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VOL. 73

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JUDGE ADVOCATE GENERAL'S DEPARTMENT

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VOLUME 73

including

CM 324029 - CM 324924

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

JAGN-CM 324029

U N I T E D S T A T E S	)	PHILIPPINES-RYUKYUS COMMAND
v.	)	Trial by G.C.M., convened at PHILRYCOM, APO 707, 18 April 1947. Dishonorable discharge and confinement for five (5) years. Federal Reformatory.
Private JAMES M. PASS (34759812), Paranaque Replacement and Disposition Center.	)	

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 61st Article of War.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

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

Specification: In that Private James Pass, (Casual) Paranaque Replacement and Disposition Center, having been duly placed in confinement at Replacement and Disposition Command Stockade on or about 18 September 1946, did, at Replacement and Disposition Command (APO 900 Unit 2) on or about 19 September 1946, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private James Pass, (Casual) Paranaque Replacement and Disposition Center, did, at Manila,

Philippines, on or about 14 September 1946, knowingly and willfully apply to his own use and benefit one tractor, of the value of over $50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Private James Pass, (Casual) Paranaque Replacement and Disposition Center, did, at Manila, Philippines, on or about 14 September 1946, wrongfully and without proper authority, have in his possession a dangerous weapon, to wit, a carbine, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private James Pass, (Casual) Paranaque Replacement and Disposition Center, did, at Manila, Philippines, on or about 14 September 1946, wrongfully and without proper authority, have in his possession six hundred and thirty one (631) cases of coffee, value of over fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Charges and Specifications but, as to the findings of the Specification of Charge I and Specification 2 of Charge IV, the findings were modified by exceptions and substitutions. 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 five years. The reviewing authority disapproved the findings of guilty pertaining to Charge I, approved the sentence and designated the Federal Reformatory, El Reno, Oklahoma, 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 as to the Specification of Charge II. Therefore, this review will be limited to a summary of the evidence and a discussion of its legal sufficiency insofar as it pertains to the findings of Charges III and IV and to the legality of the sentence.

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

On 14 September 1946, First Lieutenant Raymond E. Jackson was commanding the transportation of cargo at the Guadalupe landing docks. Accused reported to the docks with tractor #45, belonging to the 3693rd Quartermaster Company, for a load of cargo. Lieutenant

Jackson knew that accused was not a member of 3693rd Quartermaster Company and so suspected his presence and possession of the tractor. Lieutenant Jackson told his Sergeant at the docks that he would give accused a load and announced over the public address system "the man driving yellow ball tractor #45 if you are here to haul cargo, go down to the end of the pier where the loaded trailers are and pick up your cargo" (R. 8). Accused backed his tractor to a trailer loaded with 400 cases of government coffee, signed a tally for the load with the name appearing on his trip ticket [not his own name] and pulled out on Highway #54 in the direction of the Quartermaster Depot #17 to which the coffee was to be delivered. About three minutes later, Lieutenant Jackson, the Officer of the Guard, and five military policemen, followed accused to observe his movements. About 250 yards up the road, they observed the trailer traveling very slowly and a group of civilians throwing cases of coffee out of the trailer into the weeds alongside the road. The military policemen opened fire and told the driver to stop. Accused got out of the tractor holding a carbine and Lieutenant Jackson quoted accused as saying "I am glad you came to see what they are doing." The carbine was government property. The civilians came out from the bushes with some coffee and Lieutenant Jackson's party picked up the remaining cases from the bushes. Accused was directed to return the tractor to the docks, which he did, and was there placed under arrest.

Concerning accused's alleged misapplication of the tractor and his alleged wrongful possession of a carbine, Lieutenant Jackson testified, in pertinent part, as follows:

"Q: To your knowledge was this accused engaged in his legal duties at that time? Was it his duty to drive this truck?
A: It was not on the day in question. The organization to which the truck belonged did not have any truck dispatched out to my organization. I found out it was dispatched to Guadalupe" (R. 10).

"Q: By virtue of accused being on the docks on this truck coming up to the trailer, was he performing any official duty within your jurisdiction?
A: Yes, sir.

Q: Was he an authorized driver on an authorized trip?

A: To the best of my knowledge the truck was authorized to enter the installation but previous questioning about the accused lead me to know that the accused could not have been authorized driver for that truck.

Q: How do you know that?
A: From questioning the commanding officer of the unit from which the tractor was identified to be from.

Q: Was that truck dispatched from that unit on that particular day?
A: We have no trucks from that unit dispatched out for that day.

Q: Is it customary for your drivers to carry arms on the cab?
A: At that time drivers were not authorized to carry arms" (R. 12).

5. In an unsworn statement before the court, the accused stated that on 14 September 1946, a friend of his called "Big Time Slim," asked him to take his place hauling cargo from the Guadalupe landing docks to Depot #17. Accused agreed and his friend gave him a trip ticket for hauling the cargo. So he went to Guadalupe, left the trip ticket at the check point and was told over the public address system to go down the pier to get a tractor load. He picked up the cargo, went to the check point to get his trip ticket and signed the tally out. He signed the tally sheet with the same name that was on the trip ticket. The vehicle was loaded quite heavily and could not travel more than five miles per hour. As he passed the Guadalupe bridge he saw a civilian jeep moving in behind. After he drove about 200 yards he heard some shots and stopped his vehicle. He took a carbine that was in the cab and loaded a round in the chamber. Lieutenant Jackson came up with some guards and said some civilians were throwing cases of coffee from the tractor into the weeds. He told Lieutenant Jackson it was good he came along and saw what these civilians were doing, throwing cases of coffee while he (accused) was going on his way. Lieutenant Jackson told him he better get back to Guadalupe with the cargo, which he did, while Lieutenant Jackson and the guards stayed to search around the bushes for cases of coffee that were thrown off the trailer. When he returned to Guadalupe, he turned his trip ticket in at the check point, put his cargo down where he got it, and then gave the tally sheet to Lieutenant Jackson. A "Filipino officer" took him to Depot #17 for investigation, after which he was locked up in the 5th Replacement Stockade (R. 13-14).

6. Accused was convicted of: (a) misapplication of the tractor, used by him on this occasion, in violation of Article of War 94 (Chg. III); (b) wrongful possession of a carbine, carried in the tractor on this occasion (Spec. 1, Chg. IV); and (c) wrongful possession of over 400 cases of coffee, which he was transporting on this occasion (Spec. 2, Chg. IV), the two latter charges being in violation of Article of War 96, the tractor and coffee being alleged as property of the United States, furnished and intended for the military service thereof.

The offense of misapplication denounced by Article of War 94 is defined as the unauthorized application of government property

to one's own personal use and benefit (par. 150i, MCM, 1928, CM 243287, Poole, 27 BR 324).

With respect to Charge III (misapplication of a tractor), the evidence is uncontroverted that, at the time and place alleged, accused had possession of a tractor bearing vehicle markings of the 3693rd Quartermaster Company and that it was being used for hauling government cargo from the Guadalupe docks to Quartermaster Depot #17 in accordance with instructions and under the supervision of Lieutenant Jackson, the cargo officer. While the accused may have been operating the tractor without proper authority or without proper dispatch of the vehicle to him, no evidence was adduced to support the contention that he misapplied the tractor or that he had converted it to his own use and benefit. To the contrary, the evidence shows affirmatively that, at the time in question, the tractor was being used for hauling cargo in the government service pursuant to direction and under supervision of proper authority. In the absence of evidence showing that accused had used the tractor for his own personal use and benefit, it follows that the findings pertaining to Charge III cannot be sustained.

As to Specification 1, Charge IV (wrongful possession of a carbine), no competent evidence was adduced to show that accused's possession of the alleged weapon was wrongful, unauthorized or prohibited by official orders. Although Lieutenant Jackson testified that drivers of vehicles were not authorized to carry weapons, such testimony represents but a bald conclusion of the witness and is incompetent to prove the existence, validity or application of official orders prohibiting the carrying of weapons under these circumstances. Proof of the prohibition against the carrying of weapons whether of local or general application is dependent upon evidence of the written or oral order setting forth the prohibition as issued by competent authority. From such evidence, it is the duty and function of the court to determine whether possession of a weapon under the circumstances presented was wrongful or unauthorized (CM 161216 (1924) Dig. Ops. JAG, 1912-40, 395 (25); CM 192973, Smith, 49 BR 71). In the absence of competent evidence to this effect, the findings relative to Specification 1, Charge IV, cannot be sustained.

As concerns Specification 2, Charge IV (wrongful possession of over 400 cases of coffee), there is no substantial evidence to support the allegation that accused's possession of the coffee was wrongful. While the evidence indicates that, after the load of coffee in question was released to accused by proper authority, he signed the tally sheets with a name other than his own and that subsequently some civilians attempted to steal cases of coffee from accused's truck, the evidence is not of such probative and persuasive force to support a conclusion that accused was acting in consort with the civilians or to give rise to the

inference that his initial acquisition of the coffee was wrongful in order to accomplish an unlawful purpose. Lieutenant Jackson's testimony indicates clearly that he issued an order over the public address system directing accused to pick up his cargo at the pier. It is further shown that pursuant thereto, accused picked up the trailer load of coffee in question and proceeded to deliver it to its consigned destination. Although accused admits that he was not the authorized driver of the tractor and although it was not shown by competent evidence that the tractor was assigned to the duty of hauling cargo from the Guadalupe docks, which duty accused had undertaken, nevertheless, the fact remains that the coffee was authoritatively released to the accused notwithstanding the suspicions and design of the cargo officer. Obviously, Lieutenant Jackson deliberately instructed accused to pick up the cargo in question, and released it to him in order to substantiate his suspicions that accused would divert it to an illegitimate purpose. However, as pointed out above, the Board of Review finds that the evidence is not sufficient to confirm such suspicions. In view of the foregoing discussion, the findings pertaining to Specification 2, Charge IV cannot be sustained.

7. Since the maximum authorized punishment to confinement for the offense of which accused was legally convicted does not exceed one year, the designation of a Federal reformatory is not authorized (AW 42).

8. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III and its Specification and Charge IV and its Specification; legally sufficient to support the findings of guilty of the Specification of Charge II and of Charge II; 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.

_____, Judge Advocate.

(SICK IN QUARTERS), Judge Advocate.

_____, Judge Advocate.

JAGN-CM 324029 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 James M. Pass (34759812), Paranaque Replacement and Disposition Center, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Charge III and its Specification and Charge IV 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 one year 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 324029).

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.

JAGK - CM 324050

19 SEP 1947

UNITED STATES	PHILIPPINES-RYUKYUS COMMAND
v.	Trial by G.C.M., convened at Hq PHIBCOM, PHILRYCOM, 15,22,23,24,25 and 28 April 1947. "Dishonorable discharge," total forfeitures and confinement for two (2) years.
Second Lieutenant ROBERTO V. GONZALEZ (O-1896395), 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 charges and specifications:

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

Specification 1: In that Second Lieutenant Roberto V Gonzalez, 83rd Engineer Depot Company (PS), did, at Manila, Luzon, Philippines (APO 900), on or about 1 January 1947 to on or about 10 March 1947, wrongfully, through neglect, carelessness and disregard of responsibility, mismanage a branch of the Army Exchange Service.

Specification 2: In that Second Lieutenant Roberto V Gonzalez, ***, did, at Manila, Luzon, Philippines (APO 900), on or about 10 March 1947, lose through neglect, money in the value of Six Thousand Seven Hundred Eighty-Three Pesos and Eighteen Centavos (₱6,783.18) and merchandise in the value of Five Hundred Eighty One Pesos (₱581.00) all the property of the Army Exchange Service.

CHARGE II and Specification: (Finding of not guilty).

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

Specification: In that Second Lieutenant Roberto V Gonzalez, ***, having been duly placed in arrest at 1191st Engineer Base Depot, on or about 10 March 1947, did, at 1191st Engineer Base Depot (APO 900), on or about 14 March 1947, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to all charges and specifications. He was found guilty of Charges I and III and the specifications thereto but not guilty of Charge II and its specification. No evidence of any previous conviction was introduced. He was sentenced "to be dishonorably discharged the service and to forfeit all pay and allowances, due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years." The reviewing authority approved the sentence, designated the 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

In December 1946 the accused was appointed Post Exchange officer of the 1191st Engineer Base Depot, Manila, P.I., by verbal order of his commanding officer. On 9 January 1947 written orders to the same effect were published. The exchange was designated Branch Post Exchange 366. On 19 January 1947 some of the units of the base depot were moved to an area about five or six miles distant from the original location and sub-exchanges appear to have been established in the latter area (R 121,146,147).

Mr. Vincente del Rosario, an accountant employed by the Army Exchange Service in Manila, which supplied merchandise to Branch Post Exchange 366, identified and there were received in evidence the accountability ledger sheets for Branch Post Exchange 366 for January and February 1947. No inventory was reported for the month of January and, as shown by the records, accused's accountability to the Army Exchange Service for supplies furnished was in the amount of ₱15,091.55. An inventory was effected in the early part of February and by crediting the amount of the inventory, ₱2586.19, against the total accountability it was shown that the accused was short in his accounts in the sum of ₱12,505.36 (R 35-38, Pros Exs 4-5).

On 6 March 1947 the accused went to his home in Manila and sent word to his commanding officer, Major Hugh D. Coleman, that he was sick. On 10 March 1947 the accused returned to his company and Major Coleman notified him to report with "the money and critical items." He reported to Major Coleman but did not offer to turn in any money or other property. Accused stated that when he went home he had placed post exchange funds in the amount of ₱6,783.18 together with critical items in a footlocker which he left in the company area. When he came back the money and critical items were missing. Major Coleman immediately placed accused in arrest of quarters limiting his restriction to the latrine and mess hall, which limitations accused stated that he understood (R 9-11,31).

On 14 March 1947 Lieutenant Vernon W. Pinkey, who had been directed to work with accused on the accounts of the post exchange, searched the 1191st Headquarters area and found that accused was missing. On 16 March accused appeared in the area and on the following day he was escorted to

Major Coleman's office where, after being duly advised of his rights he signed a sworn statement in the form of answers to 49 questions and swore to the same before First Lieutenant Vernon W. Pinkey, CE, trial judge advocate (R 30, Pros Ex 1). The following pertinent questions and answers are quoted:

"Q. The inventory of 10 February discloses that you had ₱2,428.32 worth of merchandise, also ₱1,825.27 in cash, totalling ₱4,253.59. You were accountable to the AES for ₱15,091.55. That makes you short ₱12,663.23 since you no longer have any cash. Do you care to endeavor to explain the discrepancy?

"A. Yes sir.

"Q. State your case.

"A. I had ₱6,783.18 together with all the critical items in a safe at the Orderly Room of the 83rd. Lt Aspillaga arrived and said that Captain Evers ordered him to pick up the safe. I asked him if it was by order of Major Coleman and unless it was, I would not give him the safe unless he brought the receipt for the safe which I had signed. He came back the next day and said that Major Coleman had ordered that the safe be brought to headquarters. I then, in his presence, opened the safe took all critical items out, plus the cash and placed them in a canvas bag. I asked him if it would be possible to turn the items and cash over to him. But he said he'd prefer to have cash and critical items turned in to AES. For me to be able to turn it in, I had to have inventory forms accomplished. I have here the forms which were not then accomplished. I then placed bag with critical items and cash in my footlocker and asked from Lt Ramirez a lock. He gave me the lock and I locked my footlocker. Last Thursday, 6 March, in the afternoon I felt bad and left the camp to see a doctor, and was absent until today when I came back. When Lt Pinkey arrived and told me to get the critical items and cash that I had in my possession and go with him to report to Major Coleman, I left the orderly room and went to get the articles. Upon reaching the officers tent I noticed that my footlocker was not locked and I opened it and found the bag gone. Upon my investigation I asked my CO, Captain Buhisan, whether he knew anything about it. He told me in the presence of Lt Pinkey that he opened said footlocker last Friday and saw a bag inside. He said he closed the footlocker and had found no lock on it. I asked if any one else had seen it. One of the cooks Pvt Ortiz had seen it. We called Ortiz and he collaborated the statement of Capt Buhisan but further stated that Pvt Lucano had also been in the quarters and had seen them open the footlocker. I tried to get hold of Pvt Lucano but he was in basic training. Lt Pinkey suggested that I go report the matter and also have an inspection made. I asked permission to have an inspection made and Captain Buhisan agreed for noon today.

"Q. Why wasn't the money turned in to the AES per the regulation regarding turning in daily receipts of over ₱300 or ₱500?

"A. It was inventory money sir. I turned in all money except inventory money.

* * *

"Q. You had ₱6,783.18 in the footlocker?

"A. Yes sir.

"Q. You were charged with ₱15,091.55. The inventory showed ₱2,428.32. You still have a discrepancy of ₱5,880.05. What happened to that?

"A. I haven't gone through the records of the PX. I know there are companies that still owe the PX money. I have here now about ₱1000.

"Q. Do you have lists of the companies that owe you money?

"A. Yes. I have receipts.

* * *

"Q. Why didn't you take steps immediately to settle your accounts?

"A. The reason is that order was also an order to appoint an inventory officer. I notified the companies to turn in then stocks and cash.

* * *

"Q. What further steps did you take?

"A. None sir, due to their reply that they did not have the money to pay.

"Q. That called for an investigation on your part, didn't it?

"A. No sir. Our 1st CO had given verbal orders that cigarettes and beer be given on credit until pay day.

"Q. Who was your 1st CO?

"A. Major Cubbison.

"Q. He actually issued those instructions?

"A. Yes in the presence of Lt Morales, then adjutant of 1191st.

* * *

"Q. You mentioned money in a footlocker. Where was it?

"A. In the Officers Tent.

"Q. Was it guarded?

"A. No sir.

* * *

"Q. If you had ₱6,783.18 why wasn't it presented for inventory?

"A. I didn't have it.

"Q. Where was it?

"A. In different companies." (Pros Ex 1)

During the period 4 February and 6 March 1947 Eliseo A. Aspillaga, who had been designated as post exchange officer of Branch 366 to succeed the accused attempted to complete an inventory and effect the change in accountability but was unsuccessful due to the fact that accused did not transfer any property to him and he could not accept accountability as the records showed the shortage (R 69).

Private First Class Artemio T. Gonzalez, 83rd Engineer Base Depot, testified that he was a steward for Branch Exchange 366 during January and

February 1947, that he drew about ₱16,000 or ₱17,000 worth of beer and cigarettes from the main exchange and, in accordance with orders he had received from accused, delivered the merchandise to the units according to their strength. The exchange was supposed to have been reimbursed the selling price at the end of the month "when the enlisted men received their pay" (R 72). Private Rafael Serrano, 83rd Engineer Depot Company, also served as steward of the same branch exchange during December 1946 and January 1947. He sold merchandise for cash, turning the receipts over to accused and also sold on credit (R 79-80).

Second Lieutenant Gaudencio Ramirez, 83rd Engineer Depot, testified that on 13 February 1946 he entered the company orderly room and observed a tin box containing money and a bag lying on a desk. He concluded that this was property of the post exchange which accused had left on the desk and he made inquiry as to accused's whereabouts. Unable to locate him, Lieutenant Ramirez placed the property in a footlocker, placed a lock thereon, and on the following day notified accused of his action and delivered to him both of the keys to the lock. Accused thanked him for what he had done (R 88). On cross-examination the witness stated that about the time accused went absent from the company he exhibited a subpoena from civil authorities requiring his attendance in court on the 14th of March 1947 (R 96-97).

Captain Lewis Craig, Fiscal Officer of the Army Exchange Service, read to the court paragraph 13b and 20c (4), AR 210-65, dated 12 June 1945. The first quoted paragraph prohibits sales on credit by post exchanges, with certain exceptions not material here, and the last quoted paragraph enjoins the post exchange officer to not permit accumulation of funds in the exchange office in excess of requirements of the business or as dictated by the accessibility or limitations of banking facilities. It also required that the post exchange officer apply to the commanding officer for a guard to protect any substantial accumulation of funds in the exchange (R 105-106).

4. For the Defense

Second Lieutenant Felipe S. Morales, CE, testified that he was Adjutant of the "1191st" during December 1946 and January 1947 and that Major Gordon R. Cubbison was then the commanding officer. Major Cubbison had departed for the United States. Sometime in December the witness heard Major Cubbison order the accused to "give the beer and cigarettes to the men on credit and payable on pay day" (R 121). The witness also stated that accused had a good reputation among the troops for honesty, veracity and gentlemanly conduct (R 123).

Dr. Romeo M. Zarco, 710 Kansas, Malate, Manila, P.I., a qualified physician, stated that on or about 6 March 1947 accused came to him complaining of pains in the lumbar region. After being informed by accused that it was permissible for a civilian physician to treat him Dr. Zarco

prescribed rest "in the house." (R 130).

Second Lieutenant Balbino P. Fajardo, Infantry, was called by the defense as a character witness. He refused to state the reputation of accused among the officers and men but stated that in his opinion accused was a good officer (R 133). On cross-examination the witness stated that he "Lt Ramirez and Lt Morales are getting post exchange goods on credit" (R 135).

Second Lieutenant Ernesto J. Mecenas, CE, testified that on the morning that accused reported after being sick Captain Buhisan requested one of the men to get him a footlocker and bring it to the officer's tent. One was procured and brought to the captain who opened it and was surprised to find a sock therein. He replaced the sock and closed the footlocker stating that it probably belonged to someone (R 141).

The accused stated that he understood his rights and elected to be sworn as a witness. He had spent 17 years in the United States and had been granted citizenship. In 1940 he returned to the Philippine Islands and operated the Escolta drug, soda fountain and restaurant in Manila until being called into the Philippine Army. He was attached to the 14th Engineers and sent to Bataan. On 11 April 1942, in obedience to orders he surrendered to the enemy and was in the death march but escaped at Bacolor, Pampanga. He lived with Colonel Ramsey, formerly of the 36th Cavalry, during the occupation and after the liberation, on 26 June 1946, he was commissioned a second lieutenant, AUS. The accused stated that while he was assistant to the S-4, Headquarters CONCOR, he had a disagreement with Major Coleman relative to the use of some jeeps and he felt the major had a grievance against him. He was appointed post exchange officer, in addition to various other duties, by Major Cubbison sometime in December and on 9 January 1947 written orders to the same effect were published. The troops had not received their November and December pay. Major Cubbison ordered him to go to the main exchange, draw the merchandise and let every officer and enlisted man have the merchandise on credit "as long as the men would pay" (R 146). The accused extended credit in December amounting to about ₱8,000.00 and received payment therefor at a later date. In January all the units except the 83rd and 1319th were transferred to another area.

Accused stated that he was ordered by Lieutenant Colonel Wright to subdivide the post exchange so as to serve the units which had been transferred to the new area. That was when his troubles began. He was unable to collect for all the merchandise sold. On 1 February 1947 he closed the post exchange. On 7 February Captain Capulong was appointed inventory officer. He came to the area with Lieutenant Aspillaga, the new post exchange officer, but they were not able to locate the accused. On 10 February an inventory was begun. Accused stated that he did not assist in this inventory, because he was told that his presence was unnecessary. On 27 February Lieutenant Aspillaga told accused that he had orders to take over the post exchange

safe which was being kept in the orderly room. The accused thereupon took the money and critical items out of the safe, placed them on his desk and Lieutenant Aspillaga took the safe. The accused stated that -

> "*** Just then the Sergeant of the Guard came in and told me of an incident that was happening in the company area. I knew the CQ was in there. So I left the orderly room to go to the company area. I understand that Lieutenant Ramirez came inside and saw this money and the critical items on the top of the desk and ordered that a footlocker be brought immediately to the orderly room" (R 151-152).

The money was placed in a footlocker and on the following day, 28 February, the footlocker was moved to the officers' quarters where accused checked the contents thereof and found that "they were all OK" (R 152). On 10 March Lieutenant Pinkey came to the company to get the money and critical items and when he and accused opened the footlocker the money and merchandise were missing. Accused had previously opened the footlocker and found the items missing and he "started getting nervous" (R 152).

The accused stated that on 6 March he "started feeling pains" and went to Dr. Zarco where he got a certificate "addressed To Whom It May Concern due to the fact that my company commander may not give me permission. I showed it to my company commander who told me to go ahead and go home. I left the company at about 9:30" (R 151). On 14 March he was served with a subpoena from the Court of First Instance. The suit involved a debt owing his mother in the sum of ₱1,070,000. Major Coleman told accused, "You broke arrest and that will be one of the charges." He then ordered accused to go to the 83rd and finish the inventory (R 154).

The accused accounted for his shortage of ₱12,505.36 as follows:

Credits Claimed by Accused		Shortage
Explanation	Amount	₱12,505.36 - 25 Feb 47
Pd to Main Exchange 12 Mar 1947 -	2839.34	
Money lost in footlocker -	6783.18	
Critical items in locker -	581.00	
Certain receipts -	380.00	
Collectible from the 1574th -	700.00	
Collectible from the 83rd Eng. -	318.00	
Unaccounted for -	600.00	₱12,201.52
Balance -		303.84

Gross sales being ₱36,000.00 the shortage of ₱303.84 was therefore within the 1% allowance (R 155).

On cross-examination accused stated that he was not familiar with AFWESPAC regulations governing the operation of post exchanges, had never been a post exchange officer prior to his experience herein and was not "aware" of Army Regulations concerning post exchanges. He did not know how to transfer his fund and could not take the inventory as no officer was appointed between 4 February and 11 March. Accused did not turn in to the main exchange the money and items which he removed from the safe and left in his desk because this was "inventory property" (R 156-163).

There was received in evidence during the trial the following exhibits offered by the defense:

"A" - Subpoena received by accused (R 21).
"B" - True copy Sec. 15, WDAGO Form 66-1, Lt. Gonzalez (R 23).
"C" - Medical certificate of Dr. Zarco (R 102).
"D" - Cash receipts 12 Mar 1947 (R 104).
"E" - Par 10, SO No. 1, Hq 1191st Eng Base Depot, 9 Jan 1947. (R 145)
"F" and "G" - Branch accountability and sales reports, 34 pages (R 172).

5. Specification 1 of Charge I alleges that accused did at Manila, P.I., on or about 1 January 1947 to on or about 10 March 1947, wrongfully, through neglect, carelessness and disregard of responsibility, mismanage a branch of the Army Exchange Service. The defense, prior to entering pleas to the general issue made a motion that this specification be stricken or amended so as to apprise the accused of the specific acts or omissions intended to be denounced. The prosecution opposed the motion stating that AR 210-65 prescribed the duties of an exchange officer. The court overruled the motion. We are of the opinion that the specification is fatally defective as failing to allege a specific offense. "Mismanage," or to improperly manage, is so comprehensive a term, and could encompass such a multitude of acts or omissions as to fail entirely to apprise the accused of the offense intended to be denounced. Even though it be admitted that as a result of the investigation the accused had a general idea of the matters intended to be proven by the prosecution, a specification must contain an averment of specific acts or omissions constituting the offense. It must not be so broad in scope as to amount to a drag-net embracing innumerable misdoings. Furthermore one specification should not allege more than one offense, either conjunctively or in the alternative (MCM, 1928, par. 29b, p. 19; see CM 316296, Mayer, wherein the Board of Review held that the allegation "engaged in the illegal practice of black-marketeering" was too general an expression to allege a specific offense; see also CM 257469, Mackay, 37 BR 129, 140).

Specification 2 of Charge I alleges specifically that on or about 10

March 1947 the accused, through neglect, lost ₱6,783.18 and merchandise of the value of ₱581.00, property of the Army Exchange Service. The evidence shows that accused was short in his accounts with the Army Exchange Service in an amount approximating about ₱12,000.00. He asserted that he left ₱6,783.18 and critical items of the exchange lying upon his desk in the company orderly room. He did not deposit, or turn the money and critical items over to the Army Exchange Service because it was "inventory property." During all this time he was under orders from his battalion commander to account for his shortage by producing the money and/or property. His excuses and explanations for not turning in the alleged property are highly fantastic.

Although the evidence is conflicting as to the date on which Lieutenant Ramirez allegedly found the money and critical items belonging to the post exchange in accused's desk, the accused asserted that on 27 February he left the property on top of his desk and went away. On the following day he learned that the property had been placed in a footlocker and that the footlocker had been moved to the officers' quarters. Ramirez gave him the keys and he inspected the footlocker, finding the property therein. Accused stated that sometime later the property disappeared from the footlocker and on 10 March when Lieutenant Pinkey came to get the property in order that it might be turned in they found the footlocker to be open and the property missing.

In chronological order of events and according to accused's testimony, on 27 February he left the property exposed on top of his desk, on 28 February he examined it in a footlocker in the officers' quarters, sometime later he discovered the property missing and on 10 March he and another officer checked the footlocker and also found that the property was missing. It is therefore apparent that in addition to his initial abandonment of the property he left it unguarded and unattended in a footlocker in the officers' quarters for nearly ten days.

A losing through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss. It may result from deliberate violation or positive disregard of some specific law, regulation or order, and it may be evidenced by reckless or unwarranted disposition of the property thereby causing or permitting it to be lost or converted (MCM, 1928, par. 143, p. 158). In the light of the foregoing, there can be no doubt but that accused's neglect in abandoning and leaving the post exchange property unguarded in a footlocker caused the loss thereof and the court so found (CM 261042, Russell, 40 BR 91,102).

With regard to the specification to Charge III the evidence shows that on 10 March 1947 the accused was placed in arrest of quarters by his battalion commander, that the limits of said arrest were specifically made known to him, and that he understood the same. On 14 March 1947, and without the restriction having been lifted he went to Manila in response to a subpoena.

He stated that he did not know at that time that personnel of the Army were not supposed to answer subpoenas. Irrespective of any question as to the mandatory effect of a civil subpoena served on military personnel it cannot be maintained that it would operate to release accused from his status of arrest in quarters. The offense is committed when the person in arrest infringes the limits set by orders, and the intention or motive that actuated him is immaterial to the issue of guilt, though of course, proof of inadvertence or bona fide mistake is admissible in extenuation (MCM, 1928, par. 139a; CM 238898, Marinucci, 24 BR 379,384; CM 269105, Kolick, 45 BR 1,6).

The sentence "to be dishonorably discharged the service" is inappropriate in the case of an officer but in effect is tantamount to "dismissal" and the irregularity may be corrected by the action of the confirming authority (CM 249921, Maurer, 32 BR 229).

6. War Department records show that on 27 June 1946 the accused was appointed second lieutenant, AUS, by the Commanding General, U.S. Army Forces Western Pacific. There are no other available War Department records pertaining to accused. The record of trial shows that he is 33 years of age and is married. He was given an efficiency rating of 3.4 for the period June 1946 to February 1947.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 of Specification 1 of Charge I, but legally sufficient to support the findings of guilty of Charge I and Specification 2 thereof, Charge II and its specification, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 96.

Christian D. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Albert J. Hayden, Judge Advocate

JAGK-CM 324050 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C. OCT 5 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 Roberto V. Gonzalez (0-1896395), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of wrongfully, through neglect and disregard of responsibility, mismanaging a branch post exchange at Manila, P. I., and losing, through neglect, ₱6,783.18, and merchandise of the value of ₱581.00, property of the post exchange service, in violation of Article of War 96 (Charge I and its specifications), and of breach of arrest in violation of Article of War 69. No evidence of previous convictions was introduced. He was sentenced to be "dishonorably discharged the service," to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the finding of guilty of Specification 1 of Charge I, (mismanaging a branch post exchange) legally sufficient to support the findings of guilty of Specification 2 of Charge I and Charge I (losing money and merchandise), legally sufficient to support the findings of guilty of Charge III and its Specification (breach of arrest), and legally sufficient to support the sentence and to warrant confirmation of the sentence.

In December 1946 the accused was appointed post exchange officer of Branch Post Exchange No. 366 located near Manila, P. I. He requisitioned merchandise from the Army Exchange Service in Manila and sold it to the men of the various units for cash and also on credit. In the early part of February 1947 he was directed by his commanding officer, Major Hugh D. Coleman, to turn in all post exchange property and settle his accounts, a new post exchange officer having been designated to take over the exchange. He was accountable to the exchange service in the sum of about ₱15,091.00. Some money was turned in and on 25 February the records showed that he was short in his post exchange accounts in the sum of about ₱12,505.36. He never reimbursed the Army Exchange Service for this shortage. On 17 March 1947 he made a sworn statement wherein he asserted that he had placed ₱6,783.18 and merchandise of the value of about ₱581.00 in a foot locker which was located in the company orderly room and that such funds and property, belonging to the post exchange, had been stolen. At the trial he testified concerning the alleged loss

of this money and property and attempted to explain the loss of or his inability to collect the remainder of the amount of his shortage. There is testimony in the record tending to show that on 27 February 1947 accused left some money and a bag on his desk and that subsequently another officer placed the property in a footlocker, locked it and gave accused the keys thereto. The footlocker was subsequently moved to the officers quarters. It is this property that accused testified consisted of ₱6,783.18 and merchandise valued at ₱581.00 which he asserted was removed from the footlocker by unknown persons.

On 10 March 1947 the accused was placed in arrest of quarters by his commanding officer, Major Coleman. On 14 March, and before being set at liberty, he went to Manila, allegedly in response to a subpoena issuing from the civil court.

4. Specification 1 of Charge I alleged that accused wrongfully, through neglect and disregard of responsibility, mismanaged the branch post exchange. Although the record shows many acts of neglect and what may be construed as mismanagement, the Board of Review is of the opinion that the specification, as drawn, fails to allege a specific act or acts constituting an offense and is thereby fatally defective. The defense made timely objection to the specification as drawn and moved that it be stricken or amended which motion was overruled.

With regard to Specification 2 of Charge I the record of trial shows that the loss of ₱6,783.18, and merchandise valued at ₱581.00 was caused by the neglect of accused properly to safeguard such property or turn it in to the Army Exchange Service as he had been ordered.

The accused's defense to Charge II and its specification, alleging breach of arrest, might be considered as a mitigating circumstance but is not a defense in law. The record shows that he left the area to which he had been restricted without proper authority.

5. I recommend that the sentence be confirmed, but in view of the nature of the offenses of which accused was found guilty, recommend that the forfeitures and confinement imposed be remitted, and that the sentence as thus modified be carried into execution.

6. On or about 3 June 1947 Mr. William H. Quasha, Manila, P. I., special defense counsel, appeared before the Board of Review, made oral argument on behalf of accused, and filed brief which has been considered.

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

3 Incls
1 - Record of trial
2 - Form of Action
3 - Brief filed by Mr. Quasha, sp def counsel

(GCMO 2, D.A., 13 Oct 1947).

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

JAGN-CM 324075

UNITED STATES v. Private RUFUS McNISH (32172016), Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania.	)	SECOND ARMY Trial by G.C.M., convened at Phoenixville, Pennsylvania, 18 June 1947. Dishonorable discharge and confinement for six (6) years. Disciplinary Barracks.

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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Rufus McNish, Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at 755th Quartermaster Company (Truck), Jackson Army Air Base, Jackson, Mississippi, on or about 1 February 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at New York, New York, on or about 11 January 1947.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence but reduced the period of confinement to six 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 50½.

3. The record of trial is legally sufficient to support the findings of guilty. The only question requiring consideration here is whether the record of trial is legally sufficient to support the sentence.

4. The desertion of which accused was found guilty was committed prior to the issuance of Executive Order Number 9048, February 3, 1942, suspending the limitations upon punishment for violations of Article of War 58 as set forth in paragraph 104c, MCM, 1928. The Executive Order was made applicable, by its terms, only to designated offenses committed after the date of its issuance. It follows that the limitations upon punishments prescribed by the Table of Maximum Punishments, paragraph 104c, MCM, 1928, are applicable with respect to the offense of which accused was found guilty (CM 221662, Knight, 13 BR 211, I Bull JAG 17).

From the record of trial it appears that accused initially entered the service by induction 29 August 1941, less than six months prior to his commission of the offense of which he has been found guilty. The maximum punishment by confinement authorized by the Table of Maximum punishments (par. 104c, MCM, 1928) for the offense of desertion terminated by apprehension, after not more than six months' service, is confinement at hard labor for one and one-half years.

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 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.

Edward R. Johnson, Judge Advocate.

Joseph L. Brack, Judge Advocate.

Virgil R. Smith, Judge Advocate.

JAGN-CM 324075 1st Ind
WD, JAGO, Washington, D. C.
TO: Commanding General, Second Army, Fort George G. Meade, Maryland.

1. In the case of Private Rufus McNish (32172016), Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, I concur in the foregoing holding of 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 one and one-half years. Upon taking such action 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 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 324075).

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.

JUL 30 1947

JAGQ - CM 324088

UNITED STATES	)	KOREA BASE COMMAND
v.	)	Trial by G.C.M., convened at Korea Base Command, APO 901, 11-12 June 1947. Total forfeitures and to be hanged by the neck until dead.
Private ROBERT A. SOUCY (11163378), 81st Ordnance Tank Maintenance Company, APO 901.	)	

OPINION of 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 soldier named above and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert A. Soucy, 81st Ordnance Tank Maintenance Company, APO 901, did, at or near Camp Ascom, APO 901, on or about 22 April 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Kim Yong Ja, a human being, by shooting her with a carbine.

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

3. At approximately 0130, 22 April 1947, Captain Sitzman, Assistant Provost Marshal, Korea Base Command, noticed three enlisted men and three Korean women in a Government truck at the "337th motor pool" (R. 25). He ordered them to drive to the military police station but they

drove to the "Mitsubishi area" near the 81st Tank Maintenance shop, where the Korean girl who was sitting in the front seat "got out" and disappeared under a box car (R. 27). Captain Sitzman then departed with the three enlisted men and the two Korean women in his custody.

Thereafter at about 0230 Corporal Sessa, who had posted the guards in the Mitsubishi area, drove to the 81st Tank Maintenance shop where he discovered accused, Privates Earlywine and DeGonia, whom he had previously posted as guards at that place, talking to a Korean woman (R. 33). He "wanted to take her in as she was possibly the woman who had escaped from the truck" but they requested that he leave her there as they wanted to have intercourse with her, so he consented and departed (R. 33-34). Accused went into the warehouse with the woman and after a few minutes called to DeGonia who then entered and had sexual intercourse with her (R. 10, 11, 37).

Accused, DeGonia, and the Korean woman were still in the warehouse when Privates Hower and Husted arrived and asked her if she would have intercourse with them, but she refused and began to cry (R. 11, 46, 53). While the soldiers were discussing how they would "get rid of the girl", accused said that she made some remark about "rape and turning them in to the MP's so the best thing to do was to shoot her" (R. 13, 38). When the other soldiers told accused who was armed with a carbine that he should not do that he replied, "Get out of the way. I am going to shoot" (R. 12, 39, 48), and that "if anybody asks you anything, tell him I hollered 'Halt' three times" (R. 54). Accused then said "Halt, Halt, Halt, one, two, three" and began to fire at the victim who was standing about ten feet from him (R. 14, 39, 46). The woman fell after the first shot but accused kept firing until the clip was empty, then said "one more for good measure", placed a full clip in the weapon and fired another shot at the victim who was lying on her back (R. 15, 20, 22, 40-43). He then said "I ought to make T/5 out of this" (R. 16, 40, 43) and reported the incident to the officer of the day (Pros. Ex. 2).

At approximately 0420 Captain Sitzman returned to the warehouse and identified the victim as the same woman who had previously escaped from the Government vehicle in that vicinity (R. 28). Accused gave Sitzman his carbine stating that it was the one he had fired at the deceased as she was attempting to leave the warehouse. Accused stated that he "yelled" "Halt" three times before he fired and that when he shot he did not know deceased was a woman (R. 31).

It was stipulated that the body of the Korean woman was taken from the 81st Ordnance Tank Maintenance Shop to the 382nd Station Hospital on the morning of 22 April 1947 and that she was identified as Kim Yong Ja (R. 78). The victim died of perforating wounds of the chest and one of the bullets found in her body was shown to have been fired from the

carbine which accused handed to Captain Sitzman shortly after the killing (R. 77, 78).

Accused, after being warned of his rights under the 24th Article of War made a written statement to agents of the Criminal Investigation Division (R. 69, 70; Pros. Ex. 2). He read the statement before signing it and "seemed anxious to make it" (R. 70, 71). The statement was in effect a full confession and agreed in substance with the testimony of the eyewitnesses.

The rights of accused as a witness were explained to him and he elected to remain silent (R. 90, 91).

4. Murder is the unlawful killing of a human being with malice aforethought, without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par. 148a, pp. 162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death. An intent to kill may be inferred from an act of accused which manifests a reckless disregard of human life.

The evidence clearly establishes a premeditated and vicious killing. Four witnesses testified that after the victim made some remark about "rape" and "turning in" accused and a fellow soldier to the military police, accused stated that the only thing to do was to "shoot her". The other three soldiers present attempted to "talk him out of it" but to no avail. Consequently, accused went through the mock procedure of saying "Halt" three times and then fired a "full clip" from his carbine into the body of the victim. Then, "for good measure" as he termed it, he replaced the empty clip and fired one more bullet into the prostrate body of the woman. The shooting was witnessed by two eyewitnesses and there is no substantial conflict in their testimony. Even accused himself in his confession related in grim detail the firing of the shots. The Board of Review is of the opinion that every element of the offense charged was proved beyond any reasonable doubt.

The record of trial shows that accused requested the services of an officer as special defense counsel who was determined to be unavailable by his immediate superior and by the Commanding General, XXIV Corps. When this request was not granted accused was represented at the trial by the assistant defense counsel and Major Grebinger as special defense counsel. While every effort should be made to furnish counsel requested by an accused it is obvious that such requests cannot always be granted. The accused's request in this case was promptly forwarded through channels to the Chief Commissioner of the American Delegation, US-USSR Joint Commission

who was the immediate superior of the officer requested and who determined that the officer was not available at that time. This decision was concurred in by the Commanding General, XXIV Corps. There is no evidence to indicate that the refusal to grant the request was arbitrary or an abuse of discretion. The reason given for refusing the request was that the duties of the officer in question would not permit his assignment to this duty at that time. This is a recognized basis for such refusal. The accused was adequately represented at the trial by counsel of his own choosing and the Board of Review is of the opinion that no error was committed by such refusal which prejudiced accused's substantial rights.

A certificate attached to the record of trial signed by all the members of the court, all personnel of the prosecution and defense shows that after the court had closed to deliberate on the sentence, the president called the personnel of the prosecution and defense and the Acting Staff Judge Advocate of the Korea Base Command before the court and the Acting Staff Judge Advocate was:

> "* * * questioned by the court as to whether in a sentence of life imprisonment or death penalty it was necessary to include 'forfeiture of all pay and allowances due or to become due'; that the Acting Staff Judge Advocate, Captain Walter D. Sowa, replied that it would not be improper and then referred the court to Appendix 9, Manual for Courts-Martial, 1928, for the proper forms of sentences; that no discussion on any other point was had and the court was again closed for the purpose of voting upon the sentence; and that the accused and the reporter were not present during this discussion by order of the President of the court." (p. 1, Certificate).

While it was improper for the court to call the Staff Judge Advocate before it in closed session the certificate states that no discussion was had on any phase of the case except the one mentioned. This fact is certified to by the two defense counsels who were present during the entire proceeding. Under these facts it cannot be said that any substantial rights of the accused were prejudiced, as the only result of the advice received by the court was a change in the form of the sentence which in no way effected its severity. In any event the forfeitures adjudged by the court are surplusage as they have no place in a death sentence. While the procedure resorted to was irregular the sentence is not invalidated where such procedure does not prejudice the accused's substantial rights (CM 237637, Seery, 24 BR 65 (69)).

No issue of insanity was raised at the trial but accused was given a neuropsychiatric examination at the 34th General Hospital on 16 May 1947 prior to reference of the charges for trial. The report concludes:

> "In our opinion the 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 acts charged, to distinguish right from wrong, to adhere to the right, and refrain from the wrong."

5. The charge sheet shows that accused is 18 years of age and single. He enlisted in the Regular Army at New Bedford, Massachusetts, on 11 October 1946 for three years. He has no prior service.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

W. H. Johnson Jr., Judge Advocate.

H. McDonald Gray, Judge Advocate.

E. F. Schumann, Judge Advocate.

JAGQ - CM 324088 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Robert A. Soucy (11163378), 81st Ordnance Tank Maintenance Company, APO 901.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The evidence shows that at approximately 0130, 22 April 1947 while accused and four other soldiers were on duty as guards in a warehouse area, Kim Yong Ja, a Korean woman was discovered in a warehouse. Accused and one of the other soldiers had intercourse with her by her consent. Thereafter she refused to have intercourse with any of the others and while they were discussing the most appropriate means of "getting rid of her" she made a remark about "rape" and "turning in" accused and his companions to the military police. Accused stated the "best thing to do was shoot her" and when the others remonstrated with him he said, "Get out of the way I am going to shoot." He further stated that he would say "Halt" three times so that if anyone asked them they could state that they heard him. He then said "Halt" three times, "one, two, three" and then fired a full clip from his carbine at deceased who was standing about ten feet distant. Accused then replaced the empty clip and said "one more for good measure" and fired another shot into the body of the victim. He then called the officer of the day and informed him that the deceased failed to halt when he challenged her so he fired. The victim was dead upon arrival at the hospital a few minutes later.

Accused was examined by a neuropsychiatrist prior to trial and was found to be sane and responsible for his acts. No issue of insanity was raised at the trial.

4. The charge sheet shows that accused is 18 years of age and single. He enlisted in the Regular Army at New Bedford, Massachusetts on 11 October 1946 for three years. He has no prior service.

The neuropsychiatric report contains the following statement concerning the civilian background of accused:

> "It is my impression that this soldier has an antisocial personality. He was put in an Industrial Home for boys in Shirley, Massachusetts, where he served nine months. As a child he was stubborn, ran away from home, began to steal, was picked up many times by the police, and was finally sentenced. After joining the maritime service, he was put out after being accused of destroying government property. Upon questioning, this soldier feels that what he did was wrong and can offer no defense. It appears that his act was impulsive."

5. In view of the youth of accused and the fact that the evidence indicates that the offense was impulsively committed after the victim had threatened to complain to the military police as a form of "black mail", I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life, and that as thus commuted the sentence be carried into execution. I further recommend that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls.
1. Record of trial
2. Dft ltr for sig S/W
3. Form of Exec. action

(GCMO 309, 28 Aug 1947).

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

JAGN-CM 324095

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Munich, Germany, 11 and 12 April 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Technician Fifth Grade ERNEST L. DRISCOLL (38724245), Troop A (Mechanized), 42d Constabulary Squadron.	)	

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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Technician Fifth Grade Ernest L. Driscoll, Troop A (Mechanized), 42nd Constabulary Squadron, did, at Locarno, Switzerland, on or about 2 October 1946, feloniously receive, have, and conceal one ladies Rolex wrist watch with twelve (12) diamonds, of the goods and chattels of the Varini Jewelry Store, Locarno, Switzerland, then lately before feloniously stolen, taken, and carried away; he, the said T/5 Ernest L. Driscoll, then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

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 three years. 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:

A group of soldiers, including Private James E. Collins, Private First Class Bob Harrington, and the accused, made a tour of Switzerland between 30 September 1946 and 2 October 1946 (R. 24). Private Collins, having been sworn as a witness for the prosecution, identified a photograph shown him as a true picture of a watch which he had in his possession at one time while in Switzerland (R. 6). This photograph was then admitted in evidence, without objection, as Prosecution's Exhibit 1. Collins further testified that while in Switzerland he was questioned about a watch by the Swiss police; that the accused was with him at that time and was also questioned.

On 1 October Ernest Pfiffner, a Swiss policeman, conducted an investigation of four soldiers, including the three above named, "looking for a watch that had been stolen out of Mr. Varini's shop" (R. 7, 11, 24-25). "Each man I was questioning knew what I was looking for. * * * It was a gold ladies' wrist watch with a wide gold bracelet. There is a lid over the watch itself and it is covered with twelve jewels" (R. 12).

Collins further testified that a few hours after this investigation he gave the watch, pictured in Prosecution's Exhibit 1, to accused because "I didn't want to be mixed up in any trouble. So to avoid any trouble, I gave him the watch." Collins obtained the watch "from a jewelry store" and presumed it was the one the police questioning referred to, but the accused did not ask Collins where he got it and Collins did not know whether accused was aware of where he got it or that it was the subject of the investigation (R. 7-9). The testimony of Collins continued, in part, as follows:

"Q When you were talking to Driscoll after the police investigation, did you ask him for advice as to what you should do about this watch?
A Well, yes, I did.

Q Did you give him any suggestions as to what you, yourself, thought you had better do with it?
A Yes, I did that too, sir.

Q What did you say you were thinking of doing?
A Well, my exact words were 'I think I'll take this watch back to Varini.'

Q And what did Driscoll say?
A Well, he said I was crazy. He said if I did they would only court-martial me, whereas now they had nothing against me and they couldn't do that.

* * *

Q You were talking to him about the situation about the watch, and you testified that you said that you didn't want to get into any trouble and you were thinking of taking the watch back; and you said further that he told you that you would be crazy to do that. Did he go ahead and give you any suggestions as to a better way for you to keep out of trouble?
A Yes, he did.

Q What suggestions did he offer?
A Well, he said 'Give the watch to me and I'll take care of it.'

Q And at that time you did give him the watch?
A I gave it to him, yes" (R. 10).

It was stipulated that "if CID agent Welden H. Chandler were present he would testify as follows: On the 6th of November I questioned T/5 Driscoll and took from him one ladies' Rolex wrist watch with twelve diamonds. He would also testify that Prosecution's Exhibit 1 is a picture of the watch taken from Driscoll" (R. 13).

4. Evidence for the defense:

The accused, having been duly advised of his rights, elected to testify under oath in his own behalf. The substance of his testimony is as follows:

About 29 September accused met Collins in Locarno. He visited several jewelry stores with Collins and a soldier named Harrington but did not see the watch pictured in Prosecution's Exhibit 1 (R. 14). Around 1 October he was called to the police station. "They wanted to know what kind of watches he /Collins/ had and everything, and asked me did I see him steal anything, and I said 'No,' and he didn't describe the watch or anything. If he had I would never have touched it." No watch was described to him at the police station. Some time after the police questioning Collins volunteered to sell him a watch for $500.00, and upon being shown "the watch" he finally bought it for $100.00. Accused did not know the watch was stolen (R. 15-16). During the return journey from Switzerland Collins said to accused: "'You had better throw that in the river. It ain't going to do you any good,' and he looked out of the window and laughed, and I thought he was kidding" (R. 16). Accused was searched for watches at the Swiss border and was

wearing his purchase from Collins on his arm with another wrist watch. The border searchers "could have seen them both. * * * I think they did. I wasn't trying to conceal it" (R. 18-19). Accused categorically denied Collins' statement that the watch was a gift to him, and that he had any watch described to him by the police in Locarno (R. 19).

5. The prosecution and defense having rested, the court called Private First Class Bob Harrington as its witness. His testimony is substantially as follows:

He was one of the Swiss tourists. He was questioned in Locarno by a Swiss policeman concerning the theft of a watch described by him as a ladies' "band watch with a cover on the top and he mentioned something about there being diamonds on it" (R. 24-26, 29). The interrogator did not speak "perfect English" and the witness "didn't understand him clearly" (R. 29). During the morning after the Locarno police investigation police came to the hotel, in which witness and the accused occupied a room, and accused Collins of stealing a watch. Witness did not know whether accused was arare of the accusation or its nature (R. 41-42). Harrington further testified that he has never seen a watch like that pictured in Prosecution's Exhibit 1 (R. 35).

6. By the Charge and its Specification it is alleged that accused did, at a stated time and place, "feloniously receive, have, and conceal one ladies Rolex wrist watch with twelve (12) diamonds, of the goods and chattels of the Varini Jewelry Store, Locarno, Switzerland, then lately before stolen, taken, and carried away; he * * * then well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away," all in violation of Article of War 96.

The essential elements of the offense of knowingly receiving stolen property are (1) that the goods were stolen by some person other than accused; (2) that accused received the goods; (3) that, at the time of so doing, he knew they had been stolen; and (4) that in so doing he acted with criminal intent (CM 265038, Williams, 42 BR 389; 53 CJ 503).

The record of trial contains direct evidence which clearly establishes that Collins "obtained" a watch "from a jewelry store;" that the Locarno police conducted an investigation of accused, Collins, and others during which they were told the police were "looking for a watch that had been stolen out of Mr. Varini's shop," and a description of a watch was given them which fitted the description of the watch held by Collins; that several hours later accused obtained the watch from Collins; and that accused retained possession of the watch until it was delivered by him to an agent of the C.I.D.

In point of logical sequence, the first essential element

of the offense alleged, which must be proven if a finding of guilty is to be sustained, is the original theft of the watch from the Varini shop. There is no direct evidence in the record to establish the theft of the watch in question. Thus the finding of the court, as to that element of the offense, must rest upon inference from those circumstances which were proven and it becomes the duty of the Board of Review to determine whether there is, in the evidence, a reasonable basis for that inference (CM 212505, Tipton, 10 BR 244).

The only evidence in the record of trial is the testimony of five witnesses, augmented by a pictorial exhibit visually descriptive of the watch in question. So much of the testimony of each witness as might be said to touch upon the matter here in question may be summarized as follows:

The witness Collins testified he "obtained" the watch "from a jewelry store" (R. 9); and that after they were interrogated by the Locarno police accused and he had a conversation substantially as follows:

"Q What did you say you were thinking of doing?
A Well, my exact words were 'I think I'll take this watch back to Varini.'

Q What did Driscoll say?
A Well, he said I was crazy. He said if I did they would only court-martial me, whereas now they had nothing against me and they couldn't do that.

* * *

Q What suggestions did he offer?
A Well, he said 'Give the watch to me and I'll take care of it.'"

The witness Pfiffner testified: "I told them [accused and other soldiers interrogated by the witness at Locarno] I was looking for a watch that had been stolen out of Mr. Varini's shop and explained how the watch was" (R. 11). Accused and witness Harrington admitted being questioned by the Locarno police about a stolen watch but denied knowledge of any theft. The stipulated testimony of Chandler does not touch upon this question at all.

Pfiffner's testimony was competent to prove that he made a certain statement to accused, but it cannot be considered as competent evidence of the truth of such statement. The testimony of Collins respecting his conversation with the accused certainly implies some impropriety in the possession of the watch at that time by Collins. But such evidence, standing alone, is not competent to sustain a legal finding that the watch was stolen, at any time from any place. When

all of the pertinent legal evidence is considered as a whole, the most that can be said is that it may raise a suspicion, surmise, or conjecture that the watch had been stolen prior to accused's acquisition of it. Such evidence is not of the weight and character necessary to support the finding of guilty in this case (CM 323349, Henry, (1947); CM 317430, Veronko, (1947); CM 274812, Tracy, 47 BR 337; CM 260828, Parker, 40 BR 34; CM 238485, Rideau, 26 BR 272).

Since there was an utter failure of proof of such essential element of the offense alleged we deem it unnecessary to consider whether the evidence was sufficient to establish the remaining elements of the offense as above set out (CM 266734, Murphy et al, 43 BR 303).

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

Edward L. Johnson, Judge Advocate.

(SICK IN QUARTERS), Judge Advocate.

Joseph T. Brack, Judge Advocate.

JAGN-CM 324095 1st Ind

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 Technician Fifth Grade Ernest L. Driscoll (38724245), Troop A (Mechanized), 42d Constabulary Squadron, 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 324095).

1 Incl
Record of trial

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

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

17 November 1947

JAGV CM 324109

U N I T E D S T A T E S v. Private First Class EMANUEL NEWIRTH (14087523), and Private First Class MARTIN BATOVSKY (33894498), both Attached Unassigned to Army Postal Unit 178.	)	FIRST UNITED STATES INFANTRY DIVISION Trial by G.C.M., convened at Augsburg, Germany, 27 and 28 May 1947. Dishonorable discharge and confinement for two (2) years for each. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, SPRINGSTON and LANNING, Judge Advocates

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 Specifications:

Newirth

CHARGE: Violation of the 96th Article of War.

Specification 1: In that, Private First Class Emanuel Newirth, attached unassigned to Army Postal Unit 178, did, at Army Post Office 9, Augsburg, Germany, while assigned to duty thereat, at divers times during the period from about 15 December 1946 to about 7 February 1947, more particular dates being unknown, wrongfully and unlawfully obstruct and interfere with the mails of the United States.

Specification 2: In that Private First Class Emanuel Newirth, attached unassigned to Army Postal Unit 178, did, at Army Post Office 9, Augsburg, Germany, while assigned to duty thereat, at divers times during the period from about 15 December 1946 to about 7 February 1947, more particular dates being unknown, with intent to feloniously take and carry away, wilfully and unlawfully abstract cigarettes, foodstuffs and other sundry items from the mails of the United States.

Specification 3: In that Private First Class Emanuel Newirth, attached unassigned to Army Postal Unit 178, did, at Army Post Office 9, Augsburg, Germany, while assigned to duty

thereat, at divers times during the period from about 15 December 1946 to about 7 February 1947, more particular dates being unknown, wrongfully receive, have and convert to his own use foodstuffs, the property of a person whose name is unknown, then lately before wrongfully taken and carried away from the mails of the United States; he, the said Private First Class Emanuel Newirth, then well knowing the said property to have been so wrongfully taken and carried away.

Batovsky

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private First Class Martin Batovsky, attached unassigned to Army Postal Unit 178, did, at Army Post Office 9, Augsburg, Germany, while assigned to duty thereat, at divers times during the period from about 1 October 1946 to about 7 February 1947, more particular dates being unknown, wrongfully and unlawfully obstruct and interfere with the mails of the United States.

Specification 2: In that Private First Class Martin Batovsky, attached unassigned to Army Postal Unit 178, did, at Army Post Office 9, Augsburg, Germany, while assigned to duty thereat, at divers times during the period from about 1 October 1946 to about 7 February 1947, more particular dates being unknown, with intent to feloniously take and carry away, wilfully and unlawfully abstract cigarettes, foodstuffs, cooking utensils and other sundry items from the mails of the United States.

Specification 3: In that Private First Class Martin Batovsky, attached unassigned to Army Postal Unit 178, did, at Army Post Office 9, Augsburg, Germany, while assigned to duty thereat, at divers times during the period from about 1 October 1946 to about 7 February 1947, more particular dates being unknown, wrongfully receive, have and convert to his own use foodstuffs, the property of a person whose name is unknown, then lately before wrongfully taken and carried away from the mails of the United States; he, the said Private First Class Martin Batovsky, then well knowing the said property to have been so wrongfully taken and carried away.

Each accused pleaded not guilty to the Charge and all Specifications. Accused Newirth was found guilty of the Charge, of Specification 1, and of Specification 2, except the words "foodstuffs, and other sundry items." He was found not guilty of Specification 3 of the Charge. Accused Batovsky was found guilty of all Specifications and the Charge. There was no evidence of previous convictions. 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 a period of five years. The reviewing authority disapproved the finding of Specification 3 as to the accused Batovsky and, as to each accused, approved the sentence, reduced the period of confinement to two years, designated the Branch, United States Disciplinary Barracks, Green Haven, New York, 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. Evidence for the prosecution.

a. As to accused Newirth: On 27 January 1947 accused asked Private Owen Kushnir to carry a sack of cigarettes out of APO 9, where he was on duty, and take them to the home of one Felberbaum, a displaced person, so accused "wouldn't be caught in the shake-down." (R. 14). Kushnir took the sack containing thirty cartons of cigarettes to his duty station at the commissary where he put it away until he finished work. Thereafter he took the cigarettes to the apartment of Alexander and Theodore Felberbaum at No. 7 Judenbergstrasse, Augsburg, Germany, where he left them (R. 14,15,16). He advised the Felberbaums that the cigarettes were Newirth's, who "would be up to pick them up tonight." That night Newirth returned to the Felberbaum apartment and took about sixteen cartons, leaving fourteen there (R. 18). The following Monday, February 4, Kushnir, at accused's request, took twenty cartons of cigarettes from APO 9 to the Felberbaum apartment, and Kushnir testified that the same night "we were supposed to sell these cigarettes to Sergeant Fitzpatrick for $10.00 a carton, and Newirth came up to the house at six, and Sergeant Fitzpatrick had already been there, and they made the deal, and Sergeant Fitzpatrick bought these cigarettes at $10.00 for a carton, and Newirth got arrested." (R. 19). When Newirth was arrested by the Military Police at the Felberbaum apartment, about fifty cartons of cigarettes were taken from his possession (R. 20). Accused, in an unsworn statement made to the Investigating Officer, stated that he had taken about forty cartons of cigarettes from redeployed packages while he was working in the post office at Augsburg, Germany (Pros. Ex. E), and accused admitted to Major Clair H. Thurston, who arrested him on 4 February 1947, that the packages from which he had taken the cigarettes were redirected packages to APO 800 procured from APO 9 (R. 41).

b. As to accused Batovsky: On 7 February 1947 accused's room in a private dwelling was searched and a quantity of items were brought from there to the police station where accused admitted that two clocks, two leather wallets and two boxes of Hershey bars were items taken by him from United States mail packages not addressed to him (R. 80,81). In his confession accused Batovsky stated:

"I took close to 100 or 150, not knowing the exact number, 18 pots and pans and a lot of canned food, eats and stuff like wallets and a girls necklace. I don't know what made me do it but I followed the others. They set an example I guess. Not being the smartest human on earth I guess I am weak in many ways. I have never stolen from any of my buddies if I should care to call some of them so. I bought food on the black market also."

c. Both accused, during the period covered by the offenses charged, were on duty in the directory at APO 9 Augsburg, Germany, redirecting mail to men transferred to other organizations or deployed to the United States (R. 128,129).

d. Each accused after being advised of his rights by the Law Member, elected to remain silent.

4. Conclusive proof of guilt as to each accused flows from their admissions and confessions provided, aliunde the admissions and confessions, sufficient evidence of the corpus delicti is contained in the record. With respect to this requirement, the Manual for Courts-Martial, 1928, states:

"* * * 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."

The rule requiring some corroboration of a confession of guilt is salutary, conditioned upon the requisite that the essential corroborating proof of the corpus delicti not be given an unjustifiably broad meaning leading to obstruction or defeat of the course of justice. While considerable ambiguous language has been employed from time to time in discussing the meaning of the phrase "corpus delicti," the statements contained in United States v. Williams, 1 Clifford 5, Fed. Case No. 16707, viz:

"There must be some proof that the crime has been committed independent of the confessions, but it is not necessary that it should be plenary proof,"

and in Daeche v. United States, 250 Fed. 566 (CCA 2, 1918) viz:

"any corroborating circumstances will serve which in the Judge's opinion go to fortify the truth of the confession,"

taken in conjunction with the language of the Manual above-quoted, present what the Board of Review considers to be the applicable rule, insofar as corpus delicti is concerned, to be applied to cases of this character. In applying a similar rule in CM 302838, Zaleski, 58 BR 349-361, reaffirming the principle announced in CM 257802, Stiehl, it was stated:

> "While some corroborative evidence is prerequisite to the introduction of a confession, full proof of the corpus delicti, independent of the confession is not required. All that is required is some corroborative evidence. Dig. Ops. JAG, 1912-40, sec. 395 (11), CM 210693 (1938)."

5. Independent evidence that a crime had been committed by the accused Newirth is supplied through the testimony of Private Kushnir who, at accused's request, to avoid a shake-down, took on different occasions, two sacks of cigarettes containing, respectively, thirty and twenty cartons from APO 9 to the Felberbaum's apartment. The circumstances of accused Newirth's employment in a position of trust in the redirectory section of APO 9, thus furnishing opportunity to perpetrate the offense charged, the furtive concealment of the cigarettes by accused in their removal from the Army Post Office through Kushnir for a surreptitious purpose, and accused's possession of about fifty cartons when arrested, serve to support the confession, from which facts the court could properly conclude that these items had been abstracted and removed by the accused from packages in the United States mail. The statement of accused to Kushnir that he wanted the cigarettes removed from the APO so he "wouldn't be caught in the shake-down" was properly admitted and considered by the court as part of the res gestae. The test of the admissibility of evidence as a part of the res gestae is whether the act, declaration, or exclamation is so intimately interwoven or connected with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself, and also whether it clearly negatives any premeditation or purpose to manufacture testimony (32 C.J.S. 21). That the occasion was such as to produce nervousness on the part of accused and was made without time to contrive or misrepresent is considered clearly shown from the character of the language used; namely, "to avoid a shake-down.", an action apparently imminent. Since the admissibility vel non of evidence as part of the res gestae is a matter resting largely in the discretion of the trial court (Rast v. Mutual Life Insurance Co. of New York, 112 Fed (2d) 769, 774, CCA 4th, 1940), it cannot be said that its admission under the facts in this case was error, and having been made to a fellow soldier as part of the removal of the cigarettes from the Army Post Office, it bore a direct relation to the principal fact, the surreptitious removal of a large quantity of cigarettes from an APO and, consequently, is different in character from an admission of a material fact made to a superior officer upon apprehension or during an investigation. Concededly the latter might well be classified as a so-called declaration against interest, which

standing alone, would be an insufficient corpus for the subsequent receipt of a confession in evidence. But here because it constituted a part of an event coincident with removal of the cigarettes, its admissibility is not dependent upon the credibility of the declarant, but its probative force is derived from its close connection to the simultaneous transaction which it accompanied and tended to explain.

In connection with the unusual fact of removal of a large quantity of cigarettes from APO 9 at the accused's request, cognizance must be taken of the characteristics of such an installation and considered in the light of ordinary human experience. The degree of trustworthiness and integrity necessarily demanded of all postal employees, and the suspicion normally attendant upon the removal of any property from an APO outside of the usual course of business, would to the mind of most, reasonably preclude the possibility of the use of such an establishment as a headquarters for black-market operations, or other nefarious activities not therewith directly connected. Accordingly, the removal of considerable property from an APO outside of the usual course of business, would in itself reasonably provide evidence of the commission of a postal offense. When accompanied by admitted stealth no other plausible inference may be perceived. Accused's confession attests to the correctness of these conclusions.

6. What has been said with respect to Newirth in determining that the court correctly found him guilty is equally applicable in concluding the court erred in its finding in Batovsky's case. Excluding his admissions and confession and the recovery of unidentified personal property from accused's private room, there is not a scintilla of evidence of record that a crime had probably been committed. The Board is confined to the limits of the recorded testimony, from which it must be concluded that there being no evidence, other than the admissions and confessions, and the recovery of unidentified property, ostensibly from his possession, of the probable commission of the offense charged, consideration of the admissions and confession was improper. Accordingly, as to accused Batovsky, the evidence is not legally sufficient to support the findings of guilty or the sentence, CM 193828, Morande and Mingo, 2 BR 98, and cases there cited.

In reaching the above holdings as to both Newirth and Batovsky, the Board has considered CM-NATO 1366, Anderson, 3 BR NATO-MTO 77, wherein wrongful abstraction from United States mail packages was charged, and concludes the decision here reached is in harmony with the views therein expressed. There the competency of the confession was established, as observed by the Board, by additional competent evidence touching the commission of the offense:

> "* * * The circumstances of accused's employment in the Army post office, the finding of wrappers that had been removed from mail packages, the discovery of the specified articles in the possession of accused and the latter's significant

'identification' thereof, combine to support inferences that articles had been abstracted and removed from packages in the United States mail and that accused was implicated therewith. They thus serve to corroborate the confession; tending not only to prove the fact of the commission of the offense in each instance but, seemingly exceeding the minimum legal requirement as to proof of the corpus delicti, to demonstrate accused's connection with the offenses charged." (underscoring supplied)

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors other than those enumerated above injuriously affecting the rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence as to the accused Newirth and legally insufficient to support the findings and sentence as to the accused Batovsky.

Wilmot T. Baughn, Judge Advocate.

George B. Springston, Judge Advocate.

Harley C. Lanning, Judge Advocate.

JAGV CM 324109 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. 18 NOV 1947

TO: Commanding General, First United States Infantry Division, APO 1, c/o Postmaster, New York, New York.

1. In the case of Private First Class Emanuel Newirth (14087523), and Private First Class Martin Batovsky (33894498), both Attached Unassigned to Army Postal Unit 178, 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 Batovsky be vacated. Upon taking such action you will have authority to order execution of the sentence as to the accused Newirth.

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 324109).

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

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

CM 324235

NOV 7 1947

UNITED STATES v. Colonel JACK W. DURANT (0-279497), Air Corps	HEADQUARTERS COMMAND EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 11 December 1946 to 30 April 1947. Dismissal, total forfeiture and confinement for fourteen (14) years.

OPINION OF THE BOARD OF REVIEW
LIPSCOMB, JOHNSON and ACKROYD, Judge Advocates

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

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

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

Specification 1: In that Colonel Jack W. Durant, Air Corps, Headquarters Command, United States Forces European Theater, did, in conjunction with Major David F. Watson and Captain Kathleen B. Nash Durant, at or near Kronberg, Germany, on or about 6 November 1945 feloniously take, steal, and carry away the following goods, chattels, and items of personal property, each of a value of more than fifty dollars ($50.00), and of a total value of more than one million dollars ($1,000,000.00), the property of Prince Wolfgang of Hesse:

1 - 1 diadem pearls and diamonds
2 - 1 necklace diamonds (cataract)
3 - 1 emerald jewel
4 - 1 riviere diamonds
5 - 1 pair of big ear drops (diamonds)
6 - 2 rings with diamonds
7 - 1 lady's watch enamel diamonds
8 - 1 riviere diamonds
9 - 1 diadem with diamonds
10 - 1 fan mother of pearl
11 - 1 medal diamonds and onyx
12 - 1 amethyst diadem with diamonds
13 - 1 large amethyst necklace with diamonds
14 - 1 small amethyst necklace with diamonds
15 - 1 buckle amethyst diamonds, 3 parts

16 - 1 large brooch amethyst diamonds, 2 parts
17 - 1 pair of ear rings
18 - 4 loose amethysts with diamond edge
19 - 1 bracelet, emerald, pearls, diamonds
20 - 3 bracelets, gold
21 - 1 pair of buttons, gold, emeralds
22 - 4 golden rings
23 - 1 ring
24 - 1 pin
25 - 3 roman clasps, gold
27 - 2 golden bracelets
28 - 3 brooches, aquamarines, diamonds
30 - 1 brooch, solitaire, diamonds
31 - 2 ear rings with pendants
32 - 2 big diamonds
33 - 1 big diamond as brooch
34 - 1 big diamond with pearl as brooch
35 - 2 gold bracelets, blue enamel and diamonds with pictures of Friedrich Wilhelm IV and Queen Elisabeth of Prussia
36 - 1 necklace with 29 pearls and clasp
37 - 1 diadem, turquoise, diamonds, in three parts, 12 small and 3 big links
38 - 1 diadem, pearls, with diamonds with single buckle (broken at one place)
39 - 1 pearl-chain, 49 pearls
40 - 1 necklace, turquoise, diamonds
41 - 2 ear drops, turquoise, diamonds
42 - 1 necklace, gold with diamonds, changeable links, 17 links, 1 pendant
43 - 1 necklace, silver (platinum?) with pearls
44 - 1 necklace, gold with lapislazuli
45 - 1 necklace, gold with several stones in egg shape
46 - 1 necklace, corals with big stones (short chain)
47 - 1 necklace, corals with pendant
48 - 1 necklace, gold, thin with light colored pendant
49 - 1 necklace, silver, thin with pendant, sapphire with diamonds
50 - 1 necklace, gold without pendant
51 - 1 pendant, big sapphire with diamond edge
52 - 1 pendant, large slip knot, 2 diamonds
53 - 1 pendant, big cross, 7 pearls with diamonds
55 - 1 pendant, gold with turquoises and diamonds, horseshoe form
56 - 1 pendant, big amethyst heart
57 - 1 pendant, small amethyst heart
58 - 1 pendant, golden heart with enamel and diamonds
59 - 1 pendant, gold with 4 pearl and diamonds
60 - 1 pendant, locket, gold with glass (Amor spotted)
61 - 1 pendant, medal, gold with glass (red cross heart)
62 - 1 pendant, small golden cross with diamonds
63 - 1 pendant, medal, gold with blue enamel monogram
64 - 1 pendant, medal, gold with photo
65 - 1 pendant, medal, gold with tooth
66 - 1 pendant, medal, gold with iron cross
67 - 1 pendant, gold, with pearls, pierced
68 - 1 pendant, gold with pearls and ladybird, pierced
69 - 1 pendant, gold, with pearls and ruby in leaf form

70 - 1 pendant, gold, with rose quartz
71 - 1 pendant, gold, with diamond splinters
72 - 1 pendant, golden souvenir coin
73 - 2 pendant crosses
74 - 3 pendants, small for children
75 - 1 pin, diamonds, 4 rosettes and drops
76 - 1 pin, diamonds, 1 flower with 3 clusters
77 - 1 pin, diamonds, 2 pearls, one as a drop
78 - 1 pin, 4 pearls and diamond splinters
79 - 1 pin, gold with diamond, 3 sapphires, 2 rubies
80 - 1 pin, gold, square with 5 pearls and 4 diamonds
81 - 1 pin, gold, with 2 pearls and 1 small diamond
82 - 1 pin, gold, with 3 sapphires and 2 diamonds
83 - 1 pin, gold, 2 sapphires, 2 diamonds
84 - 1 pin, gold, with 4 pearls and diamonds
85 - 1 pin, long, platinum with diamonds
86 - 1 pin, gold with emeralds
87 - On a blue cover 7 pins
88 - On a blue cover 2 pins
89 - On a light green cover 5 pins
90 - On a light green cover 6 pins
92 - 1 tie pin, gold as a crown
93 - 1 tie pin, gold with coral and star
94 - 1 bracelet, platinum with 1 big pearl, 2 diamonds and splinters
95 - 1 bracelet, gold with watch (square)
96 - 1 bracelet, fixed with monogram and photo
97 - 1 bracelet, gold with sapphire and ruby, chain
98 - 1 bracelet, gold chain with sapphire and diamonds
99 - 1 bracelet, gold chain with sapphire, ruby and emerald, horseshoe form
100 - 1 bracelet, gold chain with pearl and diamonds
102 - 1 lady's watch, gold with monogram
103 - 1 lady's watch, gold with lapislazuli
104 - 1 pair of sleeve links, gold with sapphire
105 - 1 pair of sleeve links, gold with diamonds
106 - 1 shirt stud, sapphire with crown of diamond splinters
108 - 1 wedding ring
109 - 1 ring with round turquoise and diamonds
110 - 1 ring with oval turquoise and diamond edge
111 - 1 ring with sapphire and 2 diamonds
112 - 1 ring with large blue-grey stone, gold
113 - 1 ring, gold with ruby and diamonds
114 - 1 large buckle, gold with blue enamel
115 - 1 small buckle, gold with dark blue enamel
116 - 2 buckles, light blue-gold on black velvet ribbon
118 - 1 Badische Haus order on yellow ribbon
119 - 1 Gmundener order on pink ribbon
120 - 1 diadem (sapphire)
121 - 1 necklace (sapphire)
122 - 1 brooch (sapphire)
123 - 1 bracelet, diamond
124 - 1 brooch, rose turmalin
125 - 1 pendant, diamond
126 - 1 golden man's watch with monogram and chain
127 - 1 compass
128 - 1 pair of red sleeve links (enamel) with case
129 - 5 pairs of sleeve links

130 - 6 shirt buttons (studs)
132 - 3 tie pins
133 - 1 golden pin, monogram with crown
134 - 1 ring, gold with ruby
135 - 2 medals, gold and silver
136 - 1 diadem, emeralds and diamonds
137 - 1 necklace, emeralds and diamonds
138 - 2 bracelets, emeralds and diamonds
139 - 1 brooch with 3 pendants, emeralds and diamonds
140 - 1 brooch with 1 pendant, emeralds and diamonds
141 - 1 brooch in shape of a cross, emeralds and diamonds
142 - 1 pair of ear rings, emeralds and diamonds
143 - 1 small pendant, emeralds and diamonds
144 - 1 brooch hyacinth with diamonds (square stone)
145 - 2 brooches, bows in diamonds
146 - 1 brooch (cameo) picture of Kaiser Friedrich surrounded by diamonds
147 - 1 necklace in diamonds, oval links
148 - 1 diadem in diamonds (heraldic fleur de lis and roses)
149 - 2 rivieres (diamonds)
150 - 1 diadem (marguerites) in diamonds and pearls
151 - 1 small diadem, grey pearls
152 - 1 necklace, grey pearls and diamonds (collier de chien, dog collar)
153 - 1 bracelet, turquoises and diamonds
154 - 1 bracelet with diamonds
155 - 1 English decoration, order of Victoria and Albert (cameo with small stones)
156 - 1 brooch with sapphire cabochon (square setting) and diamonds
157 - 2 hairpins in diamonds
158 - 1 pendant amethyst heart (cabochon)
159 - 1 brooch, ruby surrounded by diamonds
160 - 1 brooch, square emerald (cabochon) with diamonds
161 - 1 brooch, mossrose in enamel with small diamonds
162 - 1 brooch, miniature (Kaiser Wilhelm II) surrounded by diamonds
163 - 1 brooch in diamonds, oval
164 - 1 cross in tablediamonds with small rubies (old)
165 - 1 pendant, red gem in crystal, setting
166 - 1 Hessian Lion Order, star pendant, badge
167 - 1 Lorgnon (eyeglasses), turtoise shell with Monogram V in diamonds
168 - 1 cross, gold and enamel, with diamonds and 3 pending pearls
169 - 1 golden chain with large cabochon amethysts
170 - 1 antique bronze lion's head with silver teeth (Greek)
171 - 1 golden handbag
172 - 3 autograph books and 1 catalogue
173 - 1 painted fan, golden frame with small precious stones
174 - 2 lace fans
175 - 3 miniatures Queen Victoria set in gold, Empress Friedrich as a child and Duchess von Teck
176 - 1 cameo with head of King Friedrich Wilhelm III
177 - 16 antique and modern rings

178 - 2 golden watches
179 - 1 brooch in small diamonds and colored stones, signature of Queen Victoris, these are in a small green leather case
180 - 1 brooch, amethyst with 4 small diamonds
181 - 1 brooch, brown topaz with initials in diamonds
182 - 1 brooch, black enamel with small stars in diamonds
183 - 5 watch chains, golden, with colored stones, 1 with baroque pearls
184 - 1 brooch, round with small pearls and cabochon ruby
185 - 1 aquamarine drop (pendant) also aquamarine in heart-shape with small rubies and white enamel
186 - 1 pendant, sapphire (carved head) with pearls (Roman)
187 - 1 pendant, brown topaz with small pearl (antique)
188 - 2 golden rings (our engagement rings) with each one ruby and 2 diamonds
189 - 1 pendant with initial C.B. in pearls and rose diamonds
191 - 1 broad golden chain
192 - 1 cross in black enamel (Waldemar)
193 - 1 golden pendant with small pearls, head of Queen Victoria
194 - 1 sapphire cabochon cuff links
195 - 3 medals and 1 coin, Kaiser Wilhelm II, Princess Mafalda, and Landgraf Friedrich Karl
196 - 1 hatpin, moonstone with small rubies
198 - 2 miniatures in collapsible mother of pearl frame
199 - 1 golden watch with monogram of Landgraf Friedrich Karl on golden chain with small pearls
200 - 1 bible of Empress Friedrich
201 - 1 Succession Chr. in beautiful binding
202 - 1 prayer book of Empress Friedrich, gilt binding, bookmarks with jewel pendants
203 - 1 bible of Empress Friedrich, gilt binding
205 - 3 settings for diadems
214 - 1 large ring with sapphire (cabochon) round (35c carat)
226 - 1 ruby bracelet with 2 rows of diamonds at the borders (waveshape)
252 - 1 fan, mother-of-pearl, gold framed, flower designs and initial "M" on one side. Gold ornamentation with diamonds, rubies, and sapphires

(Items which were excepted by the Court in its findings have been omitted from the above specification)

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: In that Colonel Jack W. Durant, Air Corps, Headquarters Command, United States Forces, European Theater, did, at or near Kronberg, Germany, on or about 8 November 1945, in conjunction with Captain Kathleen B. Nash Durant and Major David F. Watson, all acting in pursuance of a common design, feloniously take, steal, and carry away the following goods, chattels, and items of personal property: (1) two envelopes containing jewels and jewelry, (2) one envelope containing a will and 21,600 German Reichsmarks, (3) one envelope containing insignia, pins, and private letters, (4) one envelope containing several amateur photos and one medical certificate, of a total value of more than Fifty Dollars ($50.00), the property of His Royal Highness Prince August Wilhelm of Prussia.

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

Specification: In that Colonel Jack W. Durant, Air Corps, Headquarters Command, United States Forces, European Theater, did, at Washington, D. C., on or about 17 May 1946, knowingly, willfully, and wrongfully apply to his own use and benefit a pistol, value $38.00, and a pistol holster, value $4.55, property of the United States, furnished and intended for the military service thereof.

CHARGE III: (Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Colonel Jack W. Durant, Air Corps, Headquarters Command, United States Forces, European Theater, did, at or near Kronberg, Germany, at some time or times between 1 November 1945 and 3 June 1946 willfully, wrongfully, and unlawfully agree and conspire with Major David F. Watson, Quartermaster Corps, and Captain Kathleen B. Nash Durant, Women's Army Corps, individually and collectively to steal, embezzle, convert to their own use, transport, and dispose of the goods, chattels, and items of personal property listed and set forth in specifications 1, 3, and 4 of Charge I, each item of a value of more than Fifty Dollars ($50.00), and of a total value of more than One Million Five Hundred Thousand Dollars ($1,500,000.00), the property of Her Royal Highness, Margarethe, Landgrafin of Hesse, Prince Wolfgang of Hesse,

and Prince August Wilhelm of Prussia, as set forth in said specifications, with intent and purpose of depriving the owner or owners thereof permanently of their ownership therein and in pursuance thereof and to effectuate such conspiracy the following overt acts were committed:

a. Between the dates 6 November 1945 and 3 June 1946 the said Colonel Jack W. Durant, Major David F. Watson, and Captain Kathleen B. Nash Durant, did mail or cause to be mailed from Germany to themselves or other persons in the United States and other places certain packages containing part of the goods, chattels, and items of personal property set forth and listed in specifications 1, 3, and 4 of Charge I, and they did also transport or cause to be transported from Germany to themselves or other persons in the United States and elsewhere the goods, chattels, and items of personal property hereinabove set forth in the condition the property was in at the time of the wrongful taking or in the broken or mutilated condition which they themselves caused and brought about.

b. Between the dates 6 November 1945 and 3 June 1946, the said Colonel Jack W. Durant, Major David F. Watson, and Captain Kathleen B. Nash Durant, did sell and attempt to sell or otherwise dispose of, within the United States and elsewhere, certain of the jewels, jewelry, diamonds, precious stones and metals, and other items or parts of the said items hereinabove set forth, and they did individually and collectively, pursuant to the common scheme, plan, and conspiracy, conceal and hide certain of the said items and the dismantled and broken parts thereof, the subject matter of the said wrongful taking, in various places within the United States and elsewhere.

c. Between the dates 6 November 1945 and 3 June 1946 the said Colonel Jack W. Durant, Major David F. Watson, and Captain Kathleen B. Nash Durant did break up and dismantle certain of the said items of jewelry and personal property and did destroy and mutilate the settings and fittings thereof and they did further sell and attempt to sell, conceal and attempt to conceal or otherwise dispose of the dismantled parts as well as the whole thereof.

Specification 4: In that Colonel Jack W. Durant, Air Corps, Headquarters Command, United States Forces, European Theater, did, at New York, New York, and elsewhere, between the dates 6 November 1945 and 8 June 1946, wrongfully, feloniously, and unlawfully bring, import or cause to be brought and imported into the United States a large quantity of jewels and jewelry

of various types and descriptions (set forth and listed in Specifications 1, 3 and 4 of Charge I), also diamonds, rubies, emeralds, pearls, sapphires, amethysts, turquoise, moonstones, aquamarines, gold, silver, platinum and other kinds of precious stones and metals, without declaring or invoicing same and without paying the required duty thereon in violation of the United States customs laws (Tariff Act of 1930; 19 U. S. Code).

Specification 5: In that Colonel Jack W. Durant, Air Corps, Headquarters Command, United States Forces, European Theater, did, at and between Frankfurt-am-Main, Germany, London, England, New York, New York, Falls Church, Virginia, and Chicago, Illinois, at some time or times between 6 November 1945 and 8 June 1946, wrongfully, feloniously and unlawfully and in violation of the criminal laws of the United States (National Stolen Property Act; 18 U. S. Code), transport or cause to be transported into the United States and in Inter-State Commerce within the United States, among other things, the jewels, jewelry, goods and chattels listed and set forth in Specification 1 of Charge IV, each of a value of over fifty dollars ($50.00) and of a total value in excess of one hundred thousand dollars ($100,000.00), the property of Her Royal Highness, Margarethe, Landgrafin of Hessen and Prince Wolfgang of Hessen, as alleged in said Specification, then lately before feloniously stolen, taken and carried away; he, the said Colonel Jack W. Durant, then well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

Specification 6: In that Colonel Jack W. Durant, Air Corps, Headquarters Command, United States Forces, European Theater, did, at or near Kronberg, Germany, and elsewhere, between the dates of 6 November 1945 and 3 June 1946, in conjunction with Major David F. Watson and Captain Kathleen B. Nash Durant, willfully, feloniously, wrongfully, and unlawfully break, dismantle, mutilate, and destroy certain jewels, jewelry, heirlooms, personal ornaments, and other articles made of precious stones and metals, the property of Her Royal Highness, Margarethe, Landgrafin of Hesse, Prince Wolfgang of Hesse, and Prince August Wilhelm of Prussia, without the consent or permission of the rightful owners thereof.

The accused stood mute as to all charges and specifications and the trial proceeded as though the accused had pleaded not guilty. The court found the accused guilty of Charge I, and Specification 1 thereunder, except the items not shown in the specification as copied above, and except the words and figures, "one million dollars ($1,000,000.00)," substituting therefor the words and figures, "ten thousand dollars ($10,000.00);" not guilty of

Specifications 2 and 3, Charge I, but guilty of Specification 4 thereunder; guilty of Charges II and III and the specifications thereunder; guilty of Charge IV, but not guilty of Specifications 1 and 2 thereunder; guilty of Specification 3, Charge IV, except the words and figures "embezzle" and "3," and except the words and figures, "a value of more than Fifty Dollars ($50.00)" and "One Million Five Hundred Thousand Dollars ($1,500,000.00)," substituting therefor, respectively the words and figures, "some value," and "Ten Thousand Dollars ($10,000.00);" guilty of Specification 4, Charge IV, except the words and figures, "a large quantity of jewels and jewelry of various types and description (set forth and listed in Specifications 1, 3 and 4 of Charge I)," substituting therefor the words and figures, "The following items of jewels and jewelry, among the items set forth and listed in Specifications 1, 3 and 4* of Charge 1:

(Items appearing in Specification 1, Charge I:) /The items disapproved by the Reviewing Authority have been omitted/

"10 - 1 fan mother of pearl
"36 - 1 necklace with 29 pearls and clasp
"39 - 1 pearl-chain, 49 pearls
"41 - 2 ear drops, turquoise, diamonds
"43 - 1 necklace, silver (platinum?) with pearls
"46 - 1 necklace, corals with big stones (short chain)0
"81 - 1 pin, gold, with 2 pearls and 1 small diamond
"82 - 1 pin, gold, with 3 sapphires and 2 diamonds
"92 - 1 tie pin, gold, as a crown
"94 - 1 bracelet, platinum with 1 big pearl, 2 diamonds and splinters
"99 - 1 bracelet, gold chain with sapphire, ruby and emerald, horseshoe form
"100 - 1 bracelet, gold chain with pearl and diamonds
"102 - 1 lady's watch, gold with monogram
"104 - 1 pair of sleeve links, gold with sapphires
"106 - 1 shirt stud, sapphire with crown of diamond splinters
"110 - 1 ring with oval turquoise and diamond edge
"112 - 1 ring with large blue-grey stone, gold
"128 - 1 pair of red sleeve links (enamel) with case
"153 - 1 bracelet, turquoises and diamonds
"154 - 1 bracelet with diamonds
"159 - 1 brooch, ruby surrounded by diamonds
"161 - 1 brooch, mossrose in enamel with small diamonds
"184 - 1 brooch, round with small pearls and cabochon ruby
"190 - 1 brooch, horseshoe in 'rubis reconstitues'
"193 - 1 golden pendant with small pearls, head of Queen Victoria
"197 - 1 gilt box with picture of Landgrafin Marie Amelie of Hesse (belongs to Prince Philipp)
"200 - 1 bible of Empress Friedrich

*No items of Specification 4, Charge I were included in the Court's itemized finding of guilty of Specification 4, Charge IV.

"202 - 1 prayer book of Empress Friedrich, gilt binding, bookmarks with jewel pendants
"203 - 1 bible of Empress Friedrich, gilt binding
"204 - 1 silver embossed bowl (antique)
"208 - 1 emerald ring (cabochon) round with diamonds
"212 - Clips in shape of a horn with diamonds
"218 - 1 ring with small diamonds, wound like a spiral or cord
"220 - 1 bracelet with 3 octagonal rubies and diamonds
"223 - 1 wrist watch with diamonds and oblong diamond splinters (baguettes)
"224 - 1 bracelet (riviere) with square rubies and 2 diamond rows
"225 - 1 broad chain bracelet with diamonds and small square rubies
"226 - 1 ruby bracelet with 2 rows of diamonds at the borders (wave-shape)
"227 - Clips with 2 pearls and small diamonds and diamond splinters
"232 - 3 buttons, mother-of-pearls with turquoises and diamond splinters
"237 - pending ear rings with 2 sapphire drops and diamond splinters
"252 - 1 fan, mother-of-pearl, gold framed, flower designs and initial 'M' on one side. Gold ornamentation with diamonds, rubies, and sapphires

(Items appearing in Specification 3, Charge I)

/Items disapproved by the Reviewing Authority have been omitted/

"11 - 1 set (9 volumes) of bound correspondence all entitled 'Victoria' dated 1890-91 (one volume); 1891 (two volumes); 1892 (volumes 1, 2, and 4); 1893 (Three volumes)
"12 - 1 pair binoculars in leather case No. 1554958. Prince Von Hessen on case
"13 - 1 silver picture frame (glass broken)
"14 - 1 silver picture frame
"15 - 1 grape scissors - silver
"16 - 1 tablespoon - silver
"17 - 1 serving spoon, silver, matches item 25, figurehead stem
"18 - 1 silver spoon engraved on frant and back
"19 - 1 gravy server, initial 'V' on handle
"20 - 1 small silver baby food pusher
"21 - 2 small ladle shaped spoons, silver
"22 - 5 assorted small serving spoons, silver
"23 - 1 spoon, leaf design, silver
"24 - 1 small serving spoon embossed with vertical figure on handles, silver

"25 - 1 serving spoon, shovel shaped, silver
"26 - 3 butter knives, silver
"27 - 1 set of 12 small demitasse spoons, silver
"28 - 1 set silver service of silver including 12 knives, 11 forks, 18 tablespoons, 6 demi-tasse spoons
"29 - 1 silver salad spoon
"30 - 1 silver salad fork
"31 - 1 set, 12 each, tablespoons, forks and knives, gold with assorted semi-precious stone handles (some handles broken)
"32 - 1 small crucifix, silver
"33 - 1 fan, mother-of-pearl with yellow metal trimming (Badly broken)
"34 - 1 fan with scene of woman sitting on hill on one side (stones missing)
"35 - 1 pencil holder engraved 'Wolfgang 25 March 1912'
"37 - 1 silver case containing small collapsible cups
"38 - 1 small silver plate
"39 - 1 small round silver bowl with handle
"40 - 1 silver plate, initials A. P. with crown on top
"41 - 1 oval shaped silver tray
"42 - 1 small food tray, silver
"43 - 1 small mustard jar with glass lining, engraved Christmas 1891 on top
"44 - 1 gold plated silver jewel box
"45 - 1 small white metal box, hinged lid, milking scene on bottom
"46 - 2 small chalice shaped cups
"47 - 1 pair small silver candle holders
"48 - 1 silver cigarette box with hinged lid and coin on top
"49 - 1 silver turtle table bell
"50 - 12 silver bread and butter plates
"51 - 1 silver pitcher
"52 - 1 yellow metal stein with V3 on bottom
"53 - 1 agate paper knife with gold ornament including one ruby, one rose diamond, and one stone missing
"55 - 1 white jade buddha
"56 - 1 small gold ring containing miniature
"57 - 1 gold safety pin with numerals 1890-1915 set with rose diamonds
"58 - 3 gold hairpins with diamonds set in horseshoe in both sides
"59 - 1 gold and platinum crop pin with small rubies in handle
"60 - 1 gold brooch with two small miniatures (one stone in center missing)
"61 - 1 small ivory box with gold ornament with half pearls and carrying the name of Anne
"62 - 2 gold monograms with numerals IX at bottom
"63 - 1 gold medallion with gold image of Queen Victoria
"64 - 1 pendant, bell shaped, of chalcedony with one ruby, one emerald, and one pearl

"65 - 1 gold miniature dated on back 1835
"66 - 1 gold miniature marked on back 'Louis Phillippe de Farrari'
"67 - 1 small silver framed miniature marked on back K-43
"68 - 1 small gold medallion with miniature, marked on back K-46
"69 - 1 small gold medallion with miniature of Wilhelm V
"70 - 1 gold medallion - Frederick Wilhelm
"71 - 1 gold medallion with 2 miniature paintings and rose diamonds and square cut diamonds surrounding it
"72 - 1 gold medallion with miniature painting of King August
"73 - 1 miniature with picture of Louise, daughter of King Frederick Wilhelm the Second
"75 - 1 gold bracelet with six heart-shaped garnets
"76 - 1 gold bangle bracelet with eight gold enameled and jeweled charms
"77 - 2 silver napkin rings with initial C and crown
"79 - 1 gold enameled watch
"80 - 1 gold antique timepiece
"81 - 1 cross-shape clock, cut rock crystal case
"82 - 1 stein, white metal;"

The Court also found the accused guilty of Specification 5, Charge IV, except the words and figures, "a value of over fifty dollars ($50.00)" and "One Hundred Thousand Dollars ($100,000.00)," substituting therefor, respectively, the words and figures "some value" and "ten thousand dollars ($10,000.00);" and guilty of Specification 6, Charge IV, except the words "and Prince August Wilhelm of Prussia." The accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for fifteen (15) years.

The reviewing authority disapproved so much of the finding of guilty of Specification 1, Charge I, as relates to the words, "of more than fifty dollars ($50.00)." He approved only so much of the findings of guilty of Charge II, and the specification thereunder, as involve "Knowing, wilful, and wrongful application to his own use and benefit, at the place and on or about the date alleged, of a pistol, value $38.00, and a pistol holster, value $1.67, property of the United States, furnished and intended for the military service thereof, in violation of the 96th Article of War." He disapproved the findings of guilty of Charge III and the specification thereunder; and disapproved so much of the finding of guilty of Specification 3 of Charge IV as relates to the items of Specification 1 of Charge I which were excepted by the Court from its finding of guilty of Specification 1 of Charge I. He also disapproved so much of the finding of guilty of Specification 4 of Charge IV as relates to items 47, 58, 124, 209, 214, and 221 of Specification 1 of Charge I; so much thereof as relates to items 1 through 10 of Specification 3 of Charge I, and so much thereof as relates to the words, "emeralds," "turquoise," "moonstones" and "without declaring

or invoicing the same and without paying the required duty thereon," and so much of the finding of guilty of Specification 5, Charge IV, as relates to item 33 of Specification 1, Charge IV. He approved the sentence, but remitted one year of the confinement adjudged, and forwarded the record of trial for action under Article of War 48.

3. Jurisdiction to Try the Accused

Immediately following the arraignment of the accused, the defense presented a special plea asserting that the accused had been separated from the service on 23 July 1946, and that, therefore, the Court was without jurisdiction to try him for the offenses charged, except for the alleged offense of wrongfully applying Government property to his own use in violation of Article of War 94, as set forth in the Specification of Charge II. (R 18) This plea was denied by the Court and the accused was tried and found guilty of the offenses described in paragraph 2 of this opinion. The significance of the exception contained in the plea relative to the specification of Charge II, was subsequently eliminated from consideration by the action of the reviewing authority in disapproving in part, the findings of guilty of that Specification and Charge. (See paragraph 2 supra)

The facts essential to a full consideration of the present jurisdictional question are undisputed. On 16 May 1946, the accused was a Captain in the Officers' Reserve Corp serving on active duty in the temporary grade of a Colonel, Army of the United States. (R 18-23, Def. Ex. 87) On the following day, 17 May 1946, by the authority of paragraph 9, Special Order No. 113, War Department, 17 May 1946, the accused was granted a leave of absence, commonly referred to as terminal leave, for 68 days, effective on the date of that order. This order by its terms informed the accused that he would revert to an inactive status on 23 July 1946. It also provided that the accused's temporary appointment as a Colonel, Army of the United States, would remain in effect for the duration of the present emergency plus six months, unless sooner terminated by the President. The full text of paragraph 9 of the above described order is, as follows:

> "Par. 9. DP [By direction of the President] each of the folnamed officers is reld fr asgmt and dy indicated is asgd to Separation Center listed for record purposes only (no travel involved in connection therewith). WP [will proceed] to his home shown and revert to inactive status on date specified, under auth indicated, not by reason of physical disability. Lv granted as shown. WD AGO Form 53-98 auth. AUS apmts held continue in force during present emerg, plus 6 months unless sooner terminated DP. AUS-AC apmts terminate on EDCMR [Effective date of change on morning reports] date. PCS. TDN. TPA. 601-32 P 431-02, 03, 07, 08, A 212/60425. All dated 1946 unless otherwise indicated." (Pros. Ex. 86)

At the time the accused received the above described orders, his identification card was perforated with the words, "INACTIVE," and returned to him. (Def. Ex. 3) At the same time, and as part of the procedure of the Officers' Separation Point at the Pentagon Building, a certificate of service was prepared and a statement concerning the accused's military record on the back thereof was signed by him. (Def. Ex. 1 and 2) It was dated 23 July 1946, that being the expiration date of the accused's leave, and the date upon which he was to revert, according to the orders of 17 May 1946, to an inactive status. This certificate of service was placed, in accord with the prescribed procedure, in a suspense file for mailing to the accused upon the expiration of his terminal leave. (T. M. 12-222, page 207) Thereafter, on a date which is not shown, but after the accused's leave of absence had been cancelled, he received the above described Certificate of Service, which provides, as follows:

SEAL OF
UNITED STATES

Army of the United States

Certificate of Service

This is to Certify That
COLONEL JACK W DURANT 0 279 497 AC

honorably served in active Federal Service
in the Army of the United States from
26 AUGUST 1940 to 23 JULY 1946

Given at WASHINGTON D C
on the TWENTY THIRD day of JULY 1946

/s/ H. L. Ash
H. L. ASH
Colonel, Infantry

In the meantime, however, on 2 June 1946, the War Department issued an order revoking the unexecuted portion of the accused's terminal leave, and directing him to report to Fort Sheridan, Illinois on 3 June 1946. The pertinent provisions of that order are, as follows:

"1. DP [By direction of the President] so much of paragraph 9, Special Orders 113, War Department, Washington, D. C. dated 17 May 1946 as pertains to Colonel Jack W. Durant, 0279497, AC that states subject officer will revert to inactive status on 23 July 1946, is hereby revoked.

"2. The unexecuted portion of terminal leave granted Colonel Jack W. Durant by above mentioned Special Orders is hereby terminated effective 2 June 1946.

"3. Colonel Jack W. Durant, 0279497, AC now at Chicago, Illinois is relieved from assignment to Separation Center Fort George G. Meade, Maryland and is assigned to Reception Station #7, Fort Sheridan, Illinois. He will proceed from Chicago, Illinois to station assigned, reporting on 3 June 1946." (R 86, Pros. Ex. 7)

On 3 June 1946, the accused was arrested in Chicago by military officers, and informed at that time of the issuance of the War Department Order revoking his leave and directing him to report to Fort Sheridan. Later, on that day, he was taken to Fort Sheridan. (R 86, 2300, 2510-11) Subsequently, on 15 June 1946, the accused was transferred by War Department Order to the United States Forces, European Theater, Frankfurt, Germany. (R 87, Pros. Ex. 8)

In deciding whether the Court had jurisdiction to try the accused, we are not concerned with the question of his guilt or innocence. We recognize that regardless of how guilty he may be, he is entitled to the Constitutional safeguards designed for the protection of all, and that he could not be lawfully required to submit to the judgement of a military court if that court lacked jurisdiction to try him. (In re Metzer 46 U. S. 176, 12 L. Ed. 104; Ex Parte Parks 93 U. S. 18, 23 L. Ed. 787; Ex-Parte Tuirin 317 U. S. 1, 25, 87 L. Ed. 3, 11)

It is conceded that the accused was an officer in the Army of the United States and subject to military law on the date of the commission of the alleged offenses. (A. W. 2) In view of that fact and since the Court in question was duly appointed and properly constituted as required by law, our present problem may be resolved by the answers to three questions, as follows:

1. What was the status of the accused while on terminal leave?

2. What was the legal effect of the revocation of his terminal leave on 2 June 1946?

3. What was the effect of the issuance to him of a Certificate of Service?

It may be assumed that if the entering of the accused upon terminal leave or the delivery to him of a Certificate of Service constituted a separation from active military service, he could not thereafter have been lawfully tried by a military court for any offense committed prior thereto except for an offense committed in violation of Article of War 94. On this point the Manual For Courts-Martial provides, as follows:

"Jurisdiction in General - Termination. - General Rule. - The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service." (M.C.M. 1928, Par. 10)

Although the manual sets forth a number of exceptions to the above quoted general rule, it appears that the Court's jurisdiction to try the accused for the offenses in question is dependent upon his not having been separated from the active Service from the date of the alleged offenses to the date of his trial. In determining his status during that period, each of the three questions stated above will be answered in turn.

1. What was the status of the accused while on terminal leave?

The above question has been answered in only one way in Army Regulations and in numerous opinions by the Judge Advocate General. And the effect of that answer has been illustrated by the many privileges accorded to officers on terminal leave and by the restrictions imposed upon them. In Army Regulation 605-115, Section III, terminal leave is defined, as follows:

"15. Definition. - a. Terminal leave is an administrative term applied to leave granted an officer immediately <u>prior to separation from active service</u>.

b. Terminal leave begins the day after the last day of travel allowed the officer in traveling to permanent home address designated in his orders, except that in the case of an officer of the Regular Army who is being placed on the retired list terminal leave begins on the date specified in the War Department orders announcing his retirement. See paragraph 20a.

c. The <u>last</u> day of terminal leave is the <u>last day of duty</u> (pay status) and the date on which (at 2400) the orders for relief from active service become effective." (Emphasis Supplied)

In SPJGA, 1945/13372, 14 December 1945, the Judge Advocate General stated that,

"This office has consistently held that an Army officer remains an officer on active duty while on terminal leave. It follows therefore that he continues to hold an office of trust or profit under the laws of the United States during the period of such leave." (SPJGS, 1945/13372, 14 December 1945)

In determining the rights of an officer on terminal leave to engage in political and other activities, the Judge Advocate General has repeatedly held, as follows:

"Prior to the expiration of his terminal leave, an Army officer remains an officer on active duty. Consequently, during such leave he remains subject to laws and regulations governing political activity by officers on active duty. In this connection attention is invited to paragraph 6 Army Regulations 600-10, 8 July 1944, * * *." (SPJGA 1946/2188, 1 March 1946)

"Prior to the expiration of his terminal leave an officer is still on active duty, and, accordingly, his activities during leave are governed by the pertinent provisions of Army Regulations, 600-10, 8 July 1944. In this connection, particular attention is invited to the provisions of subparagraph 2e (2) (b) of the mentioned regulations which provide in substance that any member of the Military Establishment who contemplates engaging in outside activities should inform himself of the pertinent laws, regulations, and standards of the service, and that if after such investigation there is any doubt as to the propriety of his engaging in the contemplated activity he should report the pertinent facts to the War Department and request instructions." (SPJGA 1945/2522, 9 March 1945)

In order to determine whether an officer on terminal leave is entitled to the privilege of retirement for an injury received during that time the Judge Advocate General has held that,

"The mere fact that an officer is on terminal leave and is pursuing a private avocation does not per se remove him from the line of duty or overcome the presumption that an injury incurred by a person in the military service was incurred in line of duty." (JAGA 1946/7249, 9 December 1946)

In deciding that an officer on terminal leave accrues additional leave, the Judge Advocate General held that,

"During an ordinary leave of absence an officer who is to return to a duty status continues to accrue additional leave credits unless he is in an excess leave status. The mere fact that it is anticipated that a particular officer may shortly be separated from the service or relieved from active duty does not change his duty status prior to such separation or relief, nor does it alter the character of any leave which may be granted to him." (SPJGA 1944/6985, 6 July 1944)

Many other examples might be cited illustrating that officers on terminal leave are treated by the Army as officers on active duty. In fact, until the recent decision of the Federal District Court for the Southern District of West Virginia, in the case of Kathleen B. Nash Durant v. Helen Hironimus (Habeas Corpus No. 774, 4 September 1947) the conclusion that an

officer on terminal leave was in the Army and subject to its jurisdiction seems to have been unchallenged. In that case, however, the Court, on a petition for a writ of Habeas Corpus, held that Kathleen B. Nash Durant, the wife of the accused in the present case, and a former officer in the Women's Army Corps, who had been convicted by a court-martial for offenses similar to those herein involved, and who was confined in the Federal Reformatory for Women at Alderson, West Virginia, was entitled to be released. The Court presented as the primary reason for its action the following conclusion:

> "So I conclude that petitioner's actual status while on terminal leave, as distinguished from her technical status for pay purposes only, was that of an officer on inactive duty."

In reaching the conclusion that an officer on terminal leave has been separated from the Service for the purpose of military jurisdiction, the Court emphasized the fact that an officer who is being placed on terminal leave is first given lectures to prepare him for civilian life; that such an officer signs a certificate of service which is later given to him; that he is given an "Honorable Service" lapel button; and that his identification card is perforated with the word, "INACTIVE." These facts, said the Court, show that "—for all practical purposes petitioner was separated from active service in the Army when she left the separation center at Camp Beale." Accordingly, as quoted above, the Court concluded that petitioner, while on terminal leave, was connected with the Army "—<u>for pay purposes only</u>—". When the Court used the word "only," had it overlooked the many other privileges, in addition to pay, that accompany the officer on terminal leave? Had the Court overlooked the fact that an officer on terminal leave actually retains all of the privileges of his rank? As a matter of fact, his letters are transmitted through the mail without stamps under his signature alone. He is accorded hospital privileges to which only officers on active duty are entitled. He buys at the post exchange where only personnel in the active military service are entitled to buy. He is accorded the privilege of the Army Commissary. He is entitled to wear the uniform of his country, to extend and receive the salute of the soldier, and to be accorded all the honor and dignity of his rank. And if he becomes disabled while on terminal leave, he is entitled to be retired as of his present grade and to receive retirement pay for the rest of his life. Since these privileges are clearly recognized, we must, with due deference to the Court, conclude that the Court erred in reaching the conclusion that an officer on terminal leave is in the Army "for pay purposes only," We must also conclude that an officer on terminal leave remains, in a very practical way, connected with the Army for many purposes in addition to that of pay.

The Court admitted that terminal leave was a "—technical active duty status—." It might correctly have added that only officers in an active duty status can be granted a leave, and that the only real difference between ordinary leave and terminal leave is that in the first type the officer expects to remain in the Service, whereas in the second type he expects to be

released upon its expiration. Since the obvious purpose of the separation center is to prepare an officer for such a separation from the Service and for the transition from military to civilian life, it is a practical necessity of such preparation that the officer's identification card be perforated with the word "INACTIVE." If this were not done at the separation center, great inconvenience would be imposed upon the Army in the recalling of identification cards. This practical act and others of a similar character which occur at the separation center, do not change the status of an officer, nor do they contravene the clear provision of his terminal leave orders which fix for a future date the time at which he will be separated from the Service.

This actuality, and the continuance of pay and other privileges to the officer on terminal leave presuppose a continuance of a correlative duty of obedience on his part as well as the continuance of military authority and power in the Army. This continuing power is the substance of military jurisdiction. It follows that we cannot accept the decision cited as a guiding precedent in the present case. For the reasons stated, we must conclude that the accused's status while on terminal leave was that of an officer on active military duty.

2. What was the legal effect of the revocation of his terminal leave?

As previously shown, the unexecuted portion of the accused's terminal leave was revoked by order of the War Department on 2 June 1946. This order of revocation was issued long prior to 23 July 1946, the time when the first order by its terms would have separated the accused from the Service.

In a case similar to the present one, an officer had been ordered from Cushing General Hospital to Fort Devens for separation. By Special Order No. 115, the Separation Center authorized terminal leave to expire on 19 May 1946, at which time the officer would revert to an inactive status. On 4 May 1946, prior to the expiration of the terminal leave, Special Orders 106 were issued by the Cushing General Hospital, pursuant to a directive of the War Department, amending the previous order, and ordering the officer to Camp Robertson for reassignment. In considering this case, the Judge Advocate General held that,

> "As it appears from the inclosed file that the orders contained in paragraph 8, Special Orders 105, May 4 1946, were issued by the Commanding Officer, Cushing General Hospital, at the express direction of the War Department, it is the opinion of this office that such orders were effective to revoke the prior inconsistent, unexecuted orders contained in paragraph 6, Special Orders 115, Headquarters Fort Devens, Massachusetts, 25 April 1946, directing Lt. Griney's relief from active duty, and that he should be deemed to have been and to be on an active duty status." (JAGA 1946/4986)

The same principle applies in our present case. Inherent in the authority to grant terminal leave is the power to revoke such leave. The timely revocation by competent superior authority of the accused's terminal leave orders had the effect of revoking his terminal leave, and of continuing him in an active duty status.

3. What was the affect of the issuance to the accused of a certificate of service?

The Court in the case of Kathleen B. Nash Durant v. Helen Hironimus, supra, asserted "arguendo" that,

> "I am further of opinion that the certificate of service which she later received, like an honorable discharge in cases of enlisted personnel, is a formal and solemn act on the part of the Adjutant General of the Army, which, in the absence of a showing that it was issued through mistake or by an unauthorized person, cannot be impeached. There is no such showing in this case."

Army regulations authorize the issuance of certificate of service to military personnel, as follows:

> "1. Certificate of service. —a. To whom furnished.—A certificate of service will be issued to all officers and enlisted personnel of the Army of the United States who are relieved from active duty and transferred to a reserve component, and to officers whose resignations are accepted under honorable conditions, except in the case of officers when the directive or order affecting separation specifies that a certificate of service will not be furnished." (AR 345-500, May 10, 1946)

The above language shows that a certificate of service will be issued to officers "who are relieved from active duty and transferred to a reserve component." Obviously, therefore, the certificate of service is not designed to perform the same function as does a discharge. It contains no operative words informing its holder that he has been separated from the service as does the certificate of discharge. In fact, it clearly does not discharge the officer, it does not separate him from the service, but merely recites an honorable service from one date to another. Although it is given upon the transition of an officer from an active to an inactive status, it is not an instrument which effects that change, but is a mere incident thereto. We cannot, therefore, accept the conclusion of the opinion cited that it is a formal and solemn act "like an honorable discharge in the case of enlisted personnel."

Furthermore, the authority vested in the Separation Center in Washington to issue a Certificate of Service to the accused was based upon the authority of the order of 17 May 1946 which placed him on terminal leave. When, therefore, the order of 17 May 1946 was revoked by the War Department, rescinding

the unexecuted portion of the accused's terminal leave, the authority to grant the accused a Certificate of Service was automatically revoked also. The issuance in error thereafter of the Certificate of Service to the accused while he was in arrest was made without authority and was, for legal purposes, a nullity. Under similar circumstances even an honorable discharge has been held to be a nullity.

IN JAG 1942/286, Jan. 28, 1942, and in JAG 1942/688, Feb. 25, 1942, The Judge Advocate General stated in this particular, as follows:

> "A discharge given by an officer with no power to grant discharges, or by an officer with limited power to discharge in a case not coming within his authority, is a nullity. (U.S. v. Perkins, 116 U.S. 483; Ex parte Roach, 244 Fed. 625; 25 Comp. Dec. 667.")

And again in JAGA 1947/1754, 11 Feb 1947, the Judge Advocate General stated that,

> "It is believed clear that any officer who, despite the legal prohibition above expressed against the accomplishment of such discharge, purports to execute an unauthorized order of discharge acts above and beyond the scope of his authority and any discharge so executed or any certificate of discharge so accomplished is void ab initio, having been ordered by an authority not competentto act." (To the same effect SPJGA 1946/2809, 29 Mar. 1946.)

In light of the reasons stated, we are compelled to the conclusion that the issuance of the Certificate of Service in the present case had no legal effect on the active duty status of the accused.

The answers to the three questions analyzed above, require the conclusion that the accused was not released from military control by being placed on terminal leave on 17 May 1946, and that he was continuously in active military service from the date of the alleged offenses to the date of his trial. Accordingly, the Court had jurisdiction to try him for the offenses in question.

The only other jurisdictional question raised by the record is whether the jurisdiction of the Court was affected by its temporary removal from Germany to the United States. The record shows that on 17 January 1947 the Court, in order to receive the testimony of witnesses who were in the United States, adjourned at Frankfurt-am-Main, Germany, and reconvened on 10 February 1947 in the Pentagon Building in the Military District of Washington. (R 1066) After considerable testimony had been received, the Court returned to Frankfurt-am-Main where the trial was concluded. (R 2417, 2671) The defense counsel contended that while the Court was sitting in the United States it was without the "——command of the appointing authority——" and

without jurisdiction to try the accused. (R 1066)

The answer to this contention appears quite clear. The Articles of War do not impose any requirements as to where a general court-martial shall sit nor do they impose any restrictions upon the movements of a court-martial. (A. W. 2, 4, 8, 12; M.C.M., 1928, Par. 7) Courts-Martial, unlike civilian courts, are not confined to territorial limitations. By necessity the Army and its various subordinate commands are mobile units. A combat group may be detached from its parent organization and sent into another geographical territory. Similarly, a court-martial, in order to promote the ends of justice, may be sent from one territory to another to receive the testimony of witnesses there.

As a matter of caution, however, the reviewing authority procured the authorization of the War Department for the temporary movement of the Court to the United States and also procured the opinion of the Judge Advocate General concerning the legal effect of such proposed movement. (R 1068, Pros. Ex. 187-190) The Judge Advocate General stated that there were no legal prohibitions against the action contemplated. (Pros. Ex. 187)

This opinion is in accord with the action taken in a case very similar to the present one, C. M. 307 097, Mellinger, 60 BR 199. In that case an officer was tried by a court-martial which was convened at Paris, France by authority of the Commanding General, Seine Section, European Theater. After some evidence had been received, the Court adjourned and reconvened in London, England, an area beyond the command of the convening authority. Later, the Court returned to Paris where the trial was concluded. Although the question of the Court's jurisdiction was not discussed, it must be assumed that it was considered and approved.

In an earlier case, however, the Federal Court in Perlstein v. United States et al. (57 F. Supp. 123; affirmed 151 F. (2) 167, certiorari denied 328 U.S. 777) stated that,

> "It is my earnest opinion that once jurisdiction attached, it having been shown that Petitioner 'accompanied' the armed forces, the location of the Court-Martial is not material.— Once jurisdiction attached, the scene of the trial was not material so long as no prejudice to or change in the rights of the Petitioner resulted."

Since in the present case the Court-Martial came to the United States in order to receive at first hand, rather than by depositions, the testimony of various witnesses both for the prosecution as well as for the defense, no prejudice to the rights of the accused resulted therefrom. In view of the reasons stated, we conclude that the jurisdiction of the court-martial in the present case was unaffected by its temporary removal from Germany to the United States.

4. Summary of Evidence for the Prosecution.

(a) The intensified allied air raids on the German city of Frankfurt-am-Main in the fall of 1944, caused the members of the Hesse family to become gravely concerned for the safety of their historic collection of jewels which was then in a partly demolished castle in the nearby town of Kronberg. At that time Prince Phillip of Hesse, the eldest surviving son of the late Landgrave Friedrich Karl of Hesse was in a concentration camp, and Prince Wolfgang of Hesse, the next oldest son, was the acting head of that ancient family, and acting head of the Kurhessische House Foundation, a family corporation which held title to certain lands, houses, jewels, and other property. After several discussions, Prince Wolfgang's mother, Princess Margarethe of Prussia, widow of the late Landgrave of Hesse, his brother, Prince Richard of Hesse, and his sister-in-law, Princess Sophia of Greece, widow of Prince Christoph of Hesse, decided that Prince Wolfgang should take custody of the jewels belonging to the Kurhessische House Foundation, hereinafter referred to as the "House" or "Family" jewels, as well as the jewels of the individual members of the family for the purpose of burying them beneath Schloss Friedrichshof, a large mansion situated near Kronberg, which the Landgravine of Hesse had inherited from her mother, the German Empress Friedrich. (R 97, 166, 167, 170, 180, 240-41, 290, 293, 300-302, 314)

(b) In pursuance of that decision, and at the direction of Prince Wolfgang, Herr Heinrich Lange, the administrator or manager of the Hesse family estates and properties, prepared a substantial, zinc lined, wooden box for the burial of the Jewels. Thereafter on 30 October 1944, he and his secretary, Frau von Bochmann, made an inventory of the "House" jewels, the jewels of the late Prince Christoph, and certain jewels of Prince Richard and wrapped them in packages. Margarethe, the Landgravine of Hesse, and Princess Sophia, each made an inventory of her own jewels which were then delivered to Herr Lange. Prince Wolfgang also made an inventory of those jewels not included in the inventory made by Herr Lange, which belonged to him and to his wife, Maria Alexandra, now deceased. Prince Heinrich, son of Prince Phillip and the deceased Princess Mafalda of Savoy, delivered to Herr Lange a bag containing jewels which supposedly belonged to his mother and which he had received from his grandmother, the Queen of Italy. (R 857-860) Herr Lange and Frau von Bochmann placed all of the above described packages in the zinc-lined box which had been prepared for them. The box was sealed with solder and the wooden lid screwed on. Prince Wolfgang then, with the assistance of Prince Richard and a mason, buried the box in an excavation prepared for it near the furnace in the sub-cellar of Schloss Friedrichshof. The box was then covered with cement, and Prince Wolfgang never authorized its removal. (R 99, 119, 121-23, 126, 157, 240-44, 247, 291, 302-306, 313, 318, 319, 332, 407, 440-41, 457, 714, 857-60; Pros. Ex. 20, 23, 24, 26, 33, 38, 43, 41, 41, 51)

(c) In addition to the jewels which were buried in Schloss Friedrichshof, other jewels and valuables were concealed in the Castle. In the Spring of

1945, Prince August Wilhelm of Prussia, son of the late German Emperor and nephew of the Landgravine of Hesse, was living temporarily at Schloss Friedrichshof. In March or in April of that year he entrusted 21,600 Reichsmarks to Herr Lange for safe keeping. Thereafter on 7 April of the same year, Prince August Wilhelm was arrested by members of the American forces. At that time he was permitted to pack his personal belongings, and Princess Sophia assisted him. To her he entrusted his jewels, including shirt studs, cuff links, scarf pins as well as certain valuable documents. After his departure Princess Sophia delivered this property to Herr Lange, who with the assistance of Frau von Bochmann, prepared an inventory of it, including the 21,600 Reichmarks, placed it in five envelopes and deposited the five envelopes in a safe in Herr Lange's office. (R 130-132, 140, 223-224, 247, 699-707; Pros. Ex. 35-36)

(d) Subsequent to the above described events Germany was occupied by the United States Army, and in the spring of 1945, Schloss Friedrichshof with its surrounding grounds and buildings was requisitioned by the United States for use as an officer's club. At that time Schloss Friedrichshof, which is frequently referred to throughout the record as Kronberg Castle and as the Castle, was furnished for use as a business office, except that Princess Sophia occupied one wing of the building while the Landgravine lived in a smaller mansion on the grounds referred to as the Cottage. When the Army requisitioned this property, the former servants were retained and the former furnishings restored. After an inspection, Herr Lange was permitted to retain the office which he had previously occupied and to use the safe in which he had deposited Prince August Wilhelm's property. Although an inventory was made of the major furnishings, no detailed record was made of the ornaments, silverware, books, and similar articles. Furthermore, the inventory which had been prepared was made before the discovery of two vaults containing large quantities of silver tableware and ornaments. The Castle and the Cottage with their surrounding grounds, and the property therein, were placed in charge of Captain Katherin B. Nash, Women's Army Corp, who was assigned as hostess-in-charge, with authority to use this property for the purpose of conducting an officer's club. In her capacity as hostess-in-charge she had control of the keys to the silver vaults and other locked parts of the building. From the time of her arrival in July, 1945, until her departure for the United States in February, 1946, Captain Nash lived in one room of a two room apartment on the mezzanine floor which was accessible only by a private stair. (R 139, 374, 437, 837, 905) Evidence of the circumstances under which Schloss Friedrichshof was requisitioned and Captain Nash was placed in charge was taken from the testimony of defense witnesses. (R 2229-41, 2251-88, and 2434)

(e) In August 1945, shortly after Captain Nash had been placed in charge of Schloss Friedrichshof, the accused arrived in Europe and was assigned as executive officer to Major General James M. Bevans; the assistant executive officer, and assistant to the accused, was Captain David N. Watson, Quartermaster Corps. General Bevans, the accused, Captain Watson,

and General Bevan's aide shared a house, known as Spin Inn in Bad Homburg. In September, 1945, Captain Watson was promoted to the rank of a Major on the recommendation of the accused. (R 696, 672-75, 750-52, and 754)

The accused became acquainted with Captain Nash in August, 1945, and soon became a frequent visitor at the Castle. Major Watson frequently accompanied the accused to the Castle, and the accused was often seen there and elsewhere in the company of Major Watson and Captain Nash. During the fall and winter of 1945 and 1946, the accused customarily entered the Castle by a back door, not used by ordinary visitors. He stayed overnight two or three times a week in the second bedroom of Captain Nash's apartment. Major Watson also stayed there on one occasion. When the accused was visiting at the Castle a German maid was especially assigned to serve him. (R 419) Although the delivery of "drinks" to private rooms was not permitted, they were delivered to Captain Nash's apartment when the accused was there. (R 218, 392-3, 396, 402, 406, 415, 419, 425, 672-74, 844; See also testimony of defense witnesses 2507-2511)

(f) On 5 November 1945, a secret walled-in wine cellar was discovered in the basement of Schloss Friedrichshof. After this discovery, Captain Nash revoked the passes of all of the German employees in the Castle, and it was understood by them that they were being punished for their failure to reveal the presence of the wine in the castle, and as a means of influencing them to reveal the hiding place of any other hidden valuables. Shortly thereafter, however, Captain Nash rescinded her order revoking the passes. (R 142-3)

During the afternoon of 6 November 1945, the day following the discovery of the wine, Sergeant Roy C. Carlton, a subordinate of Captain Nash, and Ludwig Weiss, an old employee of the Hesse family who was working at the Castle, searched the basement for hidden valuables. After breaking through a layer of cement they discovered a buried wooden box. Sergeant Carlton at once reported his discovery to Captain Nash, and she and a German servant named Wiedmann returned with Sergeant Carlton to the basement. After sufficient cement had been removed, the top of the wooden box was pried off, revealing a zinc lining. When this lining was cut open a number of packages were found therein. At Captain Nash's direction, all of these packages were carried to Captain Nash's bedroom. (R 375-76, 378, 382-6, 414, 415)

(g) Some time on the afternoon of 6 November, 1945 the accused, according to the reluctantly given testimony of Major Watson, received a telephone call in the accused's office in Frankfurt. The accused asked Major Watson to leave the room. When the telephone conversation was finished, the accused asked General Bevans for permission to be absent for the remainder of the afternoon. Later, on the same day, Major Watson received a telephone call from the accused in which the accused directed Major Watson to investigate and report to him whatever information he could

find regarding the disposition of abandoned and found property. During this conversation Major Watson could hear Captain Nash's voice in the background. On their way to their quarters that evening General Bevans asked Major Watson what he thought the accused was "up to," and Major Watson replied that he thought something must have been found in the wine cellar. On the following morning Major Watson reported to the accused that he, Watson, had consulted the Legal and Fiscal Branch, GI Division, relative to abandoned and found property, and that he had been told by one of the officers there that he had found a kettle on a rubble heap and had kept it for himself. The accused replied that he was not interested in copper kettles, but in something bigger. Thereafter Major Watson returned to the Legal and Fiscal Branch and asked what should be done if Kaiser Wilhelm's crown jewels were found. (R 849-855, 909, 916, 919, 920, 922)

Following the discovery of the buried box, Captain Nash's room was locked on 7 November, and the housekeeper was unable to enter because the key was missing. As a result Captain Nash's room was not cleaned by the servants on that day. On 8 November, and thereafter, the closet in her room, which had previously been unlocked, was locked. It was also observed that subsequent to 7 November 1945, and until Captain Nash's departure for the United States, the accused and Major Watson were frequently with her in her room. (A 388-89, 391, 393, 407, 409, 411, 412)

(h) On the morning following the discovery of the zinc-lined box in the sub-cellar of Schloss Friedrichshof, the servant, Ludwig Weiss, reported the incident to Herr Lange. (R 282) Thereafter on 8 November 1945, Herr Lange called upon Captain Nash and told her that the Landgravine wanted a statement concerning the discovery of the jewels, and that the Landgravine wanted to know if the jewels would be delivered to the "Military Government" or if the family would get them back. Herr Lange particularly requested a written "certificate" referring to the objects which were taken from the basement. Although Captain Nash declined to give a receipt for them she said to Herr Lange, "Tell the Landgravine that when the family comes back to the Castle, they will find the jewels as they left them." (R 211) Captain Nash then told Herr Lange that in view of the discovery of the wine and the jewels, she had called in the "CIC," and had been instructed to issue orders that anything else which was hidden in the Castle should be delivered to her as the officer in charge. Herr Lange therefore informed her of the presence in his safe of the property of Prince August Wilhelm, and surrendered it to her. Neither the jewels which had been buried nor the property of Prince August Wilhelm was ever returned. (R 145-6, 152, 210-12, 222)

(i) In November 1945, the month in which the Hesse jewels were discovered in "Kronberg Castle," Mrs. Martha Lucille Orwig Hatch Evans, who had been the accused's secretary in 1944, when he was stationed in Washington, D. C., received a letter from him at her home in Arlington, Virginia. In this letter the accused enclosed a note addressed to his brother James

E. Durant of Falls Church, Virginia, which the accused requested her to deliver for him. In this letter the accused stated that he was sending her a package for delivery to his brother, and he requested Mrs. Evans to acknowledge receipt of this letter by cable using certain specified words. Mrs. Evans complied with this request. Thereafter Mrs. Evans, received a cablegram from the accused, dated at Frankfurt-am-Main, 28 November 1945, worded in part, as follows:

> "Plans Changed No Package Destroy Note Keep Me Advised Your Status Periodically Everything Fine Here" (Pros. Ex. 133a)

Upon receipt of this message Mrs. Evans destroyed the note addressed to James E. Durant, but before doing so she read it. The note instructed Colonel Durant's brother to put the package which he was to receive from Mrs. Evans in a bank deposit box, stating that he was never more serious in his life. (R 1096, 1108-11, 1124, 1156, 1173)

Shortly thereafter on approximately 16 December, 1945, the Deputy Chief of Military Personnel, Air Forces in Europe, received a telephone call from the accused in the course of which the accused asked "—if it would be possible to send a present to a lady friend at the Headquarters" in Washington by official mail, and was informed that it would not be possible. (R 1395)

(j) Between November 1945 and March 1946 a clerk in the accused's office mailed twenty or thirty packages to the United States for him. These packages were addressed to a Mr. Durant in Church Falls or Falls Church, Virginia or West Virginia, and to a city named Hudson. The same clerk also mailed a package for Major Watson to Burlingame, California, and he remembered that at least one of the packages had Captain Nash's return address on it. (R 1553-55)

During the six months preceding March 1946, five packages bearing the return address of the accused were received at the home of his brother, James E. Durant, in Falls Church, Virginia. One of these packages contained a silver tankard of a value of seventy-five dollars, which had belonged to the Landgravine of Hesse, and which had been given to the accused on the eve of the departure for the United States of Captain Nash. Other items were a shell shaped silver dish, the property of the Landgravine which had been in the Cottage; two boxes of knightly orders which belonged to Prince Wolfgang; a large watch and two handsomely bound books which had been in the Castle, the property of the Landgravine; a silver cigarette box, bearing the monogram of the late Prince Christoph of Hesse, which had been in a trunk in the Castle and belonged to his widow, Princess Sophia; a barometer which matched the large watch; and a nut cracker, which had been in the Castle and which belonged to the Landgravine. All of these items, which are of some substantial value, correspond to items 23 to 32 inclusive of Specification 1, Charge IV. (R 265, 339, 340, 603-4, 647-48, 1594, 1595, 1597, 1604, 1610, 1739, 1857, 2528; Pros. Ex. 73 & 100)

Item PX 64	Sp	Sp Item	Description	Owner	Page	Value	Page
1	1	94	Bracelet,pearl,114 diamonds	MA	253 324	$2,875	1723
2	1	161	Brooch,moss rose,77 diamonds	B-L	441	700	1723
3	1	153	Bracelet, 11 turquoise, 68 diamonds	B-L	441	1,400	1723
4			Bracelet,platinum,405 diamonds	M	821	3,300	1724
5	1	216	Pin,platinum,209 diamonds	M	821	3,500	1724
6	1	226	Bracelet,142 diamonds, 74 rubies	B-M	442, 828 860	3,000	1724
7	1	223	Wrist watch,platinum,606 diamonds	M	821	7,500	1724
8	1	99	Bracelet,gold,27 diamonds, emerald,ruby,sapphire	B-MA	324	550	1724
9	1	177	Ring,gold,pearl,9 rubies	B-L	442	50	1724
10	1	231	Ring,chalcedony,34 diamonds	M	821	75	1724
11	1	231	Ring,gold,9 diamonds-one 11 carat	M	442	14,000	1724
12	1	218	Ring, platinum,336 diamonds	M	821 2524	4,000	1724
13	1	110	Ring,oval turquoise,14 diamonds	MA	324	350	1724
14	1	208	Ring,emerald,20diamonds	M	442 828	2,700	1725
15	1	177	Ring,5 rubies, 24 diamonds	B-L	442	300	1725
16	1	231	Ring,gold,24 sapphires	M	443	25	1725
17			Clips,6 rubies,110 diamonds	M	822	5,400	1725
18	1	227	Clips,2 pearls,148 diamonds	M	443	1,900	1725
19	1	211	Clip,sapphire,62 diamonds	M	255	4,000	1725
20	1	242	Brooch,gold,21 rubies, 19 diamonds	M	822	600	1725
21	1	190	Brooch,gold,22 rubies, 8 diamonds	B-L	443	75	1725
22	1	212	Clip,platinum, 122 diamonds	M	443	4,800	1725
23	1	212	Clip,platinum, 105 diamonds	M	443	2,350	1725
24	1	41	Ear ring, turquoise, 82 diamonds	B-MA	257 325 336	550	1725
25	1	237	Ear rings, 2 sapphires, 76 diamonds	M	822	800	1725
26	4	1	Cuff links, 4 sapphires	C-AW	257 702	75	1725

Item PX 64	Sp	Sp Item	Description	Owner	Page	Value	Page
27	1	129	Cuff links, 40 diamonds, 8 sapphires, 2 pearls	B-R	443 714	300	1726
29	1	128	Cuff links, gold, red enamel, 4 diamonds	B-R	714	135	1726
31	1	249	Cuff links, gold & platinum	M	823	50	1726
32	4	1	Cuff links, gold, 4 rubies	C-AW	703	200	1726
33	4	1	Cuff links, 4 emeralds, 63 diamonds	C-AW	257	500	1726
34	1	232	Buttons, 4 turquoise, 16 diamonds	M	823	65	1726
35	1	194	Cuff links, gold, 4 sapphires	B-L	443	250	1726
36	1	249	Cuff links, gold & platinum	M	823	100	1726
39	1	107	Shirtstuds, pearl	B-W	325	250	1726
40	1	129	Cuff links, 24 diamonds, 8 sapphires, 2 pearls	B-R	444	225	1726
41	1	130	Shirt stud, 2 moonstones, 45 rubies	B-R	715	175	1727
42	1	106	Shirt stud, sapphire, 20 diamonds	B-W	329	260	1727
43	1	131	Shirt studs, gold, pair	B-R	715	40	1727
46	1	224	Bracelet, 42 rubies, 168 diamonds	M	444	10,000	1727
47			Bracelet, 5 aquamarines, 240 diamonds	B-M	444 860	1,250	1727
48	1	225	Bracelet, 54 rubies, 321 diamonds	M	444	13,500	1727
49	1	220	Bracelet, 3 rubies, 125 diamonds	M	444	3,000	1727
50			Bracelet, 88 sapphires, 112 diamonds	B-M	444 865	3,500	1727
51			Necklace, 52 pearls	M	823 829	30,000	1727
52	1	39	Necklace, 49 pearls	B-MA	329	3,000	1727
53			Necklace, 51 pearls	M	823	10,000	1727
54	1	43	Necklace, platinum,18 pearls	B-MA	329	1,100	1728
55	1	45	Necklace, gold, stones	B-MA	329	75	1728
56	1	191	Necklace, gold	B-L	445	200	1728
57	1	44	Necklace, gold, lapis lazuli	B-MA	330	75	1728
58	1	46	Necklace, coral,large stones	B-MA	330	200	1728
59	1	47	Necklace, coral	B-MA	330	150	1728
60	1	50	Necklace, gold	B-MA	330	45	1728
61	1	48	Necklace, gold, 7 pearls	B-MA	330	50	1728
62			Necklace, gold	B-MA	330	15	1728
63	1	58	Pendant, gold, 4 diamonds	B-MA	330	110	1728

Item PX 64	Sp	Sp Item	Description	Owner	Page	Value	Page
64			Brooch, gold, 4 diamonds	B-MA	330	50	1728
65			Brooch, ruby, 70 diamonds	M	257	700	1728
66	1	81	Brooch, 2 pearls, 1 diamond	B-MA	330	325	1728
67	4	1	Scarf pin, 12 rubies, 26 diamonds	C-AW	703	150	1728
68	1	82	Brooch, 3 sapphires, 2 diamonds	B-MA	257 331	425	1729
69	4	1	Scarf pin, 26 diamonds	C-AW	704	115	1729
70	1	87	Brooch, sapphire, pearl, 2 diamonds	B-MA	331	200	1729
71	4	1	Cuff links, 14 amethysts, 62 diamonds	C-AW	702	625	1729
72	1	92	Brooch, crown, 37 diamonds	B-MA	331	650	1729
74			Locket, moonstone, 21 diamonds	E*	824	330	1729
75			Locket, gold, 39 diamonds	E*	824	650	1729
76	4	1	Cuff link, 56 diamonds, 17 sapphires	C-AW	702	210	1729
77	1	239	Brooch, 4 sapphires, 128 diamonds	M	257	600	1729
78	1	193	Pendant, 16 pearls, head of Q. Victoria	B-L	445	750	1729
79	1	36	Necklace, 29 pearls, 30 diamonds	HJ	445	3,000	1729
80	1	100	Bracelet, gold, pearl, 12 diamonds	MA	445	175	1729
81			Vase, silver & enamel	M	446	15	1729
83	3	81	Watch, buried in crystal	C-L	446	150	1730
84	3	80	Watch, gold, antique	C-L	446	500	1730
85	1	178	Watch, gold, monogram	B-L	447	75	1730
86	3	79	Watch, gold, enamel	C-L	448	150	1730
89	3	77	Napkin rings, silver, 2	C-S	257	6	1730
90	1	197	Snuff box, miniature of Marie Amelie	P	448	200	1730
92	3	76	Bracelet, gold, 8 charms	C-L	449	450	1730
93	3	75	Bracelet, gold, 6 garnet hearts	C-L	450	330	1730
95	3	73	Miniature, Princess Louise of Prussia	C-L	450	200	1730
96	3	72	Miniature, George V, King of Hanover	C-L	451	150	1731
97	1	184	Brooch, 6 rubies, 56 pearls	B-L	451	200	1731
98	3	71	Miniature, 76 diamonds	C-L	451	1,000	1731
99-	3	70	Miniature, Fred. Wm. IV, King of Prussia	C-L	451	75	1731

Item PX 64	Sp	Sp Item	Description	Owner	Page	Value	Page
100	3	69	Miniature	C-L	451	5	1731
101	3	68	Miniature	C-L	451	10	1731
102	3	67	Miniature	C-L	451	25	1731
103	3	66	Miniature, Kaiser Wm. II	C-L	451	75	1731
104	3	65	Miniature	C-L	451	50	1731
105	3	64	Charm, chalcedony, ruby	L	452	25	1731
106	3	63	Brooch, gold, head of Q. Victoria	L	452	25	1731
107	3	62	Piece of uniform	W	331	None	1731
108	3	61	Ivory box	C-L	452	25	1731
109	3	60	Brooch, gold, 2 pictures	C-L	452 453	100	1731
110			Pin, 1 sapphire	C-L	453	50	1731
111	3	59	Pin, 6 Rubies	C-L	453	75	1731
113	3	57	Pin, 31 diamonds	C-L	453	50	1732
114	3	56	Ring, gold, picture Fred. the Great	C-L	454	100	1732
118	3	55	Jade Buddha	C-S	259	10	1732
119	3	54	Easter egg, gold, iron cross	L	454	45	1732
120			Mecca stone	C-L	455 2489	1.50	1732
123			Souvenir insignia, gold	MA-	332	25	1732
126	3	53	Letter opener, agate, ruby diamond	C-L	458	10	1732
127			Cross, silver gilt	S	259	10	1732
128			Easter egg, gold, enamel crystal	C-L	459 2481	25	1733
129	1	180	Hat pin, amethyst, 4 diamonds	B-L	459 2484	50	1733
130			Pen holder, silver	C-L	459	1.50	1733
131			Necklace, gold	B-MA-	332	40	1733
132	1	49	Necklace, platinum, 4 diamonds	B-MA	333	75	1733
133	1	234	Necklace, platinum	M	824	40	1733
134	3	52	Tankard, silver gilt, monogram Fred III	C-L	261 2528	100	1733
135	3	51	Cream pitcher, monogram Fred. III	C-L	450 2487	25	1733
136	3	50	Coasters, silver, 12	C-L	260 2488	48	1733
137	3	49	Bell, silver, tortoise shape	C-S	260	40	1733
138	3	48	Box, cigarette, silver	C-L	459	50	1734
139	3	47	Candlesticks, pair	S	2486	25	1734
140	3	46	Cups, egg, silver, 2	C-L	460	40	1734

Item PX 64	Sp	Sp Item	Description	Owner	Page	Value	Page
141	3	44	Box, silver	C-L	460	25	1734
142	3	45	Box, match, silver	C-L	460	20	1734
143	3	43	Pot, mustard, silver	C-L	460	25	1734
144	3	42	Tray, silver plated, small	C-L	460 2488	20	1734
145	3	41	Saucer support, silver	C-L	460	75	1734
146	1	204	Bowl, silver, embossed, antique	B-L	461	50	1734
147	3	40	Plate, silver	C-L	461	75	1734
148	3	39	Ash tray, silver	C-L	461	25	1734
149	3	38	Plate, silver, small	C-L	461	10	1734
150	3	37	Cup, collapsible, silver, W/case	C-R	716	10	1734
152	3	35	Pencil, silver	W	333	15	1734
154			Pen holder, silver	L	459	25	1735
155	1	252	Fan, gold, 95 diamonds, 4 rubies, 3 sapphires, hand painted arms & pictures	B-L	461	5,000	1735
156	3	34	Fan, tortoise shell, gold inlay	C-S-	260	50	1735
157	3	33	Fan, mother of pearl, gold inlay	C-S	260	500	1736
158	3	32	Crucifix, silver	C-S	261	10	1736
159			Smelling bottle, silver	C-L	462	25	1736
160			Chess man, metal	C-L	462 2529	10	1736
161			Chess man, metal	C-L	462	25	1736
162			Chess man, metal, gold trim	C-L	462	50	1736
163	3	31	Fruit set, 12 ea. knives, forks, spoons	C-L	261 463	900	1736
164	3	30	Fork, salad	C-L	464	20	1737
165	3	29	Spoon, salad	C-L	464	20	1737
166	3	28	24 spoons, 12 knives, 11 forks	C-L	463	3 80	1736
167	3	27	Coffee spoons, silver gilt, 12	C-S	261	180	1737
168	3	26	Butter knives, 3	C-L	463	9	1737
169	3	25	Spoon, silver, monogram Empress Friedrich	C-L	463	40	1737
170	3	24	Spoon, silver, antique	C-L	463	40	1737
171	3	23	Spoon, jam, silver	C-L	463	15	1737
172	3	22	Spoons, egg and salt, 5	L	463	15	1737
173	3	21	Spoons, mustard, 2	C-L	464	6	1737

Item PX 64	Sp	Sp Item	Description	Owner	Page	Value	Page
174	3	20	Pusher, child's, silver	C-RA*	262	5	1737
175	3	19	Spoon, monogram Empress Friedrich	L	464	2	1737
176	3	18	Spoon, porridge, silver	C-S	262	5	1737
177	3	17	Spoon, silver, monogram Empress Friedrich	L	464	30	1737
178	3	15	Spoon, silver	L	465	4	1737
179	3	15	Scissors, grape, monogram, silver	C-L	465	20	1737
180	3	13	Frame, silver	C-L	465	40	1737
181	3	14	Frame, silver	C-L	465	40	1737
182	3	12	Field glasses, zeiss, w/case	C-C	262	100	1738
183	1	203	Bible, gilt binding, writing Q. Victoria	B-L	466	300	1738
184	1	202	English Book of Common Prayer, gilt binding, pictures Q. Victoria, Pr. Albert, markers w/turquoise, pearls	B-L	466	150	1738
185	1	201	Book, Imitation of Christ, velvet	B-L	466		
186	1	172	Catalog to 187, red velvet	B-L	466 467		
187	1	172	Album, paintings, autographs, velvet	B-L	466 467		
188			Bible, German, leather	L	467		
189	1	172	Catalog to 187, silk	B-L	467		
190	1	200	Bible, German, leather	B-L	467		
191	3	11	9 vols. correspondence between Empress Friedrich & dau., Pr. Victoria	C-L	469		
192			Box, wooden, St. Michael	C-P	824		
193			Diamonds, 2	L	468	75	1739

After he had left Hudson, the Army investigator received a package, addressed to him at Chicago and bearing the return address of Captain Nash's sister in Hudson, Wisconsin. This package contained a biography, in German, of the Empress Friedrich, mother of the Landgravine of Hesse. The book belonged to Prince Wolfgang and was moved to Schloss Friedrichshof after his home in Frankfurt-am-Main was bombed. (R 342, 619, 620; Pros. Ex. 480)

*Princess Elizabeth is a daughter of Prince Philipp of Hesse and the late Princess Mafalda; Prince Rainer is a son of the late Prince Christoph of Hesse and Princess Sophia.

(1) In November 1945, Major Watson visited a friend in Belfast, Northern Ireland, whom he had met when he had been stationed there during the combat period, and gave her a silver hand mirror and a large pearl surrounded by diamonds. In March 1946, this friend received a package addressed to her in Major Watson's handwriting and bearing his return address. The package contained jewelry and loose precious stones. In June 1946, an Army investigator went to Belfast and secured from Major Watson's friend the mirror, the pearl surrounded by diamonds, and the contents of the package. The pearl surrounded by diamonds was identified as a part of the pearl and diamond diadem which was one of the principal Hesse family jewels and is shown in its original state in Prosecution Exhibit 54. This diadem is the first item on the inventory of the House jewels which were placed in the zinc-lined box and corresponds to Item 1 of Specification 1, Charge I. (R 482; Pros. Ex. 20) This item and the other items secured from Major Watson's friend in Belfast together with the owner and its current retail value in Washington, D. C. are shown in the following table by the same symbols used in the preceding table.

Item PX 107	Sp	Sp Item	Description	Owner	Page	Value	Page
242	1	221	Bracelet, platinum, 365 diamonds	B-M	263 861	$18,000	1742
243	1	123	Bracelet, platinum, 162 diamonds	B-S	264	5,000	1742
244			Necklace, pearl, double strand	E	825	500	1742
245			Hand mirror, silver	C-L	480	35	1742
247	1	242	Pin, gold, pearl, 2 diamonds	M	825	150	1742
248	1	188	Ring, gold, 2 diamonds, 1 ruby	B-L	481	150	1742
249	1	188	Ring, gold, 2 diamonds, 1 ruby	B-L	481	150	1742
250	1	87	Pin gold, 2 pearls, "Baby"	B-MA	342	20	1742
251			Brooch, platinum, 5 diamonds	M	826	75	1742
252			Safety pin, gold, pearl	M	826	20	1742
253			Sapphire, 116.20 carats	M	826	5,800	1742
254	1	250	Amethyst, drop-shaped, 103.73 carats	M	826	150	1742
255			Amethyst, cabochon, 80.85 carats	M	483 826	40	1743
257	1		One pearl, 19 diamonds, 20 rose cut diamonds, part of a diadem	B-HJ	422	3,000	1742
258	1	214	Ring, sapphire, cabochon	B-M	264 484 864	800	1743

Item PX 107	Sp	Sp Item	Description	Owner	Page	Value	Page
259	1	231	Ring, sapphire, 74 diamonds	M	264 484	200	1743
260	1	177	Ring, garnet, 10 diamonds	B-L	484	250	1743
261	1	177	Ring, 2 diamonds, 1 ruby	B-L	484	50	1743
262			Chain, platinum, w/pearls	E	827	150	1743
263 264			Pendant, platinum, 18 diamonds	E	827	100	1743
264			Chain, platinum, w/gold lock	M	827	65	1743
237			Diamonds, ruby, emerald	L	480	18,419	1741

All the items were received in evidence as Prosecution Exhibit 107. (R 482, 671, 827, 956, 959, 962-966, 1056, 1173, 1182, 1978; Pros. Ex. 31)

On 1 or 2 April, 1946, Major Watson entered a pawn shop in Belfast, Northern Ireland, and sold the proprietor a quantity of gold, including old-fashioned Victorian ladies' gold mesh handbags, broken jewelry, bangles, chains, and things of that nature, which he said he had obtained in Italy. The pawnbroker paid Major Watson 80 pounds for this lot of jewelry and put it in his window for resale. In June or July 1946, he delivered the small amount still on hand to the head constable at Belfast, who in turn delivered it to an Army investigator. The items delivered included a wide bracelet of braided silver gilt, a piece of gold chain, a gold easter egg with enamel and forget-me-nots, a red easter egg set with diamonds, a German gold ten-mark coin, an old coin of Savoy with a representation of the Annunciation, a gold coin with the head of King Victor Amadeus of Savoy, and a gold medal with the head of King Umberto I of Italy. All of these items were identified as property of Princess Mafalda. The gold chain was a piece of the watch chain of her grandfather, King Umberto I of Italy. The ten-mark coin bore the head of Emperor Frederick III, grandfather of Princess Mafalda's husband, and was given to her by Queen Margaret of Italy. The red easter egg was made by a well known jeweler in St. Petersburg (Leningrad). (R 824-25, 932-974, 1173, 1535-47; Pros. Ex. 108, 130) The aggregate resale value in Washington, D. C. of the items recovered from the pawnbroker was $135. (R 1741)

(m) In January 1946, Mrs. Evans, whose correspondence with the accused is described in paragraph (i) supra, went to London, England, as a secretary for the United Nations delegation. Later that month the accused talked to her by telephone from Frankfurt-am-Main, and in February, he visited her in London. Upon the occasion of this visit the accused took a number of items of jewelry from his jacket, explained that he had procured them in Germany, and asked her to take them back

to the United States for him. Mrs. Evans agreed to do so, but at the same time refused to sell for him a gold mesh bag. A short time later, in April 1946, Mrs. Evans returned to the United States, and brought with her in her overnight case the jewelry which the accused had intrusted to her. Although she did not attempt to conceal this jewelry from the customs authorities, she made no special declaration of it. Later, in May 1946, after the accused had returned to the United States, she had lunch with him and returned this jewelry to him. (R 786, 1097-99, 1101-5, 1117-19, 1122, 1125, 1396, 1397)

Mrs. Evans identified a number of items of jewelry as having been brought to the United States by her at the request of the accused. Those items, their description, ownership, and estimated resale value in Washington, D. C. are, as follows:

Item PX 64	Sp	Sp Item	Description	Owner	Page	Value	Page
64	1	25	Ear rings, platinum, 2 sapphires, 76 diamonds	M	822	$ 800	1725
		49	Bracelet, platinum, 3 rubies, 125 diamonds	M	444	3,000	1727
		59	Necklace, Coral	MA	330	150	1728
		63	Pendant, gold, heart-shape, 4 diamonds	MA	330	110	1728
		64	Brooch, gold, enamel, pheasant-shape, 4 diamonds	MA	330	50	1728
		65	Brooch, ruby, 70 diamonds	M	227	700	1728
		77	Brooch, gold, platinum, 4 sapphires, 128 diamonds	M	257	600	1729

On 3 June 1946, the above described items were found in the home of Captain Nash's sister in Hudson, Wisconsin. (R 562, 566). In addition to these jewels, Mrs. Evans testified that a pearl necklace was among the pieces of jewelry which she brought back to the United States, but she was unable to identify it among the several pearl necklaces recovered from Hudson, Wisconsin. (R 329, 1727, 1102)

(n) In January 1946, the accused and Captain Nash procured a leave of seven days for the purpose of visiting Switzerland and authority to travel in a Government car. (R 88-90, 2454) They departed for Switzerland together, and later in the year an Army investigator secured hotel registration cards bearing the name and description of the accused from the police departments of Berne, Zurich, and Davos-Platz. (R 1040; Pros. Ex. 119, 120) In the opinion of a handwriting expert, seven of the ten cards procured, which bear dates from 19

to 29 January 1946, were written by the accused. (R 1063, 1792, 1799) The Army investigator also secured a bathrobe from the lost and found department of a hotel in Berne which the accused admitted was his. (R 1048-49) Sometime in January or February 1946, the accused entered a jewelry store in Berne, Switzerland, and offered scrap gold consisting of broken-up settings of rings and brooches for sale. The jeweler declined to buy, and the accused then asked him if he would buy precious stones. The jeweler stated that he would not. (R 1050-1052)

(o) In February 1946, Princess Sophia, through Frau von Bochmann, requested an interview with Captain Nash relative to the return of her jewels. Captain Nash declined to see her at the time requested, and thereafter Princess Sophia repeated her request by letter. When Frau von Bochmann delivered this request to Captain Nash she stated that she could not see Princess Sophia just then, but that she would see her in the near future. Within a brief time thereafter, Captain Nash suddenly left Kronberg Castle, supposedly for the United States, without saying goodby to Frau von Bochmann, and leaving behind her a partly packed footlocker. In the bottom of this footlocker, which was taken by Major Watson from the Castle on the night before his arrest, two books of monograms which belonged to the Landgravine and which had been in the Castle were found. (R 213-15, 249, 977, 2498, 2500-02; Pros. Ex. 109)

The day before her departure, Captain Nash had dinner at Spin Inn, at which time she presented General Bevans and the accused each with a silver tankard and Major Watson with a silver pitcher as "souvenirs of Kronberg Castle." The accused mailed his silver tankard to the home of his brother, James E. Durant, in Falls Church, Virginia, where it was later found. Major Watson mailed the silver pitcher to his family in Burlingame, California, and it was later returned from there. The silver tankards were the property of the Landgravine and had a value of $75 each. The silver pitcher, which had a value of $250, was also the property of the Landgravine, having been presented to her by the King and Queen of Italy. These objects correspond to items 1 and 82 of Specification 3, Charge I which had a value of $400. (R 263, 340, 391, 480, 604, 792-96, 967, 1553, 1597, 1739, 1741; Pros. Ex. 73, 100)

(p) On 6 March 1946, orders were issued by Headquarters, United States Forces, European Theater, directing the accused to return to the United States by Air transportation for temporary duty of seven days with the War Department, and granting him leave for thirty days in the United States upon the completion of the temporary duty. The order designated him an official courier

and exempted packages he might carry in that capacity from censorship. Under the terms of the order, he was directed to return to the European Theater at the expiration of the leave granted. (R 85; Pros. Ex. 5)

(q) In March 1946, following his return to the United States, the accused and his brother, James E. Durant, called upon Miguel Carrasco, who operated a delicatessen in Falls Church, Virginia, and who was reported to have connections which enabled him to secure the delivery of a limited number of automobiles. James Durant told Carrasco that his brother wanted to buy a new car with precious stones. The accused then produced from his pocket a small packet containing more than fifteen diamonds of various sizes. Carrasco agreed to try to get a car for the accused. A few days later, the accused and his brother called upon Carrasco and were told that he had not succeeded in procuring a car for the accused. (R 1379-1393)

On 14 March 1946, the accused entered the jewelry store of Shah and Shah in Washington, D. C., and offered to sell certain diamonds. Although no sale was effected on that day, the accused returned on 16 March, and sold three "old cut" diamonds, weighing 3.38 carats, for $357. "Old cut" diamonds are diamonds of an obsolete cut, used prior to 1900. The accused gave his name as "Colonel J. W. Gable," and accepted a check made out in that name. This check was indorsed, "Col. J. W. Gable" and "James E. Durant" and was cashed on 19 March 1946 by a Washington bank. In the opinion of an expert on handwriting the first indorsement was written by the accused, and the second indorsement by some one else. The first indorsement showed indications that the writer was trying to disguise his normal writing. (R 1162-1173, 1007-8, 1570-73, 1812, 1962-63; Pros. Ex. 95, 95a, 112, 134, 135)

On 15 March 1946, the accused entered the salesroom of the Burrows Motor Company in Washington, D. C., and offered to give John S. Burrows three small diamonds if he would sell him an automobile. Mr. Burrows declined, stating that he could not accept a gift, but expressed interest in buying a larger diamond. The accused then promised to bring in a larger diamond which he stated he had bought for his wife. The following day, the accused brought in the larger diamond, and the two of them took it to a pawnbroker, who appraised it for them as being of a value of $600. The accused thereafter sold the diamond to Burrows for $500 or $525, and Burrows sold him a new Hudson automobile at list price, which the accused paid for by a check. The particular diamond weighed 2.29 carats,

and according to the prosecution appraisal, had a value of $2,600. (R 13-58-87, 1467-68, 1745; Pros. Ex. 147, 148, 148b, 149)

(r) During the latter part of March 1946, the accused went to Chicago, Illinois, and contacted Dr. Reuben Mark, a physician whom he had known as a friend for a number of years. The accused showed Dr. Mark fifteen or twenty diamonds which the accused explained that he had obtained in Europe, and asked Dr. Mark if he knew any jeweler who might be willing to buy them. In response to the accused's request, Dr. Mark took the accused to a jeweler named Horwitz, to whom Dr. Mark introduced the accused as "Jack." The accused had explained to Dr. Mark that he wanted his name concealed because Army officers were not supposed to engage in business. The accused produced a large quantity of diamonds, and Horwitz agreed to buy 70 of them at a price of $125 a carat. The accused asked for payment in cash, but Horwitz insisted on payment by check. At the accused's request Horwitz then made out a check to Dr. Mark dated 1 April 1946, in the amount of $6,379.10. This check recited the purchase of seventy old mine cut diamonds. The accused gave Dr. Mark four diamonds for his assistance in this transaction. The following day Dr. Mark became worried about the transaction, and insisted that the accused return with him to Horwitz and rescind the transaction until arrangements could be made to take care of customs' duty on the diamonds. The check was returned to Horwitz and the diamonds to the accused. He stated that he would attend to the matter of customs when he returned from a trip. (R 1576-84, 1663-68, 1770-01; Pros. Ex. 169)

Later, in May the accused asked Mrs. Evans to type a letter for him which he wanted to send to the Chicago customs' officials. At that time he showed her a vial of diamonds, but refused to tell her where he got them and requested her not to "---say anything to anyone." (R 1105)

In the meantime, however, Horwitz informed the customs' authorities of the above described transaction, and a customs' agent called upon Dr. Mark. As a result, Dr. Mark made repeated attempts to reach the accused by telephone at Falls Church, Virginia, and after about ten days he succeeded. Thereafter on 17 April 1946, the customs' agent in Chicago received a telegram from the accused in Washington, D. C., stating that the accused would come to Chicago by air. The accused called upon the customs' agent on 19 April, and explained to him that he, the accused, had obtained the diamonds in Germany in exchange for an Elgin wrist watch and 3,000 marks, and had mailed them in a cigar box to his brother without a declaration. The accused then surrendered 102 diamonds to the customs' agent which the accused stated included those sold

to Horwitz. The customs' agent "seized" the 102 diamonds, gave the accused a receipt therefor, and informed him of his right to file a petition for a remission of forfeiture. Thereafter on 22 April, the four diamonds which the accused had given to Dr. Mark were delivered by him to the Chicago customs' official and "seized." On 21 May 1946, the accused submitted to the Chicago customs' officials a petition for remission or mitigation of forfeiture concerning the one hundred and six diamonds in which he stated that he did not know that a declaration of them was required. (R 1329-55, 1669-76, 1707; Pros. Ex. 71, 72, 81, 140-144)

Later when questioned by an Army investigator about the alleged theft of the Hesse jewels from Kronberg Castle, the accused stated that "he was surprised we hadn't already found out something else, and that he knew we would find it out sooner or later so he would tell us. That was, that the customs in Chicago, had seized from him a certain number of diamonds." (R 600, 1214, 1218) He did state, however, that the one hundred and six diamonds were not a part of the Hesse jewels. (R 1252, 1266) All of the one hundred and six diamonds, with one exception, were old mine cut diamonds of a type not cut in the last fifty years. Some were of a yellow color, mined in Africa between 1872 and 1900. One was a "rose" cut or "mirror-back" diamond, a type developed only in Germany and Eastern France between 1880 and 1900. The entire lot was given a domestic value of $5,900 and a foreign value of $4,327.65. (R 1301-1303) The diamonds were of the type which were in the Landgravine's jewels, and she testified that they "belong" to her. (R 473, 477, 601, 1301-10, 1316, 1317; Pros. Ex. 71)

(s) In April and May 1946, the accused visited Chicago three times and dined four or five times with Dr. Mark, a friend of his named Rose Griffiths, and Captain Nash. On several of these occasions Captain Nash wore a platinum wrist watch and bracelet set with 606 diamonds, which had belonged to Princess Mafalda, and which was valued at $7,500. On one occasion Captain Nash wore a ring set with an 11 carat diamond which also had belonged to Princess Mafalda and which was valued at $14,000. Dr. Mark, observing these jewels, remarked to Captain Nash, "Katie, gee, that thing looks like a real diamond," and the accused replied, "Well, that is the lighting effect." (R 1694) The accused, however, told Dr. Mark that Captain Nash had received those jewels through a divorce settlement with her wealthy Arizona husband. (R 1672-75, 1680-83, 1694)

On 28 May 1946, the accused and Captain Nash were given a premarital blood test in Chicago by Dr. Mark, and on the same day they were married. (R 692, 1684, 2510) Later, when Captain Nash was called by the prosecution as a witness in this case the marital privilege was

claimed and sustained by the Court. (R 695)

(t) In April, the accused was granted an extention of his leave for fifteen days, and early in May he asked to be relieved from active duty. Thereafter by Special Order Number 113, dated 17 May 1946, he was placed on leave and 23 July 1946, was designated as the date upon which he would be relieved from active duty. (R 86; Pros. Ex. 6, 86)

On 2 June, 1946, the War Department issued letter orders revoking so much of the order of 17 May 1946, as provided for the reversion of the accused to inactive status on 23 July, terminated his leave, and directed him to report for duty to Fort Sheridan on 3 June 1946. Thereafter on 3 June 1946 both the accused and Captain Nash were taken into custody at the La Salle Hotel in Chicago, and the accused was informed at that time of the War Department order revoking his leave. (R 86, 2300, 2510-11; Pros. Ex. 7)

(u) On the morning of 3 June 1946, Captain Nash was taken to the office in Chicago of Dr. Leonarde Keeler, a civilian criminal investigator and the inventor of the polygraph or "lie detector," who had been employed to assist Army investigators. She was there questioned concerning the disappearance of the Hesse jewels from Kronberg Castle. As a result of this questioning of Captain Nash, Major John D. Salb, one of the investigators, went to Hudson, Wisconsin, where he found the wooden box, jewels, and other property described in subparagraph (k), supra (See references there cited).

On the afternoon of 3 June, the accused was also brought to Dr. Keeler's office, warned of his rights under Article of War 24, and warned that anything he might say might be used against him. He was then questioned for several hours by Dr. Keeler and Colonel Pierce, the Army investigator who had custody of the accused. After some conversation the accused was asked to submit to a polygraph test. He at first refused, and Dr. Keeler told him that he did not have to take the test. The accused then replied, "I know that. I know my law. I know what I have to do and what I don't have to do, I am a lawyer." (R 1202) A few minutes later, however, he consented to submit to the test, the results of which were not offered as evidence. (R 1202-1206)

Later, the accused was told that Captain Nash had confessed to the theft of the Hesse jewels, and he was shown her signed confession. He expressed doubt, saying "——you might frame that on me." (R 1206) In response to his request, he was then permitted

to talk with Captain Nash alone. After his conversation with his wife, the accused asked Dr. Keeler to take a walk with him. During this walk the accused said to Dr. Keeler,

> "'I know what you have said to me, what you have said about the case, is true; but I am in one hell of a jam' — as he put it. He said, 'I don't know how to get out of it' — He said, 'I don't think I can get you back the jewels; I wish I could.' He said, 'You fellows have been decent to me, and I wish I could get them back, but,' he said, 'It's impossible.'" (R 1206)

On the following morning, June 4, after further conversation in Dr. Keeler's office, the accused again asked to talk with Dr. Keeler in the corridor because he stated that he was afraid that their conversation in the office would be recorded. In this second conversation in the corridor he said that he was in trouble, and that he wanted to get the jewels back. "He stated that we might make a slip and these were tough men to get along with, and somebody might get hurt." (R 1208)

It was finally agreed to permit the accused to make telephone calls in private. Thereafter he made six or seven such telephone calls from June 4 to June 6, 1946. On each occasion the call was made from a drugstore, restaurant, or hotel of his own selection. When the calls were made the accused carefully looked about to see that no one was listening, and he carefully concealed the identity of the persons to whom he talked. After his first telephone call he said,

> "It looks good, fellows. I have contacted one man. Now I must contact another, and the first man has consented to return the jewels." (R 1209)

At about 6:00 p. m. of June 6, he endeavored to make another telephone call, but said he had been unable to make the desired contact, adding that he was "—sure that he could at eleven o'clock the following morning." During that evening the accused and the group of investigators had dinner at Dr. Keeler's apartment during which time the "case" was discussed. (R 567-573, 1208-1249, 1425, 2328-32)

On the morning of 5 June 1946, the accused was taken back to Dr. Keeler's office. In the afternoon the accused was taken at his request to a bar where, according to his statement he was to receive a telephone call. At exactly four o'clock, the telephone in the "pay station" rang and the accused answered the call. After rejoining the group of investigators he said, "It looks bad. I'm

afraid it's all off." (R 1211) After returning to Dr. Keeler's office the accused stated,

> "I have done the best I can. You can't get them back now, it's all off. ——Now do with me what you want. ——Now I have nothing more to say. ——When I am ready to tell the whole story —— When I am ready to talk, I will tell the whole story at the right time." (R 1211, See also 568, 572-3, 1210-11)

On the morning of 6 June 1946, the accused was again brought back to Dr. Keeler's office. He again asked permission to talk with Captain Nash alone. After they had engaged in a private conversation, the investigators rejoined them. During the conversation which followed the accused said in substance,

> "Yes, we did break them up in Germany" (R 1214) "——the jewels had been broken up in Germany and the loose stones had been brought back." (R 1217, 1266, See also 569-70, 1426)

At noon on 7 June 1946, the accused returned to Dr. Keeler's office, where Colonel Pierce introduced to him Dr. LeMoyne Snyder. Dr. Snyder, a physician and lawyer and "Medical-Legal" Director of the Michigan State Police and a friend of Dr. Keeler was visiting in Chicago. At Dr. Keeler's request he consented to talk to the accused in an effort to get the accused to cooperate in securing the return of the jewels. He was presented to the accused as a physician and lawyer and member of the Michigan State Police who was not officially connected with "the case." Dr. Snyder suggested to the accused that it would be best for him if he did everything possible to get the jewels back. During their conversation, in which Dr. Snyder represented himself to the accused as a friend, he said to the accused, "I think I have a good idea why you haven't made a greater effort to return those jewels." To which the accused replied, "What is that?" Dr. Snyder then replied, "I think that probably you have placed them in the hands of a fence or some third party here, and that you are afraid of him, if you reved his name or whereabouts, or try to contact him." (R 1266-88)

Following the above described conversation the accused paced the floor, and then asked to be permitted to talk with Captain Nash. He was allowed to do so, but Dr. Keeler observed their interview by means of a "One-way mirror" from a concealed position in an adjoining room. He also listened by means of a dictaphone. After considerable conversation between them, the accused said to Captain Nash,

"Yes, I think I better get the jewels back in your interest and in our interest." (R 1220)

Colonel Pierce then entered the room and the accused said,

"I have decided to help you get the jewels back. — they are in the hands of a fence, but now I am on your side and I will help you get them back the best I can. — I am doing this in the interest of all of us and the interest, particularly, of my wife." (R 1220)

Colonel Pierce then asked the accused if he had really been trying to recover the jewels during the past week and the accused replied,

"Well, I have contacted the individuals who have the jewels, but I really didn't make an effort to get them back; but now I have changed my mind, and I will make every effort possible to recover them." (R 1222)

Colonel Pierce also asked the accused if there were others involved in the "Kronberg jewelry theft" and he replied that Major Watson, Captain Nash, Corporal Carlton, and himself were the only ones involved. (R 1221)

Shortly after the accused had made the above described statements, the group, including the accused, Captain Nash, Colonel Pierce, Major Salb, Dr. Snyder, and Dr. Keeler went to a place called Martin's Restaurant for dinner. After some discussion there as to how the accused could recover the jewels without the "fence" being identified, the accused said,

"I know how we can do it. — I will call my contact and I will have him take the jewels to a luggage department in a railroad station. I will have him call back at 8:30 to notify me where the jewels are placed, and where I can find the key." (R 1223)

The accused then made a telephone call, remarking before doing so that he had forgotten the telephone number of the man he wanted to contact and would have to make another call first. After he had made his second call he announced that, "Everything is set. We will have to be back here at 8:30." The group then left Martin's Restaurant, but returned before the appointed time. At 8:30 the accused

received the expected telephone call after which he said, "Everything is all right. We can get them any time we want to." (R 1226) The accused, accompanied by Colonel Pierce, Major Salb, and a Major Evans went to the Illinois Central Railroad Station. There the accused walked to a telephone stand, reached up over the light above the stand, and then proceeded to one of the steel baggage lockers, opened the locker, and took out a small parcel wrapped in brown paper. He handed the package to Major Salb and asked that it be opened only in his presence. To this request, Colonel Pierce and Major Salb consented. The four officers then returned to Martin's Restaurant and rejoined the other members of their party. They then returned to Dr. Keeler's office where the package was opened by Major Salb in the presence of Major Salb, Dr. Keeler, and Dr. Snyder, and its contents examined by the three. The contents were then replaced and the package retied. (R 574-589, 643, 1223-27, 1274, 1429-31, 2316)

Soon thereafter the accused indicated to Dr. Snyder that he would like a private conversation with him. In this conversation the accused said,

> "I don't know how much our conversation this afternoon had to do with my getting these jewels back, but at any rate —— I want to thank you for the way you talked to me and the friendly attitude which you have toward me —— Well, what I want to talk to you about now is, I don't know what to do from this point on. They will want me to sign statements and tell everything I know, and I don't know whether I ought to do that, or just let them carry the ball from this point." (R 1274-75)

Dr. Snyder then replied that he "——couldn't conceive of how such an attitude or procedure would improve his condition, that the best way out of it, — would be for him to do everything that he could possibly do, to undo that which had been done." Dr. Snyder then said, "It is a pity that these jewels were broken up," to which the accused replied, "Yes, that is too bad. I am sorry we did it." (R 1275) Later in the conversation Dr. Snyder said, "Wasn't I right this afternoon when I said that a fence had these jewels, and you were afraid of him?" to which he replied, "You are goddam right I am afraid of him." (R 1276)

Later, the accused asked to see the contents of the package, and it was reopened in his presence. After examining the diamonds

he exclaimed angrily, "I have been double-crossed; the bigger stones are missing!" (R 1229) He was assured, however, that everything which was in the package at the railroad station was still there. He then made another telephone call after which he said, "They admitted that they didn't put all the stones in there." The accused then stated that he thought he would be able to get the other stones but that their recovery would be difficult and that he would be unable to get the others until Monday, 10 June. The accused, Colonel Pierce, Major Salb, and Captain Nash then returned to Washington, D. C., (R 590-99, 641, 642, 653, 1226, 1229, 1275-76, 1291, 1431-34, 2310, 2314)

The paper packets in the package secured by the accused in the Illinois Central Railway Station bore longhand notation as follows: "miniatures," "V.L.," "seed pearls," "very small colored," "large colored semi-prec.," " pearls," "E.R.S." and "M." According to the testimony of a handwriting expert, these notations were by the accused. (R 1006) The package and its contents were received in evidence as Prosecution Exhibit 67, a. to m. The contents of this exhibit are listed, identified, and evaluated, under the method employed in the previous tables, as follows:

Item PX 67	Sp	Sp Item	Description	Owner	Page	Value	Page
194			Diamonds, 30, 46 carats	L	468	$21,000	1720
195			Diamonds, 79.64 carats	L	468	20,000	1721
196			Diamonds, 173.46 carats	L	468	43,500	1721
197			Diamonds, 282.77 carats	L	468	42,450	1721
198	1	12-16	Amethysts, 14, large	B-HJ	266	2,980	1643
					488		
					334		
199	1	12-16	Amethysts, 51, small	B-HJ	266	2,044	1644
					334	650	1721
					468		
200			Aquamarines, 2				
201	1	136-	Emeralds, 67, 445 carats	B-L	469	266,000	1650
					267		
		139			2492	150,000	1721
					336		
202	1	121	Sapphires, 31	B-S	268	11,344	1721
					269		
203	1	37	Turquoise, 23	MA	269	200	1657
					472,336	100	1721
					2532		

Item PX 67	Sp	Sp Item	Description	Owner	Page	Value	Page
204			Sapphires, 3	MA(1)	472	900	1721
206			Moonstones & sapphires, 4			20	1722
207	1	124	Rose quartz, 71 carats	B-S-	473 269,337	700	1722
209	1	175, 198	Miniatures, 4	B-L	271,338, 473		
210	1	150	Pearls, baroque, pear shape	B-HJ	271 473,2530	3,000	1722
211	1	68,69 73	Pendants, 3	B-MA	338	485	1722
212	1	185	Aquamarines, 3	M(1) L(2)	338 474	700	1722
213	1 1	158 56,57	Amethyst hearts, 3	B-L(1) B-MA(2)	474 338	2,200	1722
214	1	146 155,176	Cameos, 4	L	338,474 2533	250	1723
215	1	136- 139	Loose stones: 22 emeralds, 16 Sapphires, 5 rubies	L	473	19,250 8,240	1658 1723

(v) On the evening of 7 June 1946, in anticipation of their departure for Washington, the accused and Major Salb went to the accused's automobile, which was in an Army garage in Chicago, to secure the clothing and personal equipment of the accused. The accused reached into the glove compartment of the car and took out an automatic pistol and holster, which he handed to Major Salb, saying, "I guess you'll want this, too". At the same time the accused said that the pistol had not been signed for and that it was not on receipt to him. (R 586, 587, 588, 635, 645, 2303, 2318; Pros. Ex. 68, 69) There was received in evidence a paper dated at Washington, D. C. on 16 May 1946, as follows:

> "I certify that I have no Government owned property in my possession.
>
> "Jack W. Durant
> Colonel O-279497"

The signature on this paper was shown to be that of the accused. (R 96, 988, 990; Pros. Ex. 18) The chief of the Weapons Branch, Small Arms Division, Office of the Chief of Ordnance, testified that the pistol was a United States Army model M 1911 A 1 and bore marks indicating that it had been accepted by the Ordnance Department as United States Military property. No pistols of this type had been sold by the Government to American purchasers. (R 1522, 1523, 1526, 1574; Pros. Ex. 168) Applicable Ordnance Department supply catalogs

list the price of this model pistol at $38 and that of the holster at $1.67. (R 1589, 1590; Pros. Ex. 170, 171)

(w) On 9 June 1946, the accused, Colonel Pierce, and Major Salb returned to Chicago. On 10 June 1946, the accused made a telephone call and soon received one back at the same booth after which he remarked, "It looks good," but that he would have to make another call. After making another call, and receiving one in return, he stated that "——we would get them back." Then at the accused's direction the group went to the North-Western Railroad Station, and the accused searched about for some time. He told Colonel Pierce that he was to get a parcel check number one hundred and ten from the sixth booth in a room of telephone booths across from the parcel check room. At Colonel Pierce's request the accused made another telephone call and then said that they were in the wrong station and that they would have to go to the La Salle Street Station. He explained that he had received his previous instructions from a third person, but that now he had received them directly. (R 592-596, 1434-36, 2004)

At the La Salle Street Station the accused entered the sixth telephone booth opposite the parcel check room and emerged with a note printed on a torn piece of a telegram blank, worded as follows:

> "Too bad my hat knocked your ticket off.
> Guess I have the right to keep the baggage."
> (Pros. Ex. 70)

The accused said that the package which they were seeking was as long as a shoe box, but not so deep. (R 596-599, 1436-1439, 2005-2006)

According to the check room attendants at the La Salle Street Station a very light package of the size described by the accused was checked there on check number 110 on Saturday, 8 June 1946, but was claimed by a civilian who seemed to be in a hurry on Monday, 10 June 1946. (R 2020-2021)

(x) On 14 June 1946, following his return to Washington, the accused told two Army investigators that his brother, James E. Durant, had more information about the case which he could give them. (R 606, 611, 1441) Thereafter on 19 June 1946, acting on information received, an Army investigator went to a wooded spot on the Leesburg Pike near Falls Church, Virginia, and there dug up a glass jar containing $28,000 in United States currency. This money was wrapped in packages which were bound with bill straps.

Some of these straps had been altered in ink. In the opinion of a handwriting expert these alterations had characteristics "consistent" with those of the accused's handwriting. (R 1485, 1488-1490, 1499, 1508, 1531, 1532, 1805, 1807; Pros. Ex. 155, 156, 147, 161, 181 to 185)

(y) Prior to the accused's entering into the military service he was employed for four years in the Department of the Interior. In October, 1941, he applied to the Morris Plan Bank of Washington for a loan of $300 with which to buy a second-hand 1937 Ford automobile, and for "personal needs." At that time his real estate was evaluated by him at $5,990 with an outstanding trust of $5,200. His bank acount in the First and Merchants National Bank, Richmond, Virginia, from 21 August 1944 to 31 December 1946 showed a balance varying from $1,617.93 to a balance of $30.00. (R 996, 1460-63; Pros. Ex. 92, 152, 165, 166)

5. Summary of Evidence For the Accused

(a) Colonel Robert Q. Brown, who was the commanding officer of Headquarters Command, SHAEF, in 1945, testified that Schloss Friedrichshof was placed under the command of Major Hartley in April 1945, and that Captain Nash was authorized to take "custody" of all the property that was at Kronberg Castle and the surrounding buildings. (R 2229-2233) He admitted, however, that no one was authorized to move property, including jewels and other valuables, out of the jurisdiction of Headquarters Command. (R 2234)

Major Joseph M. Hartley, II, who was the special service officer under Colonel Brown in 1945, testified that the office furniture found in the Castle was used by the United States Army and that clothing found in the stable of the Castle was issued to needy employees and distributed through Red Cross agencies. He also testified that the interchange of such property as dishes between clubs under the jurisdiction of Headquarters Command was authorized. He admitted that the inventory of the property in the Castle was a very general one and that it did not list all the property there in detail. After an inspection of the Castle, Herr Lange was permitted to retain his office there. He observed nothing of real value in Herr Lange's office or in the safe in his office. He recited that a registration system was instated at the Castle requiring everybody going in and out to register in an effort to prevent the unauthorized removal of property. (R 2253-69)

It was stipulated that Captain Leola Birmingham, Women's Army Corps, would testify that she saw Captain Nash give tankards to

the accused and General Bevans and a pitcher to Major Watson at a meal at Spin Inn. She would also testify that on an earlier occasion she visited the silver vaults at Schloss Friedrichshof with General Bevans and Captain Nash, at which time General Bevans picked up a perfume bottle and a picture frame which he later gave to her. Later, on another occasion, Captain Nash gave her three demi-tasse cups and saucers. (R 2439; Def. Ex. 21)

(b) Mr. Charles Kohen, the proprietor of the Hobby Shop, a small establishment in Washington, D. C., dealing in stamps, coins, autographs, and old jewelry, testified that, in his opinion, the aggregate value of the jewels brought back to the United States by Mrs. Evans for the accused, including a pearl necklace, was $1,965. (R 2339-65) The prosecution's witness had appraised these jewels at $8,410. (R 1725, 1727-29) Mr. Max Zweig, the pawn broker who appraised the 2.29 carat diamond for Mr. Burrows and the accused, testified that it was a very fine "old mine" cut stone worth from $500 to $600. (R 1361, 2365-71) The prosecution's witness on values has appraised it at $2,600. (R 1745)

(c) With the view to impeaching the testimony of the Swiss jeweler, who had said that the accused wore a garrison cap and a long blouse when he visited the witness' jewelry store in Berne in January, 1946, (R 1050-52) Major Hedwig Cadell, who saw the accused daily when he was on duty, testified that the accused habitually wore a service cap and short jacket and never wore a garrison cap or long blouse. She did not know what the accused had worn during his visit to Switzerland. (R 2441-42) Lieutenant Colonel John S. Dwinell, who had served as defense counsel for Captain Nash at her trial for the theft of the Hesse jewels, testified that prior to that trial he had interviewed Princes Philipp and Wolfgang, and they both disclaimed an ability to identify many of their wives' jewels and that they did not identify them at the trial of that case. On cross-examination, however, he was confronted with the record in that case which showed that Prince Wolfgang had identified numerous articles. Colonel Swinell identified a letter which he had written on 13 August 1946 to the Commanding General, Military District of Washington, asking that the charges against Captain Nash and the accused of 8 June 1946 be acted upon or dropped. (R 2417-33; Def. Ex. 15)

(d) Mr. B. Frank May, postmaster at Falls Church, Virginia, testified that, according to the records of his office, no registered or insured packages were delivered to James E. Durant in Falls Church between 1 November 1945 and 3 June 1946. His office has no record of ordinary, uninsured parcel post or unregistered first class mail deliveries. (R 2188-91)

(e) Miss Elizabeth De Young and Miss Betty Wood testified that they were members of the Women's Army Corps and on duty with the Military Police Detachment in Chicago in June 1946. On 3 June of that year they observed that the accused was questioned in Dr. Keeler's office for several hours. They watched the interrogation of the accused through the secret "one-way mirror" and observed that he refused to answer questions and that he repeatedly asked for a lawyer. Miss Wood accompanied the accused and Captain Nash from Chicago to Fort Sheridan on the night of 3 June and observed that they conducted a whispered conversation on the back seat of the car in which they were traveling which she could not hear. (R 2299-2303, 2325-29)

(f) Staff Sergeant Robert A. Nichols testified that on 5 June 1946 he received instructions from Colonel Pierce to conduct the accused from Chicago to Fort Sheridan and to deliver him "to the stockade." Before they started on this trip, the accused said to Colonel Pierce, "Don't you think I deserve some consideration?" to which Colonel Pierce replied, "If you want consideration, you just tell us what you do know." The accused then said, "Well, at least I am due some consideration - that car I have in the lot - is of some value." (R 2395) The accused was then accompanied to the parking lot where his car was searched and Colonel Pierce stated that he would try to place the accused's car in the Army storage garage at Garvey Court and Lake Street. The accused was then searched by Sergeant Nichols and conducted to Fort Sheridan. On the way there the accused stated that he had a headache, and asked permission to go to a drug store for an aspirin. In view, however, of Sergeant Nichol's order to take the accused to Fort Sheridan, he refused the request. (R 2395-98)

(g) Mr. Theodore Ellenbogen, Chief of the Legislative and Legal Council, Military Government for Hesse testified that he was familiar with German law and with the provisions of the Weimar Constitution. He explained that under the German Federal Constitution of 11 August 1919, titles of nobility were abolished except as part of the name of an individual. A Prussian decree of 23 June 1920 had prohibited the use of such titles as "Highness" and "Royal Highness." A Prussian decree of 5 September 1928 had prohibited the use of the title "Prince" before the name of an individual as for example, "Wolfgang, Prince of Hesse" was authorized, but the use of the title, "Prince Wolfgang of Hesse" was prohibited. No penalty, however, has been provided for the violation of these laws and they have been frequently disregarded in practice. (R 2536-43; Def. Ex. 26)

(h) It was stipulated that the finance officer at Frankfurt would testify that on 1 February 1946 Major Cadell collected $1,406.70 in pay and allowances on behalf of the accused and secured a Military Disbursing Officers' Payment order, payable to the accused, in that amount. It was stipulated that the finance officer at The Pentagon would testify that on 14 or 15 March 1946 the accused cashed such an order and drew $1,309.67 in pay and allowances. It was stipulated that the manager of The Pentagon Branch, First and Merchants National Bank of Richmond, Virginia, would testify that on 20 March 1946 the accused deposited a $1,000 Treasury check and $525 in cash in that bank. (Def. Ex. 22, 23, 24; R 2505)

(i) Major General William E. Hall, General Staff Corps, Chaplain (Colonel) Charles I. Carpenter, the Air Chaplain, Colonel Charles Maylon, General Staff Corps, Major Hedwig Cadell, Women's Army Corps, Major Cora Shannon, Women's Army Corps, Mr. Homer S. Carpenter, a Government attorney, Mr. Allen Coe, Director of the Building and Construction Division, Office of Price Administration, and Mr. Lewis J. Grayson, testified that they had known the accused at various stages of his civilian and military careers and that his reputation for truth, honesty and veracity was good. The application of the accused for commission in the Regular Army, made out in January 1946, was received in evidence. It bore a strong recommendation signed by Major General James M. Bevans, General Staff Corps. (R 2156-2161, 2192-2197, 2197-2207, 2209-2218, 2218-2225, 2241-2246, 2247-2253, 2440-2461, 2208; Def. Ex. 11)

6. Sufficiency of Proof - Specification 1, Charge I.

Specification 1, Charge I, alleges that the accused, in conjunction with Major Watson and Captain Kathleen B. Nash Durant did, at or near Kronberg, Germany, on or about 6 November 1945, feloniously take, steal, and carry away 252 items of personal property therein described, each of a value of more than $50.00, and of a total value of $1,000,000, the property of Prince Wolfgang of Hesse. The Court found the accused guilty of this specification, excepting therefrom 55 items, and excepting the allegation as to the total value, for which it substituted a lesser total value of $10,000. The reviewing authority disapproved that part of the finding which states that each item was of a value "of more than fifty dollars ($50.00)."

The legal sufficiency of the approved findings in question must be determined in the light of the law applicable to the crime charged and the evidence in the record of trial. The Manual for Courts-Martial defines larceny as,

"—the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permantly of this property therein." (M.C.M. 1928, par. 149g)

The Manual explains the above definition and the separate elements of the crime of larceny, as follows:

"In larceny there must be a taking and carrying away. The taking must be from the actual or constructive possession of the owner. The carrying away means any movement by the thief of the property, however slight, from the precise place where it was at the time it was seized."

"To constitute larceny the taking and carrying away must be by trespass; that is, it must be taken from the owner's possession without his consent."

"The distinction between 'possession' and 'custody' and the meaning of 'property' must be kept in mind. Possession is the present right and power absolutely to control a thing, and not only includes those things of which one has actual manual grasp, but extends also to those things that are in his house, or on his land, or in the actual manual care and keeping of his servants or agents."

"A person, then, has the 'custody' of property, as distinguished from the 'possession,' where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property. 'Property' in a thing is the right to possession, coupled ordinarily with an ability to exercise that right."

"In addition to the taking and carrying away of property by trespass, there must be an intent permanently to deprive the owner of his property therein, and ordinarily such intent must exist at the time of the taking."
(M.C.M. 1928, par. 149g)

Briefly reiterated, the evidence discloses that in the fall of 1944, the members of the Hesse family entrusted to Prince Wolfgang

of Hesse, the acting head of the Kurhessische House Foundation, certain jewels and other valuables belonging to various members of their family, and certain jewels and valuables belonging to their family corporation. In pursuance of their decision, Prince Wolfgang buried these valuables in a zinc-lined box in the deepest sub-cellar of Schloss Friedrichshof. Approximately two years later, in the afternoon of 6 November 1946, after Schloss Friedrichshof had been requisitioned by the United States Army and Captain Kathleen Nash placed in charge, the zinc-lined box was discovered. At the orders of Captain Nash, the sealed packages found therein were carried to her private room. It is a significant factor that on the same afternoon, or an afternoon very close in point of time to that date, the accused was with Captain Nash and that he called Major Watson by telephone and directed him to investigate and report the status of abandoned and found property. Thereafter the accused, Captain Nash, and Major Watson were frequently together, and the accused was frequently in Captain Nash's room from which others were excluded.

On the second day following the discovery of the zinc-lined box, Captain Nash admitted to Herr Lange, administrator of the Hesse properties, that the Hesse jewels had been discovered and demanded that he surrender to her any other valuables which might be concealed in the Castle. Within the same month the accused wrote to Mrs. Evans in Washington concerning a valuable package which he stated that he was planning to send to her for delivery to his brother, James E. Durant, and thereafter the accused mailed twenty or thirty packages to him. Also within the month of November, the accused and Major Watson built in the basement of Spin Inn the box which was later found at the home of Captain Nash's sister in Hudson, Wisconsin, together with one hundred and ninty-three items belonging to the Hesse family, including the jewels which the accused delivered to Mrs. Evans in London, in February, 1946. Furthermore, during the same month, Major Watson gave to a friend in Ireland a pearl surrounded by diamonds, a valuable part of a broken diadem, one of the principal Hesse family jewels.

Within two months of the discovery of the Hesse jewels, the accused and Captain Nash went to Switzerland together, where the accused attempted to sell broken pieces of gold and precious stones. Shortly thereafter, in February, Captain Nash left in haste for the United States, and was followed in March by the accused who traveled as an official courier with his baggage exempt from inspection.

After his return to the United States, the accused was in possession of many diamonds. He showed a number to Miguel Carrasca

in an effort to buy a new automobile with them; he showed a vial of them to Mrs. Evans and cautioned her not to "say anything to anyone." He sold three of them to Shah and Shah for $357, representing himself as Colonel J. W. Gable. And to the automobile delaer Burrows, he sold a 3.8 carat diamond which was valued at $2,600 for $500. Shortly thereafter in Chicago, he attempted to sell twenty diamonds to Horwitz for $6,379.10, and became involved thereby with the customs' officials. He was in Chicago in May with Captain Nash and she was wearing valuable diamonds. They were married a few days before his arrest. Following his arrest on 6 June 1946, and after a conference with his wife, he recovered a large number of diamonds from an unknown "fence" and admitted that he, Captain Nash, Major Watson, and Sergeant Carlton were the only ones who had been involved in the removal of the Hesse jewels from Kronberg Castle. He also admitted that he regretted that they had "broken up" the jewels in Germany. He further admitted that large diamonds had been retained by the Chicago "fence" and professed an attempt to recover them.

That the above described evidence fulfills the requirements of proof as to each separate legal element of the crime charged may be shown, as follows:

(1) That the Property Belonged to Prince Wolfgang as Alleged, and That He Had Possession Thereof.

When the members of the Hesse family entrusted their jewels and other valuables to Prince Wolfgang, he became a bailee for their safe keeping, and acquired a special property interest therein and possession thereof. (C.M. 244884 Tennant, 29 BR 63, 69) As a consequence it was legally proper to allege ownership in him. On this point the Manual For Courts-Martial provides that,

> "Where general ownership is in one person and possession in another, a special owner, borrower or hirer, it is optional to charge the ownership as in the real owner or in the person in possession." (M.C.M. 1928, par. 149g; See also: C.M. 187800, Michalowski, 49 BR 9; C.M. 266206, Haselwood, 43 BR 177; Wharton's Criminal Law, 12th Ed, Sec. 1172)

The subsequent action of the United States Army in requisitioning Schloss Friedrichshof, and in assuming control thereof did not destroy that property interest or deprive Prince Wolfgang of the constructive possession of the property in question. This is true because the United States did not intend to do any more than to use the Castle temporarily. Furthermore, international law as

recognized and respected by our Government forbids the confiscation of private property of the citizens or subjects of an enemy state. Articles 46, 47, and 53 of the regulations annexed to the Hague Convention, No. IV, of 18 October 1907, which are recited and explained in War Department Field Manuals 27-10, 1 October 1940, "Rules of Land Warfare," provide, as follows:

> "Article 46 - Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
> "Private property cannot be confiscated."
>
> "Article 47 - Pillage is formally forbidden."
>
> "Article 53 - An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
>
> "All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the trnasport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

It is immaterial, therefore, that Prince Wolfgang may have been temporarily deprived of his control over the buried jewels because of the occupation of the Castle by the United States Forces, for he retained a special residual right thereto, and constructive possession thereof sufficient in law to sustain the allegation of ownership in him.

(2) That Captain Nash Acquired Custody Only of the Discovered Jewels and That She and the Accused Later Committed a Trespass Thereon and Carried Them Away With an Intent to Steal.

When Captain Nash was placed in charge of Schloss Friedrichshof she was given a limited control over the property therein for the purpose of operating an officers club subject to the control and authority of her superior officer. She was also given authority to make needed interchanges of certain property between

other clubs under the jurisdiction of Headquarters Command. Her power, however, over all the property in her care was for the limited purpose stated. Under similar facts the Board of Review has repeatedly held that an officer who has charge of property, subject to the control of his superior officer, had mere custody thereof as distinguished from possession. In C.M. 220398, Yeager, 12 BR 397,400 the Board of Review stated, as follows:

> "Although accused was mess officer and as such had charge of the property issued to the mess, his removal of the cans of tuna fish was a trespass within the law of larceny. His powers as mess officer with respect to the property were limited to care thereof for the single purpose of operating the mess as an agency of the Government and for the benefit of the military personnel of the hospital. His control over the property was subject to the control of his superior officers. Such being the case, he had 'custody' only of the property as distinguished from 'possession'." (See also: C.M. 252103, Selevitz, 33 BR 383,394; C.M. 268478, Brown, 44 BR 291,294; Garrett, 48 BR 77,104)

The authority and power, however, of Captain Nash over the discovered jewels were obviously more strictly limited than was her control over the ordinary property of the Castle. Clearly, her right to hold in possession or to exercise general control over discovered jewels of great value was never contemplated by her superior officer. It is apparent, therefore, that the extent of her authority as an officer in the Army over such valuable property was limited to holding it in custody under a duty of making an immediate report of her discovery to her superior officer. (A. W. 80) Her original act upon the discovery of the jewels in transferring them to her room was consistent with her limited authority.

Furthermore, the evidence requires the conclusion that Captain Nash did not have a fraudulent intent to steal the jewels at the time she first took them in charge. Such a conclusion is logically required by the evidence showing three important factors: First, that Captain Nash employed three persons, including German servants, in procuring the contents of the zinc-lined box and proceeded in an open and bold manner as one acting in authority; Second, that Captain Nash did not know the content of the sealed packages found in the box and could not be tempted by the "giddy fancies of the

eye" until the packages were later unwrapped; and Third, that her subsequent conferences with the accused and their coordinated action in respect to the jewels all compel the conclusion that the intent to steal them was formed by the accused and Captain Nash after the jewels had been examined by them both. These factors warrant the conclusion that Captain Nash and the accused formed the intent to appropriate fraudulently the jewels after they had examined them and conferred together in her room. Their acts, after that decision was formed, in touching and moving the jewels constituted both the trespass and the asportation required by law to constitute larceny. It may reasonably be inferred that these acts occured on or about 6 March 1945. At just what stage in this process Major Watson was taken into their felonious plan is, for present purposes, immaterial.

(3) That the Property Was of the Value Found.

The one hundred and ninty-seven items described in the Specification 1 were identified by some member of the Hesse family as having been delivered to Prince Wolfgang and by him buried in Kronberg Castle. The detailed list of the value of each item is shown in the table of value in Paragraph 3, supra, and the total appraised value is far in excess of $10,000, the value found by the Court.

(4) Conclusion

The above evidence shows a continued cooperation between the accused and Captain Nash from the day the Hesse jewels were unearthed in the sub-cellar of Kronberg Castle to the day of their apprehension. And even thereafter, the accused conferred with Captain Nash Durant before he exerted his efforts to recover that portion of the jewels which was returned to the Army investigator in Chicago. The accused admitted that he, Captain Nash, Major Watson, and Sergeant Carlton were all involved in removing the jewels from Kronberg Castle, and the evidence clearly sustains his admission. Each separate link in the long chain of facts and circumstances, extending as it does from Kronberg Castle through Switzerland, England, Ireland, District of Columbia, Virginia, Hudson, Wisconsin, to Chicago, indicates the guilt of the accused, and considered collectively they are inconsistent with any other reasonable conclusion than that the accused did, in conjunction with Major Watson and Captain Nash commit the crime of which he was found guilty. Each separate legal phase of the crime charged is, beyond a reasonable doubt, established by the evidence and sustains the findings of guilty of Charge I, and Specification 1 thereunder.

7. Sufficiency of Proof - Specification 4, Charge I.

Specification 4, Charge I, alleges that the accused, in conjunction with Captain Kathleen B. Nash Durant and Major David F. Watson, and in pursuance of a common design, did, at or near Kronberg, Germany, on or about 8 November 1945, feloniously, take, steal, and carry away five envelopes containing 21,600 German Reichsmarks, jewels, and other property, of a total value of more than $50.00, the property of His Royal Highness Prince August Wilhelm of Prussia.

The same rules of the law of larceny and the same requirements of proof quoted in paragraph 5 apply to the crime in question. The evidence reveals that in the spring of 1945, August Wilhelm of Prussia entrusted to Herr Lange the jewelry, currency, and documents described in Specification 4, and that Herr Lange placed them in the safe in his office in Schloss Friedrichshof which he retained under his control even after the Castle had been requisitioned by the United States Army. Under the principles previously stated both ownership and constructive possession of this property remained in Prince August Wilhelm of Prussia.

On 8 November 1945, two days after the zinc-lined box had been discovered, and after the accused and Captain Nash had taken counsel with each other, and the accused had requested Major Watson to search for information governing the disposition of abandoned and found property, Herr Lange asked Captain Nash what disposition would be made of the Hesse jewels. Although Captain Nash assured Herr Lange that the jewels would be returned to the Hesse family, she demanded the surrender of any other hidden valuables, and the property of Prince August Wilhelm was delivered to her.

Since the accused was not present when those valuables were surrendered to Captain Nash, and since neither the accused nor Captain Nash knew of their existence when her demand for them was made, the question arises as to whether she had a fraudulent intent to convert them to her own use at the time she accepted them from Herr Lange. If she had such an intent at the time the property was delivered to her, she committed a trespass on the property in touching it, and her act in carrying the property away completed the crime of larceny. (M.C.M., 1928, par. 149g) If the act of larceny was completed when Captain Nash accepted the property, the question then follows whether the evidence connects the accused with the crime. In considering this problem it should be remembered that the United States Criminal Code states that,

"Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or procures its commission is a principal. (18 U.S. C550, 35 Stat. 1152)

It must also be remembered that prior to receiving this property, the accused in the presence of Captain Nash had made inquiry concerning the status of abandoned and found property. Thereafter they were frequently together in Captain Nash's room from which others were excluded. Clearly they cooperated in disposing not only of the jewels and valuables taken from the zinc-lined box, but in disposing of the valuables in question as well as other valuables taken from various places in the Castle. Seven pieces of jewelry belonging to Prince August Wilhelm were found intermingled with jewels and jewelry found in the home of Captain Nash's sister in Wisconsin which were clearly shown to have been brought back to this country by the accused. In the same place was also found the box that had been built by the accused and Major Watson in Spin Inn. Furthermore, the accused admitted that "they" had worked together in dismantling the jewels. This evidence, combined with all the other evidence showing cooperation between the accused and Captain Nash, not only warrants, but compels the conclusion that the accused and Captain Nash, shortly after the discovery of the zinc-lined box, counseled, aided, and induced each other in appropriating the contents of that box for their common gain. And it may also be inferred, with an equal degree of confidence, that their concerted action was designed to include such other valuable treasures either hidden or not hidden in Schloss Friedrichshof which they thought they could successfully appropriate. The implication of the evidence is that alone Captain Nash lacked the determination to commit the shameful crimes recounted herein and that she was aided and abetted in all of them by the accused.

If Captain Nash and the accused had formed the determination to take the valuables of Kronberg Castle for themselves at the time Captain Nash demanded the valuables from Herr Lange, she was clearly acting within the scope of that plan and under encouragement from the accused so as to make him, under the terms of the statute quoted above, a principal thereto. If on the other hand, they had not formed the determination to steal the valuables of the Castle when she demanded the valuables from Herr Lange, she received those valuables into her custody as an officer. If this latter hypothesis be correct, she and the accused thereafter fraudulently took the property of August Wilhelm from the custody in which she held it and thereby committed the crime alleged.

It follows, therefore, for the legal purpose of determining the guilt of the accused, that it is immaterial whether the concerted plan between the accused and Captain Nash was, or was not, in existence at the exact moment when she received the property of Prince August Wilhelm. This is true because, as heretofore stated, the evidence clearly shows that Captain Nash was previously counseled, aided, and abetted by the accused and as a logical and legal consequence he was a principal with her in the theft of the property of August Wilhelm of Prussia. The seven pieces of Prince August Wilhelm's jewelry were shown to have an aggregate value of $1,875. The evidence sustains, beyond a reasonable doubt, the findings of guilty of Charge I and Specification 4 thereunder.

8. Sufficiency of Proof - Specification 3, Charge IV.

Specification 3, Charge IV, alleges that the accused did, at or near Kronberg, Germany, between 1 November 1945, and 3 June 1946, unlawfully agree and conspire with Major David F. Watson and Captain Kathleen B. Nash Durant to steal, embezzle, convert to their own use, transport, and dispose of the items of personal property listed in specifications 1, 3 and 4 of Charge I, each of a value of more than fifty dollars ($50.00), and of a total value of one million five hundred thousand dollars ($1,500,000.00) the property of Margarethe, Landgravine of Hesse, Prince Wolfgang of Hesse, and Prince August Wilhelm of Prussia, and that such conspiracy was effected by overt acts, as follows:

(a) That they mailed or caused to be mailed from Germany to the United States and other places, packages containing the property described,

(b) That they sold or attempted to sell or otherwise dispose of, within the United States and elsewhere, certain of the property and did conceal and hide certain other items thereof, and,

(c) That they did break up and dismantle certain of the property and mutilate the settings and fittings thereof, and did sell or attempt to sell, conceal or dispose of the dismantled parts as well as the whole thereof.

The Court found the accused guilty of this specification, excepting therefrom the words and figures "embezzle" and the reference to specification "3" and the words and figures, "a value of more than Fifty Dollars ($50.00)" and "One Million Five Hundred Thousand Dollars ($1,500,000.00)," substituting therefrom respectively the words and figures, "some value," and "Ten Thousand

Dollars ($10,000.00)." The reviewing authority disapproved so much of the findings as relate to the items of Specification 1, Charge I, which were excepted by the Court from its finding of guilty of that specification.

Section 37 of the Federal Criminal Code defines conspiracy, the offense of which the accused is here charged, as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both." (18 U.S.C. 88; 21 Stat. 4)

The words, "offense against the United States" as used in the above statute have been held to have the same meaning as the words "offense against the laws of the United States." (U.S. v. Sanche 7 Fed 715; Thomas v. U.S. 156 Fed 897; Rodin v. U.S. 189 Fed 568 certiorari denied 31 S. Ct. 724, 220 U.S. 623, 551. Ed. 615) The wrongful conversion of property by persons subject to military law is a violation of Article of War 96, and is, therefore, an offense under the statute quoted above. (C.M. 252620, Watterson, 34 B.R. 95, 101)

The elements of a conspiracy, and the requirements for the proof of that offense have been carefully considered and explained, in Dahly v. United States, as follows:

> "A conspiracy under section 37 Cr. Code (18 USCA Sec. 88) is an agreement by two or more persons to commit an offense against the United States. The gist of the offense is the conspiracy; that is, the agreement between two or more persons to effect the unlawful end; but before the offense is a completed one, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy. Such act is called an overt act.
>
> "Two things, therefore, must be proved before a conviction can properly be had: The conspiracy or agreement to commit the offense named against the United States; an overt act or acts done in furtherance of the conspiracy. The overt act or acts need not be criminal per se; but an overt act must be one independent of the conspiracy or

agreement. It must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy.

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

"Proof of the overt acts may or may not be sufficient to prove the conspiracy. This will depend upon the character of the overt acts; not whether they are criminal per se or not, but whether they are of such character separately or collectively that they are clearly referable to a preagreement or conspiracy of the actors. If the jury is satisfied, beyond a reasonable doubt, from the evidence that such is the character of the overt acts proven, the jury may find the preexistence of the conspiracy. Otherwise, evidence independent of the overt acts is necessary to prove the conspiracy." (50 F (2d) 37)

The evidence which has been reviewed in the paragraphs 5 and 6, concerning respectively the larceny of the jewels buried in the zinc-lined box, and the theft of the property of Prince August Wilhelm, is relevant to the present charge of conspiracy. That evidence clearly establishes the conspiracy between the parties as alleged, independently of any admission by the co-conspirators. (M.C.M., 1928, par. 144c)

It will be remembered that about the time of the discovery of the zinc-lined box, the accused in the presence of Captain Nash made an inquiry by telephone of Major Watson as to the status of abandoned and found property. This coincidence is highly relevant regardless of whether it occurred before or after the discovery of the zinc-lined box for it shows, in connection with the other evidence, a counseling together and a cooperation concerning the acquiring of property which matured into a concerted plan. Following the discovery of the zinc-lined box, the evidence shows that the accused and Captain Nash

were frequently together in her room from which others were excluded. During the month in which the jewels were discovered, the accused and Major Watson were seen in the basement of Spin Inn, building the box which was later found in Captain Nash's sister's home in Wisconsin. Not only does the evidence show that each of the three conspirators had valuable items of the jewelry in his possession, but it also shows that the accused and Captain Nash went to Switzerland together where the accused attempted to sell broken pieces of gold and offered to sell precious stones. The close cooperation between the accused and Captain Nash in the furtherance of their conspiracy is clearly shown to have continued. In Chicago, when Dr. Mark made a remark concerning the eleven carat diamond which Captain Nash was then wearing, the accused attempted to conceal the history of the jewel by explaining that Captain Nash had acquired it through a divorce settlement with her wealthy Arizona husband. Later, when the accused had decided, following a conference with Captain Nash, to help recover some of the Hesse jewels he revealed the group interest of the conspirators in the jewels by remarking, "—I am doing this in the interest of all of us and the interest, particularly of my wife."

Each of the three series of overt acts alleged is clearly established. The evidence shows that packages were mailed to the United States for each of the alleged conspirators, including the box built in the basement of Spin Inn. Major Watson transported jewels to Ireland, and the accused transported them to Switzerland, England, and to the United States. Likewise, the efforts of the accused to dispose of the jewelry in those countries are clearly shown, as is Major Watson's activity in Ireland. The physical condition of the recovered jewels bears convincing proof that they had been dismantled and broken, and the admission of the accused, himself, points out the conspirators as the perpetrators of that act of vandalism. As previously shown, the value of the jewelry as found by the court is sustained by the proof. Considered in its entirety, the evidence establishes, beyond a reasonable doubt, the conspiracy alleged.

The question arises as to whether the conviction of Major Watson and the acquittal of Captain Nash, of a similar charge of conspiracy, of which notice is here taken, operates as a bar to the trial of the accused for a conspiracy with Captain Nash. This question is answered by the rulings of our Federal Courts which hold in effect that the acquittal of all the parties to a conspiracy except one bars trial of that one, but that an acquittal of a

lesser number does not bar the trial of the one. In the case of Kaflon v. United States, 7 F (2d) 594, the Court stated that,

> "It was enough if any two of the three individuals concerted such a scheme. As a matter of variance the defendants themselves concede that it is not essential to convict all of the defendants named in the indictment." (Certiorari denied in 269 U S 582, 46 Sup. Ct. 107, 70 L. Ed. 423; See also 97 ALR 1312 and the Federal cases there cited and Wharton's Criminal Law 12 Ed. Ses 1677)

Finally, it should be observed that a conspiracy is "——a distinct offense from the substantive crime which is its object. Consequently substantive offenses are not merged in the charge of conspiracy, and sentence upon a conviction of conspiracy in no way bars punishment for the effectuated substantive offenses." (Ellerbrake v. United States 134 F (2d) 683 and cases therein cited.)

9. Sufficiency of Proof - Specification 4, Charge IV.

The result of the findings of guilty under Specification 4, Charge IV, and the exceptions and disapprovals imposed thereon by the reviewing authority, as shown in paragraph 2 of this opinion, is to find the accused guilty of unlawfully importing into the United States in violation of the customs laws thereof, the list of items under the caption "Items appearing in Specification 1, Charge I" and the list of items under the similar caption, "Items appearing in Specification 3, Charge I" on pages 9 and 10 respectively of this opinion; and diamonds, rubies, pearls, sapphires, amethysts, aquamarines, gold, silver, platinum, and other kinds of precious stones and metals. Since no items of Specification 4, Charge I are included in the Court's finding of guilty, its general reference to that Specification is surplus and consequently that general reference must be deleted from that finding of guilty. It should be particularly observed that the reviewing authority disapproved that part of the finding which provides that the property in question was imported "——without declaring or invoicing same and without paying the required duty thereon——".

Section 593(b) of the Tariff Act of 1930 (46 Stat. 751, 19 U.S.C. 1593) penalizes any person who "——fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise contrary to law——". The National Stolen Property Act of 1934, as amended on August 3, 1939, (53 Stat. 1178; 18 U.S.C. 415) makes unlawful and punishable the transportation of stolen or feloniously taken goods of the value of $5,000.00 or more "——in interstate or foreign commerce——".

The evidence shows that the forty-two items of Specification 1, Charge I, incorporated in the approved findings of the Court, were stolen in Germany. The seventy-eight items of Specification 3, Charge I, which are also incorporated in the approved findings of the Court, are clearly shown to have been stolen in Germany. The items involved in the findings which are listed as diamonds, rubies, pearls, sapphires, amethysts, aquamarines, gold, silver and platinum are likewise shown to have been included in the property stolen in Germany. These items of property correspond to the items 17, 47, 50, 51, 53, 65, 81, 128, 129 and 154 of Prosecution Exhibit 64 as shown in paragraph 4(k) of this opinion.

The act of bringing the above described property into this country was, therefore, a violation of the national Stolen Property Act. It necessarily follows that the same act was a violation of the Tariff Act of 1930 as alleged. The evidence, beyond a reasonable doubt, sustains, the findings of guilty of Specification 4, Charge IV, and Charge IV, except as to the reference to Specification 4, Charge I.

10. Sufficiency of Proof - Specification 5, Charge IV.

Specification 5, Charge IV, alleges that the accused did, at and between Frankfurt-am-Main, London, New York, Falls Church, and Chicago, at some time between 6 November 1945 and 8 June 1946, unlawfully transport or caused to be transported into the United States and in Interstate Commerce the chattels listed in Specification 1, Charge IV, each in the value of over $50.00 and of a total value of $100,000.00, then lately stolen and that the accused knew that fact. In Specification I, to which reference is made, the accused was charged with receiving the stolen property therein described. The items listed in this specification are, as follows:

1 - 30 diamonds weighing approximately 46 carats
2 - 1 lot diamonds weighing approximately 79.64 carats
3 - 1 lot diamonds weighing approximately 173.46 carats
4 - 1 lot diamonds weighing approximately 282.77 carats
5 - 14 loose large amethysts
6 - 51 small amethysts
7 - 2 large aquamarines
8 - 68 emeralds
9 - 30 sapphires
10 - 23 turquoises
11 - 3 star sapphires
12 - 1 bag small seed pearls - loose
13 - 4 moonstones
14 - 1 large rose quartz stone
15 - 1 lot - 4 rubies; 1 pink sapphires; 1 topaz; one agate
16 - 4 porcelain miniatures
17 - 1 lot - assorted pearls
18 - 5 miscellaneous jewelry
19 - 3 aquamarines (2 mounted; 1 loose
20 - 3 heart-shaped amethysts (2 with diamonds)

21 - 1 lot 3 unmounted cameos; 1 mounted cameo
22 - 1 lot - 16 sapphires; 5 rubies; 22 emeralds; 3 pearls
23 - 1 large stein yellowish ringed metal with white metal coins around it
24 - 1 case, white metal, apparently cigarette case, wooden interior, initialed HR with crown on top
25 - 2 books, Vol 1 and 2, entitled: "Protestantism Contrasted with Romanism"
26 - 1 white metal star, circular design in center, words "Virtute at Fidelitate", crowned red striped lion in center encompassed by yellow metal.
27 - 1 white metal star, circular design in center encompassed by ring of white metal, words "Virtute et Fidelitate", smaller circle bounded by white metal enclosing a crowned red striped lion.
28 - 1 white metal star, back (Yellow metal), circular design in center, words "EinGott-Ein Recht-Eine Wahrbeit" enclosed by ring of yellow metal, center design, crown mounted on what appears to be a letter "L".
29 - 1 small dish, shell shaped of white metal
30 - 1 nut-cracker, white metal
31 - 1 barometer, white metal, circular about 2-1/2 inches in diameter
32 - 1 heavy watch, white metal, face has heavy Roman numerals, diameter approximately 2-1/2 inches in diameter
34 - 2 coral necklaces
35 - 1 gold neck chain
36 - 1 gold necklace solid chain, link design
37 - 1 gold enameled heart-shaped pendant with loop - pinkish color, with diamonds
38 - 1 gold enameled pheasant-shaped brooch
39 - 1 platinum bar pin or brooch, with ruby in the center and 2 "figure-8's" at each end set with diamonds
40 - 1 platinum brooch made up of 4 spiral designs with sapphire in the center of each design, surrounded by rows of diamonds

The Court found the accused guilty of the above described specification except as to the allegation of the value of each item for which it substituted a finding of "some value" and except as to the total value for which it substituted a finding of $10,000.00. The reviewing authority disapproved so much of the Specification as relates to item 33.

As stated in paragraph 9, supra, the National Stolen Property Act of 1934, as amended, makes unlawful and punishable the transportation of stolen or feloniously taken goods of a value of $5,000.00 or more "---in interstate or foreign commerce---".

The evidence shows that items 1 to 22 inclusive of Specification 1, Charge IV, are described in Prosecution Exhibit 67, and that they correspond to the items found in the package in the Illinois Central Railroad Station in Chicago, page 47 of this opinion. Items 23 to 32 inclusive of the specification, are described in Prosecution Exhibit 73, page 27 supra, and correspond to the items mailed by the accused to his brother and found in his brother's home in Falls Church, Virginia. Items 34, 37, 38, 39 and 40 of the Specification, are described in Prosecutions Exhibit 64 as items 59, 63, 64, 67, and 77 and correspond to the property identified as having been brought to the United States by Mrs. Evans on page 37 herein. Items 34, 35 and 36 of the Specification are described as items 58, 62 and 60 of Prosecution Exhibit 64 on page 30 of this opinion as have been found in the home of Captain Nash's sister in Hudson, Wisconsin. The Court was warranted by the evidence in concluding that all of this property was stolen property, and that the accused knew of that fact. The value alone of the items found in the package in the Illinois Central Railway Station in Chicago was shown to be far in excess of $5,000.00, and the accused was clearly shown to have been responsible as a principal for the unlawful transportation in interstate and foreign commerce of that property and the other property described. The approved finding of guilty of Specification 5, Charge IV is, beyond a reasonable doubt, sustained by the evidence.

11. Sufficiency of Proof - Specification 6, Charge IV.

Specification 6, Charge IV, alleges that the accused did, between 6 November 1945 and 3 June 1946, in conjunction with Major David F. Watson and Captain Kathleen B. Nash Durant, wilfully, feloniously, wrongfully, and unlawfully break, dismantle, mutilate, and destroy certain jewels, heirlooms, personal ornaments and other articles of precious stones and metals, the property of Her Royal Highness, Margarethe, Landgravine of Hesse, Prince Wolfgang of Hesse, and Prince August Wilhelm of Prussia. The Court found the accused guilty of this specification excepting the words, "and Prince August Wilhelm of Prussia."

The evidence reveals that among the jewels and heirlooms of the Hesse family, buried in the zinc-lined box were an amethyst

and diamond diadem with matching necklace and brooches, an emerald and diamond diadem with matching necklace, bracelets and brooches, a sapphire necklace, a turquoise and diamond diadem, and a pearl and diamond diadem. The accused admitted that he, Major Watson, and Captain Nash broke and dismantled the large pieces of the Hesse jewelry in Germany. Furthermore, both the accused and Major Watson peddled old gold and broken pieces of jewelry. Major Watson carried a part of a pearl and diamond diadem to Ireland. The accused was found in possession of many diamonds and other precious stones which, because they were of an obsolete cut, indicate that they had been a part of old jewelry. The act of the accused in breaking and destroying the ancient heirlooms of the Hesse family, objects of artistic and historical value, was a shameful act of vandalism of a nature to bring discredit upon the military service.

12. Sufficiency of Proof - The Specification of Charge II.

The Specification of Charge II alleges that the accused did, at Washington, D. C., on or about 17 May 1946, wrongfully apply to his own use a pistol of the value of $38.00, and a pistol holster of a value of $4.55, the property of the United States, furnished and intended for the military service thereof. The reviewing authority approved only so much of the finding of guilty under this specification as found the accused guilty of a wrongful "application," as distinguished from a misapplication, of the pistol, value $38.00, and a holster of a value of $1.67, in violation of Article of War 96.

The evidence shows that on 16 May 1946 the accused made a certificate that he had no Government owned property in his possession. Thereafter on 7 June 1946 when the accused's automobile was being searched in Chicago, the accused reached into the glove compartment of this car and took out an automatic pistol and holster which he handed to Major Salb, saying, "I guess you'll want this, too." At the same time the accused stated that the pistol had not been signed for and that it was not on receipt to him. These admissions are inconsistent with a claim of ownership by the accused and logically warrant the inference that the pistol in question was admittedly the property of the Government to which the accused had no right of possession. The evidence shows further that the pistol in question had a value of $38.00 and the holster a value of $1.67 and that the pistol had been accepted by the Ordnance Department as United States military property. It was also shown that no pistol of this type had

been sold by the Government to American purchasers. The Manual For Courts-Martial provides, as follows:

> "Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended." (M.C.M., 1928, par. 150i)

In view of all the facts and circumstances reviewed above, it may be concluded that the evidence, beyond a reasonable doubt sustains the approved findings that the accused wrongfully applied the Government pistol and holster to his own use, in violation of Article of War 96.

13. Procedural Matters

(a) Pretrial Investigation and Action Upon Charges - Article of War 70.

After the special plea to the jurisdiction of the Court had been overruled at the beginning of the trial of this case, the defense moved for the dismissal of all Charges and Specifications for the alleged reasons that the delay in the preferring of charges against the accused and the failure promptly to conduct an investigation as required by Article of War 70 so prejudiced him in the preparation of his defense as to violate the requirement of due process of law and the provisions of paragraph 35 of the Manual For Courts-Martial. (R 24-29) The pertinent provisions of Article of War 70 upon which the defense relied are, as follows:

> "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are

available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges." (M.C.M., 1928, p. 220)

The paragraph of the Manual referred to contains instructions concerning the manner of making a pretrial investigation. The relevant parts of that paragraph are, as follows:

"What follows in this paragraph (35a) is primarily intended to indicate a proper procedure in the more usual cases. Variations to save labor, time, or expense, or designed to meet other cases, or exceptional or local conditions, or for any other good reason, are not only permissible but should be adopted, provided the spirit and purpose of the statutory requirements quoted above are carried out. The investigation should be prompt, dignified, and military. It should also be as brief as is consistent with thoroughness and fairness, and should, therefore, not include any examination or cross-examination into matters not essential to determine the necessity of trial.

"Instructions. - At the outset of the investigation the accused will be informed of the following: The offenses charged against him; the names of the accuser and of the witnesses, as far as then known to the investigating officer; the fact that the charges are about to be investigated; his right to cross-examine witnesses against

him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation; his right to have the investigating officer examine available witnesses requested by him; and his right to make or submit a statement in any form subject to the risk of having such statement used against him.

"All available witnesses who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused." (M.C.M. p 24, par 35)

Statements in the motion of the defense and the evidence relative thereto show that the accused was arrested in Chicago on 3 June 1947. Thereafter he was questioned by investigators for several days. There is some evidence that during this time he requested the advice of an attorney. Although a defense counsel was not furnished him until after he had been returned to Washington, he was then given the services of Captain G. V. Brumbaugh, who was later, at the accused's request, appointed as the accused's special defense counsel. It thus appears that the accused was furnished a defense counsel long before he was brought to trial, and prior to the time required by the mandate of the United States Constitution and Article of War 17. The Circuit Court of Appeals in discussing this point in the case of Romero v. Squier (133 F 2d 528) stated that,

"Appellant also claims that he was denied counsel at the investigation into the matters upon which the charge against him was later made, and hence that he was denied the right of counsel of the provision in the Sixth Amendment. The pertinent portion of that Amendment reads, 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.' We do not regard the preliminary investigation as the 'criminal prosecution' for which the Sixth Amendment provides. Hence a failure to give the right of counsel to the party whose conduct is under preliminary investigation, is not a denial of a constitutional right so affecting the jurisdiction of the later convened court-martial, and hence is not subject to our consideration in a habeas corpus proceeding."

While the accused was in Chicago he was permitted to talk with his wife, Captain Nash Durant and with unknown persons through numerous private telephone conversations. It also appears that he was accorded numerous courtesies by those who held him in custody. On 7 June he was returned to Washington. He then returned to Chicago with Army investigators on 9 June in a futile effort to recover additional jewels. Following the failure of this endeavor, he was brought back to Washington on 11 June. In the meantime, on 8 June charges were preferred against him. (Def. Ex. 17) On 14 June he demanded that charges be filed against him or that he be released. On the following day the charges which had been preferred on 8 June were served upon him. The Specifications under these charges alleged embezzlement, committed in conjunction with Captain Nash, of property corresponding in general to that described in Specifications 1 and 3 of Charge I of the charges upon which the accused was later brought to trial, and conspiracy with Captain Nash to embezzle the same property. No investigation of these charges, upon which the accused was not tried, was ever conducted. On 15 June 1946 the accused was transferred by War Department order from the Military District of Washington to the United States Forces, European Theater, Frankfurt, Germany, and returned to the area where the major elements of the crimes charged were committed.

Captain G. V. Brumbaugh, whom the accused had requested as his special defense counsel, arrived in Frankfurt-am-Main on 27 June 1946. Thereafter on 12 August 1946, he made a formal demand that the accused be brought to trial or released. (Def. Ex. 18) This request was answered by an official communication, as follows:

"1. Request in basic communication for the release of Colonel Jack W. Durant from confinement is not favorably considered.

"2. Due to the seriousness of the offenses disclosed in the investigation of the Provost Marshall General's Office to this date, the customary treatment accorded other military personnel accused of like offenses, and the fact that the investigation is yet continuing, the continued confinement of Colonel Durant is warranted at this time.

"3. Subject officer is not being held incommunicado inasmuch as he is permitted to see the defense counsel of his own choice." (Def. Ex. 18)

On 13 November 1946 the accused renewed his request for release and was advised, as follows:

"1. Formal charges, alleging offenses connected with the taking of certain jewelry and other property from Schloss Friedrichshof, Kronberg, Germany, were preferred against you and served upon you at Washington, D. C., on 15 June 1946. Those charges informed you of the general nature of the offenses for which you have since been held in confinement.

"2. Since the preparation of the charges which were served on you on 15 June, additional information concerning the taking and disposition of the jewelry and other property has become available, making possible the preparation of more complete and specific charges. Accordingly, new charges have been prepared and will be referred promptly for investigation in accordance with the 70th Article of War. The Investigating Officer will inform you of the offenses charged against you as required by paragraph 35a, Manual for Courts-Martial, 1928." (Def. Ex. 20)

Thereafter, on 19 November 1946, the Charges and Specifications upon which the accused was tried were preferred. On the following day an investigating officer was appointed and on 26 November 1946, he made an official report of his investigation as shown in Exhibit A, Volume I, of the Record of Trial. From that report and the accompanying papers it appears that the accused was apprised of the nature of the charges against him, and given the names of a substantial number of the witnesses who were expected to be called by the prosecution and the substance of their expected testimony. The pretrial cross-examination of these expected witnesses was expressly waived by the accused.

Despite the repeated complaints of the defense that it was not given a fair opportunity to call and conduct a pretrial examination of certain witnesses, it appears that it was given ample opportunity, both in Europe and in this country, to call and to examine all the witnesses desired. Furthermore, although the defense complained that the delay in bringing this case to trial impaired the conduct of the defense, they do not point to a single witness or to a single item of evidence that was lost by the delay. On the other hand, the record of trial reveals that unusual opportunities for the securing of witnesses were accorded the defense.

When the magnitude of the offenses in question is considered, and when it is remembered that this case required pretrial investigation in Germany, Switzerland, England, Ireland and the United States,

it is believed that the delay in bringing the accused to trial was not unreasonable and that the pretrial investigation which was conducted constituted a substantial compliance with the requirements of due process of law, and with the requirements of Article of War 70 and paragraph 35(a) of the Manual For Courts Martial.

(b) Presence of an Unauthorized Assistant Trial Judge Advocate.

At the beginning of the first session of the Court on the afternoon of 11 December 1946, the Trial Judge Advocate announced that Second Lieutenant Reamer W. Argo, Jr. was acting as assistant trial judge advocate. (R 3) At that time Lieutenant Argo had not been officially detailed by orders to serve as assistant trial judge advocate and was not so detailed until 14 December 1946. (R 1)

During this first meeting of the Court it was in session for only an hour and twenty minutes and the only business transacted consisted of the announcement by the defense of its selection of counsel, a statement by the prosecution of the general nature of the charges and that it had no challenges, and a request by the defense for a continuance which was granted. (R 3-11) In fact, at this first session the preliminary processes leading to the swearing of the Court and the personnel of the prosecution had not been completed. (M.C.M., 1928, p 261) The record affirmatively shows that all statements made on behalf of the prosecution were made by Major Joseph S. Robinson, the regularly detailed trial judge advocate, and that Lieutenant Argo took no part in the trial other than to sit at the counsel table. By the time of the second meeting of the Court on 16 December 1946, Lieutenant Argo had been regularly detailed as an assistant trial judge advocate. (R 12) It was at this second meeting that the Court was sworn together with the personnel of the prosecution, including Lieutenant Argo, whereafter the accused was arraigned upon the Charges and Specification herein considered.

Article of War 11 provides that the authority appointing a general court-martial shall appoint a trial judge advocate and a defense counsel and "——one or more assistant trial judge advocates and one or more assistant defense counsel when necessary——". The provisions of this Article of War were fully complied with prior to the first meeting of the Court by the appointment of a trial judge advocate and it was within the power of the appointing authority thereafter to appoint an assistant trial judge advocate, as was done in this case.

Although the defense did not object to the presence of Lieutenant Argo at the Court's first session, it has subsequently complained that his presence in the court room prior to his being officially appointed as an assistant trial judge advocate was error. In presenting this contention the defense has relied upon the case of CM 318089 Knothe, digested in 6 Bull. JAG 58 as follows:

> "Accused was sentenced to dishonorable discharge. Defense counsel objected to an officer serving as special assistant to the prosecution as such officer was not on orders as a member of the prosecution and had not been sworn. The objection was overruled by the court. Held: The record of trial is not legally sufficient to support the findings and sentence. Since only the convening authority can detail or relieve an assistant trial judge advocate of a general court-martial (A. W. 11), activity in a trial on behalf of the prosecution by a volunteer assistant who has not even the color of any official appointment constitutes fatal jurisdictional error. Such activity is an invasion of the right of accused to be protected during his trial from the intrusion by one who is not properly a part of the court-martial duly convened to try him."

It is not necessary for us to pass upon the correctness of the rule applied in the case cited because the present case is clearly distinguishable therefrom. In the present case, Lieutenant Argo took no active part in the proceedings at the first meeting and his presence there during that brief session before the court was sworn and before the accused was arraigned, did not affect the course of the trial and was not in any way prejudicial to the accused.

(c) Loss of Reporter's Notes Covering Part of an Afternoon Session.

While the Court was sitting in the Military District of Washington, the reporter's notes covering part of the evidence received during the afternoon session of 12 February 1947 were accidentally destroyed prior to their being transcribed. (R 1172, Pros. Ex. 200, 201, 202) The defense declined to enter into any stipulation with the prosecution concerning the substance of the evidence recorded in the lost notes and declined also to avail itself of an opportunity again to cross-examine the witnesses in question when they were recalled. (R 1941-1944, 1946-1985, 1987) The Court prepared from notes kept by its members and from its recollection, a recapitulation

of the lost evidence. This summarization was signed by the president of the Court and placed in the record. (R 1173, 1174)

The defense contended that because of the loss of the Court reporter's notes the entire trial was invalidated. It relied on its contention upon the provision of the Manual, as follows:

> "When prior to action by the reviewing authority a record of trial is lost or destroyed, a new record will, if practicable, be prepared and will become the record of trial in the case. Such new record will, however, only be prepared when the extant original notes or other sources are such as to enable the preparation of a complete and accurate record of the case. In any case of loss of a record the trial judge advocate or other proper person will fully inform the appointing authority as to the facts and as to the action, if any, taken." (M.C.M., 1928, par 85b)

The above paragraph deals with the loss of an entire record and not with the loss of the reporter's notes covering a small part of a trial. It does not, therefore, solve the present problem. The recapitulation of the lost testimony, however, by the Court and the fact that every witness who had testified on the afternoon of 12 February 1946 was recalled and repeated his former testimony restored in a substantial way the proceeding of the afternoon in question. Under the circumstances it must be presumed that the record presents a fair and truthful report of the proceeding in question. Article of War 37 provides in part, as follows:

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused* * *" (M.C.M., 1928)

In view of the recapitulation of the lost evidence by the Court, the recalling and reexamining of each of the witnesses whose testimony has been lost, the offering to the defense of an opportunity further to cross-examine such witnesses, and the provisions of

Article of War 37, we are compelled to the conclusion that the loss of the notes in question did not injuriously affect the substantial rights of the accused.

14. History and Military Record

Records of the Department of the Army show that the accused is thirty-eight years of age. He was born at Decatur, Illinois on 25 September 1909. He attended elementary school at Decatur and was later graduated from a high school in Chicago. In 1931 he was awarded a bachelor or arts degree by the University of Illinois. From August 1936 to June 1937 he was employed as a statistical clerk in the United States Department of Labor. From June 1937 to June 1939 he was a fiscal clerk in the Department of the Interior at a salary of $200 per month. From 1939 to August 1940 he was employed by the same Department as a law clerk at a salary of $250 per month. While he was working in Washington, D. C., he attended American University and Georgetown University and received the degree of bachelor of laws from the latter institution in 1941.

He married Elvera Duller in 1930 and had two sons as a result of that marriage. This first marriage was terminated by a divorce in 1944 and on 28 May 1946 he married Captain Kathleen Burke Nash, Women's Army Corps. He is a member of the Methodist Church and the bar of the District of Columbia.

The accused was a member of the Reserve Officer's Training Corps while he was in high school and college and on 31 January 1931 he was appointed a second lieutenant, Cavalry Reserve. He was promoted to a first lieutenant, Cavalry Reserve on 16 April 1934, and to a Captain in the same organization on 3 May 1939. He was ordered to extended active duty with the Air Corps on 26 August 1940 and has been on active duty since that date. From 26 August 1940 to 18 May 1945 the accused was assigned to personnel work in A-1 Division, Headquarters, Army Air Forces. From 19 May 1945 to 9 August 1945 he was in the A-3 Section of Headquarters, Army Air Forces, Mediterranean Theater of Operations. From 10 August 1945 to 4 March 1946 he was Executive Officer to the Assistant Chief of Staff, G-1, Headquarters, United States Forces, European Theater. His efficiency ratings have been repeatedly superior. He was promoted to the rank of Major, Army of the United States on 3 April 1942, to rank in that grade from 1 February 1942. He was given a similar promotion to the rank of Lieutenant Colonel on 29 September 1942 and to the rank of Colonel on 10 November 1944. He has been awarded the Legion of

Merit, the Bronze Star Medal, the Army Commendation Ribbon with Bronze Oak Leaf Cluster, the American Defense Service Medal, the American Campaign Medal, the European African Middle East Campaign Medal with two bronze stars, the World War II Victory Medal and the Army of Occupation Medal with German clasp.

15. Conclusion

Although numerous additional questions of law were raised during the trial of this case, those about which there was any serious doubt were resolved in favor of the accused. Throughout the trial the Court maintained an attitude of fairness which is manifested in its many rulings. 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, except the reference to Specification 4 of Charge I in the finding of guilty of Specification 4, Charge IV, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof.

Abner E. Lifacomb, Judge Advocate

C. H. Johnson Jr., Judge Advocate

Gilbert G. Adler, Judge Advocate

JAGF - CM 324235 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 2 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 Colonel Jack W. Durant (0-279497), Air Corps.

2. The reviewing authority approved only so much of the findings of guilty of the general court-martial as found the accused guilty of the following offenses:

(a) The larceny of one hundred and ninety-seven items of jewelry and other personal property, of a total value of more than $10,000, the property of Prince Wolfgang of Hesse, in violation of Article of War 93 (Specification 1, Charge I);

(b) The larceny of jewels and other personal property, of a total value of more than $50.00, the property of Prince August Wilhelm of Prussia, in violation of Article of War 93 (Specification 4, Charge I);

(c) The wrongful application to his own use of a pistol and holster of a total value of $39.67, the property of the United States, in violation of Article of War 96 (Specification of Charge II);

(d) The conspiring with Major David F. Watson and Captain Kathleen B. Nash Durant to steal jewelry and other items of personal property of a value of more than $10,000, the property of the Landgravine of Hesse, Prince Wolfgang of Hesse, and Prince August Wilhelm of Prussia, in violation of Article of War 96 (Specification 3, Charge IV);

(e) The unlawful importing into the United States of a large quantity of jewels and precious stones, in violation of the United States custom laws, in violation of Article of War 96 (Specification 4, Charge IV);

(f) The unlawful transporting into the United States and in Interstate Commerce of a large quantity of stolen property, of a total value of more than $10,000, the property of the Landgravine of Hesse and Prince Wolfgang of Hesse, in violation of the National Stolen Property Act and Article of War 96 (Specification 5, Charge IV) and;

(g) The willful dismantling, mutilating, and destroying certain jewels, heirlooms, and ornaments, the property of the Landgravine of Hesse and Prince Wolfgang of Hesse, in violation of Article of War 96.

The accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence, but in order to compensate the accused for the period of time he had been confined prior to the completion of his trial, remitted one year of the confinement imposed, and forwarded the record of trial under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty, as approved by the reviewing authority, except so much of the finding of guilty of Specification 4, Charge IV as refers to Specification 4 of Charge I, and legally sufficient to support the sentence and to warrant confirmation thereof.

The record shows that in the fall of 1944, Prince Wolfgang of Hesse buried a large quantity of jewels belonging to the individual members of the Hesse family and to the Kurhessische House Foundation, a Hesse family corporation, in a zinc-lined box in the sub-cellar of Schloss Friedrichshof, a large mansion situated near Kronberg, Germany. Thereafter in the spring of 1945, Schloss Friedrichshof was requisitioned by the United States Army for use as an officers club, and Captain Kathleen B. Nash, Women's Army Corps, was assigned as the hostess-in-charge. In August 1945, the accused arrived in Europe and was assigned as executive officer to Major General James M. Bevans. The accused's assistant was Captain David N. Watson, who was promoted to the rank of Major upon the accused's recommendation. The accused and Major Watson became acquainted with Captain Nash and were thereafter frequent visitors at Schloss Friedrichshof.

On 6 November 1945, Sergeant Roy C. Carlton and a German servant discovered the buried wooden box containing the jewels. At Captain Nash's direction, all of the packages found in the box were carried to her private room. Shortly thereafter the accused, Captain Nash, and Major Watson entered into a conspiracy to steal, not only the jewels which had been found in the zinc-lined box, but such other items of value as they desired in Schloss Friedrichshof. The accused and his two confederates thereafter cooperated in the larceny of a large quantity of jewels, precious stones, and other valuables which belonged to the Hesse family and of valuables belonging to Prince August Wilhelm of

Prussia. During the month in which the jewels were discovered, the accused and Major Watson were observed building a box in the basement of Spin Inn where they were quartered. This box was later found in Hudson, Wisconsin together with 193 items of the stolen property. The accused went to London where he delivered a quantity of jewels to a Mrs. Evans which she later returned to him in the United States. The accused and Captain Nash visited Switzerland together in June 1946, and attempted to sell jewels and precious stones there. Between November 1945 and March 1946 a messenger mailed twenty to thirty packages to the United States for the accused, and a number of items belonging to the Hesse family were found in the home of the accused's brother in Falls Church, Virginia. Although the accused refused to make a formal confession, he nevertheless admitted that he and his confederates had dismantled many of the treasured heirlooms of the Hesse family.

After his return to the United States, the accused attempted to purchase a new automobile with precious stones, and under the name of "Colonel J. W. Gable," sold precious stones to Shah and Shah of Washington, D. C. In Chicago, he attempted to sell seventy diamonds for $6,379.10 and thereby became involved with the customs' officials. In May 1946, he married Captain Nash in Chicago and was arrested with her there on 3 June 1946. Following his arrest he was permitted to make numerous telephone calls to unknown persons. As a result of these telephone calls he procured the return of a large quantity of the stolen jewels. Thereafter he stated that he had not secured the return of some large diamonds. Although he asserted that he had tried to induce the person holding the large diamonds to return them, he has steadily refused to divulge any information that might lead to their recovery.

4. The accused is thirty-eight years of age. He was awarded a bachelor of arts degree by the University of Illinois in 1931, and an LL.B. degree by Georgetown University in 1941. Prior to his entering into the military service he was employed in the Department of the Interior as a law clerk at $250 per month. He was married in 1930 and is the father of two children. He was divorced from his first wife in 1944, and married Captain Kathleen B. Nash on 28 May 1946.

He was a member of the Reserve Officers' Training Corps while in high school and in college. He entered upon extended active duty as a Captain in the Air Corps on 26 August 1940. He received successive promotions and on 10 November 1944, he was promoted to the grade of a Colonel. His efficiency ratings have been repeatedly superior. He has been awarded the Legion of Merit, the Bronze Star, and the Army Commendation Ribbon with Bronze Oak Leaf Cluster.

5. The accused has been found guilty of not only the theft of jewels and ancient heirlooms of great value and of vandalism in their destruction, but also of conspiring with others to participate with him in his crimes. As a result of his influence, at least in part, his wife, Captain Kathleen B. Nash Durant committed crimes for which she has been sentenced to penal servitude for five years, and Major David F. Watson committed crimes for which he was sentenced to penal servitude for three years. The accused has violated not only the law against larceny, but also the international code which requires every soldier to respect the private property of citizens of an enemy state. In committing these crimes, he has dishonored himself, and has brought grave discredit upon the Army of the United States. In view of the gravity of his offenses and his refusal to do all within his power to rectify the injustice which his crimes have caused by revealing information which might lead to the recovery of an unknown quantity of the stolen diamonds, I believe that he is unworthy of clemency. Accordingly, I recommend that the sentence be confirmed and carried into execution, and that an appropriate Federal penitentiary be designated as the place of confinement.

6. Mr. G. V. Brumbaugh, special defense counsel, appeared before the Board of Review on 12 August 1947, and presented a brief and oral argument on behalf of the accused. Subsequently, he has presented a motion for a new trial. Appropriate consideration has been given to his brief and to his motion for a new trial.

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

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

(GCMO 77, D.A., 5 Dec 1947)

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

JAGH - CM 324240

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, 1-9 April 1947. To be hanged by the neck until dead.
Private HOWARD BLOSSOMGAME (33107934), 427th Replacement Company, 149th Replacement Battalion.	)	

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

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

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

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

Specification: In that Private Howard Blossomgame, 427th Replacement Company, 194th Replacement Battalion, did, on or about 31 December 1946, at or near Torre Del Lago, Italy, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Charles J. Richards, a human being, by shooting him with a pistol.

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

Specification 1: In that Private Howard Blossomgame, 427th Replacement Company, 149th Replacement Battalion, did, in conjunction with Private Mac C. Johnson, at or near Torre Del Lago, Italy, on or about 31 December 1946, by force and violence and putting him in fear, feloniously take, steal, and carry away from the presence of Private Charles J. Richards one motor vehicle, of a value in excess of fifty dollars ($50.00), property of the United States.

Specification 2: In that Private Howard Blossomgame, 427th Replacement Company, 149th Replacement Battalion, did, in conjunction with Private Mac C. Johnson, at or near Marina Di Pisa, Italy, on or about 17 January 1947, by force and violence and putting

him in fear, feloniously take, steal and carry away from the presence of Private Benjamin Wilson one Motor Vehicle, of a value in excess of fifty dollars ($50.00), property of the United States.

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

Specification: (Finding of Not Guilty).

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

Specification 1: In that Private Howard Blossomgame, 427th Replacement Company, 149th Replacement Battalion, did, in conjunction with Private Mac C. Johnson, at or near Torre Del Lago, Italy, on or about 31 December 1946, knowingly and willfully apply to his own use and benefit one motor vehicle of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private Howard Blossomgame, 427th Replacement Company, 149th Replacement Battalion, did, in conjunction with Private Mac C. Johnson, at or near Marina Di Pisa, on or about 17 January 1947, knowingly and willfully apply to his own use and benefit one motor vehicle of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Private Howard Blossomgame, 427th Replacement Company, 149th Replacement Battalion, did, at or near Torre Del Lago, Italy, on or about 31 December 1946, wrongfully carry a pistol in violation of standing orders as published in Section XXXI, paragraph 28, Peninsular Base Section Circular Number 1, 1945, as amended.

Specification 2: In that Private Howard Blossomgame, 427th Replacement Company, 149th Replacement Battalion, did, at or near Marina Di Pisa, Italy, on or about 17 January 1947, wrongfully carry a pistol in violation of standing orders as published in section XXXI, paragraph 28, Peninsular Base Section Circular Number 1, 1945, as amended.

He pleaded not guilty to all Charges and Specifications, and was found guilty of Charges I, II, IV, and V, and all Specifications thereunder, and not guilty of Charge III and its Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members present at the time the vote was taken concurring in the sentence. 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:

On the evening of 31 December 1946, at about 2130 hours, the accused, came to the day-room of the 688th Port Battalion Camp, located in the vicinity of Pisa, and asked a soldier named Mac Johnson if he was going on pass that night. Johnson informed him that he had an overnight pass and intended to use it that night (R. 55, 56, 66). Johnson and the accused parted, and later, at about 2200 hours on the same evening, they met in company with Consentino Francesco, an Italian citizen whomthey called Franco, near the gate of the camp on the road leading from Leghorn to Pisa (R. 56, 66, 113) where accused and Johnson engaged in a conversation which Franco did not understand. The three got a ride on a truck from the 480th Port Battalion, driven by Private Charles J. Richards, and went up the road some distance where they got off and went into a bar. Between 2200 and 2300 hours, the truck returned from the direction of Leghorn whereupon Johnson waved it down. The three got on the truck - the accused sitting beside the driver, and Johnson and Franco sitting in the back (R. 56, 57, 113, 114, 124). The vehicle was a 6 x 6, 2½ ton truck, which had a cab and a canvas top over the back (R. 373, 416). The three men had been drinking (R. 313). Johnson was a member of the 688th Port Company, 480th Port Battalion, and for a short period during the first part of 1946, accused, Johnson, and Richards had been members of that Battalion at the same time (R. 92, 93).

As the truck proceeded toward Torre Del Lago, Franco wanted to relieve himself, and by knocking on the cab made an unsuccessful attempt to get the driver to stop (R. 114, 115). Shortly thereafter, as they approached Torre Del Lago, the truck stopped on the right side of the road (R. 57, 115, 358). Richards (the driver) dismounted from the cab on the left side and raised his hands in the air as accused, who had dismounted on the right side, came around the front of the vehicle with a foreign made 7.65 cal. pistol in his hand (R. 57, 289, 292, 360, 361, 372, 373, 406). Johnson and Franco dismounted from the rear of the truck (R. 115, 126, 359, 403) and Johnson proceeded around the left side of the vehicle to find out why they had stopped (R. 359, 373, 306).

Pursuant to an order by the accused, Richards, still holding his hands over his head, went across the road to the left of the truck, crossed a narrow ditch and went a short distance into the bushes (R. 58, 289, 361), where he turned around and faced the accused and the road (R. 89, 290, 363). Then, in reply to a question asked by accused, Richards said that he knew both accused and Johnson (R. 58, 84). Accused then said: "Well, if I let you go, you will tell who steal the truck, I am going to

kill you" (R. 58, 69), and thereupon the accused fired one shot at Richards, who clasped his hands over his heart and fell to the ground on his face (R. 58, 69, 79, 363, 406).

After the accused fired the shot, he came over to Johnson and Franco and told them to keep silent. At that time accused had a pistol in his hand, and Franco interpreted his words and gestures as a threat (R. 116, 117). Johnson,testified that after accused told Richards he was going to shoot him, he (Johnson) intended to tell accused not to shoot, "but before I could get a word out of my mouth the pistol fired" (R. 58, 69). After the shooting the accused went back to the truck, turned it around, and said "Let's go", and asked if Johnson was going with him (R. 58, 59).

After the truck was turned around accused drove it towards Pisa, all three men riding in the cab (R. 59, 119, 121, 131, 306, 308). A short distance outside of Pisa the truck stopped, Franco left the group for a few minutes and returned with several Italian civilians, all of whom got into the truck, which then proceeded to San Juliano where the truck was sold to the civilians for 90,000 - 100,000 lire (R. 59, 60, 70, 122, 132, 133, 237, 315, 413, 419). Accused received the money but told Franco to keep it because accused was afraid of the police (R. 122, 133, 315, 413). Accused, Johnson, and Franco then returned to the latter's house in Pisa (R. 61, 122, 310, 315, 320, 420, 558). Upon reaching Franco's house early that morning accused removed the pistol from his pocket and threw it on the bed or handed it to Franco (R. 83, 91, 260, 282, 297, 311, 558, 565). It was the same gun which was introduced at the trial by the Prosecution as Exhibit 4 (R. 60, 83; Pros Ex 4) and belonged to Johnson (R. 60, 83). Franco returned the money to accused and at about 1000 hours the money was divided about evenly into three bundles - Johnson and accused each receiving about 30,000 - 33,000 lire (R. 69, 71, 237, 239, 240, 310, 316, 317). Franco, however, claimed that he did not receive any of the money (R. 122, 133, 136, 413).

In addition to accused, Johnson, and Franco, there were present in the latter's house a girl by the name of Brunetta and Mrs. Franzanti (owner of the house). Mrs. Franzanti testified that accused first visited her house three or four days before 1 January 1947, and stayed there for several days (R. 557). At about 0330 hours on the night of 31 December 1946 - 1 January 1947 accused, accompanied by Franco and Johnson came to her house. At that time Franco was excited and "seemed crazy." Accused was rather drunk and threw a pistol on the bed (R. 558, 559, 565, 568, 572). She said that Brunetta, who lived at her house, was there at the time (R. 560). She also testified that accused and Johnson ate breakfast that morning in her house, and stayed there for two or three days (R. 560, 570, 571). She identified Prosecution Exhibit No. 4 as the pistol accused threw on the bed (R. 570).

Brunetta testified that she had met accused four days before New Year's Day 1947, when Franco brought him to the house (R. 234, 244)

and that she had seen him in Naples in April 1946 (R. 244, 245). She stated that after accused, Johnson and Franco came into the house on New Year's Day 1947 at about 0300 hours, she saw accused throw a pistol (identified as Prosecution Exhibit No. 4) on the bed (R. 236) and then eat his breakfast (R. 265). She later slept with accused (R. 241) and at that time he had 100,000 lire which at about 1000 hours he divided equally among Johnson, Franco, and himself (R. 237, 238, 239, 240, 242). She further stated that after accused left the house, she found some documents including a WD AGO Form No. 65-4 issued to accused with his picture attached to it, (Later identified as Pros Exs 17, 18, 19, 20) in the chest drawer. (R. 244, 271, 272, 553). She admitted that she signed a statement about the affair on 11 February 1947, in which statement she said that she never saw a pistol in the possession of accused (R. 253; Def Ex L, M), but there was an ambiguity in the translation, as she said in Italian that she had never seen accused "own" a pistol (R. 275-281). She reaffirmed her statement that she saw accused "with" a pistol (R. 282).

A body, which was identified as that of Private Charles J. Richards (R. 105, 202, 234), was found at about noon 1 January 1947, lying face down with the hands clasped underneath the chest (R. 95, 102, 201, 209; Pros Ex 6), approximately 20 feet from the road where the shooting occurred. (R. 103, 327, 331; Def Ex K).

An autopsy performed at the 61st Station Hospital, APO 788, revealed that the dented head of a bullet, .25 or .32 caliber, was lodged under the skin, and the cause of death was stated to be "due to a gunshot wound of the heart and right lung with internal exsanguination" (Pros Ex 10). A medical officer testified that a man killed instantly by a gunshot would probably grasp the point of his body where he was shot (R. 345).

Experiments were conducted and testimony offered by the prosecution to show that ammunition for a 7.65 pistol was of the same physical dimensions as a caliber .32, and that a .32 shell could be shot from a 7.65 mm pistol and vice versa (R. 204, 229, 231, 232).

Evidence was introduced showing that the truck sold by accused had a market value in excess of $50.00 and was the property of the United States, furnished and intended for the military service thereof (R. 94, 34).

At about 0130 hours on the night of 16-17 January 1947, Private Benjamin P. Wilson, 196th Military Police Company, accompanied by Private Williams, was driving a 6 x 6, 2½ ton truck from Torre del Lago to Camp Barnett (R. 35, 36). Just before he got to Marina di Pisa he stopped the truck to give the accused and Johnson (who were returning from a dance at the 3330th Truck Company (R. 61)) a ride, and accused and Johnson got into the back of the truck (R. 36, 37). This truck was registered as a vehicle assigned to the 196th Military Police Company and had a market value in excess of $50.00 (R. 33, 34, 41).

After the truck had passed through Marina di Pisa, someone in the back knocked on the cab and requested to get out. The truck stopped, and accused with a pistol and Johnson with a machine gun came around to the cab, pointed the weapons at Wilson and Williams and told them to dismount (R. 37, 42, 46, 74, 75). Wilson and Williams were afraid and dismounted as ordered, raising their hands above their heads (R. 38, 42, 43). Accused and Johnson got back into the truck and drove it away in the direction of Marina di Pisa, leaving Wilson and Williams on the highway (R. 38, 42). Johnson and the accused drove the truck to Pisa where they got in touch with Franco. He contacted some Italian civilians to whom the truck was sold for 100,000 lire, of which accused received one-half and Johnson a similar amount (R. 63, 74, 369). The truck was later recovered (R. 32; Pros Ex 1).

Shortly after midnight on 16-17 January 1947 in Marina di Pisa the Italian carabinieri halted a civilian truck in which accused, Johnson, and six Italian civilians were riding (R. 164, 165, 168, 170, 176). All occupants of the truck were ordered to dismount. A search of the truck revealed a machine gun similar to Prosecution Exhibit 5 in the back thereof. A 7.65 pistol was taken from the pocket of accused, and a box of bullets for the pistol was found in Johnson's possession (R. 165, 166, 167, 172, 174, 178, 179, 300, 556; Pros. Ex 4). The carabinieri released the civilians, took Johnson and accused into custody, and later that night turned them over to the American Military Police, together with the guns and ammunition (R. 171, 180, 184, 555).

The pistol was the property of Johnson and was the gun used by accused in killing Richards and in the robbery of the Military Police Truck (R. 57, 58, 64, 79, 83, 117, 299). Accused had no authority to carry a weapon on 31 December 1946, 1 January, or 16-18 January 1947 (R. 48, 539). The court took judicial notice of Section XXXI, paragraph 28, Peninsular Base Section Circular No. 1, 1945, as amended, which prohibited the carrying of firearms by individuals except when on duty requiring them to be armed (R. 53).

4. The accused, after having been duly apprised of his rights, elected to be sworn as a witness (R. 462).

He stated that he had been a member of the 480th Port Battalion during September and October 1946, after which he was transferred to the 149th Replacement Center, located near Leghorn (R. 475). He testified that he had never heard of Richards, the deceased, but that he had known Johnson since about March 1946 (R. 475, 514). He stated that he did not know nor, prior to the trial, had he ever seen Franco or Mrs. Franzanti or Brunetta and that he had never been in Franco's house (R. 470, 471, 494, 495, 497, 498, 505). He denied engaging in taking and selling the vehicles to which prosecution witnesses had testified (R. 468, 470) or that he had ever divided any money with Franco or Johnson (R. 467, 468). He further denied that he shot Richards or was at the scene of the killing (R. 468).

He testified that on 27 December 1946 he was discharged from Ward E-5, 61st Station Hospital, where he had been under treatment for recurrent gonorrhea (R. 463, 480, 481). On the morning of 31 December 1946 he had a toothache and went to the 61st Station Hospital for consultation and to obtain the results of an X-ray which had been previously taken (R. 464, 476). He remained there all day, slept there, and did not leave until after lunch 1 January 1947 (R. 464-465, 488, 490). At about 1830-1900 hours on the afternoon of 31 December 1946 he called for transportation and while awaiting its arrival he was in Ward E-5 playing cards (R. 464, 483, 486). He asked the night ward sergeant if he could sleep there, and since the latter did not specially disapprove, he spent the night in Ward E, retiring about 2200 hours (R. 465, 466, 488, 489, 527). He did not see Johnson that night and did not leave the hospital (R. 486, 489, 505). During the course of the evening he played cards with several men, two of whom, Nixon and Gibson, he remembered (R. 465, 482, 524). Nixon slept in bed B-3 and Gibson in bed E-12 (R.465, 488, 489, 523).

The next morning the day ward sergeant asked accused what he was doing there and he replied that he had slept there (R. 466). Accused remembered the night well because he had spent Thanksgiving, Christmas, and New Years in the hospital (R. 466).

(The night duty sergeant, who was on duty the night of 31 December 1946, testified that he recalled that on or about that night a colored soldier who wasn't "on treatment" asked for a bed for the night, saying that he had been to the dental clinic and could not get transportation back home (R. 379, 380), and that it was possible that he spent that night in the ward (R. 381). He did not know whether the soldier was the accused (R. 380). Private Nixon testified that he played cards on the afternoon and evening of 31 December with several people, but he was not sure that the accused was one of them (R. 383, 384, 386, 388, 389). Private Gibson testified that on 31 December 1946 he was, and had been for some time, in the hospital and his bed was E-12; that he played cards on 31 December 1946, but did not remember whether he played with accused (R. 393, 395)).

The accused testified that on the evening of 1 January 1947 he returned to his outfit and reported for duty (R. 490, 493). He further stated that he never had the pistol in question and did not go armed (R. 469, 472).

Accused testified that on the night of 17 January 1947, at about 2200 hours he and Johnson got into an Italian civilian truck in front of the 149th Replacement depot and started to the 480th Port Battalion to get some beer (R. 500, 502, 529). Accused was riding in front with the driver, and Johnson was in the back of the truck (R. 500, 502, 519). About midnight, the Italian carabinieri stopped the truck, searched the civilians, and arrested accused and Johnson (R. 500, 517). A machine

gun similar to Prosecution Exhibit No. 5 was found in the back of the truck, but accused had no knowledge that it was there (R. 472, 502, 542, 543). He stated that the Italian police took from Johnson's possession a pistol and some cartridges (R. 471, 503, 542). Accused did not have any lire or American scrip in his possession at the time (R. 527).

Accused further testified that he appeared in the police line-up next day with Johnson and from 6 to 9 others, and Johnson was picked out by certain Italian civilians as one of two soldiers who had wrecked their bar. The other man they were looking for was short and had a scar on his right cheek (R. 473). Two soldiers from the 196th Military Police Company picked out Johnson only, but later one of the sergeants at the stockade said to accused that since Johnson had the pistol and cartridges "you must have had the other gun." Accused replied that he did not have the gun. The sergeant then said he was going to turn accused over to the "CIDs" (R. 473, 474).

The CID investigator arrived and read to him statements made by the men from the 196th Military Police Company and told him that he had been identified in the line-up as one of the men who had assisted Johnson in taking the vehicle from them on 17 January. Accused denied the truthfulness of the statements and denied that he had been pointed out in the line-up (R. 474). Accused stated that the investigator then took him into a closed room, grabbed him by the collar, started pushing him around, and told him to resist so that the investigator could shoot the accused (R. 474).

Accused could not explain why his records jacket, Form 20, temporary service record, identification card, and other papers were found at Franco's house in Pisa (R. 497, 539). He testified that he had had these papers at the 149th Replacement Depot and that he had left his records jacket (Pros Ex 18) in a green building (evidently a processing center) at the headquarters (R. 521-522). He had retained his identification card (Pros Ex 17) and Prosecution Exhibit 21A in his possession (R. 522) and could not explain how Prosecution Exhibits 17, 18, and 21A were found at the same place in Pisa (R. 509, 523).

5. The trial of the case was scheduled for 1 April 1947, and the court convened on that date. After arraignment of accused and upon motion by the defense for a continuance, the court adjourned until 3 April (R. 8). When the court reconvened on the latter date, defense counsel moved for a further continuance (R. 9) upon the following grounds:

a. Lack of time for preparation of defense due to other duties of defense counsel.

b. Illness of defense counsel.

c. Accused had not been accorded the right to be confronted by, and to cross-examine witnesses against him.

d. Certain witnesses were held incommunicado.

Grounds a and b above may be discussed jointly, for each alleges a reason why defense counsel did not have sufficient time to prepare a proper defense. Defense counsel stated that he was in the hospital from 15 to 25 March 1947 (R. 27). The papers in the case were served on the assistant defense counsel on 21 March "because at that time defense counsel was in the hospital" (R. 13). Charges were served on accused on 22 March (R. 13). There were statements made by defense counsel, as well as sworn testimony received, to the effect that from 21 March to 1 April both the defense counsel and assistant defense counsel were engaged also in preparing other cases (R. 6a, 9, 10, 11, 13). Counsel for accused stated that it was not until 29 March (R. 7) that they began preparation of the instant case.

The right to prepare for trial is fundamental. To deny this right is to deny a fair trial. In Avery v. Alabama (308 U.S. 444) the Supreme Court said (p. 446):

> "But the denial of opportunity for appointed counsel to confer, to consult with accused and to prepare his defense, would convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

In the instant case, many elements combined to make preparations for defense difficult. Italian citizens were key witnesses, and difficulty was experienced in obtaining their presence in court (R. 333, 355). Some of the military witnesses were members of casual companies and had been returned to the zone of interior (R. 520). But in spite of these difficulties, every witness requested by the defense was made available, with two exceptions: Giovanna, an Italian girl, and Major Conliff.

Johnson testified that on the night of 31 December 1946, Giovanna was at Franco's house, and that he slept with her (R. 70). Johnson testified that on that occasion accused, Franco, Anna Maria (Brunetta), the signora (Franzanti), and himself were all in the house to which he, Franco, and accused had repaired after the fatal shooting of Richards. Johnson (R. 70), Franco (R. 134), Anna Maria (R. 236) and Mrs. Franzanti (R. 559) each testified that accused was present there at that time. Both the trial judge advocate (R. 356, 357) and the defense tried to locate Giovanna but she could not be found. Even a prolonged continuance might not have resulted in the availability of this person as a witness. Had she been available, it appears that she could have only confirmed the statements of the other witnesses as to the presence of accused at that time and place - or have denied his presence. In the first alternative, her testimony would have been merely cumulative; in the second,

it still would not have materially supported the accused's story that he was in the hospital at that time. Since her testimony could not have established the accused's alibi, a failure of the court to grant a continuance because of her absence did not substantially affect the rights of accused.

The accused testified that in January 1947 he saw Major Conliff and told him that his (accused's) barracks bags had been stolen (R. 543), and that he had lost his record jacket (R. 544). Both the defense and the trial judge advocate attempted without success to locate Major Conliff (R. 544). The record jacket (Pros Ex 18) referred to was found, along with other papers belonging to accused, at Franco's house (R. 272), whereas accused denied that he had ever known Franco prior to this trial (R. 470). The defense did not ask for a continuance because of Major Conliff's absence.

The defense was conducted in a forceful and intelligent manner. It does not appear from the record that the failure to grant a further continuance materially handicapped the defense in the preparation for, and conduct of the trial.

Ground c alleged that accused had not been accorded the right to be confronted by and to cross-examine witnesses against him. Accused testified that the investigating officer did not advise him that he (accused) could talk to any of the witnesses, and that he had no idea that he could cross-examine them (R. 22). On the other hand, the investigating officer testified that he advised accused that he could examine or cross-examine the witnesses who had made the statements which he read to accused (R. 17). The secretary who was present at this interview substantiated the testimony of the investigating officer (R. 26). After the court had heard this conflicting testimony, it ruled that the rights of accused were fully protected at the official investigation and that he was given every opportunity to cross-examine the witnesses (R. 27).

Ground d alleged that certain witnesses were held incommunicado but there was no evidence introduced to support this statement. Although, in a case of this nature it would have been better practice to grant a reasonable continuance we are of the opinion that in the instant case the record of trial reveals nothing that would indicate that in denying a further continuance the court abused its discretion, or that the ruling was in derogation of any substantial rights of accused.

6. In the cross-examination by the defense of Johnson, the chief prosecution witness, the witness testified that he and accused took another truck on 9 January 1947 (R. 71). This offense is not involved in the present trial. Subsequent references to this offense were made in redirect examination, and in the court's examination of Johnson (R. 85, 88, 305). Without passing upon the competency of such evidence, it is the opinion of the Board of Review that its admission did not adversely affect the substantial rights of the accused.

7. Under the Specification of Charge I the accused stands convicted of killing one Private Charles J. Richards "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation * * * by shooting him with a pistol."

Murder is "the unlawful killing of a human being with malice aforethought." By "unlawful" is meant without legal justification or excuse (MCM, 1928, par 148a, p 162). "Malice aforethought" has been defined as follows:

> "* * *Malice * * * is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. * * * malice is implied from any deliberate or cruel act against another, however sudden" (Commonwealth v. Webster, 5 Cush 296; 52 Am Dec 711).

The Manual for Courts-Martial provides that -

> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * *" (MCM 1928, par 148a, p 163-164) (Underscoring supplied).

Malice may be inferred from the use of a deadly weapon in a manner likely to, and which does, cause death (Wharton's Crim. Law, 12th Ed 1932, Vol I, sec 420, pp 654-655). The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in the furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton's Crim Law, Vol I, sec 420, p 631).

The circumstances shown by the record of trial establish that Richards died within twelve hours after he was struck by a bullet fired from a pistol held by the accused. The facts are clearly shown that at the time accused fired the shot he was engaged in the crime of robbery; that Richards recognized the accused and Johnson; and that the accused deliberately killed Richards in order to seal his lips. The Board of Review is of the opinion that all essential elements of the crime as alleged were proven by competent evidence.

8. Under Specifications 1 and 2 of Charge II, the accused was charged with the robbery, in conjunction with Johnson of two motor vehicles, property of the United States. 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 (MCM, 1928, par 149f, p 170).

The robbery charged in Specification 1 alleged the commission of the crime, in conjunction with Johnson, of taking, by force and violence, the truck from Richards on the night of 31 December 1946 - 1 January 1947. The record of trial contains competent evidence to show that the truck was the property of the United States; that it was being driven by Richards; and that the accused, in the presence of Johnson and Franco and with a pistol in his hand, ordered Richards down from the truck, shot him, and drove the truck away. The testimony of Franco and Johnson, who were eye-witnesses, establishes all of the facts of the robbery alleged.

Specification 2 of Charge II alleges a similar robbery on or about 17 January 1947, at or near Marina di Pisa, Italy. Ownership and value of the truck were established. The evidence also shows that at the time and place alleged the truck was being driven by Private Wilson who was accompanied by Private Williams. Both of these soldiers identified accused and Johnson as the persons who took the truck and testified that accused was armed with a pistol and pointed it at Wilson, the driver.

It is the opinion of the Board of Review that every element of the offenses charged in the two specifications is substantiated by clear, convincing and competent evidence.

9. Under Specifications 1 and 2 of Charge IV, accused was charged, with misapplication in conjunction with Johnson of the two trucks to which reference is made in Charge II. The evidence establishes the ownership and value of the vehicles, and that they were furnished and intended for the military service of the United States. There is further competent evidence which shows that both trucks were sold by accused and Johnson who participated in a division of the proceeds of the sales. Every element of the offenses alleged by the two specifications is substantiated by competent evidence.

10. The two Specifications of Charge V allege that accused on or about 31 December 1946, and again on or about 17 January 1947, carried a pistol in violation of standing orders. These were the two occasions on which accused committed the robberies alleged by the Specifications in Charge II. The offenses alleged under both Specifications of Charge V are supported by competent evidence.

With respect to the offenses alleged in Charge V, however, it is self-evident that where, as in this case, charges have been preferred for armed robbery, other charges which alleged the carrying of arms on the same occasions in violation of standing orders, constitute an unreasonable mutiplication of charges against the accused. "Where charges

are preferred for serious offenses, there should not be joined with them charges for minor derelictions unless the latter serve to explain the circumstances of the former" (MCM, 1928, par 27).

11. The Board has given careful consideration to a letter dated 20 April 1947, to The Judge Advocate General from the accused. This letter points out in detail inconsistencies in the testimony of various witnesses, and makes particular reference to the low moral character of several Italian witnesses, and to the testimony of the accomplice, Johnson. The letter accentuates the testimony of the accused at the trial, which, if true, would have constituted a complete defense to all the charges.

The evidence shows that the chief prosecution witnesses to the crime charged as having been committed on or about 31 December 1946 were confederates of the person who committed that crime. The testimony of accomplices should be considered by the court with great caution. The court, however, had the opportunity to see and to hear all the witnesses, and to observe their demeanor on the stand. It heard the conflicting evidence, and heard the accused deny his participation in each and every one of the alleged offenses. It then accepted the testimony of the prosecution witnesses, and rejected the conflicting testimony of the accused. The Board finds no grounds upon which to disturb the court's findings in the case.

12. The accused was 26½ years of age at the time of the commission of the offenses. He was inducted into the Army of the United States in 1941 at Fort Meade, Maryland.

13. 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 of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

(146)

JAGH - CM 324240 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 26 November 1947

TO: 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 Private Howard Blossomgame (33107934), 427th Replacement Company, 149th Replacement Battalion.

2. Upon trial by general court-martial this soldier was found guilty of the murder of a fellow soldier, in violation of Article of War 92; of the robbery of two trucks, property of the United States, in violation of Article of War 93; of the misapplication of the same two trucks, in violation of Article of War 94; and of carrying a pistol on two occasions in violation of standing orders, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present at the time vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to 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 and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of the natural life of accused, that the sentence as thus commuted be carried into execution and that a 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 recommendations into effect, should they meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Draft of letter
3 - Form of Executive action

(GCMO 78, DA, 8 Dec 1947).

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

JAGQ CM 324269

AUG 1 1947

UNITED STATES v. First Lieutenant KENNETH E. WALKER (0-1000192), Headquarters Detachment, 145th Replacement Battalion (PS).	)	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters PHIBCOM, APO 358, 2 May 1947. Dismissal and confinement for three (3) years. United States Disciplinary Barracks.

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

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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 94th Article of War.

Specification: In that, 1st Lt. Kenneth E. Walker, AGD, did, from about June 1945 to 31 December 1946, present for payment, claims against the United States in the total amount of approximately One Thousand, Eight Hundred and Twenty-four Dollars ($1824.00), by presenting to various and several finance officers of the United States, authorized to pay such claims, pay vouchers which included subsistence and rental allowances based upon the existence of a lawful wife, which claim was then well known by the said 1st Lt. Kenneth E. Walker to be false and fraudulent, in that no such lawful wife existed.

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

Specification: In that 1st Lt. Kenneth E. Walker, AGD, has, from about 14 February 1945 to 10 July 1946, conducted himself in a manner unbecoming an officer and gentleman and to bring discredit upon the military service, in that he, during such a period, unlawfully lived as husband and wife with one Dorothy J. Stanton, the lawful wife of George J. Stanton, former member of the armed forces of the United States.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated the 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. In November 1944, Staff Sergeant George J. Stanton departed for overseas duty leaving his wife, Dorothy J. Stanton, at their home in Baltimore. In March 1946, he found his wife with a baby girl living with accused as man and wife at Goldville, Fort Knox, Kentucky. At that time, accused told Sergeant Stanton that although he "could make trouble for him, it was no use since the damage had already been done." On 20 March 1946, prior to Sergeant Stanton's discharge from the Army, he made official complaint regarding accused's actions. During his military service, a Class F deduction was made from his pay and sent to his wife. Not having received a reply to his 20 March 1946 complaint, Stanton again, on 19 November 1946, reported the above facts to The Adjutant General, War Department, requesting that they be fully investigated and that proper military punishment be imposed (R. 6; Ex. A).

When Stanton's letter was received at accused's headquarters about 20 December 1946, accused was called in and questioned concerning its contents. After proper warning, accused candidly discussed the situation as follows: He met Dorothy Stanton about February 1945. He knew that she was married and that she was not divorced. His "relationship" with Dorothy Stanton began on or about 14 February 1945 and he actually started to live with her as his wife at Marmon, Oregon, about 1 September 1945. He was the father of a baby girl born to Mrs. Stanton on 18 February 1946. Either June 1946 or June 1945 was the first month he started drawing subsistence and rental allowances "as if he were married" (R. 10-11).

Accused's "Pay Card" (WD AGO Form 14-5) was received in evidence without objection (R. 7) showing that accused had a lawful wife, "Mrs. Dorothy B. Walker, 627 Oakland, Dr. Co., Bluffs, Iowa", and that he had received a rental allowance of $75 and a subsistence allowance of $42 or $43.40 per month for the months of September to December 1946 (Ex. B). These pay cards are posted from pay vouchers (R. 7). The Deputy Finance Officer of the 12th Division testified that a First Lieutenant without dependents is allowed only 70 cents a day for subsistence and no rental allowance, and the difference between his pay and the pay of a first lieutenant with a dependent would be $96 in a 30-day month or $96.70 in a 31-day month (R. 9).

4. After having his rights explained in open court, accused was sworn and testified as follows: He met Mrs. Stanton on 3 February 1945 at a wedding of an officer - she was the maid of honor and accused was the best man. He fell in love with her "the first time I saw her", and

he visited her in her apartment on weekends. He knew she was married and that her husband would not give her a divorce, even though she had written him of her relations with accused and later advised him that she was pregnant. He believed that he (accused) was married "to this woman" and when asked why he held that belief, he replied "Well, I vowed that I loved her, she vowed also to me." In spite of her legal marriage to another, accused lived with her "in close association with other officers" as if she were his wife. While so living at Fort Knox, her husband, Staff Sergeant George Stanton, visited them and spent the night at their home. The question of divorce and the support of the 3-weeks old baby was discussed but no settlement was reached. Accused told Sergeant Stanton that he could report him to his commanding officer "but he did not take any action." Since serving overseas, accused has sent $250 to $300 a month to his "wife" and baby who have been living with his family since 1 November 1946. Her family and accused's family are both aware of the relationship that exists. After Sergeant Stanton's complaint was received, accused's Headquarters advised him that it would be better not to claim dependency and rental allowances while his case was pending and thereafter, he drew only his longevity and subsistence pay (R. 14-17).

A warrant officer and a lieutenant testified that accused writes to his "wife" every day, that he is an efficient officer, and that he does not bring any disgrace to the Army.

5. (a) The accused is charged in Specification of Charge I with presenting false and fraudulent claims against the United States by presenting pay vouchers during the period from June 1945 to 31 December 1946, which vouchers included subsistence and rental allowances based on the existence of a lawful wife when in fact "no such lawful wife existed." The essential elements of the offense, denounced by the second subparagraph of Article of War 94, are: (a) that the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false or fraudulent in the particulars alleged; (c) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved as alleged (par. 150b, MCM).

The only direct evidence presented in support of Specification of Charge I consists of:

(1) Accused's pay card showing that accused received rental and subsistence allowances during the months of September through December 1946, based on his having a lawful wife. The vouchers for these four months were not offered in evidence but the pay card, being prepared from pay vouchers, served as secondary evidence that such vouchers had been submitted.

(2) The stipulated testimony of Sergeant Stanton showed that in March 1946, accused was living with Stanton's wife at Fort Knox, Kentucky; that Stanton and his wife were not divorced, and that accused knew that Mrs. Stanton was still legally married to Sergeant Stanton.

Although this evidence standing alone is inadequate to support the charge, it is sufficient to establish the corpus delicti as a basis for the introduction of accused's confession.

"The general rule, * * * is that the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of evidence or at all, but that some evidence corroborative of the confession must be produced and such evidence must touch the corpus delicti." (CM 202213, Mallon, 6 BR 9).

In his confession to the investigating officer, accused admitted that he knew that the woman with whom he had been living, Dorothy Stanton, was legally married to another and that her husband would not give her a divorce, that he began drawing subsistence and rental allowance as if he were married in June 1946 or on 6 June 1945 and continued to do so up to the date of the investigation (December 1946).

Accused testified in court that he believed he and Mrs. Stanton were married in that they had vowed that they loved each other. On the other hand, he admitted that he knew that Mrs. Stanton was legally married to another. There is therefore no possibility of considering their relationship a common-law marriage. Accused also testified that Sergeant Stanton's letter was received at his Headquarters at Christmas time and "up to that month I received dependency and rental allowance. The following month, in the preparation of my pay voucher, I was advised by the Headquarters that while my case is pending, it would be better for me not to claim for such allowance, and this was agreeable to me. I only drew my longevity pay and my subsistence."

The evidence in the record of trial is not clear as to the month when accused first presented a pay voucher claiming dependency subsistence and rental allowance. The direct evidence covered only four vouchers - from September to December, 1946. The investigating officer first testified that accused had told him that he started presenting such vouchers in "June 1946". He then gave a brief "yes" answer to the following question asked by the trial judge advocate.

> "I understand you to say that 6 June 1945 was the first month in which he began drawing subsistence as if he were married."

The Board of Review is of the opinion that the evidence is legally sufficient to support the charge of presentation of false pay vouchers only for the period from June 1946 to December, 1946, inclusive. There is also some doubt as to the amount involved. The difference in pay between a first lieutenant with and without dependents is as follows:

	With Dependents	Without Dependents
Rental Allowance	$75.00 per month	$60.00 per month
Subsistence Allowance	1.40 per day	.70 per day

If a lieutenant without dependents is furnished quarters, he is not entitled, of course, to the $60 rental allowance. The record of trial does not show whether accused was furnished with quarters and the Board therefore feels that the record supports only a $15.00 per month excess rental allowance and a 70 cents per day excess subsistence allowance. These figures, extended for the period from June 1946 to December 1946, result in a total excess as follows:

7 months' rental allowance @ $15.00 per month	$105.00
214 days' subsistence allowance @ 70¢ per day	149.80
	$254.80

5. (b) The only direct evidence as to the specification of Charge II which charges accused with unlawfully living with "Dorothy J. Stanton, the lawful wife of George J. Stanton" from about 14 February 1945 to 10 July 1946 is the stipulated testimony of former Staff Sergeant George J. Stanton to the effect that early in March 1946 he found his wife, Dorothy J. Stanton, living with accused as man and wife, that accused knew that Mrs. Stanton was legally married to Sergeant Stanton and not divorced from him.

In his confession to the investigating officer, accused admitted that he had been living with Mrs. Stanton knowing that she was legally married to, and not divorced from, George J. Stanton, that the "relationship" began about 14 February 1945 and continued to the date of investigation (December 1946), that a child was born of this relationship as of 18 February 1946. Accused also told the investigating officer that he actually started living with Mrs. Stanton as his wife about 1 September 1945 at Marmon, Oregon.

All elements of the offense, except as to the exact period of duration, were also admitted by the accused in his sworn testimony before the court.

The evidence conclusively shows that accused did live openly with Dorothy Stanton as man and wife at Fort Knox, Kentucky, and at Marmon, Oregon, from 1 September 1945 to early in March 1946, knowing that they were not married and could not be married, but nevertheless, holding her out to the public and introducing her to fellow officers as his wife. The relationship between accused and this woman was adulterous from its inception, and made worse by the birth of their illegitimate child. While the disposition manifested by accused to make provision for his "wife" and child is commendable, he violated not only civil law but the accepted standards of decency and morality prevailing in this country and the military code of honor, by openly living in adultery and in flouting his mistress before fellow officers. His conduct in this respect constituted a violation of Article of War 95 (CM 252389, Davison, 34 BR 51).

5. (c) The charge sheet fails to show the official capacity of the person administering the oath to the accuser. This omission was not prejudicial to the rights of the accused (Sec. 1267 (3), Dig Ops JAG, 1912-1930).

5. (d) Neither Specification alleged the place or places where the offenses occurred, however, the accused was sufficiently apprised of the offenses charged and the wording thereof is such as to avoid any possible future jeopardy.

6. War Department records show that accused is 32 years of age, married and separated from his wife. He graduated from High School in 1933 and worked in a clerical capacity and as soda dispenser until 1941 when he was inducted into the Army. He was appointed a second lieutenant, AGD, on 20 June 1942 and was promoted to first lieutenant on 15 April 1944. His efficiency ratings have been excellent and superior.

7. The court was legally constituted and had jurisdiction over 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 only so much of the finding of guilty of Specification of Charge I as involves a finding that accused did, from June 1946 to 31 December 1946, knowingly present false and fraudulent claims against the United States in the amount of $254.80 and only so much of the finding of guilty of the Specification of Charge II as involves a finding that accused did, from 1 September 1945 to 1 March 1946, unlawfully live with one Dorothy J. Stanton, the lawful wife of George J. Stanton, former member of the armed forces of the United States, and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 94 and mandatory upon conviction of a violation of Article of War 95.

W. A. Pinson Jr., Judge Advocate

R. McDonald Gray, Judge Advocate

E. Johnson, Judge Advocate

WD, JAGO, Washington 25, D. C. AUG 19 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 Kenneth E. Walker (0-1000192), Headquarters Detachment, 145th Replacement Battalion (PS).

2. Upon trial by general court-martial, this officer was found guilty of presenting false and fraudulent claims during the period from June 1945 to December 1946, in the total amount of $1824.00, by claiming rental and subsistence allowances based on the existence of a lawful wife when, in fact, "no such lawful wife existed," in violation of Article of War 94 and of unlawfully living with one Dorothy J. Stanton, the lawful wife of a former member of the military service, during the period from 14 February 1945 to 10 July 1946, in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three 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 pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty, except as to part of the periods involved and the total amount fraudulently obtained, and legally sufficient to support the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. In February 1945 accused met and commenced associating with Mrs. Dorothy J. Stanton, wife of Staff Sergeant George J. Stanton. They started living together as man and wife about 1 September 1945. In February 1946, a child was born of their relationship. In March 1946, Sergeant Stanton, who had returned from overseas, found his wife, with her baby, living with accused at Fort Knox, Kentucky. Stanton declined to get a divorce and no settlement was reached. Thereafter, accused went overseas and Mrs. Stanton went to live at accused's home in Council Bluffs, Iowa. Sometime after the illicit relationship began, accused presented pay vouchers claiming dependency rental and subsistence allowances. The month when the first voucher was presented is not clear from the record, but it is certain that it covered at least the period from June 1946 through December 1946 and the excess allowances thereby received amounted to not less than $254.80.

5. War Department records show that accused is 32 years of age, and at the time he entered the service was married but separated from his wife. He graduated from high school in 1933 and worked in a clerical capacity and as soda dispenser until 1941 when he was inducted into the Army. He was appointed a second lieutenant, AGD, on 20 June

1942 and was promoted to first lieutenant on 15 April 1944. His efficiency ratings have been excellent and superior.

War Department records show that eleven days prior to trial, this officer submitted his resignation for the good of the service, in lieu of trial by court-martial. The Commanding Officer of the 145th Replacement Battalion, The Commander-in-Chief of the Far East Command, and all intermediate commanders recommended that the resignation be not accepted. Action on this resignation by the Secretary of War's Discharge Review Board is being held in abeyance pending final action on the court-martial proceeding.

6. Consideration has been given to a letter from Mrs. Dorothy J. Stanton wherein she stated that after George J. Stanton learned that accused had been found guilty by court-martial, he instituted divorce proceedings and that she is paying the expenses connected therewith. She asks that leniency be shown accused whom she considers to be her common-law husband.

7. I recommend that the sentence be confirmed but in view of all of the circumstances, recommend that two years of confinement adjudged be remitted and that as thus modified, the sentence be carried into execution. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Letter from Mrs. Stanton

(GCMO 297, 27 Aug 1947).

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

JAGH - CM 324273

SEP 1 1947

U N I T E D S T A T E S	)	AIR TRANSPORT COMMAND
v.	)	Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 6 June 1947. Dismissal and total forfeitures.
First Lieutenant CHESTER J. PYSKA (O-684045), 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that 1st Lt. Chester J. Pyska, Air Corps, alias 1st Lt. Chester Sankus, 1103rd AAF Base Unit, was at Belem, Para, Brazil, on or about 21 January 1947, in public places, to wit: on the Avenida 15 de Agosto and in and near the Grande Hotel, drunk and disorderly while in uniform.

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

Specification 1 (Finding of not guilty)

Specification 2: In that 1st Lt. Chester J. Pyska, Air Corps, alias 1st Lt. Chester Sankus, 1103rd AAF Base Unit, having received a lawful order from Capt. Lloyd T. Bunn, Air Corps, to give his name, the said Captain Bunn, being in the execution of his office, did, at Belem, Para, Brazil, on or about 21 January 1947, fail to obey the same.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification of Charge I; not guilty of Charge I, but guilty of a violation of the 96th Article of War; not guilty of Specification 1, Charge II; Guilty of Specification 2, Charge II and of Charge II. Evidence of one previous conviction by general court-martial for absence without leave

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 with the recommendation that the sentence be commuted to a reprimand and forfeiture of $100.00 of accused's pay per month for five (5) months, "in view of the accused's past good record and the nature of this offense".

3. The Board of Review adopts the statement of the evidence and law contained in the review of the Atlantic Division, Air Transport Command Judge Advocate dated 18 July 1947.

4. The accused is 28 years of age and unmarried. He completed Junior High School and completed a course in millwrighting at a vocational school. He served in a CCC camp for one year and was later employed as a painter and semi-skilled laborer in various manufacturing plants at Niagara Falls, New York. War Department records show that he was inducted into the Army on 26 June 1941. Shortly thereafter he was discharged for the convenience of the Government to enlist in the Regular Army Air Corps. After completing Aviation Cadet Training he was commissioned as a Second Lieutenant, Air Corps (Army of the United States) on 26 June 1943 and rated as a pilot. He was promoted to First Lieutenant on 7 August 1944. He flew 33 Bombardment missions in the European Theater of operations. He was awarded the Distinguished Flying Cross, the Air Medal with three oak leaf clusters, and is authorized to wear the European-African-Middle Eastern Service Ribbon with four campaign stars.

On 2 October 1944 he was found guilty by a general court-martial of being absent without leave for six days in violation of Article of War 61. He was sentenced to be reprimanded and to forfeit $100.00 of his pay per month for six months. War Department records show that on 4 July 1944 he was reprimanded and $75.00 of his pay was forfeited under the provisions of Article of War 104 for being absent without leave from briefing in preparation for a bombardment mission. On 6 September 1946 he was reprimanded under the provisions of Article of War 104 for being absent without leave from 25 August 1946 until 31 August 1946 and from 1 September 1946 to 3 September 1946.

Efficiency ratings of record show that he was rated "Excellent" for the period from 1 July 1945 to 30 June 1946, and "Very Satisfactory" for the period from 1 July 1946 to 31 December 1946.

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

sentence. A sentence to dismissal and total forfeitures is authorized upon a conviction of violations of Article of War 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 324273 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 Chester J. Pyska (0-684045), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in a public place and of failing to obey a lawful order of a superior officer to give his name, both in violation of Article of War 96 (Chg I, Spec; Chg II, Spec 2). Evidence of one previous conviction by general court-martial for a six days' absence without leave 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 with a recommendation that the sentence be commuted to a reprimand and forfeiture of $100.00 of accused's pay per month for five months "in view of the accused's past good record and the nature of the offense."

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

The accused was the co-pilot of a transient aircraft which had landed at Belem, Brazil. On or about 21 January 1947 he and an American civilian were observed in a drunken condition on the main street of Belem creating a disturbance by attempting to "get hold of women and girls passing by." One witness stated that the accused was walking in "an almost staggering condition," that his voice was thick, and described him as being objectionably drunk. Four Brazilian policemen were attempting to take the accused to a police station.

At the insistance of Captain Lloyd Bunn, the Surplus Property Officer and American Liaison Officer to the Brazilian Air Force stationed at Belem, the accused accompanied the Brazilian policemen and Captain Bunn to the police station where Captain Bunn induced the desk sergeant to release the accused after imposing a small fine. Captain Bunn asked the accused, at least three times, to state his name for the police records. The accused at first refused to state his name. After some argument he identified himself as "Sankas Chester" or "Chester Sankas."

4. The accused is 28 years of age and unmarried. He completed Junior High School and completed a course in millwrighting at a vocational school. He served in a CCC camp for one year and was later employed as a painter and semi-skilled laborer in various manufacturing plants at Niagara Falls, New York. War Department records show that he was inducted into the Army on 26 June 1941. Shortly thereafter he was discharged for the convenience of the Government to enlist in the Regular Army, Air Corps. After completing Aviation Cadet Training he was commissioned as a second lieutenant, Air Corps (Army of the United States) on 26 June 1943 and rated as a pilot. He was promoted to first lieutenant on 7 August 1944. He flew 33 bombardment missions in the European Theater of Operations. He was awarded the Distinguished Flying Cross, the Air Medal with three oak leaf clusters, and is authorized to wear the European-African-Middle Eastern Service Ribbon with four campaign stars.

On 2 October 1944 he was found guilty by a general court-martial of being absent without leave for six days in violation of Article of War 61. He was sentenced to be reprimanded and to forfeit $100.00 of his pay per month for six months. War Department records show that on 4 July 1944 he was reprimanded and $75.00 of his pay was forfeited under the provisions of Article of War 104 for being absent without leave from briefing in preparation for a bombardment mission. On 6 September 1946 he was reprimanded under the provisions of Article of War 104 for being absent without leave from 25 August 1946 until 31 August 1946 and from 1 September 1946 to 3 September 1946.

Efficiency ratings of record are "Excellent" for the period from 1 July 1945 to 30 June 1946, and "Very Satisfactory" for the period from 1 July 1946 to 31 December 1946.

5. I recommend that the sentence be confirmed but in view of all the circumstances of the case including the reviewing authority's recommendation for clemency, recommend that the sentence be commuted to dismissal, a reprimand and forfeiture of $100.00 per month for five months, and that as thus commuted the sentence be carried into execution, but that the execution of that portion of the sentence adjudging dismissal be suspended during good behavior.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO. DA., 7, Oct 13, 1947).

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

JAGK - CM 324348

16 SEP 1947

UNITED STATES v. Technician Fifth Grade GOLSON T. TURNER (35813075), Headquarters Detachment, 7822 Station Complement Unit.	FIRST U. S. INFANTRY DIVISION Trial by G.C.M., convened at Bad Tolz, Germany, 9 and 10 June 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 Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Technician Fifth Grade Golson T. Turner, Headquarters Detachment, 7822 Station Complement Unit, did, at Munich, Germany, on or about 6 April 1947, with intent to do him bodily harm, commit an assault upon Jan Korzeniewski, by wilfully and feloniously hitting the said Jan Korzeniewski in the face and body with his fists, and by cutting him on the head, with a dangerous weapon, to wit, a knife.

Specification 2: In that Technician Fifth Grade Golson T. Turner, ***, did, at Munich, Germany, on or about 6 April 1947, with intent to do him bodily harm, commit an assault upon Alfred Schmidt, by wilfully and feloniously hitting the said Alfred Schmidt in the face and body with his fists, and by stabbing him in the back, arm, and thigh, with a dangerous weapon, to wit, a knife.

Specification 3: In that Technician Fifth Grade Golson T. Turner, ***, did, at Munich, Germany, on or about 25 April 1947, with intent to commit a felony, viz, murder, commit an assault upon Amalie Ritter, by wilfully and feloniously shooting the said Amalie Ritter in the head with a pistol.

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

Specification: In that Technician Fifth Grade Golson T. Turner, Headquarters Detachment, 7822 Station Complement Unit, did, at Munich, Germany, on or about 25 April 1947, with malice afore-

thought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Annemarie Jaeger, a human being, by shooting her with a pistol.

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 hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On 6 April 1947 the accused and two other soldiers went to an apartment occupied by Amalie Ritter and Annemarie Jaeger. The accused gave Annemarie Jaeger his watch and instructed her to use it to secure schnapps. Annemarie Jaeger left with the watch and returned with two bottles of American whiskey. They opened one bottle and drank some of the whiskey. Later in the evening the accused stated that he wanted his watch and he, a soldier by the name of Scaletta and Annemarie Jaeger left to retrieve the watch (R 45,46).

During the afternoon of 6 April 1947 Jan Korzeniewski, a Polish civilian residing at 22 Meckel Strasse, Munich, Germany, sold some liquor to a girl known to him as Annemarie. The liquor was delivered to an American soldier who left a watch and "who said he would get it back later." About 2100 hours on 6 April 1947 the accused, Annemarie and a soldier named Scaletta came to Korzeniewski's room at which time the accused demanded his watch. Korzeniewski stated that the watch was in a drawer. The accused then struck Korzeniewski in the face with his fists. Alfred Schmidt, a German civilian, entered the room and saw the accused stab Korzeniewski under the left eye with a knife. The accused and Scaletta then assaulted Schmidt and during this assault the accused stabbed Schmidt in the back, arms and thigh with the knife. Schmidt was stabbed 14 times with the knife and was kept in a hospital 12 days because of his wounds. Korzeniewski was released from the hospital about the first of June 1947 (R 6-13,14-20).

Criminal Investigation Division agents Walter E. Snyder and Leon Zakrzewski were detailed to investigate the stabbing of Korzeniewski and Schmidt. They went to 22 Meckel Strasse and observed blood on the floors, stairs, furniture and bed. A TL-29 Government issue knife was delivered to Agent Snyder by the First Military Police patrol. The knife was reported to have been found at the entrance of the house. Agent Snyder kept this knife until he questioned the accused, at which time he showed the knife to the accused and asked him if he recognized it. The accused stated that the knife was his and he had left it at the doorway at 22 Meckel Strasse. This knife was received in evidence without objection by the defense (R 22-24). Agent Snyder warned the accused of his rights under the 24th Article of War and asked him if he would give a statement concerning what happened at 22 Meckel Strasse. The accused dictated a voluntary statement which was received in evidence as Prosecution Exhibit 2 (R 24,25,27,29,30). In his pretrial statement the accused stated that on 6 April 1947 he, Warlow, Tutino,

and Scaletta went to an apartment near the SS Kaserne in Munich. Two girls occupied this apartment. The six of them drank American whiskey and French cognac which they had secured by trading a watch to a Polish civilian. About 2200 hours the accused, Scaletta and one of the girls named Anna went back to the Pole to secure more liquor. The Pole stated that he had sold the watch. The accused then slapped the Pole. A German civilian entered the room and started to fight with Scaletta. Anna stated that Scaletta needed help. The Pole broke away from him and he (Turner) threw a statue at the Pole hitting him in the face. Turner then fought with the German. They fell down the stairs. The German caught him around the chest, at which time Turner stabbed the German in the back with a knife. "I stabbed a few times and then Scaletta arrived and struck the German in the face knocking him out. I dropped my knife and Scaletta and I walked back to Anna's house" (R. 34, Pros. Ex. 2).

On 25 April 1947, at about 7 p.m., the accused and Private Scaletta entered the room occupied by Private Morganello. Scaletta asked Morganello to go to the SS Kaserne with them. Corporal Turner left the room. Morganello opened his foot locker to secure some toilet articles. He had a .25 caliber pistol in his footlocker and Scaletta asked to borrow it. Scaletta took this pistol, after which he went to his room and secured a .45 caliber pistol. Scaletta gave the .25 caliber pistol belonging to Morganello to the accused. Prior to leaving the barracks Turner, Scaletta and Morganello were talking and Turner stated that he was going to kill Anne. In detailing part of this conversation and speaking of Turner, Morganello testified,

> "Well, sir, this was the first case, and Scaletta and Turner got in a fight with a German, and Turner thought Anne turned on him and called the MP's. Well we talked about that for a while. Then I heard him say he was going up there and kill her."

They went to the Kaserne and after they had been there about twenty minutes two girls came out. Corporal Turner slapped one of the girls who was known as Anne. They went to Anne's apartment where they stayed until 10:30 p.m., at which time Morganello stated that he had to go on guard. Morganello then left the apartment. The accused had been drinking but did not take any drinks in Morganello's presence during the evening. On the morning of 26 April 1947, the accused returned the .25 caliber pistol to Morganello, saying, "Thanks." When the pistol was taken by Scaletta on the evening of 25 April 1947 it was clean and contained seven rounds of ammunition. When the accused returned the pistol it was "greyish blue" and contained three rounds of ammunition. Private Morganello identified Prosecution Exhibit No. 3 as being the gun loaned to Scaletta and returned by the accused (R 35,36,39,42,55, 56).

Amalie Ritter occupied an apartment at 26 Kempferstrasse, Munich, Germany. Annemarie Jaeger was staying with her. On 25 April 1947, Corporal Turner, Private Scaletta and another soldier came to the apart-

neighborhood asking people and one woman directed us to a house which turned out to be the home of Annemarie. I knocked on the door and Annemarie opened it and went back to bed. I went in. SCALETTA stayed outside. I pulled the pistol from my pocket and injected the round into the chamber. I shot Ann through the forehead (she was lying on her back) and then I turned and fired at the head of the other girl who was lying on her side. I then left immediately. I am not sure of the correct time. When I reached the main highway by the Flak Casern I met SCALETTA and he asked me 'Did you shoot her?' and I answered 'Yes.' SCALETTA then ran away. I then went over by the Indiana Depot where my girl lives and she was not home but I stayed all night in her house. I left the next morning and arrived at the billets at approximately 0900 hours. At about 1000 hours I returned the pistol to MORGANELO but did not tell him that I had used it. I was then placed in 'Arrest in Quarters' as I had missed reveille. At approximately 1100 hours I was ordered to report to the Orderly Room and placed in custody by Agents of the CID." (Pros Ex 6)

In his pretrial statement dated 28 April 1947 (Pros Ex 7) the accused stated:

"In addition to my previous statement made to Mr. Shaw of the CID I wish to state that what I did was not with the knowledge of either Scaletta or Morganello. I went to the house with the sole purpose of shooting Anne-Maria Jager and after I had done so the other girl cried out so I shot her too. I then ran away. I accept full responsibility for the two shootings and knew what I was doing at the time." (Pros Ex 7)

4. For the Defense

The defense did not call any witnesses. The accused was warned as to his rights as a witness and elected to make an unsworn statement through counsel as follows:

"10th June, Year of our Lord 1947. I am from Kentucky. I have a mother, father, four sisters, three brothers, all living. I went to the 8th grade, country school. I have been in the Army long enough to have been in combat here in Europe. I was with an armoured division. We fought into Czecho-Slavakia during the war. As all officers in this court know my state side training prior to embarkation for Europe made me hate Germans. I could never completely wipe this training from my mind, and when I would be drunk, or even slightly drunk it would return. Everyone here must realize that I would not try to kill any of your kin folks, or mine. I only have hated Germans. The combination of drink, hate for Germans, and their deceitfulness must some

times make me crazy.

"I have heard that if I am found guilty of the charge under the 92nd Article of War the court must sentence me to either death or life imprisonment. This is the first trouble I have ever been in. If I had not been drunk on these occasions I never would have been in this trouble now. Those eighteen days I spent in the stockade after the 6th of April, in the year of our Lord, made me sore, and then when I got drunk this welled up in me. The fact that I might have done this crime, and then made those statements must be a sign that I'm slightly crazy.

"During the war I had a cousin, who was like my brother, who was killed by the Germans during the war, and I have taken this pretty hard, although it was never my sane purpose to even this up because that would only get me in trouble.

"All these statements - these confessions, I made them in hopes that it would help the Government, and in turn I thought that possibly the Government would help me, and not give me the worse it could.

"I always went to church when I was younger, and believe in God, and in the hereafter. There is a part of the unsworn statement I would like to read from the Bible, 'Psalms 51'." (R. 102-103) (The statement then concludes with the quotation from Psalms 51.)

5. Specifications 1 and 2, Charge I

The accused is charged in Specification 1 with assaulting Jan Korenziewski with intent to do bodily harm by striking him on the face and body with fists and cutting him on the face with a dangerous weapon, to wit, a knife.

Specification 2 charges the accused with a similar assault upon Alfred Schmidt, alleging that Schmidt was stabbed in the back, arms and thigh with a knife.

The evidence clearly establishes, and it is not denied by the accused, that on 6 April 1947 the accused engaged in a fight with Jan Korenziewski and Alfred Schmidt. During this fight the accused cut Korenziewski under the eye with a knife and stabbed Alfred Schmidt in the back, arms and thigh with the same knife. A knife when used to cut or stab a human being is per se a dangerous weapon. To strike a person with fists and a knife in the manner shown by the evidence clearly constitutes an assault and battery. The intent to do bodily harm may properly be inferred by the court from the circumstances surrounding the assault and the use of the knife (CM 252725, Thompson, 34 BR 161,168). The fact that the victims of the assaults were required to remain in a hospital for considerable time in order to recover from the effects of the assault is also evidence showing the intent of the accused.

Specification 3 of Charge I

This specification charges the accused with an assault upon Amalie Ritter with intent to murder by shooting her in the head with a pistol.

An assault with an intent to murder is an attempt to murder; it is an assault aggragated by the concurrence of a specific intent to murder. The intent to murder, essential to this aggravated assault, is established if the facts are such that had death resulted from the assault the offense would have been murder (CM 271098, Phoenix, 46 BR 39,45). The evidence discloses that about midnight on the night of 25 April 1947 the accused was in an apartment occupied by Annemarie Jaeger and Amalie Ritter. The girls were in bed. The accused drew a pistol and shot Annemarie Jaeger in the forehead and then shot Amalie Ritter in the back of her head. Annemarie Jaeger was killed by the bullet which struck her. Amalie Ritter survived this shooting but the bullet was so embedded in her brain that surgeons would not remove it. Knowledge by the accused that his acts would probably cause death establishes the intent to kill (MCM, 1928, par. 148a). We conclude that had death resulted to Amalie Ritter by reason of the acts of accused as shown by the evidence the offense would have been murder.

Specification and Charge II

The accused is charged with the murder of Annemarie Jaeger. The specification alleges that the accused "did *** with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Annemarie Jaeger *** by shooting her with a pistol."

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse.

> "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,)
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> "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 by a wish that it may not be caused; intent to commit any felony. ***" (MCM, 1928, par. 148a; CM 268822, Wade, 44 BR 351,357).

The uncontradicted evidence shows that about midnight on 25 April 1947 the accused shot and killed Annemarie Jaeger, the deceased dying instantly. This homicide was unlawful in that it was without legal justification or excuse. An analysis of the evidence discloses that on the night in question the accused had threatened to kill Miss Jaeger. He borrowed a gun and went to the apartment occupied by her. Almost immediately after he arrived at the apartment he struck the deceased several times. He and Miss Jaeger left the apartment to secure liquor. In a pretrial statement the accused stated that at this time he intended to kill Miss Jaeger if he succeeded in getting her alone. They returned to the apartment and had several drinks before the accused departed. He returned to the apartment after Miss Jaeger and her companion had retired but was permitted to enter the apartment, at which time he shot and killed Miss Jaeger and also shot and seriously wounded her companion. There is no evidence in the record to show that the accused was in any danger or that he had been threatened with violence prior to the shooting. No basis exists for an inference that the shooting was perpetrated in the heat of passion. On the contrary the evidence shows that the homicide was calculated and deliberate.

Although the evidence shows that the accused had been drinking on the night of the homicide it wholly fails to show such degree of drunkenness which would render the accused incapable of realizing his actions or incapable of having and carrying out his intent to murder.

The Board of Review is of the opinion that the record of trial amply supports the findings of guilty of this specification and charge.

6. The charge sheet shows the accused to be 21 years of age. His current enlistment began on 16 January 1946 for a period of 18 months. He first entered the service on 10 January 1944 and has served continuously since that time.

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. A sentence of death or life imprisonment is mandatory upon a conviction of murder, in violation of Article of War 92.

Robert E. Gilmore, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Peterkin, Jr., Judge Advocate

JAGK - CM 324348 1st Ind

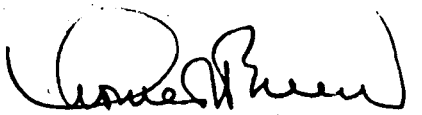
JAGO, Dept. of the Army, Washington 25, D. C.

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 Technician Fifth Grade Golson T. Turner (35813075), Headquarters Detachment, 7822 Station Complement Unit.

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 but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, 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.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 Record of trial
2 Drft of ltr for sig Sec of Army
3 Form of Ex action

(G.C.M.O. 15, 16 Oct 1947)

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

JAGK - CM 324350

7 AUG 1947

UNITED STATES v. First Lieutenant WILLIAM R. McARTHUR (O-1548491), Ordnance Department	SECOND ARMY Trial by G.C.M., convened at Fort George G. Meade, Maryland, 17 July 1947. Dismissal and total forfeitures.

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

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

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant WILLIAM R. McARTHUR, Company I, Third Training Battalion, CIC Center, Holabird Signal Depot, Baltimore, Maryland, did, without proper leave, absent himself from his station at Holabird Signal Depot, Baltimore, Maryland, from about 14 February 1947 to about 9 April 1947.

He pleaded guilty to and was found guilty of the charge and specification. No evidence of previous convictions was considered. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of three (3) years. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

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

4. War Department records show that the accused is 30 years of age and single. He graduated from high school and attended college for three years but did not graduate. He enlisted in the Army on 6 September 1940 and attained the rank of sergeant before applying for Officer Candidate School. He was appointed and commissioned a temporary second lieutenant, Ordnance Department, on 1 August 1942. On 2 March 1943 he was promoted to first lieutenant. He served in the Southwest Pacific area from 9 May 1943

to 21 April 1945. He was separated from the service on 2 January 1946. After his separation from the service and on 4 June 1946 he enlisted as a master sergeant. On 3 September 1946 he was recalled to active duty as a first lieutenant. On 8 January 1947 he was given punishment under Article of War 104 consisting of a reprimand and forfeiture of $100.00 for being drunk and disorderly in uniform on 21 December 1946. His efficiency reports are "Very Satisfactory" and "Excellent."

5. 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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

(On Leave), Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Ackroyd, Judge Advocate

JAGK - CM 324350 1st Ind

WD, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of First Lieutenant William R. McArthur (O-1548491), Ordnance Department.

2. Upon trial by general court-martial the accused pleaded guilty to and was found guilty of absence without leave from 14 February 1947 to 9 April 1947, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the staff judge advocate, which was adopted by the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

The accused was absent without leave from his station at Holabird Signal Depot, Baltimore, Maryland, for one month and 25 days. He accounts for his actions by stating that he served more than two years in the Southwest Pacific during the war. During this time he contracted malaria and was hospitalized therefor. He has had several recurring attacks of malaria. When he reported to Holabird Signal Depot he was unable to secure living quarters for his wife so he requested a reassignment. Failing to secure a reassignment he began to drink. He was involved in an automobile accident due to his drinking. He continued to drink and went on a prolonged drinking "spree."

4. This officer is 30 years of age and single. He graduated from high school and attended college for three years but did not graduate. He enlisted in the Army on 6 September 1940 and attained the rank of Sergeant before applying for Officers Candidate School. He was appointed and commissioned a temporary second lieutenant, Ordnance Department, on 1 August 1942. On 2 March 1943 he was promoted to first lieutenant. He served in the Southwest Pacific Area from 9 May 1943 to 21 April 1945. He was separated from the service on 2 January 1946. After his separation from the service and on 4 June 1946 he enlisted as a master sergeant. On 3 September 1946 he was recalled to active duty as a first lieutenant. On 8 January 1947 he was given punishment under Article of War 104 consisting of a reprimand and forfeiture of $100.00 for being drunk and disorderly in uniform on 21

December 1946. His efficiency reports are "Very Satisfactory" and "Excellent."

5. I recommend that the sentence as modified by the reviewing authority be confirmed and carried into execution.

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

CM 324350

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 294, 25 Aug 1947)

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

JAGQ - CM 324351

1 August 1947

UNITED STATES v. Captain WILLARD B. FITZGERALD (0-1822549), Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania.	SECOND ARMY Trial by G.C.M., convened at Valley Forge General Hospital, Phoenixville, Pennsylvania, 18 June 1947. Dismissal and total forfeitures.

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

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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, Captain Willard B. Fitzgerald, Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, without proper leave, absent himself from his station at Valley Forge General Hospital, Phoenixville, Pennsylvania, from about 3 December 1946 to about 7 January 1947.

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

Specification: (Finding of Not Guilty).

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

Specification 1: (Finding of Not Guilty).

Specification 2: (Disapproved by the Reviewing Authority).

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification of Charge II, Charge II, and Specification 1 of Charge III, but guilty of all remaining Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for six months. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge III and Charge III, approved only so much of the findings of guilty of the Specification of Charge I as finds the accused guilty of absence without leave from 5 December 1946 to 7 January 1947, approved the sentence, but remitted the period of confinement imposed and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

On 5 November 1946 accused was granted ten days sick leave from Valley Forge General Hospital, Phoenixville, Pennsylvania (R. 10, 13; Pros. Exs. 11, 12). This leave was extended for ten days effective 15 November and further extended for eight days effective 26 November 1946 (R. 13; Pros. Exs. 13, 14). Accused failed to report to his station at Valley Forge General Hospital on 5 December 1946 and returned to military control at Fort McClellan, Alabama, on 7 January 1947 (R. 9; Pros. Exs. 9, 10).

4. Evidence for the Defense.

Accused was duly advised of his rights as a witness and elected to testify under oath with reference to the offenses alleged under Charge I and Charge II only. Accused received a telegram from the Commanding Officer, Valley Forge General Hospital, dated 29 November 1946, informing him that his leave had been extended eight days and would expire 5 December 1946 (R. 17; Def. Ex. A). He did not return to the hospital on 5 December 1946 but sent a telegram to that installation on 2 December requesting an additional thirty days' leave. He called the hospital on 3 December, "got the impression" that he was talking to an enlisted man in the adjutant's office who advised him that his "request for leave had been approved for thirty days" (R. 17). He stayed at home in Anniston, Alabama, until 6 January 1947 when he went to the Station Hospital, Fort McClellan, Alabama, and received treatment as an "out patient" for an attack of malaria. He returned to the Station Hospital on 7 January and was "put to bed" (R.16-18). He was never advised by anyone prior to 7 January 1947 that he was "AWOL".

5. The offense of absence without leave was proved beyond a reasonable doubt by the extract copy of the morning report of accused's organization and his admissions while on the witness stand. He knew his leave expired on 5 December 1946 and that he received no orders subsequent to that date authorizing an extension. Even if accused was under the impression that he had been granted an extension such fact would not constitute a defense to the charge but would merely be an extenuating circumstance to be considered in imposing sentence. It is inconceivable that

an officer with accused's military experience would consider that he had been granted an extension of leave with no more assurance than a telephone conversation with an unidentified enlisted man. In any event when he did not receive timely written confirmation of the requested extension some inquiry on his part was obligatory. He not only failed to take any action in this respect but did not report to the station hospital at Fort McClellan until two days after the "requested extension" had expired.

6. War Department records show that accused is 36 years of age, married, and has one child. He completed three years of high school, served six years with the Virginia National Guard and four years in the Regular Army as an enlisted man before he was commissioned as a Second Lieutenant, AUS, on 12 April 1942. He was promoted to First Lieutenant on 4 December 1942 and to Captain, 17 November 1944. While War Department records show that he served three years overseas and was awarded the Purple Heart, the Staff Judge Advocate's review states that he has two Clusters to his Purple Heart and the Silver Star with Oak Leaf Cluster. He failed to complete satisfactorily a course at the Tank Destroyer School but otherwise, his efficiency ratings have been consistently excellent. War Department records show that accused is married but papers attached to his record of trial show that the Valley Forge General Hospital received correspondence from a "wife" in Anniston, Alabama, and a telephone call from a woman at Staunton, Virginia, identifying herself as his "wife", acknowledging receipt of allotment check, and inquiring as to her husband's whereabouts. These allied papers also show that accused made a $150 Class E allotment in June 1946 and thereafter submitted six consecutive pay vouchers without listing this deduction. On 2 June 1947, the Executive Officer at Valley Forge General Hospital reported that accused had passed several more worthless checks and violated the terms of his restictive arrest.

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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

W. H. Johnson Jr, Judge Advocate

Ronald Gray, Judge Advocate

G. G. Schuman, Judge Advocate

JAGQ - CM 324351 1st Ind

WD, JAGO, Washington 25, D. C. AUG 1 8 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 Willard B. Fitzgerald (0-1822549), Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 3 December 1946 to 7 January 1947, (Specification, Charge I), in violation of the 61st Article of War, and of making and uttering, with intent to defraud, a check in the amount of $30.00 drawn on a bank in which he had no account (Specification 2, Charge III), in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for six months. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge III and Charge III (making and uttering the worthless check), approved only so much of the finding of guilty of the Specification of Charge I as finds the accused guilty of absence without leave from 5 December 1946 to 7 January 1947, approved the sentence, but remitted the period of confinement imposed and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that accused, while on sick leave from Valley Forge General Hospital, Phoenixville, Pennsylvania, requested two extensions of his leave which were granted and he was advised that his leave would expire 5 December 1946. He did not return to the hospital on 5 December but returned to military control at the station hospital, Fort McClellan, Alabama, on 7 January 1947.

Accused testified that he did not return on 5 December because he wired for a 30-day extension of his leave on 2 December. He called the hospital on 3 December, "got the impression" that he was talking to an enlisted man who advised him that "his request for leave had been approved for 30 days." He did not learn the identity of the enlisted man. He remained at home in Anniston, Alabama, until 6 January when he received treatment at Fort McClellan as an "out patient" for an attack of malaria. He returned to Fort McClellan the next day and was "put to bed." He was never advised by anyone while he was home that he was absent without leave.

5. War Department records show that accused is 36 years of age, married and has one child. He completed three years of high school, served six years with the Virginia National Guard and four years in the Regular Army as an enlisted man before he was commissioned as a Second Lieutenant, AUS, on 12 April 1942. He was promoted to First Lieutenant on 4 December 1942 and to Captain, 17 November 1944. War Department records show that he served three years overseas and was awarded the Purple Heart. The Staff Judge Advocate's review states that accused has two Clusters to his Purple Heart and the Silver Star with Oak Leaf Cluster. He failed to complete satisfactorily a course at the Tank Destroyer School but otherwise, his efficiency ratings have been consistently excellent. On 2 June 1947, the Executive Officer at Valley Forge General Hospital reported that accused had passed several more worthless checks and violated the terms of his arrest.

6. I recommend that the sentence as approved by the reviewing authority be confirmed but in view of the nature of the offense of which accused was found guilty and all the circumstances of the case, recommend that the sentence be commuted to dismissal and a reprimand and forfeiture of $100.00 pay per month for two months and that the sentence as thus modified be carried into execution but that the portion thereof adjudging dismissal be suspended during good behaviour.

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 292, 25 Aug 1947).

(GCMO 23 (DA), 21 Jan 1948).

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

JAGH-CM 324352

1947

UNITED STATES	)	IX CORPS
v.	)	Trial by G.C.M., convened at Sendai, Honshu, Japan, 7 July 1947. Dismissal.
Second Lieutenant ARDEN M. GADDIS (0-1822872), Infantry.	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, GRAY and SOLF, 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 1: In that 2nd Lieutenant Arden M. Gaddis did at Sendai, Japan, on or about 29 May 1947, with intent to deceive Lieutenant Colonel Howard R. Turner who was then in the execution of his official duties as Provost Marshal, Sendai, Japan, officially state to the said Lieutenant Colonel Howard R. Turner that he, the said 2nd Lieutenant Arden M. Gaddis, did not transport Japanese females to the United States Government Post Exchange Warehouse in Sendai, Japan, in a government vehicle, which statement was known by 2nd Lieutenant Arden M. Gaddis to be untrue.

Specification 2: In that 2nd Lieutenant Arden M. Gaddis did at Sendai, Japan, on or about 1 June 1947, wrongfully occupy a room in a Japanese house with Private First Class Carl Parrick, an enlisted man, and two Japanese females, for immoral purpose.

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

Specification 1: In that 2nd Lieutenant Arden M. Gaddis did at Sendai, Japan, on or about 29 May 1947, wrongfully admit unauthorized Japanese Nationals into a United States Government Warehouse containing Post Exchange supplies.

Specification 2: In that 2nd Lieutenant Arden M. Gaddis did at Sendai, Japan, on or about 29 May 1947, wrongfully dispose of American goods, to wit, canned fish and sausages, crackers, cigarettes and Pepsi-Cola, by giving the same to Sadoko Abe and Nobuko Ito, Japanese Nationals, in violation of standing orders.

Specification 3: In that 2nd Lieutenant Arden M. Gaddis did at Sendai, Japan, on or about 29 May 1947, wrongfully drink intoxicating liquor with an enlisted man, which conduct was prejudicial to the conduct of good order and military discipline.

Specification 4: In that 2nd Lieutenant Arden M. Gaddis did at Sendai, Japan, on or about 1 June 1947, wrongfully and without authority, violate curfew regulations by being in a Japanese house after 0030 in violation of standing orders.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the IX Corps Acting Staff Judge Advocate, dated 19 July 1947, except as it pertains to Specification 1, Charge I and Specification 2, Charge II.

4. The evidence for the prosecution pertinent to Specification 1, Charge I and Specification 2, Charge II is summarized as follows:

The accused was assigned to Headquarters IX Corps as Assistant Post Exchange Officer in charge of a Post Exchange Warehouse at Nagamachi, South Sendai, Japan (R. 6-7).

On the evening of 29 March 1947, pursuant to a prearranged rendezvous, two Japanese girls, Nobuko Ito and Sadako Abe, went to the Nagamachi Station from Sendai, by street car (R 30). Shortly after 1830 hours the accused arrived at the Nagamachi Station in a jeep accompanied by Private First Class James W. Davenport (R 18). The two girls entered the jeep and were driven to the Post Exchange warehouse (R 31), approximately 1/4 or 1/3 of a mile from the Nagamachi Station (R 42). Thereupon the accused, Davenport and the two girls entered the warehouse (R 18, 31, 51).

While in the warehouse the accused, Private Davenport and the two girls shared some canned sausages, sardines, crackers, a drink similar to coca-cola, and some cigarettes (R 20-21, 31, 33, 37-40). Each girl ate some of the food, drank some of the beverage, and smoked some cigarettes (R 31, 33).

At about 2020 hours, two military policemen arrived at the warehouse (R 13). Upon being admitted to the building by the accused (R 15) they searched the building and found the two Japanese girls in one of the rooms of the warehouse (R 14). They saw some cookies, sardines, empty beer cans and pepsi-cola bottles on some packing cases (R 14, 19).

At about 2100 hours Lieutenant Colonel Howard R. Turner, the Provost Marshal and First Lieutenant Walter A. Hummel, the Officer of the Day of the Military Police Platoon, arrived at the warehouse (R 41). Colonel Turner proceeded to question the accused with reference to the incident in the presence of Lieutenant Hummel (R 41, 45). The accused freely admitted that the Japanese girls had been in the warehouse and that he had been "visiting, smoking and having a few drinks, * * *." The Provost Marshal then asked him if he had transported the girls to the warehouse in a government vehicle whereupon the accused replied, "No, Sir." The Provost Marshal then asked him how the girls reached the warehouse, to which the accused replied, "By street car" (R 42, 46).

On cross-examination Colonel Turner admitted that he did not warn the accused of his rights under Article of War 24, and he further admitted that he could not recall the accused's exact words except that he replied, "No, Sir." to the question whether he had transported the girls to the warehouse (R 43).

On examination by the court the witness stated that the accused had answered all other questions truthfully (R 43).

On motion of the prosecution the court took judicial notice of Circular No. 26, General Headquarters, Far East Command, dated 10 March 1947, Prevention of Black Market Activities, which provides in relevant part:

"3. Purpose. This circular is intended to inform persons subject to military law within or in transit to or from the occupied area of Japan, including but not restricted to military personnel, civilian employees of the War Department, and dependents, of the necessity for avoiding participation, direct or indirect, in black market activities; and the rules to be observed by them in respect to dealing in supplies transported to Japan for the use of American personnel.

"4. Definitions. The several words and phrases underscored and carried in quotation marks at the beginning of each lettered subparagraph of this paragraph, for the purpose of this circular, will be deemed to have the meanings set forth in such subparagraphs respectively:

* * *

"d. 'American goods'. Any goods, wares, merchandise or other personal property of any kind which either:

(1) are of American origin, growth, production or manufacture;

(2) are or have been sold, issued or disposed of, or intended for issue, sale or disposition by or through agencies, governmental or otherwise, for the use of American personnel or authorized personnel, including, but not restricted to, property pertaining to or secured through or from Army sales stores, commissaries, post exchanges, ship stores, clubs for officers, enlisted men and War Department civilian personnel, and the American Red Cross;

(3) are in transit to or from or have been transported to Japan from or through the United States by or for American personnel, by means of Government Transportation; or

(4) bear either on the container, unit or otherwise, a trade mark, trade name, producer's, manufacturer's or distributor's name, brand, revenue stamp, free of tax stamp, label or other mark, or stamp or device of any kind indicating it to be American growth, origin, production or manufacture, or intended for use or consumption by American personnel or authorized personnel.

"e. '<u>To Trade</u>'. To enter into, carry on, complete, or perform any contract, agreement, or obligation; to buy, sell, loan, extend credit, trade in, deal in, exchange, transmit, transfer, assign, dispose of or receive; or to have any form of business or commercial communication or intercourse.

* * *

"5. <u>Acts prohibited</u>. Except as authorized by law, regulation, competent order or directive, the following acts by American personnel are prohibited:

"a. Trading in American goods with other than American personnel or authorized personnel."

5. The evidence for the defense pertinent to Specification 1, Charge I, and Specification 2, Charge II is summarized as follows:

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

Technician Fourth Grade Roy E. Pritchard testified that he and two others went to a party at the Post Exchange warehouse on the night of 29 March 1947 (R 55). He was present while the Provost Marshal spoke to the accused, and overheard their conversation from a distance of approximately ten steps. He heard the accused say to Colonel Turner that he (the accused) did not transport the women from Sendai to the warehouse in a government vehicle (R 55-56). The witness further testified that the accused said, "They rode the trolley from Sendai to the station. I believe it was Nagamachi" (R 55, 58).

Corporal John Roland testified that he overheard Colonel Turner ask the accused if the girls had come out to the warehouse in a jeep and the accused replied, "No sir, they came by Japanese trolley to Nagamachi Station, which is near the warehouse" (R 60).

Technician Fifth Grade Benjamin S. Swan testified that he overheard the accused tell Colonel Turner that the girls rode the trolley from Sendai to Nagamachi in answer to a question as to how the girls got to the warehouse (R 62).

<u>As to Specification 2, Charge II</u>

After his rights as a witness were explained to him by the law member (R 63) the accused elected to take the stand as a witness in his own behalf (R 64). He testified that the food items which he shared with the Japanese nationals were purchased by him and that he ate a portion of the food in question (R 65).

6. Under Specification 1, Charge I the accused stands convicted of falsely stating to Lieutenant Colonel Turner officially that he did not transport Japanese females to the Post Exchange Warehouse in Sendai, Japan in a government vehicle, which statement was known by the accused to be untrue, in violation of Article of War 95.

In order to support a conviction of the offense alleged the record must show that the accused: (a) made a certain official statement, (b) that the statement was false (c) that the accused knew it to be false, and (d) that such false statement was made with intent to deceive the person to whom it was made (CM 262360, Campbell, 41 BR 58; CM 316750, Ortiz-Aponte; CM 318167, Green; CM 318705, Jackson).

The evidence shows that two Japanese girls came to the Nagamachi Station from their homes in Sendai by street car. The accused met them at the Nagamachi Station and transported them 1/4 or 1/3 of a mile to the warehouse in a jeep.

When later questioned by the Provost Marshal about the presence of the girls at the warehouse, the accused freely and truthfully answered most of Lieutenant Colonel Turner's questions. However, when asked whether the girls had been transported to the warehouse by jeep he replied, "No sir" and stated that they had come from Sendai by street car. It may be assumed that the Provost Marshal knew that the street car tracks did not pass the warehouse and that he knew that the closest point to the warehouse accessible by street car was the Nagamachi Station. He did not, however, ask the accused how the girls traveled the short distance from the station to the warehouse.

In view of the fact that the accused frankly and truthfully answered other inculpatory questions, it appears most probable that he understood the question put to him as pertaining to the mode of transportation used by the girls in traveling from Sendai to the vicinity of the warehouse. Three witnesses, who overheard the conversation, testified that the accused stated that the girls rode the trolley from Sendai to the Nagamachi Station. He did not volunteer information as to how they had gone the rest of the way, but he was not under any obligation to volunteer inculpatory information. If we assume that he fully understood the Provost Marshal's question, his answer merely amounts to a failure to make a full disclosure, to a question which, under the provisions of Article of War 24, he was under no obligation to answer at all. Failure to make a full disclosure is not tantamount to making specified and particularized false statements with deceitful intent (CM 245866, Willis, 29 BR 322; CM 136021 (1919) Dig Op JAG 1912-1940, Sect 454 (49)).

The language of the Board of Review in CM 262360, Campbell, 41 BR 58, is appropriate in the instant case.

"The fact that his selection of language might be deemed cagy does not alone justify branding his statement as a false statement made with intent to deceive. Before a conviction of the offense alleged can be sustained there must be evidence beyond a reasonable doubt, that the statement is both false and made with intent to deceive. The evidence in the instant case does not measure up to this standard" (See also CM 318705, Jackson).

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

7. Under Specification 2, Charge II, the accused stands convicted of wrongfully disposing of American goods, to wit, canned fish and sausage, crackers, cigarettes and Pepsi-Cola, by giving the same to certain Japanese nationals in violation of standing orders.

It is to be noted that the accused is not charged with misapplication or wrongful disposition of property belonging to any person other than himself.

It is the theory of the prosecution, and apparently that of the reviewing authority, that the sharing of American food, beverages and tobacco with guests who are Japanese nationals constitutes "trading in American goods with other than American or authorized personnel" in violation of Circular No. 26, General Headquarters, Far East Command, 10 March 1947, Prevention of Black Market Activities, pertinent extracts of which are quoted in paragraph 4 above.

The prohibitions contained in Circular 26, are directive in nature and became part of the written military law on its effective date, 12 March 1947 (CM 291176, Besdine, 18 BR (ETO) 181; CM 307465, Danker; CM 307097, Mellinger, 60 BR 119, 215-216; CM 317064, Johns).

Since the directive is also penal in nature, it follows that the rules ordinarily applied in the construction of penal statutes are applicable to the construction of the directive in question.

It is well settled that statutes must be construed in harmony with their announced or obvious purpose (Humbolt Land Co. v. Allen, 14 Fed (2d) 650, affirmed 274 U.S. 711). The obvious purpose of the directive contained in Circular 26, as stated in its title, and its Declaration of Purpose, is the prevention of Black Market Activities.

As indicated above, the term "to trade" is defined in the Circular as:

"To enter into, carry on, complete, or perform any contract, agreement, or obligation; to buy, sell, loan, extend credit, trade in, deal in, exchange, transmit, transfer, assign, dispose of or receive; or to have any form of business or commercial communication or intercourse" (Underscoring supplied).

The term "dispose of," upon which rests the determination of the problem presented by the instant case, is a broad term capable of many meanings. In CM 138679, Frisbie, cited in CM 217868, Schiedinger, 11 BR 329, 338, it was held that the words "dispose of" might mean any one of many acts, either lawful or unlawful, such as to arrange, to find a place for, to have control or ordering of, to pawn, barter, give away, burn, destroy, determine the fate of, mortgage, and many others. It was said of the words "dispose of" that "Standing by themselves without qualification the words have no legal significance."

Considering the variety of meanings which may be attributed to the term "dispose of" it is obvious that the words, as used in the directive, must be construed as pertaining to such disposition of American goods which may lead, directly or indirectly, to their diversion into Black Market channels. So considered it is obvious that the social serving of reasonable quantities of American foodstuffs to bona fide guests for consumption in the presence of the host cannot possibly lead to the use of such foodstuffs in Black Market Activities.

"General words in a statute should receive a general construction; but they must be understood as used with reference to the subject matter in the mind of the legislature, and strictly limited to it. Their meaning may, if necessary be expanded, as may that of narrower words, or their meaning may be restricted, and they should be so limited in their application as not to lead to injustice, opression, or an absurd consequence. So words of general import in a statute are limited by words of restricted import immediately following and relating to the same subject" (59 Corpus Juris, Sec. 580, p. 980 and cases cited therein).

"By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to the person or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes" (Ibid, sec. 581, citing First National Bank v. U. S., 206 Fed. 374).

In applying the foregoing rules of construction to the instant case, we are of the opinion that the general term "dispose of" as used in the definition of the term "to trade" pertains to disposition in the course of a business or commercial transaction, or in a manner likely to lead toward a business or commercial transaction.

Since neither fraternization with Japanese nationals, nor the entertainment of Japanese nationals was prohibited at the time of the alleged offense, it would appear that the serving of reasonable quantities of foodstuffs incidental to social hospitality does not fall within the prohibition denouncing the trading in American goods.

Accordingly we are of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specification 2, Charge II.

8. The accused is 29 years of age, married, and the father of one child. War Department records show that he completed three years of high school. He enlisted in the military service on 23 August 1938 and served until 26 August 1941, being discharged as a platoon sergeant. He re-enlisted on 7 March 1942 and after successfully completing the Tank Destroyer Officer Candidate Course, he was commissioned as a second lieutenant, Army of the United States, on 22 December 1942. He has successfully completed the Officers Automotive Course at the Tank Destroyer School, the Officers Special Basic Course at The Infantry School, and the Parachute Course at The Parachute School. He served with the 515th Parachute Infantry Regiment in the European Theater of Operations. Efficiency ratings of record show that he was rated "Satisfactory" for the period from 24 April 1943 until 30 June 1943; "Very Satisfactory" from 1 July 1943 until 31 December 1943; "Satisfactory" from 1 January 1945 until 30 June 1945; "Very Satisfactory" from 1 July 1945 until 31 December 1945; and "Excellent" from 1 July 1946 until 31 December 1946.

9. Attached to the record of trial is a request for clemency addressed to the reviewing authority by Lieutenant Colonel Ned W. Glenn, the special defense counsel, wherein it is stated in part:

> "2. Lt. Gaddis is believed to have salvagable value to the service because of his specialized training and experience with the 81 mm mortar.
>
> "3. Conviction under the 95th Article of War would bar him from serving as an enlisted man.
>
> "4. It is believed that Lt. Gaddis has correspondence showing that he requested relief from duty as an officer and re-enlistment prior to the date of his first offense.

"5. Lt. Gaddis was an enlisted man in my company before the war, and his service as an enlisted man was exemplary."

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 insufficient to support the findings of guilty of Specification 1, Charge I, and Specification 2, Charge II, legally sufficient to support all other findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. A sentence to dismissal is mandatory upon a conviction of a violation of Article of War 95 and is authorized upon a conviction of a violation of Article of War 96.

A J Rottenstein, Judge Advocate

V. McDonald Gray, Judge Advocate

William A. Self, Judge Advocate

JAGH - CM 324352 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 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 Second Lieutenant Arden M. Gaddis (O-1822872), Infantry.

2. Upon trial by general court-martial this officer was found guilty of making a false official statement (Spec 1, Chg I) and of wrongfully occupying a room in a Japanese house with an enlisted man and two Japanese females for immoral purposes (Spec 2, Chg I) in violation of Article of War 95; of wrongfully admitting unauthorized personnel into a Government warehouse (Spec 1, Chg II); of wrongfully disposing of American goods to Japanese nationals in violation of standing orders (Spec 2, Chg II); of drinking intoxicating liquor with an enlisted man (Spec 3, Chg II), and of violating curfew regulations (Spec 4, Chg II), all in violation of Article of War 96. 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 only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the IX Corps Acting Staff Judge Advocate dated 19 July 1947, which was adopted in the accompanying opinion as a statement of the evidence and the law, except as it pertains to Specification 1, Charge I (false official statement) and Specification 2, Charge II (wrongful disposition of American goods to Japanese nationals). The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 1, Charge I (false official statement) and of Specification 2, Charge II (wrongful disposition of American goods); legally sufficient to support the findings of guilty of all other charges and specifications and the sentence as approved by the reviewing authority and to warrant confirmation thereof. I concur in that opinion.

The accused was an Assistant Post Exchange Officer in charge of a IX Corps Post Exchange Warehouse in Nagamachi, located on the outskirts of Sendai, Japan. On the evening of 29 March 1947 the accused and an enlisted man transported two Japanese girls from a fourth to a third of a mile from a streetcar station to a post exchange warehouse in a military vehicle. The girls were admitted into a room which was marked "Off limits to unauthorized personnel" and the accused shared with them various items of foodstuffs, beverages, and cigarettes which he had purchased from a

post exchange. At that time the accused and the enlisted man drank some whiskey in the presence of the Japanese girls. Later in the evening a Provost Marshal arrived at the warehouse and questioned the accused. Among other questions, the Provost Marshal, who did not recall the exact words used, asked the accused in substance whether he had transported the Japanese girls to the warehouse in a Government vehicle. The accused replied, "No sir." and stated that they had come from Sendai by streetcar. The evidence shows that the girls had in fact traveled from Sendai to the vicinity of the warehouse by streetcar and had been transported the short distance to the warehouse by a jeep. It appears most probable that accused understood the Provost Marshal's question as pertaining to the mode of transportation used by the girls in coming from Sendai, and he stated that this mode of travel was by streetcar, which was true, though only partially so.

On the night of 31 March 1947 the accused and Private First Class Carl C. Parrick went to a Japanese home in the company of two Japanese girls. Accused and the soldier engaged in acts of sexual intercourse with their respective girls. After 0030 on the same night the accused and Private Parrick were found in beds in the same room, each with a Japanese girl. The curfew hour established by competent directives was 0030. Competent directives also prescribe that Japanese homes are off limits to military personnel after 2300 hours.

With respect to Specification 1, Charge I, it does not appear beyond reasonable doubt that accused fully understood the question propounded or consciously made a false statement.

With respect to Specification 2, Charge II, wherein it was alleged that the accused had wrongfully disposed of certain articles of American foodstuffs, beverages and cigarettes in violation of a Theater directive prohibiting the trading in American goods with other than American personnel, it does not appear that the accused's act of serving such articles to his guests falls fairly within the prohibition contained in the directive.

4. The accused is 29 years of age, married and the father of one child. He has had approximately four years service as an enlisted man and was commissioned as a second lieutenant, Army of the United States, upon his graduation from the Tank Destroyer Officers Candidate Course on 22 December 1942. Records of the Army show that he was rated "Satisfactory" or "Very Satisfactory" from the date of his commission until 31 December 1945. He was rated "Excellent" from 1 July 1946 to 31 December 1946.

5. Attached to the record of trial is a request for clemency addressed to the reviewing authority by Lieutenant Colonel Ned W. Glenn, the special defense counsel, wherein it is stated in part:

"2. Lt. Gaddis is believed to have salvagable value to the service because of his specialized training and experience with the 81 mm mortar.

"3. Conviction under the 95th Article of War would bar him from serving as an enlisted man.

"4. It is believed that Lt. Gaddis has correspondence showing that he requested relief from duty as an officer and re-enlistment prior to the date of his first offense.

"5. Lt. Gaddis was an enlisted man in my company before the war, and his service as an enlisted man was exemplary."

6. I recommend that the findings of guilty of Specification 1, Charge I and Specification 2, Charge II, be disapproved, that the sentence as approved by the reviewing authority be confirmed but in view of all the circumstances recommend that it be commuted to a reprimand and forfeiture of $75 pay per month for three months.

Accused testified at the trial that he has requested to be relieved from active duty in order to enlist as a soldier. If the foregoing recommendation meets with your approval, I propose to initiate action to effect his administrative separation from the service as an officer.

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 45, 19 Nov 1947)

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

JAGK - CM 324396

17 SEP 1947

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Kagamigahara Air Field, Gifu, Honshu, Japan, 3 June 1947. Forfeiture of $50 per month for six months and confinement for six months. Division Stockade.
Private JESSE J. REDMON (RA 18094731), Company L, 24th Infantry.	)	

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

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1. The record of trial in the case of the 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, Private Jessie J Redmon, Company L 24th Infantry having taken an oath by Special Court-martial of Private James Fair, Company L 24th Infantry before First Lieutenant Richard W Hughes, Trial Judge Advocate of the Special Court-Martial, a competent officer, that he should testify truly, did, at Kagamigahara Airfield Gifu Honshu, Japan, on or about 11 April 1947, willfully, corruptly, and contrary to such oath testify in substance that the door between his room and the hall, where the accused was standing was open, and that he (Redmon) could see the accused (Fair) and that the accused (Fair) was not urinating out of the window, and that he (Redmon) saw the accused (Fair) spit out of the window, which testimony was a material matter and which he did not then believe to be true.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved "only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of fifty dollars of his (accused's)

pay per month for a like period," ordered the sentence executed as thus modified, and designated the 25th Infantry Division Stockade as the place of confinement. The result of trial was published in General Court-Martial Orders No. 72, Headquarters 25th Infantry Division, APO 25, 16 July 1947.

3. Evidence for the Prosecution

Captain Elsby Goffinet was a member of a special court-martial appointed "by Special Orders Regimental Headquarters" and was present at a session thereof at which Private James Fair was tried on 11 April 1947. Accused appeared as a witness in this special court-martial case and after being sworn by the trial judge advocate testified that he was sitting on a locker looking out of his door and saw Private Fair standing at a window. Private Fair was spitting out the window but was not urinating out of the window. Private Fair was acquitted by the special court-martial "on a secret written ballot." According to Captain Goffinet, accused's testimony was, to his mind, "one of the decisive factors that made an acquittal possible" but he did not know what influence it might have had with the other members of the court (R 4a, 5).

Captain Herman A. Ruff was "at a Special Court-Martial " on 11 April 1947. Accused was a witness in the case of Private James Fair and after being sworn testified he had observed the actions of Private Fair through the open door of his room and that Private Fair was not urinating out the window. Accused's testimony was "not the decisive factor but a big factor" in bringing about the acquittal of Private Fair of "the offense" (R 6,7).

Second Lieutenant William E. Wilson was assistant defense counsel in the special court-martial trial of Private Fair on 11 April 1947. In that trial, accused had testified under oath that he could see Private Fair at all times while the latter was at the window and that Private Fair was expectorating out of the window. Accused's testimony was "a strong point in the case" and Private Fair was acquitted (R 7,8).

Second Lieutenant Warren was "present" in the court room on 11 April 1947 when accused appeared as a witness in the trial by special court-martial of Private Fair. Accused stated under oath in the special court-martial trial that he was sitting on a bunk in his room and through the open door saw Private Fair standing in front of a window with both arms on either side of the window. Accused also testified that Private Fair had not urinated out of the window and that he was watching him because he was afraid that Private Fair was sick when he went to the window. Private Fair was acquitted by the special court-martial (R 9,10).

Sergeant Bill Gunther was in his barracks on 24 March 1947 and was called from his room by Corporal Washington who said that Private Fair "was urinating out of the window." He saw Private Fair standing in the

hall and asked him if he had urinated out the window but received no reply. At this time the door to accused's room was closed. Before Sergeant Gunther was called by Corporal Washington his door was also closed and he did not see Private Fair urinating out the window. He could not see the door to accused's room before he had been called by Corporal Washington. The court in the instant case sustained the prosecution's objection to defense counsel's question to Sergeant Gunther, "Was [accused's] door closed or open when Private Fair was supposed to be 'pissing out of the window?" (R 11,12,13).

According to the deposition of Private Fair, admitted in evidence as Prosecution Exhibit 1 without objection by the defense, Private Fair was tried by special court-martial on 11 April 1947, the trial resulting in an acquittal. The strongest testimony in his favor was that given by accused who stated that he could see affiant while affiant was standing by the window. The first and second cross-interrogatories and their answers are as follows:

> "First Cross-interrogatory: At the time that you were accused of standing near the window in the hallway and spitting or pissing out of the window was Redmon in a position to see you?
> "Answer: I don't know
> "Second Cross-interrogatory: Was Private Redmon watching you from the time you left the window until you left the hall and went into his room?
> "Answer: I don't know." (R 13,14,15; Pros Ex 1)

Accused's written pre-trial statement was admitted in evidence as Prosecution Exhibit 2 over objection by the defense. This statement reads as follows:

> "I didn't know anything about Fair's case until yesterday 11 April 1947. I was outside and Fair called me into the room. He told me he had turned my name in as a witness for the trial for pissing out of the window. I told him I couldn't be a witness because I didn't see it. He said he had already turned in my name. I went with him to the room he was supposed to have pissed out of the window. He told me to say I hadn't seen him which I didn't. I couldn't see him because he was in the hall and I was in my room and the door was closed. He told me to swear the door was open. He also told me to say I saw him spit out of the window I knew this wasn't true. I heard Corporal Washington talking to James Fair and then came out of my room. At that time he had his hands on the wall and his back to me. He could have been pissing at that time." (R 15,16,17; Pros Ex 2)

Evidence for the Defense

Accused, having been advised of his rights as a witness, elected to testify under oath in his own behalf. On the day Private Fair "was supposed to

have pissed out the window," accused was sitting on his footlocker and saw Private Fair standing at the window in the hall. He did not see Private Fair urinate out the window. His door was "partly" closed and he could not remember whether he had fully closed it after Corporal Washington called to Sergeant Gunther. Someone, whose name he did not know, was in the room with him at the time. He was a witness at the trial by special court-martial of Private Fair on 11 April 1947 and had stated under oath at this trial that while he was sitting on his footlocker he saw Fair walk to the window and spit out of it and that he did not see Fair urinating out of the window. Private Fair had not told him to make a statement in court and had not come to him to talk about the case before trial. The officer who took accused's pre-trial statement had not read it back to him and accused had not told that officer that he could not see Private Fair because he was in his room with the door closed. He told the officer what he had said at the Fair trial with regard to Private Fair urinating out the window (R 18,19,20,21).

4. In order to sustain a conviction for perjury it must appear that the sworn testimony which is made the subject of the perjury charge was not only willfully false but was also material to the issue of the judicial inquiry before which it was given. It may be mentioned in passing that in this respect it is sufficient to show that the false oath concerned a circumstance tending to prove the issue although such circumstance, by itself, would be wholly insufficient to prove it (Commonwealth v. Pollard, 12 Met. (Mass) 225; Commonwealth v. Grant, 116 Mass. 17; Commonwealth v. McCarty, 152 Mass. 577).

In the instant case, neither the charge sheet nor the record of trial pertaining to the special court-martial proceedings had with respect to Private Fair was introduced in evidence. Consequently, we do not have before us the primary evidence of what the charges and specifications may have been upon which Private Fair was arraigned and of which he was acquitted. Also, the record of trial now before us contains no competent secondary evidence of what issue or issues were referred for judicial determination to the special court-martial which tried Private Fair. No witness in the perjury trial of accused identified the offense or offenses for which Private Fair had been placed on trial before the special court-martial and although accused, in his pre-trial statement, indicated that the subject of this trial was an allegation that Fair had urinated out of a window, accused was merely a witness in the Fair trial and there was no proof that he had actually seen the charges and specifications therein or that his statement was the result of anything more than hearsay information or conjecture. One officer who had been a member of the special court-martial testified that accused's testimony was "one of the decisive factors that made an acquittal possible," but he was obviously incapable of determining the effect of accused's testimony on the minds of the other members of the court at the time they voted by secret written ballot and he admitted as much on the witness stand. The other witnesses who testified as to the

materiality of accused's testimony in the Fair trial, an officer who was apparently merely a spectator and Private Fair's assistant defense counsel, were equally incompetent to express an opinion on this question. Whether certain testimony is or is not material is primarily a question of law to be determined in the first instance by the court before which such issue properly comes but ultimately by those authorities in the military justice system charged with the function of appellate review. In order to pass upon this question we must have before us some competent evidence of the charge or charges to which the challenged testimony allegedly relates. We are of the opinion that the record of trial herein fails to establish beyond a reasonable doubt that the testimony given by accused in the Fair case was material to the issues being there tried (CM 192662, Rowe, 2 BR 31,32; CM 205604, Mickey, 8 BR 201,203; CM 220746, Walling, 13 BR 59).

Moreover, there exists a special rule of proof in prosecutions for perjury requiring that the falsity of the testimony charged to be perjured must be established either by two independent witnesses or by one witness who is supported by independent evidence that is inconsistent with the innocence of accused (United States v. Palese, 133 F. (2d) 600). Although it has been held that such confirmatory testimony may be supplied by the admissions of accused made in connection with the perjury proceedings (United States v. Buckner, 118 F. (2d) 468), here there was no testimony or other evidence for accused's pre-trial admission of the falsity of his oath at the Fair trial to confirm, the record of trial before us being barren of proof of such falsity aliunde accused's admission. Sergeant Gunther admitted that he could not see whether accused's door was open or not at the time Private Fair was supposed to have been urinating out the window and Private Fair did not know whether or not accused could see him at this time. These were the only witnesses who testified on the question of falsity. Even if the falsity of allegedly perjured testimony could be established by the less stringent quantum of proof generally deemed sufficient in prosecutions for other offenses, the proof herein would still fail to support the findings of guilty, for in any event an accused cannot be convicted upon his uncorroborated confession (par. 114a, MCM, 1928).

Finally, there is another reason why the conviction of this accused must be set aside. In CM 321643, Rowell, the Board of Review, in reversing a conviction of perjury, had occasion to say,

> "Sufficient evidence was adduced at the trial in the instant case tending to show that accused gave false testimony under form of oath before a purported special court-martial and that such testimony was material to the issues there being tried. However, no written or verbal order appointing the special court having been introduced in evidence, there is no proof that such court was duly constituted or, indeed, that it ever existed in legal contemplation. This failure of proof is but accentuated by the lack of any showing as to the identity or number of the members present at the session of the special

court at which accused was tried. This being so, there is likewise a failure of proof that the purported special court-martial had jurisdiction over the person of accused and the offenses he allegedly committed, for the entire proceedings of a court-martial which has not been duly constituted are null and void ***.

"Any oath taken before an improperly constituted tribunal or one acting beyond its jurisdiction is as utterly without legal force and effect as is that body's decree, judgment or sentence. Perjury, therefore, cannot be committed in the course of such void proceedings ***.

"We are not unmindful of the provisions of 18 U.S.C. 558 to the effect that an indictment for perjury need not set forth the commission or authority of the court or person before whom the perjury was committed, it being sufficient in this respect that there be an averment that such court or person had authority to administer the oath. *** This type statute does not purport to change the law of perjury by doing away with the necessity of showing that the false testimony in question was given in a judicial proceeding or in the course of justice. These statutes have only to do with pleading and, we think, are obviously intended merely to abrogate cumbersome common law requirements as to the form of indictment in perjury cases. *** proof of the proper organization of the court or due authorization of the person before whom the oath was taken is generally, in civil criminal practice, supplied by judicial notice. *** Consequently, we are of the opinion that the above cited Federal statute can have no application to the instant case where the appointment and constitution of a tribunal of such transitory existence and limited jurisdiction as a court-martial must necessarily be drawn in question."

In the early case of Conner v. Commonwealth (2 Va. Cas. (4 Va.) 30), it was held that an indictment for perjury in taking a false oath before a regimental court of inquiry ought to set forth the number of officers sitting upon such court so that it might appear whether or not the court of inquiry was legally constituted. Although under the Federal statute cited above, as is true in all jurisdictions which have adopted in substance the provisions of the parent statute of George II (23 Geo. II, c. 11), it would be unnecessary to plead these matters today, reference is had to the Connor case merely to show the continuing necessity for proof of the proper constitution of a court-martial before which perjury has allegedly been committed (Fitch v. Commonwealth, 92 Va.824, 24 S.E. 272,274). In the instant case as in the Rowell case there was no proof of either a primary or secondary nature as to the constitution of the purported special court-martial before which accused allegedly perjured himself, nor was any special court-martial order promulgating the result of the Fair trial introduced. Had such an order been adduced, it might well have permitted a fair and legitimate assumption that the special court-martial in question had been duly constituted, for the reviewing authority publishing a promulgating order has the duty to first determine that the proceedings upon which it is based are legal

and regular (par 87b,d, MCM, 1928; CM 323744, Rice, Memorandum).

5. 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.

Robert E. Gilman, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schmidt, Judge Advocate

JAGK - CM 324396 1st Ind

WD, JAGO, Washington 25, D. C. [illegible] 1947

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724, 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Jesse J. Redmon (RA 18094731), Company L, 24th 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, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 10, DA ., 14 Oct 1947).

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

JAGQ - CM 324440

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
v.	)	Trial by G.C.M., convened at PHIBCOM, APO 358, 16 May 1947. To be hanged by the neck until dead.
Private MAURICIO IBANES (10315678), Battery C, 2011th AAA Slt. Battalion (Type C) (PS) (Prov), Headquarters Special Troops, AFWESPAC, APO 707.	)	

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

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

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

Specification 1: In that, Private Mauricio Ibanes, Battery C, 2011th AAA Slt Bn (Type C) (PS) (Prov) did, at Military Police Center, Mandaluyong, Rizal, Philippines (APO 900), on or about 15 November 1946, with malice aforethought, willfully, deliberately, feloniously unlawfully, and with premeditation kill one Captain Jacinto P. Lazo, FA, a human being by shooting him with a carbine.

Specification 2: In that Private Mauricio Ibanes, Battery C, 2011th AAA Slt Bn (Type C) (PS) (Prov) did, at Military Police Center, Mandaluyong, Rizal, Philippines (APO 900), on or about 15 November 1946, with malice aforethought, willfully, deliberately, feloniously unlawfully, and with premeditation kill one Private Anastacio Y. Casino, a human being by shooting him with carbine.

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

Specification 1: In that Private Mauricio Ibanes, Battery C, 2011th AAA Slt Bn (Type C) (PS) (Prov) did, at Military Police Center, Mandaluyong, Rizal, Philippines (APO 900), on or about 15 November 1946, with intent to do him bodily harm, commit an assault upon Private Simeon Biescas, by willfully and feloniously shooting him in the hand, with a dangerous weapon to wit, a carbine.

Specification 2: In that Private Mauricio Ibanes, Battery C, 2011th AAA Slt Bn (Type C) (PS) (Prov) did, at Military Police Center, Mandaluyong, Rizal, Philippines (APO 900), on or about 15 November 1946, with intent to do him bodily harm, commit an assault upon Staff Sergeant Antonio Panaligan, by willfully and feloniously shooting at him with a dangerous weapon to wit, a carbine.

Specification 3: In that Private Mauricio Ibanes, Battery C, 2011th AAA Slt Bn (Type C) (PS) (Prov) did, at Military Police Center, Mandaluyong, Rizal, Philippines (APO 900), on or about 15 November 1946, with intent to do him bodily harm, commit an assault upon Sergeant Alberto Mendoza, by willfully and feloniously shooting at him with a dangerous weapon to wit, a carbine.

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

3. Evidence for the Prosecution.

At approximately 1730, 14 November 1946, at Mandaluyong, Rizal, P.I., accused and other members of a security guard detail was riding to their respective posts in a government truck. While enroute, accused and Private Casino became engaged in an argument which culminated in a fist fight until it was stopped by Area Sergeant Sagoc (R. 7, 8, 16, 21).

The following day, 15 November at about 1730, as the guard was forming for roll call at the Military Police Station in Mandaluyong, accused pushed Casino to the front of the formation and shot him twice with his carbine (R. 8, 17). Casino fell to the ground and the formation started to "scatter and take cover" (R. 27, 39). Accused then pointed his carbine toward Staff Sergeant Panaligan and Sergeant Mendoza who were standing in front of the formation, fired one shot at them and as they started to run fired again but neither shot took effect (R. 39, 42). Accused then ran in the direction of the officers' club and barracks where he met Captain Lazo. He "yelled, you Captain" and fired two shots which struck Lazo in the chest (R. 28, 32, 33). During the melee, Private Biescas was struck in the arm by a bullet while running for cover (R. 44). Immediately after Captain Lazo fell to the ground Sergeant Mory shot accused in the shoulder and Private Malic disarmed him (R. 27, 32). Accused's carbine had one shell in the chamber and one in the magazine when Malic took it from him (R. 32).

Accused, after being warned of his rights signed a sworn statement on 20 November 1946 as follows:

"That on or about 1740 hours, 14 November 1946 just after the formation, while walking towards the truck Pvt. Casino stepped and kicked my legs. In fact, he did this several times to me already and called me "pataypatay" which means "very slow". I warned him this time, and all he said was he was not afraid as he is a Manila "canto" (corner) boy. While we were on the truck, we quarreled and fought. The driver stopped the truck, and so he jumped out of the truck ahead of me and pulled me out. We then had a fight but Sgt Sagoc and one other separated us. I sustained a black eye so that I was restless in my post that night. I had a hard feeling against him and had an intention to get even. When the relief truck picked us the night of the 14th I wanted to talk to him but he ignored me, so in return I told him to be careful.

"That afternoon, 15 November 1946 I had an intention to shoot him for I am afraid he might shoot me first. In the formation, soon as I came my gun was loaded and told him Pvt Casino to prepare. Before he can put his magazine to his carbine I fired at him twice. He fell and knowing he is dead, I don't know what I did next. I fired at the two Sgts and everybody ran. So I went to the Office of Battery "C" to report the matter but everybody ran and I did not see any body in the office. I went to Battery "B" to report but no body was there. So I walked towards the Guardhouse but I met Captain Lazo. I told him sir to help me. He asked me what Battery I belong and when I told him Battery "C", he told me to go to my Battery. I was down the ladder already and when I turned my back somebody fired a shot. I thought he fired the shot so I faced towards them and fired two shots. I saw him fall. I was tired and weak already as blood was coming out from my right shoulder, so I laid down and rested, and I felt they got my gun."

Autopsies were performed on Captain Lazo and Private Casino at the 19th Medical General Laboratory on 16 November 1946 and the cause of death was found to be gunshot wounds of the chest and abdomen in each case (Pros Exs I, III).

4. Evidence for the Defense.

After being advised of his rights as a witness, accused elected to testify under oath (R. 57) to the effect that Casino challenged him to fight on 14 November because "he had a grudge against me" and that Casino kicked him several times prior to the encounter (R. 58). When Sergeant Sagoc stopped the fight, Casino told accused, "From now on you be careful. I will get you someday * * * From now on you be careful of your life. You say your prayers. There is a someday yet that I will get you" (R. 59).

On 15 November when the guard was forming he saw Casino bring "his carbine down and loaded it with bullets. When I saw him doing that I loaded my carbine and I stepped one step backward, then I shot him two times and he fell down" (R. 59). He then explained that he did not know if Casino's carbine was loaded or not but he saw him "cock it." He shot Casino because "I still remembered his threats to me before and I thought he was going to shoot me." He then went toward the guardhouse where he met Captain Lazo; he told him what had occurred and was advised to report to his battery commander but when he started away from the Captain he

heard "three shots fired * * * felt that I was shot * * * fell down and heard some more shots like coming from an automatic rifle" (R. 60). He heard someone shout, "cease firing" and then lost consciousness.

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.

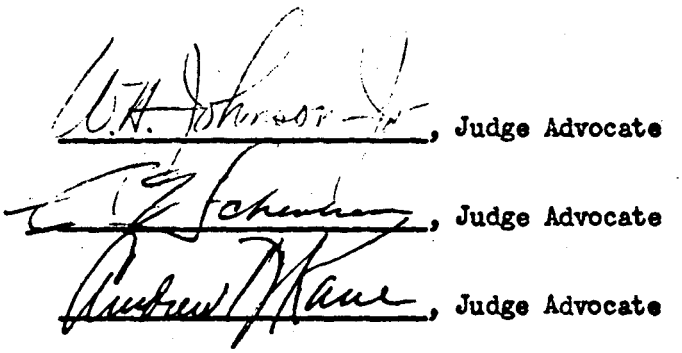
The evidence clearly establishes the deliberate and intentional killing of the two deceased and the three assaults with a deadly weapon upon three other fellow soldiers. The shooting of deceased Casino was not done in self defense as contended by accused. He admitted that he did not know whether deceased's weapon was loaded and the evidence is entirely insufficient as a matter of law to prove justifiable homicide. The killing of Captain Lazo and the assaults on the other soldiers can only be explained by the fact that after the shooting of Casino accused was excited and took this course of action to prevent apprehension or at least any interference on the part of those present. The fact that the evidence fails to show any ill will or "hard feeling" by accused against those killed or injured except Casino is immaterial. The Manual for Courts-Martial states that "when a man fires into a group with intent * * * he is guilty of an assault with intent * * * on each member of the group" (par. 149l, p. 179) and also "when the accused acts in reckless disregard of the safety of others it is not a defense that he did not have in mind the particular person injured" (par 149n, p. 180).

Every necessary element of the offenses charged was proved beyond a reasonable doubt. There is no indication that accused had been drinking; he was examined prior to trial by a board of medical officers of the 10th General Hospital on 7 March 1947, after a prolonged period of hospitalization and observation and was found to be able, at the time of the alleged offenses, to distinguish right from wrong, to adhere to the right, and at the time of the trial, to cooperate intelligently in his defense. No issue of insanity was raised at the trial.

6. The charge sheet shows that accused is 26 years of age. He enlisted at Ala-e, P.I., on 15 June 1946 for three years with no prior service. The clinical abstract attached to the report of the board of medical officers who examined accused states that he sustained numerous grenade wounds while serving as a guerilla. He completed the third grade in grammar school and has no record of difficulties with the civil authorities.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons

stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.



, Judge Advocate

, Judge Advocate

, Judge Advocate

(208)

JAGQ - CM 324440 1st Ind

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

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 Mauricio Ibanes (10315678), Battery C, 2011th AAA Searchlight Battalion, (PS) (Prov), Headquarters Special Troops, AFWESPAC.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The charge sheet shows that accused is 26 years of age. He enlisted in the Philippine Scouts at Ala-e, P.I., on 15 June 1946 for three years with no prior service. The clinical abstract attached to the report of the board of medical officers who examined accused states that he received numerous grenade wounds while serving as a guerilla. He completed the third grade in grammar school and has no record of difficulties with the civil authorities.

4. I recommend that the sentence be confirmed but in view of all the circumstances of the case including accused's apparent fear of deceased Casino because of their previous encounter and the fact that accused's actions subsequent to the shooting of Casino were impulsive and were accomplished while accused was in an excited condition, recommend that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life, and that as thus commuted the sentence be carried into execution. I further recommend that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

5. Inclosed are a draft of 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 of letter for Secretary of War
3. Form of Executive Action

(GCMO 310, 28 Aug 1947).

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

JAGH - CM 324445

UNITED STATES v. Private HABER SPENCER, JR (18104606), 625th Port Company, Transportation Corps.	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters PHIBCOM, PHILRYCOM, APO 358, 7 and 16 May 1947. To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Haber Spencer Jr., did, in conjunction with Private First Class William L. Rhodes, 3963d Truck Company and Private Samuel W. Henderson, 3526th Truck Company, at Manila, Luzon, Philippine Islands, on or about 27 October 1946, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one John P. Butler, a human being, by shooting him in the body with a carbine.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by general court-martial was introduced. All the members present at the time the vote was taken concurring therein, accused was sentenced to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Private Carl Kemp, Company "C", 97th Engineer General Service Battalion, APO 74, testified that at about 2115 hours on the night of 27 October 1946, as he was walking down the road between the officers' quarters and the "PX", a jeep approached and stopped beside him. Someone said, "get in,

Kemp", and he did so. Sergeant Vincent Milton was the driver of the jeep, and riding therein were Sergeant Nelson and Privates Butler, Martin, Henderson and Rhodes (R. 14, 15). The jeep proceeded to a corner, where all its occupants got out, and Martin and Butler were searched by Nelson. At that time, accused came up, and asked Butler if he was the one who started the trouble the night before. Nelson then told witness that accused and Butler were supposed to have a fist fight, and he (Nelson) did not want them to fight around the Enlisted Men's Club, as it might cause the club to be closed, and that Milton was going to take them to the road ahead where they could fight. Milton said witness "could go along to keep anyone from drawing weapons." Then all the parties named, except Nelson, got back into the jeep, and it proceeded down Espania Avenue where it stopped and all parties dismounted (R. 16), except Milton, who turned the jeep around and started back (R. 17). During the ride accused was "upset", and was talking with Butler about the latter having accused's friends put in the stockade (R. 28). At this time Rhodes and Henderson each had a carbine, and the accused, as he got out of the jeep, picked up a "sub-Thompson" (R. 17). Butler was unarmed (R. 24). Witness said that the following then occurred: Henderson hit Butler and knocked him down; Butler got up; someone said "It's your turn now, Spencer", and accused hit Butler with his fist and knocked him down; Butler got up again; Henderson fired a shot and Butler grabbed his stomach and fell; the rest of the party started walking away, but Rhodes turned back and fired a shot with his carbine. The party then went back to the Enlisted Men's Club (R. 17, 18). During this affray accused and Butler were talking, but witness didn't remember what was said (R. 21, 22).

Alvin J. Martin, who had been discharged from the Army, was a witness for the prosecution, and testified that on or about 27 October 1946 he was in the Army and that on that night he saw accused for the first time in a jeep outside the "PX" next to his outfit, near Manila. Witness was with Butler at the time, and accused jumped out of the jeep and told the two of them to get into it (R. 40). Witness stated that they had no choice but to obey the order, "because we was surrounded and they all got guns" (R. 41). He then testified:

> "We got into the jeep and drove to a corner of the 3526th Motor Pool and when the jeep stopped, Spencer (accused) told us to get out of the jeep. Butler stepped out of the jeep; I stepped out of the jeep. Then Spencer slapped Butler and put a gun on Butler's stomach and he said, 'Yes, this is the fellow that pulled a gun at me.' So Nelson called Spencer and Kemp on the side and told them something, but I didn't hear. So after Nelson talked with them, they approached the jeep and Spencer told us to get into the jeep and Nelson told the driver to 'take them down to the old 93rd and let them go.'"
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> * * * * *
>
> "We got into the jeep. Nelson told Spencer to take us to the old 93rd. When we got there, Spencer said it was not enough, and

so the jeep drove on a little further and then Sgt Milton, the driver of the jeep, made a 'U' turn and we all got out and after we got out, he turned out the lights and drove off. Spencer hit Butler in the face and when he got up, well, Kemp had the clip of the Thompson and he hit Butler over the head, and Rhodes - no, not Rhodes - but he hit him with a carbine." (R. 41)

And later, on cross-examination:

"Q. I understood you to say that someone said, 'Give it to him on the left side.' What do you mean by that?

"A. Henderson, he was standing in front of Butler with a carbine and Spencer walked to him and told him, 'Give it to him on the left side.' It looked to me that they were going to shoot him." (R. 44)

* * * * * *

"Q. Then it is possible that someone else could have said, 'Give it to him on the left side'?

"A. No, sir, because I was standing here and Rhodes was standing here (the witness indicated that Pvt Rhodes was standing on his left) and Spencer was standing here with Henderson standing there (the witness again indicated that Pvt Spencer was standing on his right side and Pvt Henderson was on the right of Pvt Spencer) and I didn't exactly say anything but I was listening. So I seen Spencer went over to Henderson and said to him, 'Give it to him on the left side.'

"Q. Did you recognize it was Pvt Spencer's voice?

"A. I didn't recognize his voice but I saw him."

* * * * * *

"Q. Could it have been possible that although Pvt Spencer was standing on your side, someone else said it?

"A. It could have been possible but I was looking in his mouth when he said it.

"Q. Was anybody talking at this time?

"A. No, sir, except Pvt Spencer." (R. 46)

And on examination by the Court:

"Q. Do you remember what you said awhile ago when you were asked the question, 'Did Pvt Spencer fire a shot?' and you started to reply, 'No, sir, Spencer didn't fire a shot but he gave the orders', do you remember that?

"A. Yes, sir, I do.

"Q. What do you mean by that remark that Pvt Spencer gave the orders?

"A. What did I mean by that? Spencer, he gave the order to shoot. Spencer had the sub-Thompson but he didn't fire a shot but called to Henderson, he walked over to Henderson, leaned over to him and told him 'to give it to him on the left side.'"(R.47)

Private Rhodes and Henderson also testified for the prosecution. Rhodes testified that he was on the corner near the Enlisted Men's Club on the night and at the time stated by Kemp and Martin, when accused called to him (R. 31), and told him to go with them (R. 32). From there until the jeep stopped at the scene of the affray, his testimony parallels that of Martin and Kemp. From that point, his testimony was as follows:

"Q. And then what happened?

"A. Everyone got out of the jeep. Spencer told the driver, 'You can return if you want to', and the driver said, 'What are you going to do with these weapons?' 'Oh, yes', he said and took the carbine and gave it to me and then he took the other carbine and gave it to Henderson and he got the sub-machine gun and then the jeep pull off. I slung the rifle on my shoulder and, at that time, I asked where the Filipinos were supposed to be because the Filipinos were making trouble at that time. Spencer said that there were no Filipinos - it was Butler. They were supposed to have a fight. So I said, 'That don't concern me.' And about that time, Spencer talked to Butler, 'Why did you pull a .45 at me that night'? And Butler said, 'I didn't strike you', and then Spencer struck Butler, and when Butler got up, Henderson next struck Butler and when he got up again, Spencer struck him again and Butler went down.

"Q. Then what happened?

"A. So before Butler got up the last time, Kemp struck him with a magazine or clip of the sub-Thompson. From that time, Kemp grabbed Butler and stomped him in the face. Then Kemp said, 'What have you got to say?' And then Butler was struck by Spencer with a carbine. Then Martin came up and said, 'What is all this about?' and I said, 'I don't know. Let's get out of here.' And so me and Martin started back toward the highway and then I heard a shot. I turned around and I saw Butler was on the ground, and I said to Martin, 'We're in trouble. Let's get out of here.' Then I heard another shot and we run and when I looked around I saw Spencer; he was removing the jacket from Butler and he put it in his hands, and then we started back to the Enlisted Men's Club." (R. 32, 33)

On re-direct examination he gave the following testimony pertinent to accused's leadership of the party:

"Q. Who pointed out the direction that the jeep was to go when you left in front of the 3526th Motor Pool?

"A. Private Spencer, sir.

"Q. Who told the driver of the jeep where to stop if it did stop?

"A. Private Spencer, sir."

* * * * * *

"Q. Who if anybody gave the most instructions from the time you left from the 3526th Motor Pool to the time you stopped and the jeep was turned around?

"A. The only one I heard saying anything was Spencer.

"Q. Was Pvt Butler armed when you got to where the jeep turned around?

"A. I don't know.

"Q. Did you see him use any arms?

"A. No, sir."

* * * * * *

"Q. How can you explain the three guns that were on the scene of the incident?

"A. I told you that the weapons were in the jeep when I got to the jeep and the weapons were not passed around until the driver said, 'What are you going to do with the weapons?' and Spencer said, 'We'll keep them here.'

"Q. Did Pvt Spencer have a weapon when he struck Pvt Butler?

"A. Yes, sir.

"Q. Did Pvt Henderson, at that time, have a weapon?

"A. Yes, sir, he had a weapon." (R. 34, 35)

Henderson testified that at about 1930 hours on the night stated by the other witnesses, he was in a bar with Kemp, during which time Butler and Rhodes had an argument, and that after the noise quieted down Kemp told witness "We wanted to get that fellow" (Butler). Later,

witness left the Club (R. 36). His testimony as to the events which followed was:

"Q. And then what happened?

"A. I just keep walking around and then I decided to leave to go to my girl friend's house. When I left the club, I passed the officer's quarters.

"Q. Looking at that sketch, will you show the court where this club is that you speak of?

"A. (The witness pointed to the Enlisted Men's Club drawn on the sketch) and there was a pass running from the club through the street to where the PX is on. So I goes out of the club, I gets on the street, passing the officers' quarters, to where the PX is. By the time I got there in front of the PX, I was called by someone from a jeep parked in front of the PX, and I found out later who called me. It was Spencer. Private Spencer got out of the jeep and called me and he asked me to come with him. He said that some civilians were starting some trouble. So I went with him because I thought he was telling the truth since we had been in trouble with some civilians. When I got to the jeep, there was Sgt Milton, Sgt Nelson, Pvt Rhodes, Pvt Kemp, Pvt Martin, and Pvt Butler in the jeep, and we got in the jeep. The jeep turned around and went down to here (the witness pointed to a side of the 3526th Motor Pool) in the 3526th Motor Pool and when we got in front of the gate of that motor pool, the jeep stopped and Spencer, he asked them to get out of the jeep. All of the fellows got out including myself, and when Pvt Spencer was talking, he had Pvt Martin and Pvt Butler standing and each patting him down. At that time, I didn't pay no attention to it because I had my mind on what Spencer told me, and he said, 'Let's go' and we all got back into the jeep.

"Q. And you remember who said, 'Let's go'?

"A. I just heard he said, 'Let's go.' And we all got back to the jeep, but Sgt Nelson went back across the street to the PX, and we all went on, and then we hit Espania Avenue and we cut to the right and when we got about a quarter of a mile, when we got there, Pvt Spencer said, 'This is far enough.' And then the sergeant who was driving, I said it before but I can't recall his name, he made a 'U' turn and then we all got out. When we all got out, Spencer told him to go ahead and he drove off. Spencer then gave Rhodes a carbine, he gave Pvt Kemp a sub-Thompson, and I got the other carbine, and before going on the back of the road, Spencer, he picked up the magazine of the sub-Thompson and he gave it to Kemp, and then he tells me

to stand there on the road in case any civilians come up, I was to let him know. And they went back off the road. I stayed there on the road for about, let's say, between five and ten minutes and then I heard a shot. When I heard a shot, I heard clutters near me and I saw they were coming out of the bushes. I asked Pvt Spencer who shot and he said, 'Don't worry.' And we got back to the Enlisted Men's Club. I found that all of us that went were all there, and Pvt Spencer said, 'I'll take the weapons,' and he took the weapons and I went back to the club in my outfit.

"Q. Who, if anybody, gave the most instructions that night?

"A. There was only one giving orders.

"Q. Who was that?

"A. That was Pvt Spencer.

"Q. Did Pvt Spencer tell the sergeant who was driving the jeep what to do as to stopping, turning, or where to go?

"A. He told him, the sergeant, to get us to Espania Avenue then Spencer said, 'This is far enough' and after we dropped off, he told him to go ahead.

"Q. In or near what city did all these happen?

"A. This was in Manila, Luzon, Espania." (R. 36, 37).

The fact that Butler was killed as a result of gunshot wounds was established by Dr. Salafranca, Assistant Pathologist of the 3rd Medical General Laboratory, who assisted in the autopsy (R. 8, 9; Pros Ex 2). Witness estimated that Butler died about 0600 or 0700 hours on 28 October 1946 (R. 10).

It was established by competent evidence that accused was in the military establishment at the time.

4. The Law Member explained to accused his rights as a witness, and accused elected to remain silent (R. 53).

5. After the prosecution rested, the defense made a motion "which bars jurisdiction of this court on the ground that the Trial Judge Advocate has not proved that the man was subject to military control on 27 October 1946" (R. 50). Further evidence on this point was then introduced (R. 51, 52), at the conclusion of which the court denied the motion.

The record reveals the following with reference to accused's status: He was arraigned as Private Haber Spencer, Jr., and pleaded not guilty to the specification so describing him (R. 4, 5). Captain Haskins identified accused as Private Spencer, and stated that on 27 October 1946 accused had been in witness' company for approximately two months

(R. 13), and that while he couldn't say definitely that accused was in the military service of the United States, he had no reason to believe that accused was not in the Army of the United States (R. 13, 14). Witnesses Kemp (R. 17, 24, 25, 27, 28, 30), Rhodes (R. 34), Henderson (R. 35, 36, 37, 39), and Martin (R. 46, 48) each referred to accused as Private Spencer. Witness Martin also testified that on the night of 27 October 1946, at the scene of the murder, accused was in military uniform (R. 43). Captain Doyle stated that on 18 February 1947, during an official investigation, a First Sergeant told witness in the presence of the accused, that accused was a member of the First Sergeant's organization, the 625th Port Company, on 4 October 1946, and accused was subsequently treated as a member of the Armed Forces of the United States (R. 52). After the return of the findings by the court, the trial judge advocate read data as to pay and service of accused, which he (accused) admitted to be correct (R. 55).

Jurisdiction is a fact and not a matter of pleading (Givens v. Zerbst, 255 US 1). In considering the motion of the defense the court had before it the accused's plea to the general issue, his admission of the correctness of the statement concerning his army service, the charge sheet (which is a part of the record of trial (CM 258081, Renfrow, 5 BR (ETO) 243; Dig Ops JAG, 1912-1940, sec 390 (1), p. 194)), and the testimony of several witnesses. In the opinion of the Board, these were ample facts upon which the court could base its decision as to whether the accused was in the military service, and in so deciding we can see no error. (See CM 304993, Lynch), 15 BR (ETO) 117).

6. Consideration of the entire record reveals that the following facts are undisputed:

That on 27 October 1946 a soldier named Butler was forced by accused to get into a jeep containing, with the exception of Martin who was forced to enter the jeep along with Butler, other occupants who were there at accused's invitation, and that accused was in charge of the party. That during the journey in the jeep, accused argued with Butler, and charged him of having accused's friends put into the stockade. It is obvious that accused intended that the affray was going to be more than a mere fisticuffs, for though Butler was unarmed accused armed himself with a "sub-Thompson" and armed each of his accomplices Henderson and Rhodes with a carbine. Accused picked and armed his accomplices and with a display of arms forced Butler to accompany him. He selected the spot for the fight and gave all the orders. He was without doubt the ring-leader of the "gang" whose unprovoked attack on an unarmed man resulted in a brutal homicide. There is some conflict of testimony as to who actually fired the shots, but such might be expected when a group of unprincipled men, joined together in the commission of a felony, are apprehended and brought to a court of justice after the successful accomplishment of a crime. But it is without dispute that accused, Rhodes and Henderson were all present and were the only ones armed and that

Butler died as a result of gunshots fired at this time and place. Kemp testified that Henderson and Rhodes fired the two shots, and Martin, obviously not an accomplice in the homicide, confirmed Kemp's testimony and testified further that Henderson, who fired the first shot, did so on order of accused. This testimony, together with the other facts and circumstances set forth in the record, furnish more than adequate basis for the finding that accused was guilty of the Specification and the Charge.

Murder is defined as the unlawful killing of a human being with malice aforethought. "Malice aforethought may exist when the act is unpremeditated. It may mean anyone or more of the following states of mind preceeding 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 * * *" (MCM, 1928, par 148a). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Crim. Law, 12 Ed. 1932, Sec 426, pp. 654, 655). The facts established by clear and consistent evidence introduced by the prosecution make out a strong case of murder. No justification for the act of accused or of his accomplices is revealed in the record.

The Specification alleges that accused in conjunction with Rhodes and Henderson killed Butler. Since the crime in question is alleged as having been accomplished by group action, it is only necessary, in order to sustain the findings of guilty, that the proof show that the fatal shooting resulted from the concerted action of the group. It is not necessary to show that accused himself did the shooting. The doctrine which imposes responsibility upon a principle for the act of his agent in the perpetration of the crime is a very ancient one. (State v. Jenkins, 94 Am. Dec 132; United States v. Ross (Fed Cas. #16, 196; CM 248793, Beyer et al, 50 BR 21 - 37). It is apparent here that accused is guilty of the murder of Butler as charged.

7. The charge sheet shows that accused is 24 years of age and that he enlisted in the Army on 17 April 1942, for the duration plus six months.

8. 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 finding of guilty and the sentence and to warrant confirmation of the sentence. Death or imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

(218)

JAGH - CM 324445 1st Ind

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

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 Private Haber Spencer, Jr. (18104606), 625th Port Company, Transportation Corps.

2. Upon trial by general court-martial this soldier was found guilty, in conjunction with Private First Class William L. Rhodes, 3863d Truck Company and Private Samuel W. Henderson, 3526th Truck Company, of the murder of a fellow soldier, in violation of Article of War 92. Evidence of one previous conviction by general court-martial 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 pursuant to 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 and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of the natural life of accused, that the sentence as thus commuted be carried into execution, and that a 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 recommendations into effect, should such recommendations meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 - Record of trial
2 - Draft of letter
3 - Form of Executive action

(GCMO 96, 22 Dec 1947)

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

AUG 18 1947

JAGQ - CM 324460

UNITED STATES	)	SECOND ARMY
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 26 June 1947. Dismissal and total forfeitures.
First Lieutenant JOHN T. HALFERTY (O-1550395), Ord. Company I, 3rd Training Battalion, CIC Center, Holabird Signal Depot, Baltimore, Maryland.	)	

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN And KANE, Judge Advocates

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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 holding, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant John T. Halferty, Company I, Third Training Battalion, Counter Intelligence Corps Center, did, at Holabird Signal Depot, Baltimore, Maryland, on or about 18 February 1947, with intent to defraud, wrongfully and unlawfully make and utter to the Holabird Signal Depot Exchange, Holabird Signal Depot, Baltimore, Maryland a certain check, in words and figures as follows, to wit:

18 Feb. 1947 No.

Northern New York Trust Co.
Watertown, New York

Pay to the order of Cash $30.00

Thirty and 00/xx Dollars

/s/ John T. Halferty
1st Lt Ord Dept O-1550395

Gibsons 1104

and by means thereof, did fraudulently obtain from the Holabird Signal Depot Exchange, Thirty Dollars and no cents ($30.00) in payment of said check, he, the said Lieutenant Halferty, then well knowing that he did not have and not intending that he should have sufficient funds in the Northern New York Trust Company, Watertown, New York for the payment of said check.

Specifications 2, 3, 4, 5, 6, 7, and 8: Same as Specification 1 with pertinent details as follows:

Spec. No.	Amount	Date	Payee
2	$40.00	19 Feb 47	Holabird Signal Depot PX
3	$30.00	21 Feb 47	" " " "
4	$50.00	21 Feb 47	" " " "
5	$20.00	24 Feb 47	" " " "
6	$10.00	25 Feb 47	Holabird Signal Depot Officers'
7	$10.00	26 Feb 47	" " " " Club
8	$12.20	5 Mar 47	" " " "

Accused refused to plead to the Charge or any of the Specifications and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specifications 5, 7, and 8, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

During the period from 18 February 1947 to 5 March 1947 accused cashed four checks (Specifications 1, 2, 3 and 4) at the Holabird Signal Depot Post Exchange and one check (Specification 6) at the Holabird Signal Depot Officers' Club in amounts varying from $10.00 to $50.00. These five checks amounted to $160.00 for which accused received cash. All of the checks were drawn on the Northern New York Trust Company, Watertown, New York (Pros Exs 1-4, 6). Accused's account with this bank was closed on 30 December 1946; between that date and 1 April 1947 several checks were presented to the bank for payment which were drawn by the accused and endorsed by the Holabird Signal Depot Exchange and the Holabird Officers' Club. Payment on these checks were refused because accused's account was closed. The President of the bank testified that records of that institution show the return of checks payable to the Holabird Signal Depot Exchange dated 18, 19 and 21 February in the amounts of $30.00, $40.00 and $50.00 respectively but this was the only specific and recorded information available. He also stated that on 3 February 1947 he wrote accused stating that the bank had refused to pay a check of $30.00 and advising accused that he had no account in the bank (Pros Ex 9). Reimbursement has been made on all of the checks (R. 24, 31).

After being advised of his rights as a witness, accused elected to remain silent (R. 39. 40).

4. The offenses charged were proved (except as to Specifications 5, 7 and 8, which were disapproved by the Reviewing Authority) beyond any reasonable doubt by competent evidence adduced at the trial. The Board of Review is of the opinion that the findings of guilty are amply sustained by the evidence.

5. The trial was a rehearing which had been ordered upon the disapproval by the reviewing authority of the findings and sentence of the original trial. At the conclusion of the original trial the Court sentenced the accused:

> "to be relieved from active duty in the grade of First Lieutenant promptly upon approval of this sentence, to forfeit any pay and allowances due you for any terminal leave due you upon relief from active duty, to be ineligible for any further active military service for a period of five (5) years from date of return to inactive status, and to be ineligible for any promotion during this five year period."

Two questions are thus presented for consideration: What was the legal effect of the original sentence and does the sentence of the Court on rehearing violate the provisions of Article of War 50½ to the effect that:

> "Upon such rehearing * * * no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding:"

As to the validity of the original sentence a similar situation was passed upon in CM 218970, Hendrickson, 12 BR 197 in which it is stated at page 202:

> "The original sentence of the court was, as has been stated above, 'to be relieved from active duty, and to have your commission as a reserve officer terminated.' This purported sentence was beyond the jurisdiction of the court to adjudge, did not constitute a legal sentence, and was therefore void and of no effect."

and at page 203 -

> "The original sentence of the court can be construed as no more than a vague, ambiguous recommendation to higher authority, and does not constitute a criminal judgment. Therefore, this sentence is void and of no effect."

The principle enunciated in the Hendrickson case, supra, likewise renders null and void that portion of the sentence rendered at the original hearing in the present case which provides "to be ineligible for any further active military service for a period of five (5) years from date of return to inactive status, and to be ineligible for any promotion during this five year period." Both of these purported punishments are substitutions by

the court of its own administrative determination for the determination imposed by law upon other officers and agencies. Calling of a reserve officer to active duty, and promotion of a reserve officer while in an inactive status are within the province of the President and the Secretary of War. While loss of files on the Regular Army promotion list is a recognized punishment for regular Army officers there is no similar custom or usage with reference to Reserve Officers.

The remaining portion of the original sentence:

"to forfeit any pay and allowances due you for any terminal leave due you upon relief from active duty."

is, in the opinion of the Board of Review, also void and of no legal effect. Forfeiture of pay and allowances is a long recognized attribute of courts-martial, wherever the sentence is discretionary with the court. (Winthrop's Military Law and Precedents (2nd Ed., 1920 Reprint p. 427). However Winthrop states at page 428:

"That the terms of the sentence declaring the forfeiture should be so clear and precise that the specific pay and amount of pay proposed to be divested may fully appear; and that the nature and extent of the forfeiture should be evident from the sentence itself without any reference to other source of information being required."

Since that portion of the sentence purporting to relieve the accused from active duty was null and void the forfeiture of pay and allowances due the accused upon any terminal leave due him upon relief from active duty is necessarily only effective in futuro and cannot be presently computed in either time or amount. Although this part of the sentence would appear to be of a punitive nature it may in fact amount to no sentence at all because the accused when relieved from active duty by proper authority may be entitled to no terminal leave at the time of such relief. It is too vague and ambiguous to constitute a criminal judgment. In addition, since the court obviously intended this forfeiture to be a part of the sentence immediately relieving the accused from active duty it is dependent upon that portion of the invalid sentence referring to relief from active duty to give it any degree of exactness as to time and amount.

Having determined that the sentence imposed at the original trial is of no legal effect the principal question requiring consideration is whether in view of this fact, the action of the court on the rehearing in sentencing accused to total forfeitures and dismissal violated Article of War 50½. It is clear from the Hendrickson case supra that a legal sentence could have been imposed by the original court by proceedings in revision. This is true even though punishment for the offenses of which accused was convicted was not mandatory but wholly within the discretion of the court. In the Hendrickson case accused was convicted of several Specifications in violation of Article of War 96 and consequently no mandatory punishment was required but the court could impose any sentence short of death which it deemed adequate. The Board of Review held in that case that regardless of the ineffective sentence originally imposed by the court, the reviewing authority could return the case for proceedings

in revision and require the court to render a valid sentence. In sustaining the sentence thus rendered in the proceedings in revision the Board of Review stated at page 205 -

> "In the proceedings in revision the court sentenced the accused 'to be dismissed the service.' The claim is made for the defendant that this sentence is invalid under the provisions of Articles of War 40 and 50½, in that it constitutes a greater punishment than was first imposed. This contention is not without merit and cannot be summarily dismissed. The answer to this claim, however, is that in the instant case as the first sentence was of no effect for the purpose of having it executed, it was also of no effect for the purpose of placing any limitation upon the power of the court in the proceedings in revision. In short, it was of no effect whatever. The court was, therefore, under no limitation in the revision proceedings by reason of its former purported sentence. The accused has not been twice placed in jeopardy. In Whartons Criminal Law (12th Ed.) Vol 1, page 541, the footnote refers to the case of Grant v State (1894), 33 Fla. 291, 14 So. 757, wherein an analogous case arose. In that case it was stated that a verdict of 'manslaughter in the first degree,' which the court refused to receive because there was no such degree, was not a bar to the jury again retiring and bringing in a verdict of 'murder in the first degree.' It will be noted that the later (valid) verdict was much more severe than the first (void) verdict. Yet the later verdict was upheld. The first purported verdict was a nullity and therefore did not limit the jury in its subsequent deliberation upon a proper verdict."

In the instant case we have a different situation. Accused was tried at the rehearing by an entirely different court than first heard his case. New and different evidence was adduced at the trial. Since the first court failed to adjudge a legal sentence he was deprived of the protection afforded him by Article of War 50½ that in rehearing proceedings:

> "No sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceedings."

Under the Articles of War accused is entitled as a matter of right to have the original court-martial impose a legal sentence which cannot be increased in a subsequent rehearing. In this case the original sentence was a nullity and accused was tried at a rehearing without being afforded that protection granted by Article of War 50½.

Proceedings in revision in such a case are authorized under Article of War 40 and by custom and usage of the service (Winthrop 454-459; Par 83 MCM 1928). The original court could have been reconvened and it then could have adjudged a legal sentence. Such a sentence would protect the rights of accused guaranteed by Article of War 50½ that at any subsequent rehearing, the severity of the original legal sentence could not be increased. Such was not done in this case and as a result the substantial rights of accused were injuriously affected.

In consideration of the above, it is the opinion of the Board of Review that accused was not afforded the protection provided by Article of War 50½ because no legal sentence was imposed by the original court and that the sentence of the court on the rehearing constituted error which injuriously affected accused's substantial rights.

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

C A Johnson, Judge Advocate

E G Schuman, Judge Advocate

Andrew D Kane, Judge Advocate

JAGQ - CM 324460 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Second Army, Fort George G. Mead, Maryland.

1. In the case of First Lieutenant John T. Halferty (O-1550395), Company I, 3rd Training Battalion, CIC Center, Holabird Signal Depot, Baltimore, Maryland, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

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

(CM 324460)

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

1 Incl
Record of trial

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

JAGH - CM 324461

UNITED STATES	)	BOLLING FIELD COMMAND
v.	)	Trial by G.C.M., convened at Bolling Field, District of Columbia, 27-29 May and 2-6, 9 June 1947. Dismissal, total forfeitures, and confinement for one (1) year
Captain JAMES A. BOWER (0-25997), 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 94th Article of War.

Specification 1: In that Captain James A. Bower, Headquarters First Army Air Forces Base Unit, Bolling Field, District of Columbia, did, at or near the Pentagon Building in Arlington, Virginia, on or about 29 January 1947, feloniously take, steal and carry away three (3) typewriters of the value of more than fifty ($50.00) dollars, the property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain James A. Bower, Headquarters First Army Air Forces Base Unit, Bolling Field, District of Columbia, did, at Washington, District of Columbia, on or about 30 January 1947, wrongfully sell to Typewriter Sales and Service Company, one (1) typewriter of the value of about forty-five ($45.00) dollars, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Captain James A. Bower, Headquarters First Army Air Forces Base Unit, Bolling Field, District of Columbia, did, at Washington, District of Columbia, on or about 8 February 1947, wrongfully sell to Smith Typewriter Exchange, Incorporated, one (1) typewriter of the value of about forty-six ($46.00) dollars, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Captain James A. Bower, Headquarters First Army Air Forces Base Unit, Bolling Field, District of Columbia, did, at Washington, District of Columbia, on or about 15 February 1947, wrongfully attempt to sell to Smith Typewriter Exchange, Incorporated, one (1) typewriter of the value of about forty-five ($45.00) dollars, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, all Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for one year, and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Bolling Field Judge Advocate, dated 28 July 1947.

4. Records of the Army show that the accused is twenty-seven years old, married, and the father of one infant child. He was born at Norton, Kansas, completed high school, and attended Kansas State College for two years. On 1 July 1940, he was appointed a cadet of the United States Military Academy, and upon graduation, was appointed, on 1 July 1943, a second lieutenant, Air Corps, Regular Army. He was promoted to first lieutenant on 1 December 1943, and to captain on 16 February 1946. He served as a combat pilot in China and was awarded the Air Medal for meritorious achievement in aerial flight. His efficiency reports show adjectival ratings of superior from date of initial report. There is no record of prior delinquencies in civilian or military life.

5. Consideration has been given by the Board of Review to a brief, with accompanying affidavits, filed by Messrs. Ansell and Ansell, special counsel for the accused.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed. 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. A sentence to dismissal, total forfeitures, and confinement at hard labor for one year is authorized upon a conviction of an officer of violations of Articles of War 94 and 96.

A. L. Hottenstein, Judge Advocate

Judge Advocate

J. W. Lynch, Judge Advocate

JAGH - CM 324461 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 for your action the record of trial and the opinion of the Board of Review in the case of Captain James A. Bower (0-25997), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of larceny of three Government typewriters, value over $50.00 (Spec 1), and the wrongful sale of two of the typewriters, value of $45.00 and $46.00 each (Specs 2, 3), in violation of Article of War 94; and of wrongfully attempting to sell the third typewriter, value of $45.00, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for one year, and forwarded the record of trial for action under Article of War 48.

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

The evidence shows that the accused, on 29 January 1947, removed the three typewriters described in Specification 1, Charge I, from the Pentagon Building, Washington, D. C., and that subsequently, on the dates alleged, he sold two of the typewriters, as alleged in Specifications 2 and 3, Charge I, and attempted to sell the third, as alleged in the Specification, Charge II. Commission of the offenses was substantially admitted by the accused.

The only real issue at the trial was whether the accused was mentally responsible for his acts. As to this, several military psychiatrists testified, as witnesses for the prosecution, to the effect that the accused was mentally competent at the time of the commission of the offenses charged and at the time of trial. Two qualified civilian psychiatrists testified to the effect that in their opinion the accused was not mentally responsible at the time of commission of the acts charged. There was other testimony by lay witnesses indicating that accused had suffered, since his return from overseas combat service, some temperamental changes.

Implicit in the court's findings of guilty of the offenses charged is its determination that the accused was mentally responsible for his acts at the time of the offenses. Upon the evidence adduced at the trial the court was warranted in this determination.

Subsequent to trial, additional evidence, principally in the form of affidavits by accused's associates, was submitted. This additional evidence raised some question as to the adequacy of previous examinations and indicated the advisability of further inquiry into the accused's mental condition. Accordingly I requested that a comprehensive mental examination of accused be conducted by a board of qualified medical officers at a general hospital. The report of the board, which was convened at Valley Forge General Hospital, covers a period of observation from 30 September 1947 to 3 November 1947. Consideration was given in the report to information which was not available to the psychiatrists who initially examined the accused and testified at the trial. The report shows, in substance, that as the result of various mental stresses and conflicts the accused, during the winter of 1946-1947, became increasingly forgetful, depressed, preoccupied, subject to attacks of violent anger and unaccountable acts, and was seemingly not always in complete contact with his environment. The board of medical officers reached a diagnosis of Dissociative Reaction, and concluded that, although accused was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong, he was not able, by reason of the defect noted, to adhere to the right. The Office of the Surgeon General, after examination of the files but without observation of accused, has expressed the view that accused was mentally responsible but was suffering from disorders which impaired his judgment.

It is of particular significance to me that the accused had, prior to the alleged offenses, an unblemished record; that the offenses charged were committed with no attempt toward concealment; and that accused was in no apparent financial need and had no apparent rational motive for his acts. Accused's conduct is, therefore, wholly consistent with the opinion of the board of medical officers to the effect that his conduct was unconscious and uncontrollable.

4. Records of the Army show that the accused is twenty-seven years old, married, and the father of one child. He was born at Norton, Kansas, completed high school, and attended Kansas State College for two years. On 1 July 1940, he was appointed a cadet of the United States Military Academy, and, upon graduation, was appointed, on 1 July 1943, a second lieutenant, Air Corps, Regular Army. He was promoted to first lieutenant on 1 December 1943, and to captain on 16 February 1946. He served as a combat pilot in China and was awarded the Air Medal for meritorious achievement in aerial flight. His efficiency reports show adjectival ratings of superior from the date of initial report. There is no record of prior delinquencies in civilian or military life.

5. In view of all the evidence including the findings of the board of medical officers at Vallege Forge General Hospital that the accused was not mentally responsible at the time of the commission of the alleged offenses, I do not believe guilt is established beyond reasonable doubt and therefore recommend that the findings of guilty and the sentence be disapproved. Inclosed is a form of action designed to carry this recommendation into effect, should it meet with your approval.

CM 324461

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 40,(DA) 6 Feb 1948).

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

JAGK - CM 324462

18 SEP 1947

UNITED STATES v. Privates BENJAMIN CHISOLM (RA 33812851), JOHNNIE HUBBARD (RA 15206031), and JEREMIAH WILLIAMS (RA 44160223), all members of 535th Signal Heavy Construction Company	FIRST U.S. INFANTRY DIVISION Trial by G.C.M., convened at Grafenwohr, Germany, 12 and 13 June 1947. EACH: Dishonorable discharge and confinement for life. Penitentiary.

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

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

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

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

Specification 1: In that Private Benjamin Chisolm, Private Johnnie Hubbard, and Private Jeremiah Williams, all members of 535th Signal Heavy Construction Company, acting jointly, and in pursuance of a common intent, did, at Gräfenwohr, Germany, on or about 4 May 1947, wrongfully and unlawfully enter the dwelling of Fritz Diesenbacher, with intent to commit a criminal offense, to wit, assault and battery, therein.

Specification 2: In that Private Benjamin Chisolm, Private Johnnie Hubbard and Private Jeremiah Williams, all members of 535th Signal Heavy Construction Company, acting jointly, and in pursuance of a common intent, did, at Grafenwohr, Germany, on or about 4 May 1947, wrongfully and unlawfully enter the dwelling of Fritz Diesenbacher, with intent to commit a criminal offense, to wit, rape, therein.

Specification 3: In that Private Benjamin Chisolm, Private Johnnie Hubbard and Private Jeremiah Williams, all members of 535th Signal Heavy Construction Company, acting jointly, and in pursuance of a common intent, did, at Grafenwohr, Germany, on or about 4 May 1947, with intent to commit a felony, viz., rape, commit an assault upon Josephine Diesenbacher, by wilfully, and feloniously,

and forcibly grasping and holding her, by dragging her across a room, by forcibly throwing her onto a bed, and by detaining her by physical force.

NOTE: Finding of not guilty as to Hubbard and Williams.

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

Specification: In that Private Benjamin Chisolm, Private Johnnie Hubbard and Private Jeremiah Williams, all members of 535th Heavy Construction Company, acting jointly, and in pursuance of a common intent, did, at Grafenwohr, Germany, on or about 4 May 1947, forcibly and feloniously, against her will, have carnal knowledge of Gretl Diesenbacher.

Each accused pleaded not guilty to all charges and specifications. Accused Chisolm was found guilty of all charges and specifications. The accused Hubbard and Williams were found guilty of all charges and specifications excepting Specification 3 of Charge I of which they were found not guilty. Evidence of two previous convictions was introduced as to the accused Chisolm. Evidence of one previous conviction was introduced as to each of the accused Hubbard and Williams. 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 might direct, for the term of his natural life. The reviewing authority approved the sentence as to each, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of evidence and law contained in the Staff Judge Advocate's review. The only portion of the record of trial which requires further consideration is accused Williams' participation in the rape charged in the Specification of Charge II.

At the time Gretl Diesenbacher was pulled from the bedroom by the accused Chisolm (see Par III 1, b, of review) Williams and Hubbard accompanied him into the hall (R 35,41,46). The rape occurred within one meter of the bedroom door and in a hallway which was approximately three feet by seven feet (R 45). During the rape the accused Williams was standing in a corner of this hall (R 46). Before Chisolm completed his act of intercourse the military police arrived at the house.

From the additional facts set forth it appears that the accused Williams was present at the time of the rape of Gretl Diesenbacher. The accused Williams had been an active participant on the housebreaking immediately preceding the rape. He was present at the rape of Gretl Diesenbacher by his associates and the records fail to show any resentment towards his confederates or concern for

the victim. From the facts the court was justified in finding that all accused were acting together and that Williams was present at the rape of Gretl Diesenbacher under such circumstances as to show he assented to the rape, lent to it his approval and was aiding and abetting the same (CM 321915, McCarson; CM 284438, Rape, 14 BR (ETO) 131,138; CM 287064, Cooper, 14 BR (ETO) 339, 353).

4. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, Section 2801, District of Columbia Code.

Robert D. Gilmore, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert S. Stroop, Judge Advocate

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

JAGK - CM 324463

19 SEP 1947

UNITED STATES v. First Lieutenant FREDERICK J. BOHAN (O-676911), Air Corps, and First Lieutenant WILLIAM CANADA (O-1113626), Corps of Engineers	)	FIFTH AIR FORCE Trial by G.C.M., convened at Headquarters, Far East Air Forces, Tokyo, Japan, 10 June 1947. EACH: Dismissal

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

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

2. The accused were tried in a common trial upon the following charges and specifications:

CANADA

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

Specification: In that, First Lieutenant William Canada, Company B, 808th Engineering Aviation Battalion, did, at Tokyo, Honshu, Japan, on or about 31 March 1947, with intent to do her bodily harm, commit an assault upon Emi Amano, a Japanese national, with a dangerous weapon, to wit, a pocket knife.

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

Specification: In that, First Lieutenant William Canada, Company B, 808th Engineering Aviation Battalion, was, at Tokyo, Honshu, Japan, on or about 31 March 1947, grossly disorderly in uniform in the presence of Japanese nationals, to the prejudice of good order and military discipline.

BOHAN

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

Specification: In that, First Lieutenant Frederick J. Bohan, Company B, 808th Engineering Aviation Battalion, did, at Tokyo, Honshu, Japan, on or about 31 March 1947 with intent to do her bodily harm, commit an assault upon Taku Amano, a Japanese national, by striking her on the body with his hands and pushing her to the floor.

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

Specification: In that First Lieutenant Frederick J. Bohan, Company B, 808th Engineering Aviation Battalion, was, at Tokyo, Honshu, Japan, on or about 31 March 1947, grossly disorderly in uniform in the presence of Japanese nationals, to the prejudice of good order and military discipline.

The accused Canada pleaded not guilty to and was found guilty of the charges and specifications relating to him excepting however the words "with a dangerous weapon, to-wit, a pocket knife" substituting therefor the words "with his hand" of the Specification of Charge I. The accused Bohan pleaded not guilty to and was found guilty of the charges and specifications applicable to him. Evidence of one previous conviction was introduced as to the accused Canada. No evidence of any previous conviction was introduced as to the accused Bohan. Each accused was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the specification of Charge I and Charge I in the case of each accused as involved a finding of guilty of assault in violation of Article of War 96, approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution

In November 1946 the accused, First Lieutenant Bohan became acquainted with a Japanese student named Miss Emi Amano residing at 2915 Banchi, 4 Chome, Nishi, Magome Machi, Ohta-Ku, Tokyo, Japan, and the officer had visited her home on several occasions (R 7, 84). Emi understood and could speak English. On the evening of 31 March 1947 both of the accused went to Emi's home in a jeep, parked the car in front of her house and demanded entrance thereto. Emi answered the alarm at the door and asked the accused, "What you want." They responded by forcing the door and when it became apparent that they would remove the door she opened it and again requested that they explain their conduct. Bohan introduced Canada as "my best friend" (R 8, 40). In the house with Emi was her grandmother, Taku Amano, age 78, and a male friend named Takashi Kano. The accused entered the house, Bohan carrying a can of Carnation milk in one hand and a can of fruit juice in the other. Canada carried a bottle of Three Feathers whiskey. Both were staggering and appeared to be drunk. Bohan

ordered Kano to leave the house and after having been threatened he departed (R 9, 12, 42). Canada attempted to force his attentions upon Emi. She moved away from him and requested that the officers leave the house. After an argument involving not only Emi's personal inclinations but customs of the Japanese people, the accused Canada drew a knife from his pocket, opened it and held it over Emi's head in a threatening manner. She stated, "You kill me? That's a joke," and "This is not a hotel, this is my house, please go back." A tussle ensued and as a result Canada received a slight cut on his hand. Taku Amano, the grandmother, interceded and Bohan pulled her away causing her to fall to the floor. He then slapped Emi. Canada threw a shoe at Taku and struck Emi several blows on her head and body with his fist (R 14,18-20,41,54). The accused appear to have been at the Amano house for about 45 minutes before departing (R 39).

Sachio Matsumoto, an employee at the Ministry of Agriculture, his wife Taki and son Keichi resided at No. 785,3-Chome, Hegashi, Magome, Ohta-Ku, Tokyo, their residence being in the immediate vicinity of the Amano's. At about 2100 hours on the night in question the accused, without permission of the occupants, entered the Matsumoto residence. They removed their shoes and the accused Bohan reclined on a mat. Canada made improper advances to Taki in the presence of her husband and son, offering her 500 yen. She declined the offer, stating that she could not comply with the request and that her home was not a geisha house. Bohan kicked her and told her to "shut up". Canada became abusive, then fondled and attempted to kiss her. The Japanese testified that both of the accused were drunk (R 56-58, 67). At about 2300 hours Taki fled with her stepson, Keichi, to the Amano home where they spent the night, and both accused occupied a room in the Matsumoto residence (R 62,64).

4. For the Defense

W. Lee McCauley, a civilian specialist attached to the 808th Engineer Aviation Battalion, testified that at about 1700 during the evening of 31 March 1947 he visited Canada's hut and the two consumed a bottle of whiskey. When he left Canada was drunk and staggering. McCauley asserted that accused Canada had considerable ability in handling men and equipment (R 77-80).

First Lieutenant James D. Vandergrift, Jr., commanding officer of Company B, 808 Engineer Aviation Battalion, stated that he had known accused Bohan since February 1947, that he knew his general reputation for character, and that it was excellent (R 82).

After being advised of his rights as a witness, the accused Bohan elected to take the stand in his behalf. He stated that in August 1943 he was sent to England and assigned to the 8th Air Force. He flew one tour with a bomb group and was returned to the United States in April 1944. At about 1630 hours on 31 March 1947 he participated in a drinking

party with Canada and McCauley. Later he and Canada went to the home of Emi Amano. He remembered telling the "Japanese man" to leave but he did not strike Emi. The witness stated that he saw Canada strike Emi, "and from then on, there wasn't much that we could describe very well, just a lot of noise" (R 85).

The accused Canada was advised of his rights and he elected to be sworn as a witness. He stated that he had been a member of the 25th Armored Engineer Battalion during the European campaign and had experienced some combat. During the evening of 31 March 1947 he drank considerable liquor with McCauley but he did not strike Emi Amano or her grandmother. He had a knife in his jacket on the night in question but did not remove it from his pocket. He played with Emi's dog in the house but did not molest the people therein. It was his first visit to the Amano residence (R 89-94).

5. The testimony adduced by both the prosecution and defense shows that each of the accused was drunk on the evening of 31 March 1947 and that they were in the home of the Japanese girl Emi Amano. The evidence leaves no doubt as to their motives and intentions. When Emi Amano resisted the amorous advances of the accused Canada he became abusive, making threatening gestures tending to put her in fear of great bodily harm, but this did not overcome her resistance. He then took hold of her. The girl's grandmother interceded and accused Bohan forcefully thrust her to the floor. Later in the same evening they proceeded to the Matsumoto residence and made their improper advances upon Taki Matsumoto in the presence of her husband and stepson. Both accused were wearing the uniform of officers of the United States Army. Such conduct was "grossly disorderly" and prejudicial to good order and military discipline.

Simple assault in violation of Article of War 96 is lesser to and included in the various assaults denounced by Article of War 93 (CM 200047, Plants, 4 BR 233, 237; CM 193292, Olles, 2 BR 79, 81; CM 209862, Yaple, 9 BR 143, 147). Consequently, the reviewing authority had authority to approve only so much of the findings of guilty of Charge I and its specification, in the case of each accused, as involved a finding of guilty of assault in violation of Article of War 96.

6. War Department records show that the accused Canada is 31 years of age and completed one year of college before enlisting in the Regular Army in 1941. On 12 May 1943 he was commissioned a second lieutenant, AUS. His record shows two prior convictions by general court-martial for being drunk and disorderly in violation of Article of War 96. He has been awarded the Silver Star and Oak Leaf Cluster thereto. As a platoon leader in the 25th Armored Engineer Battalion, he distinguished himself in combat during January and February 1945 in the European Theater of Operations. His efficiency reports average "Excellent".

The accused Bohan is 25 years of age and married. He received preflight training at the AAFBS, Big Springs, Texas, and was commissioned a second lieutenant, AUS, on 22 April 1943. He served as bombardier on 25 bombardment missions over enemy occupied continental Europe, was awarded the Distinguished Flying Cross with cluster and the Purple Heart. On 24 May 1946 disciplinary action under Article of War 104 was taken against accused for drinking liquor in a public place with enlisted men and for assaulting an enlisted man. His efficiency reports show an average of "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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentences as to each accused and to warrant confirmation of the sentences. Dismissal is authorized upon conviction of a violation of Article of War 96.

Charles J. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elliott R. Adams, Judge Advocate

JAGK - CM 324463 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9566, 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 Frederick J. Bohan (0-676911), Air Corps, and First Lieutenant William Canada (0-1113626), Corps of Engineers.

2. Accused were tried on common trial. As approved by the reviewing authority each of the accused was found guilty of an assault upon a Japanese woman and of being grossly disorderly in uniform in the presence of Japanese nationals to the prejudice of good order and military discipline, in violation of Article of War 96. Each was sentenced to be dismissed the service. The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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 as to each accused.

During the evening of 31 March 1947 the accused drank a considerable quantity of liquor and then proceeded in a jeep to the home of Miss Emi Amano, a Japanese student residing in Tokyo, Japan. Emi spoke English and the accused Bohan had met her in November 1946 and had visited her home on several occasions. Emi's grandmother, Taku Amano, age 78, and a Japanese man named Kano were in the house with her. The accused demanded entrance into the house and Emi refused to open the door, requesting that they state their business. They forced the door and she finally opened it. Bohan entered carrying a can of Carnation milk in one hand and a can of fruit juice in the other. Canada carried a bottle of whiskey. Bohan introduced Canada as his best friend and requested Emi to "be his girl". She refused and requested that they leave her home, stating that her house was not a "hotel". An argument ensued regarding Japanese customs and Emi's disinclination to engage in sexual relations. Canada drew a knife from his pocket, opened it and held it over the girl's head. She scoffed at such gestures, saying, "Kill me, its a joke." In the meantime Bohan had chased Kano from the house. A tussle between Canada and Emi resulted in Canada receiving a slight cut on the hand. The girl's grandmother, Taku Amano, interceded in her behalf and Bohan pulled her away and forced her to fall on the floor. Canada threw a shoe at her. Both accused were admittedly drunk. Both accused then left the Amano house and entered the home of a

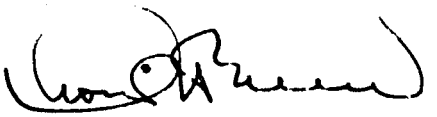
woman, Taki Matsumoto, where, in the presence of her husband and stepson Canada offered her 500 yen to go to bed with him. She refused, saying that her place was not a house of evil and that she was not a geisha girl. Bohan kicked her and Canada fondled her. Taku fled from the house with her stepson but the accused remained in a room of the house.

Both of the accused were in uniform on the occasion in question and admitted being drunk. Bohan testified that he saw Canada strike Emi Amano, but he denied assaulting her grandmother.

Bohan served as bombardier on 25 missions over enemy territory in the European Theater and was awarded the Distinguished Flying Cross with Cluster and the Purple Heart. Canada was awarded the Silver Star and Cluster for gallantry in leading a platoon in combat near Hulhausen, Germany, on 27 February 1945. His platoon received a unit citation. As an enlisted man he received a personal letter of commendation from his commanding officer for service as a member of a maintenance crew at Anchorage, Alaska, in connection with survey flights via Adak to Tokyo. Accused Canada has two prior convictions by general court-martial for being drunk and disorderly. Bohan has received disciplinary action under Article of War 104 for misconduct similar to that involved in the instant case.

In view of all the circumstances, I recommend that the sentence as to each accused be confirmed and carried into execution.

4. Inclosed are forms of action designed to carry into effect the foregoing recommendation, should it meet with your approval.



2 Incls
1 Record of trial
2 Forms of action (2)

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 21, DA, 17 Oct 1947). Bohan

(GCMO 22, DA., 17 Oct 1947). Canada.

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

JAGV CM 324505

7 October 1947

U N I T E D S T A T E S v. Private First Class EDWIN B. SAMPSELL, JUNIOR (13214546), Squadron K, 2532d Army Air Forces Base Unit.	)	FLYING DIVISION, AIR TRAINING COMMAND Trial by G.C.M., convened at Randolph Field, Texas, 18 July 1947. Dishonorable discharge and confinement for two (2) years. 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: (Nolle Prosequi).

Specification 2: (Nolle Prosequi).

Specification 3: In that Private First Class Edwin B. Sampsell, Jr., Squadron A-3, 2532d Army Air Forces Base Unit, did, at San Antonio, Texas, on or about 26 April 1947, feloniously take, steal and carry away one 1946 Buick Sedan, black, bearing Texas State License CX 8602, Motor Number 46315817, of a value of about $2400.00, the property of Colonel R. F. Garland, San Antonio, Texas.

Specification 4: (Nolle Prosequi).

ADDITIONAL CHARGE I: Violation of the 69th Article of War.

Specification: In that Private First Class Edwin B. Sampsell, Jr., Squadron K, 2532d Army Air Forces Base Unit, having been duly placed in confinement in the Guard House on or about 19 May 1947, did, at Randolph Field, Texas, on or about 28 June 1947, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that * * *, did, at Randolph Field, Texas, on or about 28 June 1947, without authority, wrongfully take and use a certain automobile, to wit, 1942 Model, Chevrolet Sedan, Army Serial No. 167238, value of about $1152.00, property of the United States.

Specification 2: In that, * * *, did, at Seguin, Texas, on or about 29 June 1947, without the consent of the owner, wrongfully take and use a certain automobile, to wit, 1935 Model, Black Ford Coupe, bearing 1947 Texas License Number D/B 4980, value more than $50.00, the property of Albert Grimm.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, but reduced the period of confinement to two years, designated the Branch United States Disciplinary Barracks, Camp Gordan, Georgia, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Additional Charges I and II and the Specifications thereunder and the sentence. Discussion will therefore be limited to Specification 3 of the Charge and the Charge.

4. The evidence for the prosecution with respect to Specification 3 of the Charge discloses that on 26 April 1947, between 2015 and 2330 hours, a 1946 black, four-door, Buick Roadmaster Sedan, Texas License No. CX 8602, the property of Robert F. Garland, was taken without authority from a parking lot at "The Tower," San Antonio, Texas. The automobile was next seen by the owner on 17 May 1947 at Marshall, Texas, where it was in the possession of the Chief of Police (R. 6, Pros. Ex. 2; R. 6, Pros. Ex. 3).

Accused's confession, dated 19 May 1947, was properly admitted in evidence (R. 15, Pros. Ex. 4). The accused, in his confession, related certain facts as to the unlawful taking or use at San Antonio, with one Private Eugene Leonard, of several vehicles during the period from 6 April 1947 to 10 April 1947. He further stated that, on or about 12 April 1947, he, Leonard and one Kelly went to the Tower Cafe at San Antonio, where Leonard told Kelly and the accused to wait for him in the rear of the cafe; that Leonard then stole a 1946 Buick sedan, picked up Kelly and the accused, and that they rode around San Antonio before returning to Randolph Field; that Leonard and accused drove the automobile on several occasions; that, on or about 10 May 1947, the accused, Leonard and Kelly went to Mason, Texas, and San Angelo, Texas, in the Buick, returning to San Antonio on 11 May 1947;

that they then went to the Tower Cafe, stole another car, and returned to Randolph Field with both cars; that accused did not see Kelly or Leonard again.

5. A witness for the defense testified that about 1 May 1947 the accused and Leonard came to her home at San Antonio in a black 1946 Buick. Leonard was driving and said he owned the car (R. 38,39). Leonard frequently polished the car, but, when the witness' sister commenced to clean the license plate, which was muddy, Leonard told her to leave it alone (R. 39). The day before Mother's Day (May 11), Leonard, Kelly and the accused went in the Buick to the witness' grandfather's ranch at Mason, Texas (R. 40).

6. The accused elected to remain silent (R. 42).

7. To be held legally sufficient, findings of guilty of larceny must be supported by proof that property of the value alleged, belonging to a certain other person named or described, was taken and carried away by the accused with the requisite fraudulent intent. (Par. 149g, MCM 1928). Particularizing with respect to Specification 3 of the Charge, it was incumbent on the prosecution to prove that the accused stole the identical automobile described in the Specification.

8. There is in this case evidence that a black 1946 four-door, Buick Roadmaster sedan, Texas License No.CX 8602, the property of Robert F. Garland, was taken without authority from a parking lot at The Tower, San Antonio, Texas, between 2015 and 2330 hours, on 26 April 1947. The description of the missing vehicle thus corresponds so far as it goes with that set forth in the Specification. Accused's confession and the testimony of the defense witness establishes that accused was involved in the wrongful taking of a black 1946 Buick sedan, which is otherwise undescribed, at the Tower Cafe at San Antonio, at an unspecified time on 12 April 1947. The only evidence indicating that the automobile taken by accused and his companions was Mr. Garland's automobile is that both vehicles were 1946 black Buick sedans and that the scene of taking was in each case the same. But the date on which Mr. Garland's automobile was missed by him (26 April 1946) and the date on which the accused admits the taking of a vehicle of similar description (12 April 1947) are widely discrepant. There is no evidence tending to reconcile this discrepancy. Therefore, so far as the record discloses, the discrepancy is explicable only on the basis that two different automobiles were involved. The sufficiency of the proof as to the specification in question might be considered doubtful, even in the absence of the mentioned discrepancy, by reason of the lack of adequate identification of the vehicle taken by accused as the vehicle missed by Mr. Garland. (See CM 314174, 5 Bull JAG 209). In any event, in view of the discrepancy, it is manifest that the proof is wholly insufficient to warrant an inference that the accused took the automobile described in the specification.

9. The accused was eighteen years and eight months of age when charges were preferred. He enlisted at Harrisburg, Pennsylvania, on 14 May 1946, for three years, and had no prior service.

10. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 3 of the Charge and legally sufficient to support the findings of guilty of Additional Charge I and its Specification, Additional Charge II and the Specifications thereunder, and legally sufficient to support the sentence.

Wilmot V. Vaughn, Judge Advocate

John G. O'Brien, Judge Advocate

George S. Springston, Judge Advocate

JAGV CM 324505 1st Ind

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

TO: The Commanding General, Flying Division, Air Training Command, Randolph Field, Texas.

1. In the case of Private First Class Edwin B. Sampsell, Jr. (13214546), Squadron K, 2532d Army Air Forces Base Unit, I concur in the foregoing holding by the Board of Review, and recommend that the findings of guilty of Charge I and Specification 3 thereunder be disapproved. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 324505).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

JAGK - CM 324519

25 SEP 1947

UNITED STATES v. Private First Class JAMES L. DAVIS (34533071), unassigned, formerly of 237th Quartermaster Laundry Company and Private WILLIE A. VALENCIA (19028908), unassigned, formerly of "A" Company, 32d Infantry.	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters PHIBCOM, PHILRYCOM, APO 358, 20 May 1947. EACH: 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 soldiers named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused were jointly tried upon the following charges and specifications:

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

Specification: In that Private First Class James L. Davis, unassigned, then of 237th Quartermaster Laundry Company, and Private Willie A. Valencia, alias Private William Franch, unassigned, then of "A" Company, 32nd Infantry, 7th Division, acting jointly and in pursuance of a common intent, did, in conjunction with Seaman Second Class George Sadler, and Jose Ramirez, at U.S. Naval Air Base on Mactan Island, Opon, Cebu, Philippine Islands, on or about 12 January 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, kill one Roberto Baniel, a human being, by striking him on and about the head with a carbine and a rock.

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

Specification: In that Private First Class James L. Davis, unassigned, then of 237th Quartermaster Laundry Company, and Private Willie A. Valencia, alias Private William Franch, unassigned, then of "A" Company, 32nd Infantry, 7th Division, acting jointly and in pursuance of a common intent, did, in

conjunction with Seaman Second Class George Sadley, and Jose Ramirez, at U.S. Naval Air Base on Mactan Island, Opon, Cebu, Philippine Islands, on or about 12 January 1947, feloniously attempt to take, steal and carry away, one boat, LCM, of the value of more than $50.00, property of the United States.

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

3. Evidence for the Prosecution

Mr. Conrado V. Reyes was employed as a finger print analyst by the Criminal Investigation Division, Philippines-Ryukyus Command, and took the fingerprints of one "Private William Franch," whom he identified in court as being the same person as accused Valencia. These fingerprints were forwarded to Washington, D.C. Without objection by the defense, a letter from The Adjutant General's Office, Washington, D.C., dated 9 April 1947 and addressed to the Commanding General, Philippines-Ryukyus Command, was introduced in evidence as Prosecution Exhibit 1. This letter stated that the fingerprints of William Franch were compared and found to be identical with those of "Willie A. Valencia, 19,028,908, who enlisted 16 August 1940" (R 6-7; Pros Ex 1). It appeared from the fingerprint card accompanying this letter that the comparison was made by a person in the Disciplinary Section of the Personnel Actions Branch in the Office of The Adjutant General.

Doctor Leon R. Horlanda was president of the Sanitary Division, Opon Headquarters, Cebu, P.I. He was a Philippine Government physician and, in the absence of an "expert pathologist," performed autopsies on the bodies of deceased persons "killed" in his district. On 13 January 1947 he performed an autopsy at the Mactan Naval Air Base. There was no indication that the body upon which he had performed this autopsy had been in water or that death had been caused by drowning. Death had been caused by skull fractures and deceased had been dead about twelve hours when he examined the corpse at 11:00 a.m. on 13 January. There were three wounds on the right side of the head, one on the left side of the head, two on the right side of the neck and one on the right mandible. The wounds on the head "may have been caused by a heavy instrument, while the wounds in the neck was caused by a sharp instrument." Doctor Horlanda did not know the identity of the deceased at the time he performed the autopsy. He identified Prosecution Exhibit 2, which was admitted in evidence without objection by the defense, as a carbon copy of the "preliminary necropsy report" made by him as a result of the autopsy he had done at the Mactan Naval Air Base on 13 January. This

copy was signed by him. The original was "in the hands of the Justice of the Peace of Opon." The report, dated 13 January 1947, recited that the necropsy, which had been performed at "11:00 A.M. 12 hours after death" had been requested by the "Municipal Mayor and Justice of the Peace" and that the deceased was "Roberto Baniel Male Age 29 years Nationality Filipino." It contained the usual post mortem findings, which were substantially the same as those/to as which Doctor Horlanda testified on the stand, and stated the cause of death to be:

> "Concussion accompanying shock subsequent to fracture of the temporal bone inflected by a heavy blow may be by a butt of a gun or a heavy instrument.
>
> "REMARKS: Death was sudden due to the appearance of the body. There was contracture of the arms and legs, showing the position of the body or action at the time of death."

Doctor Horlanda also identified Prosecution Exhibit 3, likewise accepted in evidence without objection by the defense, as a death certificate signed by him. This certificate, dated 15 January 1947, was made on a printed Government Form ("Municipal Form No. 103") and stated that Roberto Baniel had died at Opon, Cebu, at 10:30 p.m. on 12 January 1947, of concussion of the brain due to fracture of both temporal bones of the skull and that the death was "homicidal" as distinguished from "accidental" or "suicidal." It appears from Section 17 of Municipal Form No. 103 that the physician attending the deceased was responsible for completion of the death certificate (R 7-11; Pros Exs 2,3).

Mrs. Roberto Baniel of Opon, Cebu, testified that her husband, Roberto Baniel, was dead and that he had died on 12 January 1947 (R 15).

On 12 January 1947, Mr. Alejandro Godornes was sergeant of the guard at the Mactan Naval Air Base. Upon inspecting the guards at the Air Base about 9:30 p.m. that day he found that Roberto Baniel was at his post on the wharf leading to the boat pool. Returning from his inspection, he noticed four men heading for the boat pool. One of these men was a negro by the name of Sadler, formerly a guard at the air base, one was white, and the other two were colored. When he relieved the guards at about 11:00 p.m. he discovered that Roberto Baniel was not at his post (R 15-18).

The Naval Air Base was located about a mile from Opon (R 14). Mr. Ramon Ngujo was a coachman and about 9:00 p.m. on 12 January 1947 accepted as passengers accused Valencia, described as a "white man," and a colored man named Sadler. They asked him to drive them to their camp in Opon. On the way Sadler and accused Valencia picked up two girls and, upon arriving at the camp in Opon, each procured a raincoat and the party continued on to the barrio of Lipata. There, Sadler, accused Valencia and the two girls dismounted but told Ngujo to wait. When Sadler and Valencia

returned to the coach the two girls were no longer with them but this time they were accompanied by two "black" men, one of whom was accused Davis. Ngujo was then told to "drive away." He was asked to stop on the road opposite the wharf leading to the boat pool of the Mactan Naval Air Base and his four passengers got off and ran towards the boat pool. Sadler was wearing a Navy uniform and the "other two black men" were wearing khaki. He could not remember what the fourth man was wearing (R 19-20).

Mr. Cipriano Quiniones, a guard at the Mactan Naval Air Base, was present when the guards were relieved about 11:10 p.m. on 12 January 1947 and noticed that Roberto Baniel was not at his post at the boat pool. About six o'clock the next morning, Mr. Quiniones found the "body" of Roberto Baniel on the beach about 200 yards from the boat pool. The body was lying on its left side between the high and low water marks and the clothes thereon were wet. There were "no wounds" on the body "except the neck and with bluish color on the eyes." Mr. Quiniones considered that Roberto Baniel was dead at this time because he "was not moving anymore" (R 21-22).

On 12 January 1947, Ensign Wilfred Wheeler, USNR, was officer of the day of the Mactan Naval Air Base. About 11:15 p.m. that night he received a report that the boat pool guard was missing. Ensign Wheeler thereupon made a search for the guard but could not find him. The boat pool "was crowded. We had two LCMs at the dock, one was running and the other one was perhaps 100 feet away from the dock and it was adrift." The ramp was down on the LCM at the dock. The guard was found "dead on the beach" the next morning about 6:15 a.m. Ensign Wheeler felt the guard's heart and in his opinion the guard was dead. He had the body removed from the beach and made arrangements for an autopsy with "an official representative of Opon." The boat pool guard had been armed with a carbine and one clip of ammunition. When his body had been discovered on the beach, the carbine had been missing. Ensign Wheeler later found the carbine in some bushes near the boat pool, accused Valencia having informed him where it would be found (R 23-24, 42).

Seaman First Class George Sadler had been assigned to the Naval Base at Mactan. He was well known by all the security guards at the base. On 12 January 1947, he was in the company of accused Davis, accused Valencia (known to him as "Bill") and one Ramirez at a shack occupied by him and some other seamen. That day they had planned to remain in the shack until a little after dark and then repair to the boat pool, "fool" the guard, and take a boat. After dark they rode in a little "buggy" to the boat pool where they dismounted and entered a hut located in the area. Seaman Sadler was "pretty well drunk" at this time and was "talking loud." The four men agreed, while in the hut, that Sadler would go to the boat pool to see if there was anyone about. Sadler found a guard at the boat pool and asked him "if there was some people that went there who was supposed to take a

boat and get some trucks from Cebu." The guard replied in the negative and Sadler told him that "there was some fellows who was to go there to take the boat." Sadler left and reported to his companions that there was only one guard at the boat pool. Ramirez and "Bill" then went to the dock where they talked to the guard and finally "grabbed" him and took him to "the shack a little way back on the pier." When Ramirez and "Bill" emerged from the shack, they were "marching the guard." Ramirez got into one of the boats and attempted unsuccessfully to start the engine. Sadler then went to the "other" boat and tried to start its engine. The ramp of this boat was down. At this time accused Davis and "Bill" were standing at the end of the dock with the guard. There was a light shining on the dock which Sadler thought must have been a 500-watt light. As Sadler was starting the engine of the boat he was in, Ramirez came to him and said, "They let the guard escape." Ramirez was "kind of shaky and nervous" at this time. Sadler replied, "The jig is up. I'm moving out of here," and immediately left the boat pool. "Bill" was wearing "just an ordinary blue dungaree" with the sleeves cut off. Sadler would not say it was a "Navy shirt" (R 24-29).

Mr. Jose Ramirez, of Andores, Cebu, spent the night of 11 January 1947 in the house of a mestiza, Mary Watkins. He did not know Mary Watkins by any other name. Privates Franch and Davis also stayed in Mary Watkin's house that night. The three men went to a party at Sadler's house about 4:30 or 5:00 p.m. the next evening where they had a few drinks and did some talking. About 8:30 or 9:00 p.m., Ramirez, Sadler, Davis and Franch got into a "tartanilla" and proceeded towards the city of Opon. On the way they passed the naval camp where Sadler got off. The three men continued on their way. About one kilometer from the naval camp, Ramirez dismounted from the "tartanilla" to visit a house of prostitution and the two remaining passengers continued their journey towards Opon. About 11:00 p.m. that night he returned to Mary Watkin's house and found that Davis and Franch were already there. It had taken him approximately one hour to get to Mary Watkin's house from the time he had left Davis and Franch in the "tartanilla." It was a thirty minute ride in such a vehicle from the naval base to Mary Watkin's house (R 29-35).

At this point in Ramirez's testimony, the trial judge advocate asked him if he had not made contradictory statements before the trial to the effect that he and his three companions had gotten out of the "tartanilla" together and had gone to the boat pool where they had "trouble with the guard," that Franch had attempted to throw a rock at the guard and that the guard had fallen into the water. Ramirez admitted that he had made such statements but that they were untrue and were made "because I had to protect my life in Cebu. I was in prison and I had to protect myself from being cut with a bolo" (R 35-36). The following then appears in the record of trial:

"EXAMINATION BY THE COURT

"Question by the law member:

"Q. Are you at present quartered in the stockade?
"A. Yes, sir.

"LM: The testimony of the witness will be stricken from the record.

"The court had no further questions.

"There being no further questions, the witness was excused and withdrew." (R 37)

Felisa Yamson was a housewife residing at Opon, Cebu. On the night of 11 January 1947, Ramirez and accused Davis and Valencia came to her house and stayed overnight. They left the next morning. Sometime after 11:00 p.m. on 12 January, Davis and Valencia returned to her house and announced that they were going to sleep there again. Ramirez returned later, at "almost 12 o'clock." They had a small package with them which they left in the house. The package was wrapped in manila paper and was about twelve inches long, six inches wide and a little less than an inch thick (R 11-13).

Mrs. Lina Thompson saw one of the accused, known to her as "Bill," in a cafe in Opon, Cebu, about 8:15 p.m. on 12 January 1947. Sadler was with him at this time. Sadler borrowed a flashlight from Mrs. Thompson, whereupon "Bill" took the flashlight and left the cafe for about five minutes. When he returned, he was carrying a package wrapped in brown paper. This package was about half an inch thick, twelve inches long and six inches wide. The two men left the cafe about 8:50 p.m., "Bill" acting as if he "was in a rush" (R 13-14).

The pre-trial statements of accused Valencia and Davis were admitted in evidence after a showing of their voluntary nature as Prosecution Exhibits 4 and 5, respectively. The law member permitted them to be read to the court, deleting therefrom all names other than those of the respective makers (R 37-40).

In his pre-trial statement, accused Valencia stated that he was "William Franch, Pvt, ASN 1902352, 32 Regiment, Co A, 7th Inf. Division, APO 957." He was absent without leave on the Island of Bolblob when, about 6 April 1945, some soldiers from the Americal Division landed on the island. He turned himself in to them and was sent to the Island of Cebu in confinement. Later, he was sent to a replacement depot where he stayed until July. He left the replacement depot "for no good reason" and when "the other American soldiers moved out" he stayed on the Island of Cebu, living with aFilipino civilian. On 11 January 1947, he and two companions stayed all night with some people who lived approximately 4-1/2 kilometers from the naval base. He stayed there because a sailor from the naval base was going to show him and his two friends "where the boat was" with which they were thinking of "making some easy money." He met the sailor who was to point out the boat at the latter's shack about 4:00 p.m. on 12 January. About 7:00 p.m. they went to the naval base and accused Valencia procured a package containing a Navy uniform. They then repaired to a "pone" where they drank some beer. When accused Valencia and the sailor returned to the sailor's shack, Valencia's two companions were also there.

After talking for some time, the four men got in a "cartella" and rode to the naval base. They stopped near the road leading to the pier and "went down to the shadows along the road" until they came to the "head," which they entered. The sailor decided to go down to the pier and talk to the guard. When he returned, he reported that the guard was new "and didn't know anything" and that he had told the guard that accused Valencia was a new sailor and was to take a boat to Cebu. After a suit of rain clothes had been obtained for one of their number from the sailor's barracks, the group decided that accused Valencia and another would "get control of" the guard. The sailor and the other member of the party were to wait and the sailor was not to leave until he saw the boat was gone. Valencia approached the guard and asked which boat he was to take out. The guard replied that he did not know. Valencia walked to the first boat on his right but when he turned around he noticed the guard was approaching him. The guard, however, then ran back into the phone booth. After some conversation with the guard during the course of which the guard had stated that the officer of the day was not "there," Valencia's cohort said, "Let's go," and Valencia "grabbed" the guard. He stumbled with the guard and fell to the floor with him, his friend taking the guard's carbine. The guard asked them not to kill him and Valencia told him he would not be hurt if he shut up. Valencia put the guard in a boat and the carbine was given to the third member of their group who had arrived in the meantime. Accused Valencia and the other man them each attempted to start a boat. Valencia, being unsuccessful, got back up on the pier. The guard was told to get out of the boat he was in and he also got up on the pier. The man with the carbine gave it to accused Valencia and told him to hit the guard. Valencia refused and swung the carbine at his companion. As he swung, the guard was released and he "pushed the guard in the water." The man who had held the carbine ran up the pier saying he was going after the guard and at this time Valencia heard the engine of one of the boats start. Valencia then ran back to the boats, passing the sailor on the way, and started to loosen the moorings on the one with the engine running. The ramp on this boat was down. At this time his other friend said, "Let's get out of here; that boat will not go." Both ran up the pier and Valencia heard the man who had gone after the guard shouting that he "had" him. Valencia ran down the beach and saw this man "stomping the guard in the head with his feet." Valencia told him not to kill the guard and received the reply that if he did not kill the guard the guard would kill him. Valencia's companion then started hitting the guard with the butt of the carbine. Thereafter, the third member of their group came along and during the ensuing conversation, Valencia bent down to look at the guard who seemed to be dead. When he stood up again, the man who had beaten the guard was pointing the carbine at him and told him to "help" him so that Valencia "would have nothing on him." Valencia "saw" that he "would help him" so he picked up a rock the size of his head. He straddled the guard with the guard's head between his legs and threw the rock to his left, but did not hit the guard. Valencia then went some distance away from the scene but the man with the carbine said that he did not think the guard was dead and remained with

the guard. When he returned, he told Valencia that the guard was sitting up so he broke the guard's neck with his carbine and then felt his pulse and found the guard was dead. Valencia and his two companions hid the carbine in the brush and he and one of the men returned to "Opone" while the other "went back to the boat pool" (Pros Ex 4).

Accused Davis, in his pre-trial statement, stated that he was formerly a member of the 237th Quartermaster Laundry Company. He went absent without leave from his company on 27 August 1946 and went to Manila. From Manila, he migrated to Cebu where he has lived ever since. He met a sailor in December, 1946, who told him that the Navy had some boats "they were going to get rid of." On the night of 11 January 1947, he and two companions stayed at the home of "Mary Wathlins" and "planned out all the details of what was going to take place." On 12 January, they went to the sailor's shack and sat around and drank. The four men left the shack about 9:30 p.m. "to go to the docks." They stopped on the top of the hill above the docks and "talked it over again." The sailor and one of the men then went to the sailor's tent to get some "rainsuits." After their return, the sailor went ahead to tell the security guard at the docks that there would be two sailors to take a boat to Cebu to pick up a truck. When he came back he said that "everything was clear." Davis' two companions then went to the docks and he and the sailor were to join them after the guard was disarmed. He saw his two friends bring the guard out of a shack with his hands up and he and the sailor joined them. The guard was put in a boat and Davis got in the same boat and tried unsuccessfully to start it. The sailor got in another boat. The other two men took the guard off the boat and marched him to the end of the dock. Later, accused Davis heard one of these men yell that the guard had got away and he and the sailor ran up the dock. This was the last time he saw the sailor that night. On the way, he saw his two friends pulling the guard out of the water, the guard saying that they could have all the boats they wanted if they did not kill him. One of them hit the guard over the head with a large stone and the guard fell. The two men then walked up to where Davis was and, handing him the guard's rifle, said, "Let's get out of here." Davis threw the rifle in some bushes and he and one of his companions went to the "mestiza's" house, the other saying he was "going back." The third member of their party arrived at the mestiza's house about an hour and a half later (Pros Ex 5).

4. Evidence for the Defense

Each accused, his rights as a witness having been explained to him, elected to remain silent (R 41).

5. Discussion

Each accused herein was found guilty of the murder of Roberto Baniel by striking him on and about the head with a carbine and a rock. Each was

also found guilty of the attempted larceny of an LCM boat, property of the United States of a value of more than $50.

The proof that it was Roberto Baniel upon whose body an autopsy was performed at the Mactan Naval Air Base and who had died as a result of fractures of the skull caused by blows with a heavy instrument stems chiefly from the death certificate and the copy of the necropsy report introduced in evidence as Prosecution Exhibits 3 and 2, respectively. These documents were identified in court by Doctor Horlanda, the person who had made them as the result of an autopsy performed by him. Doctor Horlanda was an official of the municipality of Opon, Cebu, Philippine Islands, and he conducted his autopsy and made the records in question on behalf of that municipality. The Philippine Islands, having been granted their independence on 4 July 1946 (Proclamation No. 2695, July 4, 1946; Treaties and other International Acts, Series 1568, Department of State, Washington, D.C.), these records were foreign documents. It behooves us, then, to discuss the propriety of their admission in evidence.

It has been generally held that the provisions of paragraph 117a of the 1928 Manual for Courts-Martial permitting the use of official writings as prima facie proof of the facts therein recited, though general in terms, cannot be extended to the use of records of foreign government agencies (CM MTO 4347, Saunders, Dig Op AJAG, MTO, p 26; CM 271864, Bell, 7 BR (ETO) 275, 278). We must, then, look to the Federal statutes (par 111, MCM 1928).

It is provided in 28 USC 695a that:

> "Any book, paper, statement, record, account, writing, or other document, or any portion thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original, which is not in the United States (hereinafter referred to as a foreign document) shall, when duly certified as provided in sections 695d and 695e of this title, be admissible in evidence in any criminal action or proceeding in any court of the United States if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under section 695b, that such document (or the original thereof in case such document is a copy) satisfies the requirements of section 695 of this title, unless in the event that the genuineness of such document is denied, any party to such criminal action or proceeding making such denial shall establish to the satisfaction of the court that such document is not genuine. Nothing contained herein shall be deemed to require authentication under the provisions of sections 695d and 695e of this title of any foreign documents which may otherwise be properly authenticated by law." (Underscoring supplied.)

Section 695 of this title authorizes the admission in evidence, in any court established by act of Congress, of any writing made as a memorandum or record of any act, transaction, occurrence, or event where it appears that such writing was made in the regular course of any business and that it was the regular course of such business to make it. Section 695b provides for the issuance of a commission to any conveniently located consular officer to take testimony with regard to the genuineness of foreign documents sought to be used in evidence in a criminal action and with regard to their meeting the requirements of Section 695, and Section 695d requires that such consular officer, if he is satisfied that a foreign document is genuine, shall certify under the seal of his office to the genuineness thereof and transmit the document together with his certificate and a record of the testimony taken to the court issuing the commission. Section 695e provides that a copy of any foreign document of record or on file in a public office of a foreign country shall be admissible in evidence in any court of the United States when certified by the lawful custodian of such document and authenticated by a certificate of a consular officer resident in such foreign country.

Although Section 695e apparently departs from the common law rule relating to the admissibility in evidence of public documents in that it purports to make admissible copies of records on file in a foreign public office without requiring proof that there was an official duty to make such records (see Banco de Espana v. Federal Reserve Bank, 114 F (2d) 438,446; compare par 117a, MCM 1928), the records here under consideration are clearly not admissible under this section, for they were not sufficiently shown to be copies of documents on file in any foreign office. Although Doctor Horlanda testified that the original copy of the necropsy report was "in the hands of the Justice of the Peace of Opon," we are of the opinion that in order to be admissible under Section 695e, a proffered foreign document or copy thereof must be identified in some manner by the custodian of the file copy. It did not appear that Doctor Horlanda was the custodian of the record copies of either the necropsy report or the death certificate.

The question remains, however, as to whether these records may be considered as foreign business entries under Sections 695 and 695a. There can be no doubt that they were, generally speaking, made by Doctor Horlanda in the regular course of his business as a Government physician and that they thus met the requirements of Section 695. The mentioned Federal statutes show that it was the intendment of Congress to make genuine foreign business entries admissible in evidence on a par with domestic business entries. Having in mind that courts existing under its authority generally sit in the United States, Congress also provided in Sections 695 b - d for machinery whereby the genuineness of foreign documents desired to be used in evidence in criminal actions in such courts might be determined, in the first instance at least, in the foreign locality where they were made and where the witnesses having knowledge of their authenticity might be directly interrogated and for the taking and transmission of testimony establishing their character as entries made in the usual course of business. These

provisions as to the certification of such documents are not, however, the exclusive means of authenticating foreign business entries. In the case of Hass v. United States (93 F (2d) 427, 437) it was said,

> "It was not shown that any of the original (foreign) documents, copies of which were received in evidence, were genuine or that they had actually been executed by the persons by whom they purported to be executed. The copies were therefore not admissible, under 28 USC, s. 695 et seq. ***
>
> "It is not necessary to decide whether section 695 et seq. of 28 USC *** prescribes the exclusive means of proving foreign documents. They (sec. 695 et seq) provide at least one means by which the government could have proved the documents the copies of which were improperly received in evidence." (Parenthetical explanations and underscoring supplied.)

The court-martial which tried this case was sitting in the Philippine Islands and had before it on the witness stand and under oath the person who made the necropsy report and death certificate here in question. There would have been little point in requiring such a court to go through the empty formality of having a United States consular official take testimony from Doctor Horlanda regarding the genuineness of these documents so that this official could certify under seal his opinion as to their authenticity, nor can we believe that Congress intended to impose any such restriction upon the admissibility of these records. Here the court executed its own fact finding commission, sufficiently authenticated the documents in question by admitting them in evidence after hearing testimony as to the conditions under which they were made and thus, in our opinion, complied with the spirit and the letter of the Federal statutes having to do with the acceptance in evidence of foreign business entries. Consequently, the death certificate and the copy of the necropsy report were, generally speaking, properly received under the general provisions of section 695, which section, we believe, applies to foreign business entries as well as to domestic business entries and is not limited by section 695a which merely provides an alternative and more convenient mode of proof of foreign business entries in criminal cases. (United States v. Kaibney, 155 F (2d) 795.)

It does not follow, however, that each and every statement contained in these records is admissible. In a recent case, we had occasion to discuss at length the question as to what entries in an autopsy protocol might be considered business entries under the Federal statute (CM 323197, Abney). In that case we came to the conclusion that only those entries were admissible which fell within the scope of the regular, that is normal, course of the proper business of the pathologist or physician and which could be considered, in a legal sense, a record of fact as distinguished from opinion not based on trained observation. Consequently, we held admissible the entries in the autopsy protocol there under discussion which related to the identification of the individual upon whose body the autopsy was performed,

to the physical facts found to exist with respect to the corpse and to the diagnostic determination as to the physical cause of death. We held inadmissible, however, an entry stating that the death was due to homicide as distinguished from accident or suicide, even though such an entry was required to be made by regulations applicable in that case, on the ground that it was 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 laboratory or during the course of medical treatment.

Although in the Abney case we cited various Army regulations to show that the entries found in the autopsy protocol there in question were required to be made, the deceased in that case being a member of the Army and the death having occurred in an Army hospital, we believe it to be a matter of common knowledge, having regard to the practice of medical jurisprudence in civilized nations of the world, that autopsy reports generally must of necessity contain an identification of the person upon whose body the autopsy was performed, detailed pathological findings and a conclusion as to the time and physical cause of death. Doctor Horlanda testified that in the absence of an "expert pathologist," he customarily performed autopsies upon the bodies of persons who had met violent death in his district and his qualifications as a pathologist for this purpose were not questioned at the trial. Since he was apparently the only physician viewing the body of the deceased person at the Mactan Naval Air Base, he was also required to execute a death certificate on Municipal Form No. 103. Accordingly, those statements in the necropsy report and the death certificate, made by Doctor Horlanda or under his direction, relating to the identification and the time and physical cause of death of the person upon whose body he had performed an autopsy at the Naval Air Base were properly admitted in evidence. Also admissible were the entries in the necropsy report relating to the post mortem findings. However, as we have indicated above, the statement in the death certificate that the death had been caused by homicide rather than by accident or suicide was improperly admitted. The circumstance that Doctor Horlanda did not know the deceased at the time he performed the autopsy and that his identification was, therefore, probably based on hearsay will not affect the admissibility of the business entries referring to such identification. This circumstance goes merely to the weight to be given to such evidence. (28 USC 695; CM Abney, Supra).

It thus appears that Roberto Baniel died about 11:00 p.m. on 12 January 1947 of fractures of the skull received from blows by a heavy instrument. He was missing from his post as boat pool guard at about that time and about 6 o'clock the next morning his body was found on a nearby beach between the high and low water mark. Death had come suddenly upon him and had not been caused by drowning. These circumstances pointed towards death by external violence and indicated the probability of unlawful

homicide (CM 252086, Kissell, 33 BR 331,339; CM 295324, Parker, 29 BR (ETO) 395, 400; CM 270205, Murphy, 4 BR (NATO-MTO) 69,73; CM 319168, Poe). Was this homicide murder and, if it was, were the two accused criminally responsible therefor?

Murder is defined in the Manual for Courts-Martial, 1928, as "the unlawful killing of a human being with malice aforethought" (par 148a, MCM 1928). 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 with an implied negation of any excuse or justification (Commonwealth v. Chance, 174 Mass 245,252). Thus it has been held that where a deadly weapon is used in a manner likely to cause death and death actually results from such use, the law will presume malice from the act (CM 314939, Greene). A carbine used as a cudgel or a rock used as a bludgeon may be regarded as a deadly weapon when the manner of its employment is so vicious as to endanger life (State v. Johnson, 176 N C 722, 97 SE 14; People v. Cook, 15 Cal (2d) 507, 102 P (2d) 752; State v. Dunn, 221 Mo 530, 120 SW 1179,1182; State v. Miller, 264 Mo 395, 175 SW 187; Commonwealth v. Pasco, 332 Pa 439, 2 A(2d) 736, 739; State v. Lee, 6 W.W. Harr (Del), 171 A 195; Hopkins v. United States, 4 App DC 430,441; CM Murphy, supra). Moreover, one who takes the life of another while committing or attempting to commit a felony involving acts tending to endanger life is guilty of murder (Commonwealth v. Guida, 341 Pa 305, 19 A (2d) 98; Commonwealth v. Madeiros, 255 Mass 304, 151 NE 297; 40 CJS p 868).

Here there can be no doubt that Roberto Baniel was killed by the acts of one or more of the group of four men, including both accused, involved in the attempted theft of an LCM boat from the boat pool of the Mactan Naval Air Base on the night of 12 January 1947. Roberto Baniel was the guard over the boat pool and as such was armed with a carbine. His presence having interferred with the plans of accused and their companions, he was disarmed and after momentarily eluding his captors he was retaken and brutally beaten. Accused Valencia saw the guard being knocked insensible with the butt of the carbine by one member of the group and accused Davis saw one of his confederates strike the guard over the head with a large stone, causing him to fall. It may fairly be assumed, considering the autopsy findings, that either of these vicious attacks contributed mediately or immediately to the guard's death. Whoever, then, executed these assaults, or either of them, was clearly guilty of murder (Hicks v. State, 213 Ind 277, 11 NE (2d) 171,179; CM 295678, Keech, 28 BR (ETO) 22,27). Each accused denied having personally delivered any of the blows which reduced Roberto Baniel to a state of helplessness. However, we need not launch upon an inquiry as to which of the four men struck the fatal blow, for one who voluntarily associates himself with others in the execution of an unlawful design of so desperate a character that it must ordinarily be attended with great hazard to life is responsible for a murder committed by his companions in the perpetration of such design, even though neither he

nor his associates specifically intended to take life and even though he rendered no active assistance in the homicidal act or had forbidden his associates to kill (CM Greene, supra; CM 321915, McCarson; Commonwealth v. Devereaux, 256 Mass 387, 152 NE 380). It follows that each of the two accused is as guilty of the murder of Roberto Baniel as though he had committed such offense with his own hands, if, indeed, one or both of them had not in fact been active participants in the fatal assault (18 USC 550).

It would appear that the blows which caused the guard's death were delivered within a few moments after the four men had abandoned their plan to steal an LCM boat because of the difficulty encountered in getting either of the two boats available under way and because of their fear of apprehension due to the commotion caused by the struggle with the guard. Also, accused Valencia claimed that he asked the man holding the carbine not to kill the guard. Neither of these circumstances is sufficient to absolve accused, or either of them, from their guilt of the crime of murder on the contention that it was not shown that the homicide was consummated by one or more of their associates during the commission or attempted commission of a felony and that each consented thereto (see CM 283439, Davis, 12 BR (ETO) 239,252). We think that the killing of Roberto Baniel occurred as part of the res gestae of the attempted larceny of the boat so as to raise an implication of malice in such killing and to fasten upon each accused the role of particeps criminis in the resulting murder. In this connection, the underlying crime or attempted crime is a fact to be looked at objectively and its beginning and end are marked by what is done rather than by what is thought. When these accused and their companions entered the boat pool for the purpose of stealing one of the boats therein and in the execution of this purpose seized the guard, disarmed him and put him in fear and tried to start the engines on two of the boats, the occurrence which is described as an attempted larceny and which was actually an attempted robbery (see CM 266468, Younge, 3 BR (NATO-MTO) 307) was not ended merely because some or all of the robbers ceased to desire to proceed, had in mind only a purpose to escape and killed the guard in the furtherance of that purpose. To end an attempted robbery, where the robbers remain in freedom and possessed of a deadly weapon at the place of the attempted robbery until a fatal assault takes place, there must be at least an appreciable interval between the alleged termination and the homicide, a detachment from the enterprise before the killing has become so probable that it cannot reasonably be stayed and such notice or definite act of detachment that the other principals in the attempted crime have an opportunity also to abandon it (Commonwealth v. Green, 302 Mass 547, 20 NE (2d) 417; Commonwealth v. Grious, 317 Mass 403, 58 NE (2d) 241; CM 314404, O'Neal).

The reception in evidence of the entry in the death certificate to the effect that Roberto Baniel had died as a result of homicide as distinguished from suicide or accident, although erroneous as we have pointed out, was not prejudicial to the substantial rights of either accused, it having been sufficiently established by other proof that Roberto Baniel was murdered

(CM Abney, supra). We conclude that the findings of guilty of Charge I and its specification as to each accused are supported by substantial and convincing evidence.

Pursuant to prearranged design, accused and their two companions went to the boat pool of the Mactan Naval Air Base on the night of 12 January 1947 with the intention of stealing an LCM boat. Two of the men attempted to start the engines of the two boats which were tied up to the dock while the other two dealt with the guard. Having encountered some difficulty in getting either of the boats under way and being fearful of the consequences of the struggle with the guard, the four men fled. Later that night, the officer of the day of the naval base noticed that one of the LCMs which had been tied up to the dock was adrift and that the engine on the other was running and its ramp was down.

It thus appears that there had been an attempted larceny of the two LCM boats, if not a completed larceny of the one that was adrift, and that accused were at least aiders and abettors thereto. As aiders and abettors they were criminally responsible as principals in the first degree and, the attempt having been committed, it is immaterial that the original design to steal was later abandoned (18 USC 550; CM 227676, Kline, 15 BR 325). It is likewise immaterial that attempts to steal two boats were shown whereas an attempt to steal only one was alleged, for either of the two attempts shown, having occurred at approximately the same point of time and as part of one criminal transaction, may be employed in support of the pleading (CM 231710, Bearden, 18 BR 277,284; CM 298450, Ward, 22 BR (ETO) 297,298). An LCM (Landing Craft, Mechanized) is a shallow draft vessel designed for use in amphibious operations in landing material or general cargo directly onto the beach. It is 50 feet long and is capable of carrying 30 tons (FM 31-5, p 209,213). Although no evidence of the monetary value of the LCM found to have been the subject of attempted theft was adduced, the court, considering the nature of the property in question, could rightly infer that such value was in excess of $50, as alleged (CM 262735, Kaslow, 41 BR 113,126; CM 228274, Small, 16 BR 111,115). The fact that LCM boats are a type and kind of vessel generally used by the armed services of the United States and the showing that the one in question was one of two LCMs tied up to the dock of the boat pool of the Mactan Naval Air Base sufficiently proved, prima facie, the allegation of property in the United States (CM 319591, Pogue). The findings of guilty of Charge II and its specification are, therefore, fully supported by the evidence.

Mr. Jose Ramirez, a witness for the prosecution, testified on direct examination as to purported facts tending to show that both accused may not have been at the boat pool at the time Roberto Baniel was killed on the night of 12 January 1947. He also stated on the witness stand that he had not gone to the boat pool that night. This testimony was in direct contradiction to that of other prosecution witnesses and was favorable to the defense. He was then asked by the trial judge advocate whether he had

not made a pre-trial statement to the effect that he, the two accused and the sailor had gone to the boat pool where they had run into difficulties with the guard. Ramirez replied that he had made such a statement but that it had been made under duress. The law member, apparently acting on the theory that Ramirez had been successfully impeached, excluded the entire testimony of this witness from the record. This was error. Whether or not a witness has been successfully impeached is a question of fact to be decided by each member of the court as an ancillary matter in arriving at his vote on the findings. It is not an evidentiary matter to be ruled upon by the law member either finally or subject to objection (CM 313900, Jones, 30 BR (ETO) 165,171). However, we are not inclined to hold that this error was fatal to the findings and sentence herein, for both accused admitted in their pre-trial statements that they were present at the scene of the homicide and there is ample and convincing evidence corroborating these admissions.

"Private William Franch" was properly identified as Private Willie A. Valencia by the introduction in evidence of a letter from The Adjutant General's Office stating that the fingerprints of the person purporting to be William Franch had been compared and found to be identical with those of Willie A. Valencia. In paragraph 129 of the Manual for Courts-Martial, 1928, it is stated:

> "Where it is sought to prove that the accused enlisted at various times under different names, his identity as the person so enlisting may be proved, prima facie, by photostat copies of the various enlistment and identification records with the certificate of The Adjutant General, or one of his assistants, as official custodian of such records, that the fingerprint records accompanying the various enlistment records have been compared by a duly qualified fingerprint expert on duty as such in his office and that such fingerprints are those of one and the same person. ***
>
> "Where an accused is being held under suspected fraudulent enlistment or desertion at a post where he is unknown, his fingerprints should be taken and forwarded to The Adjutant General for identification. In such a case the identity of the accused may be established, prima facie, by the testimony of the person who took such fingerprints or by some one who was present at the time they were taken, together with the certificate from the office of The Adjutant General as above provided. ***" (Underscoring supplied.)

Having some knowledge of the various staff functions in the Washington headquarters where this Board sits, we take notice that The Adjutant General has established in the Disciplinary Section of his office the expert fingerprint comparison service contemplated by the Manual. The fingerprint identification here in question was made in this Disciplinary Section. Although the above quoted language is found in a discussion of the offense of

fraudulent enlistment in violation of the 54th Article of War, we think the exception to the hearsay rule there set forth was not intended to be limited to cases arising under that Article. Any contention that it was intended to be so limited is made untenable by the phrase, "Where an accused is being held under suspected fraudulent enlistment or desertion" (underscoring supplied). Although accused Valencia was not being tried for fraudulent enlistment or desertion, his military identification and status were in question and it was obviously for the purpose of resolving these matters, however they might arise, that the exception to the hearsay rule here under consideration was included in the Manual.

6. The charge sheet shows that accused Davis is 27 years of age and has an allotment to dependents of $22 per month. He was inducted on 26 October 1942 and had no prior service. As to accused Valencia, the charge sheet shows that he is 26 years of age and has no allotments to dependents. He enlisted on 16 August 1940 and it is not known whether he had prior service.

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

Christy V. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert G. Schroyer, Judge Advocate

JAGK - CM 324519 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted are the record of trial, the opinion of the Board of Review and the views and recommendations of The Judge Advocate General in the case of Private First Class James L. Davis (34533071), unassigned, formerly of 237th Quartermaster Laundry Company, and Private Willie A. Valencia (19028908, unassigned, formerly of "A" Company, 32d Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence as to each accused. I recommend that the sentences be confirmed but, in view of all the circumstances, recommend that the sentence as to each accused 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. I further recommend that a United States penitentiary be designated as the place of confinement.

3. Consideration has been given to a memorandum, dated 27 August 1947, from the Honorable Ernest K. Brumblet, and to a letter inclosed therein from Reverend Thomas Hickerson to the effect that accused Valencia's family attend his church and are respectable people. Consideration has also been given to a letter, dated 5 August 1947, from Mrs. Mary Ella Walker, aunt of accused Davis, and to two letters from accused Davis and three statements concerning his good character forwarded therewith.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Form of action
3. Memo fr Hon E K Bramblett w/incl
4. Ltr fr Mrs Mary Elle Walker w/incls

(GCMO 34, D.A. , 23 Oct 1947)/

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

JAGH - CM 324552

UNITED STATES	)	SECOND ARMY
v.	)	Trial by G.C.M., convened at Valley Forge General Hospital, Phoenixville, Pennsylvania, 28 and 29 May 1947. Dismissal and total forfeitures
Major HAROLD ROBERTS (0-450155), Cavalry	)	

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 Charges and Specifications:

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

Specification 1: (Findings of not guilty upon motion by defense).

Specification 2: (Findings of not guilty upon motion by defense).

Specification 3: In that Major Harold Roberts, Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, without proper leave, absent himself from his station at Valley Forge General Hospital, Phoenixville, Pennsylvania, from about 19 January 1947 to about 21 January 1947.

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

Specification 1: In that Major Harold Roberts, Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at the Branch Bank, Phoenixville Trust Company, Phoenixville, Pennsylvania, on or about 9 January 1947, with intent to defraud, wrongfully and unlawfully

make and utter to the Phoenixville Trust Company, Phoenixville, Pennsylvania, a certain check, in words and figures as follows, to wit:

No. _____ 9 Jan 1947

First Nat Bank
Brownsville, Texas

Pay to the order of ——————Cash——————

Fifty and no/100——————————————Dollars

$50.00/100 /s/ Harold Roberts 0450155

and by means thereof, did fraudulently obtain from Phoenixville Trust Company, Phoenixville, Pennsylvania, $50.00, of the value of about $50.00, he, the said Harold Roberts, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Brownsville, Texas, for the payment of said check.

Specifications 2 through 5 are identical to Specification 1, except as to the dates which are as follows:

Specification	Date of Checks
2	10 January 1947
3	11 January 1947
4	13 January 1947
5	14 January 1947

Specification 6: (Nolle Prosequi).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 3 of Charge I, of Charge I; of the Specifications of Charge II and Charge II, but not guilty, upon motion by the defense, of Specifications 1 and 2 of Charge I. Evidence of no previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for six months. The reviewing authority approved the sentence, remitted the confinement, and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Second Army Judge Advocate, dated 28 July 1947, except the sentence on page 2 thereof which reads: "Colonel Weatherby admitted on cross-examination that the accused did have amnesia

at one time (R 17, 18).", is changed to read: "Colonel Weatherby admitted on cross-examination that the accused probably had amnesia at one time. (R 17, 18)."

4. The accused is 36 years of age, married, and the father of two children. He was graduated from high school in 1926, enlisted in the Army in November 1929 and remained in the service as an enlisted man until he was commissioned a second lieutenant, Army of the United States, on 27 September 1941. He was promoted to the rank of first lieutenant, on 28 May 1942, to the rank of captain on 26 January 1943 and to the rank of major on 22 August 1944. After serving three months in the European Theater of Operations he was returned to the United States early in 1944, for hospitalization, as a result of neck and shoulder injuries received in the service prior to going overseas. During the latter part of 1944 he was again sent to the European Theater of Operations, where he remained for five months before returning to the United States. His efficiency ratings, from the date of his original commission to 31 December 1944, the date of the last rating of record, were "Superior." On 12 April 1945, he was awarded the Bronze Star Medal for meritorious service from 29 August 1944 to 18 March 1945.

5. Attached to the record of trial is a copy of a letter from accused to the Honorable Tom Connally, United States Senate, which has been considered.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation thereof. A sentence to dismissal and total forfeitures is authorized upon a conviction of violations of Articles of War 61 and 96.

M. Hottenstein, Judge Advocate

R. McDonald Gray, Judge Advocate

Walter A. Lee, Judge Advocate

JAGH - CM 324552 1st Ind

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

TO: 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 Major Harold Roberts (O-450155), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for two days, in violation of Article of War 61 (Spec 3, Chg I), and of making and uttering checks with no account in the bank for their payment upon presentation (Specs 1-5, Chg 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 six months. The reviewing authority approved the sentence, remitted the confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Second Army Judge Advocate, which was adopted in the accompanying opinion of the Board of Review, with a minor exception, as a statement of the evidence and law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation thereof. I concur in that opinion.

While a patient at Valley Forge General Hospital, Phoenixville, Pennsylvania, the accused went absent without leave on 19 January 1947 and remained absent until 21 January 1947.

Between 9 January 1947 and 14 January 1947, he made and cashed five fifty-dollar checks, drawn on the First National Bank, Brownsville, Texas, at the Valley Forge General Hospital Branch of the Phoenixville Trust Company, Phoenixville, Pennsylvania. These checks were returned unpaid and stamped "unable to locate account." The president of the First National Bank, Brownsville, Texas, by deposition testified that accused had no account in that bank when the five checks in question were presented for payment. The accused in his pre-trial sworn statement admitted that he had never had an account in the drawee bank.

A motion in bar of trial was entered by the defense, on the ground that accused was not mentally responsible at the time of the commission of the offenses charged. This motion was overruled by the court after several medical officers, who had observed accused's condition prior to trial, had testified. The president of a Board of Medical Officers, appointed at Valley Forge General Hospital for the purpose of examining accused with respect to his mental responsibility, testified that while accused probably had suffered from amnesia at some time, the Board was

of the opinion that, concerning the particular acts charged, accused was able to distinguish right from wrong and to adhere to the right. After trial, but before he took his action, the reviewing authority ordered accused before a second Board of Medical Officers for further mental examination. This Board, on 18 July 1947, reached the same opinion, relative to the mental status of accused, as did the first Board.

4. The accused is 36 years of age, married, and the father of two children. He was graduated from high school in 1926, enlisted in the Army in November 1929 and remained in the service as an enlisted man until he was commissioned a second lieutenant, Army of the United States, on 27 September 1941. He was promoted to the rank of first lieutenant on 28 May 1942, to the rank of captain on 26 January 1943 and to the rank of major on 22 August 1944. After serving three months in the European Theater of Operations he was returned to the United States early in 1944, for hospitalization, as a result of neck and shoulder injuries received in the service prior to going overseas. During the latter part of 1944 he was again sent to the European Theater of Operations, where he remained for five months before returning to the United States. His efficiency ratings, from the date of his original commission to 31 December 1944, the date of the last rating of record, were "Superior." On 12 April 1945 he was awarded the Bronze Star Medal for meritorious service from 29 August 1944 to 18 March 1945.

5. Attached to the record of trial is a copy of a letter from accused to the Honorable Tom Connally, United States Senate, which has been considered.

6. I recommend that the sentence as modified by the reviewing authority be confirmed but that the forfeitures be remitted, and that the sentence as thus modified, be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

(GCMO 29, D.A., 22 Oct 1947).

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

JAGK - CM 324590

2 OCT 1947

UNITED STATES	)	FIFTH AIR FORCE
v.	)	Trial by G.C.M., convened at Tokyo, Japan, 5 and 6 May 1947. Dismissal, total forfeitures and confinement for two (2) years.
First Lieutenant PAUL J. DOWNS (O-837283), Air Corps	)	

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

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

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 Paul J. Downs, Headquarters Squadron, Far East Air Forces, was, at Tokyo, Honshu, Japan, on or about 26 January 1947, grossly drunk and conspicuously disorderly in a public place, to wit, Army Hall, a United States Army billet.

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

Specification 1: In that First Lieutenant Paul J. Downs, ***, did, at Army Hall, Tokyo, Honshu, Japan, on or about 26 January 1947, wrongfully strike Staff Sergeant Nick W. Duffin on the face with his fist.

Specification 2: In that First Lieutenant Paul J. Downs, ***, did, at Army Hall, Tokyo, Honshu, Japan, on or about 26 January 1947, wrongfully use threatening and abusive language toward Corporal Howard L. Knapp, a non-commissioned officer, subordinate to him, by then and there stating to the said Corporal Howard L. Knapp, "You know what they do to rats, they kill them and that is what I am going to do to you " or words to that effect.

Specification 3: (Finding of guilty disapproved by reviewing authority).

Specification 4: (Finding of not guilty).

Specification 5: In that First Lieutenant Paul J. Downs, ***, did, at Tokyo, Honshu, Japan, on or about 27 January 1947, wrongfully and wilfully violate the provisions of AFPAC Circular #39 (1946) by giving to Takasaku Kaneko, a Japanese national, about 7 packages of American cigarettes.

Specification 6: (Finding of not guilty).

CHARGE III and Specification: (Finding of guilty disapproved by reviewing authority).

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

Specification 1: In that First Lieutenant Paul J. Downs, ***, did, at Tokyo, Honshu, Japan, on or about 25 September 1946, wrongfully and knowingly sell and dispose of approximately 240 cans of evaporated milk and 5 twenty pound cans of coffee of a value of more than $20.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Paul J. Downs, ***, did, at Tokyo, Honshu, Japan, on or about 15 November 1946, wrongfully and unlawfully sell approximately 300 cans of evaporated milk and 12 twelve pound cans of cocoa of a total value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that First Lieutenant Paul J. Downs, ***, did, at Tokyo, Honshu, Japan, on or about 25 September 1946, wrongfully and wilfully apply to his own use and benefit, one 1/4 ton 4 x 4 United States Army truck of a value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

Specification 4: In that First Lieutenant Paul J. Downs, ***, did, at Tokyo, Honshu, Japan, on or about 15 November 1946, wrongfully and wilfully apply to his own use and benefit, one 3/4 ton 4 x 4 United States Army truck of a value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to all charges and specifications. He was found not guilty of Specifications 4 and 6 of Charge II, but guilty of all charges and the remaining specifications, excepting however the figures "27" in Specification 5 of Charge II, substituting therefor the figures "24", and excepting the words "a total value in excess of $50.00", substituting therefor "of

some value" in Specification 2 of Charge IV. No evidence of any previous conviction 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 at such place as the reviewing authority might direct for five years. The reviewing authority disapproved the findings of guilty of Charge III and its Specification and Specification 3 of Charge II. He approved the sentence but remitted three years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

During the times hereinafter mentioned the accused was mess officer, transportation and supply officer of Army Hall, an installation of the Far East Air Forces, located in Tokyo, Japan. Army Hall was utilized by military personnel as quarters and contained officers and enlisted men's clubs and a motion picture theater. Far Eastern Air Forces had assigned three vehicles, a jeep, weapons carrier and a 6x6 truck to Army Hall for official business such as the transportation of rations. The accused occupied Room 128 in Army Hall (R 20-21). Staff Sergeant Nick W. Duffin, 35th Fighter Group, Johnson Army Air Base, APO 994, had served with the accused in the Army Air Forces prior to their departure for overseas, Duffin then being an officer with superior rank to that held by the accused. They met in Tokyo and the accused invited Sergeant Duffin to visit him at his quarters in Army Hall. On Saturday afternoon, 26 January 1947, Sergeant Duffin went to accused's room and they began reminiscing and drinking high-balls. After drinking about five "double shots" and "kidding back and forth" Sergeant Duffin said to accused, "Remember, I outranked you once." Accused said, "Well, you don't outrank me now. You are just nothing but a staff sergeant," and struck Duffin a blow in the face, knocking him to the floor. Sergeant Duffin was rendered unconscious (R 7-10).

Sergeant Joseph L. Guenley, Corporal Howard L. Knapp and his wife had also visited the accused's room during the evening in question but they appear to have been out of the room when Sergeant Duffin was assaulted. Sergeant Guenley returned to the room and found Duffin lying unconscious. His nose was bloody and Guenley lifted him from the floor and placed him in a chair. Sergeant Guenley then left the room and proceeded down the hall toward the lobby of the club where he met Corporal Knapp and asked him if he knew what had happened in the accused's room. While they were talking the accused came running down the hall, saying, "there's a squealer, I'll take care of him." The accused then challenged Knapp to step outside and "fight like a man " (R 11-12).

Corporal Knapp testified that after he left accused's room Sergeant Guenley came into the lobby and "starts punching me in the chest, saying I hit this staff sergeant." The accused then "grabbed me and told Guenley to go ahead and hit me." Someone in the club ordered the parties to "break it up" and directed that they go outside if they wanted to fight.

Knapp then left the club and proceeded to the theater. The accused followed him to the vicinity of the theater using threatening language, and said, "Do you know what they do with rats? They kill them and that is what I am going to do to you" (R 14-15).

Captain Carl E. Doughman, Air Corps, building commandant of Army Hall, heard accused threatening Corporal Knapp in the lobby of Army Hall and invited him to come into his office and discuss the matter. The accused was "drunk to such an extent that it affected his mind" and he offered to fight Captain Doughman (R 21).

Lieutenant Colonel S. N. Lapsley, 7th Army Airways Communications Service, attended the theater at Army Hall in the evening of 26 January 1947. At about 2015 hours Corporal Knapp reported to him that he was being molested by accused and requested the officer's assistance. Colonel Lapsley interviewed the accused, who appeared excited and had a strong odor of liquor on his breath. He gave accused a direct order to go to his room and then accompanied him to see that he obeyed the order. He did this to prevent further trouble inasmuch as the accused had threatened Corporal Knapp (R 23-24). At approximately 2100 hours on 26 January 1947 Sergeant Dean B. Cooper, 1126 Military Police Company, answered a call and went to Army Hall to "investigate a disturbance." He went to the enlisted men's club and stayed until it closed. The accused entered the club, noticeably intoxicated but nothing unusual occurred (R 26). At about 2345 hours First Lieutenant Marvin L. Adams, 1126th Military Police Company, went to Army Hall and made a search for the accused. He found the accused sitting at the bar in the officers' club and asked him if he knew that he had been restricted to his quarters. The accused acknowledged such fact. Lieutenant Adams thereupon "took" him to the 49th General Hospital for a sobriety test. It was stipulated by the parties that if Captain E. L. Dimond, Medical Corps, were present in court he would testify that at about 2300 hours on 26 January 1947 he performed a blood alcohol test on accused which showed "a 3.0 milligram count" (R 28).

Corporal Robert A. Stankard was the door checker and temporary mess sergeant at Army Hall. Rations were procured from the New Kaijo building and were hauled in the 6x6 truck assigned to the Hall. This truck, as well as the jeep and weapons carrier had "FEAF" on the bumpers thereof. The witness had seen the accused drive these vehicles. Coffee for the mess was supplied in 10 and 20 pound cans. Milk came in cartons containing 48 No. 1 cans and each can was labeled "Evaporated milk." Cocoa was issued in cases containing 6 No. 10 cans. The accused had a key to the supply room. The witness kept a "running inventory" of the supplies and from September through December 1946 he "was never very far off." Corporal Stankard stated that all the food that was removed from the storeroom was utilized in the kitchen. Without objection from the defense the witness was advised of his rights against self-incrimination and shown a written statement he was alleged to have made to Sergeant Cooper. He then stated

that he had moved food, cocoa and peanut butter from the storeroom on orders from the accused and loaded it into the weapons carrier. He and the accused together with the Japanese Kaneko would then take the rations out past the Nonomiya apartments. This occurred on several occasions and the accused did the driving. The witness also knew that the accused had "taken stuff out in the jeep" to barter with the other billets (R 32-35).

In the latter part of October 1946, Corporal James Wilson, mail orderly at Army Hall, received a package addressed to Corporal DeCaesar who had returned to the states. Prior to his departure DeCaesar requested Wilson to deliver the package to the Japanese, Takasaku Kaneko. Wilson gave the package to the accused upon the assurance that he, accused, would take care of it. In the afternoon of 27 January 1947 the accused and Kaneko approached Haruo Nakajima, the watchman at the entrance to Army Hall, and Kaneko stated that the package which he carried was given to him by the accused. The watchman allowed Kaneko to pass through the gate with the package. A CID agent intercepted Kaneko shortly after he had left the area and returned him to the gate where the package was opened and found to contain about 10 packages of Lucky Strike cigarettes, some coffee, tea and vaseline. The accused admitted giving the package to Kaneko (R 37-45, Pros Ex 1).

Tsunekyo Higuchi testified that he was a factory worker but at the time of trial he was living in the Fuchu prison. "In the middle of November 1946" the witness bought goods from an American officer, whom he identified as the accused. He dealt directly with Kaneko, who delivered the products and received the money, but the accused drove the truck and remained therein while delivery was being effected. He paid about 25,000 yen for the products which included 7 or 8 cases of milk, 48 green colored cans marked "Evap" being in each case, and 3 cases of cocoa, 24 pounds to the case. The products were delivered to the house of Oda Chungiro, of Azabuku Sokus-Ada-machi, 15 Tokyo, in an American truck "a little larger than a jeep." The accused was driving and the witness met the truck at the gate. Kaneko unloaded the goods and the accused drove away. The witness then paid Kaneko who immediately left the house (R 46-48). On cross-examination it was shown that the witness had identified the accused prior to the trial in a line-up of about five persons at the Tokyo Electric building (R 49).

Seichi Otsuka testified that he was the proprietor of a coffee shop in Tokyo. On about 20 September 1946 Takasaku Kaneko came to his shop and advised him that he knew an American officer who could supply him with American goods. Kaneko assured the witness that he had authority to make the deal and that it was "pretty safe." Otsuka agreed to buy the goods and on the next day the American officer, whom he identified in court as being the accused, delivered five cases of milk and five 20-pound cans of coffee to his place in a jeep. He paid either the accused or Kaneko 14,000 yen for the goods.

Yamanaka Kiyoshi, a Tokyo broker, had business dealings with accused and Kaneko "around the middle of November 1946." He bought 10 to 20 cases of milk, cocoa and peanut butter but could not remember the exact amount of each item purchased. He paid 38 yen per can for milk and 80 yen per pound for cocoa. The items were American goods and there was written on the cans "made in America." The goods were delivered in a jeep driven by accused to a place called Takeda-no-bala where he met accused and Kaneko. The jeep was OD color and "a little larger than an ordinary jeep" (R 60-62).

Takasaku Kaneko, an English speaking Japanese national residing in Tokyo, testified that he was a merchant of electrical lamps but was employed at Army Hall from September 1946 to January 1947. On 24 January 1947 he received a present from the accused which the CID took from him when he left Army Hall. Sometime during the last week in September he and the accused delivered five cases of milk and five cans of coffee to Seichi Otsuka at his home near Ginza. The coffee and milk were removed from the ration storeroom at Army Hall and delivered in the Army jeep which was dispatched for use at the Hall. The accused did the driving, Kaneko rode with him. The witness also went with the accused to deliver about 5 cans of coffee and 4 or 5 cases of milk to another Japanese named Higuchi. This occurred about the middle of November and they got the products from the ration supply room at Army Hall. The Army weapons carrier was used for this delivery. On being examined by the court the witness stated that he made a total of about four trips with the accused selling rations from the supply room. The vehicles used in transporting the property were of OD color and were not the civilian type (R 50-58).

The court-martial took judicial notice of AFPAC Circular 39, dated 23 April 1946, also ASF Catalog QM 5-1-P and a pricing guide for Class 56 subsistence items for use outside the continental United States (R 62). It was stipulated that the value of both a "jeep" and "weapons carrier" was in excess of $50.00 (R 63).

4. <u>For the defense</u>

The defense called John Ohta, the CID agent who had testified for the prosecution, and interrogated him as to the manner in which he conducted the "line up " or identification parade at the Tokyo Electric Building. He stated that he had a "few persons and enlisted men placed in a room with accused *** to make sure that nothing could go wrong and give Lt. Downs a good, fair chance." Captain Gerhard and two other officers were among the group with accused. He then brought Kiyoshi Yamanaka and Seichi Otsuka into the room and each identified accused as the officer with whom he had dealt. He later brought Higuchi into the room and he likewise identified accused (R 63-64). Captain Frederick W. Gerhard testified concerning the identification parade. His recollection of the incident was not "too clear." As he recalled the parade, Sergeant Ohta brought the Japanese

into his office and "they walked up to this fourth floor to where the accused was living." The captain asked accused to come out into the hall and when he came out the Japanese began talking and the captain thought that this was when the identification took place. There were no persons present except the captain, the accused, Sergeant Ohta and the two Japanese (R 65-67).

The law member explained to accused his testimonial rights and he elected to remain silent (R 67).

5. The prosecution requested and was permitted to recall Takesaku Kaneko, who stated that the accused was the supervisor of supplies and vice commandant at Army Hall, that he was the person present in the court room and the same person with whom he sold ration supplies to Otsuka and Higuchi. He stated further that he "collected" the selling price and turned the money over to the accused. On recross-examination the witness asserted that he assisted the accused in loading the rations from the supply room and always gave him all of the money. He had daily contact with the accused and was positive as to his identity (R 69).

6. Army Hall, or at least so much thereof as was outside the immediate private living quarters of the military personnel billeted therein, was shown to be a public place as that term is construed both in military and civil jurisprudence. It contained clubs for military personnel, a mess, motion picture theater and other facilities for the convenience of the officers and enlisted men stationed in the area (CM 315105, Rochon; CM 250293, Riley, 32 BR 311,318). The evidence shows that on the evening in question the accused was drunk and that he followed Corporal Knapp about the area harrassing and threatening him. He was ordered out of the lobby of the club where other officers were assembled and his conduct was such as to cause a field officer to take him in custody at the theater. The court construed such misconduct as morally unbefitting an officer and a gentleman, viz., a man of honor, and therefore constituting a violation of Article of War 95 (Spec. and Charge I). Such construction of the evidence is in accord with the authorities (Winthrop's Mil Law & Prec, 1920 Reprint, pp 711-718; CM 271286, Kelley, 46 BR 89,94).

Specification 1 of Charge II alleges that at the place and time alleged the accused did wrongfully strike Staff Sergeant Duffin in the face with his fist. The evidence shows that after receiving Sergeant Duffin as a guest in his room, and during the course of some friendly argument or banter the accused became infuriated and struck Duffin in the face rendering him unconscious and causing him to fall to the floor where he was later found by Sergeant Guenley. The record reveals no justification for the assault.

The evidence adequately shows that accused threatened and abused Corporal Knapp, using language substantially as set forth in Specification 2 of Charge II.

Specification 5 of Charge II denounces a violation of AFPAC Circular No. 39 (1946) by giving to the Japanese, Kaneko, about seven packages of cigarettes. The evidence shows that accused gave Kaneko a package of mail matter which was addressed to an enlisted man who had departed for the United States but who had, prior to his departure, requested that a package be given to Kaneko. The package contained a carton of Lucky Strike cigarettes and other minor items. There is no evidence that the accused knew the contents of the package at the time of delivery but for this discussion we a ssume that the circumstances are such as to impute to him knowledge thereof. The court-martial took judicial notice of AFPAC Circular No. 39, dated 23 April 1946. A copy of the quoted circular is attached to the record of trial. There are ten sections to this circular. Section I, or the preamble, stated that the purpose of the circular is to curb black market activities by prohibiting illegal importation, transportation, sale, barter, and exportation of goods into, within and from the theater, and prevent wrongful use of United States mail and means of communication and transportation furnished by the United States. Section IV relates specifically to products procured from United States Army Exchanges and Commissaries. Section V denounces the "importation, transportation, sale, barter and exportation" of any merchandise not needed for official or personal use. No provision of the circular denounces the giving of personal property to Japanese nationals, nor do we find language therein which can be reasonably construed as denouncing the alleged act. Had there been involved a considerable amount of merchandise so as to raise an inference that the "giving" or transfer of the property was an act intended to be and in fact was in furtherance of the illegal sale or barter of the merchandise, an entirely different situation would be presented which might be construed as falling within the evil intended to be cured by the circular. Therefore, our conclusion that the circular fails to denounce or prohibit the act alleged in Specification 5 of Charge II is limited to the facts presented in the instant case, recognizing that the necessary implications and intendments arising from the language of a statute (circular or directive) are as much a part of it as if they had been fully expressed. (See Crawford, Statutory Construction, sec 168, p 266.)

Specifications 1 and 3 of Charge IV allege the wrongful sale by accused on 25 September 1946 of the described property of the United States and the wrongful application to his own use of the quarter-ton 4x4 military vehicle. The accused was the mess officer and drew the rations for Army Hall. He kept a key to the supply room. Kaneko, according to the evidence, was the intermediary through whom prospective purchasers of Government property were solicited. The rations were obviously property of the United States furnished and intended for the military service, having been drawn from the supply depot (CM 310950, Dickerson, 1 BR (NATO-MTO), 203; CM 318296, Mayer). In the latter part of September, accused and Kaneko loaded five 20-pound cans of coffee and five cases of milk from the supply room at Army Hall into a jeep and delivered the products to Suchi Otsuka. Each case

of milk contained 48 green cans marked "Evap" making a total of 240 cans. Otsuka paid either accused or Kaneko 14,000 yen for the merchandise. Kaneko asserted that he delivered the money to the accused.

Specifications 2 and 4 of Charge IV allege that on 15 November the accused wrongfully sold about 300 cans of milk and 12 twelve-pound cans of cocoa, and that he wrongfully applied to his own use a three-quarter ton 4x4 truck, all property of the United States furnished and intended for the military service. Tsunekyo Higuchi asserted that in the middle of September he purchased 7 or 8 cases of milk and three 24-pound cases of cocoa from the accused and Kaneko. The accused drove the truck, a little larger than a jeep, in making the delivery and Higuchi paid Kaneko 25,000 yen therefor. Yamanaka Kiyoshi also purchased 10 to 20 cases of milk,cocoa and peanut butter from accused on about 15 November 1946, paying 38 yen per can for the milk and 80 yen per pound for the cocoa. It will be seen that the total sales on 15 November exceeded the amount alleged in Specification 2. This circumstance, however, could not prejudice accused's rights. Value of all the property was either agreed to by stipulation or computed from Quartermaster supply tables of which the court took judicial notice. The ownership of the merchandise and the trucks was adequately proven as alleged and the circumstances are such as to leave no doubt that all the property was furnished and intended for the military service. The evidence of accused's guilt as to all charges and specifications of which he was convicted except Specification 5 of Charge II is convincing to the exclusion of any reasonable doubt.

The defense attacked the manner in which the pretrial identification parade was conducted and there appears to be some conflict in the testimony as to whether other officers and enlisted men were present with the accused in the room where he was identified. Inasmuch as all the witnesses positively identified the accused at the trial, the manner of prior identification is of no major importance.

6. War Department records show that the accused is 27 years of age and married. He graduated from high school in 1936 and was employed by steel and electrical works prior to being commissioned a Second Lieutenant, Air Corps, in September 1944. His efficiency reports prior to December 1946 show ratings of excellent. In a report, dated 31 December 1946, he was rated very satisfactory. The reporting officer stated that he did not prefer to have him in the organization.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 5 of Charge II but legally sufficient to support the findings of guilty of the charges and

remaining specifications as approved by the reviewing authority, legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction for a violation of Article of War 95 and authorized for a conviction in violation of Articles of War 94 and 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Hoffman, Judge Advocate

JAGK - CM 324590 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 1947

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 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 Paul J. Downs (O-837283), Air Corps.

2. As approved by the reviewing authority, this officer was found guilty of being grossly drunk and conspicuously disorderly in a public place on 26 January 1947 in violation of Article of War 95 (Spec. and Charge I); of wrongfully striking a staff sergeant in the face with his fist; of using threatening and abusive language toward a corporal; and of violating AFPAC Circular No. 39 by giving seven packages of American cigarettes to a Japanese national in violation of Article of War 96 (Specs. 1,2,5, Charge II); of wrongfully applying to his own use a Government truck and selling Government rations of a value of more than $20.00 on 25 September 1946 (Specs. 1 and 3, Charge IV), and of wrongfully applying to his own use a Government truck and selling Government rations of a value of more than $20.00 on 15 November 1946 (Specs. 2 and 4, Charge IV), all in violation of Article of War 94.

He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, remitted three years of the confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the findings of guilty of Specification 5 of Charge II (violation of AFPAC Circular No. 39) but is legally sufficient to support the findings of guilty of all other specifications and the charges as approved by the reviewing authority, legally sufficient to support the sentence and to warrant confirmation of the sentence.

While the accused was the transportation, supply and mess officer at Army Hall, an Army billet in Tokyo, Japan, on 25 September 1946, in company with a Japanese named Takasoku Kaneko, who was employed at Army Hall, accused took from the ration supply room about 240 cans of evaporated milk and five 20-pound cans of coffee, loaded the same into a United States Army truck and delivered and sold the property to a

Japanese shopkeeper. On 15 November 1946, and in company with Kaneko, whom he was using as an intermediary, he transported from the supply room and sold to another Japanese seven or eight cases of milk (48 cans to the case) and three cases of cocoa (24 pounds to the case). He also sold to another Japanese ten or twenty cases of milk, cocoa and peanut butter. Accused received 14000 yen for the sale on 25 September and a total amount in excess of 25000 yen for the sales made on 15 November 1946. All the merchandise was shown to be United States Army rations issued for the use of military personnel and was transported by the accused in United States Army trucks.

On the afternoon of 26 January 1947 Staff Sergeant Nick W. Duffin, formerly an officer and a friend of accused, visited him at his room in Army Hall. They drank about five "double shots" of liquor and reminisced about their prior service in the States. Duffin had at one time been a first lieutenant while accused was a second lieutenant. An argument arose concerning rank, apparently in jest. Suddenly accused struck Duffin in the face with his fist and he fell to the floor where he lay in an unconscious condition until he was moved to his room by another soldier. The accused rushed out of his room and to the lobby of the officers' club where he abused and threatened Corporal Howard L. Knapp, saying to him, "You know what they do with rats, they kill them and that is what I am going to do with you." Accused suspected Knapp of informing the CID concerning his illegal sales of Government property. He followed Knapp to a military theater and continued his threats, challenging the corporal to fight. Finally a field officer returned accused to his room. The evidence shows that the accused was drunk. On 27 January 1947 he gave to Kaneko a package which had been received through the mail addressed to a soldier named DeCaesar. It was shown that DeCaesar had returned to the United States, but prior to his departure he had requested that the package be delivered to Kaneko. The package contained, among other minor items, a carton of Lucky Strike cigarettes but there is no evidence that accused knew the contents thereof. The Board of Review is of the opinion that such a gift or transfer of the package to Kaneko, even assuming that the circumstances are such as to impute to accused knowledge of the contents, was not a violation of AFPAC Circular No. 39 (1946) as alleged, the Circular failing to denounce the "giving" of such property to Japanese nationals. I concur in the opinion of the Board of Review in this regard. The accused did not testify at the trial.

4. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution. I further recommend that an appropriate United States disciplinary barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 30, DA, 22 Oct 1947).

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

JAGQ - CM 324666

20 AUG 1947

UNITED STATES v. Second Lieutenant STANLEY BRAUN (02033627), AGD, Headquarters and Headquarters Detachment, Atlantic Sector, PCD, Fort William D. Davis, Canal Zone.	PANAMA CANAL DEPARTMENT Trial by G.C.M., convened at Fort William D. Davis, Canal Zone, 11 and 14 July 1947. Dismissal and confinement for five (5) years.

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

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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: Violation of the 93rd Article of War.

Specification 1: In that 2nd Lieutenant Stanley Braun, Headquarters and Headquarters Detachment, Atlantic Sector, Fort Wm D Davis, Canal Zone, did, at Fort Wm D Davis, Canal Zone, on or about 6 March 1947, feloniously embezzle by fraudulently converting to his own use, about $400.00, lawful money of the United States, the property of Tec 4 Clark E Sayles, entrusted to him by the said Tec 4 Sayles, for deposit with the Finance Officer in the Soldier's Deposit.

Specification 2: In that 2nd Lieutenant Stanley Braun, Headquarters and Headquarters Detachment, Atlantic Sector, Fort Wm D Davis, Canal Zone, did, at Fort Wm D Davis, Canal Zone, on or about 6 March 1947, with intent to defraud, falsely sign a certain entry in the Soldier's Deposit Book, War Department Finance Department Form No. 33 of Tec 4 Clark E Sayles, the following words and figures, to wit:

"Ft Davis, CZ Four Hundred Dollars 400 /s/ J.B.Isbell /s/Stanley Braun
6 Mar 1947 /t/ J.B.Isbell /t/Stanley Braun
Capt. Finance O 2nd Lt, AGD
Mil Per O "

by forging the name of J B Isbell thereto, which said entry was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that 2nd Lieutenant Stanley Braun, Headquarters and Headquarters Detachment, Atlantic Sector, Fort Wm D Davis, Canal Zone, did, at Fort Wm D Davis, Canal Zone, on or about 6 March 1947, feloniously embezzle by fraudulently converting to his own use, about $300.00, lawful money of the United States, the property of T Sgt Henry L Heard, entrusted to him by the said T Sgt Heard, for deposit with the Finance Officer in the Soldier's Deposit.

Specification 4: In that 2nd Lieutenant Stanley Braun, Headquarters and Headquarters Detachment, Atlantic Sector, Fort Wm D Davis, Canal Zone, did, at Fort Wm D Davis, Canal Zone, on or about 6 March 1947, with intent to defraud, falsely sign a certain entry in the Soldier's Deposit Book, War Department Finance Department Form No. 33 of T Sgt Henry L. Heard, the following words and figures, to wit:

"Ft Davis, CZ Three Hundred Dollars 300. /s/J.B.Isbell /s/Stanley Braun
6 March 1947 /t/J.B.Isbell /t/Stanley Braun
Capt, Finance O 2nd Lt, AGD
Mil Per O "

by forging the name of J B Isbell thereto, which said entry was a writing of a private nature which might operate to the prejudice of another.

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

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

SECOND ADDITIONAL CHARGE: Violation of the 69th Article of War.

Specification: In that Second Lieutenant Stanley Braun, Headquarters and Headquarters Detachment, Atlantic Sector, having been duly placed in arrest in quarters at Fort William D. Davis, Canal Zone on or about 23 April 1947, did, at Fort William D. Davis, Canal Zone on or about 25 June 1947, break his said arrest before he was set at liberty by proper authority.

Accused pleaded not guilty of all Charges and Specifications. He was found not guilty of the Additional Charge and its two Specifications but guilty of all other Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for seven years. The reviewing authority approved the sentence but remitted two years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

While accused was Personnel Officer of Headquarters and Headquarters Detachment, Atlantic Sector, Panama Canal Department, Canal Zone, on 6 March 1947, he was asked by Lieutenant Cacchiotti, Detachment Commander, as to the proper method of making soldiers' deposits. Accused advised him to deliver the money and the soldiers' deposit books to him and he would "take care of it" (R. 66), whereupon Lieutenant Cacchiotti and

Sergeant Sayles went to his office and delivered to accused $300.00 for deposit to the account of Sergeant Heard and $400.00 for deposit to the account of Sergeant Sayles. The soldiers' deposit books were also given to accused at this time (R. 11-15, 66-67). Accused counted the money and stated that it would be deposited in the soldiers' respective accounts, remarking in a joking manner, "I have $700.00" (R. 12). Sergeant Heard asked accused on 25 March about his deposit book and was advised that his $300.00 had been deposited but that his book had not been returned from the Finance Office (R. 19).

The deposit books of Heard and Sayles were introduced in evidence (Prosecution's Exhibits 1 and 2) and each contained an entry dated 6 March 1947 showing the deposit of the $300.00 and $400.00 respectively with the Finance Officer. The purported signature of "J. B. Isbell" appeared on each of these deposit entries. Captain Isbell testified that he was the Finance Officer of the United States Army at Fort Gulick, Canal Zone, and the only person at that installation authorized to sign deposit entries in soldiers' deposit books (R. 35). He further testified that he did not sign the deposit entries in Prosecution's Exhibits 1 and 2; that his purported signatures thereon are forgeries and that a careful search of the records of his office failed to show that any such deposits had been received (R. 35-40).

Sergeants Collyer and Gunter, cashiers in Captain Isbell's office, testified that they were on duty on 6 March 1947 and that their records disclose no deposits on that date to the credit of either Heard or Sayles (R. 114-115; 127-128).

Sergeant Towery of the Canal Zone Police, after being duly qualified and accepted by the court as a handwriting expert (R. 51-52, 154), identified photographs of Prosecution Exhibits 1 and 2, and they were admitted in evidence by stipulation as Prosecution Exhibits 1A and 2A, respectively (R. 52-53). Samples of the handwriting of the accused (Prosecution Exhibit 4), obtained from him after due warning of his rights (R. 54), were admitted without objection; and samples of signatures of Captain J. B. Isbell were admitted as Prosecution Exhibits 6 and 6A (R. 63-64). The witness explained in detail the method used in comparing these handwritings, and demonstrated by means of charts, photographs, measurements and microscopic examinations, how he arrived at his conclusions: first, that Captain Isbell could not have written the two questioned signatures (referring to Prosecution Exhibits 1 and 2) (R. 56-57); and, second, in his opinion, accused was the author of such signatures (R. 58-59). "The possibility of someone repeating that signature, with the eight letters involved, runs up into one chance in trillions" (R. 61). The witness further explained that by comparison he eliminated the writings of several soldiers (R. 60), one being Master Sergeant Gunter (see Prosecution Exhibit 5) (R. 62-63).

After being warned of his rights under the 24th Article of War, accused made a written statement under oath to the Provost Marshal to the effect that he remembered receiving a large sum of money from Sayles and $300 or $400 from Heard, and "to the best of my recollection, I deposited the money * * * with the Finance Officer"; that the only proof he had that the Finance Officer received it is the signature of the Finance Officer on the

soldiers' deposit books; that he had on occasion permitted an enlisted man named Karton to make soldiers' deposits at the Finance Office; that he initialed the service records of Sergeant Heard and Sergeant Sayles, showing soldiers' deposits on 6 March 1947, and that he could throw no light on the dissimilarity of the signatures on the entries in question to the genuine signature of Captain Isbell (R. 94, Prosecution's Exhibit 15). Staff Sergeant Karton in his deposition (Prosecution Exhibit 16) stated that on 6 March 1947 he was not Personnel Clerk but a casual awaiting shipment to the United States and that he had no knowledge of the transactions respecting Sergeants Heard and Sayles.

A letter from the Commanding General, Atlantic Sector, and 1st Indorsement by accused acknowledging receipt thereof, was by stipulation received in evidence. This instrument placed accused in arrest in quarters on 23 April 1947 and prescribed the limits thereof (R. 146, Prosecution Exhibit 19). At about 0830 hours on 25 June 1947 accused could not be found at his quarters or at the Officers' Club (R. 149) and at about 1105, two Military Policemen found him in civilian clothes in a bar in Colon, Republic of Panama, picked him up and took him to the MP station (R. 147). Accused did not have permission to leave his quarters on 25 June 1947 (R. 152) and the order of arrest was still in effect (R. 153).

4. Evidence for the Defense.

The efficiency of the accused as a Personnel Officer was testified to by a Master Sergeant who was in charge of the Officers' Section since December 1946 (R. 156). The Sergeant further testified that he knew accused's handwriting, identified his signatures on Prosecution Exhibits 1 and 2; and stated there was no other writing on those exhibits which was that of the accused (R. 157-158). Like testimony was given by a Technical Sergeant who had known the accused for about a year both as a Personnel Officer and as a Sergeant Major of the Coast Artillery Corps at Fort Amador (R. 161-163). Lieutenant Colonel Francis X. Bradley, CAC, who has known the accused intimately since 1940, both as an enlisted man and as an officer, testified that accused's reputation and character have always been above reproach. He was an outstanding soldier and had the confidence of all the officers. Colonel McCormick testified by deposition (R. 170, Defense Exhibit A) that he was Chief of Staff of the Panama Coast Artillery Command and, during two and one-half years, he had daily opportunity to observe the performance of duty, conduct, and behaviour of accused, who was then Master Sergeant, Chief Clerk, and Sergeant Major of the Command. He had the greatest confidence in the accused and placed unlimited trust in him. Lieutenant Braun was held in the highest esteem by all the officers and men of the headquarters and performed his duties in a superior manner, was devoted to duty, and his work was of the highest order. He was a soldier of excellent character and his appearance and conduct could well serve as a model for anyone desiring to be an outstanding soldier.

It was stipulated that if Lieutenant Colonel Frank L. Brown, CMP, were present in court he would testify as follows: "That Lieutenant Braun was highly regarded by prominent officers as a personnel specialist; that he was a man with few friends; that he spent the majority of his evenings each week circumspectly drinking in several favorite bars of his choice in

Colon; that several nights each week he remained away from his quarters most of the night; that he was close-mouthed concerning his personal affairs; that he has made no reputation in Colon for either gambling or consorting with women; that he possessed no papers which would tend to prove debts, considerable savings, or intimate friendships or relationships with local individuals" (R. 171).

The accused, after being advised of his rights as a witness, elected to remain silent (R. 171).

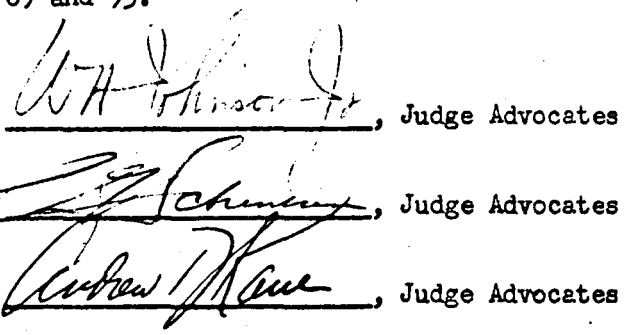
5. The evidence clearly establishes that accused in his capacity as personnel officer received the money for the two deposits in question to the accounts of the two enlisted men concerned. It is not disputed that the deposits were never received by the Finance Officer and that his purported signatures on the soldiers' deposit books are forgeries. The only direct evidence that accused perpetrated the forgeries is the testimony of the handwriting expert, Claude E. Towry, and consequently, his qualifications as an expert are important in determining the weight to be given his testimony. His qualifications were not attacked by the defense and it was shown that he is a graduate of the Federal Bureau of Investigation Academy where he successfully completed courses in comparison and identification of handwritings, including laboratory analysis of writings. He is now a civilian and member of the Canal Zone Police. He has been a qualified handwriting expert for the Government in the Canal Zone since 1934; has appeared in such capacity before Army and Navy courts-martial many times and is qualified as such before the United States District Court and other Canal Zone courts. He has testified before these tribunals as an expert in comparison and identification of handwritings on approximately 400 to 500 occasions. He was positive in his conclusions that accused perpetrated the two forgeries in question and the Board of Review is of the opinion that no reasonable doubt can exist on this point in view of such compelling evidence by an expert of his qualifications and experience.

The accused would have no reason to commit the forgeries of the finance officer's signatures on the soldiers' deposit books except to conceal the fact that he had not deposited the money in accordance with his trust and the court was clearly warranted in its finding that accused fraudulently converted it to his own use.

The breach of arrest by accused was proved beyond any doubt by the letter which he acknowledged, placing him in arrest and the military police who apprehended him in a bar in Colon. The limits of the arrest were definite and unambiguous and the evidence shows that accused understood them.

6. War Department records show that accused is 32 years of age and single. He completed four years of high school, enlisted in the Regular Army in 1937 and held the rank of Master Sergeant when he was appointed a Warrant Officer on 31 March 1943. He was relieved from active duty as a Warrant Officer on 29 November 1945 and reverted to his enlisted status as a Master Sergeant. On 21 October 1946, he was appointed a Second Lieutenant, AUS. His ratings as a Warrant Officer were consistently Superior and he has two ratings as Excellent during his service as a Second Lieutenant.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violations of Articles of War 69 and 93.



, Judge Advocates

, Judge Advocates

, Judge Advocates

JAGQ - CM 324666 1st Ind

WD, JAGO, Washington 25, D.C.

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Stanley Braun (0-2033627), AGD, Headquarters and Headquarters Detachment, Atlantic Sector, Panama Canal Department, Fort William D. Davis, Canal Zone.

2. Upon trial by general court-martial in the Canal Zone, this officer was found guilty of two offenses of embezzlement of soldiers' deposits in the amounts of $300 and $400, respectively; of two offenses of forgery, in violation of Article of War 93; and of breach of arrest, in violation of Article of War 69. 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 seven years. The reviewing authority approved the sentence but owing to his previous excellent record as a soldier, remitted two years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

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

4. The evidence shows that accused in his capacity as personnel officer, Headquarters and Headquarters Detachment, Atlantic Sector, Panama Canal Department, Canal Zone, on 6 March 1947 received two deposits of $300 and $400 respectively from two enlisted men of his unit for deposit with the Finance Officer to their accounts in soldiers' savings. The soldiers' deposit books were also delivered to accused. The money was not deposited with the Finance Office but entries were made in the two deposit books bearing the purported signatures of the Finance Officer, "J. B. Isbell" as having receipted for the deposits. The signatures of "J. B. Isbell" on the books were forgeries and a qualified handwriting expert testified that in his opinion the spurious signatures were written by accused.

While accused was awaiting trial he was duly placed in arrest in quarters and the limits of his arrest were explained to him. On 25 June 1947 he committed a breach of his arrest by going to Colon where he was apprehended by the military police.

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Two officers and two enlisted men testified for the defense to the effect that they had known and served with accused while he was an officer and enlisted man and that his reputation and character was above reproach; and that he was an efficient officer and highly regarded by his associates.

5. War Department records show that accused is 32 years of age and single. He completed four years of high school, enlisted in the Regular Army in 1937 and held the rank of Master Sergeant when he was appointed a Warrant Officer on 31 March 1943. He was relieved from active duty as a Warrant Officer on 29 November 1945 and reverted to his enlisted status as a Master Sergeant. On 21 October 1946, he was appointed a Second Lieutenant, AUS. His efficiency ratings as a Warrant Officer were consistently Superior and he has two ratings as Excellent during his service as a Second Lieutenant.

6. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution and that an appropriate Disciplinary Barracks be designated as the place of confinement.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

([illegible] 387, 17 Sept 1947)

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

JAGH - CM 324677

UNITED STATES	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at
	)	Paris, France, 3 July 1947.
First Lieutenant CHARLES R.	)	Dismissal, total forfeitures,
ST. JOHN (0-859919), Army of	)	and confinement for fifteen
the United States	)	(15) years

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 on the following Charges and Specifications:

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

Specification: In that, First Lieutenant Charles R. St. John, 101 Infantry, did, at or near Thionville, France, on or about 27 May 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Metz, France, on or about 13 June 1947.

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

Specification: In that First Lieutenant Charles R. St. John, 101 Infantry, did, at Metz, France, on or about 13 June 1947, feloniously take, steal and carry away a camera, value in excess of fifty dollars ($50.00), the property of Tadeuze Jablonowski.

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

Specification 1: In that First Lieutenant Charles R. St. John, 101 Infantry, did, at Metz, France, on or about 31 May 1947 feloniously take, steal and carry away a portable typewriter of value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Charles R. St. John, 101 Infantry, did, at Metz, France, on or about 10 January 1947, feloniously take, steal and carry away an adding machine of value in excess of fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Specification 3: In that First Lieutenant Charles R. St. John, 101 Infantry, did, at Metz, France, on or about 6 January 1947 feloniously take, steal and carry away a typewriter of value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

To the Specification of Charge I the accused pleaded guilty except the words "desert" and "in desertion" substituting therefor respectively the words "absent himself" and "without leave", of the excepted words not guilty, and of the substituted words guilty. To Charge I he pleaded not guilty, but guilty of a violation of the 61st Article of War. He pleaded guilty to all other charges and specifications and was found guilty of all charges and specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Alex Theriot, an investigator for the War Department, testified that he frequently saw the accused at Metz, France, during the period between February 1946 and March 1947. He occasionally met the accused at the mess of the National Hotel and the accused told him on several occasions that he was engaged in closing out a depot located near Metz (R 8).

In a pre-trial confession, made by accused on 14 June 1947, which was read into evidence by stipulation (R 8), he stated:

"I, 1st Lt. Charles R. St. John, 0-859919, 2nd Bn, 101 Inf., 26 Div., APO 26 (deactivated), do voluntarily and of my own free will make the following statement, after I had

been warned of my rights under the 24th AW by Victor Husband, Det Paris, 7701 EUCOM, APO 58, in the presence of Victor Zingale. On or about the 27th May 1945 I received a 24 hour pass to visit Luxemburg from the 14th Reinforcement Depot located in Thionville, France. I think I was on orders to rejoin my unit, the 2nd Bn, 101st Infantry the 29 May 1945. I was late for the meeting with the pass truck to return to Thionville and tried to hitch hike but was unable to do so. Before leaving on the 24 hour pass I had been warned that there would be disciplinary action taken if I failed to return in time. Being as was late and unable to return I decided to try and rejoin my unit in Germany and to that end I tried to hitch hike into Germany without success. After two or three days had passed in this way I became afraid of the consequence and decided not to return. I had no clothing except those I was wearing. I stayed in Luxembourg until 1st December 1945, living with some people and eating without cost at the American Red Cross. I then moved to Metz, France, staying at the Hotel Central, requisitioned by the U. S. Army for a transient hotel. I stayed here only a few days without cost for billeting and messing. I then moved to Nancy and Verdun where I was able to live in the officers' billets and eat without cost to myself until January 1946. I then moved back to Metz and obtained billeting and messing at the National Hotel without cost to me. When questioned, which was seldom, I told my questionaires that I was a member of the Signal Unit located in Thionville (866 Signal Depot). At this time I sold my ring for the sum of 6,000 francs. While living at the National Hotel I hitch hiked to Paris and managed to obtain a clothing PX card. I then bought an officer's blouse, two shirts, one pair pinks, one pair shoes, and various items of underwear. I then returned to Metz and stayed at the National Hotel until 1 May 1946. I then moved into the Royal Hotel when the National was derequisitioned at this date. I stayed at the Royal Hotel without question and without cost until the Royal Hotel was derequisitioned on 30 September 1946. I then moved to the Central Hotel that was now operated under civilian management.

"I then begun to feel the need for money and sold my clothing for approximately 6,000 francs. When this was gone I borrowed from time to time. In November or December of 1946 I stole a standard size typewriter from the Town Major's office, 31 rue du Genie, Metz, that I sold to an

unknown Frenchman in a cafe for the sum of 7,000 francs. During this same period I stole an adding machine from the U. S. Claims Office that was located at the same address as the Town Major. This machine I sold to another unknown Frenchman for the sum of 8,000 francs. Until three weeks ago, during all this time, I was eating at the Town Major's mess, then at the Bivouac Area mess and later at the 3118 Signal Battalion's Detachment mess. During the month of May 1947 I stole a portable typewriter from the 3118 Signal Service Battalion, Metz Detachment. I sold the typewriter for the sum of 5,000 francs to an unknown Frenchman. When the Royal Hotel was derequisitioned some one left a transmitting and receiving radio set, the property of the U. S. Army, in one of the rooms. I acquired this radio and later in April 1947 I sold it for 5000 francs. Yesterday, the 13 June 1947, I had become desperate for the need of funds and I entered a civilian's room in the Central Hotel, Metz, using his key that he had left hanging on the rack to gain entrance to his room. I took a Russian Leica camera, valued at 30,000 francs, a bottle of perfume and a pair of nylon stockings. I wrapped the camera in a newspaper intending to take it from the hotel and dispose of it. As I was about to leave the hotel the manager stopped me and asked 'what I had in the package'. I then realized the theft must have been discovered. So I refused to let him see what was in the package. The civilian police arrived and ordered me to return to my room. When I returned to my room I threw the camera out through the window and hid the perfume and stockings. I then wrapped a flat iron in some newspaper, thinking that when the police came to my room that would be sufficient to answer for the package I attempted to take from the hotel. A police inspector and the manager came to my room and while the inspector was questioning me the manager noticed the camera laying on the edge of the garage roof and pointed it out to the inspector. Captain Leo F. Brown, U. S. Claims, was notified and I was then taken to the Police Bureau where I made a complete confession. Captain Brown placed me under arrest in the name of the U. S. Army. I have read my statement consisting of two (2) pages and I swear that it is true." (R 9-10).

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

Alex Theriot testified that accused had a good reputation as an officer and a gentleman at Metz (R 11).

After his rights as a witness were explained to him by the law member (R 10-11) the accused elected to take the stand as witness and in his own behalf (R 12). He testified that he was born in 1921 in Puerto Rico. His

father was a psychology professor and accused attended Cornell University for three years. He was inducted in the Army in August 1942. He came overseas with the 449th Bombardment Group as Squadron Bomb Sight Maintenance Officer in December 1943. In August 1944 he volunteered for Airborne Infantry training and, after qualifying as a parachutist, was assigned to the 26th Division about on 1 January 1945 (R 12). During the time he was in combat he received the ETO ribbon, four battle stars, the Bronze Star, the Presidential Unit Citation with one Oak-leaf cluster and the Combat Infantryman Badge.

In April 1945 he was hospitalized with yellow jaundice and after release from the hospital he was assigned to the Replacement Depot at Thionville (R 13).

He stated that his confession as read to the court was true, and explained his initial absence by saying that he went to Luxembourg on an overnight pass with the full intention of returning. He missed the pass truck and became fearful of the consequences of his absence (R 13), because he had been warned that "if we went absent without leave that our allotments could be taken away from us and we would suffer punishment by our organization CO." When asked if he had the intent to return during the period of his absence he stated, "Sir, I realized throughout the time that I would eventually have to return, but it was a case of procastination mostly I believe. I always was cognizant of the fact that I would have to come back." He stated that he had always been a procrastinator (R 14). He also stated that he always wore the U. S. Army uniform between 27 May 1945 and 13 June 1947 and that he used the name of Charles James for a period of about ten months before he was apprehended (R 15). He corresponded with his wife and mother on a few occasions. During the period of his unauthorized absence he drew no pay or allowances (R 16).

5. The record of trial is legally sufficient to support the findings of guilty of Charges II and III and their respective specifications in view of accused's plea of guilty. The only problem presented by the record is whether the evidence sufficiently supports the findings of guilty of desertion alleged in Charge I and its specification.

By exceptions and substitutions the accused pleaded not guilty to desertion but guilty to absence without leave. No evidence of accused's unauthorized absence was introduced other than that supplied by accused himself in his plea, his confession and his testimony.

> "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent. However, a plea of guilty of absence without leave to a charge of desertion is not in itself a sufficient basis for a conviction of desertion. In such a case no inference of the intent not

to return arises from any admission involved in the plea, and therefor, to warrant conviction of desertion, evidence, such as evidence of a prolonged absence or other circumstances, must be introduced from which the intent in desertion can be inferred" (MCM 1928, par 130, pp 143-144).

The accused's confession supplies sufficient facts from which an inference of his intent not to return to military control may be drawn. Not only did he admit that he was quartered by, and messed with, military organizations during virtually the entire period of his unauthorized absence, without disclosing his status as an absentee, but also, inferentially, that he preferred to steal to support himself rather than to surrender to the military authorities.

The accused's confession, however, cannot be considered as evidence of desertion unless there is in the record other evidence that the offense charged has probably been committed (MCM 1928, par 114a, p 115).

In our opinion the corpus delicti was established in the instant case by accused's testimony wherein he reaffirmed the truth of the matters contained in the confession, and admitted that he used a fictitious name, presumably as an aid to avoid detection, during the period of his unauthorized absence. His statement that he remained absent without leave because of his fear of punishment for a short absence without leave, although he realized that he would eventually have to return, warrants an inference that accused intended to remain absent until such time as apprehension or other circumstances compelled his return to military control.

Accordingly we are of the opinion that the evidence sufficiently supports the findings of guilty of desertion as alleged.

6. The accused is 26 years of age, married and attended Cornell University for three years. He entered the military service on 10 August 1942, and after completing Aviation Cadet training he was commissioned as a second lieutenant, Air Corps on 12 March 1943. He was promoted to first lieutenant, AUS, Air Corps on 4 March 1944, while serving as Bomb Sight Maintenance Officer with a Bombardment Squadron in the Mediterranean Theater of Operations. In August 1944 he volunteered for Airborne Infantry training and after qualifying as a parachutist he was assigned to the 26th Infantry Division.

7. Attached to the record of trial is a recommendation addressed to the reviewing authority prepared by the defense counsel and concurred in by the trial judge advocate and four members of the court wherein it is recommended that a disciplinary barracks be designated as a place of confinement. Therein it is stated in part:

"It is submitted for your consideration that accused's desertion was a result of an inherent procrastinating tendency rather than of a desire to escape or avoid hazardous duty, and that the violations of Articles of War 94 and 93 were somewhat mitigated by the fact that the amount of moral turpitude involved, as evidenced by the circumstances, was at a minimum, and also that the attitude of the accused before and during trial was one of repentance and realization of the seriousness of his offenses. Consequently, in view of the previous excellent record of the accused, I recommend that accused should be sent to a place of confinement where rehabilitation may be accomplished."

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 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 dismissal, total forfeitures, and confinement at hard labor for 15 years is authorized upon a conviction of violations of Articles of War 58, 93, and 94.

D Hettinstein, Judge Advocate

R McDonald Ray, Judge Advocate

Waldemar A Solf, Judge Advocate

JAGH-CM 324677 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
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 Charles R. St. John (O-859919), Army of the United States.

2. Upon trial by general court-martial this officer was found guilty of desertion, in violation of Article of War 58 (Spec, Charge I); of the larceny of a camera, in violation of Article of War 93 (Spec, Charge II); and of the larceny of two typewriters and an adding machine, each of a value of more than $50, property of the United States, furnished and intended for the military service thereof, in violation of Article of War 94 (Specs 1-3, Charge III). 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 fifteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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 the opinion.

On or about 27 May 1945, the accused, who was then assigned to a Replacement Depot at Thionville, France, received an overnight pass to visit Luxembourg and overstayed that pass. He testified at the trial that he did not rejoin his unit because he feared the consequences of going absent without leave. Thereafter he was quartered by, and messed with, various Army units in the vicinity of Metz, but did not disclose his status as an absentee and performed no military duty. He drew no pay, and initially supported himself by selling various items of personal possessions and later by stealing. He was apprehended at Metz, France, on 13 June 1947 immediately after having stolen a camera from a hotel room.

He pleaded guilty to the specifications alleging larceny in violation of Articles of War 93 and 94. With respect to the alleged desertion he pleaded not guilty to desertion but guilty of absence without leave from 27 May 1945 until 13 June 1947. His intention to desert the service was clearly shown by other competent evidence.

4. The accused is 26 years of age, married and attended Cornell University for three years. He entered the military service on 10 August 1942, and after completing Aviation Cadet training he was commissioned as a Second Lieutenant, Air Corps, on 12 March 1943. He was promoted to First Lieutenant AUS, Air Corps, on 4 March 1944, while serving as a Bomb Sight Maintenance Officer with a Bombardment Squadron in the Mediterranean Theater of Operations. In August 1944 he volunteered for Airborne Infantry Training, and after qualifying as a parachutist he was reassigned to the 26th Infantry Division.

5. Attached to the record of trial is a recommendation addressed to the reviewing authority prepared by the Defense Counsel and concurred in by the Trial Judge Advocate and four members of the court wherein it is recommended that a Disciplinary Barracks be designated as a place of confinement. Therein it is stated in part:

> "It is submitted for your consideration that accused's desertion was a result of an inherent procrastinating tendency rather than of a desire to escape or avoid hazardous duty, and that the violations of Articles of War 94 and 93 were somewhat mitigated by the fact that the amount of moral turpitude involved, as evidenced by the circumstances, was at a minimum, and also that the attitude of the accused before and during trial was one of repentance and realization of the seriousness of his offenses. Consequently, in view of the previous excellent record of the accused, I recommend that accused should be sent to a place of confinement where rehabilitation may be accomplished."

6. I recommend that the sentence be confirmed, but in view of all the circumstances in the case, recommend that the period of confinement be reduced to seven years, that as thus modified the sentence be carried into execution, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

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

CM 324677

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 13, 18 Sept 1947).

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

JAGK-CM 324725

19 OCT 1947

UNITED STATES	)	PORT OF LEGHORN
	)	
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 15 May 1947. Dismissal, total forfeitures and confinement for five years.
Second Lieutenant KARL T. BLAKELEY (0-2056219), Air Corps.	)	

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

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

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

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

Specification: In that Second Lieutenant Karl T. Blakeley, attached 7105 Surrendered Enemy Personnel Administrative Company (Overhead), then of the 486th Bombardment Squadron, 340 Bombardment Group, did, without proper leave, absent himself from his command at or near Rimini, Italy from about 27 July 1945 to about 9 September 1946.

CHARGE II: (Withdrawn by appointing authority before arraignment).

Specification: (Withdrawn by appointing authority before arraignment).

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

Specification 1: In that Second Lieutenant Karl T. Blakeley, attached 7105 Surrendered Enemy Personnel Administrative Company (Overhead), did at or near Naples, Italy on or about 12 September 1945 wrongfully present for approval and payment a claim against the United States by presenting to Captain F. E. Loback, a finance officer, an officer of the United States duly authorized to approve and pay such claims, in the amount of $373.40 for services alleged to have been rendered to the United States from 1 August 1945 to 31 August 1945 by the said Second Lieutenant Karl T. Blakeley, which claim was false and fraudulent in that no such services had been performed during said period of time, and was then known by the said Second Lieutenant Karl T. Blakeley to be false and fraudulent.

Specification 2: In that Second Lieutenant Karl T. Blakeley, attached 7105 Surrendered Enemy Personnel Administrative Company (Overhead), did at or near Naples, Italy on or about 1 October 1945 wrongfully present for approval and payment a claim against the United States by presenting to Captain F. E. Loback, a finance officer, an officer of the United States duly authorized to approve and pay such claim, in the amount of $372.00 for services alleged to have been rendered to the United States from 1 September 1945 to 30 September 1945 by the said Second Lieutenant Karl T. Blakeley, which claim was false and fraudulent in that no such services had been performed during said period of time, and was then known by the said Second Lieutenant Karl T. Blakeley to be false and fraudulent.

Specification 3: In that Second Lieutenant Karl T. Blakeley, attached 7105 Surrendered Enemy Personnel Administrative Company (Overhead), did at or near Naples, Italy on or about 1 November 1945 wrongfully present for approval and payment a claim against the United States by presenting to Captain F. E. Loback, a finance officer, an officer of the United States duly authorized to approve and pay such claim, in the amount of $373.40 for services alleged to have been rendered to the United States from 1 October 1945 to 31 October 1945 by the said Second Lieutenant Karl T. Blakeley, which claim was false and fraudulent in that no such services had been performed during said period of time, and was then known by the said Lieutenant Karl T. Blakeley to be false and fraudulent.

Specification 4: (Finding of Not Guilty).

After accused's plea in bar of trial on the ground of former jeopardy had been overruled, he pleaded not guilty to the charges and specifications upon which he had been arraigned. He was found guilty of Charge I and its specification, guilty of Charge III and Specifications 1, 2 and 3 thereunder and not guilty of Specification 4 of Charge III. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

Evidence for the Prosecution

About 9 September 1946, Colonel Henry E. Kelly, assigned to G-1, Headquarters, Mediterranean Theater of Operations, received an inquiry from the provost marshal's office concerning the disposition to be made of a certain officer and he instructed that office to send the officer in question to him under guard. On 10 September, accused reported under guard to the colonel. Colonel Kelly asked accused what his name was and why he was "turning in." Accused replied that his name was Blakeley and that he had remained in Italy when his unit, "some kind of bomb group," had left during the period of redeployment but that he was now "tired of it." The colonel did not warn accused of his right under the 24th Article of War not to incriminate himself, for the colonel was not interrogating accused for the purpose of obtaining a confession but was merely "trying" to have accused "qualify to be confined." He did not make any promises or threats to accused. As a result of this conversation with accused, Colonel Kelly directed that accused be sent to Leghorn, to report upon arrival to the Theater Provost Marshal, Headquarters, Peninsular Base Section. The defense objected to the admission in evidence of accused's statement to Colonel Kelly because of its allegedly involuntary nature (R 11-17; Pros Exs 2, 3).

During September 1946, Captain Julien H. LePage was assistant provost marshal and stockade officer in the office of the Theater Provost Marshal, Peninsular Base Section. Between 10 and 12 September 1946, accused "reported" to Captain LePage at the latter's office. Accused did not appear to be in arrest. He told the captain that he had gone absent without leave in July 1945 from the 340th Bombardment Group which at that time was stationed near Rimini, Italy, and had "turned himself in" at Capodichino Airfield in Naples. Accused had his Officers' Qualification Card, Form "66-1," in his possession, which document he turned over to Captain LePage. The captain took accused to the office of the staff judge advocate, Colonel Wolfe, where he left him, and accused was later officially assigned to the 7105th Surrendered Enemy Personnel Administrative Company,

339th Enclosure. Captain LePage had not explained to accused his right not to incriminate himself but had not made any threats or promises to accused in order to obtain a statement from him. Defense counsel objected to the admission in evidence of accused's conversation with Captain LePage on the ground that it was not shown to have been voluntary (R 20-25; Pros Exs 1, 4).

Prosecution Exhibit 5 purported to be accused's Officers' Qualification Card. After being identified by Major Maxwell Miller, adjutant of the surrendered enemy personnel enclosure of which the 7105th Surrendered Enemy Personnel Administrative Company was a unit, it was admitted in evidence without objection by the defense, with leave to substitute a photostatic copy thereof in the record of trial. Prosecution Exhibit 5, as presently appearing in the record of trial, is not a photostatic copy of an original Officers' Qualification Card, but is attested by the trial judge advocate to be a "true copy" of the Officers' Qualification Card of accused, such copy being accomplished on Form 66-4. From this copy it appears that on 16 May 1945, accused was serving as a two-engine pilot with the 486th Bombardment Squadron, 340th Bombardment Group, and that the type of duty performed by him and the organization to which he was assigned for the period from 27 July 1945 to 10 September 1946 was "unknown." On line 30 of this copy, which concerns the "Initial Interview", the following appears:

"/s/ Thomas B. Meyer
Signature of Interviewing Officer
/s/ K. T. Blakeley
Signature of Officer" (R 26, 27; Pros Ex 5).

The 340th Bombardment Group departed from the Mediterranean Theater en route to the United States on 27 June 1945. On 7 November 1945, the 486th Bombardment Squadron and the 340th Bombardment Group were inactivated at Columbia Army Air Base, Columbia, South Carolina (R 31-32; Pros Ex 7).

About 20 September 1946, Colonel Claudius O. Wolfe was Staff Judge Advocate of Peninsular Base Section. On that day, accused was "called" into the colonel's office "for a conference with reference to certain incidents" and "with a view toward possible court-martial charges being preferred." Accused had been introduced to the colonel about a day or two before when the provost marshal, Captain LePage, had "brought him in." During the interview on 20 September, Colonel Wolfe did not mention the 24th Article of War to accused but did say that accused need not make any statement and that if he did make a statement it must be entirely voluntary. He did not tell accused that anything he said might be later used against him in the event of trial by court-martial. Colonel Wolfe asked accused certain questions, which questions accused answered. From accused's answers, it appeared that he had been assigned to the 340th

Bombardment Group. About 27 July 1945, this Group was preparing to return to the United States, and accused, who was stationed at that time in Naples, was ordered to report to the Group's headquarters in Rimini. He did report as ordered and was informed that the organization was returning home. He requested permission to return to Naples to pack his effects and permission was granted. Returning to Naples, he decided to stay there and did not again report to his organization. About 9 September 1946, he decided that "he could not stand living the way he was living any longer" and returned to military control at Capodichino Airport "to take his punishment and get it over with." The defense objected to the reception in evidence of accused's interview with Colonel Wolfe on the ground that accused's statements made during the course of this interview were involuntary (R 42-51).

In November 1946, Captain Donald C. Young was on duty with the Judge Advocate Section of Peninsular Base Section. He was the trial judge advocate on Peninsular Base Section general courts-martial. Sometime during that month, he had a conversation with accused, at the beginning of which he informed accused that he was the trial judge advocate of the Peninsular Base Section general courts-martial and that he had no desire to talk to him. Captain Young advised accused that he did not want to talk to him because he felt that he might possibly have to prosecute accused and did not want to take unfair advantage of him. Accused, however, persisted in his desire to converse with the captain and stated that previous to the time the United States entered the war he had been a member of the Royal Canadian Air Force. He had later been transferred to the United States Air Corps and flew many combat missions over Italy. When the war was "over" in 1945, his organization was ordered home. In the meantime, he had fallen in love with a young lady whom he wanted to marry and asked his commanding officer to transfer him to an organization which was to remain in Italy. His request for a transfer being denied, he "left" his organization so he could marry the lady and eventually did marry her. During the time he "was away from his organization" he was interested in some business in Naples. Accused did not state the exact date he had gone absent without leave but did say that "it was a short time after combat had ceased and when his organization went home." Captain Young had not explained the 24th Article of War to accused, he did not tell accused that he had a right to remain silent and he did not inform him that anything he said might be later used against him in the event of trial by court-martial. However, the captain made no threats or promises to accused. In the course of this conversation, accused asked Captain Young what he thought the general court would "give" him, to which the captain replied that he did not know. At the time of this interview, accused did not request Captain Young to act as his defense counsel but accused did make such a request "just a short time ago * * * since the charges were served on him" (R 51-55). From the accompanying papers, it appears that on 26 April 1947, accused submitted a formal request for the services of Captain Young as special defense counsel

and that this request was denied on the ground that Captain Young was not available. Defense counsel objected to the admission in evidence of accused's statement to Captain Young on the ground that it was not voluntary and that it was privileged (R 53, 54).

Captain Harold W. Graham was assigned to the 30th Finance Disbursing Section and performed the duties of deputy finance officer therein. He had on file in his section the "retain copy" of Pay and Allowance Account No. 5730-20, a voucher purportedly made payable to accused for his January 1947 pay and allowances. This was an actual copy of the original voucher upon which payment had been made to accused of the account therein stated. The original had been "sent forward." Captain Graham could not "swear" that the original voucher was signed but it was the practice of his office to "see that they are signed before they go forward." Original vouchers were sent to the General Accounting Office. He was not present when the original voucher was prepared nor did he know by whom or where it had been prepared. He could not recall having seen the original voucher. In November 1946, Captain Graham talked to accused in the finance office with reference to his September 1946 pay voucher. He related the substance of this conversation as follows:

> "He had come to the officer's pay section sometime prior to my being called by one of the enlisted men who came to ask me whether an officer who had been absent without leave was entitled to pay then. I inquired why he was asking the question. He said there was an officer making inquiry so I went over and talked to the officer who was Lt. Blakeley, and he told me that he had been absent without leave for a period of time; I don't recall the period, but that he had returned to military control early in September and he had been told by someone that he was entitled to draw his pay for that period during which he was absent without leave, and he wanted to know if he could submit a claim for it. During the conversation and at that time we still had the September pay voucher. I obtained it from the files to discover what action had been taken, when he was paid, as he told me he hadn't returned to military custody until early September. There was no notation on there concerning the fact that there had been any absence. It had, however, indicated that partial payment had been paid in the amount of $56.00 by a finance officer at Caserta, Major Brown. Upon inquiry, Lt. Blakeley told me that he had not wanted to tell the men in our office who had prepared that voucher for him that he had been absent without leave therefore he had stated that the partial payment in that sum had been made in order that he would not be claiming pay for the time during which he had been absent during the month of September. That matter was not cleared up on his

October pay voucher. It went along from that time. We paid him for October, November and December, and in January that matter was clarified on the pay voucher. We had been awaiting information concerning allotments. We didn't know what the status of the allotments might be and in just what condition his pay account was, so we paid him for the months he had pay coming until January when we made this adjustment. We refunded to him the amount of the partial payment which had appeared on the September voucher and then collected from him the amount which should not have been claimed during those first nine days in September when he stated he had been absent without leave." (R 62)

He did not warn accused that anything he said might be used against him in the event of trial by court-martial. The retained copy of Pay and Allowance Account No. 5730-20 was admitted in evidence as Prosecution Exhibit 13. It contained the remark "Due US for A.W.O.L. for 1 Sept. 46 - 9 Sept. 46 not deducted on Vou. #2207-20 $98.10" and on line 16 thereof, upon which was printed a certificate as to the truth and correctness of the account, appeared the typing "Karl T. Blakeley 2nd Lt AC." It also contained a printed and stamped notation that the account had been

"Paid by
L. N. Fields
Major, FD."

There were no signatures on this copy. Defense counsel objected to the reception in evidence of Prosecution Exhibit 13 on the ground that it was not signed by accused and was "clearly not admissible in evidence." He also objected to the admission in evidence of Captain Graham's conversation with accused on the basis that the statements made by accused during the course of such conversation were not voluntary (R 57-63; Pros Ex 13).

Filomena De Chiara was the aunt of accused's wife, Olga Mantone. Accused had married Olga in Naples on 15 November 1944 and thereafter lived with her in some rooms which they occupied in that city. Accused was a lieutenant on a bomber until the war "ended" after which time "he didn't do anything" and "was always at home, he never went out." After the "end" of the war, Filomena gave her ration card to accused and his wife because "they did not have any means to live. They were in very poor economical condition." She also brought them food "some time." Accused made no effort to conceal or hide himself and tried to sell toys which he took to the various shops in Naples. He engaged one "Piccirillo" to make some toys which he had invented but "Piccirillo" did not "deliver the toys in time" and accused's wife "filed a civil action at the Tribunal of Naples." Accused told Filomena that he had been discharged from the Army. He "was wearing civilian clothes for a while." She saw him

wearing civilian clothes "one or two times" at her niece's house when she went to see them. Testifying by deposition on 14 May 1947, she stated that "it is just a few months that he left, he left before Christmas" (R 33-35; Pros Ex 8).

Marcello Piccinini, an architect residing in Naples, met accused for the first time about the end of 1945 or the beginning of 1946. At this time, he was managing a wood construction firm and signed a contract in the firm's name to manufacture for accused and his wife an airplane toy which accused had invented. Delivery on these toys was begun in February or March 1946. A law suit was pending between accused's wife and the firm for breach of this contract but Piccinini entertained no ill feeling against accused because of it. He saw accused at his, Piccinini's, home about three or four times and at accused's home once or twice. Once, when accused was visiting him, he saw an Air Corps officer's cap lying on the table in the hall. "The greater part of the time" accused was dressed as a civilian. When he first met accused, accused was dressed in "a common grey suit" (R 36-41).

Documents purporting to be photostatic copies of pay vouchers submitted by accused for the months of August, September and October, 1945, were accepted in evidence as Prosecution Exhibits 9, 10 and 11, respectively. According to these exhibits, accused's pay and allowance account for each of the three months was as follows:

Month	Total Credits	Total Debits	Net Balance
1-31 August, 1945	$373.40	$79.95	$293.45
1-30 September, 1945	372.00	79.95	292.05
1-31 October, 1945	373.40	79.20	294.20

A signature purporting to be that of accused appeared on lines 16 and 18 of each document. Line 16 contained a certificate that "the foregoing statement and account are true and correct" and line 18 was a receipt for cash payment of the net balance. These receipts were signed on the following dates:

Pros Ex 9	12 Sept 1945
Pros Ex 10	1 Oct 1945
Pros Ex 11	1 Nov 1945

Each document bore a printed and typed notation that the respective account had been

"Paid by
F. E. Loback
Captain, F.D."

and also contained on the back thereof a typed certificate signed by the "Chief, Reconciliation and Clearance Subdivision, General Accounting Office, Army Audit Branch, St. Louis 20, Missouri," to the effect that the signer was the custodian of the original voucher in question, that such original voucher was "on file in the General Accounting Office, Army Audit Branch, Reconciliation and Clearance Subdivision, St. Louis, Missouri," and that the photostat was a true copy of the original voucher. Defense counsel objected to the reception in evidence of these photostatic copies on the ground that they were not properly authenticated and that it was not shown that the signatures thereon which purported to be those of accused were in fact made by him (R. 55-57; Pros. Exs 9, 10 11).

Major Maxwell Miller had read an order of the 7105th Administrative Company appointing accused an investigating officer to inquire into the circumstances surrounding a fire that occurred at Enclosure 334. On 4 February 1947, an official investigating officer's report concerning this fire was submitted to Major Miller's office. This report was received in evidence as Prosecution Exhibit 6. It appeared to be signed by accused as investigating officer. Major Miller did not see the report being signed and "never witnessed" accused's signature. Accused did not personally turn over this report to Major Miller and the major presumed that it first came to his attention when he picked it up from his desk. The defense objected to the admission in evidence of Prosecution Exhibit 6 on the ground that it was not shown that the signature thereon purporting to be that of accused was in fact his (R 26-30).

Evidence for the Defense

Major Miller had in his possession accused's 201 file. In this file was a statement of a medical officer, dated 17 March 1944, concerning the number of combat missions in which accused had participated. This statement was received in evidence as Defense Exhibit C. From this exhibit it appeared that accused had completed 46 combat missions and had experienced three emergency landings and one crash landing while on his tour of foreign duty, two of these emergency landings having been caused by enemy action. The medical officer recommended, in his statement, that accused be returned to the United States for rehabilitation and reassignment due to accused's numerous emergency landings. Accused's 201 file also contained a letter from Headquarters, 12th Air Force, dated 2 March 1944, notifying accused, then a flight officer, of his battlefield appointment as a second lieutenant in the Army of the United States, which appointment had been made because of his outstanding ability and leadership in actual combat. This letter was admitted in evidence as

Defense Exhibit B (R 30, 67; Def Exs C, B).

It was stipulated by and between the prosecution, the defense and accused that accused was divorced from his former wife, Katherine Blakeley, on 11 August 1944 and that one child was born as a result of this marriage (R 66).

Accused, having been informed of his rights as a witness in his own behalf, elected to make an unsworn statement through counsel as follows:

> "The accused desires to tell the court in all he was on 49 combat missions; the last mission occurred when he was in Corsica. Prior to that time in April of 1944 he took charge of a rest haven for the fliers of his group down in Naples and operated that as an Officers Club. After he commenced that operation he went back to Corsica and participated in one more mission or enough to bring him up to 49 missions; with the consent of his squadron commander he deferred making the 50th mission because at that time there was an order to the effect that all fliers with 50 missions would be returned to the Zone of Interior, and in the meantime he had met the present Mrs. Blakeley and was desirous of remaining in Italy until one of the five marriage applications which he had filed would be processed to authorize their marriage. They took over this apartment in '44.
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> "During the months of June through December 1945 the accused flew at various times in connection with testing planes. There was a service repair unit at Capodichino, I believe, Anyhow, Naples, where they were sorely in need of pilots to take the planes up and test them. I think they had two pilots assigned there but either because they didn't care so much for flying or there was more flying than they could properly do, the accused flew during those months. That is from June through December 1945, and flew much more time each month than is required of a pilot to maintain his aeronautical rating and entitled him to flying pay.
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> * * *
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> "The accused made five requests for permission to get married. They were denied by his commanding officer. However, the accused did get married in 1944 but did not know that the marriage had been authorized until this case came on for trial on 2 May. At that time it appeared that a copy of the authorization was in the staff judge advocate's office at MTOUSA Headquarters but that is the first information that the accused had that he had ever been authorized to marry" (R 69).

4. Discussion

Plea of Former Jeopardy

Before the court was sworn the trial judge advocate announced that by direction of the appointing authority "the last proceeding in the case of the United States against 2nd Lieutenant Karl T. Blakeley is declared null and void." He then stated that such previous proceedings had been declared "void" because the law member who had then sat on the court had signed the pre-trial advice to the appointing authority recommending that accused be tried by general court-martial. From the accompanying papers, it appears that the law member who was present on the court at the prior proceedings, Major Benjamin Axleroad, had in fact signed the pre-trial advice. In the instant session, the court was sworn, and, after arraignment but before pleading to the general issues, accused offered a plea in bar of trial based on former jeopardy allegedly arising from the prior proceedings in the case. The record of these former proceedings was introduced in evidence as Defense Exhibit A, from which it appeared that the members of the court as it was constituted at the prior session had been duly sworn and that the court had adjourned after accused had been arraigned upon the charges and specifications but before he had pleaded thereto. The adjournment was caused by the granting of a defense motion for a continuance in order to give the defense an opportunity to meet the allegations of an amended specification. The charges and specifications upon which accused had been there arraigned were identical with those upon which he was arraigned at the instant session. It also appeared that the court sitting in the previous proceedings was appointed by the same order appointing the court herein, that five members who had been present at the first session were present at this session and that also present at the instant session were a new law member and one other new member, both of whom had been properly detailed by way of substitution by amendatory orders, and one member who had not been present at the former session. The charges and specifications had been duly referred to the court by first indorsement prior to the first session thereof and were again referred by a new first indorsement for trial at the instant session. Accused's plea in bar of trial was overruled and he pleaded to the general issue (R 1-11; Def Ex A).

The circumstance that the law member who sat on the court at the prior proceedings was the person who had recommended the trial of accused by general court-martial in his pre-trial advice to the appointing authority did not make those proceedings void. While it is true that if the first trial had proceeded to findings of guilty, a plea of not guilty having been entered by accused, such findings might have been set aside upon appellate review for prejudicial error, the error thus found would not be predicated upon any jurisdictional grounds but upon the basis that a law member who had officially expressed his belief in accused's guilt could hardly be considered free from bias. However, such a member would not fall within the category of those persons who are legally disqualified from sitting upon a court-martial under the provisions of Article of War 8

(CM 282160, Bennett, 15 BR (ETO) 61, 64). The court, then, was legally constituted at the first hearing. Accused's plea in bar of trial, however, must fail even though there was no jurisdictional defect in the prior proceedings.

The general rule is that a person is not in jeopardy until he has been arraigned on a valid indictment or information, has pleaded, and a jury has been impaneled and sworn and, where a case is tried to a court without a jury, jeopardy begins after accused has been arraigned, has pleaded and the court has begun to hear evidence (McCarthy v. Zerbst, 85 F (2d) 640, 642; Cornero v. United States, 48 F (2d) 69, 74 ALR 797; Lovato v. New Mexico, 242 U.S. 199). Whether a trial by court-martial be considered analogous to trial with or without a jury in the civil courts, accused in the instant case did not plead to the charges in the first proceeding and, therefore, was not put in jeopardy. Moreover, even if he had pleaded his claim of double jeopardy could not have been sustained. It has been held that when it is made to appear to the court during the trial of a criminal case that, either by reason of facts existing when the jurors were sworn but not then disclosed to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the Government and the accused, the jury may be discharged and the defendant put on trial before another jury. An accused is not thereby put twice in jeopardy within the meaning of the 5th Amendment to the Constitution (Simmons v. United States, 142 U. S. 148, 153; Thompson v. United States, 155 U. S. 271, 274; 38 ALR 706). The same rule, of course, may be applied where there has been a substitution of jurors caused by the necessity of replacing those who are reasonably suspect of an inability or disinclination to faithfully execute their sworn duties (Martin v. State, 163 Ark 103, 259 S W 6, 33 ALR 133). It follows, then, that an accused has not been placed twice in jeopardy simply by reason of having been arraigned twice upon the same charges and specifications, where the proceedings had upon the first arraignment did not result in findings of not guilty or where they were brought to a halt by the reviewing authority before the announcement of any findings in the exercise by him of a sound discretion in order to promote the ends of justice (AW 40; par. 5a, 72, MCM, 1928).

No error lies in the fact that the second hearing took place before a court appointed by the same order and composed of some of the same members as the court before which the prior proceedings were had. The provisions of Article of War 50½ requiring that a "rehearing" shall take place before a court composed of officers not members of the court which first heard the case applies only to hearings held after the disapproval or vacation by a reviewing or confirming authority of a "sentence" (AW 50½, 4th subpar; par. 89, MCM, 1928). Here, the first hearing did not result in a sentence. Indeed, the second hearing herein may in a sense be considered but a continuation of the first, for it

was unnecessary to refer the case to the same court a second time or, the first proceedings not being void, to rearraign accused, the appointing authority having discretionary power to make changes in the personnel of the court even after the commencement of the trial (par. 37, 38b, MCM, 1928; see also Martin v. State, supra; Lovato v. New Mexico, supra). It did not appear that there had been any abuse of this discretionary power here.

Charge I and its Specification

Accused verbally confessed to having been absent without leave from his unit to Colonel Kelly, Captain LePage, Colonel Wolfe, Captain Young and Captain Graham. A written confession of unauthorized absence appears in the copy of the purported pay voucher of accused for the month of January 1947, which voucher was received in evidence as Prosecution Exhibit 13. We must, then, first determine whether these inculpatory statements, or any of them, were properly admitted.

A confession may not be considered by the court as tending to establish the guilt of an accused if it appears that it was involuntarily made. The Manual for Courts-Martial, 1928, prescribes no hard and fast rules for determining whether a confession was or was not voluntary and does not specifically require that any particular warning shall be given to an accused or a suspected person prior to receiving his admissions of guilt. In this respect, the Manual states:

> "A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary or suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made. Thus, where all the available evidence as to the circumstances merely shows that an accused, a private, confessed to a friend, another private, the confession may be regarded as voluntary.
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> "The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior" (par. 114a, MCM, 1928, underscoring supplied).

Consistently with these principles of law, as applied to human relationships somewhat peculiar to the military service, the Board of Review has generally held that where it appears that an accused has confessed upon being interrogated by one who is acting as his military superior, or as an agent of that superior, and the confession is challenged by the defense as being involuntary, the prosecution must establish,

in order to overcome the implication of compulsion, that accused was cognizant of his right not to incriminate himself at the time he admitted his guilt. It is not necessary, in such a case, to show that the 24th Article of War had been read to accused, but it should appear that its substance was made known to him or that a reasonable basis existed for an inference that he was aware of its provisions or those of similar civil guarantees. Also, where there is an implication that accused may have been overreached, it is not sufficient that accused had merely been told that he need not speak unless such was his desire, it being most essential, even though no explicit threats or promises of immunity or clemency were employed, that he also knew that his words might be used against him, for lacking such knowledge it could not be considered that he was fully aware of the danger of incriminating himself (CM 274678, Ellis, 47 BR 271, 283; CM 297985, Kirby, 16 BR (ETO) 353, 357; CM 298745, Souza, 16 BR (ETO) 361, 369). Although the application of this rule is generally encountered in cases involving confessions made by enlisted men to military superiors, we have no reason to suppose that this accused, a temporary officer commissioned on the battlefield from the grade of flight officer, was any more cognizant of his rights under the 24th Article of War than would be an enlisted man, nor do we discern anything in his civilian or military background which would indicate a familiarity with the legal protections extended to those accused of crime. Consequently, we believe it obvious that accused's confession of absence without leave made to Colonel Kelly, Captain LePage and Colonel Wolfe should have been excluded (CM 286729, Carlson, 17 BR (ETO) 301, 304).

Accused's statements to Captain Young and Captain Graham, however, stand upon a somewhat different footing. Where the person to whom accused relates the evidence of his guilt, although he may be accused's superior in rank, grade or station, has not in any manner assumed the role of official inquisitor, where such person does not actively interrogate accused but merely has the incriminatory admission thrust upon him or where the damning statement is but an incident of a general conversation which accused has initiated for reasons of his own, the confession of accused so made must be considered voluntary and under these circumstances no showing that accused was informed of, or even understood, his right not to incriminate himself is required. Article of War 24, as well as the 5th Amendment to the Constitution, protects an accused against self-incrimination only as a result of official compulsion, express or implied, not against a merely unwise or ill-advised disclosure of his unlawful activities (CM 289978, Redmond, 3 BR (ETO) 349, 354; CM 288872, Clark, 1 BR (POA) 89, 92). It is clear, then, that accused's statements to Captain Young and Captain Graham are admissible as confessions, providing the court would have been warranted in concluding that their voluntary nature was not vitiated by the circumstances surrounding the making of the prior statements to Colonel Kelly, Captain LePage and Colonel Wolfe.

An admission of guilt following upon a prior confession shown to have been improperly induced may not be considered voluntary unless there is some reasonable basis for an assumption that the prior baleful influences have ceased to operate upon accused's mind and that the second confession was in fact voluntary (CM Carlson, supra, p 305; CM 317671, Pelletier). In Lyons v. Oklahoma (322 US 596), the United States Supreme Court said,

> "The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process."

In the instant case, the confessions which we have held inadmissible were made in September 1946 and the confessions to Captain Young and Captain Graham were made in November of that year. The former were not obtained through explicit threats of violence or promises of leniency and their reception in evidence is prohibited only because of the coercive effect inherent in an interrogation by superiors without adequate warning. This type coercion can hardly be supposed to have had any appreciable lingering influence upon accused's mind and since there was no showing that the later confessions were given solely because accused was under the impression that any defenses which might have been available to him had been irretrievably lost because of his prior admissions of guilt, such later confessions must be considered properly in the record (CM 300744, Dickerson, 30 BR (ETO) 47,48).

There is no substance to accused's claim of privilege with respect to his conversation with Captain Young, for at the time of that conversation accused had not asked Captain Young to defend him nor had Captain Young given accused any reason to suppose that any such employment might be favorably considered. Consequently, no relationship of attorney and client had come into existence (par 123b, MCM, 1928; Smale v. United States, 3 F (2d) 101).

We must also determine whether the written confession of absence without leave appearing in Prosecution Exhibit 13, purporting to be a copy of accused's pay voucher for the month of January, 1947, was properly received in evidence. Such confession would be obviously inadmissible if it were not shown, in some manner, that the original voucher had been signed by accused or that the statements therein contained had otherwise been adopted by him. The typed name of accused appearing on line 16 of the copy is nothing more than a locus signare and does not,

standing alone, tend to establish that he signed the original. The circumstance that the copy bears a printed and stamped notation to the effect that the account therein stated had been "paid" can not be taken as evidence of such payment, thus raising an inference that accused had signed the original and had acquiesced in the deduction made because of the alleged unauthorized absence, for there was no showing that such a notation was customarily made by the finance office, in the regular course of business, only after payment had in fact been accomplished. However, even though Captain Graham testified that he had not himself seen the original voucher and was therefore unable to say that it had been signed by accused, we have no reason to disregard the evidence implicit in his testimony as a whole that the exhibit in question was a record taken from the "retain" files of his office of a pay and allowance account in the name of accused which had been paid by and cleared through his office. This exhibit, then, was a memorandum of a financial transaction made by the finance office in the regular course of its business, such a memorandum being a form of evidence held generally admissible under the provisions of 28 U.S.C. 695. It created a reasonable inference that accused had been paid the balance due him under the account as shown thereon and thus that he had signed the original voucher and had either made or agreed to the making of the statements which determined the amount of the balance paid him. The fact that Prosecution Exhibit 13 may be considered a business record within the purview of the cited Federal statute does not, however, change its character as evidence. Being an unsigned copy of a pay voucher it was obviously secondary evidence and was admissible only if properly acceptable under the best evidence rule (Irving Shoe Co. v. Dugan, 93 F (2d) 711; United States v. Kaibney, 155 F (2d) 795). Since there is no proof that the original voucher was lost or destroyed, we must assume that primary evidence of the statements of accused therein contained was readily available from the General Accounting Office. Although public records need not be proved by production of the originals thereof but may be introduced in evidence through the medium of duly authenticated copies, the exhibit here in question does not meet the requirements laid down for proof of such a secondary nature (see par 116a, MCM, 1928), for, according to Captain Graham's testimony, the original pay voucher had been sent forward to the General Accounting Office. It was thus impossible to consider the copy in his possession to be a copy of an official document on file in his office. Not being the custodian of the original, he was not the proper person to authenticate a copy. While it is true that timely objection to the introduction of particular evidence on the ground of its secondary nature must be taken in order to effect its exclusion from consideration by the court, or upon appellate review, we are of the opinion that the defense, by its rather general attack upon the authenticity of Prosecution Exhibit 13, sufficiently preserved its rights in the matter and that the confession here under consideration was, therefore, improperly received (CM 192662, Rowe, 2 BR 31,33).

The statement appearing in accused's Officers' Qualification

Card to the effect that the type of duty performed by him and the organization to which he was assigned for the period from 27 July 1945 to 10 September 1946 was "unknown" did not amount to an assertion that accused had been absent without leave and we must assume that the court did not consider it as such. However, the entry on this card stating that accused was assigned to the 486th Bombardment Squadron, 340th Bombardment Group, on 16 May 1945, is competent evidence of such assignment, this entry having been made in the usual course of business (par 80j(2), TM 12-425, 17 June 1944; 28 USC 695).

It thus appears that on 16 May 1945 accused was a member of the 486th Bombardment Squadron, 340th Bombardment Group. On 27 June 1945, the 340th Bombardment Group departed from the Mediterranean Theater en route to the United States where, on 7 November 1945, it was inactivated. We take judicial notice that the German armed forces in Italy surrendered to the Allies on 2 May 1945 (CM 302791, Kaukoreit, 59 BR 7,8). According to accused's statements to Captain Young, when the war was "over" in 1945 his organization was ordered home but, being unsuccessful in obtaining a transfer to an organization which was to remain in Italy and desiring to stay in Italy with his wife, he went absent without leave "a short time after combat had ceased and when his organization went home." During this absence, he engaged in business in Naples. Filomena DeChiara, the aunt of accused's wife, testified that accused lived with his wife in Naples until "before Christmas" 1946. He was a lieutenant on a bomber until the war "ended" after which time "he didn't do anything" and "was always at home, he never went out." During this latter period, accused told Filomena that he had been discharged from the Army. He was observed dressed in civilian clothes both by her and by Marcello Piccinini. He engaged in the business of making and selling toys and was in straitened financial circumstances. According to accused's conversation with Captain Graham, accused had returned to military control from a period of absence without leave early in September 1946. From this evidence, all of which was competent and material, the court was justified in finding accused guilty of Charge I and its specification. We are of the opinion that these findings of guilty are not vitiated by the erroneous admission in evidence of accused's statements to Colonel Kelly, Captain LePage and Colonel Wolfe and of the copy of the purported pay voucher of accused for the month of January 1947, for there can be little doubt as to the completely voluntary nature of the confessions to Captain Young and Captain Graham, which confessions when considered along with the corroborating testimony of the Italian witnesses and the other competent evidence relating to this charge leave little room for any hypothesis except that of accused's guilt thereof.

Charge III and Specifications 1, 2 and 3 thereunder

Under Charge III and its first three specifications accused was found guilty of wrongfully presenting for approval and payment false and

fraudulent claims against the United States for services allegedly rendered by him during the months of August, September and October, 1945, in violation of the 94th Article of War. In support of these allegations, documents purporting to be photostatic copies of vouchers executed by accused for the purpose of claiming and obtaining payment of pay and allowances for these months were received in evidence over objection of the defense. As we have seen, it was sufficiently established that accused was in an absent without leave status during the months of August, September and October, 1945. An officer in such a status is not entitled to pay and allowances, for he has rendered no services to the Government for which remuneration is due him (50 USC, Appendix, 1002). Therefore, if accused did in fact present for approval or payment the pay vouchers in question the findings of guilty here under consideration must be sustained.

It was incumbent upon the prosecution to first prove that accused signed the originals of the pay vouchers for the months of August, September and October, 1945, there being otherwise no evidence that such originals were prepared by him or that he adopted the statements therein contained as his own (par 116b, 2d subpar, MCM, 1928). For the purpose of meeting this requirement, the prosecution offered in evidence a report of investigation allegedly signed by accused as a result of an investigation he was required to make into the circumstances surrounding a fire at Enclosure 334. Defense counsel vigorously but unsuccessfully objected to the admission of this report on the ground that the officer who identified it at the trial had not seen accused sign it, had not received it from the hand of accused, and could not say that the signature thereon was actually that of accused. In paragraph 116b of the Manual for Courts-Martial, 1928, it is stated:

> "Where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the court to prove or disprove such genuineness; but before admitting such specimens of handwriting, satisfactory evidence should be offered as to the genuineness of the same.
>
> "A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection." (Underscoring supplied.)

The first paragraph of the above-quoted language from the Manual is but a paraphrase of 28 U.S.C. 638. Under the cited Federal statute, it has been held that proof of genuineness of a proffered standard of comparison may arise from reasonable inference (Dean v. United States, 246 F 568, 576). Considering the circumstances under which the report of investigation here in question was obtained, we think it was properly admitted in evidence as containing the genuine signature of accused despite

the objection of the defense. Moreover, an Officers' Qualification Card relating to accused and apparently signed by him as required by pertinent directives (par 93, TM 12-425, 17 June 1944) having been introduced in evidence without objection by the defense, the court had before it an undisputed specimen of accused's signature (In re Goldberg, 91 F (2d) 996).

The photostatic copies of the pay vouchers for the months of August, September and October, 1945, each contained a signature purporting to be that of accused on lines 16 and 18 thereof. The court apparently reached the conclusion that these signatures were in fact those of accused after having compared them with the specimens properly before it. Having reached this conclusion, the court was warranted in regarding these photostatic copies as duplicate originals, thus avoiding, to some extent, any necessity for consideration of the applicability of the best evidence rule (CM 262042, Pepper, 5 BR (ETO) 125,153; United States v. Manton, 107 F (2d) 834, 844; CM 323197, Abney). It may fairly be assumed, therefore, that accused assented to and adopted the claim for pay and allowances appearing above his signature in each voucher.

It remained for the prosecution to prove, however, that accused presented these vouchers for approval or payment (2d par, AW 94). This the prosecution attempted to do by way of showing that the photostats thereof emanated from the General Accounting Office, from which a necessary implication would arise that accused had caused the originals to be placed in official financial channels. When the defense counsel objected to the authenticity of the photostats as having come from the General Accounting Office, the law member ruled that the following language from paragraph 116a of the Manual for Courts-Martial applied (R 55);

> "A copy of any book, record, paper or document in the War Department, including its bureaus and branches, or in any command or unit in the Army may be duly authenticated by the seal, inked stamp, or other identification mark of such department, bureau, branch, command, or unit, or by a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original."

This ruling was error. The photostats in question each contained an authenticating certificate by the Chief, Reconciliation and Clearance Subdivision, General Accounting Office, Army Audit Branch. None were under the seal of the General Accounting Office or that of any of its subdivisions or branches. Neither the General Accounting Office nor any of its subdivisions or branches are part of the War Department or the Army (50 USC, Appendix,601). Paragraph 116a of the Manual also provides:

> "Copies of any books, records, papers and documents in

any of the executive departments of the Government are duly authenticated by the seals of such departments."

There is no Federal statute or rule of criminal procedure here applicable which dispenses with the necessity of authentication by seal, if authentication is not accomplished by direct testimony, of copies of any official documents other than those deposited in the War Department and the various offices subject to its jurisdiction (see 28 USC 661; 31 USC 46; Rules of Criminal Procedure, Rule 27). The documents here under consideration, therefore, should have been authenticated by the seal of the General Accounting Office. Not having been so authenticated they are not admissible as copies of records on file in the General Accounting Office (Wickliffe v. Hill, 13 Ky (3 Litt.) 330 - United States Treasury records; Newsome v. Langford, Tex Civ App, 174 S.W. 1036 - records of Commissioner of Indian Affairs). Although we have said that these photostats may be considered duplicate originals for some purposes, they may not be treated as duplicate originals of records in the General Accounting Office, for they were not identified as such by competent evidence coming from that office or from any other proper source. Nor can they be considered records made in the regular course of business by the General Accounting Office, for even the greatly simplified method of proof of business records made possible by 28 USC 695 does not dispense with the necessity of a positive showing that the proferred records came from the custody of and were made by or deposited in an office whose business it was to record the transactions or events therein set forth (CM 319591, Pogue).

Accused's signature, therefore, appearing on line 16 of each document and indicating that he certified the account therein stated to be true and correct would not suffice to convict him, if his signature had not appeared elsewhere on each voucher, for there would still be a lack of proof that he had presented the vouchers for approval or payment. And under this suppositious circumstance, the entries on the photostats signifying that the accounts therein stated had been "paid by" Captain Loback, a finance officer, would add no material weight to the proof adduced by the prosecution, for it did not appear that the finance office concerned, acting in the regular course of business, normally placed such notations upon the original copies of pay vouchers only after the accounts stated therein had in fact been paid.

However, line 16 was not the only place on each photostat where accused's signature appeared. It also appeared on line 18 of each document, indicating that he had in fact received payment in cash of the net balance therein stated. This being so, the court, regarding the documents as duplicate originals, was warranted in assuming that accused must in fact have presented for approval and payment the claims therein set forth to a Government financial official having authority to pay the same (CM Pepper, supra; United States v. Manton, supra; CM 260165, Thompson, 39 BR 151,158). We conclude, therefore, that the court was justified in finding that the guilt of accused of Charge III and Specifications 1, 2 and 3 thereunder was established beyond a reasonable doubt.

5. Records of the Department of the Army show that accused is 29

years of age, is married and has two dependents other than his wife. He is a high school graduate and attended Texas Agricultural and Mechanical College for two years. In civilian life he was employed as a pilot for the Dawn Dusting Corporation, Le Land, Mississippi. From 1940 to 1941 he served with the Royal Air Force as a ferry pilot and from 1941 to 1942 he was an instructor in the Royal Canadian Air Force with the grade of sergeant pilot. On 28 May 1942, he became a staff sergeant in the United States Army Air Force and served as such until he was appointed a temporary flight officer on 20 December 1942. On 25 June 1943, accused was awarded the Air Medal in recognition of meritorious achievement while participating in aerial sorties against the enemy in the Middle East Theater. On 23 October 1943, he received a silver Oak Leaf Cluster in lieu of his fifth Oak Leaf Cluster to the Air Medal, and on 15 November 1943 he was awarded his sixth Oak Leaf Cluster to that decoration. On 10 March 1944, he was given a battlefield appointment as a second lieutenant in the Army of the United States. He participated in the Tunisian, Italian and North Italian campaigns.

6. The court was legally constituted and had jurisdiction over accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of an officer of a violation of Article of War 61 or 94.

Chester L. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schmidt, Judge Advocate

JAGK CM 324725 1st Ind

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

TO: Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Karl T. Blakeley (O-2056219), Air Corps, attached 7105 Surrendered Enemy Personnel Administrative Company (Overhead).

2. Upon trial by general court-martial this officer was found guilty of absence without leave from about 27 July 1945 to about 9 September 1946, in violation of Article of War 61 (Charge I and its Specification), and of wrongfully presenting for approval and payment false and fraudulent claims against the United States for services allegedly rendered by him during the months of August, September and October 1945, respectively, all in violation of Article of War 94 (Charge III and Specifications 1, 2 and 3 thereunder). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved 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.

On 16 May 1945 accused was a member of the 340th Bombardment Group, stationed in Italy. On 2 May 1945 the German armed forces in Italy had surrendered to the Allies. The 340th Bombardment Group departed from the Mediterranean Theater en route to the United States on 27 June 1945. Prior to their departure accused had requested a transfer to an organization which was to remain in Italy, for, having been divorced from his wife in the United States and having chosen an Italian woman as his second wife, he desired to stay with his family. When this request was denied he went absent without leave from his organization on 27 July 1945 and remained in Italy, living with his wife in an apartment in Naples. During this period

of absence he engaged in the business of making and selling toys and was seen dressed in civilian clothes. Apparently his business enterprise was not a financial success, for accused and his wife were partially dependent upon the wife's aunt for their food supplies. Accused returned to military control early in September 1946. While in an absent without leave status accused submitted three vouchers claiming pay and allowances to which, because of such absence, he was not entitled. These vouchers were for the months of August, September and October 1945, and accused receipted for payment of the net balance due him on each.

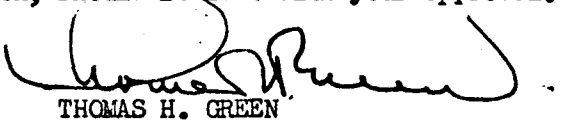
Accused, in an unsworn statement through counsel, asserted that from June through December 1945, he tested planes for a service repair unit at Capodichino or Naples.

4. Accused is 29 years of age, is married and has two dependents other than his wife. He is a high school graduate and attended Texas Agricultural and Mechanical College for two years. In civilian life he was employed as a pilot for the Dawn Dusting Corporation, Le Land, Mississippi. From 1940 to 1941 he served with the Royal Air Force as a ferry pilot and from 1941 to 1942 he was an instructor in the Royal Canadian Air Force with the grade of sergeant pilot. On 28 May 1942 he became a staff sergeant in the United States Army Air Force and served as such until he was appointed a temporary flight officer on 20 December 1942. On 25 June 1943 accused was awarded the Air Medal in recognition of meritorious achievement while participating in aerial sorties against the enemy in the Middle East Theater. On 23 October 1943 he received a silver oak leaf cluster in lieu of his fifth oak leaf cluster to the Air Medal and on 15 November 1943 he was awarded his sixth oak leaf cluster to that decoration. On 10 March 1944 he was given a battlefield appointment as a second lieutenant in the Army of the United States. He participated in the Tunisian, Italian and North Italian campaigns. It also appears from defense testimony that accused had completed 49 combat missions and had experienced three emergency landings and one crash landing. Two of the emergency landings had been caused by enemy action.

5. I recommend that the sentence be confirmed but in view of the long and excellent combat record of accused and all the circumstances of the case, recommend that the period of confinement be reduced to one year and that the sentence as thus modified be carried into execution. I further recommend that a United States Disciplinary

Barracks be designated as the place of confinement.

6. 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 62, 24 Nov. 1947)

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

JAGH - CM 324729

UNITED STATES	)	PORT OF LEGHORN
	)	
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 6 June 1947. To be hanged by the neck until dead
	)	
Private DEATHER JACKSON (18247793), 688th Port Company, 480th Port Battalion	)	

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 soldier 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 92nd Article of War.

Specification: In that Private Deather Jackson, attached unassigned, 7103rd Disciplinary Training Company (Overhead), then of the 4069th Quartermaster Service Company, did, at or near Leghorn, Italy, on or about 5 December 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Fausto Rossi, a human being by shooting him with a pistol.

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

Specification: In that Private Deather Jackson, attached unassigned, 7103rd Disciplinary Training Company (Overhead), then of the 4069th Quartermaster Service Company, did, at or near Leghorn, Italy, on or about 5 December 1946, with intent to do him bodily harm, commit an assault upon Guieseppe Catanese, by shooting him in the body, with a dangerous weapon, to wit, a pistol.

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

Specification 1: In that Private Deather Jackson, attached unassigned, 7103rd Disciplinary Training Company (Overhead), then of the 4069th Quartermaster Service Company, did, at or near Leghorn, Italy, on or about 5 December 1946, willfully, wrongfully and wantonly discharge a fire arm in disregard of the lives and property of others.

Specification 2: In that Private Deather Jackson, attached unassigned, 7103rd Disciplinary Training Company (Overhead), then of the 4069th Quartermaster Service Company, did, at or near Leghorn, Italy, on or about 5 December 1946, wrongfully carry a pistol in violation of orders as published in Section XXXI, Peninsular Base Section, Circular #1, 1945, as amended.

Accused pleaded not guilty to and was found guilty of all the Charges and Specifications. Evidence of two convictions was introduced. All of the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution pertinent to the findings of guilty is summarized as follows:

On the evening of 5 December 1946 Quirina Pazzagli was on duty as doorkeeper of a house of prostitution located on Via Santa Barbara, Leghorn, Italy (R 11-12). Entrance to the house was afforded by two sets of doors, on a level with the sidewalk outside. The outer door of wooden construction was recessed from the sidewalk. The inner door was of wooden construction with panels of frosted glass in the upper two thirds. Inside the inner door was a small lobby and annexed to the right wall thereof was a flight of stairs with a rail at the left. At the right of the lobby between the door and the stairs was a high backed bench (chest) (R 17), and door (R 13, Pros Ex 1; R 14, Pros Ex 2; R 22, Pros Ex 5; R 23, Pros Ex 6).

During the evening a party of "American Merchant Marines" had patronized the house (R 12). A short time after they had left, Quirina heard two "shots" coming from the sidewalk (R 20). Two patrons entering the house at that time informed her that the "shots" were in fact children playing with toys (R 19-21). About five minutes later Fausto Rossi, a "PS Agent" entered the house (R 12, 21), and started up the stairs (R 13). A shot was fired (R 12) and Rossi, who was on the second step (R 13, R 23, Pros Ex 6), said, "Help, help, I am wounded" (R 13). When Quirina ran forward to assist Rossi who was bleeding (R 13), another shot was fired (R 13, 21). Quirina sent Rossi to the hospital. She later found a bullet at the bottom of the stairs (R 13). Quirina identified Prosecution Exhibit 2 as a picture of the glass door, and testified that two holes appearing on the door each represented "the

hole of a bullet." The two holes were at the level of a man's head (R 14, Pros Ex 2).

Rossi was taken to the United Hospital at Leghorn (R 28). He was suffering from gunshot wound. The wound "was posterior in correspondence with the sincondrisis sacro-iliac. The bullet which passed through the iliac cavity, passing through and crossing the peritoneal cavity, was detained under the skin in correspondence with the MacBurney point" (R 29). Rossi died on 7 December 1946 (R 29). In the opinion of Professor Ugo Faccini, Chief Surgeon at the hospital (R 28), the cause of death was "acute anemia due to peritoneal hemorrhage" caused by gunshot wound (R 31).

Later during the evening of 5 December 1946 Sante Rosselli, a public safety agent, was informed that some Americans involved in a shooting on Via Santa Barbara, were in a bar on Via Grande (R 38, 41). Rosselli, accompanied by other public safety agents and some carabinieri entered the bar on Via Grande. Accused was in the bar with some "merchant marines." Accused shoved one of the agents aside and escaped from the bar, together with two "merchant marines" (R 38-40, 42-43). Rosselli left the bar in pursuit and accused fired upon him (R 39-40, 43). Rosselli did not return the fire because there were several civilians on the road (R 40).

Giuseppe Catanese testified that on the night of 5 December 1946 he was walking near the Piazza Grande when accused who had a pistol in his hand stopped him and indicated that he should turn back. Catanese turned, walked two paces and was shot in the right buttock by accused (R 33).

On examination by the court Catanese testified as follows with respect to his identification of accused:

"Q. Are you sure that this is the same man?
"A. He was like him. Now, if he is him, I can't say." (R 37).

Neville H. Romain, CID agent, investigator, interviewed accused on 20 March 1947 (R 81-82). Romain explained the 24th Article of War to accused, and did not make any promise or threat nor did he use any duress or coercion (R 81). Subsequently on 24 March 1947 accused made a statement to Romain (R 81). Romain took the statement down in longhand, and edited the language used (R 85-86). After the statement was typed accused read the statement, altered it in some respects and initialed the alterations (R 87). The statement was received in evidence over objection by the defense (R 88, Pros Ex 19). In pertinent part accused stated:

"On the 5th December 1946, Pvt. Isaac Miller and Thomas Nelson and I went into Leghorn on pass. In Leghorn we met several colored Merchant Marines, with whom we did some drinking. I don't remember much about what happened afterwards except that we went to some whorehouse and as we got to the door about three or four colored merchant marines came out and said to us something like, 'They've got girls up there'. Then they went away. Miller and I asked the lady at the door if we could go in. The lady said that we couldn't because it was too late. Then she shut the door. Miller, Nelson, the merchant marines and I then walked outside the door for a little while and turned to go away. Then I turned around and fired two shots from a pistol I had with me, into the door. Then we took off and went to a bar a few blocks away. After a short time about four Italian Policemen came into the bar, and one of them grabbed me and pointed a pistol at me, saying something in Italian. I then ran outside and up the street. I didn't shoot at the policeman who chased, although he shot at me. * * * I identify the Browing .32 Calibre Patent Pistol #716406, shown me by Agt Romain, as being the same pistol from which I fired the two shots into the door of the brothal on Via S. Barbara, Leghorn, on the night of 5 Dec. 1946. At about 2140 hours on 5 December 1946, after eluding the Italian Policeman who had chased me from the bar 'Cinghiale', I tried to get back to the bar on Via Grande to see what had happened to Nelson and Miller. Before I could reach the bar, I saw a man coming towards me, thinking that he meant to grab me, I pointed my pistol at him and told him to turn around. Then I shot him in the leg and ran away. * * *" (Pros Ex 19).

4. Evidence for the defense:

After having been apprised of his rights as a witness, accused elected to make an unsworn statement. In response to questions by the defense counsel he stated that he was born in California, was 20 years of age, and the third youngest of eleven children. He further stated that he had completed the tenth grade in school and had a year and five months of service in the Army; that he had one previous conviction by courts-martial, but no civilian police record (R 112-113).

The defense presented no evidence.

5. The prosecution showed that two bullets introduced in evidence (Pros Exs 12, 16) were fired from a revolver owned by accused. The prosecution was unsuccessful, however, in showing that the bullets were the ones extracted from the bodies of accused's two victims.

6. Accused was found guilty of the murder of Fausto Rossi at the time and place alleged. The evidence shows that on the evening of 5 December 1946, Rossi was shot after entering a house of prostitution located on Via Santa Barbara, Leghorn, Italy. A short time later another shot was fired. Both shots were fired from the exterior of the building and passed through a door to the interior. Rossi died two days later, his death being caused by gunshot wound. In his pre-trial statement accused stated that on 5 December 1946 after being denied admission to a house of prostitution on Via Santa Barbara in Leghorn he fired two shots through the door. From the circumstances disclosed by the evidence it must be concluded that Rossi's wound was inflicted by accused.

Murder is defined in the Manual for Courts-Martial, 1928, as "the unlawful killing of a human being with malice aforethought. The Manual defines malice aforethought in the following terms:

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony."

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

"Reduced to its lower 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; cited in CM 319168, Poe).

This proposition is well illustrated in CM 293962, Gutierrez, 18 BR (ETO) 257, 266. Accused in this latter case fired a bullet through a partition wall in a barracks into a room occupied by a number of soldiers and killed a sleeping soldier. The Board stated:

"Under these circumstances he is conclusively charged with the knowledge that his indiscriminate shooting into the room of sleeping men would 'probably cause death of, or grievous bodily harm to' one or more of them. The fact that he may not have intended such results offers no palliation or excuse. From this state of the evidence the court was fully justified in inferring that he acted with malice aforethought."

In the instant case accused fired into a house known to him to be patronized by members of the public and presumably staffed by persons dedicated to serving those members of the public who patronized the house. Nevertheless accused twice intentionally fired his firearm into the door of the house. These circumstances dictate the conclusion that his intentional firing into the door of the house would "probably cause the death of, or grievous bodily harm to" one or more of the patrons, staff, or other users of the house. The evidence justified the inference, implied in the finding of the court, that accused acted with malice aforethought.

Accused was found guilty of willfully, wrongfully and wantonly discharging a firearm in disregard of the lives and property of others (Spec 1, Chg III) and of assault with intent to do bodily harm with a dangerous weapon (Spec of Chg II). The evidence shows that after the shooting described above accused and his companions were tracked down and found in a bar by a group of public safety agents and police. Accused escaped from the bar with the agents in pursuit. Outside the bar accused fired on his pursuers who were deterred from the same course of action by the fact that there were a considerable number of persons on the street. Accused's failure to be governed by the same consideration justified the finding of the court, that at the time and place alleged accused did willfully, wrongfully, and wantonly discharge a firearm in disregard of the lives and property of others.

Shortly after the incident last described Giuseppe Catanese was walking in the vicinity of the Piazza Grande in Leghorn when he was confronted by accused who, with gun in hand, ordered him to turn back.

Catanese turned and had started to retrace his steps when accused fired and wounded him in the buttocks. Catanese on cross-examination was uncertain as to his identification of accused as his assailant. However, accused in his pre-trial statement admitted his commission of an assault as described by Catanese at the same time and place. The uncontradicted evidence justifies the finding of the court that at the time and place, and under the circumstances, and upon the person alleged, accused committed an assault with intent to do bodily harm with a dangerous weapon.

Accused was also found guilty of carrying a firearm in violation of standing orders. The court could properly take judicial notice of Circular 1, Headquarters Peninsular Base Section, 1945, prohibiting the carrying of firearms except on a duty status. The evidence heretofore set forth shows that accused while off duty was in possession of a firearm. The finding of guilty of the offense was warranted.

7. The court prior to deliberating on the sentence considered evidence of two convictions by inferior courts-martial for offenses committed subsequent to the offenses charged in this case. Consideration of this evidence by the court was improper. Since these convictions, however, were for minor military offenses it is not believed that they influenced the court in imposing the sentence adjudged.

8. The defense objected to the admission of accused's pre-trial statement into evidence on the ground that it was involuntary. The only evidence pertaining to the circumstances under which the statement was made is disclosed in the testimony of the person who took the statement. His testimony shows that there was compliance with the provisions of Article of War 24, and there was no evidence offered by the defense in rebuttal. The burden of proving a confession to be voluntary is, of course, upon the prosecution, and this requirement was met by the prosecution's showing that the circumstances under which the statement was taken were consistent with a voluntary declaration by accused (CM 233543, McFarland, 20 BR 15, 22).

9. Accused is 20 years of age. In his unsworn statement he stated that he is the third youngest of eleven children and that he completed the tenth grade of school. He claimed that he committed no offenses in civilian life but admitted one previous conviction by courts-martial. His service extended from his enlistment on 17 December 1945 and his foreign service from 3 May 1946.

10. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 324729 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 for your action the record of trial in the case of Private Deather Jackson (18247793), 688th Port Company, 480th Port Battalion.

2. Upon trial by general court-martial this soldier was found guilty of the murder of an Italian public safety agent, in violation of Article of War 92; of an assault with intent to do bodily harm with a dangerous weapon upon an Italian civilian, in violation of Article of War 93; of the willful, wrongful and wanton discharge of a firearm in disregard of the lives and property of others and of carrying a firearm contrary to standing orders, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to 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 and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but since the murder was the result of a wanton discharge of a firearm rather than a deliberate attack upon a particular person, I recommend that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty-five years, that the sentence as thus commuted be carried into execution and that a United States penitentiary be designated as the place of confinement.

4. Inclosed is a draft of letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry the foregoing recommendations into effect, should they meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1 Record of trial
2 Form of Action
3 Drft of Ltr

(GCMO 95, 22 Dec 1947)

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

10 September 1947

JAGV CM 324736

UNITED STATES v. Private A. W. Moore (34939587) Attached Unassigned Detachment A, Headquarters and Headquarters Company, 3rd Replacement Depot.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Marburg, Germany, 21 May 1947. Dishonorable discharge and confinement for six (6) months. 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Private A. W. Moore, attached unassigned Detachment A, Headquarters and Headquarters Company, Third Replacement Depot, did, without proper leave, absent himself from his station at Marburg, Germany, from on or about 5 November 1946, to on or about 25 February 1947.

Specification 2: (Disapproved by Reviewing Authority).

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

Specification: (Disapproved by Reviewing Authority).

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: (Disapproved by Reviewing Authority).

Specification 3: (Disapproved by Reviewing Authority).

Specification 4: In that Private A. W. Moore, attached unassigned, Detachment A, Headquarters and Headquarters Company, Third Replacement Depot, having been restricted to the limits of his Company Area in the Tannenberg Kaserne, Marburg, Germany,

on or about 4 November 1946, for a period of thirty (30) days pursuant to Summary Court Case No. 369, Headquarters Third Replacement Depot, dated 4 November 1946, did, at Tannenberg Kaserne, on or about 5 November 1946, break said restriction by going to Marburg, Germany.

Specification 5: (Disapproved by Reviewing Authority).

Specification 6: In that Private A. W. Moore, attached unassigned, Detachment A, Headquarters and Headquarters Company, Third Replacement Depot, did, at Marburg, Germany, on or about 5 March 1947, with intent to deceive Private First Class Martin Slachta, Private Ben Perrish, both 532nd Military Police Service Company, officially present to the said Private First Class Slahcta and Private Perrish a certain document, to wit:

HEADQUARTERS
"3419th ORDNANCE MEDIUM AUTOMOTIVE MAINTENANCE COMPANY
APO 751 U. S. Army

C E R T I F I C A T E

I the undersign certify that the bearer of this certificate has lost his identification tags and identification card, until identification can be made for him, his correct.idenity is as follows:

NAME: Johnson Henry
ASN: 36949587
RANK: Sergeant
ORG: 3419th Ord. Med. Auto. Maint. Co.
Height: 5ft 8 in
Compl: Brown
Sta: Bremen Germany

Harold B Robinson /s/
HAROLD B. ROBINSON /t/
Major. Ord. Company
Commanding.
3419th Ord. Med. Auto. Co."

which document was known by the said Private A. W. Moore to be false and fraudulent.

Specification 7: In that Private A. W. Moore, attached unassigned, Detachment A, Headquarters and Headquarters Company, Third Replacement Depot, did, at Marburg, Germany, on or about 5 March 1947, with intent to deceive Private First Class Martin Slachta and Private Ben Perrish, both 532nd Military Police Service Command, officially present to the said Private First Class Slachta and Private Perrish, a certain document, to wit:

"HEADQUARTERS
3419TH ORDNANCE MEDIUM AUTOMOTIVE MAINTENANCE COMPANY
APO 751 U. S. ARMY
27 February 1947.

SUBJECT: Guards of Ordnance Material

TO : Whom it may concern.

The following named Enlisted Men will proceed o/a 26 February 1947 to Kitzingen Germany reporting to the CO Kitzingen Ordnance Depot thereat on TDY for period of not to exceed ten (10) days exclusive of tvl time for the purpose of guarding a shipment of Supplies. Upon completion of TDY will ret to proper sta by rail auth: Authority: VOCO: Commanding Officer, Weser Ordnance Processing Point. TCT: TDN: P-19-546 S-34-6008 211457-G

Smith, Johnnie	T/Sgt	RA 34619814	(in charge)
JOHNSON, HENRY	Sgt	RA 36949587	
WILSON, James	T/5	16151954	

BY ORDER OF MAJOR ROBINSON:

James E Smith /s/
JAMES E. SMITH
Capt. Ord. Dept.
Commanding."

Tel: Bremen-21913

which document was known by the said Private A. W. Moore to be false and fraudulent.

Accused pleaded not guilty to all Specifications and Charges. He was found guilty of Specification 1 of Charge I except the words "25 February 1947", substituting therefor the words "16 December 1946", of the excepted words not guilty, and of the substituted words, guilty; guilty of Specification 2 of Charge I, of Charge I, of the Specification of Charge II, of Charge II, of Specifications 1, 2, 3 and 5 of Charge III; guilty of Specification 4 of Charge III except the words "in the Tannenberg Kaserne", "Tannenberg Kaserne" and "going to Marburg, Germany", substituting therefor the words "Marburg, Germany" and "leaving his company area", of the excepted words not guilty, and of the substituted words, guilty; guilty of Specification 6 of Charge III except the words "Private First Class Martin Slachta, Private Ben Perrish, both 532d Military Police Service Company", and "Private First Class Slachta and Private Perrish", substituting therefor the words "Mr. Freeman B. Ingledew, agent, 480th CID Detachment, Marburg", of the excepted words not guilty, and of the substituted words, guilty; guilty of Specification 7 of Charge III except the words "Private First Class Martin Slachta, Private Ben Perrish, both 532d Military Police Service Company" and "Private First Class Slachta and Private Perrish", substituting therefor the words "Mr. Freeman B. Ingledew, agent, 480th CID Detachment, Marburg," of the excepted words not guilty, and of the substituted words, guilty, and guilty of Charge III. Evidence of two previous convictions by Summary Court, for absence without leave and for being without a pass, was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority disapproved the finding of guilty of Specification 2 of Charge I, the Specification of Charge II, and Specifications 1, 2, 3, and 5 of Charge III, approved the sentence, but reduced the period of confinement to six months, designated the Branch United States Disciplinary Barracks, Green Haven, New York, 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. Evidence pertinent to the Specifications and Charges of which accused was found guilty, as approved by the reviewing authority, discloses that accused was absent without leave from 5 November 1946 to 16 December 1946; that he left his company area on 5 November 1946 in violation of a summary court sentence approved 4 November 1946 restricting him to his company area for thirty days; and that on 5 March 1947 accused, when interrogated by Freeman B. Ingledew, a CID agent, at the American Red Cross in Marburg, Germany, concerning his pass and identification tags, "pulled out a paper consisting of orders sending him from an Ordnance Depot to Kitzingen, Germany", which orders referred to a Sergeant Henry Johnson. Accused stated his name was Johnson. Ingledew "asked accused for his identification card and dog tags." Accused gave him a paper marked certificate stating he had lost both his ID card and identification tags, which certificate likewise referred to Sergeant Johnson (R. 9, 10).

By exceptions and substitutions the court found accused not guilty of officially presenting the above described documents to "Private First Class Slachta and Private Perrish", as alleged in Specifications 6 and 7 of Charge III and by substitutions guilty of officially presenting said documents to "Mr. Freeman B. Ingledew, agent, 480th CID Detachment, Marburg."

4. a. The offenses charged in Specifications 6 and 7, Charge III.

An accused is entitled to be advised by direct averment or by reasonable implication from facts alleged of all elements of the offense sought to be charged. [CM 154185 (1922) JAG Dig Ops 1912-40; 428(8)]. The proof must pertain to the offense charged and where, as here, the facts disclose an offense materially different from that alleged accused has not been accorded a fair and impartial trial so indispensable in the proper administration of justice. The court lacked power to change the offense charged, as it endeavored to do in its findings, by substituting the CID agent for the two privates to whom it was charged in the Specifications the documents were presented. Consistent and numerous opinions and holdings of The Judge Advocate General and of Boards of Review have established the principle that such action constitutes a fatal variance between the allegations of the Specification and the finding. The rule has been applied in cases involving larceny, embezzlement, and sodomy.

The Judge Advocate General, Major General Crowder, in applying the principle, to larceny, that a variance as to ownership of the property stolen is fatal, said in CM 110910, Brooks:

> "The question presented is an important one, and involves a consideration of the purpose of the charge and the essential allegations thereof that is, the allegations without which the charge is bad, and without proof of which the case must fall.
>
> 'A charge corresponds to a civil indictment. It consists of two parts - the technical "charges",, which should designate the alleged crime or offense as a violation of a particular article of war or other statute, and the "specification", which sets forth the facts constituting the same. The requisite of

a charge is that it shall be laid under the proper article of war or other statute; of a specification, that it shall set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended.' (M.C.M. 1917, par. 61.)

'While the same particularity is not called for in military charges which is required in civil indictments, there are certain essential conditions which must be complied with in their preparation. These are (1) that the charge shall be laid under the proper article of war or other statute; (2) that such charge shall set forth in the specification facts sufficient to constitute the particular offense.' (Davis, Military Law, p. 69).

"This author then enumerates the essential requirements of a good charge and specifications and continues:

'These precautions are necessary, not only to apprise the accused of the offense charged against him, but for the purpose of showing affirmatively that the person mentioned in the charges, as well as the offense charged or alleged, is within the jurisdiction of the court convened for the trial of the case.'

"There are two controlling principles by which the purpose, and the sufficiency of a charge to accomplish that purpose, are measured and tested. Winthrop says (Vol. 1, 2nd Ed., p. 188):

'The purpose and province of the charge are:—1st, to so inform the accused of the precise offense attributed to him that he may intelligently admit, deny, or plead specially to the same; and may be enabled to plead his conviction or acquittal upon any subsequent prosecution on account of the same act; 2d, to advise the court and the reviewing authority of the nature of the accusation and of the article or other statute upon which it is based, so that the former may rightly and judiciously try, determine, and (upon conviction) sentence, and the latter may understandingly pass upon all the proceedings.'

"The Supreme Court of the United States, speaking to this same question, said:

'But the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead former acquittal or conviction. (Cochran v. United States, 157 U.S., 290.)'

"Obviously, a person charged with the theft of the property of A is not apprised that he is to be tried or may be convicted of the theft of the property of B. Quite obviously he could not plead a former conviction or acquittal of the charge that he stole the property of A upon conviction or acquittal of stealing the property of B, or an acquittal or conviction of stealing the property of B upon a conviction or acquittal for stealing the property of A.

"3. An indictment for larceny in civil courts, or charge of larceny in a military court, must contain certain essential allegations. These are, that the accused took and carried away property appropriately described, belonging to a person named in the indictment or charge (unless the owner be unknown, in which case that fact must be alleged and proved), that the taking was unlawful, and with felonious intent to deprive the owner of his property; and that the property was of some value. An indictment or charge which omitted any of these elements would not support a judgment of conviction. (25 Cyc 74). The felonious taking must be properly alleged (25 Cyc, 73, 74), the description must be sufficiently certain to enable the court to identify the property described in the indictment or a charge as that referred to by the evidence, and show that the property is the subject of larceny (25 Cyc, 75), the name of the owner of the property said to have been stolen must be correctly stated (25 Cyc, 88), and, in civil indictments, if it is alleged that the name of the owner is unknown, and it is proved that the name of the owner was in fact known when the indictment was prepared, or in the exercise of reasonable diligence might have been ascertained, the variance is fatal (25 Cyc, 93). When the name of the owner is stated in an indictment or charge it becomes a part of the description of the offense, serving not only to identify the offense, but especially to identify the property which is alleged to have been the subject of larceny.

"It is elementary that, with respect to the essential allegations of an indictment or charge, the proof must correspond therewith."

The Board of Review in CM 201485, Darr, 5 BR 119, where the offense charged was embezzlement, following the rule set forth in the Brooks case, stated:

"No logical reason is seen why the principle laid down in the several larceny cases cited should not be equally applicable to embezzlement."

While The Judge Advocate General was unable to concur in the Board's opinion by reason of the particular facts in the Darr case, in the 1st indorsement to the Secretary of War (p. 150) he agreed with the rule of law announced, stating:

"It is a firmly established principle, of course, that if one is charged with stealing or embezzling the property of A and the proof is that the property belonged to B, with no evidence that A had any interest in it, the variance is fatal and a conviction cannot stand. The same principle would unquestionably apply to a case of wrongful misappropriation."

Discussing these questions in CM 191809, Price, 1 BR 302, the Board held:

> "Not only do the findings of guilty contain findings of vital elements not included in the offense as charged, and thus violate the rule that the power of courts-martial to make exceptions and substitutions does not, where the identity of the offense is changed, extend beyond the power to convict of a lesser included offense (Par. 78 c, M.C.M.; C.M. 186919, Sweat), but the findings also result in a variance between the allegations and findings as to ownership of the stolen property, a variance which has been held, in similar cases, to be fatal to conviction (C.M. 164042, Rodden; C.M. 157982, Acosta; C.M. 110910, Brooks)."

Following the reasoning of the preceding cases the Board of Review, in CM 204461, Fisher, 8 BR 12, where the offense charged was sodomy with a named individual, held:

> "The court has found that accused did not commit sodomy with the person named in the specification but did commit the offense with some other person whose name is unknown. This finding constitutes an acquittal of the offense charged and a conviction of an offense not charged. Following principles of law announced in numerous opinions and holdings of The Judge Advocate General and of the Board of Review, the Board is of opinion that there is a fatal variance between the allegations of the specification and the finding thereunder in this case. CM 191369, Seluskey; CM 188432, Soderquist; CM 164042, Rodden; CM 157982, Acosta; CM 157842, Greening; CM 129356, Mumford; CM 128088, Lee; CM 110910, Brooks."

The findings of the court in this case, as to Specifications 6 and 7 of Charge III, resulted in an acquittal of the offenses therein charged. As was said in CM 218667, Johns, 12 BR 134:

> "Under the long recognized doctrine that an accused is acquitted of all material allegations which were excepted by a court-martial in its finding (par. 2, Sec. 1560, Dig. Ops. J.A.G., 1912-30), the accused herein was acquitted by the court of all the material allegations which are excepted by its finding, namely, assault with intent to do bodily harm with a dangerous weapon, in violation of the 93rd Article of War. By excepting in its finding the word assault and any other word or words stating or implying that the action was wrongful, unlawful and felonious, the legal presumption arises that the act was lawful and innocent (par. 4 sec. 1471, and pars. 4,5, sec. 1559, Dig. Ops. J.A.G., 1912-30). However, the court thereupon substituted a finding of guilty of an attempt to strike a noncommissioned officer with his fist while the latter was in the execution of his office, in violation of the 65th Article of War. This finding cannot be sustained for the obvious reason that accused was not charged with this offense, which is not included in and is totally different from the offense with which he is charged. This variance is a fatal error (CM 164042, Rodden).

b. The offenses charged under Specification 1 of Charge I and Specification 4, Charge III.

Absence without leave from 5 November 1946 to 16 December 1946 was established by competent proof as was the breach of restriction. The breach of restriction and the absence without leave were initiated at the same time and were but different aspects of the same act. "If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect." (Par. 80, MCM 1928). Accordingly, there may be imposed, for the offense of absence without leave, confinement at hard labor and forfeiture of two-thirds pay per month for four months and three days.

5. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors other than those enumerated above injuriously affecting the rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of Specifications 6 and 7 of Charge III, legally sufficient to support the findings of guilty of Specification 1 of Charge I, of Charge I, of Specification 4 of Charge III, of Charge III, and legally sufficient to support only so much of the sentence as imposes confinement at hard labor for four months and three days and forfeiture of two-thirds pay per month for a like period.

Wilmot T. Baughn, Judge Advocate

John G. O'Brien, Judge Advocate

George R. Springston, Judge Advocate

JAGV CM 324736 1st Ind

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

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

1. In the case of Private A. W. Moore (34939587), Attached Unassigned Detachment A, Headquarters and Headquarters Company, 3rd Replacement Depot, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Specifications 6 and 7, Charge III, be disapproved and that only so much of the sentence be approved as involves confinement at hard labor for four months and three days and forfeiture of two-thirds pay per month for a like period. 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 324736).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGN-CM 324747

U N I T E D S T A T E S v. Privates ALFRED J. VAN DYNE, Jr. (42253394), and BERNARD P. GRIFFIN (31503880), both of Service Troop, 11th Constabulary Regiment.	)))))))))	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Regensburg, Germany, 15 May 1947. Van Dyne: Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks. Griffin: Disapproved by Reviewing Authority.

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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Alfred Van Dyne, Jr., and Private Bernard P. Griffin, both of Service Troop, 11th Constabulary Regiment, acting jointly, and in pursuance of a common intent, did, at Regensburg, Germany, on or about 4 April 1947, feloniously take, steal, and carry away two wrist watches, four cartons of cigarettes and a bottle of perfume, value greater than $50.00, the property of Technician Fifth Grade Isaac M. Kekuewa and Private Lloyd H. Farley.

Specification 2: In that Private Alfred Van Dyne, Jr., and Private Bernard P. Griffin, both of Service Troop, 11th Constabulary Regiment, acting jointly and in pursuance of a common intent, did, at Regensburg, Germany, on or about 10 March 1947, feloniously take, steal, and carry away one women's wrist watch and one camera,

value greater than $50.00, the property of Private Courtney H. Tally.

Each accused pleaded not guilty to all Specifications and the Charge. Each accused was found guilty of Specification 1 of the Charge except the words "four cartons of cigarettes and a bottle of perfume" substituting therefor respectively the word "total" of the excepted words not guilty of the substituted word guilty. Each accused was found guilty of Specification 2 of the Charge except the words "value greater than $50.00" substituting therefor respectively the words "total value greater than $20.00 and less than $50.00," of the excepted words not guilty of the substituted words guilty. Each accused was found guilty of the Charge. Accused Van Dyne 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. Accused Griffin 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 disapproved the findings and sentence as to the accused Griffin, and ordered a rehearing before another court. As to the accused Van Dyne 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 accused Griffin, this opinion will be limited to consideration of the evidence to support the findings and sentence as to the accused Van Dyne. The accused Van Dyne was found guilty of larceny of personal property of a total value greater than $50.00 [Spec. 1] and of larceny of personal property of a total value greater than $20.00 but less than $50.00 [Spec. 2]. The only question requiring consideration is whether the evidence will support the findings as to value of the stolen property in order to support the sentence to confinement in excess of one year. For this reason only so much of the evidence in the record of trial as is pertinent to value will be summarized.

4. Specification 1, of which the accused was found guilty, alleges the larceny of two watches, the property of Technician Fifth Grade Isaac M. Kekuewa and Private Lloyd H. Farley. The only evidence as to the value of these items is found in the testimony of the alleged owners and in the testimony of First Lieutenant Robert W. Goerish, Regimental Post Exchange Officer.

Technician Fifth Grade Isaac M. Kekuewa testified that on 3 April 1947, two wrist watches were taken from his locker, one belonging to him, and the other being the property of Technician Fifth Grade Lloyd H. Farley (R. 6). With respect to the value of his

watch, which was identified and introduced into evidence as Prosecution's Exhibit 1 (R. 7), Private Kekuewa testified that he bought it "off another guy" paying $50.00 for it (R. 7, 8).

Technician Fifth Grade Lloyd H. Farley testified that he bought the watch alleged as his property, which was identified and admitted in evidence as Prosecution's Exhibit 2, "At the PX in Passau" and paid $27.50 for it (R. 9).

First Lieutenant Robert W. Goerish, Post Exchange Officer, 11th Constabulary Regiment, testified relative to the value of the articles described in Specification 1 of the Charge as follows:

"Q What is that book you have in your hand?
A It is the catalogue that identifies merchandise sold in AES.

Q What does it list on each item?
A Each item sold by AES has a serial number and has a full description and price in here.

Q Lt. Goerish, I show you Prosecution's Exhibit Number 1, can you identify that to the court?
A It has an identification number of E041820, Butex watch company, 18 carat gold, 15 jewel, $23.00.

Q The price is $23.00?
A $23.00

Q Here is Exhibit Number 2, can you identify that to the court?
A Yes. Serial number E050380, Octo. 18 carat gold, case 458, number 12673, each $28.00" (R. 26).

Specification 2 of the Charge, of which the accused was found guilty with exceptions and substitutions, as heretofore stated, alleges the larceny of a watch and a camera, the property of Private Courtney H. Tally.

Private Tally testified that he bought the watch, which was identified and introduced as Prosecution's Exhibit 3 (R. 14), from a soldier in his troop and that he paid $10.00 and five packages of cigarettes for it. He also identified the camera, which was introduced in evidence as Prosecution's Exhibit 4 (R. 15), and stated that he bought it from a soldier to whom he paid $10.00 for it.

Lieutenant Goerish testified that watches of the type belonging to Private Courtney H. Tally (Pros. Ex. 3) were not sold by

the Army Exchange Services but that watches of a similar type sold new for $15.00. He testified that the camera was not a "PX item," but that a like item sold in the Post Exchange for $10.50.

5. It has been long established that except as to distinctive articles of Government issue, or other chattels which because of their character 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 323387, Learned et al (1947); CM 217051, Barton et al, 11 BR 193; TM 27-255, par. 100b). 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 (CM 323387, Learned et al, (1947)). It does not appear that the respective owners of any of the property were qualified to express an opinion as to the market value of the items. While Technician Fifth Grade Kekuewa testified that he bought the watch "off another guy," there is no evidence of the date of purchase or the condition of the watch when it was stolen. Private Farley testified that he bought his watch at the Post Exchange but did not give the date of the purchase. From the testimony of Private Tally it appears that the watch and camera purchased by him were used articles at the time of purchase, and there is no evidence relative to the date on which he bought them. While in each instance the owner testified as to the person from whom, or the place at which, he bought the property, there is nothing in the evidence to show the date on which any of the items were purchased or the condition of them at the time of the theft.

Concerning the testimony of Lieutenant Goerish, it is obvious that his estimates were based entirely on the price of similar merchandise sold new in the Army Exchange Service. While he is shown to be a Post Exchange Officer, there is nothing in the record to indicate that he was qualified as an expert with reference to market values of used watches nor was his testimony relevant or competent to establish the market value of the articles in question.

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 323640, Pamintuan (1947), CM 213952, Myers, 10 BR 296; par. 149g, MCM, 1928). 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 323387, Learned et al, (1947)). It follows that so much of the findings as pertain to the total value of the stolen articles described in each Specification in excess of $20.00 cannot be sustained. The maximum confinement authorized by paragraph

104c, Manual for Courts-Martial, 1928, for each offense of larceny of property of a value of $20.00 or less is six months.

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 1 as involves a finding of guilty of larceny by the accused, at the time and place and of the ownership alleged, of the watches described in the Specification, of some value, not in excess of $20.00; legally sufficient to support only so much of the finding of guilty of Specification 2 as involves a finding of guilty of larceny by the accused, at the time and place and of the ownership alleged of the property described in the Specification, of some value, not in excess of $20.00; legally sufficient to support the Charge; 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.

_____, Judge Advocate.

Frank C. Alfred, Judge Advocate.

Joseph T. Brack, Judge Advocate.

JAGN-CM 324747 1st Ind
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 Privates Alfred J. Van Dyne, Jr. (42253394), and Bernard P. Griffin (31503880), both of Service Troop, 11th Constabulary Regiment, I concur in the foregoing holding by the Board of Review and recommend that as to accused Van Dyne only so much of the finding of guilty of Specification 1 be approved as involves a finding of guilty of larceny by the accused, at the time and place alleged, of the watches described in the Specification, of the ownership alleged, of some value not in excess of $20.00, that only so much of the finding of guilty of Specification 2 be approved as involves a finding of guilty of larceny by the accused, at the time and place and of the ownership alleged of the property described in the Specification, of some 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 one year. Upon taking such action you will have authority to order the execution of the sentence as to accused Van Dyne.

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 324747).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGV CM 324779

19 SEP 1947

UNITED STATES v. Private REX N. HALL (38206229), 41st Airdrome Squadron (Personnel)(Prov), 4th Airdrome Group (Prov), Fairfield-Suisun Army Air Base, California.	HEADQUARTERS EASTERN PACIFIC WING PACIFIC DIVISION - AIR TRANSPORT COMMAND Trial by G.C.M., convened at Fairfield-Suisun Army Air Base, California, 7 July 1947. Dishonorable discharge and confinement for two (2) years. 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 Rex N. Hall, 41st Airdrome Squadron (Personnel)(Provisional), 4th Airdrome Group (Provisional), Fairfield-Suisun Army Air Base, California, did, at Fairfield-Suisun Army Air Base, California, on or about 6 June 1946 desert the service of the United States and did remain absent in desertion until he was apprehended at Sacramento, California, on or about 23 May 1947.

The accused pleaded not guilty to the Charge and Specification, "however, of the 61st Article of War and AWOL for the period as specified in the Specification of the Charge, Guilty." 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 two years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, Lompoc, California, 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 established by his plea of guilty under Article of War 61 and by competent evidence (R. 7,

Pros. Ex. A; R. 8, Pros. Ex. C), and the court was justified in inferring an intent to desert from the length of absence and the circumstances thereof as shown by the evidence. The only question requiring discussion is whether the evidence shows that the desertion was terminated by apprehension. If it does not so show, the sentence to two years confinement is excessive. (Para. 104c, MCM 1928).

4. The record of trial is replete with incompetent and redundant matter, and the only evidence of the prosecution pertinent to the manner of termination consists of the following exhibits and testimony:

a. Teletype message dated 27 May 1947, from Commanding Officer, Mather Field, California, to Commanding Officer, Fairfield-Suisun Army Air Base, stating in substance that accused was returned to military control 24 May 1947 (R. 8, Pros. Ex. C).

b. Extract copy of paragraph 1, Special Orders No. 140, 28 May 1947, Headquarters, Eastern Pacific Wing, Pacific Division, Air Transport Command, Fairfield-Suisun Army Air Base, stating that accused "having been app and conf at Mather Field, Calif, is placed on DS to 4th Airdrome Gp (Prov), this station, eff 24 May 47." (R. 8, Pros. Ex. D)

c. Mr. Leslie Cox, a police official of the City of Sacramento, was qualified as a fingerprint expert and testified, in pertinent substance, that on 25 November 1946 he took the fingerprints of a man who gave the name of Lester Elmer Blair; that on 6 January 1947 the same man was fingerprinted, giving the name of Rex Nelson Hall; that on 7 July 1947, the accused was fingerprinted; that comparison of the three sets of fingerprints (photostatic copies of which were admitted in evidence (Pros. Ex. J,K,L)), discloses they are those of the same person. On 14 January 1947 the witness was notified by the FBI that accused was wanted by military authorities and about ten days previously a hold order passed through his hands. (R. 10-12) (The witness was also briefly questioned as to certain unidentified hearsay notations, apparently indicating accused's record of civilian arrests, on Prosecution Exhibits J, K and L (R. 11,12). The examination in connection with the notations was so unintelligible and improper that it is not set out herein or further considered.)

5. The accused elected to remain silent and no evidence was introduced by the defense (R. 12).

6. Accused's plea of guilty of the "61st Article of War and AWOL for the period as specified in the Specification of the Charge" was inartful in that it was not made by the customary appropriate exceptions and substitutions (pp. 148,149, TM 27-255), and the court might properly have required the accused to amend the plea for purposes of clarification.

However, as the plea stands, it admits only that accused was absent without leave for the period alleged and excludes any admission as to the manner of termination.

7. The statements with respect to apprehension in the teletype message (Pros. Ex. C) and the special orders (Pros. Ex. D) referred to in paragraph four of this holding are manifestly hearsay and therefore incompetent to prove the manner of termination of accused's absence (See sec. 395(18), Dig Op JAG 1912-40). Careful examination of the testimony of Mr. Cox throws no light on the manner of termination. It is true that it may be surmised from the fact that fingerprints were taken that accused was on at least two occasions in the custody of Sacramento police, but whether he came into such custody by surrender or apprehension and whether he was turned over by them to military authorities is not disclosed.

8. It follows from the foregoing that the evidence or plea does not show that the desertion was terminated by apprehension. Therefore, the desertion must be considered to have been terminated in a manner unknown and to be punishable as desertion after an absence of more than sixty days, terminated by surrender (CM 323397, TerVree; 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).

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings as involve findings 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 V. O'Baughn, Judge Advocate

John G. O'Brien, Judge Advocate

George B. Springstead, Judge Advocate

JAGV CM 324779 1st Ind

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

TO: The Commanding General, Eastern Pacific Wing, Pacific Division, Air Transport Command, Fairfield-Suisun Army Air Base, California.

1. In the case of Private Rex N. Hall (38206229), 41st Airdrome Squadron (Personnel)(Prov), 4th Airdrome Group (Prov), Fairfield-Suisun Army Air Base, California, I concur in the foregoing holding by the Board of Review and recommend that only so much of the finding of guilty of the Specification be approved as involves a finding of guilty of desertion at the time and place and for the period alleged, terminated in a manner unknown, and that only so much of the sentence be approved 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. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 324779).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

JAGH - CM 324790

UNITED STATES	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at
	)	Regensburg, Germany, 26 June
First Lieutenant HARRY A.	)	and 12 September 1947. Dis-
WILLYARD (0-1307600),	)	missal and a fine of Five
Infantry	)	Hundred ($500.00) Dollars

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 Charge and Specification:

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

Specification: In that First Lieutenant Harry A. Willyard, Headquarters and Headquarters Troop, 94th Constabulary Squadron, was at Orsbon Barracks, Weiden, Germany, on or about 1130 hours, 31 May 1947, found drunk while on duty as custodian of Headquarters Troop, 94th Constabulary Squadron, payroll.

CHARGE II: Violation of the 96th Article of War. (Stricken on motion by the defense).

Specification: (Stricken on motion by the defense).

He pleaded not guilty to, and was found guilty of, Charge I and the Specification thereunder. He was sentenced to be dismissed the service and to pay to the United States a fine of Five Hundred ($500.00) Dollars. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Accused was "Class A Finance Agent" for Headquarters Troop, 94th Constabulary Squadron (R 6-7). At about 0820 hours, 31 May 1947, his Commanding Officer, First Lieutenant Walter F. Fagan, directed him to go to Grafenwoehr "and pick up the payroll" (R 7). At the time accused appeared normal (R 9). Private First Class Adam A. David, who was detailed to drive for accused, reported to him in front of headquarters billet (R 12). Accused, who had a bottle with him, got in the jeep slowly and had the odor of liquor on his breath (R 13). Shortly before reaching Grafenwoehr accused and David had a drink out of the bottle (R 13). David believed it contained English gin (R 14). When accused walked into the finance office at Grafenwoehr he had the appearance of being very sleepy. He sat down all right, talked intelligently, but was slow in counting his money (R 10). First Lieutenant Warner L. Dickman, the disbursing officer, had accused sign a receipt (WD AGO Form 14-48) (R 11, Pros Ex 1). Lieutenant Dickman did not consider the signature to be a very good one and had accused sign the receipt again (R 10). While returning from Grafenwoehr accused and David had some more drinks from accused's bottle and on their return there was "about one inch left" in the bottle (R 14). At approximately eleven o'clock in the morning Lieutenant Fagan received a call from his first sergeant that his presence was needed at the motor pool. When Lieutenant Fagan reached the motor pool he found accused sitting in a parked "quarter-ton" with several enlisted men and some German employees around. Accused was conversing with the driver of the jeep and talked with difficulty. As to accused's appearance Lieutenant Fagan testified:

> "The front of his trousers was wet; the bag that contained the money was wet; there was saliva running out the corner of his mouth, and his face was pale. I could smell alcohol on his breath" (R 7).

Lieutenant Fagan had accused accompany him to Major Arnold's office. Going up the stairs accused sagged three or four times but "made it on his own power by holding on to the rail" (R 7). In the opinion of Lieutenant Fagan accused was drunk (R 9). Major Arnold observed that accused's uniform was disheveled and out of position. Because of accused's actions, his manner of speech and appearance, and the odor of alcohol on his breath Major Arnold was of the opinion that accused was drunk (R 15). Major Arnold placed accused in arrest and was quite sure that accused understood the order although he was drunk (R 18). On examination by the court Major Arnold testified that accused was not in fit condition to pay the troops that day (R 20).

4. Evidence for the defense:

After being apprised of his rights as a witness accused elected to remain silent and no evidence was introduced by the defense.

5. Accused was found guilty of being found drunk while on duty as custodian of a payroll. The evidence shows that on 31 March 1947 accused, who was Class A Finance Officer for his unit, was directed by his commanding officer to pick up the unit's payroll. During the course of his errand accused had a number of drinks from a bottle containing "English Gin". On his return his commanding officer found him in an intoxicated condition in the unit area in possession of the payroll. His trousers were wet, saliva was running out of the corner of his mouth, and the odor of alcohol was on his breath. Two officers expressed the opinion that accused was drunk and one of them testified that accused was not in a fit condition to pay the troops.

> "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the Article of War" /85/ (MCM 1928, par 145).

That accused's faculties were so impaired by intoxicating liquor and that he was on duty as alleged is conclusively shown by the evidence.

6. Accused was originally sentenced to pay to the United States a fine of $500.00. The finding of guilty of the Specification upon which the sentence was based involves finding that accused was on that occasion drunk on duty in time of war. A sentence to dismissal was, therefore, mandatory upon the court under Article of War 85, and since the original sentence did not include dismissal it was null and void (I Bull JAG 275-277). The reviewing authority returned the record of trial to the court for proceedings in revision with instructions to reconvene, revoke its previous sentence and adjudge a sentence in conformity with the requirements of Article of War 85. Pursuant to the directions of the reviewing authority the court reconvened, revoked its former sentence and sentenced accused to be dismissed the service and to pay to the United States a fine of Five Hundred ($500.00) Dollars. The action of the reviewing authority in returning the record of trial to the court for proceedings in revision, and the action of the court in revoking its previous illegal sentence and in adjudging a legal sentence, were entirely proper (I Bull JAG 275-277).

7. Records of the Army show that accused is 29 years of age and married. He is a graduate of high school, and in his short civilian career was a pipe line worker. In 1936 he enlisted in the Regular Army and had enlisted service until he was commissioned a second lieutenant on 9 January 1943. He was awarded the Purple Heart for a wound received in action in the European Theater in 1945. Since February 1943 his efficiency ratings have been as follows: "Very Satisfactory" three times, "Excellent" three times, and "Superior" twice. For the period 23 May to 30 June 1947 he was rated as "Unsatisfactory".

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal is mandatory and, in addition thereto, a sentence to pay to the United States a fine of $500.00 is authorized, upon conviction of a wartime violation of Article of War 85.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 324790 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 for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Harry A. Willyard (O-1307600), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being found drunk on duty in violation of Article of War 85 (Chg I, Spec). 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 $500.00. 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 of the sentence. I concur in that opinion.

Accused was "Class A Finance Officer" for Headquarters Troop, 94th Constabulary Squadron. On 31 March 1947 he was found in the Headquarters Troop area in an intoxicated condition and in possession of the troop payroll. The front of his uniform was wet, saliva was running out the corner of his mouth, he walked with difficulty, and there was an odor of alcohol on his breath. Two officers who saw him testified that in their opinion accused was drunk, and one of the officers further testified that accused was not in fit condition to pay the troops that day.

The original sentence adjudged by the court in this case was to pay to the United States a fine of $500.00. This sentence was illegal in that it did not include dismissal which is mandatory upon conviction of a wartime violation by an officer of Article of War 85. By direction of the reviewing authority the court reconvened and revoked the illegel sentence. Thereafter the court sentenced accused to be dismissed the service and to pay to the United States a fine of $500.00.

4. Accused is 29 years of age and married. He is a graduate of high school and as a civilian was a pipe line worker. In 1936 he enlisted in the Regular Army and had enlisted service until he was commissioned a second lieutenant, on 9 January 1943. He was awarded the Purple Heart for a wound received in action in the European Theater in 1945. Since February 1943 his efficiency has been rated as follows: "Very Satisfactory" three times, "Excellent" three times, and "Superior" twice. For the period 23 May to 30 June 1947 he was rated as "Unsatisfactory."

5. I recommend that the sentence be confirmed but that $250.00 of the fine imposed be remitted, and that as thus modified the sentence be carried into execution but that the dismissal be suspended during good behavior.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 72, DA., 2 Dec 1947).

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

JAGN-CM 324802

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at Fort Leavenworth, Kansas, 20 June 1947. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
General Prisoner JOHN L. O'BRIEN.	)	

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 general prisoner named above has been examined by the Board of Review.

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

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: In that General Prisoner John L. O'Brien, while enroute under armed guard from Fort Wayne, Michigan, to Fort Leavenworth, Kansas, did, in the vicinity of Sibley, Missouri, on or about 17 December 1946 by force and violence free himself from the control of his guards and escape from the train on which he was being transported.

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

Specification: In that General Prisoner John L. O'Brien, did, at Kansas City, Missouri, on or about 17 December 1946, by force and violence and by putting him in fear, feloniously take, steal and carry away from the

person of Mark Stonner, one pair of shoes of some value.

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

Specification: In that General Prisoner John L. O'Brien, did, in the vicinity of Camden, Missouri, on or about 17 December 1946, by force and violence and by putting him in fear with a loaded pistol, unlawfully kidnap and abduct Mark Stonner, and wrongfully force the said Mark Stonner to drive him into Kansas City, Missouri, in the truck of the aforesaid Mark Stonner.

Accused refused to plead (stood mute) to all Charges and Specification. He 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 ten years. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge I, 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 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Specification 2 of Charge I, Charge I, Charge II and its Specification and Charge III, and to support the sentence. The only question requiring consideration here is whether the record of trial is legally sufficient to sustain the finding of guilty as to the Specification of Charge III. Only the evidence relating to the offense alleged in the Specification of Charge III will be hereinafter summarized:

4. The only testimony introduced as to this matter by either the prosecution or defense is the testimony of Mark Stonner which may be summarized as follows:

On the morning of 17 December 1946 at about 0900 hours the accused approached Mr. Mark Stonner at his farm home at Camden, Missouri (R. 13). The accused mentioned getting to Kansas City and Mr. Stonner informed him he could catch a train at 1130 hours at Camden, a mile and a quarter away. The accused said, "There's a better way than that," and opening his overcoat drew a revolver, pulled the hammer back, and pointed it at the witness (R. 13). The accused then ordered Stonner to "drive him in the truck." Both men entered the truck and the accused laid the gun down beside him pointed toward Stonner (R. 14). They proceeded to Kansas City. At the "6th Street stop light" in Kansas City the motor of the truck stalled and the self-starter locked. The accused then forced Stonner to exchange shoes with him, put the revolver, which he had kept pointed at Stonner "at all times" back in his overcoat and left (R. 14). Mr. Stonner was able to see that the gun was

loaded and did not feel at any time during the trip that he could have refused to take the accused any farther (R. 14, 15).

5. From the language employed in the Specification it is obvious that it was intended to charge the accused with the offense of kidnaping. This offense may be charged under the 96th Article of War as a crime not capital or as conduct of a nature to bring discredit upon the military service. In order to sustain a conviction of the crime of kidnaping, however, the Specification must allege and the evidence prove, either that the offense charged was a crime at common law or that it violated the criminal law of the United States or the law of the State in which the offense occurred, in this case the State of Missouri.

At common law it was generally held that the essential element of the offense of kidnaping was the taking of the victim from his own country, or state, to another country (51 CJS, p. 431; CM 265225, Conrad et al, 4 BR (NATO-MTO) 105). Title 18, United States Code, Section 408a, commonly known as the "Lindberg Act," denounces kidnaping, but only when it involves transportation of a person in interstate or foreign commerce. Section 408b thereof defines "interstate or foreign commerce" as "transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to another State, Territory, or the District of Columbia." In this case, since the Specification alleges and the evidence shows that the entire incident occurred within the State of Missouri, the offense as alleged and proven does not include this essential element of transportation across the State or national boundaries common to both common law and the Federal Statutes.

The Revised Statutes, Missouri, 1938, Sections 4414 and 4415 provide in pertiment part as follows:

> "Sec. 4414 Kidnaping for ransom. If any person or persons shall willfully, without lawful authority, seize, confine, inveigle, decoy, kidnap or abduct or take or carry away by any means whatever or attempt so to do, any child of any age, or any person or persons and attempt or cause such child or person or persons to be secretly confined against their will, or abducted for the purpose and with the intention of causing the father or mother or other relative of the person so abducted or anyone else, to pay or offer to pay any sum as ransom or reward for the return or release of any such child or person or persons, said person or persons so guilty of the above mentioned acts or act, shall, on conviction, be punished by death or imprisonment in the penitentiary not less than five years. * * *"

> "Sec 4415 Kidnaping. If any person shall, willfully and without lawful authority, forcibly seize, confine, inveigle,

decoy or kidnap any person, with intent to cause such person to be sent or taken out of this State, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years. * * *"

It therefore appears that an essential element of the offense of kidnaping under the Missouri Statutes is the seizing of the person of another either for ransom or with intent to transport such person from the state or to secretly confine him within the State. It is obvious that none of these elements of the offense were proved by the evidence introduced in this case. However, accused's conduct, as alleged and proven, excepting the words "kidnap and abduct," is clearly conduct of a nature to bring discredit on the military service in violation of Article of War 96.

6. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Specification of Charge III, except the words "kidnap and abduct Mark Stonner," and "the said," and legally sufficient to support the findings of guilty of all other Charges and Specifications and the sentence.

_____, Judge Advocate.

Frank C. Alfred, Judge Advocate.

_____, Judge Advocate.

JAGN-CM 324802 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Fifth Army, Chicago 15, Illinois.

1. In the case of General Prisoner John L. O'Brien I concur in the holding by the Board of Review and recommend that so much of the finding of guilty of the Specification, Charge III, be disapproved as involves a finding of guilty of the words "kidnap and abduct Mark Stonner," and the words "the said." 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 324802).

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 324805

UNITED STATES v. Private First Class EDUARDO GATCHALIAN (10327169), 1667th Engineers Utilities Detachment (PS), 1191st Engineer Base Depot (PS)	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters PHILRYCOM, APO 707, 10 June 1947. Reduction to the grade of Private and forfeiture of sixteen ($16) dollars per month for three (3) months

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

CHARGE I: Violation of the 93rd Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that, Private First Class Eduardo Gatchalian, 1667th Engineer Utilities Detachment, 1191st Engineer Base Depot (PS), did, at the 1191st Engineer Base Depot, Quezon City, Philippines (APO 900), on or about 1 March 1947, knowingly and willfully apply to his own use, one truck, 3/4 ton weapons carrier, of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to Charge I and its Specification, guilty to Charge II and the Specification thereunder and was found not guilty of Charge I and its Specification, of the Specification of Charge II: Guilty, except the words "knowingly and willfully apply to his own use," and substituting therefor, "without authority, wrongfully take and carry away," of the excepted words, not guilty, of the substituted words guilty and not guilty of Charge II, but guilty of violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of private and to forfeit sixteen ($16) per month for three (3) months. The reviewing authority approved the sentence and ordered it executed. The result of the trial was published in General Court-Martial Orders No. 178, Headquarters Philippines-Ryukyus Command, APO 707, 4 August 1947.

3. Accused was charged with misapplication of the property alleged, in violation of Article of War 94. The court by exceptions and substitutions found the accused not guilty of misapplication under Article of War 94 but guilty of a violation of Article of War 96 in that he did "without authority wrongfully take and carry away" the property alleged. The only question presented for consideration is whether the offense of which accused was found guilty by the court, was a lesser offense, necessarily included in that charged.

The controlling principle in the determination of the propriety of the substitution of an included offense by a court-martial is found in the following extract from paragraph 78c, Manual for Courts-Martial, 1928, page 65 (see also TM 27-255, par 106):

> "Lesser Included Offense--If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged the court may by its findings except appropriate words, etc, of the specifications, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter * * *" (Underscoring supplied).

In CM 316917, Morrison, (6 Bull JAG 12) in commenting on the opinion of the Board of Review, The Judge Advocate General by first indorsement stated:

> "The true test as to whether an offense found is included in that charged, is that the offense found is included only if it was necessary to the proof of the offense charged to prove all elements of the offense found" (Underscoring supplied).

In applying this test to the question at hand it is first necessary to determine what are the necessary elements of proof to support a charge of misapplication under Article of War 94. Paragraph 150i, Manual for Courts-Martial, 1928, page 185 provides:

> "Proof * * * Misappropriation and misapplication.— (a) That the accused misappropriated or applied to his own use certain property in the manner alleged (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged, (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done, and (d) the value of the property, as specified."

In the instant case the court found that the accused did, "without authority, wrongfully take and carry away one truck, three quarter ton weapons carrier, of a value in excess of $50, property of the United States, furnished and intended for the military service thereof" (Underscoring supplied).

In applying the test set forth above, one of the elements of the offense found in the present case is that accused, without authority, wrongfully took and carried away the vehicle described. Hence, it must be determined whether this element is one necessary to the proof of the offense charged.

In CM 243287, Poole, 27 BR 321, it is stated:

> "The Board of Review is of the opinion that an accused may be guilty of either misappropriation or misapplication of property, whether he was in original lawful possession thereof or obtained it by trespass * * *. It is believed that Congress desired to provide less restricted offenses, along with larceny and embezzlement, to cover those cases where a person subject to military law makes wrongful and unauthorized use of Government property devoted to the military service, without regard to whether such person obtained control of the property rightfully or wrongfully" (Underscoring supplied).

In CM 318499, White et al the Board of Review in commenting on the decision in the Poole case stated:

> "In view of the Poole case which has been consistently followed by the Board of Review in recent years we are of the opinion that misappropriation of military property is incidental to larceny, embezzlement, misapplication, wrongful selling and wrongful disposition of military property.

It does not follow, however, that it is an offense necessarily included in the other offenses denounced by the 9th subparagraph of Article of War 94. The indivisible and unexpungeable elements of larceny are a taking and carrying away by trespass. In misappropriation, the devotion to an unauthorized purpose, it is immaterial whether the initial taking is by trespass or not, or that there be any taking at all. Thus all types of misappropriation can not be included in larceny, since misappropriation may involve wrongful dealings with property which are in no way connected with larceny" (Underscoring supplied).

It may thus be concluded from the opinions cited that either the offense of misappropriation or that of misapplication may be committed by acts which are in no way connected with taking by trespass, and where the taking of the property was rightful or wrongful, or where there is no taking at all. A necessary corollary to this conclusion is that the element contained in the offense found, namely, that accused "did, without authority wrongfully take and carry away" the property alleged, is not an element necessary in proving the offense charged. Therefore the offense found is not a lesser included offense of the offense charged.

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

A. Hottenstein, Judge Advocate

John G. O'Brien, Judge Advocate

John W. Payne, Judge Advocate

JAGH - CM 324805 1st Ind

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

TO: The Secretary of the Army

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 26 May 1945, is the record of trial in the case of Private First Class Eduardo Gatchalian (10327169), 1667th Engineers Utilities Detachment (PS), 1191st Engineer Base Depot (PS).

2. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated, that all rights, privileges, and property of which 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 52, DA., 19 Nov 1947).

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

JAGQ - CM 324853

AUG 26 1947

UNITED STATES v. Captain HERBERT A. POLLARD, JR. (O-674850), Staff and Administrative Reserve, Headquarters Replacement Training Center, 1262d Area Service Unit, Fort Dix, New Jersey	)	FIRST ARMY Trial by G.C.M., convened at Fort Dix, New Jersey, 18, 19, 23-26 June 1947. Dismissal and confinement for one (1) year and six (6) months.

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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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 holding, to The Judge Advocate General.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Herbert A. Pollard, Junior, Headquarters Replacement Training Center, 1262d Area Service Unit, First Army, Fort Dix, New Jersey, did, at Fort Dix, New Jersey on or about May 7, 1947, being then and there intoxicated, while driving a motor vehicle in a careless, reckless, and negligent manner, feloniously and unlawfully inflict bodily injuries on one Frank B. Mingen from which injuries the said Frank B. Mingen died on May 15, 1947.

Accused pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and guilty of the Specification except the words, "being then and there intoxicated." No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year and six months. The reviewing authority approved only so much of the findings of guilty of the Specification and the Charge as involved a finding of guilty of unlawfully inflicting bodily injuries on one Frank B. Mingen, while driving a motor vehicle in a careless, reckless, and negligent manner, at the time and place alleged, from which the said Frank B. Mingen died on 15 May 1947, in violation of the 96th Article of War. 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. Inasmuch as the Board holds that there was prejudicial error in the trial, the evidence need not be summarized.

4. During the cross-examination by the prosecution of Captain Doty, a defense witness, special defense counsel objected to a question by the trial judge advocate and when the law member overruled the objection the following took place:

"DEFENSE COUNSEL: At this time the defense would like to have the third trial judge advocate qualified in this case as being a member of the court.

PROSECUTION: If the court please, any action that the prosecution takes is still the action of the prosecution and meets with the final judgment of the prosecution.

No objection was made to anything the defense has done with respect to the preparation of their case, and I can see no reason why the defense should make any objection to what means the prosecution wants to use in deciding what questions to ask and other things of that nature.

DEFENSE COUNSEL: Defense feels that if the appointing authority considered that two were not adequate for the trial judge advocate's side of the case, they would have appointed a third.

PROSECUTION: The court is reminded that the prosecution made no objections to Capt. Brill sitting in with the defense, did not even ask that Capt. Brill be qualified as such. It was felt that many questions which the defense might ask him were purely for instructional purposes relative to what questions the defense should or should not ask, knowing that in the last analysis it was the action of the defense. And so long as the questions themselves are not objectionable, I can see no reason why the prosecution cannot use what means it feels are indicated.

THE PRESIDENT: The court has noted that throughout this trial thus far the defense has had seated in its immediate section of the room an officer, and has likewise noted that there has been seated in the section of the room adjacent to the prosecution an officer. Those officers have not been recognized by this court as official members of either the defense or the prosecution.

The court has expected the defense and now expects the prosecution, each in turn, to handle its own case, and any consultations that either side might wish to have with officers who are not officially connected with this trial should be held at, let us say, the period of a recess and in that way assure that the case is not endangered. Those, then, are the instructions from this time on.

DEFENSE COUNSEL: We further request that the third trial judge advocate remove himself from the table. I mean there is no reason to caution him not to participate, then have him participate in spite of the court's caution.

THE PRESIDENT: This statement will be stricken from the record. There is no third trial judge advocate, therefore the remark has no point. Spectators are permitted in the room." (R. 215-216).

It is obvious from that portion of the record of trial set forth above that during the entire trial an officer other than the regularly appointed trial judge advocate and assistant trial judge advocate sat at the prosecution's table, conferred with and assisted the personnel of the prosecution in the presentation of its case. Such officer was not on orders as a member of the prosecution and had not been sworn. While the defense did not object to his presence and participation in the trial until after the prosecution had rested its case nevertheless such participation by an unauthorized officer constitutes fatal error.

In CM 318089, Knothe, 4 Bull. JAG 58, the Board of Review in a similar situation held that the record of trial was legally insufficient to support the findings and sentence, stating:

> "Only the convening authority can relieve or detail a member, judge advocate, or assistant judge advocate of a general court-martial (A.W. 11; par. 368(1), Dig. Op. JAG, 1912-1940), and it has been held that activity in a trial by an assistant trial judge advocate otherwise appointed constituted fatal jurisdictional error (CM 113341 (1918), par. 368(1), Dig. Op. JAG, 1912-1940). It appears obvious that the same fatality must accompany activity on behalf of the prosecution, in a trial, by a volunteer assistant who has not even the color of any official appointment. Such activity is an invasion of the right of accused to be protected during his trial from the intrusion by one who is not properly a part of the court-martial duly convened to try him (CM 125676 (1919), par. 1417, Dig. Op. JAG, 1912-1920; CM 200734, Burns, 5 BR 5, par. 368(1), Dig. Op. JAG, 1912-1940).

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

W H Johnson Jr, Judge Advocate

C E Schumm, Judge Advocate

Andrew J Kane, Judge Advocate

JAGQ - CM 324853 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, First Army, Governors Island, New York, New York.

1. In the case of Captain Herbert A. Pollard, Jr., (O-674850), Staff and Administrative Reserve, Headquarters Replacement Training Center, 1262d Area Service Unit, Fort Dix, New Jersey, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

2. Upon taking the action recommended above you will have authority under Article of War 50½ to direct a rehearing.

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

(CM 324853)

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 324883

U N I T E D S T A T E S	)	1ST U. S. INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Nurnberg, Germany, 1 July 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
	)	
Private VIRGIL W. EWING (35489498), 3798th Transportation Corps Truck Company (Heavy), 122d Transportation Corps Truck Battalion.	)	

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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Virgil W. Ewing, 3798th Transportation Corps Truck Company (Heavy), then a member of Detachment 72, 3rd Replacement Depot, did, at or near Marburg, Germany, on or about 10 July 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Nurnberg, Germany, on or about 3 April 1947.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor 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 only question to be considered is the propriety of the accuser acting as defense counsel.

4. The record of trial shows that the Charge was preferred by Captain Theodore H. Watkins (R. 2, 4), acknowledged 30 April 1947, and served on the accused 25 June 1947. Captain Theodore H. Watkins was detailed 16 June 1947 as an assistant defense counsel of the court which tried the accused on the Charge (R. 1). Of the defense staff regularly detailed to the court Captain Theodore H. Watkins and First Lieutenant Max R. Miller were present at the trial (R. 2). The record of trial shows that, upon being "asked by the trial judge advocate whom he desired to introduce as counsel, the accused then introduced the regularly appointed counsel excusing Major Mark Selsor [regularly appointed defense counsel] and Second Lieutenant Edward P. Sparks [a regularly appointed assistant defense counsel]"; and that "The defense was conducted by First Lieutenant Max R. Miller; the prosecution by First Lieutenant Robert T. Sprouse."

It appears from the documents accompanying the record of trial that in forwarding the Charge Captain Theodore H. Watkins stated, of the accused:

> "6. In my opinion he should be eliminated from the service. 7. I recommend trial by general court-martial."

A "statement" signed by Captain Theodore H. Watkins under date of 3 May 1947, also included among the accompanying documents, reads:

> "Private Virgil W. Ewing ASN 35489498 deserted the Service of the United States on or about 10 July 1945 and remained in desertion until 3 April 1947 at which time he was apprehended by the Military Police.
>
> "During the short period of time Ewing has been assigned to this unit, he has been absent from formations on at least four occassions, indicating a complete disregard for military discipline.
>
> "In view of the circumstances stated above, it is believed that Ewing would be a definite detriment to the service if retained."

Captain Theodore H. Watkins signed the record of trial as defense counsel (R. 35).

5. It thus appears that Captain Theodore H. Watkins was both

accuser and regularly appointed assistant defense counsel. As accuser and as accused's commanding officer he recommended that accused be tried by general court-martial and eliminated from the service. As the senior assistant defense counsel present at the trial of accused, in the absence of the regularly appointed defense counsel, he purported to participate in accused's defense. The exact extent of such participation does not appear in the record.

In the case of CM 194200, Sanderson, 2 BR 125, accused was tried upon several charges and specifications. The defense counsel was the company commander of accused, the officer who signed and swore to the charges, and also was called and testified as a witness for the prosecution. The accused testified in his own behalf, substantially admitting he had committed some of the offenses with which he was charged. The Board of Review held the record of trial legally sufficient as to those offenses admitted by the accused in his testimony but legally insufficient as to all remaining charges and specifications because "the substantial rights of the accused were injuriously affected" by "noteworthy irregularities which compel this conclusion when considered together and in conjunction with the weakness of inculpatory evidence," listing, among other such "noteworthy irregularities" the propriety of the accuser acting as defense counsel. The case was apparently one of first impression and the matter of the defense counsel was not analyzed or discussed at length, but it would appear that the Board considered the matter only as an "irregularity" without determining whether, if standing alone, it would require disapproval of the findings and sentence in whole or in part.

The matter was considered at length in CM 284066, Mejie, 55 BR 241, 4 Bull JAG 334. In that case the accuser was also the regularly appointed and acting defense counsel. At the commencement of the trial proceedings the attention of the accused was specifically invited to this fact and he replied: "I still wish Captain Geist to be defense counsel." The Board of Review considered accused's statement of desire in this respect improvident and held that:

> "* * * it is the present purpose of military law to provide an accused not merely with defense counsel but with defense counsel not 'disqualified or unable' for any reason 'to perform his duties.' * * * the law forbids an accuser to purport to defend the man he has accused. For an accuser to serve in such inconsistent capacities is unfair to himself, unfair to the court, and a mockery of the requirement that he must serve the accused with 'undivided fidelity' and by all 'honorable and legitimate means known to law.' Observance of these simple principles compel the conclusion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence."

In cases of similar nature, in which the defense counsel or assistant defense counsel was also the investigating officer who recommended trial of the accused by general court-martial the Board of Review has held such impropriety to constitute fatal error (CM 316896, Mesquite, 5 Bull JAG 332; CM 319176, Henry, 6 Bull JAG 58). In neither the Mesquite case nor the Henry case does it affirmatively appear from the record that accused was appropriately advised of the exact nature of the situation respecting regularly appointed counsel, or that he particularly desired and sought the services of such officer in preference to or along with others, although in each case appears the usual form statement that accused stated he desired to be defended by the regularly appointed defense counsel and/or assistant defense counsel.

It is to be noted that such a situation was viewed by the Board of Review in the Sanderson case as a "noteworthy irregularity," in the Mejie case as fatal error regardless of the fact that accused was at least partially advised of the situation, and in the Mesquite and Henry cases as fatal error in the absence of some showing that accused had been advised of the situation, or that he expressed a clear desire to be defended by the officer in question as opposed to a formalized acceptance of such officer when designated as defense counsel by the appointing authority. In this case it does not affirmatively appear from the record of trial that the accused was ever advised of the recommendations as to his trial and disposition made by Captain Watson, or that prior to being asked his choice of counsel his attention was invited to the fact that Captain Watson was his accuser. Neither does it appear that accused, in expressing his desires as to defense counsel, did more than accept the regularly appointed assistant defense counsel officially offered to him. We are of the opinion that such a state of facts comes clearly within the rule of law stated in the Mejie case and followed in the Mesquite and Henry cases, and that it constitutes fatal error.

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.

_____, Judge Advocate.

(SICK IN QUARTERS), Judge Advocate.

Joseph T. Brack, Judge Advocate.

JAGN-CM 324883 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 1st U. S. Infantry Division, APO 1,
c/o Postmaster, New York, N. Y.

1. In the case of Private Virgil W. Ewing (35489498), 3798th Transportation Corps Truck Company (Heavy), 122d Transportation Corps Truck Battalion, 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 324883).

HQS. 1st Div
RECEIVED
NOV 20 1947
NEW YORK

1 Incl.
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

JUDGE ADVOCATE

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

30 September 1947

JAGV - CM 324886

U N I T E D S T A T E S v. Technician Fifth Grade DICK E. HAMLIN (45039730), and Private HAROLD H. JANSSEN (37779778), both of Company C, 793d Military Police Battalion.	)	FIRST UNITED STATES INFANTRY DIVISION Trial by G.C.M., convened at Nurnberg, Germany, 7 July 1947. Dishonorable discharge and confinement for one (1) year as to Hamlin. Dishonorable discharge and confinement for two (2) years as to Janssen. Both: Reformatory.

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, Technician Fifth Grade Dick E. Hamlin and Private Harold H. Janssen, both of Company "C", 793rd Military Police Battalion, acting jointly and in pursuance of a common intent, did, at Neumarkt, Germany, on or about 21 March 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Josef Goetz, 38½ meters of cloth; 34 towels; 1 pack of damask; 17 blankets; 4 sets of underwear; 2 men's suits; 3 scarves; 3 aprons; 1 pair of shoes; 1 tablecloth; 3 pillows; 24 flour sacks; 4 embroidered pillows; 3 ladies' shirts; 12 linen sheets; 1 boy's suit; 1 boy's sweater; 1 cap; 1 nightdress; 1 pair of ladies' pants; 12 table napkins, and 1 swaddling cloth, of some aggregate value, the property of Josef Goetz.

Each accused pleaded not guilty to the Charge and Specification, and each was found guilty of the Specification of the Charge except the words "38½ meters of cloth; 34 towels; 1 pack of damask; 17 blankets; 4 sets of underwear; 2 men's suits; 3 scarves; 3 aprons; 1 pair of shoes; 1 tablecloth; 3 pillows; 24 flour sacks; 4 embroidered pillows; 3 ladies' shirts; 12 linen sheets; 1 boy's suit; 1 boy's sweater; 1 cap; 1 nightdress; 1 pair of ladies' pants; 12 table napkins, and 1 swaddling cloth" substituting therefor the words "2 men's suits and material for a coat and

other articles of personal property," of the excepted words not guilty, and of the substituted words, guilty, and guilty of the Charge. No evidence of previous convictions was introduced. Accused Hamlin was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year, and accused Janssen was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority "approved only so much of the findings of guilty of the specification and the charge as involve findings that each of the accused did, at the time and place and in the manner alleged, commit robbery of two men's suits, the property of Joseph Goetz", and approved the sentence of each accused. He designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War may direct, as the place of confinement in the case of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The only question requiring consideration in the present case concerns the legality of designating a Federal Reformatory as the place of confinement for the accused Hamlin.

4. It is well established that a Federal correctional institution or reformatory may not be designated as the place of confinement except in cases where confinement in a penitentiary is authorized by law. (CM 220093, Unckel; CM 222173, Costa; CM 226611, Smith; CM 225822, Parish; CM 324976, Babiera.)

5. Article of War 42 provides in part as follows:

> "ART. 42. Places of Confinement--When Lawful.--Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: . . . . " (MCM 1928, p.212) (Underscoring supplied)

Accordingly, confinement in a Federal reformatory (or correctional institution or penitentiary) is not authorized as to accused Hamlin by Article of War 42 as the period of confinement adjudged is not more than one year (A.W. 42; sec. 399(5), Dig. Op. J.A.G. 1912-1940; par. 90, M.C.M.; CM 225822, Parish, 49 BR 215; CM 324673, Gonzalez; CM 324976, Babiera.)

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the sentence of accused Janssen, and legally sufficient to support only so much of the sentence of accused Hamlin 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 Federal reformatory, correctional institution or penitentiary.

Wilmot T. Baughn, Judge Advocate

John G. O'Brien, Judge Advocate

George S. Springstead, Judge Advocate

JAGV CM 324886 1st Ind

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

TO: The Commanding General, First United States Infantry Division, APO 1, c/o Postmaster, New York, New York.

1. In the case of Technician Fifth Grade Dick E. Hamlin (45039730), and Private Harold H. Janssen (37779778), both of Company C, 793d Military Police Battalion, I concur in the foregoing holding by the Board of Review, and recommend that as to accused Hamlin a place of confinement other than a Federal reformatory, correctional institution or penitentiary be designated. Upon taking such action you will have authority to order execution of the sentences.

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 324886).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

HQS. 1st DIVISION
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DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGH - CM 324889

UNITED STATES v. Captain J. HAROLD POLAND (0-1031435), Headquarters and Headquarters Troop, 72nd Squadron, 10th Constabulary Regiment	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Heidelberg, Germany, 19 June 1947. Dismissal and total forfeitures

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 95th Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: In that Captain J. Harold Poland, Headquarters and Headquarters Troop, 72nd Constabulary Squadron, did, at Boblingen, Germany on or about 4 February 1947, wrongfully and unlawfully issue an order to Sergeant Robert L. McDonald to procure vehicle parts from illegal sources.

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

Specification 1: In that Captain J. Harold Poland, Headquarters and Headquarters Troop, 72nd Constabulary Squadron, did, at Weil Im Schoenbuch, Germany, on or about 5 February 1947, in his capacity as troop commander, knowingly and willfully authorize and permit

the stripping of two (2) Government vehicles, to wit: A one-quarter ton truck, four by four, War Department number 20672628, and a one-quarter ton truck, four by four, War Department Number 20385101 respectively of their component parts in violation of existing directives.

Specification 2: In that Captain J. Harold Poland, Headquarters and Headquarters Troop, 72nd Constabulary Squadron, did, at Boblingen, Germany, on or about 5 February 1947, feloniously conspire with Sergeant Robert L. McDonald and Staff Sergeant David E. Mosher to receive, have and conceal two (2) engines complete, numbers MB 622071 and MB 535961, one front axle assembly, one rear axle assembly, one radiator, two wheels complete with tires and tubes, and one windshield assembly, all component parts of one-quarter ton trucks, four by four, of the goods and chattels of the United States, then lately before feloniously stolen, taken, and carried away; he, the said Captain J. Harold Poland, then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

Specification 3: In that Captain J. Harold Poland, Headquarters and Headquarters Troop, 72nd Constabulary Squadron, did, at Boblingen, Germany, on or about 5 February 1947, procure Sergeant Robert L. McDonald to make a false official statement, by inducing him the said Sergeant Robert L. McDonald, to state to Major Flegeal that he, Sergeant Robert L. McDonald and Captain J. Harold Poland had gone to the house of Richard Hettler, Weil im Schoenbuch, to procure a tool kit loaned to Richard Hettler by Troop "C" and that on the way they had broken a spring shackle and that it had been repaired by Richard Hettler, and that the quarter ton had been towed back to the 72nd Squadron Kaserne by a two and one-half ton truck (C 11) due to the fact that they, Captain J Harold Poland and Sergeant Robert L. McDonald were unable to start the motor of the quarter-ton truck in which they were riding, and that they arrived at the 72nd Squadron Kaserne about midnight on 4 February 1947, which statement was false, and was known by the said Captain J. Harold Poland and Sergeant Robert L. McDonald to be false, this to the prejudice of good order and military discipline.

Specification 4: (Finding of Guilty disapproved by the Reviewing Authority).

He pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 1 of Charge I, not guilty of Charge I, but guilty of a violation of Article of War 96, and guilty of Specification 2 thereunder; guilty of Charge II and the Specifications thereunder except the words "authorize and," in Specification 1. 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 disapproved the findings of guilty of Specification 4 of Charge II, approved the sentence but remitted the confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence in support of the findings of guilty is substantially as follows:

On 4 February 1947 Sergeant Robert L. McDonald had a conversation with accused, his troop commander, in the latter's quarters (R 17-18). An "I.G." inspection was pending and McDonald had made frequent requests for vehicle parts and the response to such requests was "Back Order" (R. 17, 76). McDonald and accused discussed the question of getting parts, and when McDonald indicated he was not ready for the inspection, he was told by accused "to get the —— out and get them" (R 17-18). McDonald denied that accused ever ordered him to procure vehicle parts from illegal sources (R 31). Later that same day McDonald met with Sergeants Yanagi and Cordts (R 19, 34, 53). The three were members of the "maintenance crew" of accused's unit and they decided that they "had to do something" in order to get repair parts for their vehicles (R 19, 53, 61). That evening McDonald, Yanagi and Cordts drove to Stuttgart and went to the Red Cross Club. After leaving the club Yanagi and Cordts each took a jeep from a parking lot. That same evening a jeep, WD number 20672628, dispatched to Technician Fifth Grade Robert T. Heman was taken without his permission from the parking lot next to the Red Cross in Stuttgart. Another jeep, assigned to First Lieutenant Norton J. Stussman, which he had parked at the ARC Crossroads Club in Stuttgart was taken between 1950 and 2100 hours the same evening (R 10, Pros Ex 1).

Earlier that day McDonald and Yanagi in company with Richard Hettler, a German mechanic had gone to Weil im Schoenbuch, and had inspected a barn owned by Hettler's sister-in-law (R 65). The jeeps were taken to the barn in Weil im Schoenbuch where Cordts and Yanagi were joined by Hettler (R 65-66).

The jeep which Yanagi had taken was pushed into the barn and he started to strip it. According to Hettler, Yanagi and Cordts drained the water out of the jeep and all three started to take the jeep apart (R 66). McDonald in the meantime returned to accused's quarters and informed him of the theft of the two vehicles (R 21). McDonald and accused then went to Weil im Schoenbuch where they found Yanagi, Cordts, and Hettler (R 24, 56). Yanagi was underneath a jeep and did not see accused. Cordts might have said something to accused but did not recall what was said, and was

not sure that accused dismounted from his jeep. Hettler testified that accused and McDonald arrived at the barn after they had started to dismantle the jeep, and that accused entered the barn where the jeep was being stripped (R 66). McDonald left a set of tools which he had brought with him for stripping the vehicles (R 27), and after about 15 minutes he and accused drove away (R 24). Subsequently McDonald returned with a 2½ ton truck and accompanied by Technician Fifth Grade Willits (R 28). Yanagi, Cordts and the German mechanic were still there (R 28). One vehicle had been stripped of the engine, front axle assembly, rear axle assembly and the windshield (R 29, 57). The chassis of that vehicle was loaded on the 2½ ton truck and McDonald and the German disposed of it approximately 5 kilometers away in the direction of the French zone on Tuebingerstrasse (R 29-30, 57, 67).

On their return the engine had been taken from the other jeep; this engine and the other parts were loaded onto the truck, and the jeep, less its engine, was tied on behind. The chassis was "dumped" some distance beyond "the first stop" (R 30-31, 58, 67). McDonald, Yanagi, Cordts and Willits then went to the 72nd Squadron and parked the truck in the motor pool (R 31, 49). At about 9:00 o'clock on the morning of 5 February 1947 the parts were loaded on a ton and a half truck by McDonald (R 74). That evening at about 1930 hours McDonald, Sergeant Mosher and Hettler had a conversation with accused in his quarters. Accused was informed that the German police had "picked up" Hettler (R 69, 71).

With respect to the conversation at accused's quarters, Hettler testified:

"Q. Can you tell this court, the best you can remember, what Captain Poland instructed you to say?
"A. I should say that he had been there with a jeep, with a broken spring, and that later on three other soldiers came in, who had said that they were from C Troop.

"Q. Did Captain Poland make any statement as to whether or not this broken spring was repaired?
"A. Captain Poland spoke about a broken spring and engine. I do not recall correctly what was said. I tried to figure out what he meant, but the points I had understood—

"Q. Well, you testified that Captain Poland told you to say he had been there with a broken spring on that night, is that correct?
"A. He told me to state that he had been there with a jeep, with a spring which was broken, and to say the same at the next questioning."

* * *

"Q. Did Captain Poland make any statement to you as to how this jeep was removed with the broken spring?
"A. As far as I recall, Sergeant McDonald said to state that after I had repaired the spring they drove away in the jeep.

"Q. Who told you to say that?
"A. Captain Poland.

"Q. As a matter of fact, did you repair a broken spring for Captain Poland on the night of 4 February 1947?
"A. No." (R 68-69).

In the general discussion at accused's quarters McDonald remarked he "would hate to serve time" (R 77). Accused responded that McDonald did not have to worry, he was under orders (R 76-77). At Mosher's suggestion it was decided to put the vehicle parts in his basement (R 71, 80-83), and at 2100 hours the same evening the parts were taken to Mosher's house and stored (R 84-85).

On the evening of 6 February 1947 First Lieutenant Abraham Rinearson, officer of the day, on instructions from Major Flegeal went to Sergeant Mosher's home accompanied by five members of the guard. In a room in the cellar were found two jeep engines, a front axle, rear axle, windshield, radiator, and assorted wheel parts, rims and tires. The parts were taken from Mosher's house and placed in a room next to the Provost Marshal's office, where they were tagged the following morning by Sergeant Trainor (R 97-99). The numbers on the two engines were "535961" and "622071" (R 101). The chassis of a jeep, "WD 20385101" was found off the old Tuebinger Road near Weil im Schoenbuch on 5 February 1947, and on 8 February 1947 at a point in the woods about 5 kilometers from where the first chassis was found a second chassis was found with "WD number 20672628" on the hood (R 89-91).

On the morning of 6 February Sergeant McDonald and accused were present in the latter's office (R 74). McDonald testified relative to their conversation as follows:

"Q. Can you tell the court, the best you can remember, what Captain Poland said to you at that time?
"A. Well, at the time, Captain Poland was sitting there at the desk, using a typewriter, and I was looking over his shoulder. I'm not sure whether the Captain said that was his story, or what.

"Q. Did he make any statement to you with regard to your story?

"A. I'm not exactly sure how he put it. I'm not sure he made the statement to me that that was his story, or that was my story.

"Q. Do you know what that story was?
"A. I do, sir, part of it.

"Q. Can you tell the court, the best you can remember?
"A. The same story we went through on the night of the 5th at the Captain's quarters.

"Q. Can you again tell the court what that story was, the best you can remember?
"A. That I had taken Captain Poland out to the officers' quarters, and then visited a German mechanic, and on the way busted a spring; had it repaired, and then came to the kaserne and got the two and a half and towed the vehicle in." (R 75).

On cross-examination he testified:

"Q. Sergeant, did Captain Poland procure or require you to make a false official statement?
"A. I don't know exactly how it was made, sir.

"Q. Did he ever order you or direct that you make a statement with respect to what you did on February 5th?
"A. I wouldn't swear to that either way, sir. I am not sure.

"Q. You have testified that Captain Poland said that that was the story he was going to tell, isn't that correct?
"A. I said I was not sure if that was the way he said it or not. To the best of my knowledge it was." (R 77).

On or about 5 February 1947 McDonald made a statement to Major Flegeal in connection with an investigation of the case. Major Flegeal's testimony as to the statement made is as follows:

"Q. At that time, what did Sergeant McDonald say to you, to the best of your recollection?
"A. Well, the gist of the statement was that he and Captain Poland had gone to this German's house to pick up a tool box, and on the way they had either broken a spring or a spring shackle, and that they got the German to fix it. After it was fixed the quarter-ton would not start and Sergeant McDonald left it to return to the Troop and get a vehicle to

tow it in, and he returned quite later, and I believe around midnight or later, with a two and a half, and towed the quarter ton back." (R 95).

With respect to the events on the night of 4 February 1947, McDonald testified as follows:

"Q. All right, as a matter of fact, Sergeant McDonald, did you make any trip to Richard Hettler, the German mechanic, to procure a tool kit on that night?
"A. No, sir.

"Q. Did you on that night break a spring shackle on a vehicle?
"A. No, sir.

"Q. Did Richard Hettler repair a spring shackle for you on that night?
"A. No, sir.

"Q. Was any vehicle towed back to the 72d Squadron by a two and a half ton truck?
"A. No, sir." (R 73).

Prosecution introduced in evidence Circular 156, Headquarters Third United States Army, 3 December 1946 (R 96, Pros Ex 9). This circular, in turn, cited Standard Operating Procedure Number 30, Headquarters US Forces, European Theater, dated 12 July 1946 which states:

"Canabalization is prohibited except as authorized or directed by Theater Chiefs of Technical Services to be performed in service maintenance installations."

The provisions of this circular were "brought up" at the Staff and Troop Commanders' meeting, of the 72d Squadron, accused's organization (R 96).

A pre-trial voluntary statement of accused was introduced in evidence by the prosecution without objection (R 104, Pros Ex 13). In pertinent part he stated:

"* * * The next time I had heard of more jeep stealing activities was on 4 February 1947 about 2100 hours. I remember Lieutenant Green and myself at my billets at this time when Sergeant McDonald, my motor sergeant, came in and said, 'God damn, I didn't know these MP's could still shoot at you.' I asked McDonald what the hell they were shooting at him for and he said that he had been in Stuttgart and tried to get a battery from a parked vehicle at the Red Cross and that the MP's had come upon him. He went on to say that he got back

in his jeep and left. The MP's had chased him and during the chase, they had fired at him. I remember saying, 'Oh, hell, that isn't so bad, they didn't catch you did they?" Then he said, 'Oh, that isn't all.' He said that Yanagi and Cordts might have picked up a vehicle, or the MP's might have got them. I asked him how we could find out and he said that if they got a vehicle, they were to go to one of the German civilian mechanics house. (We had two such mechanics employed in our pool). * * *

"Then at that time I completely disregarded the fact that there was another stolen jeep involved and kept silent * * * I told McDonald that I wanted to go down to the mechanic's house to see what the score was.

"* * * after a little while we took C 10 and went to the Mechanic's house. McDonald went with me.

"When I arrived at the garage, I saw that Cordts and Yanagi were there and I was mostly interested in their safety. I saw one jeep in the garage and Yanagi and Cordts were discussing the good points about the jeep that was in the garage. I knew that it was a jeep that they had stolen."

* * *

On the 5th of February "We had an I.G. inspection all morning, we were busy with them and there was nothing done about the stolen jeep that day. That night the phone rang and it was Sergeant McDonald who said that he had to see me right away. He came over to my house with Sergeant Mosher, a German mechanic and T/5 Willits. McDonald was all excited and then between the three of us, we understood the German mechanic to mean that the German Land Police had picked him up and that the police had found the body of the jeep that was stripped at the mechanic's garage. The German mechanic also said that the Constabulary had also been out to see the body of the jeep.

"I told the German mechanic to go back to the Land Police and tell them that I had been there with C-10 and that he had been working on that, because the Land Police had also seen the mechanic working on C-10. Then after we left, I told him to say that someone else had brought out the stolen jeep to be torn down. After I gave these instructions to the mechanic, we began to discuss the parts from the stripped jeep. It was finally decided that the parts should be put in Sergeant Mosher's basement." (R 104-105).

4. Evidence for the defense:

Accused after being apprised of his rights as a witness elected to remain silent, and no evidence was presented by the defense.

5. The evidence shows that for some time the unit of which accused was commander and of which McDonald was a member, was short of parts for its vehicles. McDonald had on numerous occasions requested parts without success. On 4 February 1947 McDonald and accused had a conversation pertaining to the lack of vehicle parts in connection with an "I.G." inspection which was pending. McDonald indicated to accused that he was not ready for the inspection and accused told him "to get ——— ——— out and get the parts." That evening following a conversation with McDonald concerning the shortage of parts, two other members of the unit, Yanagi and Cordts stole two jeeps in Stuttgart. The jeeps, by prior arrangement, were taken to a barn in Weil im Schoenbuch. McDonald in the meantime informed accused of the theft of the two vehicles. McDonald secured tools for stripping the jeeps and with accused went to the place where the jeeps were taken. Upon their arrival at that place, one of the jeeps, at least, was in the process of being stripped by Cordts, Yanagi and a German mechanic. After accused left the barn the stripping of the two vehicles was completed. The chassis of each jeep was "dumped" some distance away and was subsequently recovered. These chassis were identified as belonging to the vehicles described in Specification 1, Charge II. The parts taken from the vehicles were brought back to the area of the unit commanded by accused. The following day the German mechanic involved in the stripping was questioned by the German police. That evening a discussion was had at accused's quarters between accused, McDonald, Sergeant Mosher, the German mechanic and others. Accused told the German to say, if questioned, that accused and McDonald had gone to see him to obtain a set of tools, that a spring on their jeep had broken en route, and that the German had repaired the spring, after which accused and McDonald drove away. It was decided among them that the parts should be hidden in Mosher's cellar. During the conversation McDonald remarked that he would hate to serve time. Accused replied that McDonald did not have to worry as he was under orders.

The parts were hidden in Mosher's cellar where they were subsequently found. The parts found were substantially as described in Specification 2, Charge II, and the motor numbers of the two motors involved were established as alleged. The evidence is conclusive that the parts were stripped from the jeeps stolen by Cordts and Yanagi.

On 6 February McDonald had another conversation with accused. The latter was sitting at a typewriter and McDonald was looking over his shoulder. Accused said that "that was his story, or that was my story." It was the same story they had recited the night before at the accused's quarters, namely, that McDonald had visited a German mechanic, and on the way had broken a spring, had it repaired, and then towed the vehicle back to the unit. On or about 5 February McDonald made a statement of similar content to Major Flegeal.

Accused was found guilty of ordering Sergeant Robert L. McDonald to procure vehicle parts from illegal sources (Spec 2, Chg I). There had been a shortage of vehicle parts in accused's unit, an "I.G." inspection was pending, and McDonald, a member of the Maintenance Crew, was not ready for the inspection. Accused ordered him to go out and get the parts. Following a conversation with McDonald, two other members of the Maintenance Crew stole two jeeps and parts were stripped from them. The manner of expressing the order, might well have conveyed the meaning that McDonald was to pursue legitimate channels in a more vigorous manner. The fact that vehicle parts were obtained from illegal sources, following accused's order to McDonald to get the parts, is not of itself proof that he was given an order to procure them from illegal sources, as alleged. While McDonald testified that during their discussions on 5 February concerning the disposition of the spare parts, accused assured him that he need have no fear of being punished, since he (McDonald) was under orders, there is no showing as to what orders accused had in mind when he made the statement, or as to what acts McDonald was referring. There was no testimony introduced which showed that accused ordered McDonald to do anything other than get the parts. Indeed, McDonald himself denied that accused had ordered him to get vehicle parts from illegal sources. In view of the foregoing, we are of the opinion that the findings of guilty of Specification 2 of Charge I cannot be sustained.

The accused was found guilty of wrongfully permitting two government vehicles to be stripped of their component parts in violation of existing directives (Spec 1, Chg II). The evidence shows that at the time and place alleged accused was present while a vehicle was being stripped. He had previously been informed that two jeeps had been stolen and the circumstances disclosed by the record of trial show that accused knew that they had been stolen in order to obtain parts. His failure to stop these acts on the part of his subordinates was, in effect, tacit permission for them to strip the two vehicles. The identity of the jeeps as alleged was established by the evidence. Paragraph 11a, Section III, Standing Operating Procedure, Number 30, Headquarters US Forces, European Theater, dated 12 July 1946, as contained in Circular 156, Headquarters Third United States Army, 3 December 1946, provided:

> "Canabalization is prohibited except as authorized or directed by Theater Chiefs of Technical Services to be performed in service maintenance installations."

Since this Circular 156, supra was considered at a Staff and Troop Commanders' meeting it is a fair inference that accused knew of the cited prohibition. The court was justified in finding that at the time and place and under the circumstances alleged accused knowingly and willfully permitted the stripping of the vehicles as alleged, in violation of existing directives.

Accused was found guilty of conspiring with others to receive, have, and conceal property of the United States which had been stolen and known to accused to have been stolen (Spec 2, Chg II). The evidence shows that the day following the theft and stripping of the jeeps the German mechanic involved was questioned by the German police. That evening there was a meeting of accused, Sergeants McDonald and Mosher, and the German mechanic. At the meeting it was decided that the stolen parts should be hidden in Sergeant Mosher's cellar and in pursuance of the agreement the parts were so hidden. The evidence clearly shows a conspiracy to conceal stolen property as alleged for the purpose of suppressing evidence of the theft of the two vehicles on the previous evening. Since no overt act effecting the conspiracy was alleged, accused was found guilty of common law conspiracy, which is a military offense cognizable under the 96th Article of War. (CM 112560, 120543 (1918), Dig Op JAG 1912-40, Sec 454 (23)).

Accused was found guilty of procuring Sergeant Robert L. McDonald to make a false statement to Major Flegeal (Spec 3, Chg II). The evidence shows that at the meeting on the evening of 5 February 1947, accused told Hettler, the German mechanic, in the presence of McDonald, to say that accused and McDonald had gone to Hettler's house to secure a tool kit, that on the way there a spring on their vehicle had broken, and that after Hettler had repaired the spring McDonald and accused left. The story was, of course, false except for the fact that McDonald and accused had gone to Hettler's place on the evening of 4 February. On 6 February McDonald again saw accused. Accused was sitting at a typewriter and informed McDonald that this is "my" or "your" story. It was the same story they had "gone over" the previous night. On or about 5 February 1947 McDonald told substantially the same story to Major Flegeal. McDonald's testimony was very equivocal and while it appears that he was an unwilling witness and probably withheld testimony damaging to accused, there is no evidence that accused asked him to make the false statement alleged. Further there is no evidence that accused induced McDonald to make a false statement to Major Flegeal. Indeed, the record fails to show whether McDonald's false statement to Major Flegeal was made prior or subsequent to accused's conversations with Hettler and McDonald. If, in fact, McDonald made the statement to Major Flegeal prior to the time accused asked Hettler to tell a certain story, it could well be, although not shown in the record, that accused adopted McDonald's story. We are of the opinion that the testimony does not support the findings of the court, with respect to Specification 3, Charge II.

5. Records of the Department of the Army show accused to be 28 years of age and married. He served as an enlisted man from 11 January 1942 to 13 January 1943. He was commissioned second lieutenant, AUS, 14 January 1943, and was subsequently promoted to first lieutenant and captain. Efficiency ratings of record show that he was rated as "Superior" for the period from 1 July 1944 to 31 December 1944, "Excellent" for the period from 1 January 1945 to 30 June 1945, and "Superior" for the period from 1 January 1946 to 30 June 1946. He has had in excess of one hundred days

of combat duty and was awarded the Bronze Star Medal. On 27 February 1945 he was punished under the 104th Article of War for absence without leave and appropriating to his own use a one-quarter ton truck property of the United States.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge I and of Charge I, and of Specification 3 of Charge II; legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge II and of Charge II, and the sentence and to warrant confirmation of the sentence. A sentence to dismissal and total forfeitures is authorized upon a conviction of a violation of Article of War 96.

L. Wattenstein, Judge Advocate

John G. O'Brien, Judge Advocate

J. W. Lynch, Judge Advocate

JAGH - CM 324889 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 for your action the record of trial and the opinion of the Board of Review in the case of Captain J. Harold Poland (O-1031435), Army of the United States.

2. Upon trial by general court-martial this officer was found guilty of ordering an enlisted man to procure vehicle parts from illegal sources, of permitting two government vehicles to be stripped in violation of existing directives, of conspiring to conceal stolen government property, of procuring an enlisted man to make a false statement, and of attempting to commit subornation of perjury, in violation of Article of War 96. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one (1) year. The reviewing authority disapproved the finding of guilty of the offense of attempting to commit subornation of perjury, approved the sentence but remitted the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specification 2 thereunder (ordering an enlisted man to procure vehicle parts from illegal sources), legally sufficient to support the finding of guilty of Specification 1, Charge II (permitting vehicles to be stripped), legally sufficient to support the finding of guilty of Specification 2, Charge II (conspiring to conceal stolen government property), legally insufficient to support the finding of guilty of Specification 3, Charge II (procuring an enlisted man to make a false statement), and legally sufficient to support the finding of guilty of Charge II, and to support the sentence as modified by the reviewing authority and to warrant confirmation thereof. I concur in that opinion.

Accused was commanding officer of Troop C, 72d Squadron, 10th Constabulary Regiment. For some time that unit was short of parts for its vehicles and Sergeant Robert L. McDonald, a member of the motor maintenance crew informed accused that because of the shortage of parts the unit vehicles would not be ready for an "I.G." inspection. Accused ordered McDonald to "get --- --- out and get them." That evening McDonald and Sergeants Cordts and Yanagi also members of accused's troop, stole two jeeps and stripped them. Accused was informed of the thefts and went to the place where the jeeps were being stripped. He did not forbid the stripping of the jeeps. The following evening (5 February) while in his quarters, accused was told that a German mechanic involved in the stripping

had been questioned by the German police. In the presence of McDonald, accused instructed the German as to what to say if questioned further relative to stripping the vehicles. Sergeant Mosher was present at the time and at his suggestion the stolen parts were hidden in his home. The next day (6 February) McDonald and accused had another meeting. Accused was seated at a typewriter and said to McDonald this is "my story" or "your story." It was the same story that had been recited to the German mechanic the evening before and was false in its essential details. On or about 5 February McDonald told the same story to Major Flegeal who was making a preliminary investigation of the incident.

The Board of Review is of the opinion that the order given by accused to McDonald on 4 February 1947 was not an order to procure parts from illegal sources. As to accused procuring McDonald to make a false statement the Board is of the opinion that there is no evidence of such procurement, and that McDonald's false statement to Major Flegeal may well have been made prior to any conversations McDonald had with accused on the subject.

4. The enlisted men involved in the case were punished as follows: McDonald, a forfeiture of $65.00 a month for three months and a reprimand; Yanagi, a forfeiture of $77.33 a month for two months and a reprimand; Cordts, a forfeiture of $80.00 a month for two months and a reprimand; Mosher, a forfeiture of $85.00 and a reprimand.

5. Accused is 28 years of age and married. He served as an enlisted man from 11 January 1942 to 13 January 1943. He was commissioned a second lieutenant, AUS, 14 January 1943, and was subsequently promoted to first lieutenant and captain. He has had in excess of one hundred days of combat service and was awarded the Bronze Star Medal. Efficiency ratings of record show that he was rated as "Superior" for the period from 1 July 1944 to 31 December 1944, "Excellent" for the period from 1 January 1945 to 30 June 1945, and "Superior" for the period from 1 January 1946 to 30 June 1946. On 27 February 1945 he was punished under the 104th Article of War for a short absence without leave and for appropriating to his own use a one-quarter ton truck, property of the United States.

6. As to the offenses of which this officer was legally found guilty there is no evidence in the record of trial that he was motivated by desire for personal gain. There is evidence, however, that the property involved in the offenses was to be used in the service of the government.

I recommend that the findings of guilty of Charge I and Specification 2 thereunder, and Specification 3 of Charge II be disapproved. I further recommend that the sentence as modified by the reviewing authority be confirmed but, in view of accused's excellent previous service which included extensive combat duty and in view of all the circumstances of this case, recommend that the sentence be commuted to dismissal, a reprimand and forfeiture of $100.00 per month for three months, and that the sentence

as thus commuted be carried into execution, but that the execution of the dismissal be suspended during good behavior.

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 67, DA., 2 Dec 1947):

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

JAGH - CM 324924

UNITED STATES	21 October 1947
v.	KOREA BASE COMMAND
Private EDDIE J. DeGONIA (RA 19256928), 280th Ordnance Tire Repair Detachment, APO 901.	Trial by G.C.M., convened at APO 901, 2 July 1947. Dishonorable discharge and confinement for life. Penitentiary.

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, GRAY and LYNCH, Judge Advocates

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

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

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

Specification: In that, Private Eddie J. DeGonia, 280th Tire Repair Detachment, APO 901, did, in conjunction with Private Robert A. Soucy, 81st Ordnance Tank Maintenance Company, APO 901, at or near Camp Ascom, APO 901, on or about 22 April 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kim Yong Ja, a human being, by shooting her with a carbine.

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

Specification 1: In that Private Eddie J. DeGonia, 280th Ordnance Tire Repair Detachment, APO 901, while posted as a sentinel did, at or near Camp Ascom, APO 901, on or about 22 April 1947, wrongfully have illicit sexual intercourse with a Korean female.

Specification 2: In that Private Eddie J. DeGonia, 280th Ordnance Tire Repair Detachment, APO 901, being on guard and posted as a sentinel at or near Camp Ascom, APO 901, on or about 22 April 1947, did wrongfully permit an unauthorized person on his post, to wit: a Korean female.

CHARGE III: Violation of the 64th Article of War. (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

He pleaded guilty to Charge II and its Specifications, and not guilty to all other Charges and Specifications. He was found not guilty of Charge III and its Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army may direct as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence introduced by the prosecution:

At about 0130 hours on 22 April 1947, when Captain Philip E. Stitzman, CMP, was leaving the headquarters of the Korean Base Command, he noticed a truck passing with three soldiers and three Korean women in it. He followed the vehicle and subsequently stopped it and instructed the driver to proceed to the Military Police station. The driver failed to stop at the designated place in the Mitsubishi area but had to stop at a more distant place because a train blocked the road. There one of the enlisted men and one of the girls escaped. Captain Stitzman informed Lieutenant Perry, officer of the day in the Matsubishi area, of the two escaping and requested that they be apprehended and that he be notified (R 7). The accused, who was a guard on duty in that area, and the other guards involved in the incident hereinafter mentioned, were witnesses to this incident and overheard the conversation between Captain Stitzman and Lieutenant Perry (R 11, 13, 78).

The accused was on duty at Post 11, Mitsubishi area (R 29; p. 1, Pros Ex 2) and the other guards on duty at various posts in the same vicinity were privates Soucy, Earlywine, Husted and Hower. The Corporal of the Guard was named Sessa (R 13).

At about 0330 hours, the girl who had escaped from the truck was discovered near a warehouse (R 22; Pros Ex 2). Soucy and accused decided that they wanted to have intercourse with the girl, and accused took her into the warehouse (Pros Ex 2). Shortly thereafter, the corporal of the guard arrived and saw the girl, but Soucy and accused persuaded him not apprehend her because they wanted to have intercourse with her (R 22). After the corporal of the guard left, Soucy and accused engaged the girl in sexual intercourse, evidently with her consent (R 22; Pros Ex 2, p. 1). Thereafter, the girl said something about turning them in to the military police and charging them with rape. Upon hearing this, Soucy said he was going to shoot her (R 23, 78, 92).

Accused tried to talk him out of his expressed intention, and wanted to "put her through the fence." But after Soucy repeated his statement several times, that he intended to shoot her, accused said, "OK" (R 23).

Earlywine then came in, and accused went out to get Husted and Hower to help him in his argument with Soucy (R. 24, 30, 78, 80). All of them met in the warehouse and tried to persuade Soucy not to shoot the girl (R. 23-24, 40-41, 57, 62, 63, 78, 79). Soucy then told the other soldiers "to get out of the way," that he was going to shoot her and he didn't want to hit them (R. 41, 63, 79), and said to DeGonia, "You get behind the post there and hold the light on her and I will shoot her." Soucy said that "a couple of times," and accused said, "OK" (R. 24, 25). (The pertinent testimony with reference to accused's action from this point will be discussed in greater detail in subsequent paragraphs). Accused then started for the pillar (R. 25) and followed Earlywine outside the warehouse (R. 43). Hower and Husted remained in the building (R. 44). Soucy then told the others that if they were questioned to say that he yelled "halt" (R. 28; Pros Ex 2, p 2), which he did three times (R. 28, 63), and proceeded to shoot the girl. Hower and Husted then started for the door (R. 59). Soucy fired more than one clip of ammunition from his carbine at the girl, who died as a result of gunshot wounds (R. 51).

At about 0430 hours, Captain Stitzman returned to the area, and identified the body of the girl as the one who had escaped from the truck earlier that same night (R. 9, 10).

4. After being advised of his rights the accused was sworn and testified in his own behalf. His story of the homicide was substantially as related above. The differences will be discussed and quoted at length in subsequent paragraphs.

5. The only offense of which accused was found guilty, to which he pleaded not guilty, was that set forth in the Specification of Charge I. This Specification alleges that accused did, in conjunction with Private Soucy, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Kim Yong Ja by shooting her with a carbine.

Many of the facts leading up to the accomplishment of this brutal homicide, and the act itself, are not in issue. The Board of Review is concerned only with the activities of the accused during the period preceeding and during the act. The general uncontradicted story was as follows:

On 22 April 1947 accused, Soucy, Earlywine, Husted, and Hower were at their respective guard posts in the Mitsubishi area. Near these posts, at about 0130 hours, a Korean girl, Kim Yong Ja escaped while the military police sought to apprehend her. Each of these soldiers either saw the girl escape, or were apprised thereof, and the corporal of the guard gave orders to these sentries to apprehend her. About two hours later, the accused, Soucy, and Earlywine discovered the girl in that area, and the three of them talked with her. Soucy and accused decided they wanted to have intercourse with the girl. Shortly thereafter, the corporal of the guard arrived and saw the girl, but Soucy and accused persuaded him not to apprehend her. Thereafter Soucy and accused, in turn, had intercourse with the girl. Sometime later, the girl was shot and killed by Soucy,

when she threatened to report him to the military police, charging him with rape.

Since there was no planned conspiracy to commit murder or other felony, and since accused did not personally inflict the lethal wound, it is only by proving that he was an accomplice of Soucy that he can be legally convicted. The Board, after carefully analyzing the evidence of each witness and considering it in the light most unfavorable to accused, is of the opinion that the conviction is not sustained by the evidence. Since this matter is primarily one of fact and not law, it is felt that the evidence as to accused's participation in the homicide should be discussed in detail.

Beginning with the time that the girl was discovered in the Mitsubishi area, whether it was by accused, Soucy, or Earlywine is unimportant. Soucy and accused argued with the corporal of the guard to keep him from turning her over to the military police. Soucy, primarily, did the arguing, "DeGonia said a few words. He didn't say much." (R. 22). The reason for wanting to detain the girl was that Soucy and accused wanted to have intercourse with her (R. 39, 22). The sole object of accused and Soucy, at this time, was sexual intercourse. While the consummation of this objective was not proper conduct on the part of regularly posted sentries, and would violate the mores of our civilization as well as the 96th Article of War, normal fulfillment of sexual desire, without force (and at this stage there was no intimation that the objective would be pursued save with at least the reluctant consent of the female) cannot be classified as a felony. The objective was reached by Soucy, and shortly thereafter by accused. Other than Soucy, accused, and the girl who had accommodated them, no one else had appeared on the scene. The objectives of Soucy and accused had been completely gained and, seemingly, all was well. Accused and Soucy had no further conquest in mind.

Thereafter the motive for the homicide was developed. Probably, as accused testified (Pros Ex 2), some of the other guards wished to engage the girl in sexual intercourse, and she demurred. At any rate, the girl said something about reporting accused and Soucy to the military police charging them with rape, whereupon Soucy said he was going to shoot her instead of letting her report them. It is from this point until Soucy fired the last shot, that accused's actions must be carefully considered, for it is only during this period that his actions could implicate him in the homicide. At the cost of reiteration, the Board feels that the pertinent testimony of each witness to the relevant events of this period should be recounted. The testimony of the witnesses Hower, Husted, Earlywine, Soucy and accused is relevant.

Hower: Witness testified that he and Husted went into the warehouse, saw the girl and Soucy and argued with the latter because he (Soucy) said he was going to get rid of her. Soucy wanted to shoot the girl, while witness and Husted wanted to "turn her in" or "slip her over the fence." Witness believed accused was in the warehouse at the time, but did not see him (R. 62). Soucy told Hower and Husted: "If anybody asks you anything, tell them I hollered 'Halt!' three times and then fired." He

then said "get out of the road" (R. 63). Hower did not hear accused do any arguing (R. 63). After the second or third shot was fired, witness went out of the warehouse, and at that time accused was "by the tires" (Husted testified that "the tires" were outside the door (R. 58). Witness did not know whether accused did anything that would help or did help Soucy to kill the girl; he heard no mention of a light or flashlight and at the time he left the warehouse he saw the girl and "there was one steady beam on the girl." This beam was "coming from the back of the warehouse where Soucy was standing." It was the only beam of light on the girl (R. 67).

Husted: Witness was on the road outside the warehouse when accused told him that there was a girl in the building, so he and Hower accompanied by accused went into the warehouse to see what was going on, and found Soucy, the girl, and Earlywine there. Soucy was saying that he was going to shoot the girl, and the others, who wanted "to turn her in or let her go", were trying to argue him out of it. Accused planned to let her go, and so stated to witness (R. 57). Soucy was not moved from his purpose by their arguments, and would not listen to them. He told them "to get out of the way, that he was going to shoot us" (meaning the other soldiers) (R. 57). Witness did not know who was by the tires, but he figured it was accused and he thought that he and Hower were the last to leave the warehouse, except Soucy, and they were just about outside when the first shot was fired (R. 58). Witness did not testify concerning lights or flashlights. He stated that at no time before or during the shooting did he see or hear accused do anything that indicated he was helping kill the girl. To the contrary, he stated that accused wanted to let her go.

Earlywine: Witness knew that Soucy, accused, and the girl were in the warehouse, and when he heard an argument, he entered the building and "Soucy had the carbine and flashlight all fixed up." "The flashlight was hooked to sort of a box." Accused was taking a prophylaxis with a kit which he had obtained from Husted or Hower who had also come into the warehouse. Soucy was "mentioning shooting" the girl, and accused said, "Don't shoot her", and told Soucy, "Let her go." (R. 40). Witness suggested turning the girl over to the military police, but Soucy "didn't want to do anything but shoot her", and told the other soldiers to get out of the way" (R. 41). Although there was very little light in the warehouse (R. 41, 51), he did not see accused use his flashlight (R. 42, 52, 56). Witness was the first to leave the building (R. 42) and was followed outside by accused, who went over by the tires. Hower and Husted at that time were still in the building (R. 43). The same relative location of the parties existed after the first shot was fired (R. 44, 54), and accused never left his position by the tires until after the firing was finished (R. 46). Just before the last shot was fired, accused hollered, "Don't." At this time accused was behind witness, who was standing in the doorway (R. 54).

Soucy: Witness testified that after the acts of intercourse, he and accused were talking to the girl, and she said something about telling the military police that she had been raped by accused and witness so the latter told accused that he was going to shoot her. Accused objected strongly several times (R. 29, 33) and then suggested that they could

assist the girl in getting away and they would not be reported (R. 23,29). Witness replied that he would not take that chance, and reiterated his statement that he was going to shoot her whereupon accused said "OK". Then Earlywine came in, and when witness told him that he intended to shoot the girl, he (Earlywine) disagreed and wanted to let her go (R. 23). Hower and Husted then came in and witness told them to get out of the way, that he was going to shoot the girl and did not want to hit them. Witness then told accused: "You get behind the post there and hold the light on her and I will shoot her." Witness said that "a couple of times" and then accused said "OK" (R. 24, 25). Witness did not see accused have a flashlight (R. 25, 32) but saw him start in the direction of the post (pillar) (R. 26, 27, 30, 31), and he could have gone out the door for all that witness knew (R. 26). After the shooting witness saw accused outside the door (R. 31). As to the light at the time, witness testified as follows:

"Q. At the time you shot the girl, was there any light on the girl?
A. Before I fired the first shot there was a light on her, and when I started firing, I don't remember anything.

"Q. Was the light that was on the girl, your light, Soucy?
A. I couldn't say for sure, because I don't know. It could have been or it couldn't have been. I don't know for sure.

"Q. Just immediately prior to that first shot do you know where Private DeGonia was?
A. No. I just seen him start for the pillar and I didn't see him exactly go behind it. I didn't see the flashlight come from there, but I just saw him head for the pillar, head for the post.

"Q. Private Soucy, just immediately prior to that first shot, did any light seem to come from the pillar?
A. I couldn't say for sure. The light was on the girl. I was just watching the girl.

"Q. The light that was on the girl, was that your light?
I couldn't say for sure. I set my light down in her direction facing her." (R. 25)

and further:

"Q. And how much light was there on the girl?
A. Just a flashlight.

"Q. And where was your flashlight?
A. It was up on top of the box to the left of me, heading down toward here (indicating).

"Q. Can you say that your light was on or was not on her?
A. I couldn't say.

"Q. Do you know where Private DeGonia went after he moved in the general direction of the pillar?
A. I did not see him. I turned around and went back to the box where I was. He could have gone out the door or went behind the pillar. I don't know which he did." (R. 27).

In the building there was just the reflection from the shop office light and a light in the tool room. "There wasn't very much light" (R. 32). Witness stated that accused did not make any effort to stop him from shooting because witness believed "he was too scared. He didn't know what was going on himself" (R. 31). "From his (accused's) manner and speech, he was afraid. He was nervous and scared" (R. 31, 33).

Accused: He testified that after he finished his act of intercourse, Soucy said he was going to shoot the girl. He tried to persuade Soucy not to harm the girl and went after Hower and Husted to assist him (R. 73, 81). Earlywine joined the party, and all of them tried to dissuade Soucy from carrying out his expressed intention of shooting the girl. Finally Soucy told them to "get out of the way, I am going to shoot", and pointed the gun at them. Earlywine then left the building, followed by accused who stopped by the tires, and Husted and Hower followed accused (R. 79). He was outside the door when he heard the first shot, and he jumped in anf flashed his light in there and saw the girl fall, and after that he leaned up against the tires. All he could hear was the rapid "shots of the shooting." He came to his senses and yelled to Soucy to "stop", but the latter fired one more shot (R. 79).

In the sworn pretrial statement made by accused the day following the unlawful homicide (R. 79, 80, 84; Pros Ex 2), the following questions and answers pertaining to the use of flashlights are particularly important:

"Q. Did you hold the flashlight on this girl while she was being shot by the shop guard?
A. Yes I flashed it on her but not steady."

* * * *

"Q. Did you tell Soucy that you would hold the flashlight on her if he would shoot her?
A. No sir.

"Q. Are you sure you didn't tell him that?
A. No, he asked me to hold the light on her and I didn't think he was serious about it and when he said for everybody to get out of the way I went back over to the door and stood there and I had my flashlight in my hand. I thought maybe he was just trying to scare her."

* * * *

"Q. Did Soucy have a flash light of his own up there?
A. Yes sir.

"Q. Did he have it trained on the girl?
A. Yes sir.

"Q. How could he shoot, using both hands, with his carbine, and still hold the flashlight on the girl?
A. I don't know how he had it trained on the girl, but he had his flashlight on all the time he was shooting and the light was trained right on the girl." (Pros Ex 2, pp. 3, 4).

In his testimony before the court, accused volunteered a clarification of one of his above statements, as follows (R.78):

"I might clarify on the statement I made in my sworn statement that I had my flashlight on the girl. I said, 'Yes, I flashed it on the girl but not steady.' Well, to clarify that, I meant I had it on her while we were in there talking and while Soucy was telling us to get out of the way. And then when we left, immediately after the first shot, Hower and Husted had gotten right there to the door and I looked in and flashed my light in then and I saw her fall, and I leaned up against the tires and my mind went into a complete blank there."

And later —

"Q. At what part in all this procedure did the shooting begin?
A. I was right at the door and they were walking out and I sort of paused there at the door and they were still walking out and I was more or less just outside the door and they were walking out and I heard the first shot. Well, then they had just gotten to the door and I jumped in and I flashed my light in there and saw the girl fall and after that I leaned up against the tires and all I could hear was the rapid shots of the shooting.***" (R. 79).

****

"Q. Well, where Soucy was standing supposedly with his flashlight pointed in the direction of the girl, was that in the same position, to the best of your knowledge, that he shot the girl from?
A. Yes sir." (R. 81).

****

"Q. Was the flashlight pointed in the general direction of the girl?
A. Yes sir.

"Q. Do you mean to tell the court that you stayed in the beam of the flashlight and the line of the sight towards the girl?
A. Well, I was in the general area around there, yes, sir. The four of us were centered around the girl." (R. 82).

****

"Q. Did Soucy ask you to hold the flashlight?
A. Yes, he asked me.

"Q. What did you do again?
A. I told him, 'No.'

"Q. At no time at all did you hold the flashlight on the girl?
A. Yes, sir.

"Q. When did you hold the flashlight?
A. While we were talking to her and while we were arguing with him, I had my flashlight on her part of the time, and then after we went outside after he fired the first shot, I flashed it on her to see what was happening." (R 82, 83).

A careful study of the testimony of Earlywine, Hower, and Husted reveals absolutely no evidence implicating accused with the unlawful killing of Kim Yong Ja. For the conviction of accusedof Charge I to stand, therefore, accused's part in the homicide must have been shown through his own statements or those of Soucy. The most damaging testimony of Soucy relating to accused's participation was that Soucy directed accusedto "hold the light on her and I will shoot her" a couple of times, and accused said "OK". Soucy admitted that after he gave accused that order, he did not know what accused did; that accused might have gone out the door. Soucy stated that there was a light on the girl before he started shooting, that it could have been from his (Soucy's) light, he could not say for sure. He did not know where the light came from; that the light was on the girl and that he could not say for sure whether it was his light, but "I set my light down in her direction facing her." The Board of Review is of the opinion that no circumstances disclosed by the testimony of Soucy served to connect accused with the homicide. It is therefore only from the statements of the accused, standing alone, that accused's participation in the crime charged must be proven, or the conviction must fall.

In his sworn statement accused stated that he held a flashlight on the girl while she was being shot by Soucy, "I flashed it on her but not steady." When on the witness stand he stated that he had his light on the girl while the talking was going on, then he left, and immediately after the first shot, he looked in and flashed his light in then and saw her fall, and he leaned up against the tires and his mind went into a complete blank. There is not even an inference that accused was actively implicated inthis homicide other than that he assisted in it by flashing his light on the victim. There is no evidence from which this fact could legally be found, except in accused's pre-trial statement. In his testimony he admitted that after the first shot was fired, he flashed his light in and saw the girl fall. It must be remembered that sixteen

shots were fired by Soucy. There is evidence that accused held his light on the girl after the first shot was fired, and while she was falling and no evidence that his light was on the victim at any other time other than the inference which may be drawn from his pre-trial statement. None of the other witnesses saw accused's light on her at any time.

The statement of accused that he held his light on the girl while she was being shot, standing alone and removed fromthe context of the written instrument, might be said to be inculpatory. When viewed in the light of his qualifying assertion that he did not hold the light steadily on the victim it becomes ambiguous and indefinite. The evidence shows that Soucy fired several shots at Kim Yong Ja, that she fell to the floor and that thereafter Soucy approached her and fired several more rounds into her body. Accused admitted that at some time during this incident he flashed his light onher "but not steady". Taken fairly, and in the light of all the evidence, this admission is as susceptible to exculpatory as to inculpatory meaning and is not inconsistent with accused's contention that the flashing of the light was done after the first shot was fired and only in an effort to determine what was going on inside the warehouse.

> "***Where the prosecution relies solely on accused's admissions or confessions to connect him with the commission of a crime it is bound by accused's statements considered in their whole effect and the jury is not at liberty to reject or disbelieve the self-serving statements while accepting the disserving statements therein unless there is other evidence in the case tending to render the self-serving statements questionable, doubtful or inconsistent * * *" (CM 319168, Poe). (See also State v. Dunkley, 85 Utah 546, 39 Pac (2nd) 1097; Forrester v. State, 93 Tex. Cr. 415, 248 S.W. 40; CM 238485, Rideau, 24 BR 263, 272; 26 A.L.R. 541; Eagan v. State, 58 Wyo 167, 128 Pac (2nd) 215, 225).

The question on appellate review is not weighing conflicting evidence, determining controverted questions of fact, or passing upon the credibility of witnesses. The Board of Review must, however, in every case determine whether there is evidence of record legally sufficient to support the finding of guilty (AW 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference (CM 150828, Robles; CM 150298, Johnson; CM 156009, Green; CM 206522, Young, 8 BR 271; CM 197408, McCrimon, 3 BR 111; CM 270591, Nash, et al, 8 BR 359; CM 212505, Tipton, 10 BR 237; CM 238485, Rideau, 24 BR 263, 272).

In view of all the evidence, it is our opinion that the court was not legally justified in inferring that accused

participated in the offense, and consequently, that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification.

6. The accused pleaded guilty to Charge II and its Specifications, and the evidence presented was legally sufficient to sustain the findings of guilty thereof. The offenses alleged in Specifications 1 and 2 occurred at the same time and place and are but different aspects of the same act: e.g. failure properly to perform the duties of a sentinel. Paragraph 80a, Manual for Courts-Martial, 1928, provides in pertinent part:

> "If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in the most important aspect."

The most important aspect of a criminal act or omission is that for which the most severe punishment is authorized. In this case neither offense is specifically covered by the Table of Maximum Punishments. However, the offense of a sentinel in allowing an unauthorized person to remain on his post is a violation of the General Orders prescribed for a sentinel (Par 26, FM 26-5) and is, therefore, analogous to a violation of standing orders for which the maximum punishment prescribed is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (CM 283685, Palmer; CM 318499, White, et al).

7. The charge sheet shows that accused is 18 years of age. He enlisted 17 September 1946, at San Francisco, California, for three (3) years.

8. The court was legally constituted and had jurisdiction of the person and offenses. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specifications, legally insufficient 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 six (6) months and forfeiture of two-thirds of accused's pay per month for six (6) months.

/s/ W. Hottenstein, Judge Advocate

/s/ R. McDonald Gray, Judge Advocate

/s/ J. W. Lynch, Judge Advocate

CERTIFIED A TRUE COPY:

Walter D. Sowa

WALTER D. SOWA
Capt., Inf
Summary Court

JAGH - CM 324924 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C., 3 November 1947

TO: Commanding General, Korea Base Command, APO 901, c/o Postmaster, San Francisco, California

1. In the case of Private Eddie J. DeGonia (RA 19256928), 280th Ordnance Tire Repair Detachment, APO 901, I concur in the foregoing 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 confinement at hard labor for six months and forfeiture of two-thirds of accused pay per month for six months. Thereupon you will have authority, under the provisions of Article of War 50½, to order the execution of the sentence.

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

(CM 324924).

1 Incl.
Record of Trial

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

CERTIFIED A TRUE COPY:

WALTER D. SOWA
Capt., Inf
Summary Court

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

JAGN-CM 318406

UNITED STATES v. Private HENRY LAYTON (33765133), Headquarters Western Base Section, USFET.	)	WESTERN BASE SECTION Trial by G.C.M., convened at Paris, France, 4 November 1946. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Private Henry R. Layton, Headquarters, Western Base Section, United States Forces, European Theater, did, at Paris, France, on or about 19 April 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 6 May 1946.

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

Specification 1: In that Private Henry R. Layton, Headquarters, Western Base Section, United States Forces, European Theater, did at Paris, France, on or about 19 April 1946, with intent to defraud, wrongfully, knowingly and unlawfully obtain an Honorable Discharge from the military service of the United States, under the name of Private

First Class Arnold H. Sanders.

Specification 3: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 3 of Charge II, guilty of all other Specifications and Charges, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. 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 pursuant to Article of War 50½.

3. The Board of Review holds the record of trial to be legally sufficient to support the findings of guilty of Charge II and Specification 1 thereof. The only question to be considered is whether or not the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence.

4. The findings of guilty as to Charge I and its Specification (AW 58), is predicated on the following evidence: Accused was apprehended 6 May 1946 in civilian clothes and at the time had in his possession a WD AGO Identification Card which was purportedly issued to "Arnold H. Sanders, WD Civ. Teletype Repairman", dated 22 April 1946, bearing no army serial number (R. 8; Pros. Ex. A). Also found in the accused's possession at the time of apprehension was an Army Honorable Discharge Certificate which certified that Arnold H. Sanders, 36777266, Private First Class, 239th General Hospital, AUS, was given an honorable discharge from the military service at the Separation Center Headquarters Western Base Section, Paris, France, on 19 April 1946 (R. 9; Pros.Ex.B). Both exhibits bore fingerprints of the accused in the space provided therefore (R. 13, 14). One Arnold H. Sanders, ASN 36777266, Pfc, AUS, a former member of the military service, was discharged honorably on 11 April 1946 at Camp McCoy, Wisconsin (R. 12; Pros. Ex. D). Accused was sworn and testified that prior to his admittance to the 239th General Hospital he had traveling orders from another soldier who took him to the First Aid Station at Etoile where he presented the traveling orders and was admitted under the name of Sanders. About a week after he entered the hospital he decided to assume the name of Arnold H. Sanders in order to get away from his past (R. 23). No evidence was adduced to establish the inception of accused's unauthorized absence or to indicate his proper organization from which he is alleged to have absented himself without leave.

5. An essential element of the offense of desertion is that the accused absented himself without leave or remained absent without leave from his place of service, organization or place of duty (par. 130 (proof) MCM, 1928, p. 143). In the instant case no attempt was made to establish

the inception of the accused's unauthorized absence or to show his proper place of service, duty, organization or unauthorized absence. The failure to establish this essential element of proof is fatal to conviction of desertion under Article of War 58 or of the lesser included offense of absence without leave under Article of War 61 (CM 317087 (1946), V Bull. JAG 355; CM 119864, Dig. Ops. JAG. 1912-40, 416 (6)). The prosecution apparently relied on the evidence of accused's apprehension in civilian clothes and on his possession of fraudulent WD AGO Identification Card and Army Discharge Certificate to establish the offense. Accused, conceivably, could have been on pass or furlough when apprehended. Although the wearing of civilian clothes and possession of fraudulent identification papers by accused at the time of apprehension might, together with competent proof of his absence without leave, substantiate an inference of the intent to desert, such evidence alone without other competent proof of the unauthorized absence, is legally insufficient to support the conviction under the Specification of Charge I.

In the opinion of the Board the offense set out in Specification 1 of Charge II constitutes a disorder to the prejudice of good order and military discipline in violation of Article of War 96 (par. 152a, MCM, 1928) and is punishable by confinement at hard labor for a period of four months and by forfeiture of two-thirds pay per month for a like period (par. 104c, MCM, 1928).

6. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and Specification 1 thereunder, and 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 [illegible], Judge Advocate.

Joseph F. Brach, Judge Advocate.

Edward R. [illegible], Judge Advocate.

JAGN-CM 318406 1st Ind
WD, JAGO, Washington, D. C.
TO: Commanding General, Western Base Section, APO 513, c/o Postmaster, New York, N. Y.

1. In the case of Private Henry Layton (33765133), Headquarters Western Base Section, USFET, I concur in the holding of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge I and its Specification be disapproved, that only so much of the sentence be approved as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period, and that a post guardhouse be designated as the place of confinement. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 318406).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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TITLE

DATE	BORROWER'S NAME	EXT.