis of 'combat fatigue.' His symptoms at that time included instability, insomnia, anorexia, combat dreams, irritability, etc. A prominent feature of the syndrome described above is impulsive behavior which the patient showed when he left the hospital without authorized leave. I feel, however, that his neurosis does not completely exonerate him from the charges as he, in my opinion, could distinguish between right and wrong and was capable of adhering to the right at the time of commission of the alleged offense. Since, however, he was evidently suffering from such a neurosis, it was undoubtedly a motivating force helping to determine his behavior and should be considered an extenuating circumstance.

"He is at this time capable of cooperating in or conducting his own defense."

5. The evidence is clear, uncontradicted and proves beyond any reasonable doubt every element of all the offenses charged. The absence without leave was proved by the introduction of the duly authenticated copy of the morning report of accused's organization, his plea of guilty, and admitted by him in his testimony on the witness stand. The court obviously believed that accused was in the hospital and subject to military control on 11 March 1946 when he received the cash on his pay voucher dated 28 February 1946 (Pros. Ex 5). Consequently the court by proper exceptions and substitutions found him guilty of absence without leave beginning on 11 March 1946.

The two offenses of presenting fraudulent claims against the United States are clearly established by the introduction of the vouchers and the pleas of guilty of accused.

The offenses of forgery and uttering a forged instrument were proved beyond any reasonable doubt. The actual forgery and uttering of the instrument were admitted by accused in his testimony. Obviously his pleas of not guilty to these offenses were based upon the assumption that he had no intent to defraud because the owner of the check in question was indebted to him in an amount in excess of the face value of the check and had promised to pay him when her allotment checks arrived. Of course such does not constitute a defense and the intent to defraud is clearly inferable from the facts and circumstances of the case.

6. War Department records show that accused is 32 years of age and married. He enlisted in the Regular Army on 28 January 1936 and served continually in that status until he was commissioned a Second Lieutenant (AUS) on 10 December 1944. He served in North Africa, Sicily, and the European Theater and was wounded in action in North Africa. He has been awarded the Silver Star, Bronze Star and Purple Heart. Only one efficiency report is available which shows a superior rating.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61, 93 and 96.

W H Johnson Jr, Judge Advocate

Fahrenbach, Judge Advocate

Andrew D Kane, Judge Advocate

JAGQ - CM 323850 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 1 1947

TO: The Secretary of the Army.

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 Thomas J. McLaughlin (AUS) (0-1998509).

2. Upon trial by general court-martial, this officer was found guilty of absence without leave for 11 months terminated by surrender in violation of Article of War 61; of presenting two false and fraudulent pay vouchers covering periods of August to October 1945 and September 1945 to February 1946, the excess claims amounting in all to $1,539.07, in violation of Article of War 94; and forging and uttering a $37 check in violation of Articles of War 93 and 96, respectively. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to two years, designated the Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

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

4. On 31 October 1945, accused presented to an Army finance officer a pay voucher covering the period from 1 August to 31 October 1945. He failed to show thereon a Class E allotment of $100 a month and also omitted the pay he had received in August in the amount of $303.17. In addition, he claimed nine years longevity pay whereas he was entitled only to six years. These excess claims resulted in an overpayment of $519.95. In February 1946, he filed another pay voucher covering the period from 1 September 1945 to 28 February 1946. Similar ommissions resulted in another excess payment of $1019.12. After receiving his pay on this second voucher, accused went absent without leave (11 March 1946) from the Regional Hospital, Fort George G. Meade, Maryland, and remained in that status until he surrendered at Chicago, Illinois, on 28 February 1947. During this absence, he took a $37 allotment check from his cousin and cashed it by forging her name thereto. Accused claimed and his cousin admitted that he had made her a loan of $87 and that she had promised to give him this allotment check.

5. War Department records show that accused is 32 years of age and married. He enlisted in the Regular Army on 28 January 1936 and served continually in that status until he was commissioned a Second Lieutenant (AUS) on 10 December 1944. He served in North Africa, Sicily, and the European Theater and was wounded in action in North Africa. He has been awarded the Silver Star, Bronze Star, and Purple Heart. Only one efficiency report is available which shows a superior rating.

6. Accused testified at his trial that he had been wounded in the head, that he suffered a loss of memory, and that he had been hospitalized in a psychopathic ward. A report by the Chief of the Neuropsychiatric Section, Station Hospital, Fort George G. Meade, Maryland, showed that accused suffered from a neurosis which was a "motivating force helping to determine his behaviour" but it "does not completely exonerate him from the charges" against him. In view of the above, this office requested that accused be transferred to a general hospital for observation. The report from the Board of Medical officers there assembled showed that accused was fully responsible for his actions.

7. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 9, D.A. , 13 Oct. 1947).

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington, D. C.

JAGH - CM 323887

30 SEP 1947

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
	)	
v.	)	Trial by G.C.M., convened at Headquarters, PHILRYCOM, APO 707, 7 May 1947. Dismissal and confinement for five (5) years
First Lieutenant LEON D. CHRISTOPHER (O-1334417), Quartermaster Corps	)	

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, GRAY, and SOLF, 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 94th Article of War.

Specification: (Finding of not guilty).

CHARGE II: Violation of the 84th Article of War.

Specification: In that First Lieutenant Leon D. Christopher, QMC, did, at Rizal, Philippines, from 7 October 1946 to 5 November 1946, through neglect, permit the wrongful delivery to persons unknown of about 85 drums of lubricating oil, value about $3,503.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to all charges and the specifications. Of Charge I and its specification he was found not guilty. Of the specification of Charge II he was found guilty, except the word and figure "from 7" substituting therefor the words "during the month of;" except the words and figures "to 5 November 1946;" except the figure "85" substituting therefor the figure "44;" except the words and figures "value about $3503.00" and substituting therefor the words and figure "of a value more than $50.00" of the excepted words and figures, not guilty; of the substituted words and figures, guilty. Of Charge II he was found guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed

the service and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution pertinent to the findings of guilty is summarized as follows:

During the month of October 1946 the accused was Commanding Officer of Quartermaster Sub-Depot No. 4, Rizal, Philippine Islands (R 8, 13, 16). Petroleum, oil and lubricants, the property of the United States, were stored and issued at that depot (R 9-10, 12-13). The depot was subdivided into 26 areas in each of which POL was stored (R 11).

Jose Palaruan, a checker in Area Number 1 of Quartermaster Sub-Depot No. 4 (R 6), testified that this area contained quantities of 1120 Lubricating Oil (R 8), 62 Octane gasoline and Loco engine oil (R 12). The 1120 Lubricating Oil in Area No. 1 was stacked in seven "unbroken piles" each of which contained 1036 or 1025 drums and one "broken pile" from which current issues were made (R 8, 12). By glancing at the "unbroken piles" and counting the drums in the "broken pile," the checker customarily made a daily survey of the stock on hand (R 8). On the morning of 17 October 1946, the witness discovered that the "broken pile" had been disturbed (R 8) and upon counting the drums in that pile, he discovered that approximately 44 drums of 1120 Lubricating Oil were missing from his area (R 9, 13-14), which fact he reported to the chief clerk, Polycronio Ucab (R 9). The witness testified that, as far as he knew there were no issues of oil during the night. The area was guarded at night by Philippine Scouts (R 14). On cross-examination the witness testified that three other areas besides his had the same type of oil (R 13). He did not know whether the missing oil had actually been delivered to anyone (R 11) or whether the oil had been moved to another area (R 13).

Polycronio Ucab, the chief clerk at the depot, testified that issues of POL from Depot No. 4 were normally made on the basis of a requisition signed by the authorized requisitioning officer of the unit, but that this procedure was subject to change by the depot commander (R 15-16). On 17 October 1946, Jose Palaruan reported the shortage of 44 drums of 1120 Oil to the witness (R 16-17), which shortage was in turn reported to the accused (R 17). Thereupon the accused directed the witness to prepare a tally-out for the issue of 44 drums of oil to the 3066th Quartermaster Laundry Company. Such a tally-out was prepared by a clerk and the accused signed the tally-out in the presence of the witness (R 17). The witness identified a tally-out sheet dated 17 October 1946, which purported to show the issue of 44 drums of "1120 (Avn oil)" to the 3066th Quartermaster Laundry Company and which bore the signed <u>receipt</u> of the accused for the lubricating oil (Pros Ex 1; R 17).

The document was received in evidence as Prosecution Exhibit No. 1 over objection by the defense on the ground that the lower left-hand corner was torn off and not produced in court, although the witness had testified that the sheet was not torn when signed by the accused (R 17-18). The

portion of tally-out sheet which was missing normally bears the signature of the checker who issues the outgoing product (Pros Exs 2, 3). The witness did not remember whether there was any writing on the missing portion of the document (R 17).

The witness further testified that no requisition for the issuance of 44 drums of 1120 Oil was received from the 3066th Quartermaster Laundry Company on or about 17 October 1946 (R 21). He also testified that the depot was guarded day and night (R 24-25).

Second Lieutenant Paul F. Tennessee testified that he was the Commanding Officer of the 3066th Quartermaster Company from 25 February 1947 until 20 March 1947 (R 29). On 28 February 1947, the witness executed a certificate at the request of two CID agents, whom he found in his supply room examining his records (R 29-30). This certificate which was introduced into evidence as Prosecution Exhibit No. 4 over objection by the defense (R 81) provides:

"HEADQUARTERS
3066th QUARTERMASTER LAUNDRY COMPANY

APO 900
28 February 1947

C E R T I F I C A T E

I the undersigned, do hereby certify to the best of my knowledge and according to the records of this headquarter, this organization did not requisition or receive the fuel mentioned in Tally # 5-4 D dated 17 October 1946, Quartermaster Depot Number 4.

/s/ Paul F. Tennessee
/t/ PAUL F. TENNESSEE
2nd Lt., QMC
Commanding"

On direct examination the witness was asked what the occasion was which prompted him to examine the records, to which he replied, "I did not necessarily make an examination of the records" (R 29). He stated that one of the CID agents "had already got the information that he was asking. He had already got it and he asked me if there was any other record. He asked me if I would make a certificate which I had done" (R 30). The witness was also asked. "I will ask you whether or not you had the records of your office for the 17th of October 1946?" to which he replied, "Maybe I did. Maybe I did not" (R 30).

The direct examination continued as follows:

"Q. I will ask you whether or not you had any requisition in your office showing that you had requisitioned 1120 aviation gasoline from Depot No. 4 in September, or October 1946?
"A. Sir, when you said requisition, I did not requisition anything.

"Q. Were there any records in your office to show that?
"A. I do not know it necessarily because after making an examination, I had orders to deactivate the company and when I started to deactivate the company I found records every where."

* * *

"Q. I ask you whether or not the contents of this certificate are true?
"A. To the best of my knowledge, it is true." (R 30) (See also R 31).

On cross-examination the witness admitted that he had been on duty with the 3066th Quartermaster Laundry Company as Company Commander for three days when he executed the certificate and that he had been with the company since 5 January (R 31). The cross-examination continued:

"Q. After you signed that certificate I understood you to say on direct examination that you found a lot of records in other places, is that correct?
"A. That is correct.

"Q. Where did you find these other records?
"A. I had orders to deactivate the company and I was concerned with all the records in the company. I was looking around for the records of the company. I found out that lot of property that were supposed to be on hand did not have vouchers to substantiate that. When I found out that was true I was quite interested in the records of the organization because I become responsible for the property in the company. When I started checking for records, I found out they were not in the places were they were supposed to be. In other words, they were not in the file cabinet. Some of them, I have not found yet. I did not sign for the property when I became commanding officer."

* * *

"Q. You do not know whether or not your organization did requisition or did receive the fuel is that right?

"A. To the best of my knowledge—that is the reason why I made it part of my certificate. The agent searched the records that we had on hand. If I recall I told to the best of my knowledge that was the records we had on hand. I made the certificate out because I was new in the organization. I did not know what they were doing there." (R 32).

When asked on redirect examination whether he later found the requisition for the lubricating oil in question, the witness replied:

"I probably ran across it. It did not interest me. I can't say I found it." (R 32) (To the same effect see R 34).

On recross-examination he stated that he could not state under oath that the 3066th Quartermaster Laundry Company did not receive and did not requisition the 44 drums of lubricating oil on 17 October 1946 (R 33).

On examination by the court he reiterated the confused state of the property records of his company upon which he had based his certificate, and stated that they were comingled with the records of another company. He also admitted that 1120 Lubricating Oil is used in laundry operations (R 33-34).

On further cross-examination he stated that the 3066th Quartermaster Laundry Company drew supplies for the 245th Laundry Company (R 35).

It was stipulated that the value of one drum of 1120 Lubricating Oil was $42 (R 15).

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

Major Owen G. Denton, on duty with the Stock Control Section of the PHILCOM Quartermaster Depot testified that he had custody of the records of the monthly stock inventories for Sub-Depot No. 4. These records showed that there was a shortage of 64 drums of oil at that depot during October 1946; no shortage or overage during November 1946; an overage of 54 drums in December 1946 and an overage of 1 drum in January 1947. The net shortage of this type of oil for the 4 months period from October 1946 to January 1947 was 10 drums. He stated the overage for December and the shortage for October might be explained by errors in storing the oil in the wrong stack creating a shortage which would become an overage when the error was discovered (R 38-39).

The witness did not know whether the tally-outs represented by Prosecution Exhibits 1, 2, and 3 were used in arriving at the results of the inventory (R 40).

Three character witnesses testified that the reputation of the accused for honesty, veracity and "conduct becoming an officer and a gentleman" was "excellent" (R 42), "very fine" (R 43), and "good" (R 44).

5. In our deliberations upon this record careful consideration has been given to a brief filed on behalf of accused by Mr. William H. Quasha,

Manila, P.I., attorney for the accused, who also appeared as his individual defense counsel at the trial.

6. By exceptions and substitutions the court found that the accused "did, at Rizal, Philippines, during the month of October 1946, through neglect, permit the wrongful delivery to persons unknown of about 44 drums of lubricating oil, value of more than $50, property of the United States, furnished and intended for the military service" in violation of Article of War 84.

Article of War 84 provides:

> "Waste or Unlawful Disposition of Military Property Issued to Soldiers.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct."

Since the accused is an officer, and since Article of War 84 is limited in its application to enlisted men (MCM 1921, par 435, p 394), it is apparent that the offense charged was erroneously laid under that article. The specification, however, appears to allege an offense in violation of Article of War 83, which is applicable to any person subject to military law.

Article of War 83 provides:

> "Military Property—Willful or Negligent Loss, Damage or Wrongful Disposition.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct."

In discussing that Article, the 1921 Manual for Courts-Martial provides in part:

> "The article embraces eight offenses, indicated by the following diagram:

Any person subject to military law who	Willfully or Through neglect	Suffers to be	Lost, Spoiled, Damaged, or Wrongfully disposed of	Any military property belonging to the United States."

(MCM 1921, par 433, p 393).

The specification does not specifically allege that the described military property was lost, spoiled, damaged or wrongfully disposed of, but it may reasonably be inferred that the delivery of government property as alleged is a type of wrongful disposition. Since delivery of property implies affirmative action or commission on the part of the accused or his subordinates rather than the types of omission connoted by the word "loss" we are of the opinion that the specification alleges the offense of suffering (or permitting) military property to be wrongfully disposed of in violation of Article of War 83.

The elements of proof of that offense as stated in the Manual for Courts-Martial are:

> "(a) That certain military property belonging to the United States was * * * wrongfully disposed of in the manner alleged; (b) that such * * * (wrongful disposition) was suffered by the accused through a certain omission of duty on his part; (c) that such omission was * * * negligent, as alleged; and (d) the value of the property, as alleged" (MCM 1928, par 143, p 158).

> "A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, etc" (ibid.).

The court found that 44 drums of 1120 lubricating oil were wrongfully delivered to persons unknown.

The evidence showed that on the morning of 17 October 1946, the checker at Area 1 of Quartermaster Sub-Depot No. 4 noticed that 44 drums of lubricating oil were missing from that area. He did not know what became of the missing property, and although the depot was guarded day and night, the prosecution did not adduce any testimony tending to show the circumstances under which the 44 drums were removed from the area.

When the apparent loss was reported to the accused, who was the Depot Commander, he directed that a tally-out sheet be prepared showing the delivery of 44 drums of lubricating oil to the 3066th Quartermaster Laundry Company. He signed the tally-out as the individual receiving the property.

In the absence of any other evidence tending to show that <u>any wrongful delivery</u> was made, the only reasonable inference which can be drawn from the evidence presented is that actual delivery was made to the laundry unit. It was, therefore, incumbent upon the prosecution to show by competent evidence that delivery of the lubricating oil was not actually made to that company.

The prosecution attempted to negate delivery to the organization shown on the tally-out by the following evidence:

a. The testimony of Polycronio Ucab, the chief clerk at Sub-Depot No. 4, that no requisition for the lubricating oil was received on or about 17 October 1946 from the 3066th Quartermaster Laundry Company.

b. A certificate by Lieutenant Tennessee, the Commanding Officer of the 3066th Quartermaster Laundry Company, that the records of that company did not show the requisition or receipt of the lubricating oil.

c. Lieutenant Tennessee's testimony to the same effect.

Although Mr. Ucab testified that there was no requisition for the lubricating oil on file in the sub-depot, he also testified that POL may be issued without a requisition at the discretion of the Depot Commander. His testimony does not destroy the reasonable hypothesis that an authorized emergency issue of lubricating oil was made to the laundry unit after business hours.

There remains for consideration the evidence introduced through Lieutenant Tennessee.

Over objection by the defense there was received in evidence a certificate signed by Lieutenant Tennessee at the request of a CID agent on 28 February 1947 wherein he certified that to the best of his knowledge "and according to the records of this headquarters, this organization did not requisition or receive the fuel mentioned in Tally #5-4 D dated 17 October 1946, Quartermaster Depot Number 4."

We know of no exception to the hearsay rule which makes competent a certificate such as that shown above.

Paragraph 117a, Manual for Courts-Martial, 1928, provides in pertinent part:

> "It is to be borne in mind that the mere fact that a document is an official report does not in itself make it admissible in evidence for it is the hearsay assertion of a person not in court. Thus, neither the report of an investigating officer nor the accompanying summary of the testimony of a witness on a preliminary investigation of a charge is competent evidence of the facts therein stated. * * *"
>
> "Exceptions.—An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or 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" (Underscoring supplied).

It is obvious that Lieutenant Tennessee's certificate was nothing other than the summary of his expected testimony made during the course of a preliminary investigation of the accused's conduct by agents of the CID. As such it was inadmissible unless it may be considered a public document of record.

In CM 318685, Sustaite, it was held that only official writings which have been preserved in a public document of record and which were originally recorded by a person having an official duty to know and record the facts or events contained in such statement are admissible in evidence as official writings. In referring to the above portion of the Manual for Courts-Martial, the Board stated:

"The proviso making admissible in evidence an 'official statement in writing * * * in * * * a certificate' must be so limited."

The mere certificate of a company commander that to the best of his knowledge and according to the records of his company, certain events did not occur, is obviously not a public document of record--for no duty exists on the part of the company commander to record such negative facts. Accordingly such a certificate cannot be received in evidence on the theory that it is a public document. Neither can it be considered admissible on the theory that it was but a summary of the pertinent facts disclosed by the property records of the 3066th Quartermaster Laundry Company.

"A certified copy must, in the absence of statutory authority to the contrary (see last paragraph of par 117a, eighth paragraph of par 129, and fifth paragraph of par 152a, MCM 1928), be a transcription in the literal terms, an exact duplication of the original. A mere summary by the certifying officer is inadmissible (Wigmore on Evidence, 3rd Ed, SS 2108, 1678; In re Kostchris' Estate, 96 Mont. 226, 29 P (2d) 529, 835)" (CM 318685, Sustaite).

Moreover, since the certificate in question was prepared not in the regular course of business but rather with a view toward the prosecution of the accused, it cannot be admissible under the so-called Federal Shop Book rule (28 USC 695; See Palmer v Hoffman 318 US 109).

The fact that Lieutenant Tennessee was present in court and was subject to cross-examination did not render the document admissible, for the document itself was nothing other than an incompetent hearsay declaration. With respect to the document, his testimony served only as proof of authentication (MCM 1928, par 116a).

The wisdom of the rule of law which renders inadmissible documents such as the one introduced in the instant case is well demonstrated by Lieutenant Tennessee's testimony with respect to the circumstances under which the document was prepared and his testimony with respect to the state of his company's property records.

He testified that this company's property records were in an utter state of confusion. He stated that the oil in question was neither requisitioned nor received to the best of his knowledge, but he admitted that his knowledge with respect thereto was woefully inadequate and based on admittedly incomplete records. He admitted that after he made the certificate he discovered that similar records were misfiled, missing, and lost and that he may have "ran across" a copy of the requisition for the lubricating oil while searching his records upon the inactivation of the unit but that it did not interest him at that time. It is thus clear that Lieutenant Tennessee's testimony had virtually no probative value.

Since the only competent evidence tending to show that 44 drums of lubricating oil in question were not actually delivered to the 3066th Quartermaster Laundry Company was the testimony of the Chief Clerk at the Depot that no requisition was received from that unit on or about 17 October 1946, and since that evidence is too meager to support an inference that any unauthorized delivery of the property was made to persons unknown, we are of the opinion that evidence falls short of establishing any wrongful disposition.

Even if we are to assume that the evidence shows that no delivery of the property in question was made to the laundry unit, the only legitimate inference which may be drawn from the circumstances as shown by the record is that the accused attempted to conceal the loss of 44 drums of lubricating oil by executing the tally-out sheet. This might have been an inculpatory circumstance had the accused been charged with suffering military property to be lost through neglect, but it falls short of establishing that the property was wrongfully delivered to persons unknown, for it is equally reasonable to suppose that the property in question was stolen. Likewise, in view of the testimony that the net shortage of 1120 Lubricating Oil in Depot No. 4 for the four month period from October 1946 to January 1947 was 10 drums, it is not unreasonable to suppose that the missing drums were merely moved from Area #1 to some other area in the depot.

Since there is no evidence of any delivery of the property in question, unless it be to the 3066th Quartermaster Laundry Company, it is obvious that the prosecution failed to sustain its burden of proving that the property in question was wrongfully disposed of by the wrongful delivery to persons unknown.

Similarly the record is barren of circumstances which warrant the inference that the accused suffered or permitted such wrongful disposition through any omission of duty on his part or that the accused was in any respect negligent. Two witnesses for the prosecution testified that the depot was guarded day and night by Philippine Scouts and no evidence was introduced that sentries were not posted in Area #1 of the depot under accused's command on the night of 16-17 October 1946.

In his review the Staff Judge Advocate states, in part:

> "Thus neglect is established by the fact that the property was tallied-out to the accused and that the loss was not satisfactorily explained (MCM, 1928, paragraph 144b)."

The portion of the Manual to which he refers pertains to the offense of injuring or losing military property in violation of Article of War 84, and although it may be equally applicable to suffering military property to be lost, spoiled or damaged in violation of Article of War 83, it cannot be said that mere proof of loss of military property issued to an individual warrants an inference that accused through neglect permitted the wrongful delivery of military property to persons unknown.

In our opinion the only elements of the offense charged which are established by the evidence are that the property in question was military property of the United States and the value of such property. Accordingly we are of the opinion that the record of trial is not legally sufficient to support the findings of guilty.

7. The accused is 27 years of age, married and completed three years of high school. Prior to entry into the military service he was an inspector at an aircraft plant in San Diego, California. War Department records show that he was inducted on 27 July 1944. Upon successful completion of Infantry Officer Candidate Course he was commissioned as a second lieutenant, AUS, on 26 April 1945. He was promoted to first lieutenant on 18 July 1946. His efficiency ratings were "Excellent" from 7 May 1945 until 3 December 1945. Thereafter he was rated "Superior" until 30 June 1946. His efficiency rating from 1 July 1946 until 31 December 1946 was "Very Satisfactory." On 23 December 1946 he submitted his resignation for the good of the service in lieu of trial for the offenses under which he was tried. Thereafter, on 28 March 1947, he requested that his offer to resign be withdrawn stating that his resignation was submitted under duress and that it did not represent his free will. On 23 July 1947 his withdrawal of his formerly tendered resignation was accepted upon the recommendation of the Secretary of War's Personnel Board.

8. The court was legally constituted and had jurisdiction of the person and offense. 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

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 323887 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 9 1947

TO: Commanding General, Philippines-Ryukyus Command, APO 707, c/o Postmaster, San Francisco, California.

1. In the case of First Lieutenant Leon D. Christopher (O-1334417), Quartermaster 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 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 please place the file number of the record in brackets at the end of the published order, as follows:

(CM 323887)

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.

JAGQ - CM 323936

1 August 1947

UNITED STATES v. Private HERBERT L. RUSSEL (33954852), 610th Port Company, APO 503.	)))))))	2D MAJOR PORT Trial by G.C.M., convened at 2d Major Port, Yokohama, Japan, 13 May 1947. Dishonorable discharge and confinement for thirty (30) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
JOHNSON, GRAY And SCHENKEN, 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. Accused was tried jointly with four other soldiers, upon the following Charges and Specifications:

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

Specification 1: In that Private James H. Nunn, Jr., Fourth Replacement Depot, APO 703, Private Mack A. Locke, Fourth Replacement Depot, APO 703, Private Joe N. Mack, Fourth Replacement Depot, APO 703, Private Herbert L. Russel, 610th Port Company, APO 503, and Private Charles Johnson, 611th Port Company, APO 503, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 6 March 1947, unlawfully enter shed number 1 of the Fifth Medical Depot, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Private James H. Nunn Jr., Fourth Replacement Depot, APO 703, Private Mack A. Locke, Fourth Replacement Depot, APO 703, Private Joe N. Mack, Fourth Replacement Depot, APO 703, Private Herbert L. Russel, 610th Port Company, APO 503, and Private Charles Johnson, 611th Port Company, APO 503, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 24 March 1947, unlawfully enter shed number 1 of the Fifth Medical Depot, with intent to commit a criminal offense, to wit, larceny therein.

Specification 3: In that Private James H. Nunn Jr., Fourth Replacement Depot, APO 703, Private Mack A. Locke, Fourth Replacement Depot, APO 703, Private Joe N. Mack, Fourth Replacement Depot, APO 703, Private Herbert L. Russel, 610th Port Company, APO 503, and Private Charles Johnson, 611th Port Company, APO 503, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 24 March 1947, unlawfully enter shed number 1 of the Fifth Medical Depot, with intent to commit a criminal offense, to wit, larceny therein.

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

Specification 1: In that Private James H. Nunn Jr., Fourth Replacement Depot, APO 703, Private Mack A. Locke, Fourth Replacement Depot, APO 703, Private Joe N. Mack, Fourth Replacement Depot, APO 703, Private Herbert L. Russel, 610th Port Company, APO 503, and Private Charles Johnson, 611th Port Company, APO 503, acting jointly and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 6 March 1947, feloniously take, steal, and carry away eleven blanket sets, each containing twenty-four blankets value of about $2079.00, property of the United States intended for the military service thereof.

Specification 2: In that Private James H. Nunn Jr., Fourth Replacement Depot, APO 703, Private Mack A. Locke, Fourth Replacement Depot, APO 703, Private Joe N. Mack, Fourth Replacement Depot, APO 703, Private Herbert L. Russel, 610th Port Company, APO 503, and Private Charles Johnson, 611th Port Company, APO 503, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 12 March 1947, feloniously take, steal, and carry away twelve blanket sets, each containing twenty-four blankets value of about $2268.00, property of the United States intended for the military service thereof.

Specification 3: In that Private James H. Nunn Jr., Fourth Replacement Depot, APO 703, Private Mack A. Locke, Fourth Replacement Depot, APO 703, Private Joe N. Mack, Fourth Replacement Depot, APO 703, Private Herbert L. Russel, 610th Port Company, APO 503, and Private Charles Johnson, 611th Port Company, APO 503, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 24 March 1947, feloniously take, steal, and carry away two bales of blankets, each containing sixteen blankets, value of about $251.20, one small blankets set, containing eight blankets, value of about $62.92, thirteen blanket sets, each containing twenty-four blankets value of about $2457.00, of a total value of about $2771.12, property of the United States intended for the military service thereof.

Specification 4: (Disapproved by the reviewing authority).

Specification 5: In that Private James H. Nunn Jr., Fourth Replacement Depot, APO 703, Private Mack A. Locke, Fourth Replacement Depot, APO 703, Private Joe N. Mack, Fourth Replacement Depot, APO 703, Private Herbert L. Russel, 610th Port Company, APO 503, and Private Charles Johnson, 611th Port Company, APO 503, acting jointly, and in pursuance of a common intent, did, at Yokohama, Honshu, Japan, on or about 12 March 1947, wrongfully and knowingly sell fifteen sets of blankets, each set containing twenty-four blankets to Japanese Nationals, value of about $2835.00, property of the United States intended for the military service thereof.

The accused 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 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 thirty years. The reviewing authority disapproved the finding of guilty of Specification 4 of Charge II, 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. The Board of Review adopts the statement of the evidence in the Staff Judge Advocate's review.

4. The evidence clearly establishes that accused, acting jointly with four other soldiers, unlawfully entered a warehouse designated as "shed number 1" of the Fifth Medical Depot, Yokohama, Japan, with intent to commit larceny therein, on or about 6 March 1947; again, on or about 12 March 1947; and again on or about 24 March 1947. On March 6, eleven "blanket sets", each containing 24 blankets, property of the United States, value about $1996.50, were stolen therefrom; on 12 March 1947, 12 similar sets of blankets, property of the United States, value about $2178.00, were stolen and on 24 March 1947, 13 similar sets and 3 other sets, total value $2550.00, were stolen from the warehouse. On or about 12 March 1947, accused and his accomplices sold 15 sets of these blankets, value about $2722.50 to a Japanese National. Following their departure from the unlawful entry on 24 March, the accused and his co-conspirators were apprehended before they effected their escape from the pier on which the "shed" was located, and the blankets stolen on that day were recovered.

The foregoing facts are substantially admitted by the accused. The evidence as to all the circumstances indicates a design by the accused and his companions jointly to effect the unlawful entries, to commit the thefts, and to sell the stolen property on the "black market" in order to finance their activities while continuing their status of absent without leave.

6. Three of the co-conspirators of accused were each sentenced to 25 years confinement. The other, undoubtedly because of his youth and because of no previous court-martial conviction was sentenced to 17 years' confinement. The court in imposing a heavier sentence on the accused apparently took into consideration his admissions that he obtained the vehicle by means of which in each instance the five accused drove to the "Shed" and transported therefrom the blankets; that in each instance he drove the vehicle; that he broke the lock on one of the doors to the "Shed" on 24 March; that he collected most of the money given in payment upon the sale of blankets taken on the first two occasions; and that he was referred to as "the boss" by at least one of his partners in crime.

7. 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. Confinement in a penitentiary is authorized by Article of War 42 for the offense of larceny of property of the United States, of a value exceeding $50, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than 10 years by section 82, Title 18 of the United States Code. Confinement in a penitentiary is similarly authorized for the offense of housebreaking, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 22-1801, District of Columbia Code.

W A Johnson Jr., Judge Advocate

W. McDonald Gray, Judge Advocate

[illegible], Judge Advocate

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

JAGK - CM 323971

13 AUG 1947

UNITED STATES	KOBE BASE
v.	Trial by G.C.M., convened at Kobe, Japan, 13 and 14 May 1947. ROBINSON and MADDOX: Dishonorable discharge and confinement for life. MAJOR: Dishonorable discharge and confinement for ten (10) years. EACH: Penitentiary.
Private HERMAN MAJOR (RA 12253250), 3525th Transportation Corps Truck Company, Private FRANK B. ROBINSON (RA 18245353), 369th Quartermaster Laundry Company, and Private MELVIN MADDOX (RA 14199708), 3523rd Transportation Corps Truck Company.	

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

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

2. Accused were tried upon the following charges and specifications:

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

<u>As to accused Robinson and Maddox:</u>

Specification 1: In that Private Frank B. Robinson, 369th Quartermaster Laundry Company, APO 317, and Private Melvin Maddox, 3523rd TC Truck Company, APO 317, acting jointly and in pursuance of a common intent, in conjunction with Mitsuzo Nishimoto, did at Kobe, Honshu, Japan, on or about 8 March 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Matsujiro Otani 3340 yen, value about $66.80, 10 men's suits, value about $326.00, 4 haoris, value about $140, 1 coat, value about $30.00, property of Matsujiro Otani, of a total value of about $562.80.

<u>As to all three accused:</u>

Specification 2: (Finding of not guilty).

Specification 3: In that Private Melvin Maddox, 3523rd TC Truck Company, APO 317, Private Frank B. Robinson, 369th Quartermaster Laundry Company, APO 317, and Private Herman Major, 3525th TC Truck Company, APO 317, acting jointly and in pursuance of a common intent, did at Kobe, Honshu, Japan, on or about 12 March 1947, by force and violence and by putting her in fear, feloniously

take, steal and carry away from the presence of Kino Maeda 2,000 yen, property of Kino Maeda, value about $40.00.

Specification 4: In that Private Melvin Maddox, 3523rd TC Truck Company, APO 317, Private Frank B. Robinson, 369th Quartermaster Laundry Company, APO 317, and Private Herman Major, 3525th TC Truck Company, APO 317, acting jointly and in pursuance of a common intent, did at Kobe, Honshu, Japan, on or about 12 March 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Koreo Shibata 3,000 yen, property of Koreo Shibata, value about $60.00.

Specification 5: In that Private Melvin Maddox, 3523rd TC Truck Company, APO 317, Private Frank B. Robinson, 369th Quartermaster Laundry Company, APO 317, and Private Herman Major, 3525th TC Truck Company, APO 317, acting jointly and in pursuance of a common intent, did at Kobe, Honshu, Japan on or about 12 March 1947, with intent to do him bodily harm, commit an assault upon Yutaka Kajiwara by stabbing him in the back with a dangerous weapon, to wit, a knife.

<u>As to accused Robinson and Maddox:</u>

Specification 6: In that Private Melvin Maddox, 3523rd TC Truck Company, APO 317, and Private Frank B. Robinson, 369th Quartermaster Laundry Company, APO 317, acting jointly and in pursuance of a common intent, in conjunction with Mitsuzo Nishimoto and Kiyoshi Sakamoto, did at Kobe, Honshu, Japan, on or about 15 March 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Toki Tange 860 yen, value about $17.20, one watch, value about $8.00, 13 bottles of sake, value about $10.00, property of Toki Tange, of a total value of about $35.20.

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

Specification: In that Private Frank B. Robinson, 369th Quartermaster Laundry Company, APO 317, did at Kobe, Honshu, Japan, on or about 15 March 1947, forcibly, feloniously and against her will, have carnal knowledge of Toki Tange.

NOTE: The specification of Charge II against Maddox is identical with the above, accused Maddox' name being substituted for that of accused Robinson.

Accused pleaded not guilty to the charges and specifications against them. All accused were found not guilty of Specification 2 of Charge I. Accused

Robinson and Maddox were found guilty of Charge I and of Specifications 1, 3,4,5 and 6 thereunder and guilty of Charge II and its specification against each. Accused Major was found guilty of Charge I and of Specifications 3, 4 and 5 thereunder. Evidence of previous convictions of accused were introduced as follows:

Accused Robinson	Summary Court	AWOL from 25 Feb 1947 to about 19 March 1947
Accused Maddox	Summary Court	AWOL from about 17 July 46 to 20 July 1946
	Summary Court	AWOL from about 24 Feb 47 to about 19 March 1947
Accused Major	Summary Court	Failure to report to work at fixed time and place

Accused Robinson and Maddox were 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 their natural lives. Accused Major was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for twenty-five years. The reviewing authority disapproved the findings of guilty of Specifications 4 and 5 of Charge I as to accused Robinson and Major. He approved the sentences of accused Robinson and Maddox and ordered them executed, designating in each case the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War might direct, as the place of confinement. As to accused Major, the reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for ten years and designated the same place of confinement as he had in the cases of accused Robinson and Maddox. The record of trial was then forwarded for action under Article of War 50½.

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

4. The court was legally constituted and had jurisdiction over each accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, as to each accused. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape or

robbery, each being recognized as an offense of a civil nature punishable by penitentiary confinement by the Criminal Code of the United States (18 USC, 452,454,463).

Charles D. Gilvert, Judge Advocate

On Leave, Judge Advocate

Gilbert E. Schlegel, Judge Advocate

vol 72 Army JAG Bd. Rev

vol 72 Army JAG Bd. Rev

TITLE

DATE	BORROWER'S NAME	EXT.