

OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 74

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JUDGE ADVOCATE GENERAL'S DEPARTMENT

BOARD OF REVIEW

Holdings Opinions and Reviews

VOLUME 74.

including

CM 325636

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON: 1948

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

(1)

JAGK - CM 324927

30 SEP 1947

UNITED STATES)

ATLANTIC DIVISION
AIR TRANSPORT COMMAND

v.)

First Lieutenant ROBERT
BOWEN (O-2059952), Air
Corps)

Trial by G.C.M., convened at Washington,
D.C., 23, 26 and 27 May 1947. Dismissal,
tf, and confinement for two (2) years.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Robert Bowen, 503d Army Air Forces Base Unit, Washington National Airport, Washington, D.C., did at 503d Army Air Forces Base Unit, Washington National Airport, Washington, D.C., on or about 14 February 1947, unlawfully enter the Officers Club of the 503d Army Air Forces Base Unit, with intent to commit a criminal offense; to wit, larceny therein.

Specification 2: In that First Lieutenant Robert Bowen, ***, did at 503d Army Air Forces Base Unit, Washington National Airport, Washington, D.C., on or about 14 February 1947, feloniously take, steal and carry away about Sixty-Five Dollars (\$65.00), lawful money of the United States, property of the Officers Club, 503d Army Air Forces Base Unit.

Specification 3: In that First Lieutenant Robert Bowen, ***, did at 503d Army Air Forces Base Unit, Washington National Airport, Washington, D.C., on or about 9 April 1947, unlawfully enter the office of the Visiting Officers Quarters, 503d Army Air Forces Base Unit, with intent to commit a criminal offense; to wit, larceny therein.

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Specification 4: In that First Lieutenant Robert Bowen, ***, did at 503d Army Air Forces Base Unit, Washington National Airport, Washington, D.C., on or about 9 April 1947, feloniously take, steal and carry away about Thirty Dollars (\$30.00), lawful money of the United States, property of the Visiting Officers Quarters, 503d Army Air Forces Base Unit.

Specification 5: In that First Lieutenant Robert Bowen, ***, did at 503d Army Air Forces Base Unit, Washington National Airport, Washington, D.C., on or about 18 April 1947, unlawfully enter the Officers Club of the 503d Army Air Forces Base Unit, with intent to commit a criminal offense; to wit, larceny therein.

Specification 6: In that First Lieutenant Robert Bowen, ***, did at 503d Army Air Forces Base Unit, Washington National Airport, Washington, D.C., on or about 18 April 1947, feloniously take, steal and carry away about Twenty-Five Dollars (\$25.00), lawful money of the United States, property of the Officers Club, 503d Army Air Forces Base Unit.

He pleaded not guilty to the charge and all specifications. At the conclusion of the evidence the law member "directs that wherever there appears in the specifications the words 'Officers Club of the 503d Army Air Forces Base Unit' the following words be substituted in lieu thereof: 'Washington National Airport Officers Club.'" He was found guilty of the charge and specifications as amended with exceptions and substitutions as to Specifications 2, 4 and 6. In these specifications the court found the amount of money taken to be as follows: Specification 2, \$30.00; Specification 4, \$25.00, and Specification 6, \$18.00, and substituted these amounts for the respective amounts alleged in the respective specifications. 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 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

On the morning of 14 February 1947 it was discovered that a window in the officers club at the Washington National Airport was broken and open. A chair was under the window. The glass over the jack pots of five slot machines located within the club had been broken and the money usually contained therein was missing (R 13,14,18,27,28; Pros Exs A,B,C,D,E).

Mr. Hill, a civilian employee of the club, described the slot machines

to be "one was a quarter and nickel combination, and two other quarter machines, two dime machines, making a total of five machines broken into." He estimated the amount of money removed from the machines to be between sixty and seventy dollars (R 14,16).

Corporal Darlie O'Neal, 503rd AAF Base Unit, was desk clerk in the Visiting Officers' Quarters at the Washington National Airport. On the night of 8-9 April 1947 he assisted in closing the officers' club and returned to the Visiting Officers' Quarters about midnight. The Visiting Officers' Quarters were located in a building which also housed a barber shop and Red Cross office. The officers' quarters were separated from the Red Cross office by a low partition. This partition was so constructed that a person could climb over it. On his return to the building he discovered the door to the barber shop broken open and all other doors open. The hasp on the door to the Red Cross office had been pulled loose. The cash register belonging to the Visiting Officers' Quarters was missing. The register contained approximately \$30.00. This sum consisted of \$25.00 "petty cash," \$2.05 from laundry and approximately \$3.00 from the "coke" machine (R 17-19,22). The cash register was found the following morning behind one of the buildings. "It was pretty well beaten up; the drawer had been pulled out and broken loose from the machine." The money was missing from the machine (R 20,21,39). Photographs of the broken door to the barber shop, the broken hasp on the door into the Red Cross office and the broken cash register were introduced as Prosecution Exhibits F, G and H, respectively (R 30,31).

On 10 April 1947 Mr. William C. Scholl, a fingerprint expert of the Navy CID, was ordered to report to the Washington National Airport to investigate a reported theft. He arrived at the airport about 10:30 a.m. and "proceeded to dust the cash register for latent fingerprints." He obtained some fingerprints (R 46,47). The cash register "dusted" by Mr. Scholl was the one removed from the Visiting Officers' barracks (R 29).

A card purporting to bear the fingerprints of the accused was offered and received in evidence as Prosecution Exhibit O without objection by the defense. Mr. Scholl compared one fingerprint obtained by him from the cash register (Pros Ex H) with the prints of accused as they appeared on Prosecution Exhibit O and concluded that the fingerprint obtained from the cash register was a fingerprint of the accused (R 49).

Master Sergeant William E. Attick, 503rd AAF Base Unit, was employed at the officers' club at the Washington National Airport as a bartender. About 1100 hours on 17 April 1947 the accused was the only officer in the club. Sergeant Attick decided to close the club for the night and called the officer of the day to assist him in securing the club funds. The club was closed and all windows and doors were locked for the night. The accused left the club with the officer of the day and Sergeant Attick. After the door of the club was locked the accused stated that he had left

(1)

a blanket in the bar room and asked Sergeant Attick to open the club so he could retrieve his blanket. Sergeant Attick asked the accused to let the blanket remain in the club until morning. They left without reentering the club to obtain the blanket (R 24-26). On the morning of 18 April 1947 it was discovered that the club had been entered by means of a window in a latrine. Three slot machines had been broken into (the glass cover over the jack pots was broken) and the money usually in the jack pots was missing. On the floor in front of one machine was a heavy aluminum pan. Photographs of the open window, two of the broken machines, the third machine, and the aluminum pan were introduced as Prosecution Exhibits I, J, K, and R, respectively (R 22,25,31,32,40,78). One quarter machine and two dime machines were broken into and the money taken. The jack pot on the quarter machine had contained approximately \$15.00. This jack pot was locked so that it would not pay the money shown therein when the proper combination of symbols appeared. The club guaranteed the jack pot to pay \$25.00 and when it was payable the bartender made the payment (R 52).

Mr. Joseph F. Bargagni, a CID agent, investigated the reported entry into the officers' club on 18 April 1947. He observed the open window and the broken slot machines. He also observed a trail of glass particles from the broken machines to the latrine and glass particles from beneath the open window to Room 1-A VOQ (Visiting Officers' Quarters) dude house billeting room which was the room occupied by the accused. Captain McCollum, the officer in charge of the billets, authorized Mr. Bargagni to enter this room. Inside the room he observed glass particles on the rug and pieces of glass in a handkerchief in the waste basket (R 40,43). Mr. Bargagni and Captain Reese, the Base provost marshal, went to the accused's office and, after identifying themselves to the accused, Mr. Bargagni told the accused they "were making a search for something that had occurred at the officers' club on the previous evening." They asked the accused if he objected to their examining his clothing and he replied, "Certainly you can." They examined his trousers and found glass particles thereon. They also examined his shoes and found glass particles embedded in the soles thereof. The accused was then asked to empty his pockets which he did on a clean sheet of paper. Glass particles and money were found in his pockets (R 36,40). On motion of the defense the evidence relating to the examination of the accused's person was stricken from the record on the ground that he had not been warned of his rights and it amounted to self-incrimination (R 41).

Captain Reese, Mr. Bargagni and the accused then went to the provost marshal's office. There the 24th Article of War was read to the accused. Thereafter the accused stated he had received the money with the glass in it after someone else had broken into the club. Mr. Bargagni then asked the accused to take a polygraph or lie detector test. The accused demurred stating that he did not believe in such machines. He later agreed to take the test (R 41). They went to Captain Curley's office and Captain Curley

explained the polygraph machine to the accused. He also stated that the accused was not required to submit to the test and that the results of the test were not admissible in court as evidence. The accused did not take the test, but stated that he would like to talk to the investigating officers and would give them a confession (R 70,71,72). The accused then stated that he had broken into the officers' club on the 17th of April and on 14 February. He had also gone into the Visiting Officers' Quarters on 9 April. They returned to headquarters and the accused made a statement which was written out and then signed by the accused (R 36,42,64,65). This statement of accused was shown to be voluntary and admitted into evidence as Prosecution Exhibit Q (R 36,42,55,56,57,64,65). The pre-trial statement of accused omitting the formal portion reads as follows:

"I am assigned to the Supply and Services Warehouse, 503d AAF Base Unit. One night in middle of February I entered the Officer's Club through a window which I forced. I broke into several slot machines and obtained \$65 in nickels, dimes and quarters and left through the point where I entered. I broke the glass in the slot machines with a soda bottle. Last Wednesday, 9 April 1947 at about 2100 I entered the office of the Officer's VOQ through the Barber Shop door by forcing the door. I forced the door between the Barber Shop and the Red Cross Lounge and climbed over the partition between the Lounge and the VOQ Office. I left by the side door, carrying the cash register with me and carried it about 60 yards where I dropped it and smashed the drawer from the register. I obtained 6 rolls of nickels which is \$12 and 2 checks which I tore up. Also one roll of pennies which are in my room, Room 1A, at the BOQ, 'Dude House'. On morning of 18 April I entered the Officer's Club about 0100 through a window in the Officer's latrine in the Officer's Club, which I opened with a push. I picked up an aluminum pan and I broke open one 25¢ machine and one 10¢ machine, that is slot machines. I pocketed the contents and left through the same window. I returned to my room and counted the money. There was between \$23 and \$25 in quarters and dimes. I rolled them in a wrapper which I obtained from a Saturday Evening Post which was on my bureau in my room. I then placed them in my toilet kit. I took the kit containing this money to my locker at the S&S Warehouse. I turned this kit over to the Provost Marshal by request at about 1200 18 April 1947. On entering the Provost Marshal's Office the kit was opened and found to contain what I stated was in it, that is the dimes, quarters and nickels. The above acts were done by me while I was in a state of semi-intoxication."
(Pros Ex Q)

After the accused made the above statement Captain Reese asked him "where the coins were" and the accused replied that they were in his locker at the service and supply warehouse. They went to the locker, at which time the accused opened the locker and removed a canvas traveling bag.

(6)

He "opened it and he said they were in there." The bag contained a leather toilet kit. Inside the toilet kit wrapped in paper was forty quarters, seventy-five dimes, and three rolls of nickels (R 37,42,43; Pros. Exs L, M).

5. For the Defense

Captain William H. McCollum testified that he was club officer and secretary-treasurer of the Washington National Airport Officers' Club. He identified a copy of the constitution of this club which was introduced into evidence as Defense Exhibit I. This constitution was dated 1 June 1946 and revised as of 8 January 1947 (R 89,90). This club was formerly the 503rd Officers Club. Captain McCollum was of the opinion that the accused had at one time been a member of the club/^{but} testified that the name of the accused did not appear on the books as a member of the club. In April the commanding officer informed Captain McCollum that the accused was barred from the club. In May the accused gave the sergeant at the club \$6.00 for March and April dues. This money was returned to the accused. The club books showed that the accused paid club dues in February 1947 (R 88-94).

The accused was informed of his rights as a witness and elected to remain silent (R 95).

6. At the conclusion of the evidence the law member acting for the court directed an amendment to Specifications 1,2,5, and 6 by saying:

"The court directs that wherever there appears in the specifications the words 'Officers Club of the 503rd Army Air Forces Base Unit' the following words be substituted in lieu thereof: 'Washington National Airport Officers Club.'"

It was contended by the defense that inasmuch as the specifications named the 503rd Army Air Forces Base Unit as the club which was entered and that this club was the owner of the money taken, the accused could not be found guilty of entering the Washington National Airport Officers Club and of taking money belonging to the latter club. In support of this position he cites those cases holding that it is a fatal variance to charge the larceny of property belonging to A and then proving that the property belonged to B.

The evidence discloses that there is only one officers' club located at the Washington National Airport. The Washington National Airport Officers' Club is the successor to the 503rd Army Air Forces Base Unit Club and many members refer to it by the original name.

In Cady v. United States (293 F 829,832) the court said:

"The old technical rules of pleading in criminal cases, inherited from ancient England, have been greatly relaxed, and have been supplanted by the more recent rule that only material and substantial variances between the pleadings and proofs will be regarded."

In Bord v. United States (133 F (2d) 313) the accused was charged with housebreaking by entering a building belonging to the Stanley Company of America, a body corporate, said building being known as the Savoy Theater. The defendant contended that there was no proof that the company was incorporated or occupied the theater. The court held:

"The purpose of the law in requiring the name of persons who occupied and used the building entered to be stated is to negative the defendant's right to break and enter, and to protect him from a second prosecution for the same offense. Whoever occupied the Savoy Theater it is obvious that appellant had no right to break and enter it or to remove property from it, and it was sufficiently identified so that he cannot again be prosecuted for these offenses."

The changing in the specifications of the name of the club which was broken into from its popular name to its legal name is one of form rather than of substance. The specification charged housebreaking and theft from the officers' club. The name of the club was not accurately alleged in the original specifications. The changing of this name to the technical name of the club did not change the nature of the offense or the identity of the club entered. The change only alleged the name of the club in a more accurate manner. No error resulted from this amendment.

It was also contended by the defense that inasmuch as the accused was a member of the club he was a co-owner of the property taken and therefore could not be guilty of stealing the same. With this contention we cannot agree. The club was under the immediate supervision of the club officer and he was responsible to the club for the funds and property belonging to the club. The individual members of the club would have no right to any particular property and would have no absolute ownership in or exclusive right to the possession of club property or funds. The funds and property were in the possession of the club officer for the benefit of the club. The depriving of the club officer of his possession of the club property by trespass and with a felonious intent to deprive the club of the property is larceny (People v. Thompson, 34 Cal. 671; Hull v. United States, 277 Fed 19; Nudelman v. United States, 264 Fed 942; 58 A.L.R. 331; 4 LRA 292; 12 LRA (NS) 94).

A member of a voluntary association who takes money belonging to the society from the custody of those responsible for it, with intent to steal

(8)

it is guilty of a larceny thereof even though he is a part owner of the money (Regina v. Webster, 9 Cox C.C.13).

During an investigation relative to the entry into the officers club on 18 April 1947 the accused was asked if he had objected to the investigating officers inspecting his clothing. He gave them permission to inspect his clothing and emptied his pockets for them. The court struck from the evidence all testimony concerning the results of this search on the ground that inasmuch as the accused was not warned of his rights it constituted self-incrimination. This action of the court was error. The prohibition against self-incrimination and compelling an individual to give evidence against himself is a prohibition against the use of physical or moral compulsion to extort communications from a suspect. It does not prohibit the use of compulsion to obtain an exhibition of the suspect's body or an examination of his clothing. This examination of clothing extends to the pockets contained therein (CM 258550, Shroyer, 38 BR 75,80). Here the investigating officers did not use force in order to make their examination. The evidence secured by this examination tended to connect the accused with the unlawful entry into the officers club and the theft of money therefrom and was admissible. Such evidence being detrimental to the accused its exclusion could in no way prejudice the substantial rights of the accused.

6. Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein (par 149e, MCM, 1928). The evidence establishes that the Washington National Airport Officers Club, which was also referred to as the officers club of the 503rd Army Air Force Base Unit, was during the nights of 13-14 February 1947 and 17-18 April 1947 broken into and on each occasion a substantial amount of money was removed from the jack pots of slot machines maintained by the club. The glass covering the jack pots was broken on the morning of 18 April 1947. Glass particles were traced from the club to the room occupied by the accused.

The Visiting Officers barracks was broken into on 9 April 1947 and the cash register taken therefrom. This register contained about \$30.00. The register was broken open and discarded but the money was missing. A fingerprint of accused was found on the register. Upon being questioned as one suspected of committing these offenses the accused made a voluntary confession wherein he admitted that he entered the officers' club one night in the middle of February 1947 where he broke into several slot machines and removed \$65.00 in nickels, dimes and quarters. He also admitted breaking into the Visiting Officers' Quarters on 9 April 1947 and taking the cash register from which he said he obtained \$12.00 in nickels, a roll of pennies and two checks which he tore up. About 1:00 a.m., 18 April 1947, he again broke into the officers' club and rifled some slot machines, obtaining between \$23.00 and \$25.00 in quarters and dimes. He turned this money over to the investigating officers. Such incriminating evidence,

including accused's confession, leaves no doubt that he broke into the various buildings and stole money from the slot machines and cash register. The amount of money taken from the Visiting Officers Quarters was definitely shown to be more than \$25.00, which was the amount found by the court to have been taken. The prosecution proved that money was missing from the slot machines but was unable to determine the exact amount taken. The machines broken open were operated by quarters, dimes and nickels. One machine was shown to have contained at least \$15.00 in quarters. The evidence coupled with the accused's confession which stated the amount of money he obtained is amply sufficient to support the finding of the court as to the amount of money taken. No prejudice to accused's rights occurred by the court finding the accused guilty of taking a lesser amount of money than the amount pleaded and reasonably proven (CM 323486, Ruckman).

7. War Department records show the accused to be 23-11/12 years of age and single. He is a high school graduate. He entered the Army in February 1943 and became an aviation cadet. He was appointed a second lieutenant, Air Corps, on 22 May 1944. On 22 February 1945 he was promoted to first lieutenant. He participated in numerous bombing operations over Germany and occupied territory for which he was awarded the Air Medal with four Oak Leaf Clusters. His efficiency reports are "Very Satisfactory" and "Excellent."

8. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93 and confinement in a penitentiary is authorized by Article of War 42 for the offense of housebreaking, it being recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 1801, Title 22, of the Code of the District of Columbia.

Robert T. Silver, Judge Advocate

Charles E. McAfee, Judge Advocate

Robert J. Albright, Judge Advocate

(10)

JAGK - CM 324927

1st Ind

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

FEB 19 1948

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 Robert Bowen (O-259952), Air Force of the United States.

2. Upon trial by general court-martial this officer was found guilty of housebreaking and of three specifications of larceny of \$30.00, \$25.00, and \$18.00, respectively, property of the Washington National Airport Officers' Club and the Visiting Officers' Quarters, all in violation of Article of War 93. 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. No evidence of previous convictions was introduced. The reviewing authority approved the sentence but 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 of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

4. The evidence shows that on 14 February 1947 the accused broke into the Washington National Airport Officers' Club and broke open five slot machines, obtaining \$30.00. On 9 April 1947 the accused broke into the Visiting Officers' Quarters and removed a cash register containing \$25.00. This cash register was broken open and the \$25.00 taken. On 18 April 1947 the accused again broke into the Officers' Club and broke open three slot machines, obtaining \$18.00. After the last entry into the club a trail of broken glass was followed to accused's room. Fingerprints of accused were compared to fingerprints found on the cash register taken from the Visiting Officers' Quarters and found to be identical. When confronted with this incriminating evidence the accused voluntarily confessed the housebreaking and larcenies. He also delivered to the investigating officer the money obtained at the club on 18 April 1947.

5. The accused is 23-11/12 years of age and single. He is a high school graduate. He entered the Army in February 1943 and after completing aviation cadet training he was commissioned a second lieutenant, Air Corps, on 22 May 1944. On 22 February 1945 he was promoted to first lieutenant. He participated in numerous bombing missions in Europe and was awarded the Air Medal with four Oak Leaf Clusters. His efficiency reports are "Very

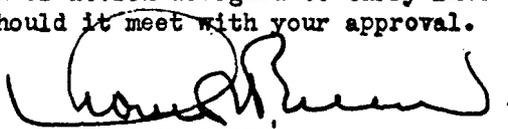
Satisfactory" and "Excellent."

6. On 16 January 1948 the accused was examined by a Board of Medical Officers at Walter Reed General Hospital and found to be mentally responsible at the time of the alleged offenses and at the time of trial.

7. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution and that a United States penitentiary be designated as the place of confinement.

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

CM 324927



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 56, (DA) 4 Mar 1948).



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

JAGH - CM 324930

26 NOV 1947

UNITED STATES

v.

Captain FREDERIC HENRY
(O-1648618), Signal
Corps.

UNITED STATES CONSTABULARY

Trial by G.C.M., convened at
Regensburg, Germany, 21, 28
May and 3, 4 June 1947. Dis-
missal, total forfeitures and
confinement for three (3) years.

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

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

Specification: In that Captain Frederic Henry, then 1st Lieutenant, Company "D", 3rd Military Government Regiment, did, at Waldmunchen, Germany, sometime during the latter part of the month of January 1946, feloniously embezzle by fraudulently converting to his own use approximately 115 kilograms of silver bullion of the value of over fifty (\$50.00) dollars, the property of Rosenthal Radio Parts Factory, entrusted to him by the U. S. Government by virtue of his position as a Military Government Officer.

✓ CHARGE II: Violation of the 96th Article of War. (Motion for finding of not guilty sustained).

✓ Specification: (Motion for finding of not guilty sustained).

(14)

Accused pleaded not guilty to each Charge and Specification. Motion of the defense for a finding of not guilty as to Charge II and its Specification was sustained and accused was found guilty of Charge I and its Specification. 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 and forwarded the record of trial for action under Article of War 48.

3. Prior to the entering of pleas, the defense objected to the jurisdiction of the court, alleging that the provisions of Article of War 70 had not been substantially complied with in that (1) available witnesses requested by the accused were not called by the investigating officer and (2) the investigating officer was not impartial. In connection with the objection the following evidence was adduced:

On 31 October 1946, Captain Ira R. Meyers executed a report of investigation conducted under the provisions of Article of War 70 with respect to the charges against accused (R. 17, 32; Def Ex A). Attached to this report as an exhibit was another report, addressed to the Commanding Officer, Company D, 3rd Military Government Regiment, executed by Captain Meyers on 10 October 1946. The latter report contained the following statement: "Captain Henry appears to be the main figure in the affair, although it is apparent that [others] shared * * * in the spoils" (R 18).

The accused testified that, during the investigation under Article of War 70, Captain Meyers asked whether he desired to call any witnesses. The accused stated that he desired to call Lieutenant Colonel Elmer Schmierer, Lieutenant Colonel Robert Schulz, Major John Hudson, and First Lieutenant Robert D. Conover. The former two officers were then in the European Theater and accused gave Captain Meyers their then known addresses. The latter two officers were in California (R 21-23). Captain Meyers replied, "Buddy, it's T.S.," and that accused would have to call Schmierer and Schulz himself (R 24). The information accused expected to obtain from the four officers was material to the charges against him (R 24).

Captain Meyers testified that accused did not request the presence of any of the four officers (R 28) but did mention the names of several officers, including Lieutenant Colonel Schmierer. Accused told him that the silver that was involved in the investigation had originally been taken under control by the first troops in the area and that they were under the command of Colonel Schmierer; also, that accused may have mentioned Colonel Schulz as being Colonel Schmierer's Executive Officer (R 31). Captain Meyers identified the report of investigation dated 31 October 1946 (Def Ex A). The report contained the following:

"3. For the defense, the accused desired to make no statement. However the accused has indicated that he would call as witnesses for the defense:

- 1) Major JOHN C HUDSON
- 2) 1st Lt. ROBERT C CONOVER

both of whom have been discharged and are now in the States. Also:

- 1) Lt. Col. SCHMIER
former CO, 3rd Battalion 358th
Inf., 90th Inf. Div.
- 2) Former S 3 of 3rd Battalion,
358th Infantry." (Def Ex A).

The court was closed and, on reopening, it was announced that the objection was not sustained (R 33). (For discussion see paragraph 8, infra.)

4. As the motion of the defense for a finding of not guilty was sustained as to Charge II and Specification thereunder, discussion will be limited to the evidence as to Charge I and its Specification.

5. Evidence for the prosecution as to Charge I and its Specification:

Captain John E. Hudson was Commanding Officer or Director of Military Government, Detachment I 355 from July 1945 to December 1945, and, during this period and until February 1946, Lieutenant Robert D. Conover was Property Control Officer of the Detachment (R 149, 126, Pros Ex 8; R 127, Pros Ex 9). The Detachment was located Waldmunchen, Bavaria. At some time during this period, certain sheets or plates of metal were taken under military government control by the detachment (Pros Ex 8). The plates were first placed in the barracks or guardhouse of U.S. Tactical Troops in the vicinity, but, as these places appeared to afford inadequate protection, they were taken, in August 1945, to the vault or safe of the Waldmunchen Stadtkasse or bank (Pros Ex 8, 9). Lieutenant Conover, Mr. Bruno Seifert (a civilian employee), Marina Jahn (a civilian employee), two enlisted men and two German policemen were present, among others, when the plates were taken to the bank (R 46, 88, 92). Mr. Seifert and a policeman measured the sheets of silver and the measurements were recorded by Miss Jahn (R 47). According to the record then made, there were 34 sheets 99 cm. long, 7 sheets 86 cm. long, 4 sheets 76 cm. long, 3 sheets 68 cm. long, 1 sheet 33 cm. long, 3 sheets 42 cm. long (R 48; Pros Ex 7). By letter dated 22 August 1945, from Lieutenant Conover to the Director, Stadtkasse, Waldmunchen, the latter was notified that the silver, described by measurements as in the preceding sentence, had been deposited in the safe in the bank and that he would be responsible for its safekeeping as it was in the protective custody of the detachment (R 51, Pros Ex 2). By letter dated 24 August 1945, over the signature of Captain John E. Hudson, as Detachment Commander, the Commanding Officer, Detachment E 204 (a higher headquarters), was notified that the silver had been taken into custody, and instructions as to its disposition were requested (R 51, Pros Ex 3). On 8 November 1945, the Burgermeister of Waldmunchen was advised, in a letter signed by

Lieutenant Conover as Acting Director, that the Burgermeister was appointed custodian of the silver (R 52, Pros Ex 4), and a Notice of Custody (Form MG/PC) was executed by Lieutenant Conover, declaring, in substance, that the silver was under the control of Military Government (R 53, Pros Ex 6). Also, on the same date, Lieutenant Conover executed a property control record (Form MG/PC 2) (Pros Ex 9). This record contained the following pertinent entries: Description of property—52 sheets of silver, 330 Kg valued at 120 RM per Kg, totaling 40,000 RM; Name of owner—Rosenthal Radio Parts Factory, Wassersuppen; Location of property—Stadtkasse, Waldmunchen; Date taken into control—6 Sept 45; Reason for control—property of nationals of Czechoslovakia; Name of manager or custodian—Burgermeister, Waldmunchen. The width of the silver was not measured and the weight as shown in Prosecution's Exhibit 9 was recorded only by guess (Pros Ex 9).

On or about 4 January 1946, the accused succeeded Captain Hudson as Commanding Officer of the Detachment (R 54, 76, 149, Pros Exs 8, 9). Some time during the latter part of January the silver was removed from the vault and taken to Detachment Headquarters. The testimony of Lieutenant Conover indicates that this was done by him at accused's request (Pros Ex 9) and the testimony of another witness was to the effect that the silver was taken from the bank by Mr. Seifert and German police (R 93). Alice Etzold, a civilian secretary, was present when several plates of what appeared to be silver were brought into a room at Detachment Headquarters by a civilian (R 77). The plates were about 90 centimeters in length and 40 centimeters in width (R 77-78). Mr. Seifert was present and Herr Pfliegl and his apprentice entered later with a "big machine" (R 78). The accused and Conover were in the room part of the time and they talked about cutting the plates (R 78-79). Miss Etzold was ordered by Mr. Seifert to leave the room (R 78). The plates were gone and what appeared to be silver dust was on the rug when she returned about an hour later (R 80).

Miss Jahn attempted to enter the office on the day in question. Seifert pushed against the door from the other side, trying to keep it closed, but Miss Jahn saw Herr Pfliegl kneeling on the floor cutting a strip from a sheet of silver (R 55, 65). The strip was five or six centimeter wide (R 60). The sheet appeared the same as the sheets that had been placed in the bank (R 55, 65). This occurred in Lieutenant Conover's office (R 56). Lieutenant Henry was in his own office at the time (R 55).

According to the testimony of Herr Pfliegl and his apprentice, they were ordered to the Military Government Office by Mr. Seifert (R 97). The accused and Mr. Seifert were in the room when they arrived and were talking together (R 98, 111). The plates were brought in later and Mr. Seifert instructed them how they were to be cut (R 98). About fifty plates were cut (R 101, 111). The plates were about one meter in length and forty to fifty or sixty centimeters in width (R 98, 109). Metal shears were used (R 102), and, according to Herr Pfliegl, strips about fourteen or fifteen

centimeters wide were cut from one long side of each plate and strips about six centimeters wide were cut from one short side of each (R 99, 100). The apprentice testified that the strips so cut were five to six centimeters and three to four centimeters, respectively, in width (R 111). The accused was in the room when the cutting was commenced but left and returned when it was finished (R 100). Most of the plates were carried out of the room as the cutting progressed (R 101), and the strips cut from them were straightened out, placed together, and were still in the room when Pfliegl and his assistant left (R 101, 112).

Later during the day Miss Jahn overheard the accused and Lieutenants Felman and Conover conversing in the accused's office. One of them said, "No one will ever know about it because we did not state how wide it was --we merely stated the length" (R 59).

Lieutenant Conover testified that he went to Prague after he left the silver at the office. When he returned the following day, he saw that a quantity of silver had been cut from the sides of the original pieces. None of it came into his possession (Pros Ex 9).

The plates were returned to the bank a few days after they were taken. A bank employee testified that they appeared different in that they were cut and torn on the edges (R 94).

Sometime after Miss Jahn saw the plates in the office, she saw the accused take a sack from his office safe. He opened the sack and placed some silver strips on his desk. The strips appeared to be the same size as the one she saw being cut by Pfliegl (R 60, 65).

In February 1946 Alice Etzold acted as interpreter in the office of the accused when he requested a goldsmith to make him some spurs from a strip of silver which the goldsmith held in his hands (R 80). On another occasion in February Miss Etzold acted as interpreter for the accused and a silversmith named Haller during a conversation relative to spurs (R 83).

In February or March 1946 the accused went to the shop of a silversmith, a lady in Regensburg with Marina Jahn as interpreter, and ordered a bracelet made from a strip of silver 5 centimeters wide and 20 centimeters long (R 61, 62, 114). Marina Jahn was with accused on a later date when he picked up the bracelet from the shop (R 62). The silver which the accused brought to the shop was tested at the shop and found to be pure silver (R 116). Though he visited her shop several times, on two visits to the silversmith's shop of Maria Lees, the accused brought a total of 8095 grams of silver valued at 3 to $3\frac{1}{2}$ pfennigs per gram (R 116). In return for this amount of silver, Maria Lees delivered to the accused on 4 May 1946 a set of coffee cups, a lighter, 6 wine beakers and a dozen each of knives, forks and spoons (R 117). The accused first brought silver to the shop of Maria Lees 4 or 5 weeks prior to 4 May 1946 (R 119).

(18)

In March 1946, the accused with Mr. Seifert went to the shop of Richard Pleyer, a goldsmith in Regensburg and asked Pleyer if he would be able to make some silver things by order of Military Government for which they have the silver in return. Pleyer said that he could (R 121). Pleyer delivered several items to the accused in June or July 1946 for which in March and August 1946 the accused gave Pleyer pure silver plates, 20 centimeters long, six to eight centimeters wide and three or four millimeters thick (R 122, 125). Accused left 14,946 grams of silver with Pleyer, the legal price of silver being 37 and 37 5/10 marks per kilogram (R 123).

On 13 July 1946 Major Wilson W. Hitchcock became Director of Detachment 355, and during the last part of August or the first part of September he inspected the silver in the bank (R 140). There were fifty-two sheets (R 140). One edge of each sheet appeared to have been cut by hand snips (R 140). Major Wilson had the sheets taken from the bank and weighed, and he found that they weighed 215 kilograms (R 141). He then returned them to the bank (R 141). He did not see the plates again until 22 November 1946 when they were turned over to Lieutenant Hebeva, a Czech liaison officer, on request of the Munich Restitution Branch (R 142). The silver was never turned over to German Property Control (R 144).

Captain Ira R. Meyers examined the plates in the bank about October 3rd or 4th, 1946, in the course of an investigation (R 130). On counting the sheets and measuring their lengths, he found there were 34 sheets 99½ cm; 7 sheets 84 cm; 2 sheets 74 cm; 2 sheets 72 cm; 1 sheet 64 cm; 2 sheets 65 cm; 1 sheet 55½ cm (R 131). The width of the sheets was not measured (R 132). On about the same date he advised the accused of his rights under Article of War 24 and interrogated him (R 133). The accused stated that the plates were taken into Property Control in August 1945 after having been turned over by a Field Artillery unit; that they were taken to the Stadtkasse and stored there; that in January 1946, after the bank manager complained that the plates were taking up too much room, they were taken to his (accused's) office; that he personally cut strips from the plates, distributed the strips among personnel of the detachment, then caused the plates to be returned to the bank; that he cut the silver because "all the other units had helped themselves to" it; and that he had silver spurs and a cigarette case made from the strips he retained (R 133-135). On 7 October 1946 the accused indicated that he desired to amend his statement (R 135). After again being advised of his rights, he stated that he had not done the cutting but had employed a German named Pfliegl to do it and that about fifty or sixty pounds of metal was taken (R 136). Part of the metal was given to Lieutenant Falman and three enlisted men (R 137).

There was admitted in evidence, after the defense withdrew its objection, a copy of a document which was identified as part of the records of the Property Control Office (R 83, Pros Ex 12). The document refers to silver bullion located at Stadtkasse Waldmunchen, property of Rosenthal Radio Parts, Wassersuppen, and contains entries indicating that the silver

was taken over and receipt acknowledged by "the Mr. Havelka Otto. Civ. Off. of the Czechoslovakia Mission for Restitution" on 27 November 1947 by authority of letter "dated 22 November 1946 CMGB, Economic Division, APO 170."

In connection with the relation of accused and Lieutenant Conover to the silver, Captain Hudson (accused's predecessor as Director) testified that Conover was Property Control Officer from the time he made the initial assignments, which was a few days after they reached Waldmunchen (Pros Ex 7). Conover testified that he, as Property Control Officer, had immediate custody of the property under direction of his superiors and had control of it for his commanding officer; that the usual chain of command applied and that he received instructions concerning the property from his commanding officer (Pros Ex 8). There was introduced in evidence, on cross-examination of a prosecution's witness, a memorandum, dated 7 December 1945, from the Director, Office of Military Government for Bavaria, to Directors, All Military Government Detachments, Eastern Military District, subject: "Reorganization of Property Control Officers at the Regierungsbezirk Level," which provided, in substance, that all Regierungsbezirk Property Control Officers will be transferred, effective 15 December 1945, to the Office of Military Government for Bavaria and that Regierungsbezirk Commanders are relieved of responsibility in Property Control matters (R 151, Def Ex C). Lieutenant Colonel George D. Hastings, who, as a Regierungsbezirk Director, was accused's commanding officer (accused commanded a Kreis Detachment, a lower level of command than a Regierungsbezirk Office), testified that a Director of Detachment was, at the time herein involved, held responsible for everything functional and administrative, but that between 1 February and 30 June 1946, functional control for Property Control was withdrawn from the detachments and placed in decentralized sub-district Property Control. Prior to the transfer, the Property Control officer of a Kreis Detachment was a staff officer on the Director's staff (R 155).

Miss Jahn stated on cross-examination that she was discharged by accused because her father was a German; that accused later instructed her to go to the Russian zone; that, when she protested, he told her to go to the British zone and not to return to the American zone; that he gave her a letter (Pros Ex 11) to assist her in crossing the boarder (R 65-70). Herr Pfliegl admitted on cross-examination that, in substance, he had belonged to Nazi organizations (R 107).

6. Evidence for the defense:

The accused made an unsworn statement, as follows:

"If it please the court, I have elected to make an unsworn statement for the very good reason that I have no desire to implicate anybody else in this case; it has been my desire ever since it started a long time ago. I know that silver was taken from the Sparkasse. I wish the court to know

that I was never the Property Control Officer in that Landkreis; I never had any control over that silver. I had nothing to do with it. It was not I who placed it in the vault at the time it was discovered; it surely was not I who took it out. A small amount of that silver was given to me. It was given to me as a present. I didn't question that because while I was on my tour of duty in Waldmunchen it was my knowledge that troops had access to that silver and had things made of it. Furthermore, while I was absent on leave from October to December - I learned later - a bill was presented to the Regierungsbezirk commander by the tactical troops in Waldmunchen for insignia that had been made from the silver. The bill was approved and the German economy was ordered to pay that bill. I do admit I gave silver to the two jewelers who testified in here. However, I wish to point this out: Landkreis Waldmunchen is on the Czechoslovakian border. I had a great deal of opportunity to deal with Czechoslovakian officials on a hundred and one different matters. The Czech officials were always extremely kind to me, and on some occasions gave me presents. They gave me an opportunity to purchase silver from Czechoslovakia. I don't believe, gentlemen - I know - that I am not guilty of this crime of embezzlement. If I am guilty of anything, I am absolutely guilty of having received a small quantity of silver from my friends." (R 167-168).

No other evidence was presented by the defense.

7. Prior to arraignment, the defense counsel stated that, "this has nothing to do with Colonel Darling's qualifications as law member," then challenged "Colonel Darling for cause, as law member but not as president." because he was not a member of the Judge Advocate General's Department (referring to Article of War 8), whereas a member of that Department (Lt Col Marian Beatty) had been detailed as defense counsel by the order appointing the court and was present in the courtroom (R 11, 12). The challenge was overruled by the court (R 14), whereupon, after arraignment, the defense moved that the proceedings be discontinued on jurisdictional grounds, giving substantially the same reason as that asserted in support of the challenge (R 17). This motion was overruled (R 17).

Article of War 8 provides in pertinent part as follows:

"The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's

Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. * * *."

A similar question arose in CM 231963, Hatteberg (18 BR 349), where two members of the court were members of the Judge Advocate General's Department but neither of them was designated as law member. The Judge Advocate General, in an approved opinion, stated, "it appears that the word 'available' (see AW 8) imports not only the narrow concept of physical accessibility but also the broader concept of discretion in the determination of the suitability of the person or thing desired." There was cited a previous opinion of this office (CM 209988, Cromwell, 9 BR 169), which held, in substance, that the discretion lodged in the appointing authority in appointing an officer other than a member of the Judge Advocate General's Department as law member of a court is conclusive upon the question of availability. Accordingly, it was held in the Hatteberg case (supra), that the failure to designate a member of the Judge Advocate General's Department as law member of the court was not, in itself, fatal error. The principle of the Cromwell and Hatteberg decisions is applicable to this case. As the designation of Colonel Darling as law member of the court was conclusive upon the question of his availability, and as Colonel Darling's competency and qualifications were not otherwise questioned, the action of the court in overruling the challenge was proper. On the same basis, it may not be said that the court was improperly constituted and without jurisdiction.

It should be observed, arguendo, that there is not a substantial showing of record or otherwise that Colonel Darling was not fully qualified to perform the duties of law member. Further, the appointment of an officer of the Judge Advocate General's Department as defense counsel, instead of as law member, may, in a case of this nature, reasonably be considered a wise exercise of discretion by the appointing authority and a concession in the benefit of the accused.

8. With reference to the objection of the defense to the jurisdiction of the court because of an alleged failure to comply with the provisions of the second paragraph of Article of War 70 as to the investigation of charges (see par 3, supra), The Judge Advocate General has repeatedly held that the mentioned provisions are directory in effect and that non-compliance therewith does not affect the jurisdiction of a general court-martial (CM 209477, Floyd, 17 BR 149, 153; CM 280385, Warnock, 17 BR (ETO) 163; CM 287834, Hawkins, 13 BR (ETO) 57; CM 322052, Shamel; CM 307119, Fabbricatore, 60 BR 265). The defense referred to the case of Hicks v. Hiatt (64 Fed Supp 238) in support of its motion. Assuming but not conceding that there is some analogy between that case and this on the question of adequacy of investigation, the Hiatt case is not considered controlling because (1)

the issue before the court became moot before a decision was rendered (see footnote following the opinion) and, for that reason, the opinion is dicta; and (2) the opinion is based on the doctrine that a totality of errors was of such effect as to deprive the accused of a fair trial. In the absence of a directly adverse decision by an appropriate Federal court, the Board of Review is impelled to follow the precedents of this office. The Board therefore concludes that the court properly overruled the objection of the defense to the jurisdiction of the court.

The function of the Board of Review in a case of this nature is to consider the legal sufficiency of the record of trial upon which the sentence is based (AW 50 $\frac{1}{2}$). As indicated in CM 323486, Ruckman, the investigation under Article of War 70 is an administrative procedure for the benefit of the appointing and referring authority, and it has been stated that the report of investigation, being an extraneous matter of procedure, is not, on its face, a part of the record of trial within the meaning of Article of War 50 $\frac{1}{2}$. It may therefore be considered that it is not the function of the Board of Review to consider the conduct of the pre-trial investigation. It is, however, conceivable, that an exception to this principle might be made should it appear that the conduct of the investigation in some way adversely affected the accused's rights at the trial proper. We find no intimation of such causal connection in this case, nor is it claimed by the defense. Therefore, even if true, the bases of accused's complaints as to the conduct of the investigation constitutes, so far as the trial is concerned, injuria sine damno, a technical wrong that did him no harm (cf CM 229477, Floyd, 17 BR 149, 156). We have, notwithstanding, examined the report of investigation and associated papers and the testimony of record and believe that there was substantial compliance with the provisions of Article of War 70 and paragraph 35a, Manual for Courts-Martial. There is no showing that the investigating officer was prejudiced against the accused or that he did not properly exercise the wide discretion lodged in him in the conduct of the investigation. That he had knowledge of the subject matters of the Article of War 70 investigation by reason of his prior informal investigation does not in itself impute partiality but is consistent with a desire on the part of the responsible authorities to assure thoroughness in the investigation. The accused's claim that certain officers were requested by him was directly denied by the investigation officer and is not otherwise borne out by the record, and, in any event, there is no showing that they were reasonably available or that their testimony was material or non-cumulative. It is significant that the testimony of none of the officers mentioned was presented to the court by the defense by deposition or otherwise and that the record as a whole indicates that the testimony of none except Lieutenant Conover, whose deposition was introduced by the prosecution, was material. It is also significant that it does not appear that the accused expressed any complaint at the time of the investigation as to its adequacy. We consider the investigation fair and adequate under the circumstances.

9. The evidence shows, in substance, that about 4 January 1946 the accused assumed command of the Military Government Detachment located at Waldmunchen, Germany. There had previously been taken into custody by the detachment a quantity of metal and in August 1945 this metal, consisting of fifty-two plates ranging in length from ninety-nine centimeters to thirty-three centimeters, was placed for safekeeping in the safe or vault of the Waldmunchen Stadtkasse or bank. Although the particular metal was never analyzed, there is no doubt that it was silver. It was referred to as silver by all of the witnesses who saw it, the accused admitted it was silver, the official notices and correspondence concerning it described it as silver, and there is no suggestion of record that it was anything but silver. Captain John E. Hudson, the then commanding officer or director of the detachment, notified higher military authority that the silver had been taken into custody and requested instructions as to its disposition, and Lieutenant Conover, the Property Control Officer of the Detachment, executed a Notice of Custody and Property Control Record and, further, as Acting Director, notified the Burgermeister of Waldmunchen that the Burgermeister was appointed custodian. The official notices and correspondence concerning the silver described it as the property of Rosenthal Radio Parts Factory, Wassersuppen, Czechoslovakia. It may be inferred that when the accused became commanding officer of the Detachment he had access to the files pertaining to the silver and had knowledge of its location, its supposed ownership and its status as being under military government control.

During the latter part of January 1946 the silver plates were taken from the bank to accused's headquarters. It is not entirely clear whether this was done at accused's express direction, but the evidence is conclusive that accused caused or participated in causing a considerable quantity of the silver to be cut from the plates. The evidence, aliunde accused's extra-judicial statement, does not positively establish the quantity taken, but accused, in the mentioned statement, admitted taking fifty or sixty pounds, that is, twenty-two to twenty-seven kilograms, which, at a value of thirty-seven marks per kilogram, would have a total dollar value of \$81.40 to \$99.90. There is some evidence, based on the difference between the estimated weight of the silver when deposited in the bank and the weight found during Major Hitchcock's investigation, which would justify the court in finding that one hundred fifteen kilograms were taken. Any variance of proof in this respect does not affect the sentence, as in either case the total involved is in excess of \$50.00. Whether all the silver was used by accused for his personal benefit, as may be inferred from the evidence, or whether a substantial part of it was distributed by him to personnel of his organization, as was claimed by accused but is not otherwise shown, is immaterial (22 C.J. 427-429; CM 237265, Fowler, 23 BR 349).

Stress was laid by the defense on the contention that Lieutenant Conover, as Property Control Officer, was entrusted with the silver and had control over it, that the accused had no responsibility toward or

control over it as trustee or fiduciary, and that, therefore, the accused's offense, if any, did not constitute embezzlement. As to this question, consideration will be given not only to the evidence adduced at the trial but also to the provisions of the Handbook for Military Government in Germany and Revision thereof dated 20 December 1944, and the supplementing Financial and Property Control Technical Manual. Both publications were issued by Supreme Headquarters, Allied Expeditionary Force, and, therefore, are the subject of judicial notice under the provisions of paragraph 125, Manual for Courts-Martial 1928. The pertinent provisions of the mentioned Technical Manual, under heading "General Plan," state, in substance, that a Property Control Officer (hereafter referred to as P.C.O.) is a specialist Military Government Officer whose duties are solely those of Property Control; that P.C.O.'s exercise advisory and local functions in connection with property control; that as soon as possible P.C.O.'s will be assigned to take over all local property control functions exercised by Military Government Officers in the initial period; that for functional guidance the technical chain of communication will operate but military command channels will be employed where specific responsibilities are imposed on military commanders in matters which affect the property control function as for the transmission of definite orders. Under heading of "Organizational and Operational Duties of P.C.O.'s," the technical manual prescribes that P.C.O.'s will act in a staff capacity to the military commanders of the area on all matters concerning the property control function and will confer with the Military Government Officers in his area and offer his advice and consultation in matters relating to property control. Section 365 of the Handbook (supra) provides that control of property by Military Government will be organized by specialist Property Control Officers.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. Although it is not required in embezzlement that the accused have possession of the property, it is necessary that he have control or care of it (Moore v. U. S. 160 U.S. 268; Grin v. Shine, 187 U.S. 196, par 149h, MCM 1928; CM 262750, Splain, 4 BR (ETO) 197).

There is not in this record any clear showing that the accused had care or control of the silver. Instead, it appears that he had nothing whatsoever to do with the original acquisition of the silver and that Lieutenant Conover, as Property Control Officer, executed the required notices when it was taken under property control. Nor does it appear that the accused at any time thereafter, until the date of the alleged offense, exercised or purported to exercise any control over it. The testimony of the witnesses as to accused's responsibility as detachment commander with respect to the silver is ambiguous, largely hearsay, and of little probative value. The provisions of the Handbook For Military Government and the Financial and Property Control Technical Manual are somewhat more revealing. It appears therefrom that the Property Control Officer was a functional specialist who, although he occupied a staff position, organized and took over all property control functions and

operated through a technical chain of communications instead of through ordinary command channels. The Handbook and Technical Manual are not explicit as to a Detachment Commander's control over and responsibility toward property after it is taken under Property Control but it may be gathered that it was not functional in nature and was wholly indirect, incidental to and limited by his general administrative and disciplinary jurisdiction over the Property Control Officer. As we perceive it, the accused's status with respect to the silver was somewhat analogous to that of a commanding officer to funds entrusted to a finance officer on his staff. We do not believe that the stewardship, trusteeship, fiduciary relationship, or care and control requisite to embezzlement may properly be predicated on the somewhat tenuous connection here shown between the accused, as commanding officer, and the silver under the immediate supervision of Lieutenant Conover, his subordinate staff officer. Admittedly, stewardship or care and control over property of the nature of that herein involved might arise, in the absence of other circumstances, by virtue of the accused's office and position, but this becomes highly doubtful, in the absence of other evidence, in view of the interjection of the Property Control Officer's functions and even more doubtful in the light of the responsibility and custodianship expressly lodged in the Director of the Stadtkasse and the Burgermeister of Waldmunchen. We conclude, therefore, that the evidence is insufficient to establish that the accused was entrusted with the silver or had any appreciable degree of responsibility, care, or control over it. We may surmise that the stewardship requisite to embezzlement existed, but we do not find that it was proved by convincing evidence. Instead, the evidence of stewardship is nebulous and any conclusions based on it would be entirely conjectural. It follows that the accused is not, on the evidence of record, guilty of embezzlement.

The record does, however, contain ample evidence to show that after the accused had gained, in a manner not sufficiently established, possession of the silver, he fraudulently converted it to his own use. Notwithstanding how the accused acquired the property, his exercise of dominion over it by wrongfully applying it to his own use was wholly inconsistent with his duties as an officer and was adverse to the interests of the owner and the government and, therefore, constituted conduct to the prejudice of good order and military discipline under the 96th Article of War, an offense lesser to and included in the charge of embezzlement (CM 204829, Burroughs, 8 BR 119; CM 145164, Hunter, Sec 451 (21) Dig Op JAG 1912-40; CM 145710, Schwarz). (Also see CM 252620, Watterson, 34 BR 95, 102, 3 Bull JAG 346, holding that in unlawful conversion it is immaterial whether the converter acquired possession of the property by trespass or otherwise.)

It was contended by the defense that ownership of the silver was not proved as being in the Rosenthal Radio Parts Company. There is some authority to the effect that a charge of conversion does not require an allegation of ownership (CM 246616, Holdstock, 30 BR 121, 132), but, in any case, it is well established that in embezzlement cases a

mere erroneous legal conclusion on the part of the pleader as to the ownership of the property will not constitute fatal error where accused is not misled thereby, his defense is not hampered and he is fully apprised by the language of the specification of the offense intended to be charged (CM 276298, McNeil, 48 BR 287, 299; CM 293993, Thurber, 9 BR (ETO) 319, 327). That rule is applicable as well to conversion as to embezzlement. The accused in this case undoubtedly knew, by virtue of his position and access to the files, that the silver was consistently described as that of the Rosenthal Radio Parts Company. He can hardly claim that he was misled or that his defense was hampered by reason of the allegation of ownership.

10. Dismissal and confinement for three years is authorized on conviction of an officer under Article of War 96. However, confinement in a Federal penitentiary or reformatory is not authorized on conviction of fraudulent conversion (CM 218166, Hosler, 11 BR 393, 394).

11. The records of the Army disclose that the accused was born 24 July 1915 at Cincinnati, Ohio. After being graduated from high school he attended Williams College, University of Cincinnati, and London University for a total period of two and one-half years and was later employed as an actor. He was inducted into service on 26 December 1942, and, on 14 September 1943, was appointed and entered into active duty as a second lieutenant, Army of the United States. His efficiency reports from 1 July 1945 to 31 December 1946 show two adjectival ratings of superior and one of excellent.

12. Consideration has been given to the brief and oral arguments submitted by Mr. Leonard H. Freiberg and Mr. William H. Mandell, attorneys for accused.

13. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors or irregularities 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 only so much of the findings of guilty of the Charge and Specification as include findings of guilty of fraudulent conversion to accused's own use, at the time and of the property alleged, in violation of the 96th Article of War, and legally sufficient to support only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for three years at a place other than a Federal penitentiary or reformatory.

R. H. Stein, Judge Advocate
John G. O'Brien, Judge Advocate
(Dissent), Judge Advocate

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

(27)

JAGH -- CM 324930

26 NOV 1947

UNITED STATES

v.

Captain FREDERIC HENRY
(O-1648618), Signal
Corps

UNITED STATES CONSTABULARY

Trial by G.C.M., convened at
Regensburg, Germany, 21, 28
May and 3, 4 June 1947. Dis-
missal, total forfeitures and
confinement for three (3) years

DISSENTING OPINION by
LYNCH, Judge Advocate

1. I concur in the statement of facts in this case as set forth in the majority opinion and also concur in the conclusion that the evidence in this case is not legally sufficient to sustain a finding of guilty of embezzlement. I dissent to the proposition that fraudulent conversion is a lesser included offense of embezzlement and a fortiori, I am of the opinion that the record of trial may not support a finding of guilty of fraudulent conversion and does not support the sentence.

2. I am aware that in CM 204829, Burroughs, 8 BR 120, the Board in effect held that fraudulent conversion is a lesser included offense of embezzlement. However, in view of the reasoning in the White case (CM 318499), the Burroughs case is no longer controlling.

In the White case an accused tried for larceny was convicted of misappropriation. The Board stated:

"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."

Thus, to constitute a lesser included offense the lesser offense may not include elements not contained in the offense charged.

Conversion has been defined as follows:

"An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. * * *."

* * *

"A direction conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature; * * *" (Black's Law Dictionary, Third Edition).

And it has been stated that:

"Although an actual, forcible dispossession or manual taking of personal property need not exist to constitute an act of the defendant a conversion, a conversion generally consists of a wrongful, tortious, or unlawful taking of property from the possession of another by fraud, duress, trespass, theft, or force, and without his consent or approbation, either express or implied" (53 Am Jur 823, 824 and cited cases).

Therefore, a conversion may consist simply of an unlawful taking of property from the possession of another by trespass. A conversion in this latter sense is not an element included within the offense of embezzlement, and since the general term conversion does not exclude an unlawful taking by trespass conversion is not a lesser included offense of embezzlement within the rule enunciated in the White case. All types of conversion can not be included in embezzlement, since conversion may involve wrongful takings of property which are in no way connected with embezzlement.

The conclusion that, since the words "fraudulently convert to his own use" are included in the embezzlement specification, the offense connoted by those words is lesser included in the offense charged, is without merit. The words and the acts which they described are further qualified and limited in the embezzlement specification by the words "entrusted to him." These words of limitation exclude a conversion consisting of trespass. The finding which the majority opinion holds is supported by the record of trial does not include these words of limitation. In effect it is held that an offense of wider latitude than that alleged is supported by the record of trial. I cannot concur in this result.

For the reasons stated it is my opinion that the record of trial is not legally sufficient to support the findings and sentence.

 _____, Judge Advocate

JAGH - CM 324930

1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial, the majority opinion of the Board of Review and the dissenting opinion of one member, in the case of Captain Frederic Henry (O-1648618), Signal Corps.

2. Upon trial by general court-martial this officer was found guilty of embezzlement of one hundred fifteen kilograms of silver bullion of the value of over fifty dollars (\$50.00), property of Rosenthal Radio Parts Factory, entrusted to him by the United States Government by virtue of his position as a Military Government Officer, in violation of Article of War 93. 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 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. All the members of the Board of Review are of the opinion that the record of trial is legally insufficient to support findings of guilty of embezzlement because the fiduciary relationship or care and control requisite to that offense is not proved by convincing evidence. The majority members are, however, of the opinion that the record of trial is legally sufficient to support so much of the findings of guilty as involve findings that the accused did, on the date alleged, fraudulently convert the property to his own use, in violation of Article of War 96. The dissenting member is of the opinion that fraudulent conversion in violation of Article of War 96 is not a lesser included offense of embezzlement under Article of War 93. It is my opinion that fraudulent conversion in violation of Article of War 96 is a lesser included offense of embezzlement under Article of War 93, and I concur in the majority opinion of the Board of Review that the record of trial is legally sufficient to support only findings of guilty of fraudulent conversion in violation of Article of War 96 and legally sufficient to support the sentence and warrant confirmation thereof.

About 4 January 1946 the accused assumed command of the Military Government Detachment at Waldmunchen, Germany. There had previously been taken into custody by the detachment fifty-two plates of silver. A record was made reciting that the silver belonged to the Rosenthal Radio Parts Company. The plates were placed for safekeeping in the safe or vault of the Waldmunchen Stadtkasse or bank. The Property Control Officer of the detachment executed the required notices incident to the taking of property under Military Government Property Control and the Burgermeister of

(30)

Waldmunchen was notified that he was appointed custodian. In January 1946, after the accused assumed command, the plates were taken from the bank to accused's headquarters, where accused, with others, caused strips to be cut from each plate, thereby obtaining, according to his admission, fifty to sixty pounds of silver or, according to other evidence, one hundred fifteen kilograms. The total value of the silver taken was in excess of fifty dollars (\$50.00). The plates were returned to the bank after the strips were cut off. Accused claimed that part of the silver cut from the plates was distributed to certain members of his detachment, but there is other evidence from which it may be inferred that a substantial part of the silver was manufactured into articles for accused's personal use. In connection with accused's alleged fiduciary relationship to the silver, the evidence indicates that the Property Control Officer was the actual fiduciary or was primarily responsible for care and control of the property, with custody lodged in German civilians, and that accused's only connection with the silver was by virtue of his administrative and disciplinary jurisdiction over the Property Control Officer. There is no evidence that accused had anything to do with the property prior to commission of the offense.

4. The records of the Army disclose that the accused was born 24 July 1915 at Cincinnati, Ohio. After being graduated from high school, he attended Williams College, University of Cincinnati, and London University for a total period of two and one-half years and was later employed as an actor. He was inducted into service on 26 December 1942, and, on 14 September 1943, was appointed and entered upon active duty as a second lieutenant, Army of the United States. His efficiency reports from 1 July 1945 to 31 December 1946 show two adjectival ratings of superior and one of excellent.

5. Consideration has been given to a brief submitted by Leonard H. Freiberg, Esq., and William H. Mandell, Esq., attorneys for accused.

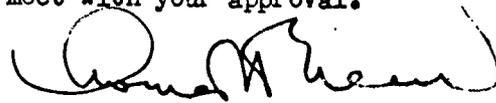
6. I recommend that only so much of the findings of guilty be approved as involve findings that the accused did, at the place and time alleged, fraudulently convert to his own use the silver described, property of another, of a value of over fifty dollars (\$50.00), in violation of Article of War 96. I further recommend that the sentence be confirmed but, in view of accused's previous good record and the modification of the findings, recommend that the period of confinement be reduced to six months, with a United States disciplinary barracks designated as the place of confinement, 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 it meet with your approval.

CM 324930

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

(GCMO 93, (DA) 19 Dec 1947).


THOMAS H. GREEN
Major General
The Judge Advocate General

16

16 Dec 47
see Royall says
14 days confinement.
#10

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

JAGN-CM 324937

UNITED STATES)

v.)

Gefreiter HELMUT PEISKER (81-G-725202), and Obergefreiter WERNER ANGERMANN (81-G-725152), both of 9147th Quartermaster Service Company (German) Surrendered Enemy Personnel and Persons subject to Military Law.)

6 JUL 1947
PORT OF LEGHORN

Trial by G.C.M., convened at Leghorn, Italy, 13 June 1947. Both: To pay fine of \$250 and confinement for three (3) years and to be further confined until such fine is paid but for not more than two (2) years in addition to three (3) years adjudged. MTOUSA Disciplinary Training Center.

HOLDING by the BOARD OF REVIEW
JOHNSON, ALFRED AND BRACK, Judge Advocates

1. The record of trial in the case of the prisoners of war 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 94th Article of War.

Specification 1: In that Gefreiter Helmut Peisker, and Obergefreiter Werner Angermann, both of the 9147 Quartermaster Service Company (German) Surrendered Enemy Personnel and persons subject to military law, acting jointly and in pursuance of a common intent, did, at or near Livorno, Italy, on or about 4 April 1947, knowingly and willfully apply to their 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 Gefreiter Helmut Peisker, and Obergefreiter Werner Angermann, both of the 9147th Quartermaster Service Company (German) Surrendered Enemy Personnel and persons subject to military law, acting jointly and in pursuance of a common intent, did, at or near Livorno, Italy, on or about 4 April 1947, feloniously take, steal, and carry away two, fifty gallon drums, and fourteen, five gallon drums of D.D. T. compound, and ten bars of soap, of a total value in excess of fifty dollars (\$50.00), property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to the Charge and its Specifications. Each accused was found guilty of Specification 1, guilty of Specification 2 "except the words 'and ten bars of soap,'" and guilty of the Charge. Each accused was sentenced to pay to the United States a fine of \$250, to be confined at hard labor for three years, and to be further confined at hard labor until payment of such fine, but for not more than two years in addition to the three years thereinbefore adjudged. The reviewing authority approved the sentence as to each accused, designated MFOUSA Disciplinary Training Center as the place of confinement for each accused, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$. Thereafter, by General Court-Martial Order Number 72, Headquarters Port of Leghorn, dated 2 October 1947 by stated authority of "EUCOM Radio SC 21278 dated 30 September 1947," the place of confinement for each accused was redesignated as EUCOM Military Prison, Mannheim, Germany.

3. The record of trial is legally sufficient to support the findings of guilty as to each accused. The only question requiring discussion is the legal sufficiency of the record of trial to support the sentence as to each accused.

4. Each offense of which the accused were found guilty was in violation of Article of War 94 which provides as to punishment:

"* * * Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties."

Article of War 45 provides:

"* * * Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe * * *."

By Executive Order, reproduced in paragraph 104c, Manual for Courts-Martial, 1928, the prescribed maximum punishment for each offense of which the accused were found guilty is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for not to exceed five years. Such limitation on punishment is applicable "in cases of enlisted men only" (par. 104a, MCM, 1928). Thus it would appear that as to any person subject to military law, other than an enlisted man or other person who must, by law, be accorded the same treatment as enlisted men, a fine is a proper and lawful form of punishment for the offenses in question. It seems equally apparent that in view of the limitations expressed in paragraph 104c, Manual for Courts-Martial, 1928, as to an enlisted man, or as to any other person subject to military law who must by law be accorded the same treatment as enlisted men, a fine is not a lawful form of punishment for such offenses (SPJGW 1945/7910, 4 Bull JAG 383). It thus becomes necessary to determine the legal individual status of each accused with respect to proper application of the legal maximum punishment authorized by law as to each.

5. The accused were charged and arraigned as "Surrendered Enemy Personnel." They entered no special plea nor did they otherwise question this announced status, and there is nothing in the record of trial from which we may draw any conclusion that the accused had any other status than that of "Surrendered Enemy Personnel."

However, we have not only the right, but the duty, to take judicial knowledge of the acts, directives, and declarations of the Secretary of War. On 10 February 1947 the Secretary of War addressed a letter to the Secretary of State (WDGPA/2089) in which he said:

"I refer to your letter of 13 November 1946, SPD 740.0014 EW/9-626, in which you inclosed a copy of a letter from Judge Max Huber, Acting President of the International Committee of the Red Cross, concerning the applicability of the provisions of the Geneva Convention to a special category of military detainees who are generally termed 'Surrendered Enemy Personnel' or 'Disarmed Enemy Forces.'

"It is the view of the War Department that the provisions of the Geneva Convention apply to those categories of persons named above, they being entitled to the status of prisoners of war, because they either acquired such status prior to general surrender or were accorded such status at a later date. Further, it is the view of the Department that all civilian internees held in the United States custody for reasons other than war crimes or similar

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offenses, are also entitled to the protection of that Convention.

"You may be assured that the report of the International Committee of the Red Cross is being brought to the attention of the commanders concerned for remedial action and that all enemy military personnel presently held will be treated in accordance with the provisions of the convention" (Emphasis supplied).

We must necessarily conclude that such declaration is determinative of the status of accused as "prisoners of war" at least from and after the date it was made.

Article 46 of the Geneva Convention provides, in part:

"Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power" (TM 27-251, 7 Jan 44, p. 93).

An examination of the original French text of the Article in question shows the word "militaires" which means "military men; soldiers" (TM 30-253), and has been translated as "soldiers" in the official English translation (4 Malloy, 5224, 5237) carrying with it its generic sense. Thus it might possibly be argued that since an officer is a soldier, in the Army of the United States, and since an officer may be punished by a fine for a violation of the 94th Article of War, then an enlisted prisoner of war may be punished by a fine for the commission of the same offense. However, we are of the opinion that a proper interpretation of the first paragraph of Article 46, supra, demands that the word "soldiers" be taken to mean soldiers of like rank. This latter concept is strengthened by the context of the second paragraph of Article 46, which states:

"Rank being identical, officers, non-commissioned officers or soldiers [In the official French text the word is 'soldat' and is more properly translated in this case as 'private soldier' (TM 30-253)] who are prisoners of war undergoing a disciplinary punishment, shall not be subject to less favorable treatment than that provided in the armies of the detaining Power with regard to the same punishment" (TM 27-251, 7 Jan 44, p. 93).

While this provision does not amend the first paragraph of the Article, since it applies only to punitive disciplinary treatment whereas the first paragraph is in reference to judicial punishment to be prescribed,

it is clearly indicative of the tenor of the entire convention to the effect that a prisoner of war shall, as limited by that convention, be accorded the same treatment by the detaining Power as it would accord to a soldier of its own service who holds the same or comparable rank.

We are therefore of the opinion that the provisions of paragraph 104c of the Manual for Courts-Martial, 1928, above noted as respecting the maximum authorized penalties for the offenses here in question, are applicable to each of the accused, and that so much of their sentences as provides for fines, and for confinement at hard labor in event of non-payment thereof, are illegal.

6. For the reasons stated the Board of Review holds the record of trial, as to each accused, legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for a period of three years.

Edward J. Johnson Judge Advocate.

Frank C. Alfred Judge Advocate.

Joseph T. Bush Judge Advocate.

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JAGN-CM 324937

1st Ind

13 NOV 1947

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

TO: Commanding General, Port of Leghorn, APO 512, c/o Postmaster, New York, N. Y.

1. In the case of Gefreiter Helmut Peisker (81-G-725202), and Obergefreiter Werner Angermann (81-G-725152), both of 9147th Quartermaster Service Company (German) Surrendered Enemy Personnel and Persons subject to Military Law, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentences be approved as involves in each case confinement at hard labor for three years. Upon taking such action you will have authority to order the 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 324937).

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.

(37)

OCT 7 1947

JAGQ - CM 324945

UNITED STATES

FOURTH AIR FORCE

v.

Corporal JOHN T. MOORE
(RA 35526502), Squadron
C, 401st Army Air Forces
Base Unit, Hamilton Field,
California.

Trial by G.C.M., convened
at Hamilton Field, Cali-
fornia, 29 July 1947. Dis-
honorable discharge and
confinement for five (5)
years. Disciplinary Bar-
racks.

201

OCT 24 1947

NO. 418 AIR FORCE

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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

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

CHARGE: Violation of Article of War 93.

Specification 1: In that, Corporal John T. Moore, Squadron "C", 401st Army Air Forces Base Unit, Hamilton Field, California did, at Company "A", 856th Engineer Aviation Battalion, Manila, Philippine Islands, on or about 15 September 1945, feloniously take, steal and carry away United States Postal Money Orders #64403, 64404, 64405, 64406, 64407, 64408, 64409, and 64410, dated 10 August 1945, in the sum of One Hundred Dollars (\$100.00) each, drawn on San Francisco, United States Army Postal Service, A.P.O. 75 Branch, California, and United States Postal Money Orders #15079 and 15080, dated 5 September 1945, in the sum of One Hundred Dollars (\$100.00) each, drawn on San Francisco, United States Army Postal Service, A.P.O. 358 Branch, California, of the total value of One Thousand Dollars (\$1000.00), the property of Private First Class Floyd Carter.

Specification 2: In that Corporal John T. Moore, Squadron "C", 401st Army Air Forces Base Unit, Hamilton Field, California, did, at Manila, Philippine Islands, on or about 15 September 1945, with intent to defraud, falsely make in its entirety

the endorsement of Private First Class Floyd Carter to that certain United States Postal Money Order #64403, dated 10 August 1945, in the amount of One Hundred Dollars (\$100.00), drawn to the order of Private First Class Floyd Carter, and payable at San Francisco, United States Army Postal Service, A.P.O. Branch 75, California, said endorsement being in words and figures, to wit, "Pfc Flory Carter", and by means thereof did fraudulently obtain from the United States Postal Service the sum of One Hundred Dollars (\$100.00) cash, good and lawful money of the United States.

Specifications 3 to 11: Same as Specification 2 except Postal Money Orders are numbered 64404-10, inclusive, 15079, and 15080, respectively.

Accused pleaded guilty to, and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be 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, reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 50½.

3. The charge sheet accompanying the record of trial shows that accused was honorably discharged on 4 January 1946 and that he reenlisted on 2 July 1946. The offenses for which accused was tried and of which he was convicted are alleged to have been committed on 15 September 1945 and the evidence shows them to have been committed as alleged. The honorable discharge of accused on 4 January 1946 was confirmed by informal communication with the office of The Adjutant General.

4. It is a general rule, with certain prescribed exceptions, that court martial jurisdiction over soldiers ceases on discharge from the service and that jurisdiction as to offenses committed during a period of service thus terminated is not revived by reentry into the service (par 10, MCM; CM 200925 Mackiewicz, 5 BR 9). Violations of Article of War 94 are an exception to this rule.

5. Accused is charged with the larceny of ten \$100 money orders (Specification 1) and the forgery of an indorsement on each of these money orders, thereby defrauding the United States Postal Service (Sp. 2-11), all in violation of Article of War 93. It is apparent that the larceny charge (Sp. 1) is barred by the general rule cited above. The remaining question is whether Specifications 2 to 11, inclusive, should be considered as frauds against the government in violation of Article of War 94, even though they are charged as, and found by the court to be, violations of Article of War 93.

The pertinent portions of Specifications 2 to 11 read as follows:

"In that * * * did, * * * with intent to defraud, falsely make in its entirety the indorsement of Private First Class Floyd Carter to that certain United States Postal Money Order * * * drawn to the order of Private First Class Carter * * * and by means thereof did fraudulently obtain from the United States Postal Service the sum of One hundred Dollars * * *."

These specifications follow generally the specimen form for forgery in violation of Article of War 93 (Form No. 97, App. 4, p. 250, MCM), and by implication and conjecture, they might be considered as describing violations of Article of War 94 although the wording does not follow the specimen form suggested in the Manual for Courts-Martial (Form No. 106, App. 4, p. 251, MCM).

It has long been held that charging an offense under the wrong Article of War is an immaterial error (par. 394(2) Dig. Ops. JAG 1912-40, p.197). It is obvious that a specification charging desertion should be alleged as a violation of Article of War 58 and a correction of any misnumbering of the Article of War in such a case would not be prejudicial to the substantial rights of the accused.

There are many offenses, however, which may be properly charged as a violation of either of two Articles of War. In such cases, it is prejudicial to the rights of an accused to try him under one Article of War and then, for jurisdictional reasons, hold in the approval or confirmation action that the offense violated a different Article of War. For example, an officer might be tried under Article of War 95 and sentenced (improperly) to confinement and forfeitures along with dismissal. Even if the offense were also a violation of Article of War 96, it would be improper for the reviewing or confirming authority to "legalize" the confinement-forfeiture portion of the sentence by changing the designation of the Article of War under which he was tried to Article of War 96.

If the allegations and proof in instant case related solely to a violation of Article of War 94, there would be no difficulty in holding that the accused was charged under the wrong Article of War and in changing it to the correct one. But when, as here, a specification properly alleges and the evidence proves a violation of Article of War 93, jurisdiction cannot be sustained solely on the basis that the specification by implication might be interpreted as also covering a different offense in violation of a different Article of War. To do so would constitute error injuriously affecting the substantial rights of the accused.

(40)

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

W. H. Johnson Jr., Judge Advocate
C. J. Schmitt, Judge Advocate
A. T. Kane, Judge Advocate

(41)

OCT 15 1947

JAGQ-CM 324945

1st Ind

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

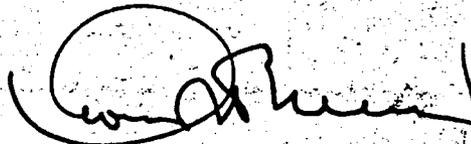
TO: Commanding General, Fourth Air Force, Hamilton Field,
California.

1. In the case of Corporal John T. Moore (RA 35526502), Squadron C, 401st Army Air Forces Base Unit, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

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

(CM 324945).

1 Incl
Record of trial



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(43)

JAGK - CM 324987

9 SEP 1947

UNITED STATES)

HEADQUARTERS KOBE BASE

v.)

) Trial by G.C.M., convened at
) Kobe, Honshu, Japan, 6 and 9
) June 1947. WHALEY and JANKAITIS:
) Findings of guilty disapproved
) by reviewing authority. TAYLOR:
) Dishonorable discharge and con-
) finement for life. Penitentiary.

) Technician Fifth Grade DEWEY WHALEY
) (RA 38729596), Technician Fifth
) Grade ADOLPH L. JANKAITIS (RA 13242617)
) and Private JAMES TAYLOR (RA 15226374),
) all Headquarters Company, Kobe Base,
) APO 317.

REVIEW by the BOARD OF REVIEW
SILVERS, MoAFEE and ACKROYD, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the soldiers named above.
2. The accused Taylor was tried upon the following charge and specification:

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

Specification: In that Private James Taylor, Headquarters Company, Kobe Base, Technician Fifth Grade Dewey Whaley, Headquarters Company, Kobe, Base, and Technician Fifth Grade Adolph L. Jankaitis, Headquarters Company, Kobe Base, acting jointly, and in pursuance of a common intent, did, at Kobe, Honshu, Japan, on or about 24 April 1947, forcibly and feloniously, against her will, have carnal knowledge of Shizue Seki, a Japanese civilian.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Federal Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review adopts the statement of the evidence and the law contained in the Staff Judge Advocate's Review with the exception of the following language appearing on page 6 thereof:

(44)

"***Under the rule limiting the impeachment of witnesses to proof of bad reputation for truth and veracity, a female witness cannot be impeached by an attack on her character for chastity even though she is the prosecutrix in a rape case, by evidence of specific acts of unchastity ***."

The Board of Review, in the recent case of CM 318548, Hernandez (6 Bull JAG 67), had occasion to say,

"In a prosecution for common law rape, or assault with intent to rape, any evidence, otherwise competent, tending to show the unchaste character of the prosecutrix is admissible on the issue of the probability of her having consented to the act charged and on the question of her credibility and for this purpose her lewd habits, ways of life or associations and her specific acts of illicit sexual intercourse or other lascivious acts with accused or others are all relevant. Such evidence is generally admissible though it refers to a point of time prior to or after the commission of the alleged offense, but the court, in the exercise of a sound discretion, may reject such evidence if it is so remote in point of time as to be clearly and logically irrelevant."

To this we might add that the unchaste character or acts of the prosecutrix may be brought out by appropriate though perhaps embarrassing questions addressed to her upon cross-examination as well as by direct evidence emanating from other sources (CM 300091, King, 26 BR (ETO) 133,147; CM 295675, Anderson, 30 BR (ETO) 145,150; Lee v State, 132 Tenn. 655, 179 S.W. 145). In this respect she may be attacked upon cross-examination without the necessity of first establishing by other proof the probability of lewd conduct on her part and she may not properly refuse to answer questions having a bearing on her chastity on the ground that the answers thereto might tend to degrade her where such answers would be material to the issue being tried. The prosecutrix may, however, assert at any time her right not to incriminate herself (AW 24; par. 122, MCM, 1928).

In the instant case, however, we are of the opinion that no error occurred by reason of the court's refusal to permit the prosecutrix to answer upon cross-examination the query as to whether she had participated in sexual intercourse before the night of the alleged rape. Even though she testified that she was unmarried, this question was so broad in scope as to require her to divulge details of her private life which might well have been too remote in point of time and relevancy to be considered material to any subject of inquiry legitimately before the court. For example, a disclosure that the prosecutrix had voluntarily submitted to a single act of intercourse under circumstances which would have no appreciable tendency to show that at the time of the alleged offense she was of a licentious and promiscuous disposition would be obviously immaterial upon the issue of her consent to the sexual act in question and would not serve in the least to impeach her credibility. To compel her to make such a disclosure would be

an invasion of her right not to degrade herself on immaterial matters, and, although the rights guaranteed under Article of War 24 are to be personally asserted by the witness and not by the parties to the action or the court, nevertheless, the court may of its own motion refuse to receive immaterial and inadmissible evidence (par. 75a, MCM 1928).

4. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence 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.

Christie E. Gilbert Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Hays, Judge Advocate

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

(47)

JAGK - CM 325040

21 OCT 1947

UNITED STATES)

HEADQUARTERS I CORPS

v.)

Trial by G.C.M., convened at Kure,
Honshu, Japan, 10-13 June 1947.

Major FRANK A. KOTCHES)
(O-905315), Air Corps)

Dismissal, total forfeitures and
confinement for three (3) years.

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

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Major Frank A. Kotches, Air Corps, Hiroshima Military Government Team, being at that time assigned to duty in a procurement section, United States Military Government, did, at or in the vicinity of Kure, Honshu, Japan, on or about 1 July 1946, wrongfully and unlawfully ask, accept, and receive from Masuoka Gumi, a contracting company, through Muneharu Imashiki, 30,000 yen, lawful Japanese currency, value about \$2,000.00 in United States currency, at the then official rate of exchange, as compensation for or in recognition of, services rendered or to be rendered by the said Major Frank A. Kotches or his assistants to the said Masuoka Gumi, a contracting company, in relation to the furnishing of services, supplies, and construction for the Allied Occupation Forces, a matter before the said Major Frank A. Kotches, an officer of a Military Government procurement section, United States Army, in which the United States was and is interested.

NOTE: Specifications 2, 3, 4, 5, 6, 7, 8, 9, 10 and 12 differ materially from Specification 1 only in the date of the offense, the name of the company giving the accused property, the name of the agent handling the transaction, the property or money accepted by the accused, and the value thereof as follows:

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<u>Spec</u>	<u>Date of Offense</u>	<u>Name of Company</u>	<u>Name of Agent</u>	<u>Property accepted by accused</u>	<u>Value</u>
2	11-15-46	Masuoka Gumi	Yukio Kurashita	Pearl necklace	\$ 133.00
3	9-20-46	Masuoka Gumi	Heishiro Kondo	Diamond ring	1335.00
4	10-15-46	Masuoka Gumi	Masuoku Tosaku	¥35,000	2333.00
5	9-15-46	Matsumura Gumi	Toyomatsu Iida	String of pearls	200.00
6	9-25-46	Matsumura Gumi	Satoshi Hanamoto	Camera	670.00
7	12-25-46	Matsumoto Gumi	Kakutaro Morito	Diamond ring	260.00
8	6- 1-46	Tomijima Gumi	Edward S. Duus	¥25,000	1666.00
9	9-17-46	Onogi Gumi	Takao Onogi	Diamond	340.00
10	11-15-46	Toda Gumi	Genshichi Yoshida	(String of pearls (Roll of silk	400.00 335.00
12	2-18-47	Nishiura Gumi	Sumi Okuda	(4 diamond rings (1 diamond brooch (1 unmounted diamond	670.00

Specification 11: (Finding of guilty disapproved by reviewing authority)

Specification 13: In that Major Frank A. Kotches, Air Corps, Hiroshima Military Government Team, did, at or in the vicinity of Kure, Honshu, Japan, on or about 6 March 1947, wrongfully have in his possession \$406.00 in United States currency in violation of Circular 3, Far East Command, dated 10 January 1947.

He pleaded not guilty to and was found guilty of the Charge and all Specifications with exceptions and substitutions as follows:

The word "ask" was excepted from Specifications 1 to 8 and 10 to 12, inclusive. Specification 3, except the word "\$1335.00" substituting therefor the word "\$1000.00."

Specification 4, except the words "35000 yen" substituting therefor "20,000 yen" and excepting the words "\$2333.00" substituting therefor "\$1333.00."

Specification 5, except the words "Matsumura Gumi, a contracting company, through" and "said Matsumura Gumi, a contracting company," substituting therefor "said Toyomatsu Iida".

Specification 6, except the words "Matsumura Gumi, a contracting company" substituting therefor the words "Toyomatsu Iida," and except the words "said Matsumura Gumi, a contracting company," substituting therefor "said Toyomatsu Iida."

Specification 12, except the words "four diamond rings and one diamond brooch" substituting therefor respectively "four rings" and "one brooch."

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 three years. The reviewing authority disapproved the finding of guilty of Specification 11 and approved the findings of guilty of Specification 12 "except the words 'total value about \$670.00', substituting therefor the words 'of a substantial value.'" He approved the sentence and designated the United States Penitentiary, McNeil Island,

Washington, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Between 1 March 1946 and 6 March 1947 the accused was assigned to duty in the Procurement Section of the United States Military Government in Japan (R 32, Pros. Ex 8). From 9 June 1946 to 21 January 1947 the accused was the procurement officer of the 76th Military Government Company. The name of this company was during this period changed to Hiroshima Military Government Team (R 17,20). Military government teams procure for the Army certain services, equipment, supplies, and buildings, including the construction of buildings or other engineering projects from the Japanese as they are required by the occupation forces in Japan. When a proper Army command determines that supplies, equipment, construction work or buildings are required from the Japanese Government a procurement demand is made upon the Japanese Government for the required items. The procurement demands described the items required and the quantity. They also list under the heading of "suggested source" the name and address of any person or firm which might supply the required items. The Japanese Government then contracts for the required items or for the construction of any buildings or other structures. The issuance of procurement demands, the "follow up" of such demands, and the giving of releases and receipts necessary to insure that supplies or facilities are furnished and paid for promptly are the primary duties of the procurement officer. His influence, both before and after contracts are let by the Japanese Government, is very great (R 25,26,39,40).

It was stipulated that all procurement demands served on the Japanese Government were processed by the Procurement Section of the Hiroshima Military Government Team (the 76th Military Government Company prior to the change of name), and that the Japanese Government would not honor procurement demands coming from any other source (R 233, Pros Ex 57).

The prosecution read to the court AR 600-10, 8 July 1944, and Changes 3 and 4 thereto (R 13).

The court took judicial notice that the official rate of exchange between yen and dollars was 15 Japanese yen for one American dollar (R 14,15).

The Japanese word "Gumi" is used instead of "company" in Japan when referring to engineering and construction work (R 130).

On 1 July 1946 the accused attended a party at the Kunioya Restaurant, Kure, Japan. Major Weber, Mr. Duus, an employee of the Hiroshima Military Government Team, Masuoka Tasaku, President of Masuoka Gumi, Heishiro Kondo, Chief of the Construction Section Masuoka Gumi, and Muneharu Imashiki were also present at this party (R 60,67,98). During this party Masuoka Tosaku delivered 100,000 yen in 100 yen notes to Muneharu Imashiki. Muneharu Imashiki

divided this money into three packages of approximately 30,000 yen each. He delivered one of these packages to the accused, another to Mr. Duus, and the third to Major Weber. Each package was about one inch thick. The three packages of yen were marked by the accused and placed in a bag belonging to Mr. Duus. After the party Mr. Duus, Major Weber and the accused returned to their barracks, at which time the accused opened the bag and handed Mr. Duus and Major Weber each a package of yen and retained one for himself (R 61, 63, 68, 69, 70, 73, 99, 100). Mr. Duus testified that he did not know at the time he went to the restaurant they were going to get the money. The money was given as "a token of appreciation for having gotten the work and had nothing to do with getting the job" (R 71). He also testified that Mr. Masuoka had mentioned two days prior to the party that he was going to give a present and he (Mr. Duus) understood that he was to get an equal amount of the money (R 78, 79). Muneharu Imashiki testified that at the time he gave the money to the accused he stated to the accused through Mr. Duus,

"This money is not being given for work received, but because Mr. Masuoka will be subject to many favors later on, this present is being made in place of an article" (R 61).

Masuoka Tosaku testified that

"I saw Major Kotche's name on the PD's I received. I also saw Major Kotches where the work was being done and also for the fact that my company had received work and in appreciation for it I intended to give a portion of the money to Major Kotches."

When asked, "Did you feel it was necessary for you to give the money to Major Kotches?" the witness replied, "As I could not give him at that time any present in material and the fact that I have to associate with him in the future, I thought it was advisable" (R 100, 101).

On 15 November 1946 Kondo, Heishiro, chief of the Construction Section of Masuoka Gumi, purchased a pearl necklace for two thousand yen. He proceeded to Major Kotche's house where he gave this necklace to Major Kotches. Kurashita Yukio, an interpreter, stated to the accused at the time of the delivery of the necklace, "This is a present from Mr. Kondo" (R 87, 94). The pearls were purchased with money belonging to Masuoka Gumi and the president of the company approved the transaction (R 101). It was stipulated that the accused received the necklace from Yukio Kurashita on 15 November 1946 (R 46, Pros Ex 10). The necklace was introduced in evidence as Prosecution Exhibit 11 (R 47). The market value of jewelry in Japan varies with the customer. This necklace was valued between two thousand and ten thousand yen (R 220, 221, 224).

On 20 September 1946, the accused attended a party at the Kunioya Hotel. Mr. Masuoka, Mr. Kurashita, Kondo Heishiro, Colonel McGowan and other unidentified persons were also present at this party. Toward the end of the

party a group of people, including the accused, were seated at a table. Kondo Heishiro reached under the table and gave the accused a diamond ring. Nothing was said between them at this time. The ring was given because "it had no deep meaning but just to become closer with him *** I thought it would be advantageous to become friendly with foreigners for future purposes." The ring was purchased for twenty thousand yen belonging to Masuoka Gumi. Mr. Masuoka testified that "the purpose of the party was in appreciation, as the job was progressing very nicely, and for the purpose of handling the diamond ring" (R 83,84,86,102). It was stipulated that the accused received this ring and the ring was introduced in evidence as Prosecution Exhibit 13 (R 47,48; Pros Exs 12,13). This ring was valued at about 15,000 yen (R 225).

On 15 October 1946, the accused and other people attended a party at the Kunioya Hotel. Masuoka Tosaku gave Mr. Kurashita two packages, each containing 15,000 yen. He instructed Mr. Kurashita to do the proper thing with the money (R 103,104). Kurashita Yukio testified that he attended the party at the Kunioya Hotel on 15 October 1946 but Mr. Masuoka did not give him any packages or instructions and he did not give anything on that occasion to the accused (R 96). During the latter part of December 1946, Mr. Masuoka went to the accused's quarters to "exchange Christmas greetings." After exchanging Christmas greetings with accused he left a package, wrapped in newspaper, on the edge of a table. This package contained 20,000 yen. He further testified, "I just made a reference that it was a Christmas present and left it on the edge of the table." Mr. Masouka further testified on cross-examination that it was not exactly a Japanese custom to give presents at parties, but that he heard that it was done in foreign countries. (R 104,105).

On the 15th of September 1946 Hanamoto Satoshi, an interpreter for Matsumura Gumi, was in the accused's office on business relative to some construction work. Mr. Satoshi started to leave the area, at which time the accused approached him at "the gate" and stated "that he would be pleased if he could get a diamond." Mr. Satoshi reported this conversation to Toyomatsu Iida (R 117, 118). Mr. Iida and Hanamoto went to the accused's office where Hanamoto, translating for Iida, asked accused if he would change his request for a diamond to pearls. The accused acceded to this request. They then left the office. Some two days or two weeks later Mr. Iida and Hanamoto returned to the accused's office, at which time Hanamoto acting for Iida gave the accused a string of pearls. These pearls had been purchased for three thousand yen (R 109-111,118-120).

At the time the pearls were delivered to accused he stated, "the pearl necklace is very good, but I do not have a camera either." Mr. Iida purchased a camera for 11,500 yen and gave it to Mr. Hanamoto to deliver to the accused. Mr. Hanamoto delivered the camera to the accused (R 113,114, 121,122). Mr. Iida testified that he paid for the pearls and camera because "I figured that the job may be stopped and in that case I may lose my job. I did that without notifying my company" (R 236). It was stipulated that

the accused received the pearls mentioned in Specification 5 (R 48, Pros Ex 14). The pearls were introduced in evidence as Prosecution Exhibit 15 and were shown to have a value of between four and five thousand yen (R 49,225).

On 25 December 1946 Kakutaro Morito, managing director of Matsumoto Gumi, went to the accused's quarters and gave the accused a diamond ring. This ring cost 3900 yen and was purchased with company money. The company books reflect the transaction and it is the only present given by this company. Prior to this occasion his company had received two contracts totaling between 14 and 15 million yen. The accused's name appeared on the procurement demand (R 124-129,130-133).

On 1 June 1946, Mr. Iesaka Ki, the president of Tomijima Gumi, gave a party at Hiro during a Japanese festival (Sohen). Major Weber, Mr. Duus, and the accused were guests at this party. Mr. Ishioka, Mr. Ito, and Mr. Isoji, Japanese nationals, were also at the party. During this party Major Weber outlined the work to be performed in the area. Major Weber wanted between 100,000 and 200,000 yen before the work started. The accused was present during this conversation which was conducted in English. The Japanese discussed this proposition but stated that they could not "agree to that sum." They agreed to pay 50,000 yen to Major Weber and the accused. The following day Mr. Duus went to the office of Ishioka and received two packages of yen. The money was 100 yen notes. He delivered one package to the accused and the other to Major Weber (R 136-145). Iesaka Ki testified that he agreed to pay the 50,000 yen and asked Mr. Ishioka to pay it for him. He later paid Mr. Ishioka 50,000 yen out of the funds of Tomijima Gumi (R 146-152). Ishioka Hisao delivered 50,000 yen to Mr. Duus at the request of Iesaka Ki. This money was in two packages. He was repaid by an engineer from Tomijima Gumi (R 153-158).

During September 1946 Onagi Kotaró, the managing director of Onogi Gumi, was in accused's office, at which time the accused asked him if he wanted some work in the Hiro area. He answered, "Yes, but if possible I would like to have work in the Kure Area." The accused then stated he would think about it. He left the office but was called back into the office by Miss Yamada, an interpreter. Miss Yamada stated that the accused wanted a diamond and asked Mr. Onogi to give him one. He asked about the size and Miss Yamada showed him a pearl ring and stated that one the size of the pearl would do. This conversation was in Japanese in the accused's office. The accused was not present. Onogi purchased two diamonds. One stone was larger than the other. He placed the larger stone in a box and gave it to his brother Takao. It was stipulated that about 17 September 1946 the accused received the unmounted diamonds described in Specification 9 from Takao Onogi (R 49, Pros Ex 16). This diamond was introduced in evidence as Prosecution Exhibit 17 and shown to have a retail value of between 15 and 16 thousand yen (R 50,226).

Mitsue Yamada testified that in September 1946 she was a typist employed by the Hiroshima Military Government Team. In September 1946 some Japanese people came into the office and the accused requested her to find out which one of them was the boss. The accused also stated, "If you find out, will you ask him if he has not a diamond." He indicated the size of the diamond desired by referring to a pearl ring she was then wearing. She communicated this request to Mr. Onogi (R 166-170). Mr. Onogi testified that prior to giving the diamond his company had received procurement demand contracts amounting to approximately fifty million yen and that after giving the diamond the contracts amounted to about five million yen. He stated the reason for giving the diamond to be, "I knew that he wished to have a diamond and if I did not give him one, I may not have obtained the work that would have come to me and also after the work was obtained, there may be some disturbance to the smooth operation of the work later on, so I gave it to him"(R 163,164).

Genshichi Yoshida, a construction engineer of Toda Gumi, purchased a string of pearls and a roll of silk with money belonging to the company. He paid 6,000 yen for the pearls and 5,000 yen for the silk. On 15 November he went to the accused's office and gave him the string of pearls, stating, "Thank you very much for the work we have received. In accordance with Japanese custom, we are making an humble present. Please accept it. Further, we would appreciate it very much if you would be good enough to favor us in the future" (R 177-179,185,186). On December 25, 1946, Genshichi Yoshida sent his wife to the accused's quarters to deliver the roll of silk to the accused. Mrs. Genshichi delivered this roll of silk to the accused and stated, "As my husband is busy today I brought this Christmas present here instead of him." This roll of silk was about a yard wide and about 10 feet long. It was a type of silk used to make obis. This type of obi would not normally be worn every day (R 180-184,185,186). It was stipulated that the accused received the pearls described in Specification 10 and they were introduced in evidence as Prosecution Exhibit 19 and shown to have a value of over 10,000 yen (R 50,226).

About the first of November 1946 Shozo Nishiura, president of Nishiura Gumi, went to the accused's office to see about obtaining some construction work. Near the middle of November he sent Okuda Sumi to the accused's office to see if the procurement demands could be expedited. On 19 December 1946 his company received a procurement demand contract which was estimated to amount to 31 million yen (R 201,202,203). Miss Sumi Okuda went to the accused's office to see about the procurement demands. The accused said, "I will think about it" (R 209,210). On 18 February 1947, Nishiura Shozo gave Sumi Okuda a brooch, four rings, and an unmounted diamond and instructed her to deliver them to the accused as a Christmas present and to say, "I am sorry the present was brought here late, but it took me sometime to acquire these presents" (R 204,213). On 20 February 1947, Miss Okuda delivered

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this jewelry to the accused. She also delivered Mr. Nishiura's messages which included a request for similar work when this project was finished. The accused replied, "If the work is done well, I will try my best to give you more work" (R 214,215). It was stipulated that on 18 February 1947 the accused received from Sumi Okuda four rings, one of which was a diamond ring, a brooch and an unmounted diamond. This jewelry was introduced as: a diamond ring as Prosecution Exhibit 23, three sapphire rings as Exhibits 24, 25 and 26, a brooch as Exhibit 27, and the unmounted diamond as Exhibit 28 (R 53,54). Prosecution Exhibit 23 was valued at 80,000 yen, Exhibits 24 to 27, inclusive, each at between 300 and 500 yen, and Exhibit 28 between 60,000 and 70,000 yen (R 227,228).

It was stipulated that on 6 March 1947 the accused had on his person \$406.00 lawful currency of the United States (R 56, Pros Ex 30). It was also stipulated that the accused arrived in Japan about 6 October 1945 and that on 6 March 1947 he was not on orders to depart from Japan (R 57, Pros Ex 31). The court took judicial notice of Circular No. 3, General Headquarters Far East Command, 10 January 1947 (R 14, Pros Ex 4). This circular provides that as of 30 September 1946 United States personnel in Japan (except in certain instances not applicable to accused) are prohibited from possessing or using United States currency. The circular permits finance offices to exchange United States currency for the military payment certificates used in the area for personnel under orders to leave the area but in an amount not exceeding \$150.00.

5. For the Defense

Iesaka Ki was called as a witness for the defense and testified that Mr. Duus suggested the giving of the money as a present. The suggestion was made in Japanese. The accused was in the room at the time. He knew Mr. Duus was working for the Military Government. Mr. Duus did not state the names of the individuals who would receive the money (R 235,236).

Iida Toyomatsu testified that he personally furnished the money to buy the pearls and camera mentioned in Specifications 5 and 6 (R 236).

Sanada Tameichi, an employee of the Japanese Government, testified that the Japanese Government had received between 1800 and 2000 procurement demands. These demands originate with the Military Government and are signed by the procurement officer. The "suggest source" space on the procurement demand is used to suggest the name of the most efficient or convenient person or firm to fulfill the demand. The Imperial Japanese Government decides what firm will receive the contract but if there is no objection to the suggested firm that firm usually receives the contract (R 238-242).

It was stipulated that during the period of 1 March 1946 to 6 March 1947 the Hiroshima Military Government Team received procurement demands

from the British Commonwealth Occupation Forces Headquarters and transmitted them to the Japanese Government. The suggested source and number of demands are as follows:

<u>Suggested Contractor</u>	<u>No. of Procurement Demands</u>
Masuoka Gumi	15
Tomijima Gumi	5
Matsumoto Gumi	1
Mizuno Gumi	4
Matsumura Gumi	7
Onogi Gumi	6
Nishiura Gumi	1
Toda Gumi	1

(R 242).

Sachiko Yoshino, chief clerk of the Procurement Section, Hiroshima Military Government Team, testified that there were 2544 procurement demands on file in the office. She produced all procurement demands on file which were related to construction work by Masuoka Gumi, Matsumura Gumi, Onogi Gumi, Nishiura Gumi and Tomijima Gumi. Procurement demand No. 1298 was received from the BCOF engineers. The suggest source was originally typed as "no suitable firm known." The name "Masuoka" is written thereon in pencil. Procurement demand No. 2255 was forwarded without the name of a company as a suggested source. The witness called the liaison office and obtained the name "Masuoka Gumi" from Mr. Myajima and she then filled in the name of the company as the suggested source. Procurement demand 2298 dated 20 November 1946 was typed in their office and the suggested source was Masuoka Gumi. Procurement demand 772B dated 6 February 1947 was requested by Lieutenant Colonel Springer, commanding officer Hiroshima Military Government Team, and the suggested source was Masuoka Gumi. Procurement demand 1904 dated 12 October 1946 was typed in the office and the suggested source was Matsumoto Gumi. The name "Onogi Gumi" was first typed on the demand but was crossed out and Matsumoto Gumi written thereon in ink. Procurement demand 2361 dated 28 December 1946 was received from Colonel McGowan of the BCOF Engineers, the suggested source being Mizuno Gumi. Procurement demand 2281 dated 20 November 1946 was typed in the office and Onogi Gumi was the suggested source. The work demand came from the BCOF Engineers (R 243-256).

Squadron Leader Francis W. Barnes, BCOF Engineers, testified that formal requests for work were submitted to their office and when approved they were sent to the Military Government Team. Some work demands were forwarded without a suggested source. When that happened the Military Government Team usually telephoned for instructions as to the suggested source. He knew of no occasion when accused changed a suggested source of his own volition. The work demand, accompanying Procurement demand 1298, has Masuoka Gumi as the suggested source and witness personally filled in

the name of the company. The work demand accompanying Procurement demand 1904 originally designated Onogi Gumi as the suggested source. The suggested source was changed to Matsumoto Gumi by the witness acting on orders from his chief engineer, Colonel McGowan. Procurement demand 2361 relates to repair work necessitated by an earthquake and was submitted on 27 December 1946 after radio approval from the Eighth Army. The suggested source was Mizuno Gumi. The work demand accompanying Procurement demand 2281 originated in his office and the suggested source was Onogi Gumi (R 256-262). It was stipulated that if Lieutenant Colonel Karl L. Springer were present in court he would testify that on procurement demand 772-B he ordered that the suggested source be entered as it now appears on the official files (R 263).

A certified true copy of the accused's 66-1 card was introduced in evidence as Defense Exhibit 62. This card shows the various personal data relative to the accused and his duty assignments. His efficiency ratings are "Excellent" or "Superior" (R 65).

A certified true copy of a citation for meritorious service in Japan from 8 October 1945 to 13 May 1946 issued by Headquarters, Eighth Army was introduced as Defense Exhibit No. 63. This citation authorizes the accused to wear the Army Commendation Ribbon (R 265).

A certified true copy of a "letter of commendation" from the British Commonwealth Forces dated 27 April 1946 was introduced in evidence as Defense Exhibit 64. This letter commends the accused's service to the British Commonwealth Occupation Forces during the period 1 February 1946 to 25 April 1946 (R 265).

5. Specifications 1 to 4, 7 to 10, and 12

Section 113 of the United States Criminal Code (18 USC 203) provides:

"Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than \$10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of

honor, trust, or profit under the Government of the United States.

"Retired officers of the Army, Navy, Marine Corps, and Coast Guard of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section: Provided, That nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status."

The language of this statute is very broad. It not only prohibits persons in the employ of the United States from accepting compensation for services rendered by way of advocacy "before any department, court martial, bureau, officer, or any civil, military or naval commission" but it also prohibits such employees from accepting compensation for services relating to any matter in which the United States is interested which matter is pending "before any department, court martial, bureau, officer, or any civil, military, or naval commission." It is well settled that the provisions of the above section of the criminal code apply to all persons in the employ of the United States regardless of their position and includes Army officers (United States v. Olster et al, 15 Fed Suppl 625; McMullen v. United States, 96 Fed (2d) 574; United States v. Long, 184 Fed 184; United States v. Booth, 148 Fed 112).

The undisputed evidence discloses that the accused was the procurement officer for the Hiroshima Military Government Team. It was a part of his duties to process procurement demands for supplies, equipment and other things required for the use of the occupation forces in Japan. These demands were made upon the Japanese Government. Each demand usually contained the name of a company which was considered capable of furnishing the supplies or performing the required work. A number of the procurement demands called for the construction or alteration of buildings. After a demand was made upon the Japanese Government the Japanese Government would then make a contract with some person or firm, usually the one suggested on the procurement demand, for the required supplies or work. Thereafter and during the fulfillment of the contract the accused's duties required him to see that the contracts were being properly carried out, to locate necessary material, and to issue receipts and releases when work was complete. Numerous contracts were made for construction work. Either before the contracts were made or after the work had commenced under the contracts the accused received money and/or jewelry from the persons and firms as alleged in Specifications 1,2,3,4,7,8,9,10 and 12. The persons delivering these articles testified that they were given for past favors and/or for future favors and because the accused could cause them trouble when they were late in completing a project. The evidence also shows that officers in the British Commonwealth Occupation Forces also received money and jewelry at the same time the accused received money or jewelry. The evidence does not show any specific favors on the part of the accused on behalf of the firms giving the money or jewelry. This fact will not absolve

the accused. The evidence shows the gifts were made for past or future favors relating to contracts and that the accused had official duties to perform relating to these contracts.

The United States is one of the powers concerned with the military occupation of Japan. In this capacity it established military government teams and assigned them to various stations throughout Japan. The Hiroshima Military Government Team worked with the British Commonwealth Occupation Forces at Kure, Japan. The furnishing of supplies or buildings for the occupation troops regardless of nationality is a proceeding in which the United States is interested. This interest is further demonstrated by the fact that the United States Occupation Forces processed the procurement demands and later approved or disapproved the actions of the Japanese in furnishing supplies or construction work.

The receiving of money and jewelry by the accused in the manner shown by the evidence is a violation of section 113 of the United States Criminal Code, set forth above and is also contrary to Army Regulations 600-10, 8 July 1944, Changes 4, 17 September 1946, which provides:

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

"(a) It is impossible to enumerate all the various outside activities and interests to which these regulations refer. The following examples may be regarded as typical:

1. (As changed by C 3, 16 Aug 46) Acceptance by an officer, or, with the approval of the officer, by a member of his immediate family of a substantial loan or gift or any emolument from a person or firm with whom it is the officer's duty as an agent of the Government to carry on negotiations."

The acceptance of gifts by an Army officer from persons with whom he transacts Government business has on numerous occasions been held to be a violation of Article of War 96 (CM 235011, Goodman, 21 BR 243; CM 234644, Cayotte, 21 BR 97; CM 267639, Tressler, 44 BR 27; CM 307417, Ruf, 30 BR (ETO) 13; CM 304586, MacDowell, 32 BR (ETO) 1).

Specifications 5 and 6

In each of these specifications the accused was charged with wrongfully and unlawfully asking, accepting, and receiving certain property from Matsumura Gumi, a contracting company. The court by exceptions and substitutions found the accused guilty of wrongfully and unlawfully accepting and receiving the described property from Toyomatsu Iida.

A court-martial may in its findings as to the specifications except one or more words, and where necessary substitute other words, provided the facts as so found constitute an offense by the accused which is punishable by the court and provided such action does not change the nature or identity of any offense charged in the specification as originally drafted or increase the amount of punishment that might be imposed for any such offense. When the evidence fails to prove the offense charged but does prove a lesser offense necessarily included in the one charged the court-martial may by appropriate exceptions and substitutions find the accused guilty of the lesser included offense (par 78c, MCM, 1928). It has been held in larceny cases that where an accused has been charged with the larceny of property from A and the court by exceptions and substitutions found the property to belong to B the variance was a change in the nature of the offense and fatal to a conviction (CM 193191, Hosmer, 2 BR 77, and cases cited therein).

The finding of the court in reference to Specifications 5 and 6 constitutes a change in the identity of the offense charged and does not constitute a lesser offense necessarily charged therein. The Board of Review is therefore of the opinion that the findings of guilty of these specifications cannot be sustained.

Specification 13

The evidence concerning this specification shows that on 6 March 1947 the accused had in his possession \$406.00 lawful money of the United States and that the possession of this money was in violation of Circular 3 Far East Command dated 10 January 1947. The violation of circulars issued by proper authority has long been held to be a violation of Article of War 96 (CM 318858, Fisher).

Miscellaneous

The reviewing authority approved the findings of guilty of Specification 12 except the words "total value about \$670.00" substituting therefor the words "of a substantial value." The competent evidence established the value of the property to be between 141200 yen and 152000 yen or a total value of between \$9411.00 and \$10,111.00. The action of the reviewing authority in changing the value from \$670.00 as found by the court to a substantial value could not prejudice the rights of the accused.

It is noted that the charges upon which the accused was arraigned were sworn to on 3 June 1947 and referred for trial on 4 June 1947. The papers accompanying the record of trial disclose that originally charges were sworn to on 21 April 1947 and referred to an investigating officer on that day. These charges were drawn so that they would fall within the provisions of section 207, Title 18, U.S.C. The investigating officer made his report on 30 April 1947. The charges were thereafter redrawn so that they would fall within the provisions of section 203, Title 18, U.S.C. The charges upon which accused was tried therefore set forth a different legal conclusion from the ones originally preferred but all offenses were based upon the facts already brought to light by the investigation. Under the circumstances we believe that a new investigation would have been futile and that there was a substantial compliance with the provisions of Article of War 70 (CM 319858, Correlle).

6. Records of the Department of the Army show the accused to be 44-2/12 years of age and single. He attended high school for two years but did not graduate. Prior to his entry into the Army he was employed for two years as Superintendent of Public Works at Stamford, Connecticut, and for 13-7/12 years as secretary-manager of an automobile sales agency. From 30 August 1920 to 31 August 1922 he served in the United States Navy with the grade of Yeoman 3rd Class. On 12 May 1942 he was appointed and commissioned a temporary first lieutenant, Air Corps, Army of the United States. On 9 March 1943 he was promoted to captain and on 15 February 1944 he was promoted to major. His efficiency records are "Excellent" and "Superior."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted herein 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 insufficient to support the findings of guilty of Specifications 5 and 6, but legally sufficient to support the findings of guilty of Specifications 1,2,3,4,7,8,9,10,12 and 13 and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96 and confinement in a penitentiary or other Federal correctional institution is authorized upon a conviction of an officer of the United States for an offense denounced by section 203, Title 18, United States Code.

Christie E. Silvers Judge Advocate

Charles E. McAfee, Judge Advocate

Gilbert B. Johnson, Judge Advocate

JAGK - CM 325040

1st Ind

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

NOV 1 1945

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 Major Frank A. Kotches (O-905315), Air Corps.

2. Upon trial by general court-martial accused was found guilty of receiving compensation on twelve different occasions for services rendered or to be rendered to Japanese contracting companies doing business with the occupation forces in matters in which the United States is interested (Specs 1-12). He was also found guilty of possession of United States money in excess of that allowed by theater directives (Spec 13). All specifications were found to be in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct for three years. The reviewing authority disapproved the finding of guilty of Specification 11 and approved the finding of guilty of Specification 12 except the words "total value \$670.00" substituting therefor the words "of a substantial value" approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the findings of guilty as to Specifications 5 and 6 but legally sufficient to support the finding of guilty of all other specifications as approved by the reviewing authority and the sentence and to warrant confirmation thereof.

From 1 March 1946 to 6 March 1947 the accused was on duty in Japan with the military government. During most of this time he was a procurement officer. He submitted procurement demands to the Japanese government for services to be rendered to the occupying forces. He also followed up these demands, issued receipts and releases relative to supplies received or work performed by the Japanese contractors. During this time on the dates alleged in the specifications numerous Japanese contracting companies delivered to the accused money and/or jewelry for past favors and for favors to be performed relative to the contracts made with them by the Japanese government on behalf of the occupying forces. The accused received jewelry valued in excess of \$3683.00 and Japanese yen amounting to \$5999.00.

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Specifications 5 and 6 require disapproval because the court found that the person giving the items of property described in these specifications was a different person than the one alleged in the original specifications. There was therefore a finding of guilty as to each specification of an offense not originally charged and not a lesser offense necessarily included in the original charge.

4. Accused is 44-2/12 years of age and single. Prior to his entry into the service he was Superintendent of Public Works at Stamford, Connecticut for two years, and secretary-manager of an automobile sales agency for 13-7/12 years. He served two years in the United States Navy as a yeoman 3rd class. His Navy service began on 30 August 1920. On 12 May 1942 he was appointed and commissioned a first lieutenant, AUS. He was promoted to captain on 9 March 1943 and to major on 15 February 1944. His efficiency reports are "Excellent" and "Superior."

5. Consideration has been given to a letter from Walter B. Scott, Fort Worth, Texas, addressed to Honorable Robert P. Patterson, Secretary of the Army, and a letter from Miss Emma M. Wecke, Darien, Connecticut, addressed to Senator Brien McMahon and forwarded by him to The Adjutant General. On 14 October 1947 Mr. Thomas J. Ryle and Sidney C. Perell, attorneys of Stamford, Connecticut, appeared before the Board of Review and argued the case on behalf of the accused.

6. I recommend that the findings of guilty of Specifications 5 and 6 be disapproved, that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

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

CM 325,040

2 Incls

1. Record of trial
2. Form of action



THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 50, 19 Nov. 1947).

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

JAGQ - CM 325046

SEP 18 1947

U N I T E D S T A T E S

7TH INFANTRY DIVISION

v.

Private First Class WILLIAM
 C. WELLER (RA 18259517),
 Company "F", 32d Infantry.

Trial by G.C.M., convened at
 Seoul, Korea, 15 July 1947.
 Dishonorable discharge and
 confinement for ten (10) years.
 Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
 JOHNSON, SCHENKEN and KANE, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class William C. Weller, Company "F", 32nd Infantry, did, at Yonan, Korea, on or about 5 June 1947, aid and abet Private William D. Barnes in the unlawful killing of one Sergeant Clarence A. Urbanski, a human being.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for life. The reviewing authority approved the finding of guilty of the Specification and so much of the Charge as involves a finding of guilty of a violation of Article of War 93; approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due

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and confinement at hard labor for a period of ten years, and forwarded the record of trial for action under Article of War 50½.

3. The Specification in this case alleges that accused "did * * * aid and abet * * * in the unlawful killing * * *" of Sergeant Urbanski. The court imposed a sentence including life imprisonment and the reviewing authority reduced the confinement to ten years which is the maximum confinement authorized for voluntary manslaughter. The question to be considered is whether the Specification supports a sentence for voluntary manslaughter.

Manslaughter is defined in par. 149a, MCM, as follows:

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.

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

The difference in the two types of manslaughter is emphasized in the Table of Maximum Punishments, Par 104c, MCM, which provides for confinement for ten years for voluntary manslaughter and three years for involuntary manslaughter. Appendix 4, MCM, sets forth only a single Specification for manslaughter (Form 88, p. 249) which reads as follows:

"In that * * * did at * * * on or about * * *, willfully, feloniously and unlawfully kill * * *, by * * * him (in) (on) the * * * with a * * *."

It is obvious that this form includes all of the elements of voluntary manslaughter and further, that the word "willfully" should be omitted from an involuntary manslaughter charge. Several Board of Review cases have held that this word should be excepted by a court on finding an accused guilty of involuntary manslaughter only (CM 202359 Turner 6 ER 87; CM 217590 Lamb 11 ER 275).

On the other hand the Board of Review has found only one case involving the requisite wording in a Specification charging voluntary manslaughter. In that case, CM 4993 Key 14 ER ETO 33, the Specification charged the accused with "willfully, feloniously and unlawfully" killing a certain person. The court in its findings eliminated the word "willfully." The Board held that the omission of the word "willfully" did not affect the substantial rights of the accused and upheld a sentence imposed for voluntary manslaughter.

Par. 87b, Manual for Courts-Martial, 1928, provides in pertinent part:

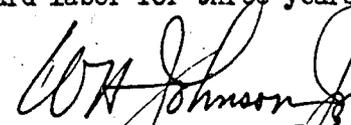
"No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby."

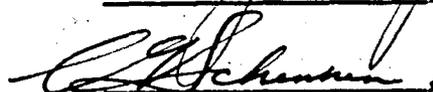
In the instant case however we do not have a "defective" specification. The specification as drawn charges the accused with the offense of involuntary manslaughter. While the evidence may have been sufficient to prove a homicide of a greater degree the above quoted portion of the Manual for Courts-Martial does not permit a finding of a greater offense when only the lesser offense is adequately charged.

In view of the sharp disparity in the period of confinement which may be imposed for the two offenses, voluntary and involuntary manslaughter, the accused is entitled as a matter of right to know prior to trial the degree of the unlawful killing with which he is charged. This can only be accomplished by alleging words of wilfulness or intention when voluntary manslaughter is charged and omitting such words when involuntary manslaughter is charged. To follow the doctrine that such words are not necessary, and allow the evidence to determine the degree of the offense, would deprive an accused of the opportunity to prepare adequately and intelligently his defense.

The Board of Review holds therefore, that the words "willfull" or "intentional" are an integral and necessary part of a specification or finding of voluntary manslaughter. A specification alleging an "unlawful killing" and failing to allege words of wilfulness, or intention to kill, constitutes a specification alleging involuntary manslaughter only. Such is the situation in the instant case. For the reasons stated, that portion of the Key case, supra, which holds that the word "wilfully" need not be used in a specification alleging voluntary manslaughter is overruled and should no longer be followed.

4. The Board of Review holds that the record of trial is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years.


 W. A. Johnson, Judge Advocate


 C. J. Schuman, Judge Advocate


 A. D. Kane, Judge Advocate

(66)

JAGW - CM 325046

1st Ind

OCT 8 1947

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

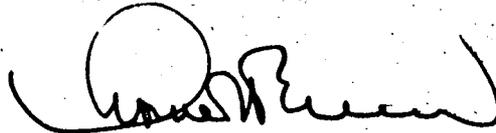
TO: Commanding General, 7th Infantry Division, APO 7, c/o Postmaster,
San Francisco, California.

1. In the case of Private First Class William C. Weller (RA 18259517), Company "F", 32d Infantry, attention is invited to the foregoing holding by the Board of Review in which I concur. It is recommended that only so much of the sentence be approved as provides for dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for three years. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 325046)

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.

(67)

JAGK - CM 325056

5 JAN 1948

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters
PHILRYCOM, APO 707, 25 June 1947. Dis-
honorable discharge (suspended) and
confinement for six months. Stockade.

Private ALFREDO BALUCANAG)
(10309499), "C" Company, 57th)
Infantry Regiment, Philippine)
Scouts)

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

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

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

CHARGE: Violation of the 84th Article of War.

Specification 1: In that Private Alfredo Balucanag, Company "C" 57th Infantry Regiment (Philippine Scouts), APO 1009, on or about 21 March 1947, unlawfully sell to unknown persons one (1) wheel assemblies, motor vehicle $2\frac{1}{2}$ ton 6x6, of a value of about \$42.33 each, and each consisting of one (1) tire, 7.50 x 20, one inner tube, 7.50 x 20, and two (2) rims, of a total value of about \$42.33, issued for use in the military service of the United States.

Specification 2: (Finding of not guilty).

He pleaded not guilty to the charge and its specifications. He was found guilty of Specification 1, not guilty of Specification 2, and guilty of the charge. 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 six months. The reviewing authority approved the sentence and ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the General Prisoners' Branch.

PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 186, Headquarters, Philippines-Ryukyus Command, APO 707, 7 August 1947.

3. Evidence

On or about 21 March 1947, the official in charge of the vehicle pool at Camp Batangas noticed that some 2-1/2 ton 6x6 wheel assemblies were missing from the pool (R 7,9). Accused, after having been interrogated by criminal investigation agents during the course of an investigation into "thefts" of wheel assemblies from the pool, signed a written pre-trial statement in which he admitted that:

"*** on 21 March 1947, I was assigned as roving patrol with Sgt. Hernandez and Pvt. Narciso. At about 2100 hours on this night, Sgt. Hernandez took the rifle from me while I picked up a 6x6 tire from the pile on Post #2, 'A' pool and rolled it towards the fence. Sgt. Hernandez then was following me. When I had rolled the tire to the fence, Sgt. Hernandez disposed of it to civilians whom I can not identify. Out of this sale, Sgt. Hernandez gave me P30.00, the selling price of the tire. I gave half of this amount (P15.00) to Narciso as his share."
(Pros Ex 1)

According to the criminal investigation agents, accused had been warned of his right not to incriminate himself at the beginning of the interrogation and no threats or promises were made to him. He had signed the statement voluntarily after he had read it and had indicated that he understood its contents. According to accused, who testified in his own behalf, the statement had been folded in such a manner at the time he signed it that only the part where he was to place his signature was visible. He had not read the statement nor had anyone read it to him and he signed it only because he had been told that if he signed it he could go back to his company. He did not see any tires or wheels "being moved" while he was on guard at the vehicle pool on the night of 21 March. The written statement was received in evidence as Prosecution Exhibit 1 (R 9-12, 17-23, 35-38; Pros Ex 1).

Private Narciso had also been interrogated by criminal investigation agents and, if their testimony is to be believed, had voluntarily signed a pre-trial statement referred to during the trial as "Prosecution Exhibit 3 for identification." One of the agents taking part in this interrogation testified, without objection being interposed by the defense, that Private Narciso had "implicated Pvt Balucanag just as it has been stated in the statement by Pvt Balucanag himself." According to another agent, accused had been present during the interrogation of Private Narciso. Nothing appears in the record of trial to indicate that accused, at the time Private Narciso "implicated" him, did anything other

than remain silent. Private Narciso had made the statements in question on 26 March 1947 and accused's written pre-trial statement is dated 28 March. Private Narciso testified, as a witness for the prosecution, that he had not signed Prosecution Exhibit 3 for identification and that he had never seen that document before. He replied in the negative to the following question propounded to him by the trial judge advocates:

"On 26 March 1947, did you make the following statement:
'At about 1900 hours I saw Sgt Hernandez took the rifle of Balucanag. Then I noticed Balucanag rolling one tire near the "A" Pool fence slipped it through it and sold it to some civilians. I could not identify. Then Sgt Hernandez received the money from these civilians the cost of the tires which he and Balucanag sold. I know that the tires cost ₱20.00 because Sgt Hernandez and Pfc Balucanag told. Out of this ₱20.00, Sgt Hernandez gave Pfc Balucanag ₱10.00, and in turn Balucanag gave me ₱5.00, as my share and part in the deal?' Did you make that statement?" (R 26)

Private Narciso further testified that he had been on roving patrol at "A" Pool on the night of 21 March 1947, but he did not "notice" the sale of tires in which Sergeant Hernandez and accused allegedly participated nor did he receive five pesos that night.

Although it does not appear that Prosecution Exhibit 3 for Identification was ever formally offered or received in evidence as an exhibit, this document was inserted in the record of trial proper as Prosecution Exhibit 3. It contains the statement to which the trial judge advocate referred in the question quoted above and the further assertion that the unlawful sale of the tire therein related took place on 21 March 1947 while Private Narciso and accused were on roving patrol at the vehicle pool (R 15,16,18, 19,24-27; Pros Exs 1,3).

4. Discussion

In the recent case of CM 325377, Sipalay, and again in CM 325378, Catubig, both companion cases to the one at bar, the Board of Review had occasion to point out that a showing, aliunde the pre-trial statement of accused therein, of the mere circumstance that 2-1/2 ton, 6x6, wheel assemblies were missing from the Camp Batangas vehicle pool on or about the date of the alleged unlawful sale by such accused of wheel assemblies of a similar type and kind was not a sufficient corroboration of his extrajudicial confession of guilt of such alleged offense. It was held, in each case, that, in order to support a conviction of an offense for which an accused has been brought to trial and to which he has confessed, there must be adduced, by way of corroboration of the confession, substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde the confession that the particular offense in question had probably been committed. In the Sipalay case, it was said:

"*** Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the 'black market.' But this is guess work, for there are other and equal possibilities as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F (2d) 769, 773).
***"

Consequently, if the conviction in the instant case is to be sustained, we must look for a greater degree of corroboration of the confession of this accused than is afforded by the showing that some 2-1/2 ton, 6x6, wheel assemblies were missing from the vehicle pool on or about 21 March 1947.

Having arrived at this point in our discussion, the query is at once presented as to whether the statement of Private Narciso to the criminal investigation agent, as related by the agent on the witness stand, implicating accused "just as it has been stated in the statement by Pvt Balucanag himself" and the written pre-trial statement of Private Narciso to the same effect, appearing in the record as Prosecution Exhibit 3, may be considered as substantive evidence establishing the probability that an unlawful sale of a 2-1/2 ton, 6x6, tire had in fact taken place on the night of 21 March and thus sufficiently corroborating accused's confession. We shall not linger to comment upon the ancillary question as to whether Prosecution Exhibit 3 was ever properly introduced or received in evidence, nor shall we here set forth the rules governing the admissibility of and denying substantive effect to evidence which is offered merely by way of impeachment of a witness, if, indeed, the extrajudicial statements of Private Narciso were employed solely to impeach his testimony on the witness stand (see CM 323083, Davis).

According to the pre-trial statements of Private Narciso, he was an aider and abettor to an unlawful sale by accused of a tire on the night of 21 March. It is a general rule of law that the extrajudicial admissions and confessions of a purported accomplice, made after the termination of the common act or design and not in furtherance thereof and not uttered in the presence of accused under circumstances wherein a failure to make a prompt denial might be construed an admission on his part, are inadmissible "against" accused and this is so whether or not the accomplice is himself in court as an accused person (par 114c, MCM 1928; CM 275792, Blair, 48 BR 151,153; CM 287995, Nichols, 29 BR (ETO) 67,71). This rule is based on the theory that such admissions of the accomplice are not admissions of accused and thus may not be used to establish that accused was a participant in the offense concerning which his alleged cohort has made incriminatory statements. Although the statements of Private Narciso which were so damning to accused were apparently made in accused's presence during the course of an investigation by criminal investigation agents into the activities of both men, accused, being obviously in custody at the time, had the right to remain silent and his failure to repudiate such statements could not, under these circumstances, be considered a tacit admission by him of the truth thereof (CM 270871, Shirley, 45 BR 351,355).

Having in mind, however, that the corpus delicti does not include the agency of accused as the criminal and that such agency need not be evidenced independently of his confession (Forte v. United States, 94 F (2d) 236), the question remains whether an extrajudicial statement of a purported accomplice, not made under such circumstances that it would amount to an admission by accused himself, may nevertheless be employed, wholly apart from those portions thereof tending to implicate accused, to establish the corpus delicti or the probability of its occurrence. There is a considerable body of authority indicating that it may be so employed. It has, for example, been widely held that in a prosecution for aiding and abetting another in the commission of a crime or in a prosecution for committing the crime itself where aiders and abettors are held responsible as principals, any evidence may be adduced against the abettor which would be admissible upon the trial of the principal to establish the guilt of the latter, including the conviction of the principal and his extrajudicial confessions and admissions even though made after the termination of the joint enterprise and when the abettor was not present, or, if present, was under no duty to utter a denial (State v. Lyda, 129 Wash 298, 225 P 55; Watkins v. State, 199 Ga 81, 33 S E (2d) 325, 330; State v. Bowers, 108 Kans 161, 194 F 650; Commonwealth v. Dennery, 259 Pa 223, 102 A 874; Wigmore on Evidence (3rd Ed) s. 1079 (c); 22 C J S p. 1331, 1333). It has also been held that the guilt of the thief may be likewise established in a prosecution for receiving stolen property (53 C J p. 530 and cases there cited; contra, Kirby v. United States, 174 U S 47,55). We, however, find ourselves unable to follow this line of decision insofar as it sanctions the reception in evidence, with respect to the particular accused

whose guilt or innocence is in issue and for the purpose of proving the commission of the offense charged, of the out of court statements, not attributable to accused, of another or such other's conviction. We have adopted this view because of our belief that the admission of such evidence as substantive proof against an accused, even though the third person from whom it emanates is a purported accomplice and whether or not he is brought to trial with accused, constitutes an unwarranted denial of the right of confrontation (Kirby v. United States, supra; State v. Hester, 137 S C 145, 134 S E 885, 899; Const. Amend. 6; par. 111, 113, 119c, MCM, 1928).

The right of confrontation is an ancient right, a rule of evidence which existed in Anglo-Saxon jurisprudence before the adoption of the Sixth Amendment to the Constitution. As embodied in that Amendment, and in the constitutions of the various states, it is not to be taken as an absolute prohibition against any evidence which does not come from the mouth of a living witness on the stand and under oath, but is subject to the general exceptions to the hearsay rule which were recognized before and at the time of its enshrinement in constitutional provisions in this country and which have since come into being due to various statutory extensions of these exceptions (Salinger v. United States, 272 U S 542, 548; Commonwealth v. Gallo, 275 Mass 320, 175 N E 718, 722; United States v. Leathers, 135 F (2d) 507 - 28 U S C 695 held a constitutional statutory extension of common law shop book rule). A perusal of the English cases cited in Kirby v. United States, supra, will indicate that the type evidence here under discussion was not and is not one of these exceptions.

It has been rather loosely said that the sole reason for surrounding an accused with the protection of the right of confrontation is to insure to him the opportunity to cross-examine the witnesses against him, from which it might be argued that the pre-trial statements of Private Narciso were properly admitted in evidence herein for the reason that Private Narciso took the witness stand and thus became subject to cross-examination. Nothing could better illustrate the fallacy of such a contention than the very events which transpired during the trial of this case, for Private Narciso categorically denied, from the witness stand, that he had ever made the extrajudicial statements in question. Certainly, it would be most unjust to allow these repudiated statements to stand as evidence subject to being accepted by the court as proof of the corpus delicti should the court disbelieve Private Narciso's testimony in denial. We might here add that much the same situation would have existed had Private Narciso, while on the witness stand, admitted making the statements in question but had denied ^{or had not affirmed} the truth thereof (Ellis v. United States, 138 F (2d) 612, 616). It follows that the right of confrontation, subject to the exceptions to which we have referred above, must be afforded to accused at the time the incriminatory statements are made in open court. It is not sufficient that accused have the opportunity to cross-examine the witness

concerning damaging assertions, received as substantive evidence, which such witness may have made out of court or, again having in mind certain exceptions not here material, that there was an opportunity for cross-examination out of court at the time such assertions were made (United States v. Douglas, 155 F (2d) 894 - affidavits of accusers, attached to information, held improperly submitted to jury even though one of these accusers was called as a witness). Although the right of confrontation may be waived or, more properly speaking, forfeited by an act of accused, such as where after arraignment and during the trial he escapes or, the case not being a capital one, otherwise voluntarily absents himself while being aware in either instance that his trial is about to continue (par 10, 55, MCM 1928; CM'209900, Benjamin, 9 BR 149; Diaz v. United States, 223 U.S. 442, 455), nevertheless, hearsay evidence of the type here under consideration does not, in military practice, gain substantive effect merely because accused has failed to object to its reception (par 113a, 126c, MCM, 1928; CM 325457, McKinster; see for contrary civil rule, Spiller v. Atchison Ry. Co., 253 U.S. 117, 130; United States v. Homestake Mining Company, 117 F. 481, 489).

However, casting aside for the moment all consideration of the right of confrontation and assuming, without deciding, that the court, having in mind the fact that accused's confession was dated 28 March, may have been warranted in assuming that accused acquiesced in the incriminatory statements made in his presence by Private Narciso on 26 March, thus making these statements admissible against him on familiar principles, we are of the opinion that accused's conviction herein should still be set aside. As we have seen, if the statements of Private Narciso are admissible as substantive evidence against accused at all, they gain such evidentiary status only because of a showing that accused had, tacitly or otherwise, adopted them as his own so that they would thus become accused's own verbal admissions. An accused cannot be legally convicted upon his uncorroborated extrajudicial admission, where such admission is merely verbal in nature and is made after the crime, any more than he can upon his uncorroborated confession made out of court (CM 301983, Young, 19 BR (ETO) 105, 126) and it is clear that an accused's confession or admission is not sufficiently corroborated by other confessions or admissions made by him (CM 319501, Gilbert). In short, we fail to find in the instant record of trial competent and substantial evidence, existing independently and apart from accused's confession and from his admissions, if it be assumed he made such, tending to establish that the offense alleged had probably been committed.

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 S. Gilbert, Judge Advocate
Carlos E. McAfee, Judge Advocate
Gilbert S. Hayward, Judge Advocate

(74)

JAGK - CM 325056

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 15 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1947 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Alfredo Balucanag (10309499), "C" Company, 57th Infantry Regiment, Philippine Scouts.

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 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 46, (DA) 9 Feb 1948).

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

(75)

JAGH - CM 325075

10 October 1947

UNITED STATES)

EIGHTH ARMY

v.)

Trial by G.C.M., convened at
APO 343, 12 June 1947. Dis-
honorable discharge and con-
finement for life. Penitentiary.

Private LOUIS W. ROCKWELL
(RA 46001043), Attached Un-
assigned to Headquarters and
Headquarters Detachment, 14th
Replacement Battalion, 4th
Replacement Depot.)

REVIEW by 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.

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

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

Specification: In that Private Louis W. Rockwell, attached unassigned Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703, did, at or in the vicinity of Noda, Chiba Prefecture, Honshu, Japan on or about 17 February 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Moshie Watanabe, a human being by shooting her with a pistol.

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

Specification: In that Private Louis W. Rockwell, attached unassigned Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703, did, at Troop "B", 8th Cavalry Regiment, APO 201, Tokyo, Japan, on or about 16 February 1947, unlawfully enter the supply room of Troop "B", 8th Cavalry Regiment, APO 201, with intent to commit a criminal offense, to wit, Larceny therein.

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

Specification: In that Private Louis W. Rockwell, attached unassigned Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703,

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did, at Troop "B", 8th Cavalry Regiment, APO 201, Tokyo, Japan, on or about 16 February 1947, feloniously take, steal and carry away one pistol, of the value of about \$40.00 property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be 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 for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Eighth Army Judge Advocate, dated 19 July 1947.

4. 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 sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 273 and 275, Criminal Code of the United States (18 U.S.C. 452, 454). Where part of the whole sentence is punishable by confinement in a penitentiary, the whole sentence may be served therein (AW 42).

R. H. Stein, Judge Advocate

R. M. ..., Judge Advocate

J. W. Lynch, Judge Advocate

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

(77)

JACK - CM 325090

21 OCT 1947

UNITED STATES)

EIGHTH ARMY

v.)

Private BERT E. HALL, JR.)
(RA 13227433), and Private)
First Class JOHN D. GRAY)
(RA 13227427), both of)
Headquarters Company, 1190th)
Engineer Base Depot)

Trial by G.C.M., convened at
APO 343, 1 and 3 July 1947.
Each: Dishonorable discharge
(Suspended) and confinement
for one (1) year. United
States Disciplinary Barracks.

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

1. The record of trial in the case of the soldiers named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty as to the accused Gray, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Bert E. Hall, Jr. and Private First Class John D. Gray, both of Headquarters Company, 1190th Engineer Base Depot, acting jointly, and in pursuance of a common intent, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 23 February 1947, feloniously take, steal and carry away a ring, value about Six Hundred Dollars (\$600.00), the property of Minosake Kondo.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence as to each accused, but suspended the execution of the dishonorable discharges until the accused were released from confinement and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas,

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as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 163, Headquarters Eighth Army, APO 343, 5 August 1947.

3. On 23 February 1947 the accused, Private Bert E. Hall, Jr. and Private First Class John D. Gray, were in the Tokindo Watch Shop, Yokohama, Japan. The manager of this shop was waiting on other customers at the time the accused entered the shop. Three other Japanese nationals were in the store at this time. The two accused were standing near a show case containing rings. This show case was unlocked. The glass top on this show case was broken and it was possible to move it about five centimeters. While the two accused were standing at this show case the people in the shop heard some noise which they thought was made by one of the accused when he placed a package on the show case. The accused left the store without making any purchases. Immediately after they left the store it was discovered that the glass covering the show case had been pushed back and a diamond ring was missing. There had been other customers in the shop on 23 February 1947 prior to time the accused entered the shop. (R. 7-9, 11). Yukiko Kondo, the wife of the owner of the store, testified that the diamond in the missing ring "was more or less square. It was a little yellowish and it had a black spot" (R. 10).

Minosuke Kondo, the owner of the Tokindo Watch Shop described the diamond in the missing ring as being "more or less oval and right in the middle was a black spot. He had paid 22000 yen for the ring and his selling price was 30,000 yen (R. 14).

This ring was returned to the owner by "an officer of the C.I.D. I am not sure of his name, but it sounded like Beligan." The ring was sold after its return (R.10).

Thomas C. Rowan, a CID agent, investigated a case involving the two accused. He was present when agent Craven searched a footlocker belonging to the accused Hall. In this footlocker they found a "gold ring with a small diamond set." The day following this search Agent Rowan turned this ring over to Lieutenant Verigan of the CID office (R. 16).

Chotaro Tsuchiya, a jeweler and watch maker, testified that on 2 May 1947 he appraised a diamond and found it to be worth 14,000 yen. This diamond weighed .7 of a carat. It was more or less square, yellow in appearance, and contained a spot of carbon in the center (R. 15).

4. The accused offered no evidence and after their rights as witnesses were explained they each elected to remain silent (R. 18).

5. Larceny is the taking and carrying away by trespass of personal property which the trespasser knows to belong either generally or specifically to another, with intent to deprive such owner permanently of his property therein (par. 149g, MCM).

To establish the offense of which each accused stands convicted it was necessary to prove by direct or circumstantial evidence the taking and carrying away of the ring as alleged. The proof may be either direct or circumstantial, but cannot rest upon mere suspicion or conjecture. Proof of a mere opportunity to commit a crime is not sufficient to establish guilt (CM 216004, Roberts, 11 BR 69, 71).

The evidence establishes that on 23 February 1947 a diamond ring was stolen from the Tokindo Watch Shop under circumstances which cast suspicion upon either one or both of the accused. It was shown that this ring was returned to the owner by a CID agent whose "name was believed to be Beligan." This ring was sold and it was impossible to produce it in court.

CID Agents Craven and Rowan searched a footlocker belonging to the accused Hall and found therein a diamond ring. This ring was delivered to CID Agent "Verigan." No one described this ring other than to say it was "a gold ring with a small diamond set." The evidence does not show when the search of Hall's footlocker was made. Likewise the record is silent as to the time the stolen ring was returned to the owner. If it could be assumed that agent "Beligan" and agent "Verigan" are one and the same person the record of trial is still insufficient to show that the stolen ring was the ring taken from Hall's footlocker. The CID agent who returned the stolen ring to the watch shop did not testify and there is no evidence to show how he came in possession of the ring he returned to the watch shop. The ring so returned may have been the one found in Hall's footlocker, however the record is silent on this point and the assumption that it was the same ring rests only upon a mere conjecture. The ring taken from Hall's footlocker was not described in detail and therefore the evidence is insufficient to warrant the assumption that the ring found in the footlocker was in fact the stolen ring. A detailed description of the ring might have coincided with the description of the stolen ring and thereby afforded a basis upon which the court could have based a finding that the rings were in fact one and the same ring.

It is not necessary in all cases involving theft of property to introduce the stolen property in evidence or display it to the court. The property may be of such a character that it is impossible to introduce it in evidence or it may have been consumed, burned, lost, discarded or as in this case sold. When the articles are not introduced in evidence they must be identified by other evidence so that the court can determine

beyond a reasonable doubt that the stolen articles were in fact the same articles found or known to have been in the possession of the accused (CM 202976, Baker, 6 HR 389,392).

The evidence in this case goes no further than to raise a mere suspicion that the two accused stole the ring from the Tokindo Watch Shop. The accused Hall was shown to have been in the possession of a diamond ring but the evidence wholly fails to show when this ring was found in his possession or that it was the ring stolen from the Tokindo Watch Shop. No evidence was introduced to show that the accused Gray ever possessed a diamond ring.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentences.

Robert D. Silver Judge Advocate

Charles E. McAfee Judge Advocate

Albert S. DeLong Judge Advocate

JAGK - CM 325090

1st Ind

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

TO: The Secretary of the Army

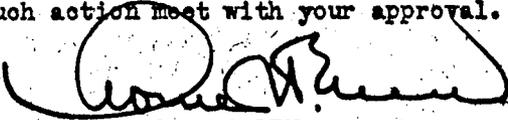
1. Herewith transmitted for your action under Article of War 50¹, as amended by the act of 20 August 1937 (50 Stat. 724, 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Bert E. Hall, Jr. (RA 13227433), and Private First Class John D. Gray (RA 13227427), both of Headquarters Company, 1190th Engineer Base Depot.

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 sentences and, for the reasons stated therein, recommend that the findings of guilty and the sentences be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentences 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 51, 19 Nov 1947).



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

(83)

JAGV - CM 325107

30 DEC 1947

UNITED STATES

U. S. CONSTABULARY

v.

Private JOHN W. SHATZER
(RA 33742249), Headquarters
Troop, 10th Constabulary
Regiment.

Trial by G.C.M., convened at
Stuttgart, Germany, 3 June
1947. Dishonorable discharge
and confinement for one (1)
year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, SPRINGSTON and LANNING, 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 84th Article of War.
(Disapproved by Reviewing Authority).
Specification: (Disapproved by Reviewing Authority).

CHARGE II: Violation of the 96th Article of War.
Specification 1: (Disapproved by Reviewing Authority).
Specification 2: (Finding of Not Guilty).
Specification 3: In that Private John W. Shatzer, Headquarters Troop, 10th Constabulary Regiment, did at Oberurbach, Germany, on or about 2400 hours, 19 March 1947 wrongfully enter an "Off Limits Place", to wit the Venereal Disease Hospital at Oberurbach.
Specification 4: In that Private John W. Shatzer, Headquarters Troop, 10th Constabulary Regiment, did between the dates 1 February 1947 to 18 March 1947 have carnal knowledge of a female under 16 years of age.

Accused pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specification, of Charge II and Specifications 1, 3 and 4 thereof, and not guilty of Specification 2 of Charge II. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances

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due or to become due and to be confined at hard labor for two years. The reviewing authority disapproved the findings of guilty of the Specification of Charge I and Specification 1 of Charge II, approved the "findings relative to the other Specifications of Charge II" and the sentence, reduced the period of confinement to one (1) year, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$.

3. Evidence adduced in support of Specifications 3 and 4 of Charge II, the only offenses left for consideration, shows that on the night of 19 March 1947, accused drove a jeep through the closed gate of the Venereal Disease Hospital, Oberurbach, Germany. The hospital had "off limits" signs in both the English and German languages on every entrance, each bearing the stamp of the military government from Waiblingen (R. 10).

Several times between January 1947 and March 7, 1947, accused had sexual intercourse with one Greta Guhr in her apartment. She was under sixteen years of age until September of 1947 (R. 14, 15). At the time the acts took place she had told accused she was sixteen (R. 15).

4. The accused, having been advised of his rights, elected to remain silent.

5. The evidence thus establishes that the accused wrongfully entered an "off limits" area, as charged in Specification 3 of Charge II, and also proves that accused had sexual intercourse several times with one Greta Guhr, a female under the age of sixteen years, as alleged in Specification 4 of Charge II. There is no doubt but that the Specification first mentioned alleges a military offense analogous to that of violation of standing orders and having a comparable maximum punishment. There is a serious doubt, however, as to whether or not the second specification charges an offense and it is with that question the Board of Review is presently concerned.

Specification 4 of Charge II alleges that the accused " * * * did between the dates 1 February 1947 to 18 March 1947 have carnal knowledge of a female under 16 years of age." Conceivably the intentment was to charge the offense commonly known as "statutory rape", or sexual intercourse committed with a female under the statutory age of consent, similar to that denounced by Congress for certain territories, districts, and places within the exclusive jurisdiction of the United States (Section 279 of the Federal Penal Code of 1910, 18 USCA Sec. 458), and in the District of Columbia (Sec. 22: 2801 District of Columbia Code, 1940 Ed.). The cited statutes are inapplicable to non-capital offenses purportedly committed in violation of public law as enforced by the civil power in Germany (Chapter XVII Sec. VI Par 446 MCM, 1921, p. 463; Par 152c, MCM, 1928; CM 211420, McDonald, 10 BR 61), other than possibly to determine the measure of punishment (AW 42; CM 322167, Jernigan, (August, 1947)).

Irrespective of whether the laws of this country, or German laws which might conceivably be recognized by an Army courts-martial denounce such conduct as an offense, it must be observed that the above specification fails to allege an offense. The language employed neither charges an act or acts which are "per se" offenses, nor contains words indicating that accused's conduct was "wrongful" or "unlawful." Notwithstanding an allegation that the female was under sixteen (16) years of age, no negation of a marital status appears in the specification, either expressly, or by reasonable inference in view of the omission of the female's name therefrom. When considered in the light of the generally accepted definition of carnal knowledge, viz: "The act of a man in having sexual bodily connection with a woman; sexual intercourse" (Black's Law Dictionary, Third Edition p. 282), the failure to deny such a status removes the wrong charged from the category of an act "per se" an offense. Manifestly, the specification contains no other words importing wrongdoing. Lacking the requisite language to charge an act "per se" an offense, and similarly lacking an allegation that the conduct was wrongful or unlawful, no offense was charged and the proof may not supply the legal deficiency (CM 226512, Lubow, 15 BR 105; CM 254704, Thompson, 35 BR 329, 339; CM 321667, Scholz (June 1947)). This rule has been clearly and concisely set forth in CM 254704, Thompson, supra, wherein the Board of Review stated:

"* * * where an act charged is not per se an offense, words such as 'wrongful,' 'unlawful' or the like must be used in the Specification to make it an offense CM 113535 and 130811, Dig Ops. JAG 1912-40, sec 451(8); CM 218409, 1 Bull JAG 18; CM 226512, 2 Bull JAG 17)."

In the application of the above principle to the instant case and reaching a conclusion consistent therewith, the Board of Review has not been unmindful of the following excerpt from paragraph 87b, Manual for Courts-Martial 1928, based upon the provisions of Article of War 37:

"* * * No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby."

Without considering the question of whether the accused was misled, defense counsel should, in view of the manifestly defective character of Specification 4, have moved to strike or to have otherwise objected to the same (pars. 71a, 73, MCM 1928, pp. 56, 57). An accused should not, however, be held accountable in such a case for failure of his counsel to so act, especially in an instance which requires speculation as to the offense actually intended.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 4 of Charge II, legally sufficient to support the findings of guilty of Specification 3 of Charge II and Charge II, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

Wilbert T. Baughn, Judge Advocate

Charles Springdale, Judge Advocate

ON LEAVE

_____, Judge Advocate

JAGV - CM 325107

1st Ind

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

JAN 16 1948

TO: Commanding General, U. S. Constabulary, APO 46, c/o Postmaster,
New York, New York.

1. In the case of Private John W. Shatzer (RA 33742249), Headquarters Troop, 10th Constabulary Regiment, I concur in the foregoing holding by the Board of Review and recommend that the finding of guilty of Specification 4, Charge II, 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 pay per month for a like period.

2. The acts expressly alleged and reasonably impliable from the allegations of Specification 4, Charge II, do not constitute an offense. The defects in pleading must therefore be deemed to have injuriously affected the substantial rights of accused within the meaning of paragraph 87b (third subparagraph) of the Manual for Courts-Martial, 1928, and Article of War 37.

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

(CM 325107)

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.

(89)

JAGH CM 325112

20 January 1947

UNITED STATES)

SECOND ARMY

v.)

Trial by G.C.M., convened at
Fort George G. Meade, Maryland,
29,30 July 1947. Dismissal and
total forfeitures.

Captain EDWARD S. HALBERT)
(O-1056730), MI Reserve,)
Headquarters and Headquarters)
Company, Counter Intelligence)
Corps Center, Holabird Signal)
Depot, Baltimore 19, Maryland)

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, LYNCH, and BRACK, 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 Specifications:

CHARGE: Violation of Article of War 96.

Specification 1: In that Captain Edward S. Halbert, Hq and Hq Co, CIC Center, Holabird Signal Depot, Baltimore 19, Maryland, did, at or near CIC Headquarters, Holabird Signal Depot, Baltimore 19, Maryland, on or about 7 March 1947, with intent to deceive Lt Col J. E. Stearns, officially state to the said Lt Col J. E. Stearns, that he had not signed the application for a marriage license involving one Ann Marusic, which statement was known by the said Captain Halbert to be untrue.

Specification 2: In that Captain Edward S. Halbert, Headquarters and Headquarters Company, CIC Center, Holabird Signal Depot, Baltimore 19, Maryland, did, without due cause, at Holabird Signal Depot, from on or about August, 1946, to on or about May, 1947, dishonorably fail and neglect to provide for the support of his minor child, Gregory Thomas Halbert.

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

(90)

3. The Board of Review adopts the statement of the evidence contained in the review of the Second Army Judge Advocate as a statement of the evidence in this case, with one exception and one addition as follows:

The sentence on line 17, page 3 of the Staff Judge Advocate's Review is corrected to read: "It was his opinion that 'The signature on Prosecution's Exhibit 2 could have been written by the writer of Prosecution's Exhibits 7, 7a, 7b, and 7c.'" (R 48)

The Board adds to the Staff Judge Advocate's statement of the evidence the following: A photographic copy of the original record of marriage license application and minister's certificate of marriage ceremony, on file in the office of the Clerk of the Circuit Court for Harford County, Maryland, was admitted in evidence as Prosecution's Exhibit 2, without objection. It was further stipulated that Prosecution's Exhibit 2 is a true exact and authenticated copy of the original thereof (R 13). There was testimony that one of the parties must appear in person, be sworn and furnish the information necessary to fill out the form and sign the application. The application is then given to the applicant for use of the person performing the ceremony. After the ceremony the person performing the ceremony completes the form (R 11). The marriage application form introduced into evidence bears the signature of "Edwin S. Halberg" as applicant and shows that the person so designated declared under oath that Edwin S. Halberg was the name of the groom and Ann Marusic was the name of the bride; that both were in the Army, that Halberg was divorced; and that Miss Marusic's permanent residence was in Minnesota. The certificate on the application form recites that Edwin S. Halberg and Annie Marusic were married at Bel Air, Maryland, on 29 August 1944 by Marion S. Michael (Pros Ex 2, R 76). The Reverend Marion S. Michael testified that he had signed a similar certificate (R 15).

4. Accused was found guilty of the dishonorable failure to support his minor child, Gregory Thomas Halbert (Chg, Spec 2). The evidence pertaining to this finding of guilty adduced at the trial shows that accused met Anne Marusic, then a member of the Women's Army Corps at Edgewood Arsenal sometime in June 1944. On 10 June 1944 they had a date during the course of which they had intimate relations. Subsequently Miss Marusic discovered that she was pregnant, discussed the matter with accused and made plans for marriage. On 29 August 1944 she and accused went to Bel Air, Maryland, where accused went into the court house. After leaving the court house, they finally located a visiting minister, the Reverend Marion S. Michaels, who married them. Mr. Michaels recognized accused as Edwin S. Halberg. Accused went overseas in 1944. After her discharge from the Women's Army Corps in October 1944, Miss Marusic returned to her home. On 11 March 1945 at St. Paul, Minnesota, Miss Marusic gave birth to Gregory Thomas Halbert. Subsequent to the birth of the child she received letters from accused in which he referred to the child as "Chip." The letters received by Miss Marusic from accused subsequent to their marriage were addressed to her as "Mrs Ann M. Halbert." Miss Marusic did not see

accused again until February 1946 when they stayed together in a room in the Palmer House, Chicago, Illinois, at which time accused acknowledged paternity of the child. Although Miss Marusic wrote accused asking for money she has received from him a total of \$90.00. In his own testimony accused denied that he ever contributed to the support of the child.

Members of the military service have an obligation to support their children whether the children be born in or out of lawful wedlock, and failure to fulfill that obligation is clearly conduct of a nature to bring discredit upon the military service (SPJGA 1945/11391). Where a child is born in lawful wedlock there is a presumption that the husband is the father of the child and a child born in lawful wedlock is legitimate. (7 Am Jur, Title "Bastards," Sec 14,15) Thus in a prosecution of the husband for non-support of such a child the husband would have to prove that he was not the father of the child in order to defend successfully where in fact he was not supporting the child. In such case in civil practice it is not necessary to have a filiation proceeding to determine paternity and to order support.

It has been contended in the instant case that since accused had a subsisting marriage at the time of his marriage to Miss Marusic the marriage was void and hence there is no presumption that accused was the father of Miss Marusic's child. Because of the void marriage it is argued that the child is illegitimate and that filiation proceedings with an order to support by a civilian court of competent jurisdiction would be a condition precedent to a successful prosecution by court-martial for non-support.

Presupposing that the marriage was in fact void this argument is untenable under the peculiar circumstances of this case. Accused's conduct prior to and subsequent to the birth of the child is an admission to the world that he is the father of the child and for the purposes of a prosecution for non-support of a minor child in violation of the 96th Article of War the admission obviates the necessity of a prior filiation judgment against accused. The rule here enunciated is to be limited strictly to the facts and circumstances found in this case. Expressly undecided is the situation presented by a good faith denial of paternity in a prosecution for non-support.

The evidence adduced for consideration by the court in this case warranted the finding that accused dishonorably failed to support his minor child.

Accused was also found guilty of making a false official statement (Chg, Spec 1). The evidence supporting this finding of guilty shows that during an investigation of his marital status accused stated to Lieutenant Colonel J. E. Stearns that he, accused, had examined the marriage application and that the signature on the application was not his. The circumstances of record show that the marriage application

referred to by accused was the marriage application introduced in evidence as Prosecution Exhibit 2, which recited that Edwin S. Halberg and Ann Marusic were the parties seeking permission to marry, and which bore the signature "Edwin S. Halberg." Accused admitted in his testimony that he stated to Lieutenant Colonel Stearns that the signature on the application was not his.

As to the falsity of accused's denial the prosecution introduced a handwriting expert who on the basis of a comparison between known specimens of accused's handwriting and the signature "Edwin S. Halberg" on the marriage application, testified that the signature on the marriage application could have been made by accused or by some other person. Both the marriage application and the known specimen of accused's handwriting were introduced in evidence, and without the intervention of a handwriting expert the court could have determined that the signature on the application was made by accused (MCM, 1928, par 116a; CM 260165, Thompson, 39 BR 151,159; CM 276285, Lucas, 48 BR 265,273). In this case the inconclusive character of the testimony of the handwriting expert may not be said to have rendered ineffectual the determination of the court, implicit in its finding of guilty, that accused was the author of the signature on the application. The court had for its consideration other evidence of a highly corroborative nature. On the day the application was accomplished accused entered the courthouse where the application was obtained, and subsequently on the same day was united in matrimony with the prospective bride named on the application, and the person, who performed the marriage ceremony, and identified accused as the person who married Ann Marusic, certified the fact of marriage on the application form.

The Specification alleges that accused stated he had not signed the marriage application, and the testimony shows that he stated that it was not his signature on the marriage application. The accused's name is "Edward S. Halbert", and the signature on the application is "Edwin S. Halberg." "Edwin S. Halberg" is not accused's customary signature, but as shown the name "Edwin S. Halberg" was written on the application by accused, it was his signature at the time he wrote it. In any event the denial that it was his signature was an effective denial that the name was written in his handwriting. There was no variance between the allegation and proof.

The finding of guilty of making a false official statement as alleged was warranted by the evidence.

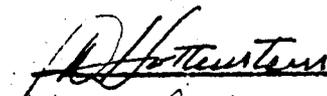
5. Records of the Department of the Army show that accused is 34 years of age: He was married to one Mae Wilder in 1943 and divorced from her in 1944. He attempted matrimony in 1944, prior to his divorce from Mae Wilder, with Ann Marusic. One child whose paternity accused

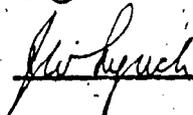
now denies was born of this union. On 28 June 1946 accused married Dorothy Marie Spuhler at Las Vegas, Nevada. Accused was graduated from Junior College and attended Chico State College for one year. In civilian life he was variously employed as a field supervisor by the Department of Agriculture, the Forestry Service as a ranger, the Department of Justice as an immigration inspector and by the City of El Paso, Texas, as a police officer. He had enlisted service from 5 September 1942 to 3 June 1943 when he was commissioned second lieutenant. He served behind the enemy lines in China for approximately a year. Upon separation from the service in May 1946 he had attained the grade of Captain, and his efficiency index was "5.2" the adjectival equivalent of which is "excellent." He was recalled to active duty in August 1946. His efficiency reports of record since recall to active duty are "excellent" and "superior."

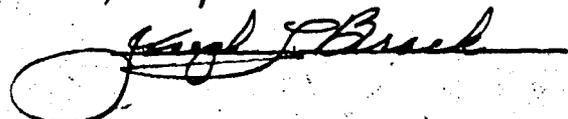
The Board of Review has considered the following communications pertaining to accused in its review of this case: Letter to The Assistant Judge Advocate General, dated 13 August 1947 from The Honorable Leroy Johnson, House of Representatives; letter to the President, dated 3 August 1947, from Mrs. Grace G. Halbert, mother of accused; letter to The Adjutant General, dated 19 October 1947, also from accused's mother; telegram to The President, dated 9 August 1947, from Mr. George R. Prestidge, Visalia, California.

Douglas N. Sparretts, Esq. of Baltimore, Maryland, appeared before the Board of Review and presented oral argument in behalf of accused on 19 December 1947.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority and to warrant confirmation of the sentence. A sentence of dismissal and total forfeitures is authorized upon conviction of violations of Article of War 96.

 _____, Judge Advocate

 _____, Judge Advocate

 _____, Judge Advocate

(94)

JAGH CM 325112

1st Ind

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

JAN 20 1946

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 Captain Edward S. Halbert (O-1056730), MI Reserve, Headquarters and Headquarters Company, Counter Intelligence Corps Center, Holabird Signal Depot, Baltimore 19, Maryland.

2. Upon trial by general court-martial this officer was found guilty of making a false official statement (Charge, Spec 1), and of dishonorably failing to support his minor child (Charge, Spec 2), 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 one year. The reviewing authority approved the sentence, remitted the confinement imposed 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 review of the Second Army Judge Advocate, which with minor additions has been adopted by the Board of Review as the statement of the evidence in the case. 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.

Sometime in June 1944 accused met Ann Marusic, then an enlisted member of the Women's Army Corps, and had a date with her on 10 June 1944 during which the two indulged in sexual intercourse. Subsequently Miss Marusic discovered that she was pregnant. She informed accused of her condition and they made plans for getting married. On 29 August 1944 accused and Miss Marusic were purportedly married at Bel Air, Maryland, by the Reverend Marion S. Michaels, who identified accused as Edwin S. Halberg, the name by which the prospective bridegroom was designated on the marriage license. Subsequently accused went overseas and Miss Marusic was separated from the Women's Army Corps. In March 1945 at Saint Paul, Minnesota, Miss Marusic gave birth to Gregory Halbert. In correspondence with Miss Marusic after the marriage at Bel Air in August 1944 accused addressed her as "Mrs. Ann M. Halbert," and after the birth of the child referred to the child as "Chip." In January 1946 after accused's return from overseas, he and Miss Marusic stayed together at the Palmer House in Chicago at which time Miss Marusic testified accused admitted paternity of the child.

Accused testified in his own behalf that he never had sexual intercourse with Miss Marusic, and denied that he married her. He further

stated that at the time of the purported marriage he had a subsisting marriage which was not dissolved until October 1944. He admitted, however, that he had written to Miss Marusic addressing her as Mrs. Ann M. Halbert. He also admitted that he had never contributed to the support of the child.

It is considered that accused's conduct as evidenced by the record of trial constituted sufficient acknowledgment of paternity of the child, and this coupled with his admitted failure to support the child warranted the finding of guilty of dishonorably failing to support the same.

During an investigation of his marital relationship with Miss Marusic accused stated to Lieutenant Colonel Stearns, a superior officer, that the signature on the marriage application was not his. A handwriting expert testified that accused could have written the signature and also that some other person could have written it. That signature and known specimens of accused's handwriting were in evidence and with the other evidence of record of a corroborative character warranted the determination of the court that the signature was written by accused.

4. Accused is 34 years of age. He was married to one Mae Wilder in 1943 and divorced from her in 1944. He attempted matrimony in 1944, prior to his divorce from Mae Wilder, with Ann Marusic. One child whose paternity accused now denies was born of this union. On 28 June 1946 accused married Dorothy Marie Spuhler at Las Vegas, Nevada. He was graduated from Junior College and attended Chico State College for one year. In civilian life he was variously employed as a field supervisor by the Department of Agriculture, the Forestry Service as a ranger, the Department of Justice as an immigration inspector and by the City of El Paso, Texas, as a police officer. He had enlisted service from 5 September 1942 to 3 June 1943 when he was commissioned second lieutenant. He served behind the enemy lines in China for approximately a year. Upon separation from the service in May 1946 he had attained the grade of captain, and his efficiency index was "5.2", the adjectival equivalent of which is "excellent." He was recalled to active duty in August 1946. His efficiency reports of record since recall to active duty are "excellent" and "superior."

5. Consideration has been given to the following communications pertaining to accused: Letter to The Assistant Judge Advocate General, dated 13 August 1947 from The Honorable Leroy Johnson, House of Representatives; letter to the President, dated 3 August 1947, from Mrs. Grace G. Halbert, mother of accused; letter to The Adjutant General, dated 19 October 1947, also from accused's mother; telegram to The President, dated 9 August 1947, from Mr. George R. Prestidge, Visalia, California.

Douglas N. Sharretts, Esq. of Baltimore, Maryland, appeared before the Board of Review and presented oral argument in behalf of accused on 19 December 1947.

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6. I recommend that the sentence as modified by the reviewing authority be confirmed, 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
1. Record of trial
2. Form of action

(CM 325112)

GCMO 41, (DA), 6 Feb 1948).

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

(97)

OCT 10 1947

JAGQ - CM 325172

UNITED STATES)

PHILRYCOM

v.)

Trial by G.C.M., convened at
APO 707, 3 July 1947. Dis-
honorable discharge and con-
finement for two (2) years.
PHILRYCOM Stockade.

Privates BONIFACIO RAMOS)
(10336925) and PEDRO)
FERNANDEZ (10341706), both)
of Company A, 60th Tank)
Battalion (PS).)

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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 holding, to The Judge Advocate General.

2. The accused were tried, in a joint trial, upon the following Charge and Specification:

CHARGE: Violation of the 83rd Article of War.

Specification: In that Pvt Bonifacio Ramos, and Private Pedro Fernandez, both Co "A" 60th Tank Bn (Philippine Scouts), APO 900 acting jointly and in pursuance of a common intent did, at QM Depot No. 4, Rizal, Philippines APO 900 on or about 10 May 1947 willfully suffer 34 drums of oil value in excess of \$50.00, military property belonging to the United States to be wrongfully disposed of by allowing the oil to be carried away by parties unknown.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence as to each accused, designated the General Prisoners Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, as the place of confinement as to each accused and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence for the Prosecution.

On 9 May 1947, several thousand drums of oil were stacked "five high" at Quartermaster Sub Depot No. 4, Rizal, P.I. (R. 8), awaiting shipment as surplus items to Korea (R. 9). Upon reporting to Post No. 11, Quartermaster Sub Depot No. 4, at 2400, 10 May 1947, Corporal Luking relieved accused Ramos and observed drum prints on the ground. When he asked accused Ramos about these prints, the latter changed the subject and told Luking about a leaking pipe. Luking then reported the drum prints to the Corporal of the Guard (R. 11-12).

Immediate investigation disclosed fresh oil drum tracks in the mud leading from the stacked drums, across three eight-inch pipe lines, through a barbed wire, concertina fence, about 300 yards down an unused road, over some railroad tracks, and into a grove of trees where the drums had apparently been loaded on a cart (R. 7, 17). The drum tracks "went out just about the middle of Post 11 and past Post 12" (R. 7).

Post No. 11 was a walking post extending 100-150 yards along the pipeline and about 10 yards from the stack of drums (R. 12-14, 17). Post No. 12 was also a walking post and joined Post No. 11 "at the corner."

Accused Ramos and Fernandez were posted as guards on Posts No. 11 and 12, respectively, from 1800 to 2400, 9 May 1947. The guards were inspected at 2030 by the Sergeant of the Guard and the Officer of the Day. At that hour, it was dark, there was no moon, and (without flashlights) drum prints were not observed on the ground on Post No. 11 nor in the vicinity of Post No. 12 (R. 15). Neither guard reported anything unusual at the inspection nor at any other time during their tour of guard duty (R. 15).

An inventory on 12 May, as compared to a report of oil on hand on 9 May, showed 34 drums missing (R. 8). It was established that the value of these drums was \$1500.75 (Pres. Ex. 1; R. 19).

4. Evidence for the Defense.

Accused Ramos having been duly informed of his rights as a witness, testified that he spent his entire tour of duty walking his post along the pipelines and he neither saw nor heard anyone on his post except the Sergeant of the Guard, the Officer of the Day, and his relief Guard (R. 23-24). When he went on duty at 1800, it was twilight and he did not see any tracks on the ground at that time (R. 25). He walked his

post along the pipelines, passing about 10 or 15 yards from the stacked drums (R. 24-25). When he inspected his post he did not see any drum tracks on the ground (R. 25). He did not go to sleep and did not hear any noises (R. 24).

Accused Fernandez having been warned of his rights as a witness, testified that he was guard on Post No. 12 on 10 May, that he walked his post "just awhile, but I mostly stayed near the gate" which was open and therefore the most important point on his post. From the gate, he could not see Post No. 11 nor could he hear oil drums being rolled on Post No. 11. On cross-examination, he stated that at the point of his Post nearest to Post No. 11, he could see the stacked oil drums, but he did not know whether he could hear drums being rolled over eight-inch pipes (R. 26-27).

Private Loreto Rillon, the Guard on Post No. 13 testified that his Post was next to Post No. 12, that the latter post included an open railroad gate which was the most dangerous part of the post from a security standpoint, that as he approached Post No. 12, he would see accused Fernandez standing by the gate, that one could not see Post No. 11 from this gate (R. 20-22).

5. The evidence establishes that 34 drums of oil were removed from Quartermaster Sub Depot No. 4, Rizal, P.I., between 9 and 12 May 1947, and that fresh drum tracks were found on Post No. 11 at 2400, 10 May, which were not observed at 1800 or 2030 that date. These drum tracks were traced from the stacked drums, over three eight-inch pipelines, through a barbed wire, concertina fence, 300 yards down an unused road, over some railroad tracks, and into a grove of trees. The tracks went out just about the middle of Post 11 and "past Post 12".

Accused Ramos was posted as Guard on Post No. 11 from 1800 to 2400, 10 May. The court was fully justified in its findings that these oil drums could not have been removed from and through his Post without his knowledge and consent.

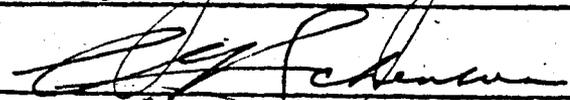
Whether accused Fernandez was involved in the removal of these oil drums is entirely a matter of conjecture, insofar as the record of trial is concerned. He was on guard duty on the adjoining post when the removal occurred. One corner of his post was within sight of the stacked oil drums and the tracks made by the rolling drums went past his post. There is no evidence in the record of trial as to how close these tracks were to his post. If they ran parallel thereto for the entire length of his post, he would have had ample opportunity to observe their removal and his failure to report such activity would have justified the court's findings. On the other hand, the tracks may

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have gone past the near corner of his post at a reasonable distance therefrom and in such a case, the findings of the court could not be sustained. The noise which the rolling of the drums must have caused in the quiet of night is one point for consideration, but standing alone, it is not considered sufficient to support a finding of guilty of willful sufferance. The Board of Review holds that the evidence contained in the record of trial is insufficient to sustain the circumstantial conclusion that accused Fernandez willfully suffered the removal of the oil drums as alleged.

6. For the reasons stated above the Board of Review holds that the record of trial is legally insufficient to support the findings and sentence as to the accused Fernandez; legally sufficient to support the findings as to the accused Ramos, except the words "and Private Pedro Fernandez, both" "acting jointly and in pursuance of a common intent" and to support the sentence as to accused Ramos.


_____, Judge Advocate


_____, Judge Advocate


_____, Judge Advocate

LAW LIBRARY
JUDGE ADVOCATE GENERAL

(101)

JAGQ - CM 325172

1st Ind

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

TO: Commanding General, Philippines-Ryukyus Command, APO 707, c/o Postmaster,
San Francisco, California

1. In the case of Privates Bonifacio Ramos (10336925) and Pedro Fernandez (10341706), both of Company A, 60th Tank Battalion (PS), I concur in the holding by the Board of Review and recommend that as to accused Fernandez the findings of guilty and the sentence be disapproved. Upon taking such action you will have authority to order execution of the sentence as to accused Ramos.

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:

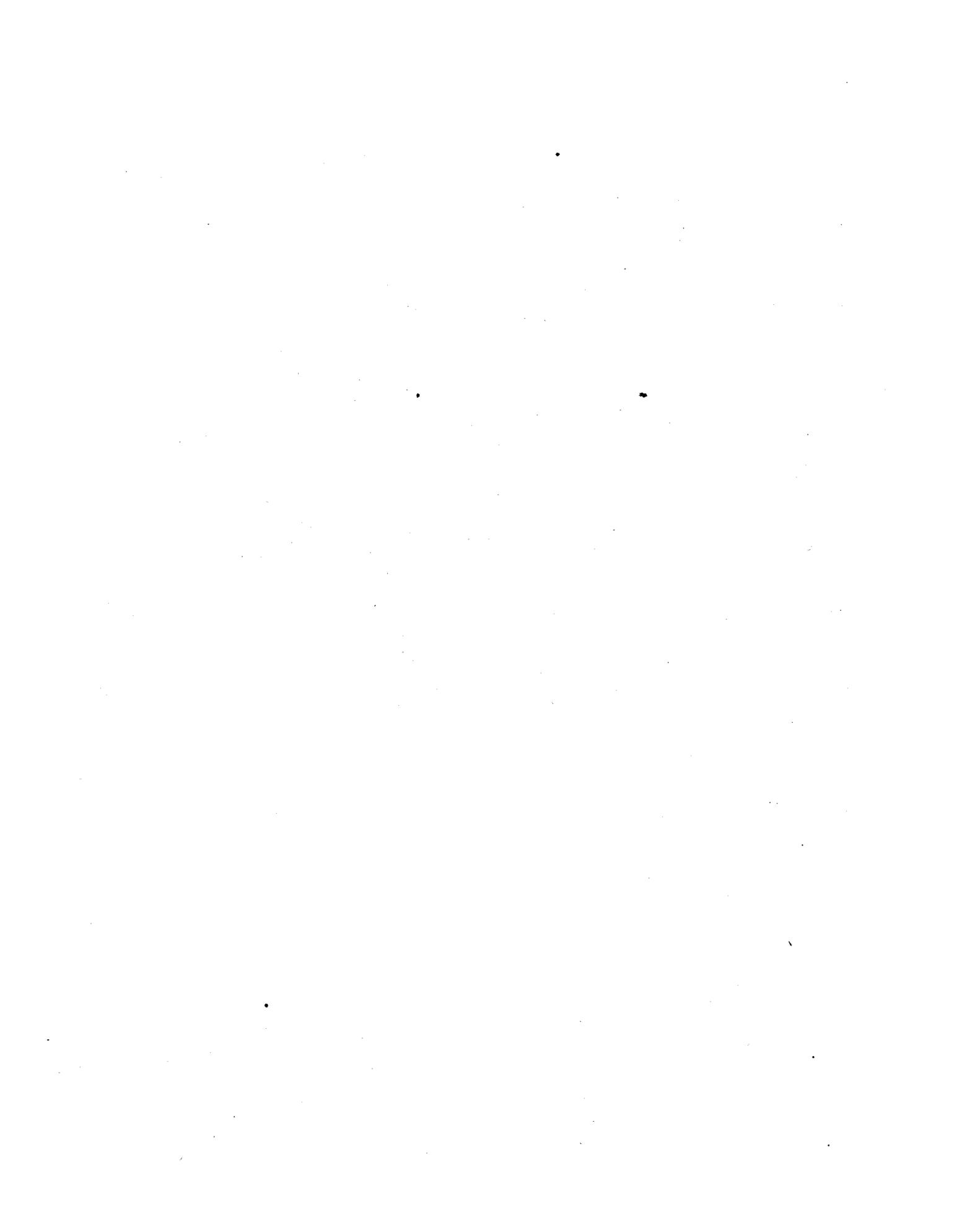
(CM 325172).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

12026



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

(103)

JAGK - CM 325200

27 OCT 1947

UNITED STATES)

AIR PROVING GROUND COMMAND

v.)

Trial by G.C.M., convened at Eglin
Field, Florida, 9, 10, 11 and 15
July 1947. Dismissal and confine-
ment for ten (10) years.

Second Lieutenant RAYMOND
T. HIGHTOWER (O-590044), Air
Corps)

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

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following charges and specifications:

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

Specification 1: In that Second Lieutenant Raymond T. Hightower, Squadron B (Casual), 610th Army Air Forces Base Unit, did, at Andalusia, Alabama, on or about 28 April 1947, by force and by putting her in fear, feloniously take, steal and carry away from the person of Miss Lila May Britt, personal property, to wit: one (1) cluster diamond ring, two (2) single stone diamond rings, one (1) fraternity ring, one (1) wrist watch, one (1) silver pin and one (1) pair silver earrings, the property of Miss Lila May Britt, of a value of more than \$50.00.

Specification 2: In that Second Lieutenant Raymond T. Hightower, ***, did, at Andalusia, Alabama, on or about 28 April 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Miss Lila May Britt.

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

Specifications: In that Second Lieutenant Raymond T. Hightower, ***, did, at Andalusia, Alabama, on or about 28 April 1947, forcibly and feloniously against her will, have carnal knowledge of Miss Lila May Britt.

He pleaded not guilty to all charges and specifications. He was found guilty of Specification 1 of Charge I except the words "by force and by putting her in fear, feloniously take, steal and carry away from the person of Miss Lila May Britt, personal property, to wit: one (1) cluster diamond ring, two (2) single stone diamond rings, one (1) fraternity ring, one (1) wrist watch, one (1) silver pin and one (1) pair silver earrings, the property of Miss Lila May Britt, of a value of more than \$50.00," substituting therefor the words, "wrongfully commit an assault upon Miss Lila May Britt by presenting a firearm, a forty-five calibre service pistol, within the range of said Miss Lila May Britt, and pointing said firearm at her in a threatening manner;" of the excepted words, not guilty, and of the substituted words, guilty. With regard to Specification 1 of Charge I he was found not guilty of a violation of Article of War 93 but guilty of a violation of Article of War 96 thereunder. The accused was found guilty of Charge I and Specification 2 thereof. With regard to Charge II and its specification, the accused was found guilty of the specification except the words "forcibly and feloniously against her will, have carnal knowledge of Miss Lila May Britt," substituting therefor the words, "with intent to commit a felony, viz: rape, commit an assault upon Miss Lila May Britt, by willfully and feloniously striking her on or about the head and body with his fists and presenting a firearm, to wit: a forty-five calibre service pistol within the range of said Miss Lila May Britt and pointing the said firearm at her in a threatening manner;" in violation of Article of War 93, but not guilty of a violation of Article of War 92. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Special plea by the defense

Prior to pleading to the general issue the defense entered a plea in bar of trial "predicated upon the announcement by the War Department in the early part of 1946 to the effect that cases involving rape and other specific offenses would not be tried within the continental limits of the United States without specific authority from the Secretary of War" (R 9). In response thereto the prosecution offered in evidence its Exhibits 1 and 2 which were received without objection. Prosecution Exhibit 1 is a letter, dated 28 May 1947, addressed to the Commanding General, Eglin Field, Florida, and signed B. W. Simmons. Pertinent matter contained in the letter is as follows:

"As prosecuting attorney for the state of Alabama, 22nd. Judicial Circuit, I want to surrender to you, for court martial, Lieutenant Raymond Tolbert Hightower who is confined in the jail here, following your delivery to the State at our request, to answer a charge of robbery and rape upon the person of Miss Lila

Mae Britt of Andalusia, Alabama, who, due to the illness of her mother and for other reasons personal, does not want to make a public appearance in the State court to prosecute Lt. Hightower.

"I hope you will not consider this request as an acknowledgment that the State Court is impotent in this matter, or that our case is weak, or that I do not want to pursue the matter to a conclusion in the Circuit Court here."

By first indorsement thereto, dated 4 June 1947, this letter was forwarded to the Secretary of War.

Prosecution Exhibit 2 is a radiogram from the War Department stating that the Under Secretary of War as of 25 June 1947 authorized trial of Second Lieutenant Raymond T. Hightower by General Court-Martial for rape.

4. Evidence for the Prosecution

At the time of the alleged offenses and of trial the accused was an officer in the Army of the United States assigned to Squadron B, 610th Army Air Forces Base Unit, Eglin Field, Florida (R 14,147). On the afternoon of 28 April 1947 the accused and Chief Warrant Officer Jefferson Fitzgerald had a few drinks in quarters and proceeded to go for a ride in accused's car. They rode to Valparaiso, Florida, where they procured a bottle of rum and at the suggestion of Fitzgerald, they decided to go to Andalusia, Alabama, a town about 50 miles from Eglin Field (R 26). The accused appears to have had no money with him and he borrowed five dollars from Mr. Fitzgerald who also paid for the gasoline required for the trip. The parties drank rum as they traveled toward Andalusia and also stopped at Crestview, Florida, where they consumed some beer. At about 1730 hours they arrived at Andalusia and at the suggestion of Mr. Fitzgerald they visited the home of Miss Martha Gantt, an acquaintance of Fitzgerald who kept a rooming house in Andalusia (R 15,25). Miss Gantt met the parties at the door, received them into the living room but stated that she had previously agreed to watch the children of some friends and had to leave the house. She thereupon called Miss Catherine Cauley, a roomer in the house, and requested that she entertain her guests while she was away. Shortly thereafter Miss Gantt called Miss Lila May Britt, a 52-year old school teacher, who resided a few blocks away and requested that Miss Britt come over to her house while she was away, explaining she had company but was required to keep the children of her friends while they attended the movie. Miss Britt lived with and cared for her 72-year old mother, who was an invalid, and was reluctant to comply with her neighbor's request, but did agree to go to the Gantt house for about an hour (R 30,40, 48). Mr. Fitzgerald and the accused then had a few drinks in the breakfast room, the women drinking only Coca Cola. Miss Gantt went away to fill her previous engagement, and at about 2030 hours the accused, Fitzgerald and Miss Cauley proceeded in accused's car to the home of Miss Britt and brought her to the Gantt residence where they repaired to the breakfast

room and engaged in a general conversation. The women drank some soft drinks and the men consumed the greater part of the rum which they had with them (R 17,30). Miss Britt testified that after about an hour at the Gantt house the following occurred:

"A. I can tell you exactly when I got home. It was not long. I remember this because I said, 'The hour is up, and Martha has not come back, and I must be going home.' Lieutenant Hightower offered to take me home. He asked Fitzgerald if he would like to go along or stay there. Fitzgerald said, 'It is only a jump, and you will be back in a few minutes. I will sit right here.' We started out to the car and he asked me - he said, 'You don't drink, do you?' I said, 'No, I don't drink and don't smoke.' He said, 'What do you do, then?' I said, 'I drink enough coffee to overbalance all the things I don't do, I guess.' We got in the car, and instead of going home we went up town around the square. He started down towards the jail. I said, 'I don't live on this side of town; I live on the other side.' He turned and went around the square. I said to go down Church Street. He would not know that, but I indicated it and he did not stop. He turned at the Postoffice. I said, 'I must go home.' At that time I was getting pretty panicky, and he quickened his pace and we went just as hard as we could tear down the Brewton road. I said, 'Please listen. I don't even know you. Turn around and take me home. Here is a place we can turn around - by Mr. West's.' He paid no attention then. In a few minutes he said, 'We will turn,' and I thought my fears were over and said, 'I will calm myself.' He stopped the car and said, 'Give me what money you have.' I had my red pocketbook with me that I had picked up and I knew it had no money in it and told him. He said, 'You know damn well you have money. Give it to me.' I said, 'Frankly, I don't have, because I picked ^{up} this purse and my money is in the other one and I did not change it.' He said, 'Give me your jewelry,' and snatched my earrings and grabbed off this fraternity ring. (Here witness indicated a fraternity ring she was wearing.) He hit me with it up here (witness indicated a spot on her left temple) a little gash that stayed two or three days. He grabbed my nose glasses. Do you want them?

"Q. Will you please show them to the court.

"A. (Witness drew a pair of nose glasses from her purse and held them up in her hand.) He mashed them together in some way. I had them to Weise's and they fixed them. He crushed them together in some way. They did not break, for which I was very thankful. Then he told me to give him my watch and my rings, and I said, 'I just cannot give them to you. You have no need for them. You could not wear them, and my father gave me the diamonds and my father is not living, and I prize them very highly.' He said it didn't make a damn to him - give

them to me. He said, 'Are you going to give them to me?' I said, 'No, I am not.' He said, 'Oh, yes, you are.' He opened this compartment there and took out this gun and I immediately gave them to him - the rings, the watch, and this pin. (Witness indicated by pointing to a pin she was wearing on her dress.) He had the other things. So then he commanded me to take off my clothes and get on the back seat, holding the gun over me. Of course, I thought my life was at an end. I didn't know what he would do, and I did it whatever time he threatened me with the gun. When I did not at once, he gave me a blow here (indicating right breast) once and on the back of the neck twice. Here on my neck (indicating by pointing to the back of her neck) and here on the chest (indicating by pointing to the right side of chest) I was as blue as I could be and the knot is still there. I am taking X-ray treatments for it.

"Q. Before you continue - you say he wanted money. Did he say why he wanted the money?

"A. He said he was broke. That was his only reason.

"Q. What value do you place on these rings, approximately, other than the sentimental value?

"A. You mean altogether?

"Q. All told, what value do you place on them?

"A. About \$400. The watch was \$50. I had just finished paying for it.

"Q. Continue with your story. What happened next?

"A. Of course, the next thing was he went ahead with the purpose that he had put me back there for.

"Q. I will have to ask you to tell the court specifically what happened. The court is only here to get the whole truth. Don't feel embarrassed. I understand your hesitancy, but we want you to tell them actually what happened.

"A. Well, he had - that is, he tried once, but I don't know how far he succeeded, but he said, 'This damn thing won't explode,' - whatever that means, and with that he pulled me over on him and forced himself upon me with my mouth, holding me down with my head, hitting me on the back of my neck and pounding me on my head. I could not stand it and I vomited on him. That made him mad and he grabbed up a coca cola bottle with a top on it and rammed it in me. I screamed. I thought I was dead. I guess he thought so, too. With that he hopped out of the car. He at all times kept this gun on hand. He put it down easy; so I know it was well loaded. He hopped out of the car with that gun and ordered me back in the front seat and got in. He dressed outside. He got in the car and backed out all the way up. I did not open my mouth. He said, 'Don't you say a word to anyone. This is the last time you will see me, and if you go down to Eglin Field looking for me, you won't find me because my name is not Hightower.' He said, 'If I hear of your getting on the

telephone and calling anyone I am coming back.' At every threat he said he would blow my brains out. He drove up in front of Gantt's and stopped. He got out of the car, took the gun with him, and said, 'If you move one inch I will blow your brains out.' I did not move my head to the right or left. He was gone but a few minutes. I don't know where he went. When he came back he said, 'I am going to take you home and put you out in front of your house.' Instead of doing that, he turned in a little street about ten feet from there and backed the car out and came down in front of Miss Gantt's house and stopped on the opposite side and said, 'Get out of this car.' I began getting out. He grabbed the gun and said, 'Can't you get out of here in a hurry?' I tried to and as soon as I was out, he grabbed the door and tore off down the road. Immediately I went across the street and into Martha's house, and there she sat with Chief Warrant Officer Fitzgerald. I told them the story, except for the awful part. I was a little bit embarrassed. I was frightened to death. Fitzgerald walked home with me. He was all to pieces, he was so unnerved." (R 31-34)

In response to further questions the witness stated positively that the accused gained penetration of her body for a limited period of time and that he also forced his penis into her mouth. She "violently protested to everything." After Fitzgerald had taken her home, Miss Britt stated that she called a taxi to take him to a hotel or Eglin Field and she then locked the door and went to bed. "It was then 11:00." She did not go immediately to the doctor for fear of exciting her mother, who was suffering from high blood pressure and any excitement might have been fatal to her (R 35,36). At about 0700 hours Miss Britt had a consultation with Dr. Parker, her family physician, who made a routine examination of her and had her to return to his office in the afternoon, at which time he made a more detailed examination of the condition of her body. A report was then made to the civil authorities, apparently by Dr. Parker, and a consultation was had between Miss Britt, Dr. Parker, Mr. Clifton V. Hines, deputy sheriff, and Mr. Reeves, the chief of police. At about 1600 hours on the same day the accused appeared at the door of Miss Britt's home and requested admittance, stating that "I brought your jewels." Miss Britt received him into the living room and he handed to her the jewelry which he had taken from her excepting however the "ear screws." The accused asked her if she knew the whereabouts of Fitzgerald and if he was with the sheriff. She replied that she did not know. He then left "and tore down the road" (R 39). On cross-examination Miss Britt stated that she had known Mr. Fitzgerald for about two years, had seen him at the Gantt residence several times prior to the evening in question, but that she had never attended any drinking parties with him. She had known Martha Gantt for twenty years but had never spent the night in her

house. In response to questions concerning the pistol which she stated that accused brandished on her, she asserted that he took it from the glove compartment of the car and removed it from a holster. When required to remove her clothes she placed them on the back seat but they fell off on the floor. The witness stated that she washed herself when she returned to her home after the incident in accused's car but she did not examine her body because "I would not know what to do." Her experience had been very painful and the cut in her face had bled slightly but the bruise disappeared in about three days. She had talked to Mr. Simmons, the States Attorney, after her conference with the doctor. Miss Britt was asked to repeat the statements she had made to Fitzgerald and Miss Gantt when she returned to their house. She stated that "Martha said, 'What has happened to you.' I said, 'I have been robbed.'" She denied making conflicting statements to Miss Gantt, Mr. Simmons or Tom Gantt (R 41-56). The witness was interrogated at length by the court. She stated that she had been a teacher in the graded schools of Andalusia for 17 years. The jewelry removed from her person was exhibited by her to the court and described as "These two rings: (a cluster diamond and plain diamond); a shrine diamond ring; my brother's medical fraternity ring; this pin that I am wearing; my glasses and my watch" (R 61). She had never had a gun pointed at her before this incident and she believed the accused intended to shoot her. He had said several times that if she ran he would "blow my brains out." The accused had grasped her by the hair and pulled her to the position demanded of her to effect his purpose (R 65).

Dr. L. D. Parker, a qualified physician of Andalusia, Alabama, testified that he had known the Britt family for about 30 years. The mother of Miss Lila May Britt was suffering from hypertension arteriosclerosis and, considering that she was over seventy years of age, she might suffer a stroke of paralysis causing her death at any time. Dr. Parker examined Miss Britt on two occasions in his office on 29 April 1947. In the early morning he had no lady attendant present and a more detailed examination was made in the afternoon. Miss Britt had a "cut place and scratch down the left side of her face three or four inches long." No suture was required. The patient was

"upset - excited, nervous and upset ***. *** her right breast had quite a large lump, about the size of a hen egg, and the whole breast showed etoma and was blue surrounding the lump. There were various bruises on the abdomen - the lower abdomen - about 1-1/2 inches in diameter and each one of the marks was blue. There were various places on the right leg, as I remember - on both legs. There were some on the left leg, but the right leg was worse. She complained of her neck and back, but I could not find anything definitely wrong there. On the later examination I found that she had bruises and lacerations on the

labia minora - there are two lips, small and large, at the entrance of the vagina - and this is the smaller one right next to the entrance. There were abrasions or bruised places and cuts through the skin about three quarters of an inch long - about so long - (here witness indicated by showing a space between his finger and thumb approximately 3/4 of an inch) and broken enough that it was cut through the skin on the inside. The hymen and on the entrance to the vagina it was severely lacerated and bruised. This lacerated and bruised condition on the inside, a small speculum inserted back in the mouth of the uterus about three inches, and even the mouth of the uterus showed some evidence of having been hit some way with some hard substance." (R. 67-68)

Dr. Parker expressed the opinion that the injuries could not have resulted from normal intercourse (R 67-68). On cross-examination Dr. Parker stated that at his first examination of Miss Britt "she told me that she did not think the vagina had been penetrated so far as the intercourse was concerned. She said that he was in a position that he was going to have intercourse and tried to, but she did not think he penetrated her" (R 68). The patient had always been slightly nervous but was not "what you would call the psychoneurotic type that is always complaining." The lesions in her private parts were not such as might be expected from rough treatment during intercourse and were caused by some foreign body. In accordance with Miss Britt's desires, Dr. Parker had called the local police and when they conferred at his office Miss Britt related only the circumstances of the robbery to them (R 72).

Mr. Jefferson Fitzgerald was recalled by the prosecution and stated that while he and the accused traveled toward Andalusia on the evening in question they had "some coke or 7-Up" in bottles in the car which they were using for chasers. When Miss Britt returned to the Gantt house "She was crying and very excited like and very incoherent and said Lt. Hightower had not taken her home and had made advances to her and had tried to tear her clothes off and had taken her jewelry." At about 1130 hours the next day, Mr. Fitzgerald had called the accused from the office of the deputy sheriff and said, "What have you done, boy?" He answered, "What do you mean?" "I asked if he had the jewelry or anything in his possession that did not belong to him. *** He said he did have *** I told him to bring it up there right away. ** First he said he did not have any gas or money to buy any and he would bring it tomorrow. I told him he had better bring it right away or the Sheriff would come down after it." (R 74) Mr. Fitzgerald testified further that on occasion he had seen a gun with holster in the glove compartment of accused's car but did not see any gun on the evening in question. When Miss Britt returned to the Gantt house and stated that accused had made advances to her and taken her jewelry he noticed that she was not wearing glasses as had always been her custom (R 78-79).

Captain William H. Morris, CMP, the Assistant Provost Marshal at Eglin Field, testified that on the evening of 29 April 1947 he received instructions to make an investigation concerning the accused. He contacted accused at his home in Shalimar Courts. An officer who accompanied him requested the accused to step outside of the house and then asked him if he had been to Andalusia the night before. He replied in the affirmative. The accused was asked if he had made a further trip to Andalusia and he replied that he had gone back that day to return some glasses and jewelry. The officers then took the accused in custody and placed him in arrest of quarters at Eglin Field. On the following day Captain Morris went to accused's home in Shalimar Courts and told Mrs. Hightower, accused's wife, that he wanted to get a gun "that Lt. Hightower was supposed to have had in his car." Mrs. Hightower replied that there was a gun in the car and went to where it was parked, opened it and removed from the glove compartment a pistol, holster, three clips, a clip pouch and first-aid packet. She handed these articles to Captain Morris. The witness identified and there was received in evidence as Prosecution Exhibit 3 a 45-caliber service pistol with belt, holster, first-aid packet and three ammunition clips (R 82-84).

Staff Sergeant Martin R. Van Slyke, Squadron A, 610th AAF Base Unit, was a special guard assigned to guard the accused. He testified that on about 30 April 1947 the accused stated to him that he wanted to see Mr. Fitzgerald, that "He is the only one that could do me any good. He was in the car with me." On the following morning the accused stated that Fitzgerald "wasn't in the car with him and he had to get to talk to him and that he had to get someone to say a bare ass lie." The accused had also said that he had a .45 pistol in the compartment of his car and requested Van Slyke to get someone to remove it and turn it in to supply or make away with it. Van Slyke stated further that the accused told him that "he tried to make her and could not do it, and she offered to go down on him. *** that he knocked the hell out of her and threw her out of the car right on the main street of Andalusia." The accused had given the witness a letter to deliver to his wife (R 86-90).

Staff Sergeant James F. Ball, Squadron A, 610 AAF Base Unit, was also a member of the detail guarding accused at Eglin Field. Sergeant Ball asserted that accused told him that "he was in the car with the lady and she attempted to in other words, 'go down on him.'" She offered him jewelry and a pair of shoes and he became infuriated, struck her, and "boosted her out of the car and threw the shoes after her and drove off." He noticed jewelry in the car and on the next day Fitzgerald called him and he took the jewelry back "and told her, 'You are getting off relatively light and easy'" (R 92).

First Lieutenant Edward H. Alderman, MC, testified that he was dispensary officer at the Station Hospital, Eglin Field, Florida, on 29

April 1947, and that at about 1300 hours on said date the accused reported to him and requested an examination for venereal disease, stating that he had attempted intercourse with a pick-up three days previously. Lieutenant Alderman gave accused a physical examination and the results were negative (R 96).

It was stipulated by the parties that the items listed in Specification 1 of Charge I had a market value of over \$50.00 (R 97).

5. For the Defense

The defense moved for a finding of not guilty of all charges and specifications, which motion was overruled. Without objection there was received in evidence as Defense Exhibit A a certified transcript of Case No. 8 of Docket No. 2 of the proceedings of the Grand Jury of Covington County, Alabama. The entry is as follows:

"The State v. Lt. Raymond Tolbert Hightower No. 8 Charge: Robbery, Rape and Crime against nature. No Bill, G. C. Pierce (Foreman)" (R 98).

Without objection there was received in evidence as Defense Exhibit B a stipulation that if certain named prominent citizens and officials of Washington County, Florida, were present they would state in substance that they had known the accused for many years and that his reputation in the community for moral character was good (R 99). There was also received in evidence, without objection, a sworn statement of Mr. C. F. Lear, Vice-President and Cashier of the Valparaiso State Bank, Valparaiso, Florida, to the effect that the bank had made accused a loan of \$300 on 31 May 1947 and that as of 11 June 1947 a balance of \$250 remained unpaid (R 100, Def Ex C).

Robert Gay, taxi stand operator of Andalusia, Alabama, testified that he knew Miss Lila May Britt and had delivered whiskey to her house on several occasions during the last five years. He asserted that:

"I goes with him to deliver the package myself so the driver won't handle it. I carries it to the door and knock on the door, and I have a pint of whiskey. She comes to the door and otherwise not dressed like she ought to ***. She comes to the door and I seen a couple of soldiers."

The witness asserted that he knew no more of Miss Britt's general reputation for chastity than what he had seen and it was "pretty bad." On cross-examination the witness denied that he was a bootlegger, he carried the whiskey for the bootleggers. On one occasion she appeared to be drinking and had on a nightgown "you could see through." She stayed at Miss

Gantt's house most of the time. The witness could not spell the name of the street, "Dunston," on which he said Miss Britt lived (R 100-107).

W. R. Lindsay, Taxi business, Andalusia, Alabama, testified that he had delivered packages of whiskey to Miss Martha Gantt at her rooming house on South Three Notch Street. He saw soldiers at the place. He had taken a drink with Miss Britt and knew her general reputation for chastity and moral conduct, which he described as "It is always run around whenever anything come along to Andalusia" (R 109-112).

Mr. G. C. Pierce, President of the First National Bank of Opp, Alabama, testified that he was the foreman of the Covington County grand jury which considered the case of State v. Hightower. Miss Britt was asked the direct question "if Lt. Hightower made an attempt to rape her," and she replied, "No" (R 115). Under further examination the witness stated that "Mr. Simmons asked her if they had sexual intercourse and she said, "No," and further "Yes, she was asked the question if she felt like Lt Hightower should be punished for what he had done and she said she did but she didn't want him tried in the courts of Covington County" (R 116-119).

Mr. Clifton V. Hines, first deputy sheriff of Covington County, Alabama, testified that on 29 April 1947 when he went to Dr. Parker's office to confer with Miss Britt she stated that she had been robbed of her jewels. Nothing was said about any sex offense. Fitzgerald had made the telephone call to accused from his office. Miss Britt had assured the witness that if she got the jewels she did not want to prosecute in the county due to the publicity involved and the illness of her mother. Mr. Hines had waited for a call from Miss Britt if and when her jewels were returned but she had not called him (R 121-131).

Mr. Tom Gantt, Chief of Police of Florala, Alabama, testified that he was a former sheriff of Covington County and that he had known Miss Britt for twenty-five years. He had talked with her prior to the trial and she denied having been raped but stated that "We did have a fuss" and she showed the witness bruises on her neck and legs. She also stated that "he carried her jewelry off and that he brought it back." Mr. Gantt asserted that he had taken a drink with Miss Britt, ^{and} on one occasion procured a quart of wine and a quart of liquor for her (R 136).

Miss Martha Gantt testified that at about 2300 hours on the night of the alleged offenses, Miss Britt was crying when she returned to her home and asserted that she had been robbed. The next day the witness received information from the civil authorities concerning the alleged rape. She approached Miss Britt with regard to the latter information and Miss Britt said she had been attacked but that she did not want any publicity concerning the matter (R 139). On cross-examination the witness stated that Miss

Britt never imbibed intoxicating liquor, had never spent the night in her home and reluctantly agreed to go to her house for an hour on the night of 28 April. Miss Gantt was acquainted with Robert Lindsay, the taxi operator, but she did not know Robert Gay. Neither of these parties had ever delivered liquor to her home (R 141-144).

The law member explained to the accused his rights as a witness and he elected to testify under oath in his own behalf. He stated that on the night of 28 April 1947 at the suggestion of Warrant Officer Fitzgerald the two went to Andalusia. Fitzgerald purchased the gasoline "and more or less forced me to go," stating that he knew some girls "up there." They purchased a bottle of rum at Valparaiso. The parties had a round of beer and the accused "matched him out of five dollars." On the way they had another beer and when they arrived at Andalusia, at about 1900 hours, Fitzgerald made a telephone call and "he suggested that he had a couple of nice looking girls on the line." They went to the home of Miss Gantt where she answered the doorbell in "more or less unusual dress." The parties were seated in the living room and accused had the bottle of rum in his hands. Miss Gantt "ran up and grabbed the bottle and took it back and put it on the breakfast table." The accused, Fitzgerald and Miss Cauley left the house and purchased some lime "colas." Miss Gantt departed to fill a previous engagement. After eating supper at a nearby restaurant the accused, Fitzgerald and Miss Cauley went to the residence of Miss Britt and returned with her to the breakfast room at Miss Gantt's home, where they engaged in a general conversation described by the accused as "What I would call a whorehouse conversation." The parties drank rum, using lime "colas" for chasers. Accused asserted that he was not a heavy drinker and took no more than a couple of drinks because he already "had a few too many and more would have got me intoxicated." At approximately 8:40 Miss Britt insisted that she had to go home. The accused stated that "I was informed that I was the only man with an automobile." He requested Fitzgerald to take Miss Britt home and also requested that he go along in the car, but Fitzgerald refused. After he and Miss Britt got into the car she started removing her jewelry, saying, "Here you can have that." He declined saying, "Woman, I don't want your jewelry, I am not even interested in it." She said, "Put it in your pocket. We are going to play a little. We are going to have fun." He drove her to her home and "opened the door for the lady to get out." She declined and wanted him to "go somewhere for some more beer." She started searching the car for something. He said, "In the first place, I am quite a bit your junior. I don't care to even talk with you about *** she wanted me to accept the jewelry; in fact, she gave me the jewelry and wanted me to accept it if I would have sexual intercourse with her - anyway at all, she said, and however I desired." The accused then related that Miss Britt made sexual advances upon him, finally partially undressing herself and stated that "I sat there 30 minutes begging her to get out of my car and let me go back." She declined. He thereupon grabbed her by the hair of her head and the left leg, threw her out into the street and drove off.

He also threw the jewelry out of the car and left Miss Britt and the jewelry in the "middle of the street." She threatened him, stating that she would report that he had raped her and stolen her jewelry. Accused stated that this was about 2200 hours and that he went back to the Gantt house where Fitzgerald came to the door in his "shirt-tail" and declined to ride back to the field with him, saying that he was going to "shack up with Martha." He then went back to Eglin Field and on the following morning tried to get on the sick book but was not successful. He was given some headache pills. At about noon he got a call from Fitzgerald, stating that "she is going to swear that you stole her jewelry." He remembered that Miss Britt's glasses were in his car, but he had no money to purchase gasoline for the trip and so advised Fitzgerald. He was able to borrow four dollars from Master Sergeant Beaulieu, got some gasoline and drove to Miss Britt's home in Andalusia where he invited her to come out to his car and get her glasses. She went to the car and accused handed her the glasses and stated, "I understood that you ran to the sheriff about this." She replied, "No, I have not said a word to anyone and turned around and invited me to come back there that night" (R. 147-153). On cross-examination, the accused stated that Miss Cauley was the girl he "was working up to," but as they sat at the breakfast table Miss Britt fondled him and told him that she could show him "as good a time as any young girl could." Fitzgerald was supposed to date Miss Gantt. Both Miss Britt and Miss Gantt drank rum, using 7-Up for a chaser. The accused was asked if he made a statement to Sergeant Van Slyke, who guarded him, concerning the alleged offense. He replied that he did talk to him about some minor details. He never talked to Sergeant Ball, another one of his guards. He denied that when he testified before the grand jury he stated that he picked up the jewels of Miss Britt on the street the day following the alleged attack. Accused denied that he had a gun in his car on the 28th of April but stated that he had placed it in the car on the morning of 29 April (R. 155-165).

5. Evidence in rebuttal

Lieutenant Colonel Charles D. Chitty, Jr., Air Corps, testified that he knew the accused's general reputation as to moral character and that it was poor. On cross-examination he stated that his opinion was based on his own observations of accused's conduct and efficiency as well as what he had heard others say about him (R. 164-165). Mr. Clifton B. Hines, the deputy sheriff, was asked if he knew Tom Gantt's general reputation for truth and veracity. He had heard people state that they would not believe him and he had heard others say that they would (R. 167).

Mr. Bowen Simmons, the Circuit Solicitor for the 22nd Judicial District of Alabama, testified that on the morning of 28 April 1947 Miss Britt came to his office in the courthouse and made certain statements to him. He took her before the Circuit Judge and discussed the charges to be filed against the accused. Miss Britt "refused to issue the warrant herself." The prosecution in the state court was commenced "without the

consent and over the protest of Miss Britt." She at all times preferred that the prosecution be had in the military court. Mr. Simmons was of the opinion that both warrants charging robbery and rape were prepared at the same time, however, a few days could have elapsed between the time of their issuance (R 167-170).

Miss Catherine Cauley, Elba, Alabama, testified that when she, the accused and Mr. Fitzgerald went to Miss Britt's home to bring her to the Gantt residence, Miss Britt at first refused to leave her home, having observed that Fitzgerald was intoxicated. She offered excuses stating that she had considerable school work requiring her attention. However, the accused talked to her and urged her to go along with them, after which she finally consented. After they arrived at the Gantt residence the men mixed drinks but neither she nor Miss Britt drank any liquor. They drank 7-Up or Coca Cola. The witness had never seen Miss Britt before that night. Prior to the time that the accused left to take Miss Britt home she noticed that "his tongue had begun to get thick" but otherwise she did not observe any evidence of intoxication. Miss Britt left the house with the accused at about 9:30 p.m. Miss Gantt returned at about 11:00 p.m. Miss Cauley heard Fitzgerald answer a call at the door but she did not know whether it was before or after Miss Gantt came in (R 174-181).

Miss Martha Gantt was called by the prosecution in rebuttal and stated that she had known Tom Gantt all her life and knew his general reputation for telling the truth. She stated, "I would not believe him on his oath" (R 182).

Mr. C. M. Wiggins, 220 Bresden Street, Andalusia, Alabama, a character witness for the prosecution, stated that he had lived across the street from Miss Lila May Britt and had known her for thirty years. He had never heard her chastity brought in question "until this trouble came up." There were street lights in front of his house (R 183-186).

Mr. J. A. Brawner, Chief of the Driver's License Division, Alabama State Department of Public Safety, living at Andalusia, stated that he was a personal friend of Miss Britt and had known her for twenty-five years. He asserted that her reputation for chastity was good and that her character was above reproach (R 187).

6. Discussion

Procedural Matters

Several procedural questions raised during the trial merit consideration. The prosecution moved that in view of the nature of the expected testimony, spectators be excluded from the court room. The defense objected and an agreement was reached whereby spectators were limited to

such interested persons as might be designated by the defense and such military personnel as were attending the court-martial for instructional purposes. The action of the court was within the exercise of its sound discretion and could only be construed as favorable to the accused (par 49e, p. 38, MCM 1928).

After the reading of the charges and specifications to the accused but prior to entering pleas, the defense interposed a plea in bar of trial contending that the War Department in 1946 had announced that rape and certain other offenses would not be tried within the continental limits of the United States without authority from the Secretary of War. The defense obviously referred to WDAGO letter of 30 January 1946 to each commanding officer exercising court-martial jurisdiction in the United States which provided that "no person subject to military law shall be tried by court-martial for murder or rape committed after 31 January 1946, within the geographical limits of the states of the Union or District of Columbia, except upon special authorization in each instance of the Secretary of War." The prosecution thereupon offered and there was received in evidence without objection Prosecution Exhibits 1 and 2 showing the request of the civil authorities that the military authorities take jurisdiction of the accused and the alleged offenses and the indorsement of The Judge Advocate General advising that the Under Secretary of War had on 25 June 1947 authorized the trial of accused by general court-martial on the charge of rape. The authority of the Secretary of War to issue the aforementioned order to the field is not questioned, however, jurisdiction of courts-martial arises out of authorizations contained in the Constitution and Acts of Congress, more specifically Article of War 2. Its limitations are no less than the Constitution and the Congress has prescribed. Article of War 92 provides that:

"No person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."
(Underscoring supplied.)

We take judicial notice that at the time of and prior to the trial of this case Congress had by appropriate declarations, proclaimed a state of war to exist between the United States and other specified countries.

"In the absence of specific provisions to the contrary, the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace." (Hamilton v. Ky Distilleries Co., 251 U.S. 146. See also, Kahn v. Anderson, 255 U.S. 1, 10; 40 Op. Atty. Gen. No. 100, 1 Sept 1945, 4 Bull. JAG 481).

We also take judicial notice that at the time of the trial, peace had not been officially proclaimed nor had treaties of peace with all nations

with which a state of war existed been ratified. Therefore, in contemplation of law the accused was not tried by court-martial "in time of peace."

Defense counsel requested a continuance of the case asserting that although he had utilized the greater part of a month in preparation for trial, he had been unable to procure the attendance of Martha Gantt and Tom Gantt. The motion was overruled subject to having it renewed later in the trial. Both of the witnesses named were subsequently produced and the defense did not renew its motion for a continuance nor request the attendance of any witnesses not shown to have been present. The ruling of the court was not prejudicial to the rights of the accused nor did it constitute an abuse of discretion.

The Charges and Specifications.

The evidence sufficiently supports the finding that at the time and place and upon the person alleged, the accused committed the crime of sodomy (Charge I and Specification 2 thereof).

With regard to Specification 1 of Charge I the court, by exceptions and substitutions, found the accused not guilty of robbery as alleged but guilty of wrongfully committing an assault upon Miss Britt "by presenting a firearm, a forty-five calibre service pistol, within the range of said Miss Lila May Britt, and pointing said firearm at her in a threatening manner." As we construe this finding, the court thus found accused guilty of an "assault with a dangerous weapon." See CM 195931, Willis; CM 274647, Trujillo, 47 ER 250. It is provided in the Manual for Courts-Martial that:

"Exceptions and substitutions — One or more words or figures may be excepted and, where necessary, others substituted, provided the facts so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the Specification or increase the amount of punishment that might be imposed for any such offenses. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense." (Par 78c, MCM, 1928; Underscoring supplied).

In Winthrop on Military Law, pages 582, 583, Reprint, page 383 it is stated:

"It need scarcely be noted that while the court-martial may always convict of a lesser kindred offense, it is not empowered to find a higher or graver offense than the one charged, nor an offense of a different nature. * * * and this though the evidence clearly shows that the greater or the distinct offense was the one actually

committed; for a party cannot be convicted of an offense of which he has not been notified that he is charged and which he has had no opportunity to defend." (Underscoring supplied).

It is elementary that if the offense found is necessarily included in that charged, the accused has had notice of and the opportunity to defend against, and may be convicted of such necessarily included offense. (Par 78c, MCM, 1928). However, as was stated in CM 323728, Wester, "the particular offense found, in order to be properly considered a lesser included offense of that charged must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not contained in such offense." Although "assault" is among the lesser offenses necessarily included in robbery, "assault with a dangerous weapon" contains an additional element not necessarily included in robbery. (Par 149f, p 171, MCM, 1928). In this connection see CM 223331, Ross, 13 ER 375, 378, holding that "assault with intent to do bodily harm with a dangerous weapon" is not of itself a lesser included offense in the charge of robbery.

By comparison of the finding as to Specification 1 of Charge I and the finding as to the Specification and Charge II it will be observed that "presenting a firearm, a forty-five calibre service pistol, within the range of said Miss Lila May Britt, and pointing said firearm at her in a threatening manner" are the same acts found by the court as being an element of the offense found in the latter Charge and Specification, for as we construe the evidence, only one act of "presenting a firearm * * *" occurred. We are therefore of the opinion that the finding of guilty of Specification 1 of Charge I should be disapproved in its entirety on the ground that the act found to constitute the assault therein merged into and became an integral part of the assault found in Charge II and its Specification. For cases involving this proposition see CM 194289, Ray, 2 ER 131, 132; CM 243818, Smith, 28 ER 111, 117.

With respect to Charge II and its Specification the court found accused not guilty of rape but guilty of "with intent to commit a felony, viz, rape, commit an assault upon Miss Lila May Britt, by willfully and feloniously striking her on and about the head and body with his fists and presenting a firearm, to wit; a forty-five calibre service pistol within range of said Miss Lila May Britt and pointing said firearm at her in a threatening manner." Here again the court not only found the accused guilty of "assault with intent to commit rape" but set out in its findings acts constituting (a) an assault and battery (b) an assault with a dangerous weapon. Assault with intent to commit rape in violation of Article of War 93 is concededly a lesser offense necessarily included in rape. (Par 148b, MCM, 1928. CM 228000, McCoy, 16 ER 33, 39). The additional matters therefore amplified the finding by including specific acts not alleged nor necessary to the offense found. The form of the finding was irregular and so much thereof as is in addition to the finding of assault with intent to rape should be disapproved. By way of illustration of the foregoing principles the Board refers to CM 195261, Gilmore, 2 ER 201, 203; CM 211866, Karvajna, 10 ER 147, 149; CM 228000, McCoy, 16 ER 33, 39.

The foregoing is not to be construed as implying that the evidence does not show that the accused struck Miss Britt on and about her head and body with his fists nor that he did not present and point the pistol at her in a threatening manner. We are of the opinion that the evidence adequately shows such acts to have been committed. What is intended is to say that having found the accused guilty of a lesser offense necessarily included in the rape charged, it was improper to supplement such offense found by specifying acts not pleaded nor necessary to the finding. In other words, the evidence set forth the acts. It was sufficient for the court to find the offense.

The events transpiring between accused and Miss Britt after they left the Gantt residence on the night of 28 April 1947 were peculiarly within the immediate knowledge of the two persons. Their testimony is in conflict. The weighing of conflicting evidence and the passing upon the credibility of witnesses are functions which the Articles of War have lodged, in the first instance at least, in the members of the court-martial hearing the case. It is their function, under their oath, to well and truly try and determine, according to the evidence, the issues joined; it is their sworn duty to administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States.

The condition of Miss Britt's body subsequent to the commission of the alleged offenses, the circumstances of her appearance at the Gantt residence, her age and status in the community, were all matters tending strongly to corroborate her testimony that she was the unwilling victim rather than the aggressor in the unsavory activities. Certainly had she been the pursuer as the accused contended, there would have been no reason for the resulting violent injuries to her body, including her private organs. The reluctance of Miss Britt to reveal "the awful part" immediately after the occurrence thereof, as well as her desire to avoid undue publicity regarding the offenses is both reasonable and understandable. Rarely would a woman be found who would not shrink from such publicity. Under the circumstances shown in the record, the failure of the grand jury to indict the accused has no bearing on his guilt or innocence and did not affect the jurisdiction of the court-martial trying the case. Upon the whole record we are of the opinion that the court resolved every reasonable doubt in accused's favor. Without reference to the offenses of which he was found not guilty, our examination of the record convinces us to the exclusion of every reasonable doubt as to accused's guilt of the offenses of assault upon Miss Britt with intent to rape her and of sodomy as alleged.

7. Records of the Department of the Army show that the accused is 26 years of age and married. He graduated from high school in 1941 and was employed by the United States Forestry Service prior to enlisting in the Army on 5 September 1942. He attained the rank of staff sergeant

and on 9 November 1946, after completing Officer Candidate School he was commissioned a second lieutenant, Air Corps, AUS. His record reveals two efficiency reports, one rating him as "Excellent" and the other as "Very Satisfactory."

8. The court was legally constituted and had jurisdiction over the accused and the offenses. Except as noted, 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 of Charge I and Specification 2 thereof but legally insufficient to support the finding of guilty of Specification 1 thereof, legally sufficient to support only so much of the findings of guilty of the Specification, Charge II, as involves a finding that accused did, at the place and time alleged, with intent to commit a felony, viz, rape, commit an assault upon Miss Lila May Britt, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of Article of War 93.

Chest T. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

(122)

JACK-CM 325200

1st Ind

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

NOV 6 1947

TO: Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Raymond T. Hightower (O-590044), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of an assault upon Miss Lila May Britt by pointing a pistol at her in a threatening manner in violation of Article of War 96 (Spec 1 of Charge I); of sodomy per os upon her in violation of Article of War 93 (Ch I and Spec 2 thereof) and of assault with intent to commit rape upon Miss Britt by striking her about the head and body and pointing a pistol at her in a threatening manner in violation of Article of War 93 (Ch II and its Spec). He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for ten (10) 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, but legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence.

On the evening of 28 April 1947, the accused and Chief Warrant Officer Jefferson Fitzgerald left Eglin Field, Florida, in accused's automobile and proceeded to Andalusia, Alabama, where Mr. Fitzgerald had suggested that they spend the evening with friends. The accused was without funds and Mr. Fitzgerald advanced him \$5.00 and purchased the gasoline for the trip. They had several drinks as they traveled toward Andalusia and also purchased a bottle of rum. They arrived at Andalusia at about 1800 hours and went immediately to the residence of Miss Martha Gantt who received them into her house but stated that she had an engagement to look after her minister's children during the evening. She took the bottle of rum which was then about half full, placed it on the breakfast room table and invited a roomer in the house, Miss Catherine Canley, to help entertain her guests.

Prior to her departure for the minister's home Miss Gantt called Miss Lila May Britt, a 52 year old school teacher living about three blocks

away and requested that she come to the Gantt residence and take care of the place while she was away. Miss Britt agreed to go to Miss Gantt's residence and stay for about an hour. At about 2000 hours the accused, Mr. Fitzgerald and Miss Cauley called at Miss Britt's home to take her to the Gantt residence. Miss Britt noticed that Fitzgerald appeared intoxicated and at first she declined to accompany them. The accused insisted and she went with them to the Gantt residence where they repaired to the breakfast room and engaged in a general conversation. Drinks were served but the evidence indicates that the women drank soft drinks, while the men drank rum. After the parties had conversed for about an hour Miss Britt stated that "the hour is up, Martha has not come back, and I must be going home." The accused agreed to accompany her and they repaired to his car, which was parked in front of the house. He stated to her "You don't drink, do you?" She replied "No, I don't drink and don't smoke." He said, "What do you do then?" She replied that she drank coffee. Accused started driving in a direction other than her home. She testified that she protested but he drove the car to a remote place about 100 yards off of a road leading toward Brewton, Alabama, parked and demanded that Miss Britt give him her money. She replied that she had none. He then demanded her jewelry. She refused to give up her jewelry and accused reached into the compartment of his car and drew therefrom a service pistol, pointed it at her and forcibly removed from her person two diamond rings, a medical fraternity ring, a wrist watch and a pair of earrings. He then struck her several blows on the chest and body and ordered her to get into the back seat of the car and undress. Fearing for her life she got into the back seat and removed her clothes. The accused thereupon proceeded to have intercourse with her. He gained penetration in a limited manner and then stated "This damn thing won't explode." He then took from the floor an unopened coca-cola bottle and "rammed it in me." Subsequently he grasped Miss Britt by the hair of her head and by force caused her to take his penis in her mouth. She testified that after he was through with her accused took her back to the town of Andalusia, threatened her if she should report the incident and at about 2300 hours released her on the street near the Gantt residence. Miss Britt immediately reported to Miss Gantt that she had been robbed of her jewelry. On the following morning she reported the incident in detail to her family doctor and underwent a physical examination. She had bruises on her neck and body and her female organs were lacerated and bruised in such a manner as could not have been caused by sexual relations.

Report was made to the civil authorities. In the afternoon of the same day Mr. Fitzgerald, by telephone from the sheriff's office, notified the accused, who had returned to Eglin Field, that a report had been made of the incidents occurring the previous night and told him to bring the jewelry and return it to Miss Britt. After borrowing

some money to buy gasoline the accused returned the jewelry, excepting the earrings, to Miss Britt at her home. Warrants were issued charging the accused with robbery and rape. The accused was surrendered to civil authorities and confined for about a month awaiting action of the grand jury. Both Miss Britt and the accused appeared before the grand jury. She stated that she desired the case to be tried in a military court thereby avoiding publicity. She lived with her invalid mother who suffered with high blood pressure and she feared that the publicity might excite her mother and cause her death. Medical testimony supported her apprehensions in this regard. The grand jury indorsed "No bill" to the charges pending against accused and the States Attorney for the 22nd Judicial District of Alabama requested that the military authority assume jurisdiction.

Accused testified in denial of any assault upon Miss Britt, asserting that she solicited him to have intercourse with her in any manner he chose, and that he became angry and "threw" her from the car.

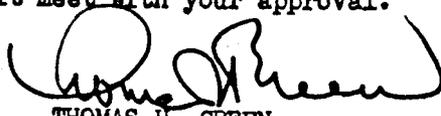
The record shows that Miss Britt had been, prior to the offenses herein, a respected school teacher in the grade schools of Andalusia, Alabama, for 17 years. She had never been married. The record also shows that the accused comes from a highly respected family and has no prior criminal record. He denied being drunk on the night in question but the circumstances are such as to lead to the belief that excessive intoxication contributed measurably to the commission of the offenses. I recommend that the finding of guilty of Specification I of Charge I be disapproved; that only so much of the finding of guilty of the Specification of Charge II be approved as involves a finding that accused did, at the place and time alleged, with intent to commit a felony, to wit, rape, commit an assault upon Miss Lila May Britt, that the sentence be confirmed and carried into execution. In view of the accused's youth and his prior creditable record I recommend that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Consideration has been given to communications concerning the accused which have been received from Honorable Spessard L. Holland, United States Senate, and Honorable Bob Sikes, Member of Congress, together with numerous letters from citizens of Alabama and Florida attesting to the prior excellent character and reputation of the accused.

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

2 Incls

- 1 - Record of trial
- 2 - Form of Action



THOMAS H. GREEN
Major General

The Judge Advocate General

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

(125)

JAGK - CM 325228

9 FEB 1948

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at
Headquarters PHILRYCOM, APO

Corporal RAMON L. GUANGCO
(10320055), Company "C",
57th Infantry Regiment,
Philippine Scouts.)

707, 28 June 1947. Dis-
honorable discharge (suspended),
total forfeitures and confine-
ment for one (1) year.
Stockade.)

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

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

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 83rd Article of War.

Specification: In that Corporal Ramon L. Guanco, Company "C" 57th Infantry Regiment, Philippine Scouts, APO 1009, did, at Batangas, Batangas, Philippine Islands, on or about 21 March 1947, willfully suffer four (4) wheel assemblies, motor vehicle 2½ ton 6x6, each consisting of one (1) tire, 7.50x20, one (1) inner tube 7.50x20 and two (2) rims, of a total value of about \$369.32, military property belonging to the United States to be wrongfully disposed of by sale to unknown persons.

The accused pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "of a total value of about \$369.32" substituting therefor the words "more than Fifty (\$50.00) dollars"; of the excepted words, not guilty; of the substituted words, guilty, and guilty of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging

dishonorable discharge until the soldier's release from confinement, and designated General Prisoners' Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War may direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 191, Headquarters Philippines-Ryukyus Command, APO 707, 12 August 1947.

3. Proof adduced by the prosecution established that on about the date alleged property similar to that described in the specification was missing from the "A" Motor Pool at Camp Batangas, P.I. The accused was a member of the guard detailed to safeguard such property. In a pre-trial confession, which the court-martial concluded was of a voluntary nature, the accused admitted that on or about the date alleged he willfully suffered government property similar to that described in the specification to be unlawfully disposed of by sale to unknown persons. Irrespective of whether a wrongful sale or a willful suffering of a wrongful sale is alleged, it is obvious that a wrongful sale is involved in the corpus delicti of either offense. Therefore, in order to sustain a conviction in either case, even though accused has confessed to the offense charged, it must appear, from evidence aliunde accused's confession, that the property in question had probably been unlawfully sold.

We find no competent evidence in the record, aliunde accused's confession, tending to establish the probability that the alleged wrongful sale had in fact occurred, thus permitting the confession to be considered. For a more detailed discussion of the points of law involved, see CM 325377, Sipalay; CM 325378, Catubig; CM 325056, Balucanag.

4. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Richard J. Silvers Judge Advocate
Gilbert J. Atwood Judge Advocate
Harley H. Lanning Judge Advocate

57
1 Mar 48

JAGK - CM 325228

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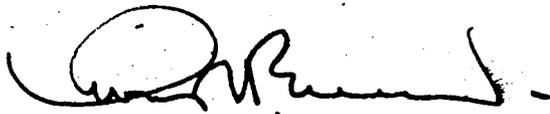
JAGO, Dept. of the Army, Washington 25, D. C. FEB 10 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Corporal Ramon L. Guanco (10320055), Company "C", 57th Infantry Regiment, Philippine Scouts.

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

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.

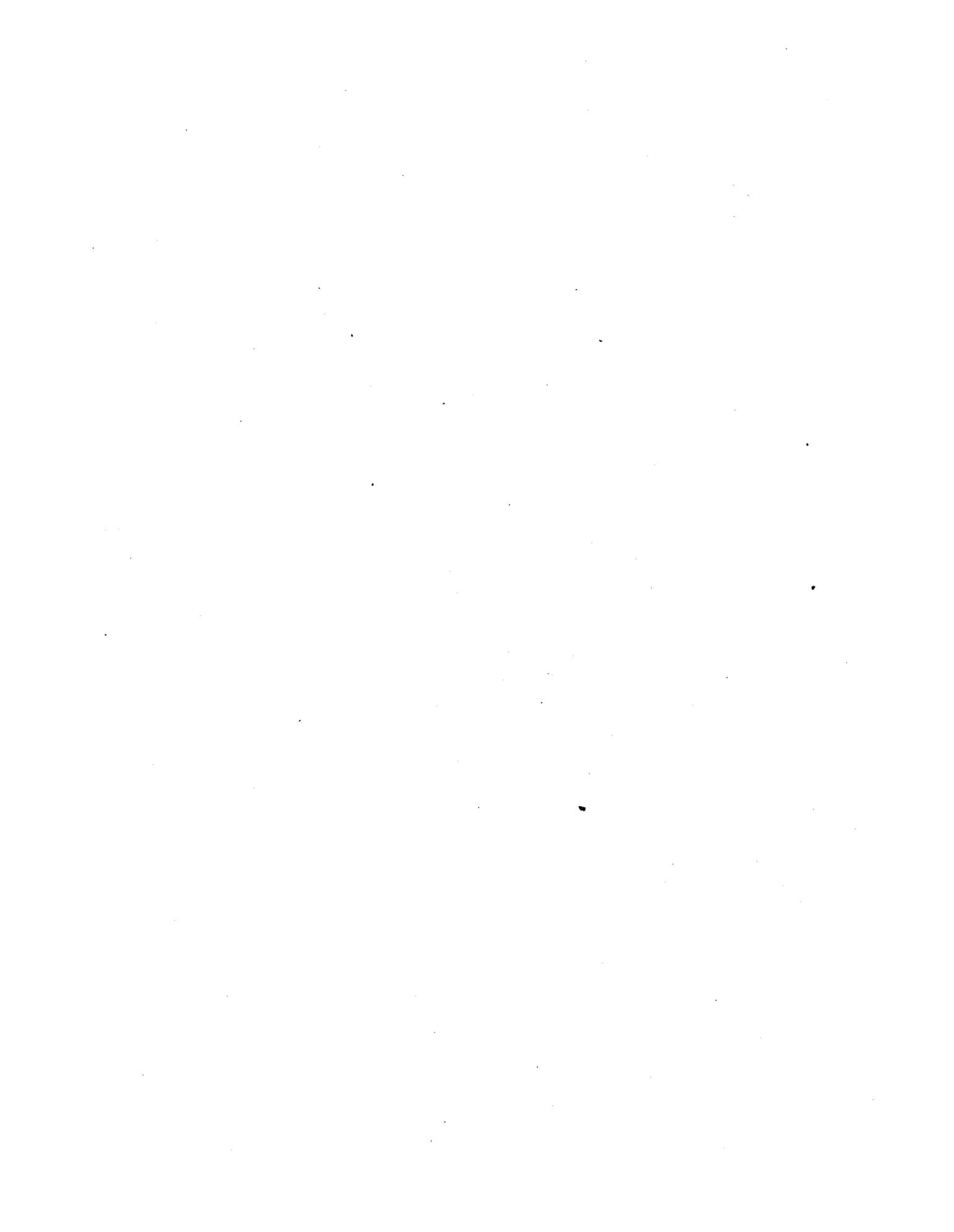


THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

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

(GCMO 57 (DA) 4 Mar 1948).



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

JAGH - CM 325231

SEP 10 1947

UNITED STATES)

v.)

Second Lieutenant Bonifacio
 Silverio (O-1896981),
 Infantry)

PHILIPPINES - RYUKYUS COMMAND

Trial by G.C.M., convened at
 Headquarters, PHILRYCOM, APO
 707, 18 July 1947. Dismissal,
 TF, CHL for six (6) months.

HOLDING by 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.

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

CHARGE I: Violation of the 93rd Article of War

Specification: (Nolle Prosequi)

CHARGE II: Violation of the 96th Article of War

Specification: In that Second Lieutenant Bonifacio Silverio, Regimental Headquarters Company 44th Infantry (PS), then Sergeant, being indebted to Mrs. Vicenta A. Victorine in the sum of 4000 pesos for money had an received by him, which amount became due and payable on or about 1 June 1946, did, at Manila, Philippine Islands, from 1 June 1946 to 1 June 1947, dishonorably fail and neglect to pay said debt.

He pleaded not guilty to the Specification of Charge II and Charge II, and was found guilty of that Specification and Charge. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for six (6) months. 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:

(130)

On or about March 1946, twenty men, included among whom was the accused, submitted an application to purchase twenty jeeps from the Foreign Liquidation Commission through a single application (R 6, Pros Ex 1).

Mrs. Vicenta Adriatico Vda de Victorino testified that she met the accused in October 1945, in connection with the investigation of a robbery committed at her residence (R 9). Subsequent to that time, accused induced her to go into business with him involving the acquisition of surplus vehicles from the Foreign Liquidation Commission (R 9). Witness gave accused four thousand pesos to cover payment of ₱ 200 each to twenty veterans whose names were to be used in the purchase of twenty jeeps (R 9, 10). As security for that sum accused, a month later, gave witness a note, dated 1 May 1946, payable thirty days after date, in the sum of ₱4,000, "Which I (accused) have secured from her in concept of a loan" (R 9, 10 Pros Ex 3). As a separate transaction accused obtained a weapons carrier from the Foreign Liquidation Commission (R 10). This vehicle was paid for by witness by her personal check (R 10, 11, 12); it was registered in the name of accused because accused said he was going to resign from the Army and drive it himself, and also if the vehicle was in a collision, Mrs. Victorino would not be "dragged into court" (R 12). Mrs. Victorino never profited by the income from the vehicle (R 12), and received no payment on the note (R 10, 11).

4. The evidence for the defense was elicited wholly by cross-examination of Mrs. Victorino. She admitted that on 11 July 1947 (about a month after charges had been served on accused), she signed a paper (Def Ex "A") which acknowledged the transfer of the weapons carrier to her in consideration of which transfer she cancelled all claims against accused for payment of the ₱4,000 promissory note and desired to drop her charges against accused for failure to pay the note. She stated, however, that she signed the paper on condition that, if anything, directly or indirectly caused by the accused, happened to witness or her family, the accused would be responsible to her and her family (R 13, Pros Ex 4).

The accused, after having his rights explained to him by the law member, elected to remain silent (R 14).

5. There is some ambiguity in the testimony of Mrs. Victorino, in that she stated that she was induced to go into business with accused, and (evidently in the conduct of such business) gave him ₱4,000 to cover payments to veterans whose names were to be used to obtain priorities for the purchase of jeeps. This ambiguity however is resolved by the introduction of the note, the terms of which included an admission by the accused that the ₱4,000 was secured as a loan. There is no evidence that the payee was other than satisfied with the transaction. It may be assumed, therefore, that it was the non-payment of this note, dated 1 May 1946, that constituted the debt, the non-payment of which was alleged to constitute a violation of Article of War 96.

It is well settled that a pre-existing valid and enforceable debt constitutes a sufficient consideration to support an undertaking on a note (10 CJS 604, and cases cited). The sole question that remains for consideration by the Board of Review, therefore, is whether the neglect and failure to pay the note was "dishonorable", for the gravamen of the offense charged lies in the dishonorable character of the accused's failure to pay the debts, arising from circumstances which so characterize it and not from the default.

6. Mrs. Victorino testified that she was in business with accused. The ₱4,000 was given accused in connection with the purchase of vehicles in furtherance of this business enterprise (R 9). A group of twenty men, including accused, did signify their intention to purchase jeeps (Pros Ex 1, 2). It might be assumed that the business was dissolved, because a note evidently satisfactory to Mrs. Victorino and designating the transaction as a loan was executed by accused for the ₱4,000, but there is no other evidence of such dissolution. There is no evidence that the jeeps were not purchased. All evidence with reference to the purchase of the weapons carrier was to the effect that it was a separate transaction (R 10, 11). The note was due and payable on 30 May 1946, although it was not paid at that time. There is no testimony that a demand for payment was made or that the accused evaded payment. Mere failure to pay a debt promptly is not of itself sufficient grounds for charges against an officer under the Articles of War (CM 276250, Harvey, 48 BR 239, 248; CM 273874; Miller, 47 BR 85, 90; CM 271690, Williamson, 46 BR 157, 163; CM 232882, Koford, 19 BR 229, 242). It is accordingly the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of this specification.

7. Since it is the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of the specification, it is unnecessary to discuss the legal effect of the paper executed by Mrs. Victorino, after charges were served on accused, and purporting to cancel all claims against the accused for the payment of the promissory note.

8. The accused is 37 years of age, and married. He served as an enlisted man in the Philippine Scouts from 21 January 1929 to 15 August 1943. He was commissioned Second Lieutenant, Army of the United States, on 16 August 1946.

9. The court was legally constituted and had jurisdiction of the person and offense. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

J. H. Heston, Judge Advocate

R. McDonald Gray, Judge Advocate

William A. Self, Judge Advocate

JAGH - CM 325231

1st Ind

WD, JAGO, Washington 25, D. C.

SEP 18 1947

TO: Commanding General, Philippines-Ryukyus Command, APO 707,
c/o Postmaster, San Francisco, California

1. In the case of Second Lieutenant Bonifacio Silverio (O-1896981), Regimental Headquarters Company, 44th Infantry Regiment (PS), I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 325231).

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.

JAGN-CM 325266

UNITED STATES)

v.)

Private First Class
 EUGENE R. CUNEO (15224752),
 Medical Detachment, 118th
 Station Hospital)

24TH INFANTRY DIVISION

) Trial by G.C.M., convened at
 Kokura, Kyushu, Japan, 19
 July 1947. Dishonorable dis-
 charge and confinement for
 two (2) years. Disciplinary
 Barracks.

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 93rd Article of War.

Specification 1: In that Private First Class Eugene R. Cuneo, Medical Detachment, 118th Station Hospital, APO 929, did, at Fukuoka, Kyushu, Japan, on or about 1700 hours 8 June 1947 feloniously take, steal, and carry away clothing (laundry), value about 21 dollars 13 cents (\$21.13), the property of Technician Fifth Grade John P. Novak RA 43046513, Medical Detachment, 118th Station Hospital, APO 929.

Specification 2: In that Private First Class Eugene R. Cuneo, Medical Detachment, 118th Station Hospital, APO 929, did, at Fukuoka, Kyushu, Japan, on or about 1730 hours, 8 June 1947, with intent to do her bodily harm, commit an attempted assault upon Kimura Aiko, Fukuoka City, Kita Minato Machi, Hondori, Hattoba Hotel, by attempting to cut her with a dangerous weapon, to wit, an open knife.

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

Specification 1: In that Private First Class Eugene R. Cuneo, Medical Detachment, 118th Station Hospital, Fukuoka, Kyushu, Japan, did, at Fukuoka, Kyushu, Japan, on or about 1730 hours 8 June 1947, willfully, wrongfully, and unlawfully destroy property, value about 9,300 yen, of a value of one hundred eighty-six (\$186) United States dollars, property of Toyota Harue, Fukuoka, Kyushu, Japan, to wit, nineteen (19) windows, two (2) light bulbs, two (2) doors.

Specification 2: (Finding of Not Guilty).

Specification 3: In that Private First Class Eugene R. Cuneo, Medical Detachment, 118th Station Hospital, Fukuoka, Kyushu, Japan, having been restricted to the limits of the Medical Detachment area, 118th Station Hospital, APO 929, Fukuoka, Kyushu, Japan, did, at Medical Detachment, 118th Station Hospital, on or about 1700 hours 8 June 1947, break said restriction by going to Fukuoka, Kyushu, Japan.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1 of Charge I and of Charge I; guilty of Specification 2 of Charge I, except the words "with intent to do her bodily harm," "attempted," and "by attempting to cut her with a dangerous weapon, to-wit, an open knife," in violation of Article of War 96; guilty of Specification 1 of Charge II except the words and figures "value about 9,300 yen, of a value of about one hundred eighty-six United States dollars," substituting therefor the words and figures "of a value less than fifty dollars"; not guilty of Specification 2 of Charge II; guilty of Specification 3 of Charge II; and guilty of Charge II. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved only so much of Specification 1 of Charge II, as to value, as finds "some substantial value not in excess of \$20.00," approved the remaining findings and 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 50 $\frac{1}{2}$.

3. The record of trial is legally sufficient to support the findings of guilty, except as to the value found in Specification 1 of Charge I. The only matters which will be discussed here are the legal sufficiency of the record of trial to support the finding of guilty of Specification 1 of Charge I, as to value, and the legal sufficiency of the record of trial to support the sentence.

4. Specification 1 of Charge I of which accused was found guilty, alleges in essence that he stole "clothing (laundry), value about 21 dollars 13 cents (\$21.13), the property of Technician Fifth Grade John P. Novak." It is clearly proven by the evidence contained in the record of trial that at the time and place alleged accused took, stole, and carried away a bundle of laundry belonging to Novak. First Lieutenant George B. Kich, Assistant Provost Marshal for Fukuoka, the investigating officer, having been sworn as a witness and then shown a written statement, testified that the statement had been previously made to him in his official capacity by John P. Novak. His testimony then continues:

"Q. Did you in your capacity return any laundry to Novak?

A. Yes, sir, I did.

Q. Will you please state the amount of such laundry?

A. It is listed here — four khaki trousers, three khaki shirts, 5½ pairs woolen sox, one OD cap, five cotton drawers, two handkerchiefs, and barracks bag.

Q. Did he swear this was his property?

A. Yes, sir, he did.

Q. You actually counted this equipment at the time it was taken?

A. Yes."

The prosecution then read into the record, and asked the court to take judicial notice of, a Government price list of the items mentioned by First Lieutenant Kich. Neither in the testimony of First Lieutenant Kich, or elsewhere in the record, is there any evidence to establish where, how, or from whom the "laundry" delivered by First Lieutenant Kich to Novak came into the former's possession, or that it was the same "laundry" allegedly stolen by the accused. While we are prepared to hold that the evidence in the record of trial is sufficient to prove that accused stole a bundle of finished laundry it is obvious that there is no competent evidence in the record to show the items of clothing contained in such package. It follows that there was no competent evidence from which the court could determine the value of the subject "laundry" other than to determine that it had some substantial value not in excess of twenty dollars. The maximum authorized punishment for an offense of larceny of property of a value of twenty dollars or less is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor not to exceed six months (par. 104c, MCM, 1928).

5. Specification 1 of Charge II, of which accused has been found

JAGN-CM 325266 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 24th Infantry Division, APO 24, c/o
Postmaster, San Francisco, California.

1. In the case of Private First Class Eugene R. Cuneo (15224752), Medical Detachment, 118th Station Hospital, I concur in the foregoing holding by the Board of Review and recommend that only so much of the finding of guilty of Specification 1 of Charge I as to value be approved as finds some value not in excess of \$20, 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 and four months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 325266).



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 325313

UNITED STATES	)	TECHNICAL DIVISION
	)	AIR TRAINING COMMAND
v.)	
Lieutenant Colonel SAMUEL	)	Trial by G.C.M., convened at
C. PUCKETTE (O-320509),	)	Fort Francis E. Warren,
Air Corps	)	Wyoming, 5 and 6 August 1947.
	)	Dismissal

 OPINION of the BOARD OF REVIEW
 HORTENSTEIN, 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. The 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 Lieutenant Colonel Samuel C. Puckette, Air Corps, Squadron K-1, 463rd Army Air Forces Base Unit, was, on or about 11 March 1947, found drunk in a semi-nude condition in his automobile on a public thoroughfare, to wit: County Road No. 411, Spokane County, Washington.

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

Specification 1: In that Lieutenant Colonel Samuel C. Puckette, Air Corps, Squadron K-1, 463rd Army Air Forces Base Unit, was, at Army Air Base, Geiger Field, Washington, on or about 11 March 1947, drunk and disorderly in station.

Specification 2: In that Lieutenant Colonel Samuel C. Puckette, Air Corps, Squadron K-1, 463rd Army Air Forces Base Unit, was, on or about 11 March 1947, found drunk in a semi-nude condition in his automobile

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on a public thoroughfare, to wit: County Road No. 411,
Spokane County, Washington.

He pleaded not guilty to the Charges and the Specifications thereunder. He was found guilty of Charge I and Specification 2 thereunder, guilty of Charge II and the Specifications thereunder, and not guilty of Specification 1 of Charge I. 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 Technical Division, Air Training Command Judge Advocate, dated 26 August 1947.

4. Records of the Army show that accused is 35 years of age, married, and the father of three children, the eldest of which is nine years of age. He was born in Arkansas, completed high school, graduated in engineering from Georgia Tech in 1934, and received his LLB degree in 1938 from Woodrow Wilson Law School, Atlanta, Georgia. In civilian life he was variously employed as a tool designer, faculty member at Georgia Tech, and as a field engineer for the Georgia Power and Light Company. He entered upon extended active duty in 1939 as first lieutenant in the Reserve and was subsequently promoted through successive ranks to the rank of lieutenant colonel. He had 25 months service in Hawaii from 1941 to 1943, and also had 9 months service in the China-Burma-India Theater.

During the period from 13 November 1939 to 10 March 1947 his efficiency has been rated as very satisfactory three times, excellent seven times, and superior twice. There is no record of prior delinquencies either in the Army or in civilian life.

5. The following letters pertaining to accused were considered by the Board of Review: letter to the President, dated 18 August 1947, from Mr. Frank J. Irving, Daytona Beach, Florida, inclosing a letter to Honorable Richard B. Russell, United States Senate from Mrs. Mary Doyal Puckette, wife of accused; letter to The Judge Advocate General, dated 5 September 1947, from Honorable Walter F. George, United States Senate, and a letter to The Judge Advocate General, dated 13 August 1947, from Honorable J. W. Fulbright, United States Senate.

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 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. Hottelstein, Judge Advocate
John G. O'Brien, Judge Advocate
W. Lynch, Judge Advocate

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JAGH - CM 325313

1st Ind

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

NOV 1

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 Lieutenant Colonel Samuel C. Puckette (O-320509), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in station in violation of Article of War 96 (Spec 1, Chg II), and of being found drunk in a semi-nude condition in his automobile on a public thoroughfare in violation of Articles of War 95 and 96 (Spec 2, Chg I; Spec 2, Chg II). 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 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 of the sentence. I concur in that opinion.

Accused appeared at the dispensary, Geiger Field, Spokane, Washington, on the afternoon of 11 March 1947, in an intoxicated condition, accompanied by his three children. One of the children was ill with an ear infection and at the time no medical officer was present. While waiting for a medical officer to appear accused conversed with an enlisted man in a loud voice using some profanity. When Lieutenant Newland, a medical officer, entered the dispensary accused seized him by the arm and pushed him down the hall. When Lieutenant Newland remonstrated with accused the latter apologized. While his child who was ill was being treated, accused went outside the dispensary, entered his car, and was observed drinking from what appeared to be a whiskey bottle. On his return to the dispensary he had a cut over his eye. Lieutenant Newland told accused he should not attempt to drive his car but should wait until a driver could be procured for him. When Lieutenant Newland suggested that accused be given a blood alcohol test, accused gathered his children together, left the dispensary and drove off. Lieutenant Newland called the gate and told the sentinel to stop accused and send him back. Accused failed to stop at the gate in response to the sentinel's signal. Approximately ten minutes later his children appeared at the gate and gave the sentinel some car keys. Some time later accused was found in his car several hundred yards from the

gate. He was asleep and the lower portion of his body was nude. His trousers were found on the front seat and his shorts on the bumper of the car. He was brought back to the dispensary at Geiger Field and given a blood alcohol test which showed that the alcohol content of his blood was 3.1 milligrams of alcohol per cubic centimeter of blood. This result indicated that accused was seriously intoxicated.

Accused testified in his own behalf that since his return from foreign duty he has suffered from malaria and dysentery. On 11 March 1947 his wife was ill in bed and accused prepared breakfast for her and their three children. His stomach was upset and instead of eating he had a few drinks. He left home at about 12:30 p. m. for the dispensary at Fort Wright to secure medical treatment for one of his children. He stayed at Fort Wright until 2:00 p. m. and being unable to get the child treated at Fort Wright he went to Geiger Field. He admitted pushing Lieutenant Newland but also stated that he apologized. He also admitted leaving the post after Lieutenant Newland suggested that he be given a blood test. While leaving the post accused stated that he had a sharp stomach pain and knew that he would have to relieve himself immediately. For that reason he did not stop at the gate. After leaving the post he stopped his car, sent his children back to the gate and went into the woods and removed his trousers and shorts. Thereafter he remembered nothing until he was awakened by the Military Police.

Accused is 35 years of age, married, and the father of three children, the eldest of which is nine years of age. He was born in Arkansas, completed high school, graduated in engineering from Georgia Tech in 1934, and received his LLB degree in 1938 from Woodrow Wilson Law School, Atlanta, Georgia. In civilian life he was variously employed as a tool designer, faculty member at Georgia Tech, and as a field engineer for the Georgia Power and Light Company. He entered upon extended active duty in 1939 as first lieutenant in the Reserve and was subsequently promoted through successive ranks to the rank of lieutenant colonel. He had 25 months service in Hawaii from 1941 to 1943, and also had nine months service in the China-Burma-India Theater.

During the period from 13 November 1939 to 10 March 1947 his manner of performance of duty has been rated as very satisfactory three times, excellent seven times, and superior twice.

4. The defense counsel recommended to the reviewing authority by letter dated 16 August 1947 that the dismissal be suspended and that accused be permitted to resign. Six undated letters by six of the seven members of the court which tried accused were inclosures to the letter of the defense counsel, and each set forth the concurrence of the member in the recommendation of the defense counsel.

(1:6)

The Board of Review considered the following letters pertaining to accused: Letter to the President dated 18 August 1947 from Mr. Frank J. Irving, Daytona Beach, Florida, inclosing a letter to Honorable Richard B. Russell, United States Senate, from Mrs. Mary Doyal Puckette, accused's wife; letter to The Judge Advocate General, dated 5 September 1947, from Honorable Walter F. George, United States Senate, and letter to The Judge Advocate General, dated 13 August 1947, from Honorable J. W. Fulbright, United States Senate.

5. In view of accused's prior excellent military service over a period of eight years, and in view of all the circumstances of the case, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of \$100 pay per month for four months, and that the sentence as thus commuted be carried into execution.

If this recommendation is approved I propose to initiate action to effect the officer's immediate relief from active duty through administrative measures.

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

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



THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 65, D.A., 2 Dec 1947).

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

(147)

JACK - CM 325329

19 NOV 1947

UNITED STATES

EUROPEAN AIR TRANSPORT SERVICE

v.

Sergeant FREDERIC L. HOLLAND
(33986442), Company A, 831st
Engineer Aviation Battalion.

Trial by G.C.M., convened at Rhein/
Main Air Base, 1, 15-16 July 1947.
Dishonorable discharge (suspended),
total forfeitures and confinement
for five (5) years. Disciplinary
Barracks.

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

1. The record of trial in the case of the soldier named above has been examined 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. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that, Sergeant Frederick L. Holland, 33986442, Company "A", 831st Engineer Aviation Battalion, APO 57, US Army, did, at 17 Karlmarxtrasse, Langen, Germany, on or about 25 May 1947, unlawfully enter the shop of Artur Derefelt, with intent to commit a criminal offense, to wit, larceny, therein.

Specification 2: In that Sergeant Frederick L. Holland, 33986442, Company "A", 831st Engineer Aviation Battalion, APO 57, US Army, did, at 17 Karlmarxtrasse, Langen, Germany, on or about 25 May 1947, feloniously take, steal, and carry away one electric print dryer, 220 volt, 80x70 cm Made BUECHER, one washing pan, three metal sheets chromplated 60x45 cm, one camera portrait type 13x18 cm with 4-5 film packs, lense and canvass cover, two tripoids, wooden, two atelier lamps with reflectors 500 watts, 220 volts, made K. WEICHERT, one stage spot light 100 watts, 220 volts, one dentist light, three rubber cables, one reproduction board, five clamps for LEICA films V 2 A steel, one paper cutter, 24x30 cm, one watch, a value of about \$500.00, the property of Artur Derefelt.

He pleaded not guilty to the Charge and Specifications. He was found guilty of Specification 1, and guilty of Specification 2 except the words

"three metal sheets chromplated 60 x 45 cm" and of the words "of about \$500" substituting therefor the words "of more than \$50" of the excepted words not guilty, of the substituted words guilty and guilty of the Charge. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five (5) years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was published in General Court-Martial Order Number 32, Headquarters, European Air Transport Service, APO 633, 18 August 1947.

3. Evidence for the Prosecution.

Artur Derefelt, a German civilian, owned and operated a photographic shop on Karlmarxstrasse, Langen, Germany (R. 9-26).

About midnight on 24-25 May 1947 three German civilians noticed a jeep without lights parked near the shop of Artur Derefelt. They heard whispering, the sound of running, and sounds as if someone was repairing a motor. Frau Hakenhauser heard whispering and saw people "moving out of the house and back." She saw only one person at a time but was under the impression that three people were present on this occasion (R. 26-29).

On the morning of 25 May 1947 it was discovered that the shop of Artur Derefelt had been entered by way of a window and the property described in Specification 2 stolen therefrom (R. 9, 26). A photograph of the window entered was identified and introduced as Prosecution Exhibit 1 (R. 10, 36). Artur Derefelt owned all of the stolen property except one stage spot light and the dental light which belonged to Dr. Müller. These two articles had been loaned to Mr. Derefelt who used them in the shop (R. 22).

About 11:00 a.m., 25 May 1947, Mr. Dohle, the police chief of Langen, Germany, went to Mr. Derefelt's shop to investigate a report that the shop had been broken into. He found some footprints in a flower bed beneath the window which had been entered. Fingerprints were found on the window. He made plaster casts of four footprints found at the place of the incident. Mr. Dohle also testified that he had engaged in police work for 18 years and had had special instructions in taking finger and foot prints. He identified two of the plaster casts made on this occasion and they were introduced in evidence as Prosecution Exhibit 15 (R. 30-32).

The accused was interested in photography and maintained a darkroom or laboratory above the noncommissioned officers' club at Kestlerbach, Germany. The accused was ordered to move his laboratory and Master

Sergeant Howard E. Olsen gave accused permission to move it into the basement of his home. This move was to be made on 24-25 May 1947 (R. 50-53).

On 24 May 1947 the accused was at Sergeant Olsen's home. After dinner Sergeant Olsen and his wife, Lieutenant and Mrs. Goodman and the accused went to a show. This party broke up "around midnight", the Goodmans going home and the accused going to bed at Sergeant Olsen's place. Sergeant Olsen had a jeep which was kept in the basement or the yard. This jeep was not locked (R. 51, 52).

About 1100 hours on Sunday morning, 25 May 1947, Lieutenant Goodman arrived at Sergeant Olsen's house with some photographic equipment. Sergeant Olsen testified that when he went into the basement Lieutenant Goodman's equipment had been moved into the basement. He had seen photographic equipment at Lieutenant Goodman's home and the equipment introduced into evidence was not the same equipment he had previously observed at Lieutenant Goodman's home. Sergeant Olsen testified -

"Q. When you got down there, where was Lt. Goodman's equipment?

A. It was in the entrance of the garage.

"Q. How much equipment did he have?

A. I don't know, I don't know one piece of photography equipment from the next, I don't think I can answer the question.

"Q. Did you say anything to the accused in regard to any photographic equipment he had in your basement?

A. Again under the 24th Article of War I exercise my rights."

Sergeant Olsen was then asked if he had made a pretrial statement and said that he had made such a statement. He identified the pretrial statement and stated that he had been warned of his rights under the 24th Article of War before making the statement. He refused to testify concerning the contents of the statement and "what he found in the basement" on 25 May; on the grounds that such testimony might incriminate him. The prosecution then offered this pretrial statement of Sergeant Olsen in evidence and over objection of the defense it was received as Prosecution Exhibit 17 (R. 54-56).

On 26 May 1947 the accused, Sergeant Olsen, and two other men, were ordered to report to the Provost Sergeant's Office of the 813th Aviation Engineer Battalion at 1:00 p.m., at which time they were questioned by Lieutenant Wilson. Sergeant Kelly was present on this occasion and testified that the men were warned of their rights under the 24th Article of War before they were questioned (R. 40). The accused was asked for the shoes that "he wore Saturday night", at which time he stated that he was wearing them. The accused left the office to change shoes. He came back to the office with a pair of shoes and turned them over to Lieutenant Wilson. These shoes were identified and received in evidence as Prosecution Exhibit 16 (R. 32, 47).

On the evening of 26 May 1947, Master Sergeant Karl D. Stetson, a special investigator, went to Sergeant Olsen's home to search for the property stolen from Mr. Derefelt's shop. He had permission from Colonel Daniel to make the search. When he arrived at Olsen's home, Sergeant Olsen was not there. He waited until Sergeant Olsen returned and asked his permission to search the house. Sergeant Olsen asked the reason for the search. Sergeant Stetson searched the house without explaining the reason therefor. In the basement of the house he found the photographic equipment which had been stolen from Artur Derefelt's shop together with other photographic equipment. He removed all of the equipment to the Provost Marshal's Office at the Rhein/Main Air Base (R. 64, 65).

The property stolen from Mr. Derefelt's shop and found in Sergeant Olsen's house was identified and introduced as Prosecution Exhibits 1 to 13 inclusive.

About 8:00 p.m., 27 May 1947, the accused and Sergeant Olsen were taken to the Provost Marshal's Office and questioned concerning the theft of property from Mr. Derefelt's shop. This questioning continued until about 3 a.m., the following day and resulted in the accused making a statement which statement was introduced in evidence over the objection of the defense as Prosecution Exhibit 18 (R. 67). In this statement the accused admitted breaking into Mr. Derefelt's shop on 24 May 1947, stealing the photographic equipment, and taking it to Sergeant Olsen's house. The voluntary nature of this statement was the subject of much testimony, Master Sergeant Stetson testifying that he warned the accused of his rights and that he did not use any force or duress on accused. Sergeant Olsen, Major Smith, Captain Hoffman and Captain Barnes were all present at the time the accused was questioned (R. 67-69).

The accused testified as to the making of the statement and stated that the first time the 24th Article of War was read to him was at Rhein/Main about 3:00 o'clock in the morning at the time he made the statement. He had been questioned by many people. He stated:

"Q. Has anyone ever made an offer to you in regard to testimony that you would give?

A. Yes.

"Q. What did they offer you for testimony?

A. Said it would go a lot easier, and things like that.

"Q. Who told you that?

A. Just about everybody questioning me.

"Q. Did they promise you anything?

A. Yes, you did even.

"Q. What did I promise you?

A. That was down at Stahl's room.

"Q. What did I promise you?

A. You was under the impression that there was someone else implicated and made the statement if anyone else was implicated, and if I made the statement someone else was, it would be a lot easier for me, I can't remember the word — principal, of the court-martial.

"Q. Isn't it true that I did not say it would be easier on you, but if several people were involved, that you possibly would not be treated as a principal in the case, is that right?

A. You went on to say, not being the principal, I would be a lot better off, it would make it a lot easier.

"Q. Did I use those words?

A. Not those exact words.

"Q. Did I promise you anything?

A. You didn't make a definite promise, no sir.

"Q. At any time did anyone promise you?

A. It is general procedure if you are questioning anybody to make the statement 'if you make the statement that it will be a lot easier'.

"Q. Who made this promise to you?

A. Practically everybody that questioned me." (R. 45)

The police chief of Langen compared Prosecution Exhibit 15 (the plaster casts of footprints), with Prosecution Exhibit 16 (shoes taken from accused) and found:

"These shoes fit on five places with the plaster cast. First, the same size, second, the heels are run down on the outside, then this slants at the heels, fourth, there is an American mark here, and then the slant here on the outside." (R. 32)

First Lieutenant Arthur J. Sorenson investigated the charges against the accused. He explained to the accused his rights under the 24th Article of War. The accused stated that he took the equipment and loaded it on Sergeant Olsen's jeep. They went to the Provost Marshal's storeroom and the accused identified the equipment "which he took that night" (R. 72,73).

First Lieutenant William S. Shimonkivitz, photography officer, Headquarters EATS, testified as to the value of the equipment described in Specification 2. His testimony shows the value of the equipment to be in excess of \$50.00 (R. 58-64).

4. For the Defense.

Captain Milton Hoffman testified that he was the accused's company commander and that he was present during the interrogation of the accused at the Provost Marshal's Office on 27 May 1947. Concerning this interrogation he testified that it began about 8 p.m., and continued until about 3 a.m., at which time the accused made a statement. The accused was questioned by first one person and then another, "I would not say a third degree method, but certainly by a cross-fire." All persons questioning the accused were his superior officers.

The accused was warned of his rights under the 24th Article of War when he made the statement. Concerning this warning he testified -

"Q. Was the accused properly warned of the 24th Article of War, were you present?

A. I was present when the appropriate Articles of War were read and explained to him.

"Q. Did he indicate that he understood them?

A. There was some doubt about one of the Articles of War. I recall that the Provost Marshal could not locate the specific applicatory paragraphs -- I think there was some doubt in the sergeant's mind as to what he was liable or not liable for when he answered questions which were asked of him." (R. 82)

Concerning the statement made to accused in securing this confession he (Captain Hoffman) testified:

"Q. Did you advise Sergeant Holland to make a statement?

A. I did.

"Q. Can you recall the words you used, or the approximate text of the conversation when you gave Sergeant Holland this advice?

A. I cannot recall the exact words, the talk between myself and Sergeant Holland took a period of perhaps five or ten minutes. They followed this talk between myself and the sergeant with a period of interrogation of the sergeant by the members of the Provost Marshal's staff --

"Q. Excuse me captain, I would like to interrupt you a minute. Concerning these five minutes when you talked to Holland, can you remember approximately what you told Holland?

A. I told him I wanted the truth out of him so far as he was able to tell the truth about the circumstances of the alleged incident. I told him that as nearly as I could see from the information divulged to me by the Provost Marshal's staff concerning their evidence, that he was pretty badly implicated in this thing, and it would be advisable for him to come clean rather than make a prolonged or difficult investigation.

"Q. Did you state it would be easier for him if he made a statement?

"Q. Answer the question.

A. I did so state." (R. 79,80)

* * * * *

"Q. At what time during this occasion did you give this advice to Sergeant Holland?

A. It was dark already, I would say it must have been about 11:00 o'clock or 12:00 o'clock.

"Q. Just what did you tell him?

A. Exactly, I can't recall sir. I told him if he had knowledge, if he knew, if he had in fact committed this crime, he was to admit it to the investigating authorities, that it would be easier for him, that things would go easier for him, if he told the truth." (R. 83)

First Lieutenant Harold Chase, Special Assistant Defense Counsel, testified that he entered the Army in December 1941 and was attached to a Military Police Organization at Fort Custer, Michigan. He attended a course of instruction pertaining to investigations. This course included the making of casts from footprints or other impressions made by members of the body. Such casts are called "Moulage." His duties consisted of investigating crimes and on many occasions he used moulage work in his investigations. "Usually the biggest identifying feature of a pair of shoes is the position of the nails." Prosecution Exhibit 15 is not a very good print as it merely shows the heel and none of the seams. Prosecution Exhibit 15 is a cast of the prints of a shoe. This cast shows three identifying features; one, a slight depression on the outside portion of the shoe adjacent to the ball of the shoe; two, a slight depression on the outside portion of the heel of the shoe; and, three, an imprint made by some trade name or trade mark that is attached to the bottom of the shoe. These marks are all common factors, "everybody wears their shoes, with the exception of less than 2 or 3%, by putting the most pressure on the outside portion of the shoe, resulting in a depression of the heel and depression of the outside portion of the sole." The trade name or trade mark would be common to any shoe manufactured by the same people. In his opinion it would have been possible for the shoes introduced in evidence as Prosecution Exhibit 16 to have made the print but the "print could have been made by any shoe of similar proportions because practically any shoe which is worn for any length of time has a depression on the outside of the heel and the outside of the sole" (R. 74-78).

Captain Hoffman, the accused's Company Commander; Lieutenant Raymond McCarthy, a Platoon Leader in the company; Captain Charles F. Dietz, Assistant Field Executive Officer, 831st Aviation Engineer Battalion; Captain Frederick E. Bornann, Adjutant 831st Aviation Engineer Battalion; and, First Lieutenant A. F. Truskin, the Commanding Officer of the 2012

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Labor Supervision Company, all testified that the accused's reputation in the community is good and that his work is performed in a superior manner (R. 80, 85-88).

The accused was advised of his rights as a witness and elected to remain silent.

4. The evidence establishes that during the night of 24 May 1947 the photographic shop of Artur Derefelt located at 17 Karlmarxtrasse, Langen, Germany, was broken into and certain equipment was stolen therefrom. Most of this stolen equipment belonged to Artur Derefelt and the property which he did not own (two items owned by Doctor Muller) was in his possession and under his control.

On 27 May 1947 the stolen property was found in the basement of a house occupied by a Sergeant Olsen. The evidence also shows that the accused was the owner of some photographic equipment which he used in a darkroom and that Sergeant Olsen had told the accused that this equipment could be moved into the basement of his (Olsen's) house. The accused was at Sergeant Olsen's house on 24 May 1947 and about midnight retired to one of the bedrooms for the night. On the morning of 25 May 1947 a Lieutenant Goodman brought some photographic equipment to the basement of Sergeant Olsen's house. Sergeant Olsen testified that when he went into the basement about 11:00 a.m., 25 May 1947, Lieutenant Goodman's equipment "was in the entrance of the garage." Sergeant Olsen refused to testify concerning the stolen property found in his garage or basement asserting that he could not be compelled to give testimony which might incriminate himself. He was then asked if he had made a pretrial statement. He admitted that he had made such a statement and identified a written statement as the one he had made after being warned of his rights. However, he refused to testify concerning the contents of this statement. This statement was then offered and received in evidence as Prosecution Exhibit No. 17. Prior statements made out of court by a witness may be used to refresh the witness' memory or to impeach him. Such statements, made by witnesses other than an accused, when offered for impeachment purposes are not to be considered substantive evidence against an accused. The statement of the witness Olsen was not offered for the purpose of impeaching the witness but for the sole purpose of placing such statement in evidence as substantive evidence against the accused. The witness Olsen did not adopt the statement as his evidence or testify that any statement contained therein was true. He merely admitted making the statement and when interrogated concerning the contents of the statement he refused to answer on the grounds that his answer might incriminate him. Under such circumstances the statement of Sergeant Olsen (Pros Ex 17) was not admissible in evidence for any purpose (CM 323083, Davis).

The pretrial statement of the accused amounting to a confession was received in evidence over the objection of the defense that the statement was not voluntarily made. Evidence was introduced relating to the making

of this statement. The defense also moved to strike this statement after all evidence had been received by the court. This motion was denied.

Captain Hoffman, the accused's company commander, testified the interrogation of the accused began about 8:00 p.m., on 26 May 1947, and continued until about 3:00 a.m., the following day and during this time the accused was questioned by first one person and then another "I would not say a third degree method, but certainly by a crossfire." All participating in the questioning were superior officers of the accused. During this questioning Captain Hoffman told the accused -

"Q. Did you advise Sergeant Holland to make a statement?

A. I did.

"Q. Can you recall the words you used, or the approximate text of the conversation when you gave Sergeant Holland this advice?

A. I cannot recall the exact words, the talk between myself and Sergeant Holland took a period of perhaps five or ten minutes. They followed this talk between myself and the sergeant with a period of interrogation of the sergeant by the members of the Provost Marshal's staff --

"Q. Excuse me captain, I would like to interrupt you a minute. Concerning these five minutes when you talked to Holland, can you remember approximately what you told Holland?

A. I told him I wanted the truth out of him so far as he was able to tell the truth about the circumstances of the alleged incident. I told him that as nearly as I could see from the information divulged to me by the Provost Marshal's staff concerning their evidence, that he was pretty badly implicated in this thing, and it would be advisable for him to come clean rather than make a prolonged or difficult investigation.

"Q. Did you state it would be easier for him if he made a statement?

* * *

"Q. Answer the question.

A. I did so state."

"A confession not voluntarily made must be rejected."

* * *

"The fact that the confession 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.

"Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved." (Par 114a, MCM, 1928)

In CM 292716, MacDonald, 4 BR (ETO) 357, 365, a confession was held to be involuntary and inadmissible in evidence because of the actions of a Captain Rasmussen. Captain Rasmussen testified that before interrogating the accused he said,

"We wanted his story, and we wanted it honest and straightforward, and we did not want any beating around the bush, and it would be better for him to make a clean breast of this thing because the government would find these things out sooner or later, and we wanted him to tell the whole truth of the matter."

Although in the instant case the accused was warned of his rights under the 24th Article of War at some time during his interrogation by his military superiors and was again warned of his rights just prior to the time he signed his confession, it also appears that the accused's commanding officer advised the accused to make a statement and that he was "badly implicated in this thing and that it would be advisable for him to come clean rather than make a prolonged or difficult investigation" and that it would be easier for him if he made a statement. This statement was made during an interrogation which began about 8 p.m., and lasted until about 3 a.m. The testimony relating to the securing of this confession impels the conclusion that the confession was involuntary and secured through a hope of benefit inspired by the accused's military superiors whom accused had every reason to believe could effectuate this proffered benefit. The confession was not admissible in evidence.

Within a week after the written confession was made, First Lieutenant Arthur J. Sorenson interviewed the accused. He told the accused that he was the investigating officer and warned him of his rights under the 24th Article of War. The accused admitted to the investigating officer that he took the equipment and loaded it on a jeep. The accused and the investigating officer went to a storeroom where the accused pointed out the equipment. In CM 292716, MacDonald, supra, the Board of Review also had occasion to say -

"And if a confession is induced by threats or violence or any undue influence, a subsequent confession is not admissible, unless it appears to the satisfaction of the court that the prior influences have

ceased to operate on the defendant's mind to bring about the later confession.* * * But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown" (Mangum v. United States 289 Fed. 213, 215).

"Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible, but the question arises as to whether a confession made subsequently to such inadmissible confession is itself admissible. This question, as in the case of any other confession, is one for the judge to decide, and each case must be determined on its own facts. The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made. The determination of the extent of the influence persisting at the time the subsequent confession is made rests upon attendant circumstances, and the inquiry is whether, considering the degree of intelligence of the prisoner, the nature and degree of the influence, and the time intervening between the confessions, it can be said objectively that the confessor was not compelled to confess by reason of the pressure or inducement which motivated him to confess on the prior occasion. If the court concludes from all the facts and attendant circumstances that the improper influence had ceased to operate or had

been removed, the subsequent confession is admissible. It has also been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession. The warning, however, so given should be explicit, and it ought to be full enough to apprise the accused: (1) That anything that he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him, for it has been well said that 'for want of this information, the accused might think that he could not make his case worse than he had already made it, and, under this impression, might have signed the confession before the magistrate' (Wharton's Criminal Evidence, Vol.2, sec.601, pp.998-1002) (Underscoring supplied).

"A confession * * * may be rendered involuntary by a prior involuntary confession (Underhill's Criminal Evidence, 4th Ed., sec.266, p.521).

"Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. * * * The evidence to rebut the presumption * * * must be presented by the prosecution * * *. The evidence to rebut the presumption must be clear and convincing * * * (Evidence from American Jurisprudence, Civil and Criminal, sec.487, pp.424-425)."

No mention was made by the investigating officer of the accused's previous confession, nor was the accused informed that it could not be used against him. It is reasonable to conclude under such circumstances that the accused might well have thought he could not make his case any worse than he had already made it and thereby made his statement to the investigating officer. The Board of Review is of the opinion that the oral statements of accused amounting to a confession and made to the investigating officer were not admissible in evidence and should have been excluded by the court.

Proof that a person was in possession of recently stolen property may raise a presumption that such person stole it (CM 325457, McKinster). However,

"The general rule that the possession of stolen property is evidence of guilt is limited by the rule that to warrant an inference of guilt it must further appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by the accused. It would be pushing the rule too far to require of one accused of a crime an explanation of his possession of the stolen property, when such possession could also, with equal right, be attributed to another. Hence the mere fact of finding stolen articles on the premises of a man of a family or in a place in which many others have free access without showing his actual conscious possession thereof discloses only a prima facie constructive possession and is not such a possession as will justify an inference of guilt thereof (17 RCL 73)" (CM 226734, Brown, 15 BR 139, 145).

In the instant case the stolen photographic equipment was found in the basement of a house occupied by Sergeant Olsen. The accused had permission from Sergeant Olsen to move his photographic equipment into the basement. The accused was at Sergeant Olsen's house the night the property was stolen. Lieutenant Goodman moved photographic equipment into the basement of Sergeant Olsen's house the morning after the photographic equipment was stolen from Artur Derefelt's shop. Aside from the accused's confessions, which were inadmissible in evidence, there was no evidence to show that the accused was at any time in the actual possession of the stolen property or that he placed it in Sergeant Olsen's basement so as to raise a presumption that he had stolen it.

The only remaining evidence tending to connect the accused with the theft of the equipment from Artur Derefelt's shop is the footprints found beneath the window used to gain admittance into the shop.

Footprints found at or near the scene of a crime are generally admissible in evidence and when shown to correspond with the footprints of the accused they tend to identify him as the guilty party. (Cumming v. State, 110 Ga 293; 35 SE 117; Lindsey v. State, 9 Ga App 299, 70 SE 1114; 31 AIR 204). In State v. Cole, 93 Kansas 819, 150 Pac 233, the court quoted with approval from 2 Bishop New Criminal Procedure (2nd Ed) p. 943 as follows:

"Footprints, on a question of identity, if they correspond to those which be made by the boots probably worn, or the horse probably ridden, are admissable, yet alone are inadequate to justify a conviction."

In Ditto v. State, 83 Texas Crim Rep 220, 202 SW 735, it appeared that the defendant had been convicted of burglary and the only evidence connecting him with the crime was the correspondence of his shoe with a track found near the scene of the crime. The court said "we are not satisfied to affirm this judgment with this as the only criminating fact. Tracks, in connection with other evidence, may have some cogency tending

to illustrate the case, or connect an accused with a given offense, but at best it is unsatisfactory. This is practically the only evidence in the case. We are of the opinion the conviction should not be sustained especially in view of the fact there are no other criminating circumstances."

The German police made casts of the footprints found under the window of Artur Derefelt's shop on the morning following the unlawful entry therein and theft therefrom. The person making the casts compared them with shoes obtained from the accused and stated that the prints, from which the casts were taken, were made by the shoes belonging to the accused. Evidence of a witness for the defense indicated that the prints could have been made by any shoe made by the same company and of the same size as accused's shoes.

The evidence relating to the footprints found near the scene of the crimes was admissible as tending to connect the accused with the offenses charged.

The record contains some slight evidence tending to connect the accused with the offenses charged, but this evidence is not compelling or convincing. The Board of Review is of the opinion that the admission of the improper evidence by the court injuriously affected the substantial rights of the accused and constituted prejudicial error within the meaning of Article of War 37.

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

Richard W. Silvers, Judge Advocate

Charles E. McAfee, Judge Advocate

Albert L. DeLong, Judge Advocate

JAGX - CM 325329

1st Ind

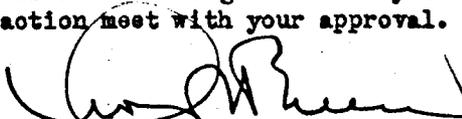
JAGO, Dept. of the Army, Washington 25, D. C. NOV 2 1947

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50¹/₂, as amended by the act of 20 August 1947 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Sergeant Frederic L. Holland (33986442), Company A, 831st Engineer Aviation Battalion, Rhein/Main Air Base.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which this accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(GCMO 91, 18 Dec 1947).

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

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JAGK - CM 325355

20 OCT 1947

UNITED STATES)

PORT OF LEGHORN

v.)

Trial by G.C.M., convened at Leghorn,
Italy, 10 June 1947. To be hanged
by the neck until dead.

Sergeant HARRY F. BARRY
(RA 33817217), 870th Quarter-
master Laundry Company)

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 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 Sergeant Harry F. Barry, 870th Quartermaster Laundry Company, did, at or near Leghorn, Italy, on or about 26 April 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private John Joshua, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of one previous conviction by summary court for absence from guard 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. The accused, a sergeant in the 870th Quartermaster Laundry Company stationed at Tombolo, Italy, was a member of the guard detail of his organization on 26 April 1947 (R 51). His duties included that of sergeant in charge of the "restriction hall" of the organization. About 6:30 p.m. 26 April 1947, the accused went to the "restriction hall" and stated that he did not want anyone in the hall that did not belong there. Private John Joshua was in the "hall" at this time. The accused told Private Joshua to leave. Joshua left the building and the accused followed him. Outside the building they argued and then began to "fight." They wrestled and fell to the ground with Joshua on top. This fight or wrestling was stopped by other men of the organization (R 11,12,25). According to Private Robert

L. Davis the accused then said he was going to kill Joshua (R 19). Another witness present at this time denied hearing any such threat (R 26).

The accused returned to the building and began to read the rules and regulations applicable to the persons assigned to the restriction hall. Private First Class George W. Allen was assigned to the building and the accused told him to go to bed. Allen refused to go to bed and they began to argue. The accused said that Allen was drunk. They began to "tussle." Allen admitted on the witness stand that he had been drinking on the night in question. The accused stated that he was going to get the sergeant of the guard and put Allen in jail (R 18,19,25,32,35,36,38).

The accused left the building and proceeded, at double time, to the guardhouse some 200 yards distant (R 18,26,33,38).

The accused entered the guardhouse and asked Sergeant William F. Scott if Sergeant Williams was present. Sergeant Scott answered, "No, he isn't. He is up in the area." The accused then stated that he wanted a guard as he had a man he wanted arrested and placed in confinement. Sergeant Scott stated that no guards were available. The accused then took a 30-caliber carbine from a table and left the guardhouse. Sergeant Scott told him not to take the carbine (R 52,53). As the accused left the guardhouse he met Private John Joshua. Joshua who was not armed ran into a nearby building which had formerly been used as an officer's mess. The accused went near this building and fired three shots at Private Joshua. Two of the shots struck Private Joshua in the stomach. The accused ran to the restriction hall where he was disarmed. At the time the shots were fired no witness heard any conversation between the parties (R 13,14,17,26,33,38,39,44,52). Private John Joshua was removed to the 61st Station Hospital at 1930 hours on 26 April 1947. He died in the early morning hours of 27 April 1947. Captain Alfred M. Decker, MC, performed an autopsy upon the body of Private John Joshua. He identified the autopsy report made by him as an official record required to be kept by the hospital. This report was introduced into evidence without objection by the defense. According to Captain Decker and as shown by the autopsy report, John Joshua died "from summation of multiple injuries, or secondary perforating gunshot wounds of the abdomen of which there were two" (R 8,9,10).

Paul Billings, 7102 Criminal Investigation Division Platoon, interviewed the accused and explained to him his rights under the 24th Article of War. Thereafter the accused made a voluntary statement in writing concerning the shooting of Private John Joshua. This statement was received in evidence as Prosecution Exhibit 3 without objection by defense. In this statement the accused said that on 26 April 1947 he was on duty as the sergeant in charge of the restriction hall. About 1800 hours he went to the hall and started to call the roll. Private Allen was drunk and making so much noise that he could not call the roll. He then ordered "all

men that weren't supposed to be there out." John Joshua started an argument and invited him outside. They went outside and "got into a tussle." This tussle was broken up by some of the men and Joshua went towards his tent. He went inside to call the roll. Private Allen began an argument and then struck him. They tussled but some of the men interfered. He then went to the guardhouse to get a guard to confine Allen. At the guardhouse he asked for Sergeant Williams but Williams was not present. He asked for a guard but a guard was not available. He then took a carbine and left the guardhouse. As he left the guardhouse he saw John Joshua coming into the compound. Joshua saw him and jumped into a little shack near the guardhouse. He had forgotten about Joshua but when he saw Joshua "acting that way" he thought Joshua was "up to something." He backed up a couple of steps and ordered Joshua out of the shack because he wanted to talk to him. He repeated the order "about 5 times" and backed up some more so Joshua could come out. Joshua jumped over into a corner so he put a round into the carbine and ordered Joshua to come out of the building. Joshua did not come out so he "fired two shots where I thought he would be because I couldn't see him from where I was standing." Everyone ran from the restriction hall and he then ran to the restriction hall where he surrendered the carbine to Sergeant Williams (R 51, Pros Ex 3).

4. For the Defense

First Sergeant Richard Christian Woodford testified that on 26 April 1947 the accused was on duty and in charge of the restriction hall. At 5 p.m. 26 April 1947, he delivered the office keys to the accused and the accused was not under the influence of alcohol (R 77,78).

The accused was advised as to his rights as a witness and elected to testify in his own behalf. The accused detailed the events at the restriction hall substantially as they are set forth above. He denied having threatened to kill Private Joshua as testified to by Private Davis. After the tussle with Private Allen he went to the guardhouse in order to have Private Allen confined. He asked Sergeant Scott where Sergeant Williams could be found and received the reply that he was in the area. He then told Sergeant Scott he wanted a guard. A guard was not available. He took a carbine and left the guardhouse. He described the events that followed as:

"As I was leaving the guardhouse, just below the place they have the old officers mess, we have a wire fence there, it is like a gate, probably Joshua was coming through, and just as he was coming through, he saw me and saw me with the carbine, sling arm on the shoulder, he ran into this old officers mess, he got bunched up in the corner; I ordered him to come out; I kept backing up and ordered him to come out; he wouldn't come out. I backed up to this wire fence, that is when he jumped over towards me, over to the other side; that is when I jumped back and fired" (R. 67).

When asked, "Can you tell any reasons why you thought it was necessary for you to shoot Joshua?" he replied, "I either thought it would be Private Joshua or myself. I didn't know what Joshua had in his mind, or whether he had a weapon or not." Concerning the tussle he had with Joshua at the restriction hall, he testified that after the tussle he "thought no more of it." He fired two shots after giving Joshua five or six orders to come out of the building. He fired into the building at the place he believed Joshua to be located therein. He also testified that he had served in the regular Army for three years. His home is Baltimore, Maryland. His father and mother are living. He has a high school education (R 64-75).

5. Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. Malice does not necessarily mean hatred or personal ill will toward the person killed. Malice aforethought may exist when the act is unpremeditated (par 148a, MCM, 1928).

The evidence discloses that the accused shot and killed John Joshua. Joshua was unarmed and when he saw the accused with a rifle he attempted to hide from the accused. This killing occurred shortly after the accused and Joshua had engaged in what was described by various people as a "fight," "a wrestling" and "a tussle." One witness testified that following this "tussle" the accused threatened to kill Joshua. Other witnesses did not hear any such threat and accused denied that he made any such threat. Following this "tussle" with the deceased the accused returned to his duties and became involved in a dispute with Private Allen, after which he proceeded to the guardhouse to secure assistance in arresting and confining Private Allen. The accused testified that at the time he encountered the deceased near the guardhouse he had forgotten the "tussle" with the deceased. This "tussle" may explain the actions of the deceased when he saw the accused with a carbine. The evidence fails to show that accused was in any danger of bodily harm or injury or any reason or justification on the part of the accused when he shot and killed Private Joshua and we conclude, as the court did, that his acts constituted murder (CM 324519, Davis).

The Board of Review is of the opinion that the facts as shown by the record of trial fail to show any mitigating circumstance which in contemplation of law would reduce the offense to manslaughter.

6. The charge sheet shows the accused to be 21-8/12 years of age. He served in the Army from 8 March 1944 to 12 December 1945, at which time he was discharged in order to permit him to re-enlist in the regular Army for a term of three years.

7. The court was legally constituted and had jurisdiction over the

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

Charles A. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Robert J. Adams, Judge Advocate

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JAGK - CM 325355

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. OCT 23 1947

TO: 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 Sergeant Harry F. Barry (RA 33817217), 870th Quartermaster Laundry Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but, in view of all the circumstances, recommend that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of the 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 such action meet with approval.

3 Incls

1. Record of trial
2. Draft ltr sig S of A
3. For of Execution



THOMAS H. GREEN
Major General
The Judge Advocate General . . .

(GCMO 58, 21 Nov 1947).

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

(169)

JAGK - CM 525377

24 NOV 1947

UNITED STATES)

PHILIPPINE-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters
PHILRYCOM, APO 707, 7 July 1947. Dis-
honorably discharge (suspended), total
forfeitures and confinement for two (2)
years. General Prisoners Branch,
PHILRYCOM Stockade, APO 707.

Private First Class ARSENIO
SIPALAY (10320577), Company
"C", 57th Infantry Regiment,
Philippine Scouts)

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

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

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

CHARGE: Violation of the 84th Article of War.

Specification: In that Private First Class Arsenio Sipalay, Company "C", 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Island, on or about 21 March 1947, unlawfully sell to unknown persons four (4) wheel assemblies, motor vehicle 2½ ton 6x6, each consisting of one (1) tire 7.50 x 20, one inner tube 7.50 x 20, and two (2) rims, of a total value of about \$296.31, issued for use in the military service of the United States.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification except the word and figures "about \$296.31," substituting therefor the word and figures "over \$50," and guilty of the charge. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the General Prisoners' Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 197,

Headquarters, Philippines-Ryukyus Command, APO 707, 16 August 1947.

3. Evidence

Mr. Stanley E. Geddis was in charge of the vehicle pool of Camp Batangas. One area of this pool was known as "A" Pool. During the course of a daily inspection of "A" Pool about 21 March 1947, he noticed that "some wheel assemblies were missing from some vehicles." The missing wheel assemblies were "7.50 x 20's which are normally used on 2½ ton, 6x6 trucks; and 900 x 16's which are normally used on ¾ ton, 4x4 weapons carriers, ambulances which are also of the ¾ ton type; 1½ ton personnel carriers which also use the 900 x 16; and ¼ ton jeeps and trailers which use a 600 x 16." The 2-1/2 ton truck wheel assemblies had been taken from vehicles parked in the southeastern and one other section of "A" Pool." Mr. Geddis had "checked" the Government list price of wheel assemblies for a 2-1/2 ton truck, 6x6, 7.50 x 20, and found that the tire was priced at \$24.02, the inner tube at \$3.03, and the "remaining wheel assemblies" at \$19.12, making a total of \$46.17 for each. The missing wheel assemblies were property of the United States "intended for the use of the military service" (R 6-9).

During the month of March 1947, Company C, 57th Infantry Regiment, Philippine Scouts, supplied guards for "A" Pool. Accused was a member of this company (R 8,15,25). Guard Post Number 5 was located in the southeastern part of "A" Pool (R 15,25). Mr. Geddis had noticed that there were "tires" missing before this unit took over the guard (R 9).

A typewritten statement purportedly signed by accused was admitted in evidence as Prosecution Exhibit 2 over the objection of the defense that it was involuntarily made (R 14). From the testimony of the three members of the Criminal Investigation Division who took part in the interrogation of accused at which the statement was obtained, it appeared that accused had been informed of his right not to incriminate himself, that no threats or promises were made to him and that after his answers had been reduced to the form of a written statement he read the statement, indicated that no changes need be made, and voluntarily signed it (R 10-13, 16-18, 22-23). First Lieutenant James H. Hendricks, accused's company commander, testified that he was present "from the beginning" of the questioning of accused. He could not "recall" that accused was informed of his right not to incriminate himself. No threats or promises were made to accused in the Lieutenant's presence and accused voluntarily answered the questions put to him. Lieutenant Hendricks did not see accused sign a statement (R 23-27). Accused testified under oath that his right not to incriminate himself was not explained to him before being interrogated by members of the Criminal Investigation Division. He was questioned on two separate occasions by two different agents. On the first occasion, he had maintained that he had not sold tires

and that he had not seen anyone selling tires. On the second interrogation he was slapped and forced at the point of a pistol to sign a prepared statement which was "folded down" in such a way that he could not see its contents. The agent who allegedly mistreated accused was one of the agents who testified that no undue pressure had been employed in obtaining accused's statement (R 28-33).

The pertinent portion of the typewritten statement purportedly signed by accused and admitted in evidence as Prosecution Exhibit 2 reads as follows:

"Last Friday, 21 March 1947, I was on duty as roving patrol with Sgt. Guango at the 'A' Pool. When we got up there we made a thorough inspection on all the posts. At post #5 we observed that there are civilians hanging around the 'A' Pool fence. The guard on this post was Pfc. Ciriace Catubig. We understand that Catubig was having transaction with these civilians. Then Sgt. Guango, Catubig and the civilians were having conversation and reached an agreement that Sgt. Guango was going to sell them Army tires and I was persuaded to consent to the agreement. Then Catubig let two of the civilians inside the pool and got the tires. There were four (4) tires taken and rolled outside the fence. Sgt. Guango told me to get the money from the civilians. I asked him how much the money was and he told me that it was eighty (P80.00) pesos, the cost of the 4 tires. Then I stepped near the fence and got the P80.00 pesos from the civilian. I could not recognize nor identify any of the civilians because it was dark and could hardly see their faces. After the P80.00 were handed to me I gave forty (P40.00) pesos to Sgt. Guango and I kept the other P40.00 as my share in the transaction."

4. Discussion

Accused was charged with and found guilty of having unlawfully sold to unknown persons four 2-1/2 ton truck wheel assemblies in violation of the 84th Article of War. There was testimony aliunde his pre-trial statement to the effect that an unspecified number of such wheel assemblies were missing from a certain section of an Army vehicle pool at or about the date of the commission of the alleged offense and that accused had the opportunity to take them. Accused, in his written pre-trial statement, admitted that on the date in question and while acting as "roving" guard over the vehicle pool he had participated in the unlawful sale to unknown civilians of four "tires" taken from the same section of the vehicle pool from which the 2-1/2 ton truck wheel assemblies had disappeared. Obviously, accused's statement could have been considered by the court as at least a partial confession of guilt of the charge and specification upon which he was arraigned. Challenged by him as having

been obtained by duress, this confession was admitted in evidence upon a showing by the prosecution of circumstances under which the inculpatory statement was obtained which completely controverted accused's claim of duress. The court was, therefore, warranted in coming to the conclusion that the confession was voluntary (see CM 320230, Huffman).

It is axiomatic that an accused cannot be convicted upon his "un- corroborated" extrajudicial confession. We must, then, inquire as to whether the confession here in question is sufficiently corroborated to sustain the conviction of this accused. Concerning the question of corroboration, the Board of Review in CM 239085, Jones (25 BR 41,43), said:

"The general rule which has been stated and applied by the Board of Review in numerous cases is that while the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of the evidence or at all, nevertheless some evidence must be produced to corroborate the confession and such evidence must touch the corpus delicti (CM 202213, Mallen; CM 220604, Antrebus; CM 237225, Chesson; and CM 237450, Ivy). In CM 193828, Morandi and Mingo, the Board quoted with approval the following language from Daeché v. United States (CCA 2nd) 250 Federal 566: 'The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed ***'. (See also CM 256407, Jaycox, 36 BR 269,277.)

The above rule seems to have been based on Daeché v. United States in which the court, in addition to the quotation therefrom appearing in the Jones case, said,

"Independently they (the corroborating circumstances) need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof."
(Parenthetical statement supplied.)

In the recent case of CM 317678, Wing, the Board of Review intimated that the rule as expressed in the Jones case might be subject to an interpretation not warranted by the law upon the subject as laid down by the Federal courts and in support of its position pointed out that the court in the Daeché case did not say that evidence aliunde the confession need not prove the corpus delicti at all, but merely held that such evidence need not establish the truth of the corpus delicti at all. And in CM 314092, Bishop (64 BR 21,24), the Board of Review, citing the Wing case, restated the rule in the Jones case, omitting therefrom the doubtful phraseology, in the following terms:

"*** the corpus delicti need not be established beyond a reasonable doubt aliunde the confession, but some evidence corroborative

of the confession must be produced, and such evidence must touch upon the corpus delicti."

The law relating to the corroborative evidence necessary to support a conviction of one who has confessed to crime, as set forth in the Daeche case, has been further expounded by the Federal courts since that case was decided. In Forte v. United States (94 F. (2d) 236), the Court of Appeals for the District of Columbia said,

"Probably the most frequently quoted, and we think at times misquoted, case on the subject of corroboration of confessions is Daeche v. United States."

The court expressed its views on the question at length. It said,

"The question presented is of first impression here; and we feel bound upon a subject touching so materially liberty, and in many cases life itself, and especially in the criminal law where justice requires equality of treatment in respect of trial procedure and proof, *** to follow in adopting a rule for this jurisdiction the rule of the great majority of courts in the United States - that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delicti and the whole thereof. We do not rule that such corroborative evidence must, independent of the confession, establish the corpus delicti beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the corpus delicti and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith."

It was pointed out, however, that the corpus delicti does not include the agency of the accused as the criminal and that such agency need not be evidenced independently of the confession. The Forte case was followed by the same court in the later cases of George v. United States (125 F. (2d) 559) and Ercoli v. United States (131 F. (2d) 354). It was applied by the Board of Review in CM 306668, Jones (22 BR (ETO) 173,179) and cited with approval in CM Wing, supra.

In paragraph 114a of the Manual for Courts-Martial, 1928, it is stated:

"An accused can not be convicted legally upon his unsupported

confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words there must be evidence of the corpus delicti other than the confession itself ***. This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense."

A thoughtful comparison of the above rule of the Manual with the rule expressed in the Forte case will reveal that there is little material variance between them, the one requiring evidence aliunde the confession that the offense charged has "probably" been committed and the other requiring "substantial" supporting evidence of the corpus delicti "and the whole thereof." We think the words "probably" and "substantial" have a contextually similar connotation. For the purposes of the instant case, nothing would be gained by discussing the meaning of the phrase "and the whole thereof" as opposed to the language of the Manual to the effect that the corroborating evidence "need not be sufficient of itself *** to cover every element of the charge."

It thus appears, having in mind that the term "corpus delicti" relates to the occurrence of the events which comprise the particular offense charged or found, that, in order to sustain a conviction of an offense for which accused has been brought to trial and to which he has confessed, there must be adduced competent evidence, outside the confession, tending to establish that the offense of which accused was found guilty was probably committed. Supporting evidence which merely tends to show a possibility that the crime was committed is not a sufficient corroboration, for such supporting evidence lacks the requisite quality of raising a probability in the minds of reasonable men. It is not, in other words, substantial evidence (National Labor Relations Bd. v. Union Pacific Stages, 99 F. (2d) 153,177).

In applying these principles of law to the case at bar, it becomes at once apparent that the corpus delicti with which we are here concerned is the unlawful sale of four 2-1/2 ton truck wheel assemblies and not a larceny, embezzlement or some wrongful disposition of such property other than sale. It is therefore necessary, in order to support a conviction of this offense, that there appear in the record of trial direct or circumstantial evidence, aliunde accused's confession, tending to show that four such wheel assemblies had probably been unlawfully sold. Indeed, paragraph 114a of the Manual for Courts-Martial, 1928, in setting forth examples of evidence which might be properly considered corroborative of a confession, states:

"In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was

missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule.
(Underscoring supplied.)

The only evidence additive to accused's confession which we find here is proof that a number of 2-1/2 ton truck wheel assemblies were missing from Camp Batangas vehicle pool on or about the date of the alleged offense under circumstances indicating that accused had the opportunity to become involved in their disappearance. For the purposes of this discussion, however, the evidence extrinsic to accused's confession having to do with his involvement in any offense is immaterial. The only question here presented is whether the showing that the wheel assemblies were missing is sufficient to raise a probability that they were unlawfully sold. Having stated the proposition thus baldly, logic and reason require a negative answer. Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the "black market." But this is guess work, for there are other and equal possibilities as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F. (2d) 769,773). We conclude, therefore, that accused's confession to the effect that he had participated in the unlawful sale of at least the "tires" from the four wheel assemblies in question was without sufficient corroboration and that the conviction based thereon should be set aside.

This is not a case of first impression here. The Board of Review has heretofore, on several occasions and regardless of the legal theory applied at the time, decided that mere proof that property allegedly unlawfully sold was missing is not a sufficient corroboration of accused's confession that he did in fact unlawfully sell such property. We are aware of no reason why we should now overrule these prior decisions (CM 319774, Walker; CM 319774, Deakins; CM 211261, Sedlak, 10 BR 53,55;

(176)

CM 211218, Fleming, 10 ER 25, 29; CM 193828, Morande, 2 ER 95, 98).

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.

Chester D. Silvers Judge Advocate

Charles E. McAfee Judge Advocate

Albert E. DeBroys Judge Advocate

(177)

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JAGK - CM 325377

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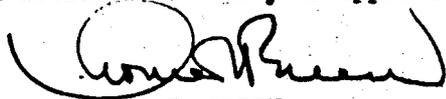
JAGO, Dept. of the Army, Washington 25, D. C.

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724, 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Arsenio Sipalay (10320577), Company "C", 57th Infantry Regiment, Philippine Scouts.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.

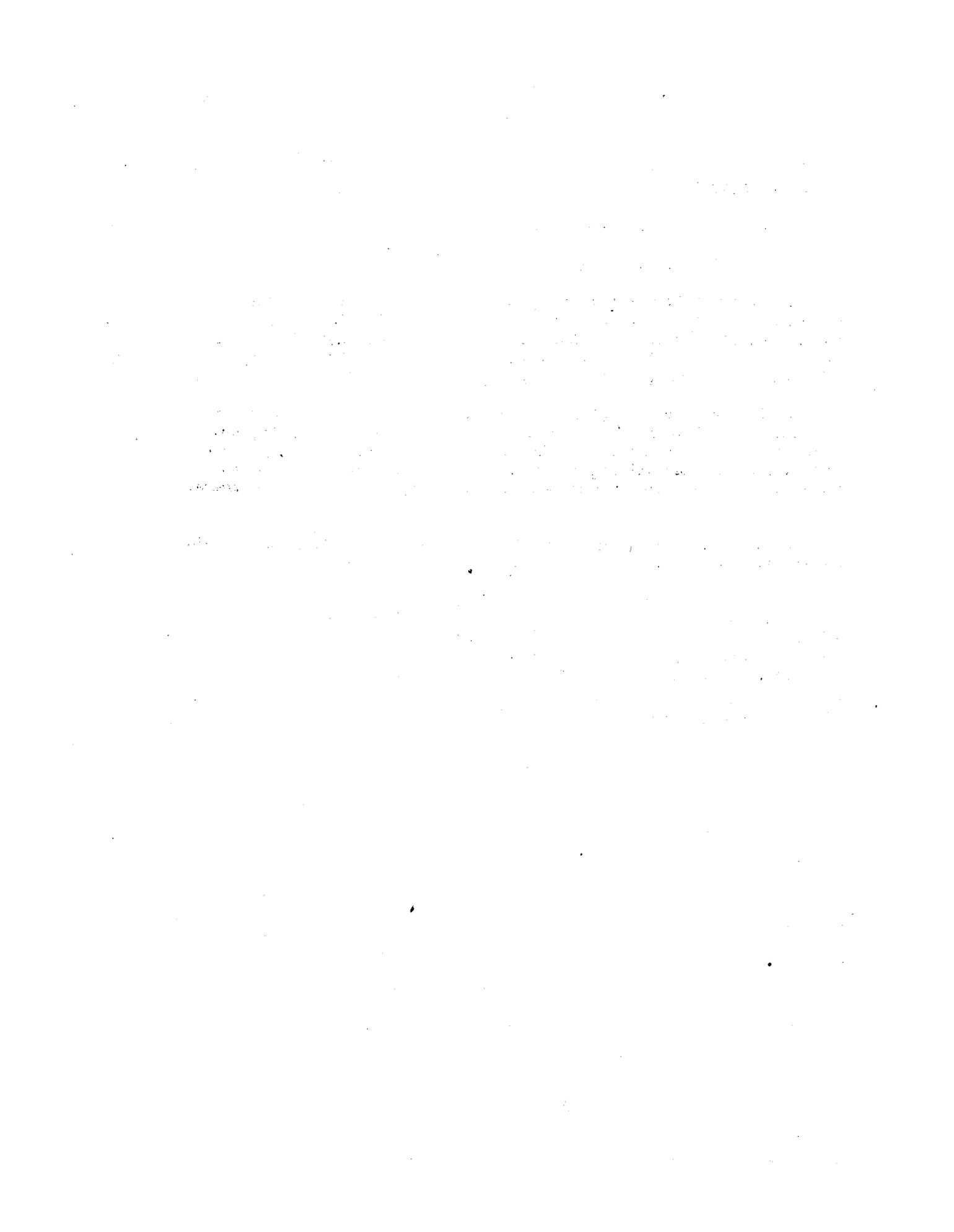


THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(GCMO 74, 2 Dec 1947).



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

(179)

JAGK - CM 325378

26 DEC 1947

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters Philrycom, APO 707, 27 June 1947. Dishonorable discharge (suspended), total forfeitures, confinement for two (2) years. Stockade.

Private First Class CIRIACO)
CATUBIG (10320251), C Company,)
57th Infantry Regiment,)
Philippine Scouts)

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

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

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 84th Article of War.

Specifications: In that Private First Class Ciriaco Catubig, Company "C" 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Islands, on or about 17 March 1947, unlawfully sell to unknown persons seven (7) wheel assemblies, motor vehicle 2-1/2 ton 6x6, each consisting of one (1) tire 7.50x20, one inner tube 7.50x20, and two (2) rims, of a total value of about \$296.31, issued for use in the military service of the United States.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification except the words and figures "17" and "about \$296.31," substituting therefor respectively the words and figures "20" and "more than Fifty Dollars," and guilty of the charge. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the General Prisoners Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was published in General

Court-Martial Orders No. 195, Headquarters, Philippines-Ryukyus Command, APO 707, 16 August 1947.

3. Evidence for the Prosecution

Mr. Stanley E. Geddis was in charge of the vehicle pool at Camp Batangas. In the course of his daily inspections of the pool during the month of March, he noticed that wheel assemblies were missing from certain vehicles from time to time. The missing wheel assemblies had been taken from 2-1/2 ton 6x6 trailers, 3/4 ton weapons carriers, 3/4 ton ambulances and 1-1/2 ton personnel carriers. About 23 March, a jeep was "confiscated" by the military police along the side of the "A pool" fence. It contained "tires" that had been taken from A Pool. A wheel assembly includes a tire, tube, wheel and rim. The Government list price of a 2-1/2 ton 6x6 wheel assembly, 7.50 x 20, was \$24.02 for the tire, \$3.03 for the tube, and \$19.12 for the remaining parts (R 6,7).

On 25 March 1947, First Lieutenant Daniel D. Shultz, 35th Criminal Investigation Division, interrogated accused during the course of an investigation into the "theft" of some tires in Batangas. Thirty-two persons other than the accused had been "picked up for the investigation." Accused was questioned almost immediately after his arrest. In addition to Lieutenant Shultz, two other criminal investigation agents and accused's commanding officer were present at the interrogation of accused. According to the testimony of one of these agents, the investigation pertained to "the tires, which were sold by the scouts at the A Pool" and accused "was identified by the civilian, whom the MP apprehended - he was included in the names - the civilian was apprehended at the check point. In the investigation it was revealed that scouts were involved. In the statement of the scout who confessed to his crime, he incriminated Private Catubig."

Accused was informed of his right not to incriminate himself and, although he was searched, no one struck accused nor were any promises made to him. He voluntarily answered the questions propounded to him and his answers were reduced to the form of a typewritten statement. Accused, in the presence of Lieutenant Shultz and on the day of the interrogation, signed and swore to the statement "voluntarily" after he had been given the opportunity to read it and parts of it had been "clarified" in Tagalog. Accused had been asked whether he had anything "to add, to erase or to retract", to which he replied, "Nothing at all - the statement is the truth, the whole truth and nothing but the truth." He had also stated that he understood the statement and that he knew Tagalog. Accused answered some questions in Tagalog. Prosecution Exhibit 1 was identified as a "certified true copy" of the statement in question and was received in evidence over the objection of defense counsel that the recitals therein contained had not been voluntarily made. It is in the English language and is dated 25 March 1947 (R 8-14,16,18; Pros Ex 1).

Prosecution Exhibit 1, in pertinent part, reads as follows:

"That last Thursday, 20 March 1947, I was detailed as guard at the 'A' Pool, Post #5, from 1800 to 2200 hours. On this night and at the same hours Patricio Espina was assigned on Post #4; Lope Magpantay on Post #3; Roberto Carandang on Post #2; and Vicente Calaging on Post #1. On this date at about 2000 hours, one civilian named Simplicio approached me on my post and said he will buy tires from me. I agreed to his offer and I then allowed four (4) civilians (unidentified) and Simplicio to enter the 'A' Pool thru the barbed wire fence to detach 6x6 tires from trailers inside my post. I allowed them to detach only six (6) tires (6x6) because that was the number they were buying from me. Our agreement was P20.00 for every tire with rims and arrows. After they had removed the 6 tires they took them out of the fence thru the same passage where they entered. Then Simplicio paid me P120.00. The 5 civilians then left me with the tires rolling them.

"I kept all the money for myself. However, when I was already in our camp after relieved from duty, Sgt. Graciano Hernandez approached me and asked for his share in the sale of 6x6 tires I made on that night. When he asked me for a share I began to have the impression that he knows all what I did on my post, hence, I gave him P20.00, and the rest I keep for myself. Sgt. Hernandez however did not bother me anymore.

"On the following day, Friday, 21 March 1947, I was again detailed as guard on Post #5, 'A' Pool, from 2200 hours to 0400 hours on the following morning. Likewise on this night and at the same hours Patricio Espina, Lope Magpantay, Roberto Carandang, and Vicente Calaging were detailed on Posts #4, 3, 2 and 1, 'A' Pool, respectively. At about 2300 hours on this day, 21 March 1947, while I was on my post the same group of 5 civilians headed by Simplicio came to me and told me that they will again buy tires, to which I said yes. I then allowed them to enter the 'A' Pool thru the same passage way they passed on the previous night. Once inside they began removing 6x6 tires from trailers, while I stood on the lookout. During this time nobody came to my post to inspect except the patrol guard with Sgt. Hernandez who passed by on a truck without stopping. I don't know if the patrol guards saw the civilians removing the tires inside my post. When they were through they passed by my side, each carrying a tire (6x6) with the exception of Simplicio. Simplicio, however, gave me the money for the four (4) 6x6 tires with rims and arrows amounting to P80.00.

"Once outside of the fence Patricio Espina came to me and said that I must sell some more tires to the civilians. I told Espina that I don't like anymore, explaining to him that I have sold them 4 tires already and that I am already afraid. When I

don't like to agree to his demand he asked me for his share in the sale I had just made. I therefore gave him P20.00, and the remaining P60.00 I pocketed them. When I arrived in our camp after being released at about 0200 hours I hid the money. Sgt. Hernandez did not come to me to get his share, and for this I didn't feel bothered. On this night while I was on my post I did not see Espina or any other Scout guards at the 'A' Pool sold tires to any civilian. This is also true on the night he was on guard at Post No. 5 when he first sold tires to civilians that he didn't see them sell tires.

"Last Saturday, 22 March 1947, I was again posted as guard at the 'A' Pool on Post #5, from 0200 to 0600 hours. Likewise Espina, Magpantay, Carandang and Calaging were posted on their respective posts. During this night some other civilians came to me to buy tires but I didn't sell them because I was already afraid of being caught. On the following day, Sunday, 23 March 1947, I was again assigned on the same Post but I didn't sell any tires because no civilians came to me.

"The P90.00 found in my wallet composing of three 20-peso bills and two 10-peso bills were the remainder of the proceeds of the sales I made on Thursday and Friday, 20 and 21 March 1947, respectively, to civilians. This is the only amount that remained to me after spending a part of the money and lending some pesos to my friends."

Evidence for the Defense

Accused, having been informed of his rights as a witness, elected to testify under oath in his own behalf. He stated that he was questioned by Lieutenant Shultz on 24 March and that no one else was present at the interrogation. The Lieutenant made no promises to him in order to get a statement; "Just he slap me." "When Lieutenant Shultz investigated me, he asked me where did you get this money - I told him that is from my salary and then he slapped me and then sent me to the guardhouse." When he "went back" from the guardhouse, on 25 March, "they just asked" him to sign the statement admitted in evidence as Prosecution Exhibit 1. He did not "dictate" this statement and signed it because he was "forced" to do so by the criminal investigation agents. He was told, "If you will sign this statement, you will be sent right away to your company." Lieutenant Shultz was not present at this time. The "things" written in the statement were not true.

Between 6:00 p.m. and 10:00 p.m. on 20 March 1947, he was on duty as a guard on Post No. 5 of "A Pool," Batangas. Nothing "unusual" happened during this tour and he did not sell any tires that night nor did he allow any civilians to enter the pool through the fence. He did not give Sergeant Hernandez any money nor did he see the sergeant that night. On the night of 21 March, he was again on guard duty at Post No.

5. Nothing "unusual" happened that night and he did not see a group of civilians come through the fence.

When he was arrested by criminal investigation agents he had ninety pesos in his possession. His pay was fifty-one pesos and 98 centavos per month. He was last paid at the end of the month of February, at which time he was paid for the months of December, January and February and the money found in his possession was part of that payment. He did not receive "this Ninety pesos from selling tires."

Accused testified that he did not understand Tagalog and that he spoke a Visayan dialect known as Cebuano and did not understand any other "dialect." He appears to have testified in English without the aid of an interpreter (R 19-22).

4. Discussion

Accused was charged with and found guilty of having unlawfully sold to unknown persons seven 2-1/2 ton 6x6 motor vehicle wheel assemblies in violation of the 84th Article of War. There was testimony aliunde his pre-trial statement to the effect that an unspecified number of such wheel assemblies were missing from the vehicle pool at Camp Batangas at various times during the month of March, 1947, and that accused had the opportunity to take them. Accused, in his written pre-trial statement, admitted that while acting as a guard over the vehicle pool he had, on 20 March 1947, sold six "6x6" tires "with rims and arrows" to certain civilians and that on 21 March he had sold four "6x6" tires "with rims and arrows" to the same civilians. Obviously, accused's statement could have been considered by the court as a confession of guilt of the charge and specification upon which he was arraigned.

Challenged by him as having been obtained by duress and promise of immunity, this confession was admitted in evidence upon a showing of circumstances under which the inculpatory statement was obtained which completely controverted accused's assertions in this respect. The court was, therefore, warranted in concluding that the confession was voluntary (see CM 320230, Huffman). Although the written pre-trial statement of accused was received in evidence through the medium of what purported to be an unsigned "certified true copy" of the original signed statement, the defense, by failing to object to the secondary nature of this document, must be held to have been satisfied with its authenticity (CM 296251, McCreary, 27 BR (ETO) 163,169; CM 215351, Nadrowski, 10 BR 383,387).

It is axiomatic that an accused cannot be convicted upon his "un-corroborated" extrajudicial confession. We must, then, inquire as to whether the confession here in question is sufficiently corroborated to sustain the conviction of this accused. The Board of Review, in discussing the question of corroboration in the recent case of CM 325377, Sipalay,

a companion case to the one at bar, had occasion to say:

"In Forte v. United States (94 F. (2d) 236), the Court of Appeals for the District of Columbia said,

* * *

'The question presented is of first impression here; and we feel bound upon a subject touching so materially liberty, and in many cases life itself, and especially in the criminal law where justice requires equality of treatment in respect of trial procedure and proof, *** to follow in adopting a rule for this jurisdiction the rule of the great majority of courts in the United States - that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delicti and the whole thereof. We do not rule that such corroborative evidence must, independent of the confession, establish the corpus delicti beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the corpus delicti and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith.'

It was pointed out, however, that the corpus delicti does not include the agency of the accused as the criminal and that such agency need not be evidenced independently of the confession. The Forte case was followed by the same court in the later cases of George v. United States (125 F. (2d) 559) and Ercoli v. United States (131 F. (2d) 354). It was applied by the Board of Review in CM 306668, Jones (22 BR (ETO) 173,179) and cited with approval in CM Wing, supra.

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'An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words there must be evidence of the

corpus delicti other than the confession itself ***. This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense.'

A thoughtful comparison of the above rule of the Manual with the rule expressed in the Forte case will reveal that there is little material variance between them, the one requiring evidence aliunde the confession that the offense charged has 'probably' been committed and the other requiring 'substantial' supporting evidence of the corpus delicti 'and the whole thereof.' We think the words 'probably' and 'substantial' have a contextually similar connotation. For the purposes of the instant case, nothing would be gained by discussing the meaning of the phrase 'and the whole thereof' as opposed to the language of the Manual to the effect that the corroborating evidence 'need not be sufficient of itself *** to cover every element of the charge.'

"It thus appears, having in mind that the term 'corpus delicti' relates to the occurrence of the events which comprise the particular offense charged or found, that, in order to sustain a conviction of an offense for which accused has been brought to trial and to which he has confessed, there must be adduced competent evidence, outside the confession, tending to establish that the offense of which accused was found guilty was probably committed. Supporting evidence which merely tends to show a possibility that the crime was committed is not a sufficient corroboration, for such supporting evidence lacks the requisite quality of raising a probability in the minds of reasonable men. It is not, in other words, substantial evidence (National Labor Relations Bd. v. Union Pacific Stages, 99 F. (2d) 153,177).

"In applying these principles of law to the case at bar, it becomes at once apparent that the corpus delicti with which we are here concerned is the unlawful sale of four 2-1/2 ton truck wheel assemblies and not a larceny, embezzlement or some wrongful disposition of such property other than sale. It is therefore necessary, in order to support a conviction of this offense, that there appear in the record of trial direct or circumstantial evidence, aliunde accused's confession, tending to show that four such wheel assemblies had probably been unlawfully sold. Indeed, paragraph 114a of the Manual for Courts-Martial, 1928, in setting forth examples of evidence which might be properly considered corroborative of a confession, states:

'In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was

missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule. (Underscoring supplied.)

The only evidence additive to accused's confession which we find here is proof that a number of 2-1/2 ton truck wheel assemblies were missing from Camp Batangas vehicle pool on or about the date of the alleged offense under circumstances indicating that accused had the opportunity to become involved in their disappearance. For the purposes of this discussion, however, the evidence extrinsic to accused's confession having to do with his involvement in any offense is immaterial. The only question here presented is whether the showing that the wheel assemblies were missing is sufficient to raise a probability that they were unlawfully sold. Having stated the proposition thus baldly, logic and reason require a negative answer. Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the 'black market.' But this is guess work, for there are other and equal possibilities as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F. (2d) 769, 773). We conclude, therefore, that accused's confession to the effect that he had participated in the unlawful sale of at least the 'tires' from the four wheel assemblies in question was without sufficient corroboration and that the conviction based thereon should be set aside.

"This is not a case of first impression here. The Board of Review has heretofore, on several occasions and regardless of the legal theory applied at the time, decided that mere proof that property allegedly unlawfully sold was missing is not a sufficient corroboration of accused's confession that he did in fact unlawfully sell such property. We are aware of no reason why we should now

overrule these prior decisions (CM 319774, Walker; CM 319774, Leskins; CM 211261, Sedlak, 10 BR 53,55; CM 211218, Fleming, 10 BR 25,29; CM 193828, Morande, 2 BR 95,98)."

In the instant case, it is at once apparent that accused's confession was not sufficiently corroborated by the showing of the mere circumstance that 2-1/2 ton 6x6 wheel assemblies were missing from the Camp Batangas vehicle pool at various times during the month of March, 1947. The question, then, is whether the record of trial contains other evidence of corroborative force. We think it does not.

The fact that about 23 March the military police "confiscated" a jeep located just outside the vehicle pool, which jeep contained tires taken from the pool, does not logically tend to establish a probability that such tires, or other tires taken from the vehicle pool, had been unlawfully sold, for the circumstances surrounding the "confiscation" were never brought to light at the trial. The testimony of one of the criminal investigation agents who had participated in the interrogation of accused that the investigation, of which the interrogation was a part, pertained to "the tires, which were sold by the scouts at the A Pool" was clearly nothing more than a conclusion on his part, a conclusion based on hearsay which must necessarily be excluded from consideration. His further testimony to the effect that accused had been identified by a civilian as a participant in the sale of tires from the vehicle pool and that another soldier who had confessed to "his crime" had incriminated accused is hearsay of the first water. Although we have held that an extrajudicial identification of an accused as the perpetrator of a particular offense is admissible for the limited purpose of corroborating further identification made in court (see CM 318341, Wolford, 67 BR 233,235), such evidence is received only on the issue of identity and can never be admitted by way of establishing the corpus delicti concerning which the identification is made or even as tending to show the probability that the offense charged has in fact been committed (CM 325401, Gray). Accused admitted on the witness stand that at the time he was arrested he had ninety pesos in his possession but possession of such a sum can hardly be considered substantial evidence sufficient to raise in the minds of reasonable men a probability that an unlawful sale of property of the vehicle pool over which accused had been posted as a guard had in fact occurred, for no evidence, aliunde the confession, was adduced tending to show that this money probably derived from the proceeds of an unlawful sale of the property in question or even that accused had become suddenly enriched without adequate explanation (see CM 234561, Nelson, 21 BR 55,58).

5. For the foregoing reasons, the Board of Review is of the

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opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Richard D. Sibus Judge Advocate

Charles E. McAfee Judge Advocate

Gilbert L. Schroy Judge Advocate

JAGK - CM 325378

1st Ind

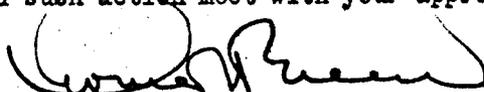
JAGO, Dept. of the Army, Washington 25, D. C.

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1947 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Ciriaco Catubig (10320251), C Company, 57th Infantry Regiment, Philippine Scouts.

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 accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls . .

1. Record of trial
2. Form of action

(GCMO 22 (DA) 20 Jan 1948).



3. The only question which it is necessary to consider in this case is whether the evidence in the record of trial aliunde the confession of accused, either direct or circumstantial, is sufficient to establish the probability that the offense charged had actually been committed and thus to permit the confession to be considered. The accused was charged with the unlawful sale of certain wheel assemblies issued for use in the military service. The only evidence offered to show the probable commission of the offense, aliunde the confession of accused, consisted of testimony that the wheel assemblies were missing from the Ordnance Depot vehicle pool on or about the date of the alleged offense.

In the recent case of CM 325377, Sipalay, and again in CM 325378, Catubig, both companion cases to the one at bar, the Board of Review had occasion to point out that a showing, aliunde the pre-trial statement of accused therein, of the mere circumstance that 2-1/2 ton, 6x6, wheel assemblies were missing from the Camp Batangas vehicle pool on or about the date of the alleged unlawful sale by such accused of wheel assemblies of a similar type and kind was not a sufficient corroboration of his extrajudicial confession of guilt of such alleged offense. It was held, in each case, that, in order to support a conviction of an offense for which an accused has been brought to trial and to which he has confessed, there must be adduced, by way of corroboration of the confession, substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde the confession that the particular offense in question had probably been committed. In the Sipalay case, it was said:

"*** Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the 'black market.' But this is guess work, for there are other and equal possibilities as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds

of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F (2d) 769, 773)..

4. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Christy D. Silbert, Judge Advocate
Gilbert B. Schroyd, Judge Advocate
Harley A. Lanning, Judge Advocate

(194)

JAGK - CM 325379

1st Ind

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

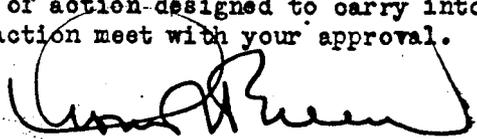
JAN 30 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1947 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Nestorio Ynota (10318180), "C" Company, 57th Infantry Regiment, Philippine Scouts.

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

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(GCMO 48 (DA), 9 Feb 1948).

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

(195)

JAGK - CM 325381

22 JAN 1948

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters PHILRYCOM, APO 707, 30 June 1947. Dishonorable discharge (suspended) and confinement for two (2) years. Stockade.

Private First Class MARCELINO DATU
(10322341), C Company, 57th Infantry
Regiment, Philippine Scouts.)

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

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

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 84th Article of War.

Specifications: In that Private First Class Marcelino Datu, Company "C" 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Islands, on or about 21 March 1947, unlawfully sell to unknown persons ten (10) wheel assemblies, motor vehicle 1/4 ton 4x4, of a value of about \$17.04 each, and each consisting of one (1) tire 600x16, one (1) inner tube 600x16, and two (2) rims, of a total value of about \$170.40, issued for use in the military service of the United States.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification except the words and figures "ten (10)" and "about \$170.40," substituting therefor respectively "six (6)" and "more than \$50.00," of the excepted words not guilty, of the substituted words guilty, and guilty of the charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated General Prisoners' Branch, PHILRYCOM Stockade, Provost

Marshal's Section, APO 707, or elsewhere as the Secretary of War may direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 196, Headquarters, Philippines-Ryukyus Command, APO 707, 16 August 1947.

3. The only question which it is necessary to consider in this case is whether the evidence in the record of trial aliunde the confession of accused, either direct or circumstantial, is sufficient to establish the probability that the offense charged had actually been committed and thus to permit the confession to be considered. The accused was charged with the unlawful sale of certain wheel assemblies issued for use in the military service. The only evidence offered to show the probable commission of the offense, aliunde the confession of accused, consisted of testimony that the wheel assemblies were missing from the Ordnance Depot vehicle pool on or about the date of the alleged offense.

In the recent case of CM 325377, Sipalay, and again in CM 325378, Catubig, both companion cases to the one at bar, the Board of Review had occasion to point out that a showing, aliunde the pre-trial statement of accused therein, of the mere circumstance that 2-1/2 ton, 6x6, wheel assemblies were missing from the Camp Batangas vehicle pool on or about the date of the alleged unlawful sale by such accused of wheel assemblies of a similar type and kind was not a sufficient corroboration of his extrajudicial confession of guilt of such alleged offense. It was held, in each case, that, in order to support a conviction of an offense for which an accused has been brought to trial and to which he has confessed, there must be adduced, by way of corroboration of the confession, substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde the confession that the particular offense in question had probably been committed. In the Sipalay case, it was said:

"*** Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the 'black market.' But this is guess work, for there are other and equal possibilities as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the

missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F (2d) 769, 773).
***"

4. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Chester D. Silvers, Judge Advocate

Gilbert E. Stroyf, Judge Advocate

Harley A. Lanning, Judge Advocate

(198)

JAGK - CM 325381

1st Ind

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

JAN 26 1948

TO: The Secretary of the Army

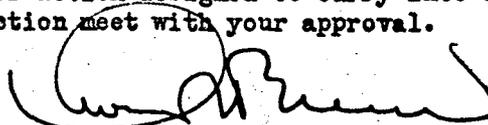
1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1947 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Marcelino Datu (10322341), C Company, 57th Infantry Regiment, Philippine Scouts.

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 and the sentence be vacated, that the accused be released from the confinement imposed by the sentence in this case, and that all rights, privileges and property of which accused has been deprived by virtue of said sentence 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 43 (DA), 6Feb 1948).

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

JAGK - CM 325384

2 FEB 1948

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters
PHILRYCOM, APO 707, 26 and 27 June 1947.
Dishonorable discharge (suspended),
total forfeitures, and confinement for
two (2) years. Stockade.

Private First Class ROBERTO
CARANDANG (10325856), Company)
C, 57th Infantry, Philippine)
Scouts)

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

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

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

CHARGE: Violation of the 84th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Private First Class Roberto Carandang, Company "C", 57th Infantry Regiment, Philippine Scouts, APO 1009 did at Batangas, Batangas, Luzon, Philippine Islands, on or about 21 March 1947, unlawfully sell to unknown persons fifteen (15) wheel assemblies, motor vehicle, 2 1/2 ton, 6x6, of a value of about \$42.33 each, and each consisting of one (1) tire 7.50 x 20 one (1) inner tube, 7.50 x 20 and two (2) rims of a total value of about \$634.95, issued for use in the military service of the United States.

Specification 3: In that Private First Class Roberto Carandang, ***, did at Batangas, Batangas, Luzon, Philippine Islands, on

or about 22 March 1947, unlawfully sell to unknown persons ten (10) wheel assemblies, motor vehicle, 2 1/2 ton 6x6, of a value of about \$42.33 each, and each consisting of one (1) tire, 7.50 x 20, one (1) inner tube, 7.50 x 20 and two (2) rims of a value of about \$423.30, issued for use in the military service of the United States.

Specification 4: In that Private First Class Roberto Carandang, *** did at Batangas, Batangas, Luzon, Philippine Islands, on or about 24 March 1947, unlawfully sell to unknown persons nine (9) wheels assemblies, motor vehicle, 2 1/2 ton, 6x6 of a value of about \$42.33 each and each consisting of one (1) tire 7.50 x 20, one (1) inner tube, 7.50 x 20, and two (2) wheel assemblies, motor vehicle 3/4 ton 4x4 of a value of about \$45.05 each and each consisting of one (1) tire, 900 x 16, one (1) inner tube, 900 x 16, and two (2) rims, of a total value of about \$477.57, issued for use in the military service of the United States.

The accused pleaded not guilty to all specifications and the charge. He was found not guilty of Specification 1, guilty of Specification 2, guilty of Specification 3 except the words and figures "ten (10) and \$423.30", substituting therefor the words and figures "seven (7) and \$296.00, of the excepted words not guilty and of the substituted words guilty, guilty of Specification 4 and guilty of the charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for a period of two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated General Prisoners Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 194, Headquarters Philippines-Ryukyus Command, 16 August 1947.

3. This is a companion case to CM 325056, Balucanag, CM 325377, Sipalay, and CM 325378, Catubig, and involves identical principles of law. Here as in the cited cases the accused was charged with the unlawful sale of certain wheel assemblies in violation of Article of War 84. Proof adduced by the prosecution established that on or about the time of the alleged unlawful sales, it was discovered that property of a similar description was missing from the area where the accused had been posted as a guard. In a written pre-trial statement the accused confessed that on or about the dates alleged he sold property similar to that described in the specifications. The record of trial does not contain competent evidence aliunde accused's confession sufficient to enable the court reasonably to determine that the described property was probably sold. (See also CM 325381, Datu; CM 325480, Promito.)

4. For the reason 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.

Charles D. Silvers, Judge Advocate

Gilbert G. Adams, Judge Advocate

Harley Lanning, Judge Advocate

(202)

JACK - CM 325384

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. FEB 6 1948

TO: The Secretary of the Army

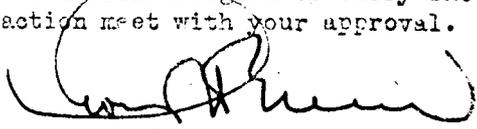
1. Herewith transmitted for your action under Article of War 50², as amended by the act of 20 August 1947 (50 Stat. 724, 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Roberto Carandang (10325856), Company C, 57th Infantry, Philippine Scouts.

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 and sentence be vacated, that the accused be released from the confinement imposed by the sentence in this case, and that all rights, privileges and property of which accused has been deprived by virtue of said sentence 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 63 (DA) 1 March 1948).

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

(203)

JAGV - CM 325391

19 DEC 1947

UNITED STATES

v.

Technician Fifth Grade
AURELIO W. REYES (RA 39005990),
formerly of Depot Detachment, Peiping
Headquarters Group, Peiping China.

ARMY ADVISORY GROUP, CHINA

Trial by G.C.M., convened at
Nanking, China, 28 July 1947.
Dishonorable discharge (sus-
pended) and confinement for
six (6) months. Disciplinary
Barracks.

OPINION of the BOARD OF REVIEW
BAUGHN, SPRINGSTON and LANNING, Judge Advocates

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

2. Accused was tried jointly with Private William H. Keen upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that, Private William H. Keen, Enlisted Detachment, Station Complement, Army Advisory Group, then of Depot Detachment, Peiping Headquarters Group, and Technician Fifth Grade Aurelio W. Reyes, Headquarters Detachment, 701st Military Police Service Battalion, Shanghai Detachment, Station Complement, Army Advisory Group, then of Depot Detachment, Peiping Headquarters Group, acting jointly and in pursuance of a common intent, did, at or near Peiping, China, on or about 18 January 1947, feloniously attempt to take, steal and carry away one motor vehicle, to wit, a truck, 1/4 ton, 4 x 4, Command and Reconnaissance (jeep) of the value of about Nine Hundred and Eighty-Three Dollars (\$983.00), property of the United States, furnished and intended for the military service thereof.

Accused pleaded not guilty to and was found guilty of the Specification and the Charge. There was no evidence of previous convictions. Accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence but reduced the period of confinement to six months, suspended the dishonorable discharge until accused's release from confinement, and designated the Branch, United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The sentence was published in General Court-Martial Orders No. 16, Office of the Chief, Army Advisory Group, 23 August 1947.

3. Evidence for the Prosecution.

Private Donald M. Taylor, Ordnance Detachment Depot, Peiping Headquarters Group, Peiping, China, offered to expose a crew that was dealing in black market and stolen vehicles to Captain Miguel J. Pomar, Provost Marshal of the Army Advisory Group, Nanking, China, when the Captain was stationed at Peiping (R. 53, 6, 7). The CID was notified by Taylor that a vehicle would leave the motor pool on the night of 18 January 1947, and action was taken by making a record of it and the roving patrol was told to watch (R. 54). Prior to 8:15 that evening Taylor went to Sergeant Narain Singh, Auxiliary Military Police, stationed at the Peiping Depot as Sergeant of the Guard, and told him that a jeep was going out of the gate at 8:15 (R. 13). That afternoon Taylor had approached the accused and asked him to take a car out through the gate, stating that Private William H. Keen would meet accused outside the gate of the Depot (Pros Ex 6). Taylor also prior thereto had asked Keen if the latter would do him a favor in connection with selling a jeep and on the day the jeep was taken Keen agreed (Pros Ex 5). About 8:15 that evening Singh was at the Depot gate when accused drove up in a jeep. Singh requested a lift and got in the jeep. Taylor, who had told Singh he was going with the CID, was at the main gate when the jeep was driven up to the gate (R. 14). When the MP at the gate requested a trip ticket accused pointed to the glove compartment whereupon Singh, who was then sitting next to accused, reached into the glove compartment, took out a paper (R. 15), which was a work order, and showed it to the MP who then allowed them to go out of the gate (Pros Ex 6). Accused then drove the jeep in the direction of the Peiping main gate on the Tientsin Road to within about one thousand yards of the gate where, in response to a flashlight signal given by a Chinese on the side of the road, accused stopped the jeep and sounded his horn. Keen and two Chinese came out of a small hut on the opposite side of the road and entered the jeep (R. 11). Accused then drove into a small lane off Hateman Street, stopping at a house next to the curve which house was entered by all the occupants of the jeep except Singh. American MP's drove up, took possession of the jeep, and one of the MP's went into the house, brought out the soldiers and the Chinese and took them to Headquarters (R. 12). Technician Fifth Grade Jurek, who was on guard duty at the main gate of the Peiping Supply Depot that night, allowed accused to drive the jeep out of the gate, without a trip ticket and upon presentation of a work order slip, because an AMP Sergeant (Singh) and the Corporal of the Guard, Technician Fifth Grade William Wallace, told him to let accused go through without a trip ticket (R. 24). Wallace, who was with the MP guard, had been awakened by an AMP Sergeant, advising him a jeep, with only a work order, was going to be taken out of the gate. This AMP Sergeant (Singh) wanted Wallace to follow the jeep driven by Reyes in his (Singh's) jeep, which Wallace did, since the AMP Sergeant believed the jeep accused was driving was going to be stolen and Wallace wanted to follow it to see (R. 20).

4. Evidence for the Defense.

Accused, having been advised of his rights, elected to remain silent.

5. Accused could be guilty of attempted larceny even though Taylor was not committing the offense of larceny or an attempted larceny. This is true if it is established that the accused had formed an intent to commit such offense and thereafter performed an overt act carrying out such intent. In this connection Taylor's intent, unknown to him, would be immaterial. The facts related above, however, disclose a clear case of entrapment, contrary to public policy, constituting conduct of such character as to require disapproval of the conviction (CM 187319, Line, 1 ER 25). The conversation of Taylor with Captain Pomar, his inciting, inducing and luring accused into commission of the offense, including securing the active cooperation of the guards, represented actions repudiated in military law. There is not the slightest evidence of record to indicate the accused is an habitual criminal; his excellent military record since 26 March 1941 suggests the contrary.

The reason for the rule against entrapment is comprehensively stated in the Line case above cited, where the Board of Review said:

"The public policy preventing the criminal prosecution of persons whose acts are induced by Government agents, is accentuated in military law. One of the principal duties of an officer of the Army is the development, training, discipline and leading of the soldier he commands. When an officer becomes aware that the soldier is about to commit a criminal offense it becomes his positive duty immediately to restrain that soldier, certainly not to encourage and incite him to violate the law. No justification for instigation by the Military Police based upon proof that accused was a practiced criminal, or that he was engaged in an unlawful business, is found in this case. Such being the fact, it was the duty of the officers involved to prevent the offense, not to incite it in order that accused might be criminally prosecuted." (CM 187319, Line, supra, p. 30).

The propriety and soundness of the rule announced in the Line case (decided 7 August 1929) is fortified by the decision of the United States Supreme Court in Sorrells v. United States, 287 U. S. 435 (1932) where the majority opinion of the court, adopting approved statements of Circuit Courts of Appeal (4th and 8th), held:

"The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.

"* * * decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime."

and in a separate concurring opinion it was said:

"The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy."

The record may be searched in vain for any suggestion of evidence that accused was engaged in black market activities, or that any reasonable cause for laying a trap existed, or that accused had a connection of any character with a crew dealing in black market and stolen vehicles, as intimated by Taylor to Captain Pomar. Quite the contrary, from the confession of accused, introduced by the prosecution, and consistent with the facts as developed, it was upon the insistence and solicitation of Taylor that accused finally agreed to and did drive the jeep out of the depot. Hence, while here the case of entrapment is predicated upon facts elicited from accused's confession, nothing of record appears to contradict these facts, and they conform to and are corroborated by the other factual proof offered. Situations of this character invoke the principle that the court may not reject statements made in a confession favorable to the accused where no evidence is produced to repudiate or cast doubt upon such statements. The rule gains in potency where the other established facts are consistent with and corroborate accused's recitation of the events involved. Support for these conclusions is found in CM 319168, Poe, decided 16 May 1947, where the Board held:

"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 [court] 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."

Accordingly, we must conclude that because Taylor's activities, of a character condemned under both military and civil law, were the motivating causes of an offense in no manner initiated by accused, the conviction may not be sustained.

6. The court was legally constituted and had jurisdiction of the accused and the subject matter. For the reasons hereinbefore stated, the Board of Review is of the opinion the record of trial is legally insufficient to support the findings of guilty of the Specification and the Charge, and the sentence.

Wilmot T. Baughn, Judge Advocate

George B. Springston, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGV - GM 325391

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 50 $\frac{1}{2}$ is the record of trial in the case of Private William H. Keen (RA 33662378), formerly of Depot Detachment, Peiping Headquarters Group, Peiping, China, and Technician Fifth Grade Aurelio W. Reyes (RA 39005990), formerly of Depot Detachment, Peiping Headquarters Group, Peiping, China. 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 as to Reyes and, for the reasons stated therein, recommend that the findings of guilty and the sentence in his case be vacated, that the accused be released from the confinement imposed by the sentence, and that all rights, privileges and property of which this accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

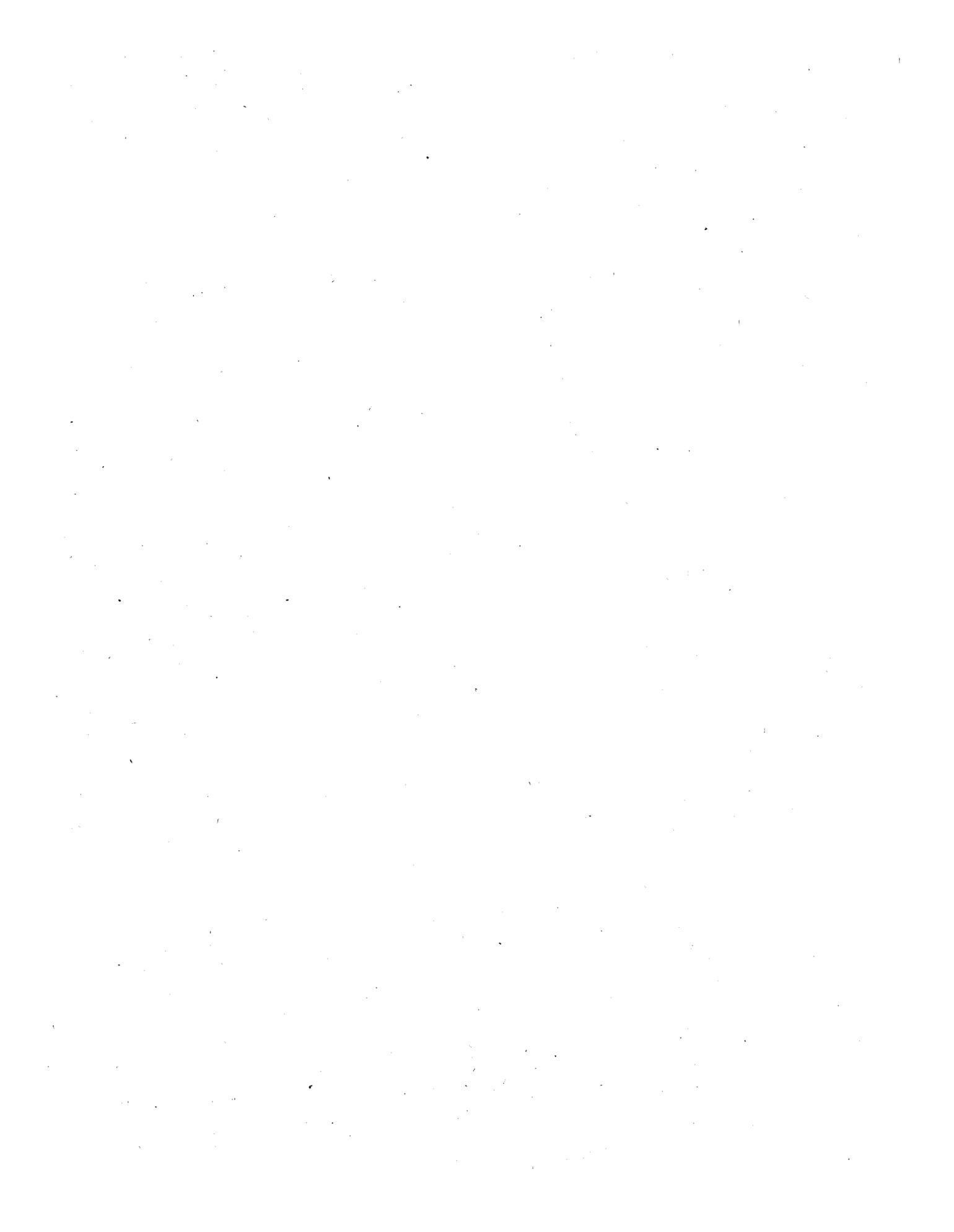


THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(GCMO 34 (DA), 27 Jan 1948)•



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

(209)

JAGV - CM 325391

19 DEC 1947

UNITED STATES)

v.)

Private WILLIAM H. KEEN)
(RA 33662378), formerly of)
Depot Detachment, Peiping)
Headquarters Group, Peiping,)
China.)

ARMY ADVISORY GROUP, CHINA

Trial by G.C.M., convened at
Nanking, China, 28 July 1947.
Dishonorable discharge and
confinement for six (6) months.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, SPRINGSTON and LANNING, 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that, Private William H. Keen, Enlisted Detachment, Station Complement, Army Advisory Group, then of Depot Detachment, Peiping Headquarters Group, and Technician Fifth Grade Aurelio W. Reyes, Headquarters Detachment, 701st Military Police Service Battalion, Shanghai Detachment, Station Complement, Army Advisory Group, then of Depot Detachment, Peiping Headquarters Group, acting jointly and in pursuance of a common intent, did, at or near Peiping, China, on or about 18 January 1947, feloniously attempt to take, steal and carry away one motor vehicle, to wit, a truck, 1/4 ton, 4 x 4, Command and Reconnaissance (jeep) of the value of about Nine Hundred and Eighty-Three Dollars (\$983.00), property of the United States, furnished and intended for the military service thereof.

Accused pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of one previous conviction was introduced. Accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence but reduced the period of confinement to six months, designated the Branch, United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence for the Prosecution.

Private Donald M. Taylor, Ordnance Detachment Depot, Peiping Headquarters Group, Peiping, China, offered to expose a crew that was dealing in black market and stolen vehicles to Captain Miguel J. Pomar, Provost Marshal of the Army Advisory Group, Nanking, China, when the Captain was stationed at Peiping (R. 53, 6, 7). The CID was notified by Taylor that a vehicle would leave the motor pool on the night of 18 January 1947, and action was taken by making a record of it and the roving patrol was told to watch (R. 54). Prior to 8:15 that evening Taylor went to Sergeant Narain Singh, Auxiliary Military Police, stationed at the Peiping Depot as Sergeant of the Guard, and told him that a jeep was going out of the gate at 8:15 (R. 13). That afternoon Taylor had approached the accused Reyes (tried jointly with Keen) and asked him to take a car out through the gate, that Keen would meet Reyes outside the gate of the Depot (Pros Ex 6). Taylor also prior thereto had asked Keen if the latter would do him a favor in connection with selling a jeep and on the day the jeep was taken Keen agreed (Pros Ex 5). About 8:15 that evening Singh was at the Depot gate when Reyes drove up in a jeep. Singh requested a lift and got in the jeep. Taylor, who had told Singh he was going with the CID, was at the main gate when the jeep was driven up to the gate (R. 14). When the MP at the gate requested a trip ticket Reyes pointed to the glove compartment whereupon Singh, who was then sitting next to Reyes, reached into the glove compartment, took out a paper (R. 15), which was a work order, and showed it to the MP who then allowed them to go out of the gate (Pros Ex 6). Reyes then drove the jeep in the direction of the Peiping main gate on the Tientsin Road to within about one thousand yards of the gate where, in response to a flashlight signal given by a Chinese on the side of the road, Reyes stopped the jeep and sounded his horn. Accused and two Chinese came out of a small hut on the opposite side of the road and entered the jeep (R. 11). Reyes then drove into a small lane off Hateman Street, stopping at a house next to the curve which house was entered by all the occupants of the jeep except Singh. American MP's drove up, took possession of the jeep, and one of the MP's went into the house, brought out the soldiers and the Chinese and took them to Headquarters (R. 12). Technician Fifth Grade Jurek, who was on guard duty at the main gate of the Peiping Supply Depot that night, allowed Reyes to drive the jeep out of the gate, without a trip ticket and upon presentation of a work order slip, because an AMP Sergeant (Singh) and the Corporal of the Guard, Technician Fifth Grade William Wallace, told him to let Reyes go through without a trip ticket (R. 24). Wallace, who was with the MP guard, had been awakened by an AMP Sergeant, advising him a jeep, with only a work order, was going to be taken out of the gate. This AMP Sergeant (Singh) wanted Wallace to follow the jeep driven by Reyes in his (Singh's) jeep, which Wallace did, since the AMP Sergeant believed the jeep Reyes was driving was going to be stolen and Wallace wanted to follow it to see (R. 20).

4. Evidence for the Defense.

Accused, having been advised of his rights, elected to remain silent.

5. Accused could be guilty of attempted larceny even though Taylor was not committing the offense of larceny or an attempted larceny. This is true if it is established that the accused had formed an intent to commit such offense and thereafter performed an overt act carrying out such intent. In this connection Taylor's intent, unknown to him, would be immaterial. The facts related above, however, disclose a clear case of entrapment, contrary to public policy, constituting conduct of such character as to require disapproval of the conviction (CM 187319, Line, 1 BR 25). The conversation of Taylor with Captain Pomar, his inciting, inducing and luring accused into commission of the offense, including securing the active cooperation of the guards, represented actions repudiated in military law. Such methods should be particularly condemned since it appears the educational background of accused was two years of grammar school, he was classified as illiterate when he enlisted, but on 31 January 1944 he was marked as being literate although on that date his AGCT score was 37 and his mental age, while possibly above two or three years was not much more (R. 40).

The reason for the rule against entrapment is comprehensively stated in the Line case above cited, where the Board of Review said:

"The public policy preventing the criminal prosecution of persons whose acts are induced by Government agents, is accentuated in military law. One of the principal duties of an officer of the Army is the development, training, discipline and leading of the soldier he commands. When an officer becomes aware that the soldier is about to commit a criminal offense it becomes his positive duty immediately to restrain that soldier, certainly not to encourage and incite him to violate the law. No justification for instigation by the Military Police based upon proof that accused was a practiced criminal, or that he was engaged in an unlawful business, is found in this case. Such being the fact, it was the duty of the officers involved to prevent the offense, not to incite it in order that accused might be criminally prosecuted." (CM 187319, Line, supra, p. 30).

The propriety and soundness of the rule announced in the Line case (decided 7 August 1929) is fortified by the decision of the United States Supreme Court in Sorrells v. United States, 287 U. S. 435 (1932) where the majority opinion of the court, adopting approved statements of Circuit Courts of Appeal (4th and 8th), held:

"The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.

"* * * decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime."

and in a separate concurring opinion it was said:

"The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy."

There is nothing in the record to implicate accused in black market or stolen vehicle dealings. The reasoning advanced in the opinion of the Board in the case of Technician Fifth Grade Reyes, who was tried jointly with this accused, is equally applicable in this case where the uncontradicted facts plainly disclose a clear entrapment of an illiterate soldier, contrary to the positive duties of the law enforcement agencies of the Army.

Here, as related by accused in his confession, two or three days prior to the incident involved Taylor asked accused if accused would do him a favor by picking up "the boys who would buy the jeep. He said that he had been dealing with them before. I told him that I didn't know, I must have gotten chicken hearted, I reckon I must be crazy, I told him that I would. So last night he asked me again, said that he had everything fixed and for me to get the boys, he told me to meet the boys down in front of Lockhart Hall in some of those beer joints. He said that I would know them easy." Accused also stated the following occurred: "When I arrived in town I went in front of the Cosmos Club, one of the fellows there asked me if I had anything to sell. I told him that I had nothing but knew a fellow that did, then he said he must be your friend. I said yes, he is. He said well let's go to the East gate. We went to the East gate and waited for about fifteen minutes, then the jeep drove up."

While the entrapment is predicated upon facts elicited from accused's confession, such facts conform to and are corroborated by the other factual proof submitted. Following the reasoning in CM 319168, Poe, decided 16 May 1947, the court was bound by accused's statements considered in their whole effect and was not at liberty to reject the self-serving statements while accepting the disserving statements since the record is barren of other evidence tending to render the self-serving statements questionable, doubtful or inconsistent. The rule gains potency where, as stated, the other established facts are consistent with and corroborate accused's version of the transaction.

Accordingly, the Board concludes that because Taylor's activities, of a character condemned under both military and civil law, were the motivating causes of an offense in no manner initiated by accused, the conviction may not be sustained.

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

Wilmer T. Bangson, Judge Advocate

George Springston, Judge Advocate

Harley A. Lanning, Judge Advocate

(214)

JAGV - CM 325391

1st Ind

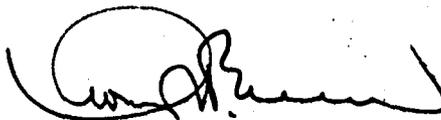
JAGO, Dept. of the Army, Washington 25, D.C.

TO: Commanding General, Army Advisory Group, China, APO 909,
c/o Postmaster, San Francisco, California

1. In the case of Private William H. Keen (RA 33662378), formerly of Depot Detachment, Peiping Headquarters Group, Peiping, China and Technician Fifth Grade Aurelio W. Reyes (RA 39005990), formerly of Depot Detachment, Peiping Headquarters Group, Peiping, China, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence as to Keen 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 325391).



THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 34 (DA), 27 Jan 1948).

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

(215)

JAGQ - CM 325401

SEP 19 1947

UNITED STATES

v.

Private
ROBERT L. GRAY (RA 19244261),
Cannon Company, 351st Infantry
Regiment.

TRIESTE UNITED STATES TROOPS

Trial by G.C.M., convened at
Trieste, Italy, 20 May 1947.
Dishonorable discharge and
confinement for three (3)
years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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

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

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

Specification: In that, Private Robert L. Gray, Cannon Company, 351st Infantry Regiment, did, at Banne, Italy, on or about 11 March 1947, feloniously take, steal and carry away four watches, value about one hundred dollars (\$100.00), the property of Private First Class Edwin A. Machul, Private First Class Clarence J. Cenlay Jr., Private First Class Emmett R. Allen, Private First Class Everett T. Murray all of Company E, 351st Infantry Regiment.

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

Specification: In that Private Robert L. Gray, Cannon Company, 351st Infantry Regiment, did, without proper leave, absent himself from his station at Banne, Italy from about 27 March 1947 to about 13 April 1947.

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

Specification: (Disapproved by Reviewing Authority).

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of, the Specification of Charge I except the words "one

hundred" dollars (\$100.00) and "Private First Class Emmett R. Allen, Private First Class Everett T. Murray all;" substituting therefor respectively the words "\$84.75" and "both"; guilty of Charge I and guilty of Charges II and III and the Specifications thereof. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority disapproved the findings of guilty of Charge III and the Specification thereof; approved the sentence, designated Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence for the prosecution.

On or about 11 March 1947 accused and three other enlisted men were present in the squad room of the Cannon Company, 351st Infantry Regiment. Accused was arranging his clothing and field equipment on his bed (R. 7). Two Italian citizens were also in the room. They were vendors of trinkets and one of them repaired watches. Sergeant Carp, one of the enlisted men present, asked the watch repairman about a watch which he was having repaired and was told by the repairman that it would be ready on Saturday. The Italian then went back to a bed and called out "Sergeant, I left four watches on the bed here and they disappeared." The Sergeant inquired where the watches were left and the repairman pointed to a bed next to that of accused's. The repairman looked through his suitcase and clothes but could not find the watches.

Sergeant Carp then said "This is out of my hands. I am going to call in the company Officers" (R. 7). Lieutenant Mullery, a company officer, came to the squad room and upon examining accused's musette bag found four watches in the bag (R. 8, 14). The bag was fastened and the Lieutenant opened one hook to look inside (R. 15). Two of the watches, (Pros Exs 1 and 3) were identified by Sergeant Carp and Lieutenant Mullery as watches found in accused's musette bag (R. 8, 14). It was stipulated that Prosecution's Exhibit 1 was the property of Private First Class Clarence J. Conley, Jr., and was valued at forty-nine dollars and seventy five cents (R. 11); and that Prosecution's Exhibit 3 was the property of Private First Class Edwin A. Machul and was of a value of thirty-five dollars (R. 12). When the search was made accused denied taking the watches (R. 14). Lieutenant Mullery did not know if one of the Italians placed the watches in accused's bag; he did not know upon whose bed the bag was lying; (R. 16) and he did not know definitely that the bag in which he found the watches was accused's bag although he thinks accused admitted it belonged to him (R. 16, 17). Sergeant Carp being recalled testified that the bag was on accused's bed (R. 18); that he (Carp) had never seen the watches until Lieutenant Mullery took them out of the bag (R. 19); that the Italian told him that the watches had been taken (R. 20); and he had not seen the watches on the bed before the Italian told him they were stolen (R. 20).

On 28 March 1947 accused absented himself without leave from his station and remained in that status until 13 April 1947 (Pros Ex 4, R. 22).

4. Evidence for the defense.

Accused having been duly advised of his rights as a witness testified under oath (R. 28) that he did not take the watches and that the first time he saw them was when Lieutenant Mullery "pulled" them out of his (accused) bag (R. 29). He does not know how the watches "got in his bag" (R. 29) and his bag was open, not closed (R. 30). He heard one of the Italians say "my watches are gone" and the Italian asked him if he had seen the watches (R. 32). When the Lieutenant found the watches in his bag accused demanded that the company commander take finger prints from the watches. He had never seen the watches before they were taken from his bag and did not see them on the bed (R. 33).

He went absent without leave on 27 March 1947 and "turned in" six days later to the Military Police (R. 31).

5. The offense of absence without leave was established by the introduction in evidence of the extract copy of the morning report of accused's organization and his admissions on the witness stand.

Paragraph 149g, Manual for Courts-Martial, 1928, 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 of his property therein. (Clark)."

and states further -

"In larceny there must be a taking and carrying away. The taking must be from the actual or constructive possession of the owner."

and further -

"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."

Except for the testimony of Sergeant Carp as to statements made by the Italian watch repairman there is a complete lack of evidence in the record that the watches which were the subject of the alleged larceny were ever taken by anyone. The stipulations as to ownership and value of two of the watches (Pros. Ex 1, 3) make no mention of the fact that they were in the custody of the Italian at any time and there is no evidence in the record as to any trespassory taking by the accused or by anyone else.

The Manual for Courts-Martial further provides in Paragraph 113 as follows:

"Hearsay is not evidence. By this rule is meant simply that a fact can not be proved by showing that somebody stated it was a fact. The fundamental reasons for the rule are that the author of the statement was not under oath, and was not subject to cross examination, and that the court had no opportunity of observing his demeanor."

It was obviously the theory of the prosecution that the hearsay statement of the Italian watch repairman to the effect that the watches in question had been stolen was admissible as a part of the *res gestae* and therefore an exception to the hearsay rule. The meaning and effect of the term "*res gestae*" as set forth in paragraph 115b, Manual for Courts-Martial, 1928, has been clearly enunciated in CM 197011 Kearney 3 BR 63 (67-74) and it is considered by the Board of Review that the following quotation from the Kearney case supra disposes of the theory of the prosecution in the instant case.

"In a word, the hearsay utterance of the declarant becomes admissible as though it were original evidence when it partakes of the nature of a shadow giving outline and form to the substance of a main fact or transaction otherwise properly in evidence. The utterance cannot itself be both shadow and substance and be admissible as part of the *res gestae*. There must be a *res* otherwise testimonially shown. * * * The obvious reason therefor is that the separately evidenced main transaction lends credit to the proffered unsworn utterance to offset the distrust with which the law looks on hearsay."

In the present case as has been pointed out above there is no direct competent evidence that any watches were ever stolen by anyone or that there were at any time any watches on a bed in the orderly room. Consequently, there was no "main act" proved by any competent testimony with which the hearsay declaration of the Italian to the effect that "someone had taken his watches" could be connected. Hence the hearsay declaration was inadmissible to prove such taking and the prosecution accordingly failed to prove one of the essential elements of the offense of larceny. The finding of the watches in accused's bag is insufficient in and of itself to sustain the findings of guilty without some evidence in the record that a theft had been committed. Neither the Italian who claimed to have placed the watches on the bed nor the owners of the watches in question testified at the trial and consequently there was no evidence proving the *corpus delicti* of the offense.

The Board of Review therefore holds that the record is legally insufficient to sustain the finding of guilty of Specification of Charge I and Charge I alleging larceny of the watches in question.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated above the Board of Review holds that the evidence is legally insufficient to support the findings of guilty of Charge I and the Specification thereof; legally sufficient to support the findings of guilty of Charge II and the Specification thereof and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for one month and twenty-one days and forfeiture of two thirds pay per month for a like period.

W. H. Johnson

, Judge Advocate

J. J. Scheraga

, Judge Advocate

A. T. Kave

, Judge Advocate

(220)

OCT 6 1947

JAGQ - CM 325401

1st Ind

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

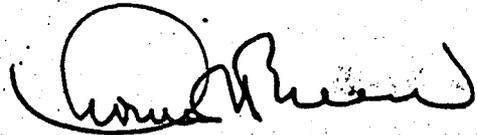
TO: Commanding General, Trieste United States Troops, (thru) Commanding General, Mediterranean Theater of Operations, APO 512, c/o Postmaster, New York, New York.

1. In the case of Private Robert L. Gray (RA 19244261), Cannon Company, 351st Infantry Regiment, 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 provides for confinement at hard labor for one month and twenty-one days and forfeiture of two-thirds pay per month for a like period. Upon taking such action you will have authority to order the execution of the sentence 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 325401)

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 (221)
Washington 25, D.C.

JAGK - CM 325443

3 FEB 1948

UNITED STATES)

v.)

Private First Class CIRILO
DE DIOS (10316163), 57th
Infantry Regiment, Company
C, Philippine Scouts.)

PHILIPPINES-RYUKYUS COMMAND

Trial by G.C.M., convened at Head-
quarters PHILRYCOM, APO 707, 9
July 1947. Dishonorable discharge
(suspended), total forfeitures
and confinement for two (2) years.
Stockade.

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

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

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

CHARGE: Violation of the 83rd Article of War.

Specification 1: In that Private First Class Cirilo de Dios, Company "C" 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Island, on or about 13 March 1947, willfully suffer five (5) wheel assemblies, motor vehicle 3/4 ton 4x4, of the value of about \$48.30, each, and each consisting of one (1) tire 900x16, one inner tube 900x16, and two rims, of a total value of about \$241.50, military property belonging to the United States to be wrongfully disposed of by sale to unknown persons.

Specification 2: In that Private First Class Cirilo de Dios, Company "C" 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Island, on or about 14 March 1947, willfully suffer five (5) wheel assemblies, motor vehicle 3/4 ton, 4x4, of the value of about

\$48.30 each, and each consisting of one (1) tire 900x16, one inner tube 900x16, and two rims, of a total value of about \$241.50, military property belonging to the United States to be wrongfully disposed of by sale to unknown persons.

Specification 3: In that Private First Class Cirilo de Dios, Company "C" 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Island, on or about 15 March 1947, willfully suffer five (5) wheel assemblies, motor vehicle 3/4 ton 4x4, of the value of about \$48.30 each, and each consisting of one tire 900x16, one inner tube 900x16, and two rims, of a total value of about \$241.50, military property belonging to the United States to be wrongfully disposed of by sale to unknown persons.

The accused pleaded not guilty to and was found guilty of all Specifications and the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the General Prisoners' Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 222, Headquarters Philippines-Ryukyus Command, APO 707, 22 August 1947.

3. Proof adduced by the prosecution established that on about the dates alleged property similar to that described in the specifications was missing from the "A" Motor Pool at Camp Batangas, P.I. The accused was a member of the guard detailed to safeguard such property. In a pre-trial confession, which the court-martial concluded was of a voluntary nature, the accused admitted that on or about the dates alleged he sold government property similar to that described in the specifications. It will be noted that the accused was found guilty of three specifications alleging that he willfully suffered the property therein described to be wrongfully disposed of by sale to unknown persons. Irrespective of whether a wrongful sale or a willful suffering of a wrongful sale is alleged, it is obvious that a wrongful sale is involved in the corpus delicti of either offense. Therefore, in order to sustain a conviction in either case, even though accused has confessed to the offense charged, it must appear, from evidence aliunde accused's confession, that the property in question had probably been unlawfully sold.

We find no competent evidence in the record, aliunde accused's confession, tending to establish the probability that the alleged wrongful sale had in fact occurred, thus permitting the confession to be considered. For a more detailed discussion of the points of law involved,

see CM 325377, Sipalay; CM 325378, Catubig; CM 325056, Balucanag.

4. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Charles T. Sibero, Judge Advocate

Gilbert E. Anthony, Judge Advocate

Harley A. Lanning, Judge Advocate

(224)

JAGK - CM 325443

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. FEB 9 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 624; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Cirilo de Dios (10316163), 57th Infantry Regiment, Company C, Philippine Scouts.

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

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.



THOMAS H. GREEN

Major General

The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(GCMO 64 (DA) 4 March 1948).

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

(225)

JAGK - CM 325444

27 JAN 1948

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters
PHILRYCOM, APO 707, 8 and 9 July 1947.
Dishonorable discharge (suspended),
total forfeitures, and confinement for
two (2) years. Stockade.

Private LOPE MAGPANTAY)
(10314711), "C" Company, 57th)
Infantry Regiment, Philippine)
Scouts)

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

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

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

CHARGE: Violation of the 84th Article of War.

Specifications: In that Private Lope Magpantay, Company "C", 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Islands, on or about 21 March 1947, unlawfully sell to unknown persons seven (7) wheel assemblies, motor vehicle 2½ ton 6x6, each consisting of one (1) tire 7.50 x 20, one inner tube 7.50 x 20, and two (2) rims, of a total value of about \$296.31, issued for use in the military service of the United States.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification except the words and figures "unlawfully sell to unknown persons seven (7) wheel assemblies and of a total value of about \$296.31," substituting therefor the words and figures "willfully suffer twelve (12) tires wheel assemblies and of a value of more than \$50.00, property belonging to the United States Government to be wrongfully disposed of by sale to persons unknown," of the excepted words, not guilty, of the substituted words, guilty, and he was found not guilty of the charge but guilty of a violation of the 83rd Article of War. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved only so much of the findings of guilty of the specification of the charge as

finds the accused guilty, at Batangas, Batangas, Philippine Islands, on or about 21 March 1947 of willfully suffering seven (7) tire assemblies of a value of more than \$50.00, property belonging to the United States Government to be wrongfully disposed of by sale to persons unknown, approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated General Prisoners' Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 223, Headquarters Philippines-Ryukyus Command, dated 22 August 1947.

3. The only question which it is necessary to consider in this case is whether the evidence in the record of trial aliunde the confession of accused, either direct or circumstantial, is sufficient to establish the probability that the offense charged had actually been committed and thus to permit the confession to be considered. The accused was charged with the unlawful sale of certain wheel assemblies issued for use in the military service. The only evidence offered to show the probable commission of the offense, aliunde the confession of accused, consisted of testimony that the wheel assemblies were missing from the Ordnance Depot vehicle pool on or about the date of the alleged offense.

In the recent case of CM 325377, Sipalay, and again in CM 325378, Catubig, both companion cases to the one at bar, the Board of Review had occasion to point out that a showing aliunde the pre-trial statement of accused therein, of the mere circumstance that 2-1/2 ton, 6x6, wheel assemblies were missing from the Camp Batangas vehicle pool on or about the date of the alleged unlawful sale by such accused of wheel assemblies of a similar type and kind was not a sufficient corroboration of his extrajudicial confession of guilt of such alleged offense. It was held, in each case, that, in order to support a conviction of an offense for which an accused has been brought to trial and to which he has confessed, there must be adduced, by way of corroboration of the confession, substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde the confession that the particular offense in question had probably been committed. In the Sipalay case, it was said:

"*** Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the 'black market.' But this is guess work, for there are other and equal possibilities

as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F (2d) 769, 773).
 ***"

4. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Charles W. Roberts Judge Advocate

Albert J. Albright Judge Advocate

Harley A. Lanning Judge Advocate

(228)

JAGK - 325444

1st Ind

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

TO: The Secretary of the Army

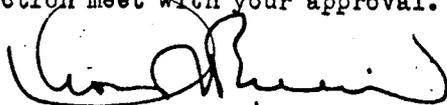
1. Herewith transmitted for your action under Article of War 50¹/₂, as amended by the act of 20 August 1947 (50 Stat. 724, 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Lope Magpantay (10314711), "C" Company, 57th Infantry Regiment, Philippine Scouts.

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 and sentence be vacated, that the accused be released from the confinement imposed by the sentence in this case, and that all rights, privileges and property of which accused has been deprived by virtue of said sentence 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 37 (DA) 5 Feb 1948).

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

(229)

JAGK - CM 325445

27 JAN 1949

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
)	
v.	)	Trial by G.C.M., convened at Head-
	)	quarters PHILRYCOM, APO 707, 2 and 3
Private First Class MIGUEL QUIJOTE	)	July 1947. Dishonorable discharge
(10320559), 57th Infantry Regiment,	)	(suspended), total forfeitures and
"C" Company, Philippine Scouts.	)	confinement for two (2) years.
	)	Stockade.

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

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

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

CHARGE: Violation of the 84th Article of War.

Specification 1: In that Private First Class Miguel Quijote, Company "C", 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Islands, on or about 1900 hours 22 March 1947, unlawfully sell to unknown persons seven (7) wheel assemblies, motor vehicle $2\frac{1}{2}$ ton 6 x 6 of a value of about \$42.33 each, and each consisting of one (1) tire 7.50 x 20, one (1) inner tube, and two (2) rims, of a total value of about \$296.31, issued for use in the military service of the United States.

Specification 2: (Finding of not guilty).

He pleaded not guilty to both specifications and the charge. He was found guilty of Specification 1, not guilty of Specification 2 and guilty of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the General Prisoners' Branch, PHILRYCOM STOCKADE, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was published

in General Court-Martial Orders No. 220, Headquarters Philippines-Ryukyus Command, APO 707, dated 21 August 1947.

3. The only question which it is necessary to consider in this case is whether the evidence in the record of trial aliunde the confession of accused, either direct or circumstantial, is sufficient to establish the probability that the offense charged had actually been committed and thus to permit the confession to be considered. The accused was charged with the unlawful sale of certain wheel assemblies issued for use in the military service. The only evidence offered to show the probable commission of the offense, aliunde the confession of accused, consisted of testimony that the wheel assemblies were missing from the Ordnance Depot vehicle pool on or about the date of the alleged offense.

In the recent case of CM 325377, Sipalay, and again in CM 325378, Catubig, both companion cases to the ones at bar, the Board of Review had occasion to point out that a showing, aliunde the pre-trial statement of accused therein, of the mere circumstance that 2-1/2 ton, 6x6, wheel assemblies were missing from the Camp Batangas vehicle pool on or about the date of the alleged unlawful sale by such accused of wheel assemblies of a similar type and kind was not a sufficient corroboration of his extrajudicial confession of guilt of such alleged offense. It was held, in each case, that, in order to support a conviction of an offense for which an accused has been brought to trial and to which he has confessed, there must be adduced, by way of corroboration of the confession, substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde the confession that the particular offense in question had probably been committed. In the Sipalay case, it was said:

"*** Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the 'black market.' But this is guess work, for there are other and equal possibilities as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the

missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F (2d) 769, 773).
***"

4. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Christy D. Silber Judge Advocate

Gilbert E. Abroyd , Judge Advocate

Harley A. Lanning Judge Advocate

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JAGK - CM 325445

1st Ind

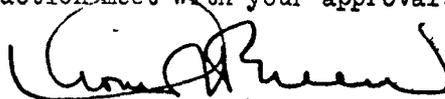
JAGO, Dept. of the Army, Washington 25, D. C. FEB 30 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1947 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Miguel Quijote (10320559), 57th Infantry Regiment, "C" Company, Philippine Scouts.

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

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.



THOMAS H. GREEN

Major General

The Judge Advocate General

2 Incls

1. Form of action
2. Record of trial

(GCMO 42 (DA), 6 Feb 1948)

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

(233)

JAGK - CM 325457

7 NOV 1947

UNITED STATES)

FIFTH ARMY

v.)

Captain ARTHUR E. MCKINSTER)
(O-1643863), Signal Corps.)

Trial by G.C.M., convened at
Denver, Colorado, 11 July 1947.
Dismissal and confinement for
one (1) year and six (6) months.

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that, Captain ARTHUR E. MCKINSTER, Signal Corps 5610 ASU, Fitzsimons General Hospital, Denver, Colorado, did, at Fort Francis E. Warren, Wyoming, on or about 26 February 1947, feloniously take, steal and carry away one radio, value about \$44.00, and one electric razor, value about \$15.00, the property of Captain Donald H. Buzzard.

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

Specification 1: In that Captain ARTHUR E. MCKINSTER, Signal Corps 5610 ASU, Fitzsimons General Hospital, Denver, Colorado, having been duly placed in arrest at Fitzsimons General Hospital, Denver, Colorado, on or about 3 March 1947, did, at Fitzsimons General Hospital, Denver, Colorado, on or about 12 April 1947, break his said arrest before he was set at liberty by proper authority.

Specification 2: In that Captain ARTHUR E. MCKINSTER, Signal Corps 5610 ASU, Fitzsimons General Hospital, Denver, Colorado, having been duly placed in arrest at Fitzsimons General Hospital, Denver, Colorado, on or about 3 March 1947, did, at Fitzsimons General Hospital, Denver, Colorado, on or about 17 April 1947, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, 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 and six months". The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involved a finding of guilty of the larceny of one radio, of a value of about \$25, and one electric razor, of a value of about \$12.50, at the time and place and of the ownership alleged, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On and for some time before 26 February 1947, Captain William H. Lindsey, Fitzsimons General Hospital, was temporarily assigned to Fort Francis E. Warren, Wyoming, for the purpose of appearing before a board of officers in connection with his application for integration into the officers' corps of the Regular Army and was billeted in one of the buildings of the "Hostess House" of that post. Accused was also present at Fort Warren for the same purpose and was billeted in another building of the "Hostess House". Captain Lindsey had agreed to drive accused back to Fitzsimons General Hospital after both had appeared before the board of officers, which event was to occur about 10:30 a.m., on 26 February. About 7:30 a.m., that morning, Captain Lindsey was in accused's room and noticed that he was packing his suit case. The suit case was "a little larger than a small overnight bag - an ordinary sized suit case". Accused was half through packing and had his clothes in the suit case. Captain Lindsey left while accused was still packing up. About 10 a.m., he drove up to the building in which accused was quartered and blew the horn on his automobile. In about two minutes, accused came out and placed his suitcase in the back of Captain Lindsey's car. The two officers then attended the board meeting after which they started on their return trip to Fitzsimons General Hospital. Arriving in Denver, accused asked Captain Lindsey to take him to a bank so that he might cash a check. This was done and accused remained in Denver, Captain Lindsey driving on to the hospital. Captain Lindsey had seen a radio in the "day room" of the building in which accused was quartered and was of the opinion that it would fit into accused's suitcase even after the suitcase had been partially filled. He did not see the radio in accused's possession nor did he see accused pack it in the suitcase (R. 6-11). This radio was "approximately the same size" as the one on exhibition in the court room.

Captain Donald H. Buzzard was permanently stationed at Fort Francis E. Warren and was billeted in "temporary barracks 915", the bachelor officers' quarters on that post. The Captain and two other officers were the only persons permanently quartered in the building. At one end of the barracks was a lounge in which Captain Buzzard kept his radio, a table model portable Sparton, battleship gray in color with a red loud-speaker and a cellophane dial. This radio was about five inches thick, twelve inches long and about eight inches high. The "right thumb knob"

would "not turn the dial." The radio had been purchased in December 1945 in an Army post exchange in Berlin, Germany, for between \$25 and \$30 and, although it was not a foreign make, that type radio had been made for overseas shipment and Captain Buzzard had not seen another like it since he had come back to the United States. Captain Buzzard identified the radio on exhibition at the trial as his Sparton radio whereupon it was introduced in evidence without objection by the defense as Prosecution Exhibit 1. This radio was a portable table model "Sparton", iron gray, approximately 5 inches thick, 12 inches long and about 8 inches high, with a red speaker and a broken selector dial. About noon on 26 February 1947, upon returning from "chow", Captain Buzzard noticed that his radio was missing from the lounge. He was also unable to find his Schick Colonel electric razor, which he had left either in his room or in the latrine. This razor had been sent to him from the United States by his mother in April or May, 1946. When he received it, he noticed that an OPA price stamp, stating the price to be \$15, had been placed thereon. He tore off the stamp but some of the paper of which it was made remained stuck to the razor. He identified a Schick Colonel electric razor, exhibited at the trial, as being the one belonging to him which was missing from his quarters on 26 February. This razor was admitted in evidence without objection by the defense as Prosecution Exhibit 2. It was "ivory" in color and had a "partially removed price tag" on the back (R. 11-15, 21-22, 25, 32-33; Pros Ex 1, 2).

Mr. Harold C. Bennett was supervisor of service of the Schick Service Department, Denver, Colorado. It was "almost impossible" to say when the Schick razor exhibited at the trial was made, for although it appeared to be a type made for the first time in late 1945, Schick razors were sold to military personnel through service stores during the war years and any of the models produced from 1942 through 1945 could be changed to resemble the latest model by replacing certain parts. As a matter of fact, Mr. Bennett could not definitely state that the model in question had not been sold in service stores even prior to late 1945, although he had then become familiar with that type razor for the first time, "when they started producing them for the civilian market." The razor in question was "in good shape" and, "assuming it was new in April 1946," it would now be worth between \$12.50 and \$13. The list price of such razor was \$15 but they were sold through service stores for about \$9. "Several thousand" Schick razors had been sold since 1930 (R. 22-24).

Acting upon information he had obtained at Fort Warren, Captain Buzzard went to Fitzsimons General Hospital on 27 February 1947 to search for his missing property. When he arrived at the hospital, he enlisted the aid of the provost marshal thereat, Lieutenant Colonel Arthur M. Henderson. Both officers then proceeded towards the signal office of the hospital, the interior of which office could be seen from a lobby. While they were standing in the lobby, accused was seen sitting at his desk in the signal office. On the desk was a radio which Captain Buzzard identified as his (R. 13-15, 16-17). Leaving Captain Buzzard in view of the signal

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office, Colonel Henderson called upon the Inspector General of the hospital whereupon the following events occurred (R. 17, 18):

"I conferred with Colonel Beringer, the Inspector, and he called the Signal Officer and asked Captain McKinster to come up to the Inspector's Office. Captain McKinster was questioned and the radio was procured by me from the floor behind the desk in Captain McKinster's Office. After the questioning of Captain McKinster regarding this radio, Captain McKinster stated that this radio was purchased by him from a Mr. Graziano, a person dressed in Army clothing by Captain McKinster, but he didn't know whether the person was a soldier or not. Captain McKinster stated in Colonel Beringer's presence and in my presence that he had paid \$30.00 for the radio - \$10.00 in cash and \$20.00 by check - that the deal had been culminated in the Cosmopolitan Hotel, but had commenced in the Brown Palace cocktail bar and completed in the hotel room in the Cosmopolitan Hotel. At that time Captain McKinster was asked if he could produce his check book. Captain McKinster stated it was in his suitcase in his room. He was asked if he would agree to go to his room and obtain the suitcase. He then remembered it was in the Signal Office where he had, apparently, returned and had not been to his room. I went with him to the Signal Office, got the suitcase, brought it upstairs and he opened it and procured a check book. The last two entries in the checkbook was one for \$15.00 and one for \$20.00, containing no dates or in any way identifying them as to whom they had been made out. Captain McKinster granted me permission to go to the bank and I had him accompany me thru an endeavor to find out if those checks had been returned. They had not - to this date, I do not know whether or not he has those checks. Inasmuch as one of the items in question was an electric razor, I asked him if he owned an electric razor and he stated that he did - that his brother had sent him one and he had it for approximately eighteen to twenty-four months. I asked him if the razor was in his possession and he produced it from the suitcase. It was a white Schick Colonel. During the investigation, Captain Buzzard described the radio and he also described the razor which was similar in description to these two items here and stated in each instance a peculiar marking or mode of identification.

Q: Is this the radio and the razor?

A: Yes, the information on the two tickets was placed there by me when I had taken them into custody and I have had them in a safe in my office until they were obtained today by the TJA for use in the trial."

According to Colonel Henderson, Captain Buzzard had stated at the "investigation" that his radio was of "a foreign make." Captain Buzzard denied that he had made such a statement. The manufacturer's markings on the radio indicated that it was made in Jackson, Michigan (R. 19, 32).

Second Lieutenant Francis I. Downing, Army Nurse Corps, was on terminal leave at the time of the trial. She had known accused about seven months. About 22 or 23 February 1947 she had been informed that accused, who was stationed at Fitzsimons General Hospital, had gone to Fort Warren. About 3:00 p.m., on 26 February, she received a telephone call from accused, who was in Denver, and about four or half past four o'clock that afternoon she met him in that city at the Ship's Tavern in the Brown Palace Hotel. Accused at this time was drinking beer with a couple introduced to her by accused as Mr. and Mrs. Graziano. Lieutenant Downing had not met these people before. Mr. Graziano was dressed in "O.D.'s." When she joined accused and his party in the tavern, accused and the Grazianos were discussing the purchase by accused of a radio similar to the type exhibited at the trial. Accused and Lieutenant Downing remained in the tavern between half an hour and an hour and then both went to accused's room at the Cosmopolitan Hotel. No one accompanied them to this room. About 6:00 p.m., Mr. Graziano came to the room with the radio and accused decided to buy it. Accused paid Mr. Graziano \$30 for the radio - \$10 in cash and the balance by check. After the purchase, accused placed the radio on top of his open bag. There was no razor involved in this transaction. Asked by the defense counsel on cross examination whether she knew the meaning of perjury, Lieutenant Downing replied that she did. She also stated that she had no reason "for covering up anything" for accused (R. 25-28). Captain Buzzard did not know a Mr. Graziano (R. 33).

Without objection by the defense, a copy of a letter order to accused from the Commanding General, Fitzsimons General Hospital, dated 3 March 1947, was received in evidence as Prosecution Exhibit 3 (R. 32). From this letter order it appeared that as of the date thereof accused was placed in arrest of quarters and was restricted to visiting certain places within the limits of the post. It also appeared that the following notation had been written by hand upon the order and signed by the General:

"Delivered personally
8:35 a.m. 3 March 1947"

The copy was certified to be a true copy by the acting post judge advocate (Pros Ex 3).

Colonel Henderson saw accused in the Zanza Bar, which was located "just off the post", at about 8:00 or 8:15 p.m., on 12 April 1947. The Colonel did not, at this time, know that accused was under arrest. He did not speak to accused and remained in the bar for about an hour. Accused was still there when he left (R. 28-30).

Captain James J. McGowan, Assistant Provost Marshal, Fitzsimons General Hospital saw accused in the Cozy Kitchen on "approximately" 17 April 1947. The Cozy Kitchen was located on a highway outside the post. Accused was accompanied by two ladies from the post. One of these ladies was Lieutenant Downing. Captain McGowan did not know accused was under arrest at this time. (R. 30-32).

Evidence for the Defense

Accused, having been advised of his rights as a witness, elected to testify under oath in his own behalf. He detailed his actions on 26 February 1947 as follows:

"* * * On Wednesday morning, 28 February 1947, I was packing while Captain Lindsey went to get the car and said he would be back in a short while. I finished packing and heard the horn, put on ^{my} overcoat and put my bag in the back of the car. We went to the interviewing board at Fort Warren. After that was completed, I signed out and left the post. We drove as far as Greeley, had dinner, drove on to Denver. We had a high-ball in a small town on the way. I told him to drop me at the bank as I wanted to write a check. He dropped me at the bank. I got cash on my check, went to the store and bought some underwear and socks. Then I went to the Cosmopolitan Hotel and obtained a room for that night, thinking I would come to the post the next morning for work. After I got the room, I went across to the Ship's Tavern in the Brown Palace Hotel and was sitting there when Mr. and Mrs. Carl Graziano came in and invited them to have a drink with me. I had met them at the Frontier Bar at Cheyenne. They sat down, had a few beers and he brought up the subject that he had a small portable radio that he wanted to sell. I was not in the market as I had a radio, but he needed money badly and I said if he would bring it to my room at the Cosmopolitan, I would look at it. We had been there about an hour when Miss Downing came in. We stayed about three-quarters hour longer and they left. I had another high ball and then went to the hotel room to clean up. We had been there only a few minutes when he came and brought the radio with him. We found out it couldn't play because he couldn't turn the selector dial. He insisted it all be cash, but I didn't have it and I gave him \$10.00 cash and wrote a check for the balance which was \$20.00. Then I sat the radio on my bag. Mr. Graziano left and Miss Downing and I went to 'chow' and then we went to the show and went to the Rainbow Room on Broadway." (R. 38-39)

The check for \$15.00 which he had cashed at the bank "came back, but the other one has never shown up". After he had bought the radio he was out of money and Lieutenant Downing loaned him \$20.00 to cover the expenses of the evening. He later paid this money back to her. Mr. Graziano did not tell accused where he had obtained the radio but "just said that he had it in the car". Accused did not know where the Grazianos "stayed". He first met them in a bar in Denver on 24 February and "saw them one other time on the post at Fort Warren the morning we were leaving". The razor had been sent to him by his brother (R. 38 40).

It was stipulated by and between the prosecution, defense and accused that if accused's brother, Orville McKinster, were present in court he would testify that on or about 1 December 1944 he was a member of the Merchant Marine and had access to ship's stores. On that date he bought an ivory Schick Colonel electric razor in a ship's store in Los Angeles and sent it to accused, who at that time was stationed in Paris, France (R. 35).

Two officers stationed at Fitzsimons General Hospital, Captain Lawrence S. Franklin and First Lieutenant Lynn A. James, testified that accused's reputation for honesty and integrity was very good (R. 35-37).

Evidence for the Court

Lieutenant Downing was recalled as a witness for the court. After accused had purchased the radio, she and accused spent the evening dining and dancing. It was an inexpensive evening, "perhaps \$5.00 or \$6.00". Accused paid all the bills and Lieutenant Downing did not lend him any money "that night". At the time he paid for the radio, however, she thought she had loaned him "a small sum - not more than \$5.00." She wouldn't have had any more than five dollars on the 26th of the month. She was "not very sure" that she had loaned him this sum. She doubted that she could have loaned him more than \$5.00. It was a "kind of an agreement" between them for her to loan money to accused when she was "out with him" (R. 41-42).

Captain Lindsey was recalled as a witness for the court. He remembered that on their way back from Fort Warren to Denver, he and accused had stopped in Greeley and had lunch there. He may have had a cocktail somewhere along the route. He let accused out at one of the banks in Denver but did not know the name of the bank. The court refused to grant the defense a continuance so that it might clear up the matter of the name of the bank by producing "the cancelled check from the First National Bank" (R. 43-45).

4. Discussion

Charge I and its Specification

Under this Charge and Specification, accused was found guilty of having stolen a radio worth about \$44.00 and an electric razor worth about \$15.00, the property of Captain Buzzard. The reviewing authority in approving the findings of guilty of larceny of these articles, reduced the findings of value with respect to the property in question to about \$25.00 in the case of the radio and to about \$12.50 in the case of the electric razor.

Captain Buzzard had quarters in Temporary Barracks 915 at Fort Francis E. Warren. He kept his radio, a portable table model Sparton with a damaged selector dial, in the lounge of this barracks. He also left his Schick Colonel

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electric razor either in his room or in the latrine. This razor had a piece of paper sticking to it where an OPA tag had been torn off. About noon on 26 February 1947, upon returning to his quarters from mess, Captain Buzzard noticed that both his radio and electric razor were missing. The next day, acting upon information he had received, Captain Buzzard went to Fitzsimons General Hospital to search for his property. Standing in a lobby of the hospital, he saw a radio similar to his on a desk in the signal office, which office could be observed from the lobby. Accused was sitting behind this desk. Accused then was called before the inspector general of the hospital and during the ensuing investigation the radio seen in the signal office was procured from a position on the floor behind the desk therein. Accused fetched his suitcase from the signal office and took therefrom a Schick Colonel electric razor. The radio and razor were both introduced in evidence at the trial and Captain Buzzard testified that they were owned by him. The radio was a portable table model Sparton with a damaged selector dial and the electric razor was ivory in color and had a partially removed price tag on the back.

On and for some time before 26 February 1947, accused was billeted in one of the buildings of the "Hostess House" at Fort Warren, having been temporarily assigned to that post from Fitzsimons General Hospital for the purpose of appearing before a board of officers in connection with his application for a commission in the Regular Army. In the "day room" of this building was a radio approximately the same size as the one introduced in evidence. When, about 10:00 a.m., on 26 February, accused left his quarters at Fort Warren in the company of Captain Lindsey he took with him a suitcase which had sufficient capacity, even when partially packed, to contain the radio seen in the "day room."

When confronted with the radio and the electric razor during the interrogation by the inspector general at Fitzsimons General Hospital, accused explained that he had bought the radio from a Mr. Graziano in a hotel room in Denver, Colorado, and that the razor had been sent to him by his brother about two years before. He stated that he had paid Mr. Graziano \$30.00 for the radio, \$10.00 in cash and \$20.00 by check. Accused reiterated these explanations while on the witness stand and under oath and further stated that on the return trip to Fitzsimons General Hospital on 26 February, Captain Lindsey had let him out at a bank in Denver where he had cashed a check for \$15.00 and that a nurse, Lieutenant Francis Downing, was with him when he later that day bought the radio from Mr. Graziano. Captain Lindsey testified that he had in fact left accused at a Denver bank on 26 February. Accused's story concerning his purchase of the radio was corroborated in detail by Lieutenant Downing. In the course of the investigation at Fitzsimons General Hospital, accused produced his check book and it was noticed that undated entries therein for the last two checks purportedly issued were for \$15.00 and \$20.00, respectively. It was stipulated that accused's brother would testify that on or about 1 December 1944, he had sent accused an ivory Schick Colonel electric razor.

We thus have presented for our consideration a case in which the evidence adduced in support of the allegations of larceny of the radio and electric razor is in direct and irreconcilable conflict with that adduced in defense thereof. There can be no doubt that if the court was warranted in accepting the former while rejecting entirely the latter, accused's guilt of the charge and specification here in question would be overwhelmingly established. Such conflicts are to be resolved, in the first instance at least, by the court and in so doing it is not required to accept as true the testimony of any witness, whether advanced by the prosecution or by the defense, but may give such weight as it deems fit to any evidence properly brought to its attention (Wharton's Criminal Evidence, 11th Ed., s. 881; CM 267476, Wilson, 44 ER 1, 9; CM 318085, Chance; par 78a, MCM, 1928). The only requirement is that, as an end result, the court's findings of guilty be based upon such evidence, apparently selected from the whole as worthy of belief, as would, standing alone and unencumbered by any unexplained contradictions within itself, be of the prescribed quantum and consistent with no other rational hypothesis than that of accused's guilt (par 78a, MCM, 1928; see CM 319322, Spencer - unexplained contradiction in evidence necessarily relied upon by court; CM 324396, Redmon - insufficient quantum in perjury case; CM 312356, Preater - proof consistent with reasonable hypothesis of innocence). In the instant case we believe the findings of guilty of Charge I and its Specification meet the above requirement and we have discovered no reason why they should be set aside.

If we were to consider what may have been the rationale of the court in refusing to give credence to the evidence favoring the defense herein, we would point out the following matters. The undated entry in accused's check book indicating that the last check written by him before 27 February was in the amount of \$20.00, which was the amount of the check allegedly given to Mr. Graziano on 26 February in partial payment of the radio, falls short of establishing a reasonable probability that a check in such a sum, if it was in fact written at all, was actually delivered to Mr. Graziano. The defense attempted to explain its failure to produce more conclusive documentary evidence on this issue by making the simple assertion that the check in question had not been returned, which purported circumstance is somewhat difficult to understand in view of accused's statement that Mr. Graziano "needed money badly." Indeed, the court may well have considered that the entry as to the \$20.00 check was seized upon by accused as a convenient foundation for the whole structure of his story in which the alleged check to Mr. Graziano played such a large part. There was a sufficiently logical basis for a conclusion by the court that Lieutenant Downing's corroboration of the Graziano episode was the result of collusion, for accused, having been seen in her company at the Cozy Kitchen on or about 17 April 1947, had ample opportunity to coach her with respect to the claims he had made to the inspector general on 27 February. Moreover, there was a somewhat suspicious variance between her version of what transpired on the evening of 26 February and that of accused, for, when

recalled as a witness for the court, she refuted accused's testimony to the effect that she had loaned him \$20.00 to cover their entertainment expenses. Finally, it would be most difficult to believe that accused's possession on 27 February of a Sparton radio with a damaged selector dial and an electric razor with a partially removed price tag, similar articles bearing identical marks of identification having been stolen the day before from a place to which accused had access, was nothing more than a mere coincidence (CM 262039, Cochran, 4 BR (ETO) 321, 322; CM 229977, Proctor, 17 BR 259, 265; CM 274609, Harraway, 47 BR 217, 236). The court was clearly warranted in disbelieving in its entirety the stipulated testimony of accused's brother with respect to the electric razor or, if it did not disbelieve such testimony, in coming to the conclusion that the razor found in accused's possession on 27 February 1947 was not the same one sent to accused by his brother in December 1944.

We cannot lightly pass over the refusal of the court to grant the defense a continuance for the purpose of allowing it an opportunity to produce "the cancelled check from the First National Bank". The defense was obviously referring to the \$15.00 check which accused claimed to have cashed at the bank in Denver on his way back from Fort Warren. There being such a sharp conflict on the issue of accused's credibility and that of the evidence favorable to him, he should have been extended every reasonable opportunity to bolster up his version of his activities on the day of the alleged theft. However, we are of the opinion that the court's abuse of its discretion in this respect was not such substantial error as to require us to hold the findings of guilty of Charge I and its Specification legally insufficient (AW 37), for even if there had been a positive and unimpeachable showing that accused had in fact cashed a \$15.00 check at a Denver bank on 26 February a reasonable hypothesis of innocence would not have been necessarily established thereby. Had a like ruling been made as to an offer of proof of the return of the \$20.00 check which was allegedly paid to Mr. Graziano, our decision might well have been quite different.

The finding of the reviewing authority as to the value of the radio appears to have been based upon Captain Buzzard's testimony as to the original cost price. This is not an acceptable method of proving market value (CM 208481, Ragsdale, 9 BR 13; CM 268007, McKinney, 44 BR 205). However, since under the approved findings of guilty the total value of the property found to have been stolen by accused is not in excess of \$50.00, thus obviating any possibility of penitentiary confinement (18 USC 466), and since the maximum punishments set forth in paragraph 104 of the Manual for Courts-Martial, 1928, do not apply to officers, it is immaterial what the monetary market value of the radio may have been, it being obvious that it had some substantial value (CM 319858 Correlle).

Charge II and its Specifications

Under this Charge and its Specifications accused was found guilty of breach of arrest on two separate occasions, about 12 and 17 April 1947, respectively. The prosecution adduced evidence showing that accused was seen off the limits of the post on or about each of these dates. In order to establish that accused had been under arrest and restricted to the limits of the post on the dates in question, a copy of a letter order to this effect from accused's commanding officer was introduced in evidence by the prosecution without objection by the defense. By failing to object to the reception in evidence of this document, the defense waived all objections to its authenticity (par 116a, MCM, 1928) but it did not and could not by such failure make competent those statements therein which did not come within any of the recognized exceptions to the hearsay rule (par 113a, 126c, MCM, 1928; CM 323197, Abney). There can be little doubt that a written military order, when the writing is made for record purposes by one having an official duty to know and record the event of the giving of the order, is an official statement in writing admissible in evidence to prove, prima facie, that the directive therein contained was in fact issued (par 117a, MCM, 1928) and even though no duty exists to reduce to writing, that is, to record, a particular order, if regulations or the usual course of administration sanction the making of such a memorandum it may be considered a business entry and thus gain evidentiary status for the same purpose under the provisions of 28 U.S.C. 695 (CM 312023 Schirmer). We believe the body of the letter order here in question is clearly admissible under the latter theory for the purpose of establishing that an order was issued by accused's commanding officer placing accused in arrest and restricting him to the post (par 20, MCM, 1928). However, it was also necessary to show that notice of this order was brought home to accused (CM 191631, Thomas, 1 BR 261, 267). The only evidence of such notification is contained in a notation resembling a return of service placed upon the order by the commanding officer indicating that he had personally delivered the written order to accused. This notation is obviously hearsay and does not appear to be admissible in evidence under any exception to the hearsay rule. We have been unable to find any provision in Army Regulations requiring or sanctioning the making of such a written return, and it was not shown nor are we judicially aware, that entries of the type in question are regularly made in the course of administrative business. Consequently, we are of the opinion that the findings of guilty of Charge II and its Specifications must be set aside.

5. Records of the Department of the Army show that accused is 35 years of age, is married and has two dependents other than his wife. He is a high school graduate and attended Colorado State College for two years. From 1935 to 1937 he was employed as a school teacher and from 1937 to 1941 he operated his own ranch, raising cattle and wheat. On 25 March 1941, he entered the military service as an enlisted man and

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served as such until his graduation from the Signal Corps Officer Candidate Course on 19 February 1943, at which time he was appointed and commissioned a second lieutenant in the Army of the United States. He was promoted to the grade of first lieutenant on 8 October 1943 and to the grade of captain on 1 March 1945. He served in the European Theater from 8 January 1944 to 19 August 1945 and participated in the Normandy and Northern France campaigns.

6. Careful consideration has been given to the letter and the brief written by accused's individual defense counsel which is attached to the record of trial. On 10 October 1947, Honorable William G. Stigler, Member of Congress from Oklahoma, appeared before the Board of Review on behalf of accused.

7. The court was legally constituted and had jurisdiction over accused and of the offenses. Except as noted above, 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 of Charge I and its Specification as approved by the reviewing authority, legally insufficient to support the findings of guilty of Charge II and its Specifications and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of an officer of a violation of Article of War 93.

Charles T. Silver, Judge Advocate

Carlos E. McJee, Judge Advocate

Albert J. LeBoyd, Judge Advocate

JAGK - CM 325457

1st Ind

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

TO: The Secretary of the Army.

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Arthur E. McKinster (01643863), Signal Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny of a radio, value about \$44, and of an electric razor, value about \$15, the property of Captain Donald H. Buzzard, in violation of Article of War 93 (Charge I and its Specification) and of two Specifications alleging a breach of arrest on or about 12 and 17 April 1947 respectively, in violation of Article of War 69 (Charge II and Specifications 1 and 2 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 for "one year and six months." The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involved a finding of guilty of the larceny of one radio, of a value of about \$25, and one electric razor, of a value of about \$12.50, at the time and place and of the ownership alleged, 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 of Charge I and its Specification as approved by the reviewing authority, legally insufficient to support the findings of guilty of Charge II and its Specifications and legally sufficient to support the sentence and to warrant confirmation thereof.

Captain Donald H. Buzzard had quarters in Temporary Barracks 915 at Fort Francis E. Warren, Wyoming. He kept his radio, a portable table model Sparton with a damaged selector dial in the lounge of this barracks. He also left his Schick Colonel electric razor either in his room or in the latrine. This razor had part of a price tag sticking to it. About noon on 26 February 1947, upon returning to his quarters from mess, Captain Buzzard noticed that both his radio and electric razor were missing. Accused had been temporarily billeted in one of the buildings of the "Hostess House" at Fort Warren while waiting to appear before a board of officers in connection with his application for a commission in the Regular Army. In the "day room" of this building was a radio approximately the same size as the one belonging to Captain Buzzard. About 10:00 a.m., on 26 February accused left his quarters at Fort Warren and took with him a suitcase of sufficient capacity, even when partially packed, to contain the radio seen in the "day room." Later that day, he proceeded on his return trip to his

permanent station, Fitzsimons General Hospital, in the automobile of a brother officer and, arriving in Denver, Colorado, he got off at a downtown bank. The next day, 27 February, Captain Buzzard came to Fitzsimons General Hospital in search of his missing property. Accused was called before the inspector general of the hospital and a portable table model Sparton radio with a damaged selector dial and a Schick Colonel electric razor with a partially removed price tag were found in his possession. Captain Buzzard identified these articles as the radio and electric razor belonging to him which were missing from his quarters at Fort Warren.

Accused claimed that he had bought the radio from a Mr. Graziano in a hotel room in Denver on 26 February. An Army nurse who had been acquainted with accused for about seven months and who was on terminal leave at the time of the trial, testified that she was with accused in the hotel room at the time a person who had been introduced to her as Mr. Graziano delivered the radio to accused and that she saw accused pay Mr. Graziano \$30 for the radio, \$10 in cash and the balance of \$20 by check. Accused stated that the \$20 check had never been returned and that he did not know where Mr. Graziano "stayed." Accused also claimed that the Schick Colonel electric razor was a gift to him from his brother. It was stipulated that accused's brother would testify that on or about 1 December 1944, he had sent accused a Schick Colonel electric razor similar in color to the one found in accused's possession on 27 February 1947.

The court, having had the opportunity to observe the manner in which the various witnesses presented their testimony, resolved the issue of guilt of larceny of the radio and electric razor against accused and, after carefully weighing the evidence herein, I am of the opinion that its findings in this respect were justified.

On two separate occasions, on or about 12 and 17 April 1947, respectively accused was seen off the limits of the post of Fitzsimons General Hospital. There was introduced in evidence a copy of an order from accused's commanding officer, dated 3 March 1947, placing accused under arrest and restricting him to the limits of the post. There is, however, no competent evidence in the record of trial tending to prove that accused had received proper notice of such arrest and restriction and, for this reason, I am of the opinion, as is the Board of Review, that the findings of guilty of Charge II and its Specifications should be disapproved.

4. Accused is 35 years of age, is married and has two dependents other than his wife. He is a high school graduate and attended Colorado State College for two years. From 1935 to 1937 he was employed as a school teacher and from 1937 to 1941 he operated his own ranch, raising cattle and wheat. On 25 March 1941, he entered the military service as an enlisted man and served as such until his graduation from the Signal

Corps Officer Candidate Course on 19 February 1943, at which time he was appointed and commissioned a second lieutenant in the Army of the United States. He was promoted to the grade of first lieutenant on 8 October 1943 and to the grade of captain on 1 March 1945. He served in the European Theater from 8 January 1944 to 19 August 1945 and participated in the Normandy and Northern France campaigns.

5. Consideration has been given to the letter written on behalf of accused by Major General Harry H. Vaughan, Military Aide to the President, dated 21 July 1947, and to the letter and the brief written by accused's individual defense counsel which is attached to the record of trial. On 10 October 1947, Honorable William G. Stigler, Member of Congress from Oklahoma, appeared before the Board of Review on accused's behalf. A letter from Mrs. A. E. McKinster, accused's wife, dated 19 July 1947 and addressed to the President has also been considered.

6. I recommend that the sentence be confirmed but, since the only offense of which accused will stand guilty upon disapproval of Charge II and its Specifications is that of petty larceny, that the period of confinement be reduced to six months and that, as thus modified, the sentence be carried into execution.

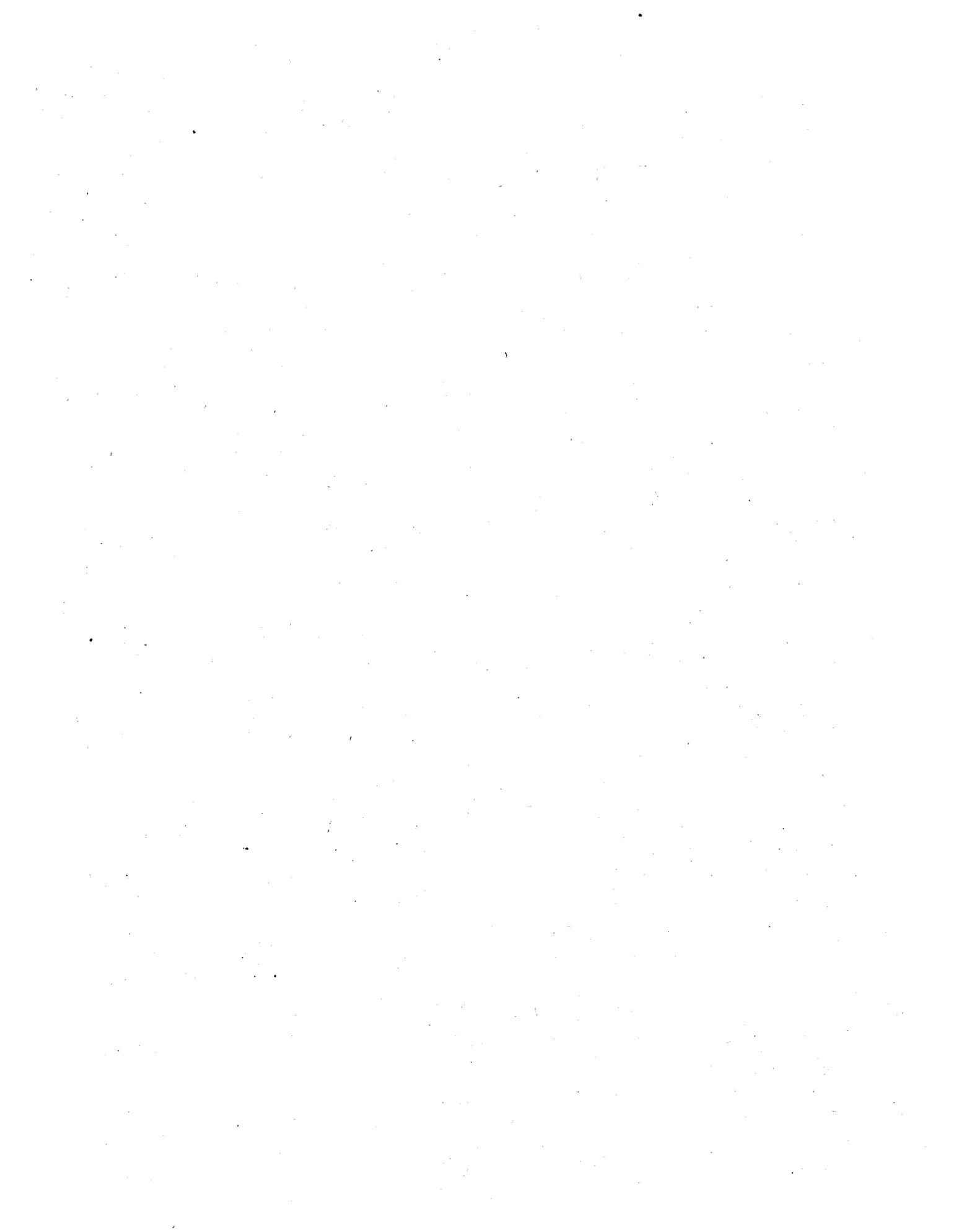
7. Inclosed is a form of action designed to carry into execution the foregoing recommendation should it meet with your approval.

CM 325,457

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


THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 69, 2 Dec 1947)



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

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JAGK - CM 325480

22 JAN 1948

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters
PHILRYCOM, APO 707, 7 July 1947. Dis-
honorably discharge (suspended), total
forfeitures, and confinement for one
(1) year. Stockade.

Private ENESERIO PROMITO)
(10317192), Company C, 57th)
Infantry Regiment, Philippine)
Scouts.)

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

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

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

CHARGE: Violation of the 84th Article of War.

Specification: In that Private Eneserio Promito, "C" Company 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Islands, on or about 22 March 1947, unlawfully sell to unknown persons seven (7) wheel assemblies, motor vehicle 2 1/2, ton 6x6, of a value of about \$42.33 each, and each consisting of one tire 7.50 x 20, one (1) inner tube 7.50 x 20, and two (2) rims, of a total value of about \$296.31, issued for use in the military service of the United States.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification, except the words and figures "seven (7) and of a total value of about \$296.31" substituting therefor the words and figures "two (2) and of a total value of more than \$50.00", of the excepted words and figures not guilty, of the substituted words and figures, guilty, and guilty of the charge. 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 might direct for one year. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated General Prisoners' Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct,

as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 221, Headquarters Philippine-Ryukyus Command, dated 21 August 1947.

3. The only question which it is necessary to consider in this case is whether the evidence in the record of trial aliunde the confession of accused, either direct or circumstantial, is sufficient to establish the probability that the offense charged had actually been committed and thus to permit the confession to be considered. The accused was charged with the unlawful sale of certain wheel assemblies issued for use in the military service. The only evidence offered to show the probable commission of the offense, aliunde the confession of accused, consisted of testimony that the wheel assemblies were missing from the Ordnance Depot vehicle pool on or about the date of the alleged offense.

In the recent case of CM 325377, Sipalay, and again in CM 325378, Catubig, both companion cases to the one at bar, the Board of Review had occasion to point out that a showing, aliunde the pre-trial statement of accused therein, of the mere circumstance that 2-1/2 ton, 6x6, wheel assemblies were missing from the Camp Batangas vehicle pool on or about the date of the alleged unlawful sale by such accused of wheel assemblies of a similar type and kind was not a sufficient corroboration of his extrajudicial confession of guilt of such alleged offense. It was held, in each case, that, in order to support a conviction of an offense for which an accused has been brought to trial and to which he has confessed, there must be adduced, by way of corroboration of the confession, substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde the confession that the particular offense in question had probably been committed. In the Sipalay case, it was said:

"*** Aliunde accused's confession, not an iota of evidence, direct or circumstantial, appears in the record of trial touching upon any circumstance connected with the disappearance of the wheel assemblies relating to their eventual disposition. Whether they were retained by the taker for his own use, given away in consideration of past favors, destroyed or sold remains in the realm of merest conjecture and suspicion. True, having in mind civilian shortages of automotive appliances in the Philippine Islands, it may be said that there is a possibility that the missing wheel assemblies were sold on the 'black market.' But this is guess work, for there are other and equal possibilities as to what may have been done with this property. Disregarding the confession, the record of trial does not contain evidence sufficient to enable the court reasonably to determine that the wheel assemblies were probably sold rather than retained by the taker, given away or otherwise dealt with. No proof aliunde accused's confession appears herein which would direct the minds of the triers of fact towards a reasonable choice between the many and various possible forms of disposition to which the

missing property may have been subjected. It is thus impossible, by way of elimination or other rational process, to raise any one of these conflicting possibilities to the level of a probability (Troutman v. Mutual Life Ins. Co., 125 F (2d) 769, 773).

4. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Charles H. Sibert, Judge Advocate

Robert E. Shroyer, Judge Advocate

Harley A. Lanning, Judge Advocate

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JAGK - CM 325480

1st Ind

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

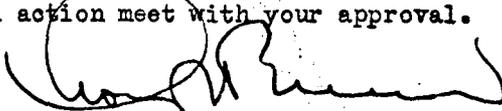
JAN 26 1949

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1947 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Eneserio Promito (10317192), Company C, 57th Infantry Regiment, Philippine Scouts.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 47 (DA) 9 Feb 1948)

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

JAGH - CM 325484

NOV 1947

UNITED STATES	)	6TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at
Second Lieutenant VIRGIL W.	)	APO 6, 2 August 1947. Dis-
DALLMANN (O-1340991), Service	)	missal, total forfeitures,
Company, 20th Infantry Regi-	)	and confinement for seven
ment	)	(7) years.

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

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

Specification 1: In that Second Lieutenant Virgil W. Dallmann, Service Company, 20th Infantry Regiment, APO 6 Unit 2, did, at APO 6 Unit 2, during the month of February 1947, feloniously take, steal, and carry away fifteen (15) drums of gasoline of the value of more than \$50.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: Same as Specification 1 except the month, "March."

Specification 3: Same as Specification 1 except the amount, "twenty-five (25)," and the month, "April."

Specification 4: Same as Specification 1 except the amount, "eighteen (18)," and the month, "May."

Specification 5: (Finding of not guilty).

Specification 6: In that Second Lieutenant Virgil W. Dallmann, Service Company, 20th Infantry Regiment, APO 6 Unit 2, did, at APO 6 Unit 2, during the month of February 1947, wrongfully, knowingly, and without proper authority, dispose of by sale fifteen (15) drums of gasoline, of the value of more than \$50.00, property of the United States, furnished and intended for the military service thereof.

Specification 7: Same as Specification 6 except the month, "March."

Specification 8: Same as Specification 6 except the amount, "twenty-five (25)," and the month, "April."

Specification 9: Same as Specification 6 except the amount, "eighteen (18)," and the month, "May."

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

Specification: In that Second Lieutenant Virgil W. Dallmann, Service Company, 20th Infantry Regiment, APO 6 Unit 2, did, at APO Unit 2, between 1 February 1947 and 30 June 1947, deal in "blackmarket", in that said Second Lieutenant Virgil W. Dallmann, imported and caused to be imported into Korea, APO 6 Unit 2 saccharine and did wrongfully dispose of said saccharine by sale to Korean Nationals, by sale or trade, contrary to standing orders and directives, to the discredit of the military service.

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

Specification 1: Same as Specification 1, Charge I.

Specification 2: Same as Specification 2, Charge I.

Specification 3: Same as Specification 3, Charge I.

Specification 4: Same as Specification 4, Charge I.

Specification 5: Same as Specification 6, Charge I.

Specification 6: Same as Specification 7, Charge I.

Specification 7: Same as Specification 8, Charge I.

Specification 8: Same as Specification 9, Charge I.

Specification 9: Same as Specification of Charge II.

Specification 10: (Finding of not guilty).

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specification 5, Charge I, and Specification 10, Charge III, and guilty of all other Specifications and the Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of one thousand dollars, to be confined at hard labor for ten years, and to be further confined at hard labor until the fine be paid, but not in excess of one year in addition to the ten years. The reviewing authority approved only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven years, 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 substantially as follows:

Accused is in the military service and was a member of the Headquarters 20th Infantry (R 8). From January 1947 through May 1947 accused was in charge of the Kwangju station railhead (R 11-12, 27-28). During this period Son Tong Chu, otherwise known as "Suntan" (R 16), was employed by accused as interpreter (R 11-12). "Suntan" testified that during February 1947 accused inquired of him as to where accused could sell some gasoline. "Suntan" asked accused to wait a few days, at the end of which he informed him that he had found a buyer. Accused directed "Suntan" to have Korean trucks come to the railhead for the gasoline. Fifteen drums of gasoline were sold for which "Suntan" received nine thousand yen per drum, the receipts therefor being turned over to accused (R 12). Other sales of 15 drums each were consummated in February and March with accused receiving a part of the proceeds. During April a total of 25 drums of gasoline were sold (R 13) and in May, 18 drums (R 14). Deliveries in the April and May transactions were made to the purchasers by "G.I." truck. "Suntan" did not receive payment for the May transactions as the Korean police arrested him and confiscated the gasoline (R 13-14). Accused received nine thousand yen per drum for the April sale (R 13). The April deliveries were made from the Kwangju station railhead (R 13) and the May deliveries from the "POL dump" (R 14).

Son Hee Jong testified that he sold 6 drums of gasoline for "Suntan" in February, 15 drums in March, and 8 drums in April (R 22). The February sale was picked up at the railhead and the other two were delivered by "G.I." truck (R 22-23). Two "G.I.'s" accompanied the "G.I." truck, one being dressed in "G.I." working clothes, and the other being dressed in "two clothes."

Private First Class Arthur Ozbun testified that during April and May, at accused's direction he delivered 4 truck loads of gasoline to a Korean warehouse. Each load consisted of 18 drums of gasoline (R 77). On each delivery he was accompanied by "Suntan" and accused (R 28).

Both "Suntan" and Ozbun identified a drum in the courtroom as similar in size to the drums which each, respectively, had sold and delivered (R 14, 28). The drum was identified by Captain Lisandra Gonzales as a 55-gallon drum (R 30). Captain Gonzales testified that during February the price of gasoline was \$5.14 per 55-gallon drum, and in March, April, and May, \$6.14 per 55-gallon drum (R 30).

In addition to having "Suntan" sell gasoline accused also gave "Suntan" six bottles of saccharine to sell. "Suntan" was unable to find purchasers for the saccharine so accused told him to "forget about that" (R 14).

A pre-trial statement of accused was admitted in evidence over objection by the defense. In his statement accused admitted that during February while he was in charge of the railhead, Camp Kwangju, Korea, he had his interpreter, "Suntan", make arrangements for the sale of gasoline. Pursuant to the arrangements made by "Suntan" accused in February authorized the delivery of 15 drums of gasoline to Koreans. The sum of 70,000 yen was realized on this sale. In March accused again authorized Koreans to pick up 15 drums of gasoline, in this instance accused was informed by "Suntan" that 120,000 yen had been realized. In April accused, accompanied by Private First Class Ozbun and "Suntan", delivered two loads of gasoline totalling 25 drums of gasoline to a Korean warehouse. "Suntan" informed accused that he had been robbed of the proceeds of this sale. In May accused again delivered 18 drums of gasoline to the same Korean warehouse. Payment was never received for this last sale.

With reference to the sale of saccharine accused stated:

"I brought six bottles of saccharine tablets (100 tablets to the bottle) with me when I arrived in Korea. I, later, wrote my wife to send me some bottles of Saccharine. She mailed me five bottles. In the latter part of December or the first part of January, I gave SON Tong Ohu six and in or about March, 1947, I gave him the other five bottles of saccharine. SON sold all eleven bottles for ¥6,000.00 (Korean) each, so he told me, and kept the yen at his home on both occasions. The total he assertedly told me he received for the eleven bottles of saccharine was ¥66,000.00 (Korean)." (Pros Ex 2, p 2).

With reference to the circumstances under which accused made his pre-trial statement, Second Lieutenant Richard H. Duea testified that on 24 June 1947 he, accompanied by CID Agent Weled, Captain Pope, and Colonel Alexander, went to the Camp Sykes Stockade to interview accused. Duea was the last of the party to enter the tent where accused was interviewed and at the time he entered the tent Agent Weled was warning accused

of his rights. After the warning was given Agent Weled proceeded to question accused. Subsequently accused was given his statement to read and after reading it said it was correct. Lieutenant Duea then asked accused if he understood his rights under the 24th Article of War and upon receiving an affirmative answer placed accused under oath. The latter then signed the statement and initialed all the pages (R 30-31).

Captain Harris Pope who was also present at the interview testified as follows with respect to the interview:

"Q. Now, Captain, will you explain to the court just what the procedure was in that guard tent just prior to taking this statement?

"A. Well, Mr. Weled and Mr. Bullock, and Colonel Alexander came into the tent. Mr. Weled was talking to Lt. Dallmann and said he would like for him to make a statement. 'We came to get a statement from you.' and Mr. Bullock spoke up at that time and said, 'Dallmann, don't try to kid us this time. You know we can radio the states and get the truth.'

"Q. Will you repeat that?

"A. 'Dallmann, don't try to kid us, because you know we can radio the states and get the truth.'

"Q. Now, prior to that time, had you had any occasion to talk to Lt. Dallmann?

"A. I had.

"Q. Did Lt. Dallmann make any statement to you regarding conditions in the states, to which Agent Bullock referred?

"A. Lt. Dallmann asked me if there was any possibility of keeping them from wiring his home, and I asked him, 'Why?' and he said that his mother had heart trouble, and he did not want to upset her, he wanted to be the one to tell her about it.

"Q. In your opinion, knowing this, would you interpret Agent Bullock's remark as a threat?

"A. I would, sir." (R 33-34).

On cross-examination Captain Pope testified that the Regimental Commander had appointed him as accused's defense counsel with directions to keep accused out of further trouble. The Regimental Commander also gave orders that no one was to take a statement from accused unless he (Capt Pope) was present. Captain Pope admitted that he did not advise accused in the course of the investigation (R 34).

On examination by the court Captain Pope stated that he was free to advise accused during the interrogation, that he did not know to what the CID Agent was referring when he said, "We could wire to the states for it" and that there were no other acts performed by the CID which he considered as threatening to accused (R 34-35).

4. Evidence for the defense:

Accused elected to remain silent.

Second Lieutenant Harold Otiker and Captain Harris Pope testified that "Surtan's" reputation in the community for truth and veracity was bad (R 41-42).

One other witness testified to an offense of which accused was acquitted and this testimony need not be set forth in this opinion.

5. Accused was found guilty of four acts of larceny of stated amounts of government gasoline and of four sales of the same gasoline under both the 94th and 95th Articles of War (Specs 1, 2, 3, 4, 6, 7, 8, and 9, Chg I; Specs 1, 2, 3, 4, 5, 6, 7, and 8, Chg III). The evidence shows that during the period extending from January through May 1947 accused was in charge of the railhead at Kwangju, Korea. During February 1947 accused arranged through his interpreter, a Korean known as "Surtan", to sell gasoline. Thereafter gasoline was sold to Korean purchasers, who had been located by "Surtan," in the following amounts during the months stated: 15 55-gallon drums, February; 15 55-gallon drums, March; 25 55-gallon drums, April; and 18 55-gallon drums, May. That the gasoline taken and sold by accused was property of the United States is clearly shown from the circumstance that it was obtained from Army installations, one of which was in accused's charge.

The lowest value of gasoline during the period covered by the specifications was \$5.14 per drum; the value of the gasoline involved in each specification was, therefore, in excess of \$50.00.

It may not properly be contended that, as to the gasoline taken from the railhead of which accused was in charge, accused should have been charged with embezzlement rather than larceny. Where an officer in charge of a motor pool to which gasoline had been issued was convicted of the larceny of the gasoline, the Board of Review has stated:

"But accused did not have possession of such property in contemplation of the law, he had only a custody limited to the care and lawful operation of the pool. His custody or control of the property in the pool was subject to the order and control of his superior officer. It follows that the taking and selling by accused and his confederates constituted larceny thereof" (CM 318296, Mayer, and authorities cited therein).

The findings of guilty of larceny of government property and of the wrongful sale of the same in violation of the 94th and 95th Articles of War was warranted, by the evidence of record.

Where there is larceny of government property and a sale of the same by one person there is no prohibition against charging both offenses against the offender (sub-paragraph 4, par 149g, MCM 1928).

The acts of accused in stealing and selling property of the United States constituted violations of the 94th Article of War, and conduct unbecoming an officer and a gentleman, in violation of the 95th Article of War. Charging the same offenses under both Articles does not constitute a duplication of charges (CM 248494, Kwarchak, 31 BR 297, 300; CM 275518, Linville, 48 BR 55, 61).

Accused was also found guilty of the importation and sale of saccharine contrary to standing orders and directives in violation of Articles of War 95 and 96 (Spec of Charge II; Spec 9, Charge III). It is apparent that the directive alleged to have been violated was Circular 39, General Headquarters, United States Armed Forces, Pacific, 23 April 1946. This circular forbids the sale for financial profit of goods transported by government transportation. There is no evidence, outside of accused's pre-trial statement, which established the probability that the saccharine with which accused was dealing was transported by government transportation. That portion of accused's pre-trial statement pertaining to his transactions with respect to saccharine was, therefore, without the corroboration prescribed by law. In our opinion the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification, and Specification 9, Charge III.

6. The defense objected to the admission in evidence of the accused's pre-trial statement on the ground that it was obtained by threat. The threat was a vague assertion by the CID Agent interrogating accused not to try to "kid us, because you know we can radio the states and get the truth." Whether the purported threat was such as to compel accused to make the pre-trial statement was properly a question for the court to decide (CM 252086, Kissell, 33 BR 331, 343).

7. Records of the Army show that accused is twenty-one years of age and married. He is a graduate of high school and in civilian life was employed as the manager of a grocery store. He had enlisted service from 25 August 1945 to 29 May 1946 when he was commissioned second lieutenant in the Army of the United States. His efficiency ratings are as follows: For the period from 1 July 1946 to 31 December 1946, he was rated as excellent, and for the period from 1 January 1947 to 30 June 1947, superior.

Attached to the record of trial are letters to the reviewing authority from accused's regimental executive officer, regimental S-4 officer, and battalion commander, all urging clemency on behalf of accused. Two of the letters cited accused's bravery in causing ammunition cars to be removed from a fire in a petroleum dump.

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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 other than as discussed above. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification and Specification 9 of Charge III; legally sufficient to support the findings of guilty of all other Charges and Specifications and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95, and a sentence to dismissal, total forfeitures, and confinement for seven years is authorized upon a conviction of Article of War 96.

H. Feinstein, Judge Advocate
John G. O'Brien, Judge Advocate
W. H. [unclear], Judge Advocate

JAGH - CM 325484

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 the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Virgil W. Dallmann (O-1340991), Service Company, 20th Infantry Regiment.

2. Upon trial by general court-martial this officer was found guilty of four acts of larceny of stated amounts of government gasoline and of four sales of the same, in violation of Articles of War 94 and 95 (Chg I, Specs 1, 2, 3, 4, 6, 7, 8, 9; Chg III, Specs 1, 2, 3, 4, 5, 6, 7, 8), and of selling saccharine contrary to standing orders in violation of Articles of War 95 and 96 (Chg II, Spec; Chg III, Spec 9). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor for ten years, to pay to the United States a fine of \$1000, and to be further confined at hard labor until payment of the fine but not more than one year in addition to the ten years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for seven years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification and Specification 9, Charge III (Sale of saccharine), legally sufficient to support the findings of guilty of all other Charges and Specifications and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

Accused was in charge of a railhead in Kwangju, Korea, and during the period January through May 1947 sold slightly in excess of 4000 gallons of government gasoline of a value in excess of \$400 to Korean purchasers. Most of the gasoline sold was from the store of gasoline at the railhead and some was obtained from another Army dump. The sales were negotiated through a Korean civilian employed at the railhead as an interpreter.

As to accused selling saccharine contrary to standing orders, the applicable order in effect in Korea at the time forbade the sale for profit of items transported by government transportation. While the offense charged is admitted in accused's pre-trial statement there is no other evidence in the record which shows that any sales were in fact consummated or which shows that the saccharine was in fact brought to Korea by means of government transportation. Because of the lack of

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corroboration for accused's statement in relation to the sales of imported saccharine, the Board of Review is of the opinion that the findings of guilty of the offenses based upon the alleged sales are not legally supported by the evidence.

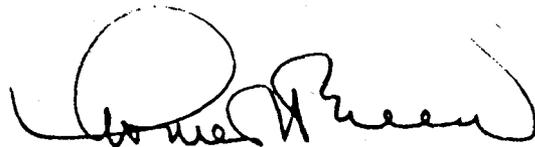
4. Accused is twenty-one years of age and married. He is a graduate of high school and in civilian life was employed as the manager of a grocery store. He had enlisted service from 25 August 1945 to 29 May 1946 when he was commissioned second lieutenant in the Army of the United States. His two efficiency ratings of record are respectively "Excellent" and "Superior."

Attached to the record of trial are letters to the reviewing authority from accused's regimental executive officer, regimental S-4 officer, and battalion commander, all urging clemency on behalf of accused. Two of the letters cited accused's bravery in causing ammunition cars to be removed from a fire in a petroleum dump.

5. I recommend that the findings of guilty of Charge II and its Specification, and of Specification 9, Charge III, be disapproved, that the sentence be confirmed but in view of all the circumstances that confinement in excess of five years be remitted and that as thus modified the sentence be carried into execution. I also recommend that a United States disciplinary barracks be designated as the place of confinement.

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

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



THOMAS H. GREEN
Major General
The Judge Advocate General

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(GCMO 83 (DA) , 10 Dec 1947)

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

(263)

JAGK - CM 325492

23 OCT 1947

UNITED STATES)

v.)

Technician Fifth Grade
CHARLES L. MOSELY
(RA 35817411), Headquarters
and Headquarters Detachment,
538th Quartermaster Battalion,
EA, APO 58.)

AMERICAN GRAVES REGISTRATION COMMAND

Trial by G.C.M., convened at
Paris, France, 15 August 1947.
To be hanged by the neck until
dead.

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Technician Fifth Grade Charles L. Mosely, Headquarters and Headquarters Detachment 538th Quartermaster Battalion, did, at or near American Graves Registration Command Saint Germain Depot, on or about 1 June 1947, feloniously take, steal and drive away one ambulance, of the value of more than \$50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Technician Fifth Grade Charles L. Mosely, Headquarters and Headquarters Detachment, 538th Quartermaster Battalion, did, at Fresnes s/Marne, near Claye Souilly, France, on or about 8 June 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Renee Delort, a human being, by striking her with an unknown thing.

Accused pleaded guilty to the Charge and its Specification. He pleaded not guilty to the Additional Charge but guilty of a violation of the 93rd Article of War thereunder and guilty to the Specification of the Additional Charge except the words "with malice aforethought, deliberately, with premeditation" substituting therefor "between the word 'feloneously' and the word 'unlawfully' the word 'and'". He was found guilty of all

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Charges and Specifications. Evidence of one previous conviction, by summary court-martial, was submitted. All the members present at the time the vote was taken concurring, accused was sentenced to be hanged by the neck until dead.

3. Evidence.

Written stipulations entered into by the parties, duly signed and concurred in by the accused, were received in evidence and are summarized as follows.

On 2 June 1947 a U. S. Army ambulance with bumper markings USFGR DP 225 was discovered to be missing, without authorization, from the St. Germain's Depot Motor Pool, American Graves Registration Command, Paris, France (Pros Ex A). At about 0630 hours on 1 June 1947, the accused, one Madame Renee DeLort and "a small woman" parked an "OD" colored ambulance at a French civilian garage located at 122 Avenue Gambetta, Paris, France, but returned shortly thereafter and drove the ambulance away (Pros Ex B). At about 0800 hours on 1 June 1947 the accused and a "tall woman about 40 years of age" together with one Madame Froment left an "OD" colored ambulance at a civilian garage located at 8 bis rue Leontine, Paris, France. The wife of a civilian employee of the garage notified the French customs authorities of the presence of the ambulance at the garage. On 3 June 1947 "the tall woman" offered to sell the ambulance to a French civilian for 150,000 francs. On 4 June 1947 French customs police went to the garage and took possession of the ambulance. Subsequently on the same day the accused and "the small woman" appeared at the garage and made inquiry as to the whereabouts of the ambulance (Pros Ex C). On the same date, 4 June, a French woman who identified herself as Renee Louise DeLort offered to sell to Pierre Rio, Chief Brigadier of the French customs, who was dressed as a civilian, a Dodge U. S. ambulance for 150,000 francs. The ambulance was alleged to have been brought from Germany by a U. S. soldier who, through his girl friend, Yvette Froment, had become acquainted with Madame DeLort. The ambulance was turned over to the U. S. authorities in Paris and a fine of 250,000 francs was assessed against Madame DeLort but she was not taken into custody (Pros Ex D). Madame DeLort, Jeanne Froment and the accused lived at the same hotel in Paris. On 7 June 1947 Jeanne Froment gave Renee DeLort 100,000 francs to produce evidence and assist her in securing a divorce. Madame DeLort asserted that she had been fined 300,000 francs because of the attempted sale of the ambulance but that she did not intend to pay the fine "alone" because the accused and Jeanne were also involved. Jeanne Froment and the accused went to the garage to see if Madame DeLort was telling the truth. Jeanne Froment saw Madame DeLort for the last time at the hotel on 7 June 1947. Shortly after midnight on the same date the accused came to Jeanne's room at the hotel, drank a cup of coffee and left. He returned to her room at about 0830 hours on 8 June 1947 (Pros Ex E). Antoine Versino was the desk clerk at the Hotel Royale Versailles, Paris, France. According to his stipulated testimony the accused, Mosely, lived in room 210 of the hotel. Madame

DeLort also lived at the hotel. Madame DeLort called Versino on the hotel phone at 2230 hours on 7 June and requested to be awakened at 0530 hours the following morning. At about 0130 hours on 8 June the accused appeared at the hotel but left in a jeep shortly thereafter. At 0400 hours Madame DeLort left the hotel wearing a dark blue dress and dark blue coat (Pros Ex F). Emile Lebreton, French civilian, was employed as a guard at AGRC St. Germain Depot, Paris, France. On the night of 7-8 June 1947 the accused was Corporal of the Guard at the depot. The accused left his post at about 0130 hours. He left again at about 0315 hours stating that he was going to the Hotel Astoria. He returned to his post at about 0555 hours and his clothing was wet and dirty and his cap was muddy (Pros Ex G). Madame DeLort failed to appear at the christening of the baby of a friend on the morning of 8 June 1947. Some partially burned papers bearing her handwriting were found in the latrine near her room (Pros Ex H).

On 22 June, George Buhler, Adjutant of the Gendarmie Nationale, Brigade of Claye Souilly, proceeded to a place known as "Swine's Pit" near Claye Souilly, France, where he found the body of a woman clad in blue coat, blue skirt and blue and white sweater. The body was in an advanced state of decay. A wedding ring was on the finger of her left hand. The body was removed to the Fresne Cemetery in the condition in which it was found and a post mortem examination was performed by Dr. Andre Bertaux on the following day. Dr. Bertaux found that the skull was fractured causing hemorrhage of the brain. He was unable to state positively the cause of death due to the advanced state of putrification but the skull appeared to have been struck by a blunt instrument. The condition of the body indicated that the woman had been dead a month or probably less. The body was clad in a blue coat and blue and white jumper. On the coat there was a brooch and a gold wedding ring was on the left ring finger. Dr. Bertaux delivered the clothing and jewelry to Commissaire Balzeau, Surete Nationale, who delivered the jewelry to Miss Jeannine DeLort, daughter of Renee DeLort (Pros Ex I, J, K).

On 7 June 1947 Renee DeLort had phoned her 22-year old daughter, Jeannine DeLort and arranged to attend a christening with her the following morning. Jeannine DeLort tried to contact her mother the following day. She went to her mother's room in the hotel, found the dresses "we planned to wear to the christening" but could not locate her mother. On 24 June Mr. Balzeau of the Surete Nationale handed to Jeannine DeLort a wedding ring, a gold brooch and a button. Jeannine recognized the first two items as being property of her mother. The gold button was from a blue coat which her mother had borrowed from her on 7 June 1947 (Pros Ex L).

On 23 June 1947 the French police in company with several civilians visited the St. Germain Depot AGRC and interviewed the accused. They also returned the missing ambulance. After the interview the accused was warned of his rights under Article of War 24 by Captain Berry K. Anderson and he thereupon made a written confession to the officer that on 1 June 1947 he took the ambulance from the St. Germain Depot and arranged through his girl friend and Mrs. DeLort to sell it. He asserted that "something

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went wrong and we had to bring this ambulance back to St. Cloud where we parked it in a garage" (R. 21-25, Pros Ex M1). No threats or promises were made to the accused except however he was assured that "since the girl was not the Army's problem in this case that the Army would not push the case against her" (R. 23). On 27 June the accused was taken into custody by the French police and detained overnight in a police station. On the following day, and after he had been duly advised of his rights as is provided in Article of War 24, the accused signed and swore to a written confession before Captain Anderson and other U. S. Military personnel. The defense objected to the admission in evidence of the confession and the accused took the stand for the limited purpose of testifying as to the manner under which the confession was obtained. He stated that he signed and swore to the statement "because, sir, I was in a French police station and because my girl friend, I wanted them to do as much for her as I could - as they would do for me, because I loved her." He had been told that he would be turned over to the French police until the investigation was completed. He told Lieutenant McMurray that the statement was true before he signed it and, "I didn't care because I wanted to get it off my hands" (R. 45-46). On cross examination the accused stated that Captain Anderson read and explained to him his rights under Article of War 24, that no force or threats were used and that he made the confession because he wanted to get out of the French Police Station and to clear his girl friend. "They promised me they would do as much for my girl friend as they could" (R. 50-52). On redirect examination accused stated that he was born and reared on a farm and had finished the eighth grade (R. 53).

The confession was received in evidence and is as follows:

"SPECIAL INVESTIGATION SECTION
7701 EUJCOM DETACHMENT (PARIS)
APO 58 US ARMY

Date 28 June 1947

STATEMENT OF: Tec 5 Charles L. Mosley, RA35817411, 538 QM Bn., AGRC, APO #58.

In the case of Death of Mrs. Rene Dolert, Hotel Royal Versailles, 31 Rue Lenarois,
Paris, France

Taken by Joseph J. Godek—Special Investigation Section

In the presence of Joseph S. Michowski—Special Investigation Section---

Hqrs. SIS-Paris, France 1330 - 1530 hours 28 June 1947
(Place) (Time) (Date)

Charles L. Mosley it is my duty to inform you of your rights at this time. Under the 24th Article of War you are not required to make any statement that might degrade or incriminate you. It is your privilege to remain silent. However, anything you may say may be used either for or against you in the event that this investigation results in a trial. Do you thoroughly understand your rights?

Yes C.L.M.
(Answer)

C. L. Mosely
(Signature)

STATEMENT: My name is Charles L. Mosley, Tec 5, RA 35817411, 538 GM Bn., AGRC, APO #58. After having been warned of my rights under the 24th Article of War, by the above named investigators, I make the following statement of my own free will.

I have known Mrs. Rene Dolert, Hotel Royal Versailles, #31 Rue Lemarois, Paris, France for about six (6) weeks. On or about the 1st of June 1947, I had stolen a 3/4 ton ambulance from Ille of St. Germain and had taken it to a garage near St. Cloud. Mrs. Dolert was supposed to have sold the ambulance. I do not know just how much she was to get for the ambulance.

However, it appeared that she was not able to sell the ambulance and it was moved to another garage. On the 3rd or 4th of June 1947, Mrs. Rene Dolert told my girl friend, Jeanne Froment, that unless I stole some motor vehicles and turned them over to her, she would inform the Military Police that I had stolen the ambulance, and also tell the French Police that my girlfriend was involved in the theft of the ambulance.

Mrs. Dolert also told my girlfriend that if I did not steal the motor vehicles, I was to pay her three hundred thousand French francs, to keep her from telling the Police about the theft of the ambulance.

My girlfriend informed me of what Mrs. Dolert, had told her about my stealing the motor vehicles or giving her the three hundred thousand French francs. At that time, I did not make any reply to my girl friend, but decided that I was not going to steal any motor vehicles, nor was I going to pay Mrs. Dolert, three hundred thousand French francs. I decided that I would have to get rid of Mrs. Dolert, so that she would not turn me in to the Military Police. I did not set any time or any place but knew it would have to be soon. On 7-8 June 1947 I was to be on duty from 2400 hours to 0800 hours. My duties were Cpl. of the Guard, and as such, I had a 1/2 ton 4x4, to be used by me in posting my guards at the Hotel Astoria, the Railhead and at the Main Gate at Ille of St. Germain. At or about 0100 hours on 8 June 1947, I saw Mrs. Dolert at the Hotel Royal Versailles, #31 Rue Lemarois, Paris, France and told her to meet me at Porte St. Cloud around 0400 hours. I did not tell her anything else except to meet me at that time. I then returned to Ille of St. Germain and checked my guards and also the warehouses. At about 0400 hours I returned to the Hotel Astoria and picked up a soldier named 'Rachoppi' and took him to Ille of St. Germain. I then left Ille of St. Germain and drove to Porte St. Cloud where I met Mrs. Dolert. She got into the 1/2 ton 4x4, and I drove to a small grove of trees located east of Claye Souilly, and turned off the main highway and drove the 1/2 ton 4x4 around to the rear of the trees. I stopped the vehicle and Mrs. Dolert and I got out of the vehicle. Mrs. Dolert was standing in front of the 1/2 ton 4x4. After getting out of the vehicle, I took my pocket-knife and started to remove the bumper markings front and rear. Mrs. Dolert continued to stand in front of the vehicle. After I had finished removing the rear bumper markings, I walked around to the side of the vehicle and removed an old type lug wrench and turning around I struck Mrs. Dolert on the rear of her head. At the time I struck

her Mrs. Delort was standing with her back to me. Mrs. Delort fell to the ground and did not make a sound. I then hit her again while she lay on the ground.

I dragged the body of Mrs. Delort to a small group of trees and left her body there. At this time Mrs. Delort was dead as far as I could see. When Mrs. Delort had got out of the vehicle she had left her handbag in the vehicle. I returned to the vehicle and backed it out of the place it had been parked at, into the main highway, following the tracks I had made on the way in. I then drove toward Paris and after passing Claye Souilly, I stopped the vehicle and using some newspapers for a base, I burned Mrs. Delort's handbag. I also burned the contents of the bag which consisted of lip stick, powder, etc. There was no money in the handbag. The only thing I kept at that time was a small note book which I kept. I had an idea that Mrs. Delort had sold the ambulance and had kept the money. I wanted to see if she had made any notations in the note-book about the ambulance. I kept this book with me until just before noon on Sunday when I burned it in one of the toilets in the Hotel Royal Versailles, where I had a room.

I do not remember just where I threw the wrench away. At the time I was removing the bumper markings, Mrs. Delort had thought I had stolen the 4ton 4x4 and was going to turn it over to her.

It took about an hour from the time I left Porte St. Cloud until the time I returned to St. Germaine. It was about 0500 hours when I got back to Ille of St. Germain, I then woke up some of the soldiers and posted some guards, finishing my duties at about 0900 hours. I was then off duty and went to the Hotel Royal Versailles, where I went to bed. My girlfriend Jeanne Froment did not know or have anything to do with the death of Mrs. Delort. I have read the above statement and it is true to the best of my knowledge.

////////////////////////////////////End of Statement////////////////////////////////////

/s/ C. L. Mosely
Charles L. Mosley
Tec 5 RA 35817411

Sworn to, and subscribed to, before me this 28th day of June 1947, at Paris, France

/s/ W.H. McMurray 1st Lt Inf
W. H. Mc Murray
1st Lt. Infantry
Summary Court Officer"
(R. 56, Pros Ex N)

After being duly advised of his rights as a witness the accused elected to remain silent.

4. Although the accused pleaded guilty to larceny of the ambulance in violation of Article of War 94, and to voluntary manslaughter at the

time and upon the person alleged, in violation of Article of War 93 under the Additional Charge and its Specification, evidence was presented, and has been briefly summarized, relative to both Charges and Specifications in order to show more completely the circumstances culminating in the homicide.

The defense objected to the admission in evidence of accused's confession - obviously on the ground that the confession was not voluntary on the part of the accused. We need look no further into the manner in which the confession was given than accused's own testimony in this regard. He asserted that he had been detained overnight in a French police station. He feared that he would be held and tried for murder by the French authorities. The girl whom he loved was also apparently being held by the French police. He confessed therefore according to his own testimony, after being fully advised of, and with understanding of his rights in order to effect his transfer to the custody of American authorities and to clear his girl friend of complicity in the crime. Conceding that the confession was induced by promise of his removal from the French authorities and the rendering of assistance to clear his girl friend, it appears to be well established in the law that such promises of collateral benefit do not in themselves render a confession involuntary and therefore inadmissible in evidence. "Promises of collateral benefit or boon not relating to immunity from the consequences of the crime are not, *ex proprio vigore*, sufficient to render the confession inadmissible as involuntary; and where they are not, under all the circumstances, sufficiently strong to overcome the will of the declarant so as to cause an innocent man to confess falsely, the confession is admissible. Thus a confession signed upon an inducement and in an attempt to free the confessor's father is admissible. A confession made by a drug addict induced by the hope of receiving drugs is likewise admissible. So the rule is established that before a confession will be rendered inadmissible the inducement held out must go directly to the benefit of the accused by way of his personal escape from punishment." (Underscoring supplied, Sec 620, p 1041, Wharton's Criminal Evidence, Vol 2, 11th Ed).

Likewise, "a confession is not involuntary where induced by a promise that the prisoner may see his wife who was confined in another cell, or have his shackles removed, and permit him to associate with other prisoners, or be permitted to take exercise, or be released from a rigorous confinement, or to protect him from others alleged to be implicated in the crime." (Sec 268, p 531, Underhill's Criminal Evidence, 4th Ed.). The Manual for Courts-Martial prescribes no hard and fast rules for determining whether or not a confession is voluntary, such determination depending on the circumstances in each case and although a confession not voluntarily made must be rejected, the evidence herein is cogent and irresistible that the confession was, in law, voluntary on the part of the accused and the court was fully justified in admitting it into evidence.

There remains for consideration the question of whether the evidence sufficiently establishes the murder of Renee DeLort as alleged and found. Malice is the element that distinguishes or marks the boundary between the two grades of homicide, murder and manslaughter. (Collins v. U. S.,

150 U. S. 62, 14 S ct 9; Stevenson v U. S., 162 U. S. 313, 16 S ct 839). Malice aforethought has been variously defined by the text writers and the courts and although the language employed may vary, the meaning is predominantly the same. The Manual for Courts-Martial sets forth certain states of mind preceeding or coexisting with the act or omission by which death is caused, asserting that malice aforethought may mean any one or more of such states of mind. (MCM, 1928, par 148a).

In CM 323197 Abney the Board of Review adopted the definition contained in Comm v Chance, 174 Mass 245, 252, which stated that,

"Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to the common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negative of any excuse or justification."

Malice aforethought has also been defined as, "a predetermination to do the act of killing without legal excuse and it is immaterial as to how suddenly and recently, before the killing, such determination was formed." (Fields v Comm, 152 Ky 80, 153 SW 29; Turner v Comm, 167 Ky 365, 180 SW 768.).

The accused's confession is most revealing as to his state of mind or predetermination with reference to the homicide. Mrs. DeLort had "threatened" to report accused's illegal activities, and also implicate his girl friend, unless he paid her 300,000 francs or stole some more government vehicles and turned them over to her. He decided that he would do neither but that "I would have to get rid of Mrs. DeLort, so that she would not turn me in to the Military Police. I did not set any time or place but knew it would have to be soon." There is the expressed predetermination to do the act of killing without legal excuse and in the light of the subsequent events, constitutes murder in law.

The "threat" of Mrs. DeLort to report accused's illegal activities unless he gave her money or furnished her with property to sell may have engendered great resentment or aroused his passion to do away with her, but the killing appears to have been deliberately planned and executed in cool precision under pretense of delivering the vehicle to the victim. In order to mitigate the offense to voluntary manslaughter all the following elements must concur: (a) suddenness, (b) heat of passion, and (c) adequate provocation. Heat and passion without such provocation, or provocation, however great, that fails to arouse spontaneously the other element, will not be sufficient to reduce the homicide to voluntary manslaughter. (Par 149(a), p. 165 MCM, 1928; Sec. 19, p 167, Vol. 26 Am Jurisprudence; McHargue v Comm, 231 Ky 82, 21 SW 2nd 115).

Accused's confession read in the light most favorable to him goes no further than to show a motive for the killing and negatives the presence of those conditions named above and necessary in order to mitigate the homicide to voluntary manslaughter.

5. The charge sheet shows that the accused is 21 years of age and has no deductions or allotments to dependents. He was inducted in the AUS on 7 September 1944 and enlisted in the Regular Army at Camp Chaffee, Arkansas, on 4 October 1945.

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

Chester A. Silvers, Judge Advocate

Charles E. McElfee, Judge Advocate

On Leave

, Judge Advocate

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JAGK - CM 325492

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NO

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 Charles L. Mosely (RA 35817411), Headquarters and Headquarters Detachment, 538th Quartermaster Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but in view of all the circumstances including the attempted blackmail of accused by the victim, I recommend that it be commuted to dishonorable discharge, total forfeiture and confinement at hard labor for the natural life of accused. I further recommend that a United States Penitentiary be designated as the place of confinement.

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

3 Incls.

1. Record of trial
2. Drft ltr sig S of A
3. Form of Execution



THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO: 57, 21 Nov 1947).

JAGK - CM 325494

3 FEB 1948

UNITED STATES)

PHILIPPINES-RYUKYUS COMMAND

v.)

Trial by G.C.M., convened at Headquarters
PHILRYCOM, APO 707, 10 July 1947. Dis-
honorably discharge (suspended), total
forfeitures, and confinement for two (2)
years. Stockade.

Corporal Esteban A. Ortiz
(10312837), 57th Infantry
Regiment, "C" Company,
Philippine Scouts)

OPINION of the BOARD OF REVIEW

SILVERS, ACKROYD and LANNING, Judge Advocates

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

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

CHARGE I: Violation of the 84th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

CHARGE II: Violation of the 83rd Article of War.

Specifications: In that Corporal Esteban A. Ortiz, Company "C", 57th Infantry Regiment, Philippine Scouts, APO 1009, did at Batangas, Batangas, Philippine Islands, during the period of on or about 21 March 1947, willfully suffer motor vehicle wheel assemblies, of the value of more than \$50.00, military property belonging to the United States, to be wrongfully disposed of by sale to persons unknown.

The accused pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its specification and guilty of Charge II 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 at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated General Prisoners' Branch, PHILRYCOM Stockade, Provost Marshal's Section, APO 707, or elsewhere as the Secretary of War might direct, as

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the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 227, Headquarters Philippines-Ryukyus Command, APO 707, 26 August 1947.

3. Proof adduced by the prosecution established that on about the date alleged property similar to that described in the specification was missing from the "A" Motor Pool at Camp Batangas, P.I. The accused was a member of the guard detailed to safeguard such property. In a pre-trial confession, which the court-martial concluded was of a voluntary nature, the accused admitted that on or about the date alleged he sold government property similar to that described in the specification. It will be noted that the accused was found guilty of willfully suffering the property described in the specifications to be wrongfully disposed of by sale to unknown persons. Irrespective of whether a wrongful sale or a willful suffering of a wrongful sale is alleged, it is obvious that a wrongful sale is involved in the corpus delicti of either offense. Therefore, in order to sustain a conviction in either case, even though accused has confessed to the offense charged, it must appear, from evidence aliunde accused's confession, that the property in question had probably been unlawfully sold.

We find no competent evidence in the record, aliunde accused's confession, tending to establish the probability that the alleged wrongful sale had in fact occurred, thus permitting the confession to be considered. For a more detailed discussion of the points of law involved see CM 325377, Sipalay; CM 325378, Catubig; CM 325056, Balucanag.

4. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Charles T. Silver Judge Advocate
Gilbert S. Schroyd Judge Advocate
Harley A. Lanning Judge Advocate

JAGK - CM 325494

1st Ind

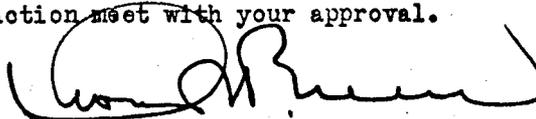
JAGO, Dept. of the Army, Washington 25, D. C. FEB 9 1948

TO: The Secretary of the Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Corporal Esteban A. Ortiz (10312837), 57th Infantry Regiment, "C" Company, Philippine Scouts.

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

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(GCMO 58 (DA) , 4th March 1948)



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

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JAGN-CM 325510

UNITED STATES)

v.)

Private RAYMOND H.
SCHOENLEBER (12225352),
Headquarters & Headquarters
Company, 7715 European Com-
mand Ordnance School.)

UNITED STATES CONSTABULARY

Trial by G.C.M., convened at
Kassel, Germany, 9 and 16 July
1947. Dishonorable discharge
and confinement for five (5)
years. Disciplinary Barracks.

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 93rd Article of War.

Specification: In that Private Raymond H. Schoenleber, Headquarters and Headquarters Company, 7715 European Command Ordnance School, APO 171, did, at Eschwege, Germany, on or about 7 June 1947, with intent to do her bodily harm, commit an assault upon Ilse Vaupel, by willfully and feloniously striking the said Ilse Vaupel on the body with rocks and a knife.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification, guilty of the Specification of Charge II "except the words 'and a knife,'" and guilty of Charge II. 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 disapproved the finding of guilty of Charge I and its Specification, 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 50 $\frac{1}{2}$

3. The record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority. The only question requiring discussion here is the legal sufficiency of the record of trial to support the sentence. In view of the holding of the Board of Review, as hereinafter set out, it will not be necessary to summarize the evidence contained in the record of trial.

4. The maximum authorized punishment for the offense of assault "with intent to do bodily harm with a dangerous weapon, instrument, or other thing," is dishonorable discharge, total forfeitures, and confinement at hard labor for five years (par. 104c, MCM, 1928). The maximum authorized punishment for the lesser offense of assault "with intent to do bodily harm" is dishonorable discharge, total forfeitures, and confinement at hard labor for one year (par. 104c, MCM, 1928). It was alleged and found that this assault was accomplished by striking the victim "on the body with rocks," but it was not alleged or found that the instruments used were dangerous ones. There was evidence that the rocks were used in a manner which did in fact produce serious bodily injury, but the instruments were not per se dangerous ones, and the description and use thereof alleged and found did not, in the opinion of the Board, ex vi termini impart dangerous character. Punishment as for the greater offense of assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, is not, therefore, authorized (CM 320174, Holland (1947); CM 210370, Renfro, 9 BR 263).

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 year.

Edward J. Brennan Judge Advocate.

(SICK IN QUARTERS), Judge Advocate.

James J. [unclear] Judge Advocate.

JAGN-CM 325510 . 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 Private Raymond H. Schoenleber (12225352), Headquarters & Headquarters Company, 7715 European Command Ordnance School, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. 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 325510).

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.

(281)

JAGQ - CM 325518

SEP 30 1947

UNITED STATES

v.

Privates
SALVATORE A. ALBERTO
(RA 33576110), and
LEONARD P. SIELKY
(RA 36518372), both of
Headquarters Company, 7717th
Quartermaster School Center.

U. S. CONSTABULARY

Trial by G.C.M., convened at
Darmstadt, Germany, 3 July
1947. Dishonorable discharge
and confinement for six (6)
months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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

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

ALBERTO

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

Specification: In that Private Salvatore A. Alberto, Headquarters Company, 7717th Quartermaster School Center, did, without proper leave, absent himself from the Quartermaster School Center at Darmstadt, Germany, from about 6 March 1947 to about 9 May 1947.

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

Specification: (Finding of Not Guilty).

SIELKY

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

Specification: In that Private Leonard P. Sielky, Headquarters Company, 7717th Quartermaster School Center, did without proper leave, absent himself from the Quartermaster School Center at Darmstadt, Germany, from about 6 March 1947 to about 9 May 1947.

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

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

Each accused pleaded not guilty to all Charges and Specifications. Each accused was found not guilty of Charge II and the Specifications thereof, and guilty of Charge I and the Specification thereof. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence as to each accused, designated the Branch, United States Disciplinary Barracks, Green Haven, New York, as the place of confinement and forwarded the record of trial under Article of War 50 $\frac{1}{2}$.

3. Evidence for the Prosecution.

The evidence on Specification of Charge I consisted of extract copies of the morning reports of accused's organization (Pros. Ex 1, R. 8). The extracts read as follows:

"Alberto, Salvatore A. 33576110 Pvt
Sielky, Leonard 36518372 Pvt

Above 2 EM dy to AWOL 0630 hrs

/s/ William A. Bonzer
1st Lt. QMC"

"Alberto, Salvatore A. RA 33576110 Pvt
Sielky, Leonard RA 36518372 Pvt

AWOL to conf.

/s/ William A. Bonzer
1st Lt. QMC"

The certificate on the extract copy showing "duty to AWOL" is dated 6 March 1947 which is the date upon which the accused are alleged to have absented themselves without leave. The certificate on the extract copy showing "AWOL to conf" is dated 10 May 1947 and the absence of each accused is alleged to have terminated on 9 May 1947. The certificate is properly executed by 1st Lt. William A. Bonzer, QMC, Commanding Officer of accused's organization, and he verified his signature at the trial (R. 8).

4. Each accused after being advised of his rights elected to remain silent (R. 22).

5. The extract copies of the morning reports introduced in evidence were defective, in that, although they show each accused from duty to absent without leave and from absent without leave to duty, they fail to show the dates upon which the changes of status occurred. On their face, they consist only of copies of entries showing a change in status from duty to absent without leave and from absent without leave to confinement with certificates dated 6 March 1947 and 10 May 1947 reciting that the extracts are a true and complete copy of the original entries. The extracts have no probative value to show the dates of the initial absence of the accused nor of their return to a duty status.

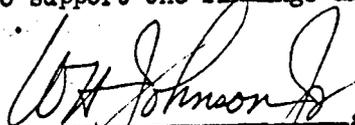
In a similar case (CM 9204, Simmers, ETO 9 June 1945) the Board of Review held:

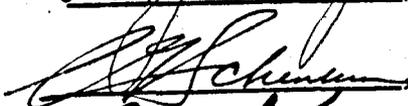
"While it might be possible in this case to say that the officer who prepared the document simply misinterpreted the forms and that the date 3 October 1944 refers to the date when accused initially absented himself rather than to the date of certification; so to interpret the document would involve recourse to mere conjecture, violate accepted principles of construction and open the door to possibilities of grave error. It is concluded that the extract copy of the morning report here introduced has no probative value as showing the date of accused's initial absence."

To the same effect is CM 9839, Wells, 21 BR (ETO) 217.

There was no other competent evidence adduced at the trial as to the alleged absence without leave of the accused and accordingly there was no proof that either accused committed the offense of which he was found guilty.

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

 , Judge Advocate

 , Judge Advocate

 , Judge Advocate

(284)

JAGQ - CM 325518

1st Ind

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

TO: Commanding General, U. S. Constabulary, APO 46, c/o Postmaster,
New York, New York.

1. In the case of Privates Salvatore A. Alberto (RA 33576110), and Leonard P. Sielky (RA 36518372), both of Headquarters Company, 7717th Quartermaster School Center, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentences, and recommend that the findings of guilty and the sentences be disapproved. At the time of taking your action you will have authority to direct a rehearing in each case.

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 325518).



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.

(285)

JAGK - CM 325523

15 DEC 1947

UNITED STATES)

6TH INFANTRY DIVISION

v.)

Second Lieutenant KENNETH
J. HANNI (O-1340195),
Infantry)

Trial by G.C.M., convened at Pusan,
Korea, 29 and 31 July 1947. Dismissal,
total forfeitures and confinement for
five (5) years.

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. Accused was tried upon the following charges and specifications:

CHARGE 1: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Kenneth J. Hanni, Headquarters and Headquarters Company, 63d Infantry, did, at APO 6 Unit 3, on and between 18 October 1946 and 12 June 1947, feloniously embezzle by fraudulently converting to his own use one electric air heater, of the value of about \$13.45, one radio, of the value of about \$47.50, and one silk coat, Chinese, quilted, of the value of about \$14.05, of a total value of more than \$50.00, the property of the Army Exchange Service, entrusted to him for sale by the Army Exchange Service.

Specification 2: In that Second Lieutenant Kenneth J. Hanni, ***, did, at APO 6 Unit 3, on or about 15 January 1947, feloniously embezzle by fraudulently converting to his own use 150 cases of Coca Cola, of the value of over \$50.00, the property of the Army Exchange Service, Kunsan Branch, Kunsan, Korea, APO 6 Unit 3, entrusted to him as Assistant Post Exchange officer, 63d Infantry Regiment, APO 6 Unit 3, by the said Army Exchange Service.

Specification 3: In that Second Lieutenant Kenneth J. Hanni, ***, did, at APO 6 Unit 3, on or about 27 December 1946, feloniously embezzle by fraudulently converting to his own use, occupation currency, of the value of \$400.00, the property of Army Exchange Service, Field Exchange Number

101-L, Camp Hillemmeyer, Korea, APO 6 Unit 3, entrusted to him by the said Army Exchange Service.

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

Specification 1: In that Second Lieutenant Kenneth J. Hanni, ***, did, at APO 6 Unit 3, on and between 18 October 1946 and 12 June 1947, feloniously embezzle by fraudulently converting to his own use one electric air heater, of the value of about \$13.45, one radio, of the value of about \$47.50, and one silk coat, Chinese, quilted, of the value of about \$14.05, of a total value of more than \$50.00, the property of the Army Exchange Service, entrusted to him for sale by the Army Exchange Service, to the discredit of the military service.

Specification 2: In that Second Lieutenant Kenneth J. Hanni, ***, did, at APO 6 Unit 3, on or about 15 January 1947, feloniously embezzle by fraudulently converting to his own use 150 cases of Coca Cola, of the value of over \$50.00, the property of the Army Exchange Service, Kunsan Branch, Kunsan, Korea, APO 6 Unit 3, entrusted to him as Assistant Post Exchange Officer, 63d Infantry Regiment, APO 6 Unit 3, by the said Army Exchange Service, to the discredit of the military service.

Specification 3: In that Second Lieutenant Kenneth J. Hanni, ***, did, as Post Exchange Officer for Field Exchange Number 101-L, at APO 6 Unit 3, on or about 27 December 1946, feloniously embezzle by fraudulently converting to his own use occupation currency, of the value of \$400.00, the property of Army Exchange Service, Field Exchange Number 101-L, Camp Hillemmeyer, Korea, APO 6 Unit 3, entrusted to him by the said Army Exchange Service, to the discredit of the military service.

Specification 4: In that Second Lieutenant Kenneth J. Hanni, ***, did, at APO 6 Unit 3, between 18 October 1946 and 12 June 1947, deal in Black Market Activities, by selling cigarettes, purchased from Army Exchange Service, to Korean Nationals at a profit, contrary to standing orders and directives, to the discredit of the military service.

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

Specifications: In that Second Lieutenant Kenneth J. Hanni, ***, did, at APO 6 Unit 3, between 18 October 1946 and 12 June 1947, deal in Black Market Activities, by selling

cigarettes, purchased from Army Exchange Service, to Korean Nationals at a profit, contrary to standing orders and directives.

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and Specifications 2 and 3 thereunder, guilty of Charge II and Specifications 2, 3 and 4 thereunder and guilty of Charge III and its specification. He was found guilty of Specification 1 of Charge I except the words, "One radio, of the value of about \$47.50" and the words, "of a total value of more than \$50.00," substituting therefor the words, "Of a total value of more than \$20.00," and guilty of Specification 1 of Charge II except the words, "One radio, of the value of about \$47.50" and the words, "of a total value of more than \$50.00," substituting therefor the words, "Of a total value of more than \$20.00." No evidence of any previous conviction was introduced. He was sentenced "to pay to the United States a fine of one thousand dollars, to be dismissed 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 ten years." The reviewing authority approved only so much of the sentence as provided for dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years and forwarded the record of trial for action under Article of War 48.

3. Evidence

About October, 1945, accused became Assistant Field Exchange Officer of Field Exchange 101, which was the main post exchange for the 63rd Infantry Regiment and was located at Kunsan, Korea. There were branch exchanges with various units of the Regiment and a warehouse which supplied all the regimental post exchanges. The warehouse was situated close by the main exchange in Kunsan. Accused being assistant field exchange officer, was manager of the exchange. As such, his duties were to receive and check merchandise, to make adjustment vouchers for overages and shortages on incoming shipments, to supervise the break-down of merchandise to the branch exchanges and to make invoices. He received the accounts of the branch exchanges when they came in at the end of each month and took care of the inventories. He also acted as bookkeeper of the exchange and had charge of the warehouse. Accused had "more or less of a free hand" in running the exchange and had been chosen for this position because of his "business and administrative training." He was 19 years of age at the time. Although Major Jesse O. Saffold was Field Exchange Officer of Field Exchange 101, he was not familiar with post exchange operations, "was only a figurehead" and admitted on the witness stand that he "did not know what was going on" in the exchange. Monthly sales in Field Exchange 101 were generally over \$100,000 (R 10-14,19,22,58-60,64,65).

Accused's office was in the main post exchange building in Kunsan

and he was quartered in a room in an adjacent building used for officer's quarters. Accused frequently worked on the books of the field exchange in his room and typed business letters there (R 21,22,35,55,60).

On 24 May 1947, Lieutenant Colonel John L. Reese, Inspector General of the 6th Infantry Division, in the course of an investigation into certain alleged irregularities in the management of the 63rd Infantry Regiment's post exchanges, interrogated accused under oath after informing him of his rights under the 24th Article of War. Colonel Reese detailed the substance of his conversation with accused as follows:

"*** The accused stated to me under oath that there had been an overage in the Post Exchange, Camp Hillenmeyer, during the month of December, and that this overage was divided between himself and the PX officer at Camp Hillenmeyer. The accused stated to me under oath that he received \$400 from this overage. On or about 25 May the accused turned over to me \$400.00 in Occupation currency, which he stated was the same \$400.00 divided from the inventory overage. This overage of some \$2116.00 was not indicated on the inventory sheet. The inventory sheet contained a discrepancy in Pall razor blades. 2,228 five cent packages of Pall razor blades were erroneously listed on the inventory sheet at one dollar per package. The accused stated to me under oath that he had no authority to divide this overage with the Post Exchange Officer at Camp Hillenmeyer.

"He further informed me that he was holding the money to take care of future shortages in the warehouse, for which he was responsible. He further testified that on or about 14 January, 1947, he caused to be delivered to the Camp Hillenmeyer Post Exchange some \$375.00 worth of occa-cola to take care of the \$400.00 that he had received the month before. This occa-cola was not placed on invoice, nor was it charged to the Post Exchange at Camp Hillenmeyer. On or about 25 May this \$400.00 in Occupation currency was turned over to me by the accused in the accused's room. The accused admitted to me under oath that he had sold cigarettes to Koreans, which he had obtained from the Post Exchange warehouse. The accused further admitted under oath that during the month of May he had sent \$500.00 to the United States. During the month of April he sent some \$400.00 to the United States. The accused testified under oath that he had sold quite a number of cigarettes in excess of his ration. On or about 26 May, I asked the accused if he had objection to Lt. Col. Ream accompanying him to his room and searching his room. He stated he had no objection. The accused stated to me under oath that a Korean house boy, Choe Bong Ili, or the office boy at the PX, had sold cigarettes for him. The accused testified that he received Occupation currency for cigarettes sold approximately ninety-eight per cent of the time.

"The accused further testified that he had sent his Korean

house boy to the warehouse with definite instructions to Sergeant O'Connor to let him have cigarettes. These instructions were not in writing. The accused testified further that he had received approximately \$700.00 from sources other than his monthly pay since being assigned to the 63rd Infantry Regiment. This figure did not include the \$400.00 in his possession." (R. 7-8)

Accused had "volunteered" information concerning "the \$400" after he had been presented with "the allegations" and stated that he still had the money in a Chinese trick box in his room and that he intended to hold it pending the outcome of an inventory for the next month to cover possible shortages in the warehouse. "About" 25 May, Colonel Reese accompanied accused to the latter's room and accused took the money out of the box and turned it over to the Colonel. Asked why he did not keep the money in the safe, accused replied that,

"I was not holding it to cover shortages at Camp Hillemeier, sir, I was holding it to cover shortages in the warehouse. It was in my room, because I thought it was the only safe place to keep it. I couldn't keep it in the safe with the rest of the money."

The post exchange at Camp Hillemeier was designated as Field Exchange 101-L, was a branch of Field Exchange 101 and was under the direct supervision of one Lieutenant Scott. The accused stated that the \$700 he had received from sources other than his pay while serving with the 63rd Infantry Regiment had been obtained from the sale of cigarettes to Koreans (R 9-11,13,15,27).

Lieutenant Colonel Evert E. Ream, Post Exchange Officer, 6th Infantry Division, aided Colonel Reese in the investigation into the affairs of the post exchanges of the 63rd Infantry Regiment. Upon examination of the records of Field Exchange 101, he noticed that the inventory sheets for Field Exchange 101-L for the month of December, 1946, carried 1795 packages of Pal double-edged razor blades and 433 packages of Pal single-edged razor blades multiplied by the price per carton of \$1.00 when they should have been multiplied by the price per package of 5 cents. This difference would have caused an overage of "\$2206.35" in Field Exchange 101-L. The overage actually shown for the month of December for that exchange was \$91.89. He also found that on the January inventory sheet for Exchange 101-L that these same items of merchandise were properly priced at five cents. This should have caused a shortage of "\$2,206.35" but the actual shortage shown was \$113.92. There was an erasure on this inventory sheet as to the amount of cash sales for the month. Also the cash sales slip for this month was dated 28 January and was entered on the books as of 26 January, the latter date being the date of the inventory (R 15,16).

Colonel Ream testified that

"I took Lt. Hanni in my jeep to his room, and went into his room, and I asked him questions relative to all of the items in his room. Those items that he said he owned I did not mention to him. The items that he told me he did not own and were not on invoice from the Exchange are those that I mentioned. Relative to the Post Exchange items that he said he owned and had purchased, those I did not mention."

Among the items in accused's room, which according to accused's statements to the Colonel belonged to the exchange, were an electric heater and a silk brocaded Chinese coat. The heater was on the floor, in plain view, and accused told Colonel Ream that he had taken it from the exchange so that he might keep warm. The silk coat was in accused's closet and as to this item accused stated that he had taken the coat home to examine it, had set it aside waiting to make up his mind whether or not he wanted to purchase it, had finally decided that he did want to purchase it but had not paid for it "as yet." The coat had been in his possession only a few days. Silk coats are "normally" disposed of by lottery. Accompanied by accused, Colonel Ream turned the coat over to the office of Exchange 101. At this time, accused requested permission to pay for 25 cartons of cigarettes which he had taken from the exchange and for which he had not previously paid. Permission was granted, and accused paid the cashier for 25 cartons of cigarettes (R 17-20,22).

Colonel Ream identified Prosecution Exhibit 1 as a true copy of an inventory sheet of Field Exchange 101-L. This exhibit was admitted in evidence without objection by the defense and shows the erroneous listing of the prices of Pal razor blades referred to above. It is dated 26 December 1946. The Colonel also identified Prosecution Exhibit 2 as a true copy of "one page" from the journal of Field Exchange 101. This exhibit was likewise admitted in evidence without objection by the defense. It contains an entry dated 26 December showing a credit to Exchanges "101-X; 101-L; 101-N; 101-P; 101-Z for Dec." of a total overage of \$125.68 and a debit "To Warehouse" in the same amount (R 17; Prés Exs 1,2).

Sergeant Donald H. Martin was manager of Field Exchange 101-L. The "actual cash value" of the overage of that exchange for December, 1946, was \$850. This sum was "divided" between accused and Lieutenant Scott in the office of Field Exchange 101 in Kunsan. There were five persons present at the time the "division" was made; accused, Lieutenant Scott, Sergeant Martin, Sergeant O'Connor, and Sergeant Lewis. Nothing was said about keeping the transaction quiet and there was no appearance of secrecy. Lieutenant Scott "requested" that he be allowed to "hold" the full amount of the overage cash, but accused said that it should be kept in the main field exchange. They both agreed that there probably was an

error in the inventory and that it would probably show up in the inventory for the following month. The decision was finally made that they would each "hold" half the amount (R 26-28).

About 15 January 1947, accused sent 150 cases of Coca Cola to Field Exchange 101-L to "replace" the amount of cash which he had held back. This Coca Cola came from the warehouse and was not accompanied by an invoice. It was sold in Exchange 101-L and the proceeds were "put in regular PX money." The price of Coca Cola was \$2.55 per case (R 27-29).

When the January, 1947, inventory for Field Exchange 101-L was figured against the accountability of that exchange, it was discovered that there was a shortage of approximately \$3200. According to Sergeant Martin, Lieutenant Scott replaced this shortage with actual cash before the final inventory for that month was turned in to Field Exchange 101. Field Exchange 101-L kept a daily sales analysis sheet, made out in duplicate. One copy was kept in the files of Exchange 101-L and the other was sent to the main exchange, 101. Since the daily sales analysis sheets for the last five days of the month of January did not show the cash added by Lieutenant Scott, Sergeant Martin made out additional sheets for the five days in question, showing the new balance, and made the usual distribution of them. The retained copies of the old sheets were burned by order of Lieutenant Scott. Sergeant Martin thought accused knew "of these changes being made", but this belief was based solely on his having sent a copy of each of the original five sales analysis sheets to the main exchange. The inventory of Field Exchange 101-L for the month of January as finally submitted to the main exchange showed a shortage of only \$115 (R 27, 29-32).

Sergeant Harry G. O'Connor was the noncommissioned officer in charge of the field exchange warehouse. On one occasion, on accused's order, he delivered 150 cases of Coca Cola to Sergeant Martin without an invoice being prepared therefor. During the winter, "when it was pretty cold" and "we did not have any wood to put on the fire", Sergeant O'Connor sent three heaters to the exchange office without an invoice at the request of accused. While taking inventory of the warehouse, accused picked up a brocaded robe and, from what he said with respect to the robe, Sergeant O'Connor got the impression that accused was going to take it to the officers' quarters and show it to some of the officers. Accused said nothing about keeping the robe. "Several times," accused called Sergeant O'Connor and told him to give a Korean boy named Choi, Bong Ili, a certain quantity of cigarettes. The sergeant complied with these requests and never got an invoice or sales slip to account for the cigarettes, which were taken from stock. He was not paid for these cigarettes, but he had nothing to do "with handling the money," this being done in the exchange office. The largest amount of cigarettes he could recollect having given to Choi for accused was 15 cartons. Sergeant O'Connor generally kept duplicate invoices on all items that went out of the warehouse. He had no property "out on invoice" to accused. On numerous occasions he had

discussed post exchange affairs with accused in the latter's quarters (R 33-37).

According to Sergeant Martin, heaters sold in the post exchange for \$13.45 each and quilted Chinese coats for \$14.05 (R 28).

Private First Class Edward Sears was cashier of Field Exchange 101. On 28 May 1947, he made out an invoice to accused for 25 cartons of cigarettes and received from accused the full amount of the purchase price, \$18.75, in cash. This invoice was introduced in evidence without objection by the defense as Prosecution Exhibit 3. It is dated 28 May 1947 and bears the notation "Paid in Cash." Private Sears did not know whether 25 cartons of cigarettes had in fact been turned over to accused, but accused simply told him that he had the cigarettes and desired to pay for them (R 42,45, Pros Ex 3).

Choi, Bong Ili, a Korean national, had worked as an office boy in the office of Field Exchange 101. Accused sent him to the warehouse to get cigarettes some four times. He obtained the cigarettes from Sergeant O'Connor. He sold these cigarettes to a Korean for occupation script and turned the money over to accused. He did not sell any cigarettes for yen. The "largest amount" he obtained from the warehouse and sold to the Korean was about 25 cartons, for which he obtained 80 or 90 dollars. On one occasion, Choi himself bought eight or ten cartons of cigarettes from accused for which he paid 550 yen a carton. These cigarettes also came from the warehouse. Accused had told Choi that if he did not get "those" cigarettes, he would be "relieved from the office" (R 45-47).

On 26 May 1947, Choi told "an American Lieutenant Colonel" that he had sold cigarettes for accused only one time. This was a sale of ten cartons for which he obtained Korean yen in exchange. He "did not understand" the Colonel and thought the Colonel was referring to the cigarettes Choi himself had purchased from accused. On 3 July 1947, Choi was interrogated by "an American Major." He stated to the Major, "No sell cigarettes for American man to Korean man", "No sell cigarettes for Lt. Hanni", "No sell cigarettes for Korean yen", "No sell 10 cartons cigarettes for Lt. Hanni" and "No sell cigarettes any man." He made these statements because he "didn't understand the Major." Lieutenant Colonel Reese and Major Thomas D. L. Cronan, each of whom had questioned Choi with the results detailed above, were called to the witness stand by the defense. Both testified that Choi had not been placed under oath during the respective interrogations, that no interpreter was used but that Choi appeared to be able to understand questions propounded to him in English (R 49,51-54,56,57).

Major Saffold had seen a heater similar to those used in the field exchange office in accused's room during the month of April, 1947. At this time, the weather was such as to require a heater. The heaters

used in the office were "brought up" from the warehouse. Property was not supposed to be removed from the warehouse except on invoice or cash sales. Major Saffold had "bought a carton or two of cigarettes out of the warehouse." During the investigation of this case, he had refused to answer a question as to whether he had ever sold cigarettes to Koreans for yen. Major Saffold had taken over accountability for Field Exchange 101 at some time between 26 November and 12 December 1946. Field Exchange 101-L was "under" him, but nothing was brought to his attention concerning an overage or a shortage in the accounts of that exchange for the month of December. He did not think accused smoked (R 60-64).

On direct examination by defense counsel, Major Saffold, a witness for the defense, testified that prior to the disclosure on or about 26 May of the "alleged discrepancies," he had confidence in accused, was satisfied that accused "could discharge his duties" and had seen no reason for not giving accused "a free hand." Accused had begun to straighten out the business affairs of the exchange and had "set up a set of books that looked like you could make head or tails of, which it didn't seem like they had before." The Major was "very favorably impressed" with accused's "efficient manner of taking over." On cross-examination, Major Saffold again stated that he had confidence in accused "prior to May 26th." He was then asked if he had this confidence in him after that date, to which he replied that he did not, that he "had reasons not to" (R 58,62).

Accused, having been advised of his rights as a witness, elected to testify under oath in his own behalf as to Charge I and its Specifications. He stated that he was 19 years of age. He had "some business training" in high school and "three-quarters of accounting in college." With the exception of having been employed as a stock clerk in a Safeway grocery store after school hours, he had no business experience whatsoever. He had been Assistant Field Exchange Officer of Field Exchange 101 from the middle of October, 1946, until 24 May 1947.

Accused used an electric heater in his section of the field exchange office but, since it blew out the fuses, he moved it to his room to keep warm while he was working on exchange records. He intended to turn the heater in when it got warmer. It was placed in plain sight at the head of his bed. The heater was carried on the inventory, for when he counted the heaters in the warehouse he would add the one in his room to the total number. He "could have bought" the heater he had in his room and he "guessed" his use of it was not proper.

While accused was counting the Chinese robes in the warehouse, he picked out one that he liked and sent it to his quarters. He was going to show it to some of the officers and then decide whether to buy it. He intended to bring it back to the exchange if he did not buy it. When

Colonel Ream asked about the robe, accused decided "then" that since it was "a critical item" he would not be allowed to buy it. He therefore took it to the exchange office and, in the Colonel's presence, turned it in. He did not have time "to think about" the garment prior to that time, for it had been placed in his quarters on 24 May and he had been called away to Camp Hillenmeyer "in this investigation" that afternoon. He did not again see the robe until he returned to his quarters on 28 May in the company of Colonel Ream. These robes were sold by lottery in the branch exchanges. Accused did not consider that as a field exchange officer he had any priority for the purchase of such robes.

When Colonel Ream inspected accused's quarters, the Colonel went around the room and asked accused whether each item therein belonged to accused or to the exchange. Accused did not misrepresent "the picture" and in this respect testified,

"I imagine if I would have told him they were mine, he wouldn't have known any different. The ones that were mine I told him; the ones that were Post Exchange, I told him."

Accused told the Colonel that the heater and the robe were post exchange property, that he was using the heater "to keep warm" and that he had taken the robe to his quarters with the intention of buying it but that he had not yet paid for it.

Concerning the \$400 "split" accused testified:

"On the 26th, I believe it was, of December, the inventory of 101-L was turned in to my office. All these branches turn it in to us to have the accounts reconciled. At this time with the amount of cash they brought in with it, they would have had \$850.00 overage. Lt. Scott and I discussed this, and decided that it had to be an error, because when they are billed items for fifteen cents and sell them for fifteen cents, they don't make \$850.00 in a month, so we decided to withhold this money until the next month. We were sure that the error would show up during the next month's business. At first, because I was taking the responsibility for it, I told him that I would have to keep all the money in the Field Exchange office, but Lt. Scott says that since it was his Post Exchange that was over, he should keep the money. We finally compromised and we each took half. I kept the \$400.00 in the office. I put it in an envelope and put it in a box in my desk. Now, about the 10th of January, I believe it was, I was checking over this inventory of 101-L, and I discovered that they had an enormous quantity of razor blades, according to their inventory. When I checked up, I found they couldn't possibly have had that many. I saw

they had mis-priced their razor blades. Actually it was nickel packages instead of cartons, so I notified Lt. Scott of this error. At the same time I told him that I would chip in \$400.00 worth of coca-cola to compensate for the \$400.00 of his money - of his Exchange money that I had in the office at the time, so about the 15th of the month Sergeant Martin came in and picked up the coca-colas.

* * *

"I intended to put the \$400.00 into the warehouse, to compensate for the coca-cola going out, but we had a small overage at the beginning of the month, because of some mistake that KBC had made and we received a few items during the month, a few small items, overages I mean, in these items which made us over for the month, so at the end of the month, it wasn't necessary to put this \$400.00 in to keep within our one per cent, so, because of the many shortages that we had been having - we had two or three practically every month, and my personnel were inexperienced, I decided to withhold that \$400.00 to cover any shortages that we may have in the future. Of course, if we did not have any shortages before I went home, I intended to turn it over to the Major, or put it back into the Post Exchange." (R 70)

He did not return the \$400 in cash to Exchange 101-L because there was a small overage at the warehouse "so far that month" and;

"*** I meant to hold it in case we were within our one per cent at the end of the month, I meant to hold this \$400.00 on my future shortages, and it was much easier to hold \$400.00 than it was to hold \$400.00 worth of coca-cola." (R 77)

When Lieutenant Scott brought the January, 1947, inventory of Field Exchange 101-L to accused, he noticed that there was an "enormous shortage." "It was so far short that it just wasn't possible." The mistake in pricing razor blades on the December inventory would have caused a shortage of only about \$1000. Accused told Lieutenant Scott to check the inventory again. The second time the inventory was turned in there was "about a hundred dollar shortage." Accused did not tell Lieutenant Scott how to make up the shortage and had no idea how it was made up. "If" he had told Lieutenant Scott to alter his cash sales records, such advice would have been given only to "cover" the \$400 which Lieutenant Scott had retained and which accused "presumed" Lieutenant Scott had applied to the January account of Field Exchange 101-L. Accused would not have noticed the sales analysis sheets submitted by Exchange 101-L, for, although he was the bookkeeper of the main exchange, these sheets were not entered in the books. Sales analysis sheets "are only the departmental breakdown of cash that is turned in." "They were just placed in the file. *** What I was interested in was the cash that came in, not the departmental break-down." At the time accused received the first January inventory from Exchange 101-L, that exchange

had not yet turned in "their end of the month cash." They had about a week's cash on hand and this was turned in at the time the second inventory was submitted. The \$400 remained in the exchange office for a while but accused finally took it to his room and put it in a little tin box. This was done because he had decided that the \$400 "wasn't safe" in the office and he "didn't want it laying around." "Nobody ever bothered my room. There was people always coming and out of the office." He did not place the money in the safe in the exchange office for:

"I didn't want to get it mixed up with our other money, sir. For instance, if an inspector ever came in and counted the money in the safe, there would be too much money there. There would be more money than the records would show. It would be very embarrassing."

Accused did not intend to "convert" the \$400. This money was never carried on his person and was never mixed with accused's personal funds or with other funds (R 65-81).

4. Discussion

Specification 1, Charges I and II

Under Specification 1 of Charge I, accused was found guilty of having embezzled an electric air heater and a quilted Chinese silk coat, the property of the Army Exchange Service, in violation of Article of War 93. Under Specification 1 of Charge II, he was found guilty of having embezzled the same property in violation of Article of War 95.

Accused was the Assistant Field Exchange Officer of Field Exchange 101, the main field exchange of the 63rd Infantry Regiment. He acted as manager of this exchange and also had charge of the exchange warehouse. Colonel Ream, while participating in an investigation into the manner in which the business affairs of the post exchanges of the 63rd Infantry Regiment had been conducted, took accused

"*** in my jeep to his room, and went into his room, and I asked him questions relative to all of the items in his room. Those items that he said he owned I did not mention to him. The items that he told me he did not own and were not an invoice from the Exchange are those that I mentioned. Relative to the Post Exchange items that he said he owned and had purchased, those I did not mention."

Among the items in accused's room, which according to accused's admissions to Colonel Ream belonged to the post exchange, were the heater and Chinese coat in question. Accused informed the Colonel that the heater

had been taken from the exchange for the purpose of heating his room and that he had taken the coat a few days before for examination prior to deciding whether he would purchase it. He had finally decided to purchase it but had not paid for it "as yet." The heater was on the floor of accused's room, in plain view, and the coat was in a closet. Colonel Ream, accompanied by accused, turned the coat over to the office of Exchange 101.

Accused was billeted in a room in a building used for officers' quarters located adjacent to the main field exchange building in which he had his office. He frequently performed clerical functions relating to field exchange matters in his room. Major Saffold, Field Exchange Officer of Exchange 101, had seen the heater in accused's room in April 1947 and observed that the weather at this time was sufficiently severe to require heating. During the winter, when it was cold and there was no wood to put on the fire, the sergeant in charge of the warehouse had delivered three heaters to the exchange office without an invoice at the request of accused. The sergeant had seen accused take the Chinese coat from the warehouse and, from accused's remarks on this occasion, had received the impression that accused was going to take it to the officers' quarters and display it to some of the officers.

Accused testified that he had moved the heater from the exchange office to his room to keep warm while working on field exchange records and that he intended to turn it in when the weather got warmer. The heater was carried on inventory. As to the Chinese coat, he testified that he was going to show it to some of the officers and then decide whether to buy it. He did not have time "to think about" the garment prior to the time Colonel Ream saw it in his room on 28 May 1947, for he had been called away to attend the investigation at Camp Hillenmeyer on 24 May, the day the coat had been placed in his quarters, and he had not returned until 28 May. Upon his return, he decided that since the coat was a "critical" item he would not be allowed to buy it and he therefore turned it in. Coats of this type were sold by lottery. When Colonel Ream inspected accused's quarters, the Colonel went around the room and asked accused whether each item therein belonged to accused or to the exchange. Accused did not misrepresent the picture and in this respect testified:

"I imagine if I would have told him they were mine, he wouldn't have known any different. The ones that were mine I told him; the ones that were Post Exchange, I told him."

We note that on 24 May, accused was interrogated in a formal investigation conducted by Colonel Reese and that on the day Colonel Ream "took" accused to his room, accused paid the cashier of Exchange 101 for 25 cartons of cigarettes. The receipt for this payment is dated 28 May 1947.

In CM 319591, Pogue, the Board of Review had occasion to say:

"In embezzlement as in larceny it must be shown

beyond a reasonable doubt that accused intended to deprive the owner permanently of his goods (Commonwealth v. Este, 140 Mass. 279, 284; Moore v. United States, 160 U.S. 268, 269; Hubbard v. United States, 79 F. (2d) 850, 853; CM 205811, Fagan, 8 BR 229, 232; CM 205920, McCann, 8 BR 239, 245). This proposition is not to be confused with those cases where accused has 'borrowed' moneys entrusted to him by others with the intention of replacing such moneys with other funds at a later date. This may be an embezzlement of the funds so converted, for the intent to replace them with an equivalent amount is but an intent to make restitution, which is not a defense to embezzlement (CM 253054, Howard, 34 BR 235, 250; CM 276435, Meyer, 48 BR 331, 338)."

From all that appears in this record of trial, we have no reason to suppose, nor do we believe the court was warranted in inferring, that accused had possession of the electric heater belonging to the Army Exchange Service for any purpose other than the merely temporary one of heating his room. At no time did accused claim ownership in the heater or deal with it in any way inconsistent with an acknowledgment of a superior right to possession in the field exchange over which he exercised control. There is not a scintilla of evidence indicating an intention on the part of accused to permanently deprive the exchange of its property in the heater. Consequently, even though accused's use of the heater may have been improper, such use did not constitute the offense of embezzlement.

Although the Chinese coat was found in a closet in accused's room, there is no indication that it had been placed there for purposes of concealment. Indeed, all the inferences are to the contrary. Accused had taken it from the warehouse in the presence of the sergeant in charge of that installation and had given the sergeant an explanation for the taking which did not vary materially from accused's later assertions in this respect on the witness stand. Without any prompting whatsoever, accused readily admitted to Colonel Ream that the coat belonged to the Army Exchange Service and detailed the circumstances under which it had come into his possession. We think it may be said that every shred of evidence relating to the coat is as consistent with accused's professed intention of examining it with a view to purchase as it is with an inference that he intended to permanently appropriate it to his own use without paying for it. This being the state of the proof, accused's guilt of embezzlement of the coat may not be predicated upon the single circumstance that it was found in the closet of his room.

At the time the coat was found in his room, accused told Colonel Ream that he had made up his mind to buy it but that he had not paid for it "as yet." Coats of this type were sold by lottery and accused was apparently aware of the impropriety of acquiring the coat in question by direct purchase. The question presented for our consideration, then, is whether accused's retention of the coat in his possession after he had formed the

intention of effecting an illegal purchase thereof constituted the crime of embezzlement. His subsequent abandonment of this intention would, of course, be no defense.

Respecting the element of intent in embezzlement, it has been held:

"Criminal intent in embezzlement is not based on technical mistakes as to the legal effect of a transaction honestly entered into, or nice distinctions in weighing the authority of the officers involved. There can be no embezzlement if the mind of the person doing the act is innocent. There can be no embezzlement without a wrongful purpose" (Lawver v. State, 221 Ind. 101, 46 N.E. (2d) 595).

In a sense, it may be said that accused's intent to acquire the coat by direct purchase was generally wrongful and that his mind was bent upon evading the regulations restricting the sale of "critical" items. But is this the "guilty mind," the "fraudulent purpose," which is the hallmark of every embezzlement? Stated otherwise, did accused intend to deprive the owner permanently of his property, without his consent? We think he did not, for where property is placed upon the market for sale, even though that market be restricted for some particular reason by the seller, the seller has impliedly agreed that his proprietary interest shall become subject to a change of specie. He has agreed to take a price in money or other valuable consideration in place of the article sold and, even if the sale is consummated in violation of the seller's instructions, such sale does not become void but is voidable only. It could hardly be said that the seller's subsequent avoidance would fasten upon one who bought with notice of the violated restrictions the odium of embezzlement. It follows, we believe, that the proof herein fails to show that accused harbored a felonious intent with respect to the Chinese coat found in his quarters. His intent to illegally purchase the coat was something more than a mere intent to make restitution, which latter intent, as we have seen, is not a defense to embezzlement. (See United States v. Titus, 64 F. Supp. 55.)

For the foregoing reasons, we are of the opinion that the findings of guilty of Specification 1 of Charge I and of Specification 1 of Charge II should be disapproved.

Specifications 2 and 3, Charges I and II

Under Specification 2 of Charge I, accused was found guilty of the embezzlement of 150 cases of Coca Cola, the property of the Army Exchange Service, Kunsan Branch, Kunsan, Korea, in violation of Article of War 93. Under Specification 3 of Charge I, he was found guilty of the embezzlement of \$400, the property of the Army Exchange Service, Field Exchange Number 101-L, Camp Hillenmeyer, Korea, in violation of Article of War 93. Specifications 2 and 3 of Charge II, of which accused was also found guilty,

respectively alleged the embezzlement of the same items in violation of Article of War 95.

The main post exchange for the 63rd Infantry Regiment, Field Exchange 101, was located at Kunsan, Korea. This exchange had several branches, one of which was Field Exchange 101-L, located at Camp Hillenmeyer. Exchange 101-L was under the direct supervision of one Lieutenant Scott. Close by the main exchange at Kunsan was located the exchange warehouse which supplied all the regimental post exchanges. Accused, as Assistant Field Exchange Officer of Field Exchange 101, was manager of that exchange. He also acted as bookkeeper of the exchange and had charge of the warehouse. His duties were to receive and check merchandise, to make adjustment vouchers for overages and shortages on incoming shipments, to supervise the breakdown of merchandise to the branch exchanges and to make invoices. He received the accounts of the branch exchanges when they came in at the end of each month and took care of the inventories. Major Jesse O. Saffold was Field Exchange Officer of Field Exchange 101, but he was not familiar with post exchange operations, "was only a figurehead" and "did not know what was going on" in the exchange.

The "actual cash value" of the overage of Field Exchange 101-L for the month of December, 1946, was \$850. At a conference held in the office of the main field exchange at Kunsan, Lieutenant Scott "requested" that he be allowed to "hold" the full amount of the overage cash, but accused said that it should be kept in the main field exchange. The two officers both agreed that there probably was an error in the inventory and that it would probably show up in the inventory for the following month. The decision was finally made that they would each "hold" half the amount. This conference was held in the presence of three enlisted men. There was no appearance of secrecy and no admonitions not to speak about the transaction were made. The December overage of Exchange 101-L as shown on the records was \$91.89. The journal of Exchange 101 contained an entry dated 26 December showing a credit to Exchanges "101-K; 101-L; 101-N; 101-P; 101-Z for Dec." of a total overage of \$125.68 and a debit to the warehouse in the same amount. About 15 January 1947, accused sent 150 cases of Coca Cola to Exchange 101-L to "replace" the amount of cash which he had held back. This Coca Cola came from the warehouse and was not accompanied by an invoice. Property was not supposed to be removed from the warehouse except on invoice or cash sales. The Coca Cola was sold in Exchange 101-L and the proceeds were "put in regular PX money."

The January, 1947, inventory for Exchange 101-L initially showed a shortage of approximately \$3200. About \$1200 of this shortage was apparently due to an error in the inventory for the previous month in which a number of packages of razor blades were carried at the price per carton instead of the price per package. According to the noncommissioned officer who acted as manager of Exchange 101-L, this shortage was replaced by Lieutenant Scott with actual cash before the final inventory for that month

was turned in to the main exchange. In order that the records of Exchange 101-L would show the new balance caused by this addition of cash, new daily sales analysis sheets were made out for the last five days of the month of January and the usual distribution was made of them. Sales analysis sheets were made out in duplicate by Exchange 101-L, one copy being sent to Exchange 101 and the other being retained in the files of Exchange 101-L. The retained copies of the old sales analysis sheets for the five days in question were destroyed at the direction of Lieutenant Scott. The duplicate copies of these sheets had been sent to Exchange 101. The January inventory sheet for Exchange 101-L bore evidence of an erasure on the entry as to the cash sales for that month. The cash sales slip for this month was dated 28 January and was entered on the books as of 26 January, the latter date being the date of the inventory. The shortage shown on the January inventory as finally submitted to Exchange 101 was only \$113.92.

During the interrogation of accused by Colonel Reese and after accused had been presented with "the allegations," he "volunteered" the information that he had "the \$400" in a Chinese trick box in his room and stated that he was holding it to cover future shortages in the warehouse. Later, "about" 25 May, Colonel Reese accompanied accused to the latter's room and accused took the money, which was in occupation currency, out of the box and turned it over to the Colonel. Accused told the Colonel that the money was kept in his room because he thought it was the only safe place to keep it.

Accused testified that when, in December 1946, he and Lieutenant Scott discussed the \$850 overage in the December inventory of Exchange 101-L, they determined that "it had to be an error" and decided to "withhold" the money until the next month. Accused first told Lieutenant Scott that since he, accused, "was taking the responsibility for it," he would have to keep all the money in the main exchange office. They finally compromised and each took "half." Accused put "the \$400" in an envelope and put the envelope in a box on his desk. About the tenth of January, in checking the inventory of Exchange 101-L for the month of December, 1946, accused noticed the error in pricing razor blades. He informed Lieutenant Scott of this error and sent him \$400 worth of Coca Cola from the warehouse to replace the \$400 in cash which he had withheld. He replaced the case with Coca Cola because there was an overage at the warehouse and it was "much easier to hold \$400 than it was to hold \$400 worth of Coca Cola." He intended to retain the cash to apply against future shortages at the warehouse. There had been many shortages at that installation due to the inexperience of personnel. If no shortages occurred before accused "went home," he intended to turn the money over to the exchange officer or put it back into the exchange. The warehouse shortage for the month of January was within the one percent allowance and it was therefore unnecessary to use the \$400 at that time.

According to accused's testimony, when Lieutenant Scott brought the January, 1947, inventory of Exchange 101-L to him, accused observed that it disclosed an "enormous shortage," one that "just wasn't possible." He therefore instructed Lieutenant Scott to check the inventory again and when the second inventory was submitted the shortage was only "about a hundred dollars." He did not tell Lieutenant Scott how to make up the shortage and had no idea how it was made up. "If" he had told Lieutenant Scott to alter his cash sales records, such advice would have been given only to "cover" the \$400 which Lieutenant Scott had retained and which had presumably been applied to the January account of Exchange 101-L. Accused would not have noticed the sales analysis sheets submitted by Exchange 101-L, for these sheets, being merely the departmental breakdown of the cash turned in, were not entered in the books, accused being interested only "in the cash that came in, not the departmental breakdown." The "end of the month cash" of Exchange 101-L had not been turned in at the time accused received the first January inventory from that exchange.

Accused further testified that the \$400 remained in the exchange office for a while but that he finally took it to his room and put it in a little tin box. This was done because, since many people had access to the office, he decided that it wasn't safe there. He did not place the money in the safe in the exchange office, for he "didn't want to get it mixed up with" the money of Exchange 101 and feared that an inspection of the safe would show that "there would be too much money there." Accused did not intend to "convert" the \$400 and never carried it on his person or commingled it with funds of his own or with other funds.

In our discussion of the legal sufficiency of the finding that accused embezzled 150 cases of Coca Cola, the property of the Army Exchange Service, Kunsan Branch, Kunsan, Korea, we will assume that the designation "Kunsan Branch" was meant to include the exchange warehouse at Kunsan which supplied the various post exchanges of the 63rd Infantry Regiment and over which accused had control. The evidence clearly establishes that accused caused 150 cases of Coca Cola to be sent from this warehouse, without invoice, to Exchange 101-L at Camp Hillenmeyer for the purpose of "replacing" the amount of \$400 which accused had "withheld" from a cash overage of that exchange for the month of December 1946. This exchange was a branch of the main regimental exchange of which accused was manager. It is undisputed that this Coca Cola was sold by Exchange 101-L in the regular course of its business and that the proceeds were placed in its account. The question, then, is whether this Coca Cola transaction amounts to an embezzlement.

It has been traditionally held that where one has applied property, in specie, to the use of its general owner, even though, in good or bad faith, he has thereby deprived another who might be considered a special

owner of the property of its use, he cannot be deemed guilty of a larceny or embezzlement thereof unless at the time of such application the special owner had a right of possession superior to that of the general owner in the nature of a lien or other exclusive right to control the disposition of the property. This rule is an application of the principle that both larceny and embezzlement are crimes requiring an intent to deprive the "owner" permanently of his property without his consent. (Regina v. Holloway, 3 Cox CC. 241; 31 LRA (NS) 822; see for cases where special owner has superior right, Commonwealth v. Greene, 111 Mass. 392; 58 ALR 330; CM 324927, Bowen.) In Regina v. Holloway, a worker in a tannery clandestinely took skins belonging to the tannery which had been dressed by another workman with the intention of delivering them to the foreman so that he would be paid for the work done on them as though they had been dressed by him. It was held that there was no larceny of the skins, for there was no intent to deprive the tannery of its property in them. Since the rule in question deals with one of the fundamental elements of the crimes of larceny and embezzlement, its effect may not be dissipated by any reliance upon the theory that the accused, as against the particular owner alleged in the pleadings, had no legal right to apply the property in the manner shown by the proof. The allegation of ownership has only to do with the identification of the property made the subject of the larceny or embezzlement charge, the pleadings and proof being sufficient in this respect if it is shown that the alleged owner had the merest and most temporary form of special interest in the property in question (CM 319858, Correlle, and cases there cited). Thus it has been held that one may be guilty of stealing from a thief property which the latter has himself stolen (Wharton's Criminal Law, 12th Ed., sec. 1186) and that, in embezzlement cases, it is no defense to the bailee that the title of the bailor was wrongful (CM 313165, Hunter), for in these cases the property under consideration is identified by the tag of ownership found in the allegations and accused's felonious intent is shown by his having applied the property to his own use or to the use of a stranger to the title or right of possession therein. It could hardly be said, however, that an accused could be held guilty of larceny from a thief of property stolen by the latter where such accused intended, at the time of the taking, to restore the property to the true owner.

In the instant case, it is obvious that accused applied the Coca Cola to the use of the general owner thereof, the Army Exchange Service, when he sent it to Exchange 101-L which was a sales outlet of that Service. The warehouse, which had thereby been deprived of the Coca Cola, was also part of the Army Exchange Service and there was no showing that the right of possession of the warehouse in the Coca Cola was, by way of lien or otherwise, superior to the general proprietary interest therein of the mentioned Service. True, when accused sent the Coca Cola to Exchange 101-L, he must have known that it would there be sold, that it would thus become subject to a change of specie and, therefore, that the Army Exchange Service would be deprived of the Coca Cola, as such.

But, as in the case of the Chinese coat, this property was intended to be sold and it must be considered that the owner had consented to such a change. We might also point out that even if, upon all the evidence, it were proved beyond a reasonable doubt that accused had shipped the Coca Cola to Exchange 101-L without an invoice as a means of embezzling other property of the Army Exchange Service in the future or for the purpose of covering up such an embezzlement in the past, this would not establish an embezzlement of the Coca Cola (Commonwealth v. Este, supra). In our opinion, the finding of the court herein that accused embezzled the Coca Cola is not warranted by the evidence.

The finding that accused embezzled the \$400 "withheld" by him from the December, 1946, overages of Exchange 101-L must be discussed from two different aspects; first, did his exercise of control over the money as a result of and immediately after his conference with Lieutenant Scott constitute the offense of embezzlement and, second, if not, did the circumstances of his subsequent retention of the money in his possession until it was found in a box in his quarters by Colonel Reese afford sufficient evidence of his guilt of that offense? Since it appears that accused exercised a considerable measure of supervision over the business affairs of Exchange 101-L, it may be said that he was capable of committing an embezzlement of its assets as well as a larceny thereof (CM 317327, Durant, 66 BR 277,309).

We must answer the first proposition in the negative. The meeting between accused and Lieutenant Scott in the office of the main field exchange, at which meeting the two officers decided that they would each "hold" half the December overages of Exchange 101-L, took place in the presence of three enlisted men under conditions indicating a complete absence of the secrecy and fraud generally attendant upon a contemplated embezzlement. Indeed, since upon all the evidence concerning this episode the inference that accused, at the time of this conference, took his "half" of the overages of Exchange 101-L solely for the purpose of applying it to future shortages is as strong if not stronger than an inference that he intended to apply it to his own or another use, we must assume that the court, giving accused the benefit of every reasonable doubt, accepted the former inference and rejected the latter. Accused stated that he had intended to apply the \$400, which had come from Exchange 101-L, to future shortages in the warehouse. Both installations were part of the Army Exchange Service, the general owner of the money, and, as in the case of the Coca Cola, it was not shown that Exchange 101-L had any right in the money superior to that of the parent organization. Accused's guilt of embezzlement of this money, therefore, cannot be predicated upon his intention of building up a financial reserve to apply against future shortages in the warehouse.

As to the second proposition, it appeared that accused had received the \$400 in December, 1946, and that it was in a box in his room "about" 25 May 1947 when he turned it over to Colonel Reese. Before turning it

over to the Colonel, accused had informed him of its whereabouts and had "volunteered" a full explanation as to how it happened to be in his room, stating that he intended to hold it against future shortages at the warehouse. This information had been given to the Colonel after accused had been presented with "the allegations," but it did not appear that these "allegations" included an accusation of embezzlement of the \$400. Accused testified that the money had never been commingled with his own or other funds and there was no evidence that it had been so commingled. There was no evidence that accused had ever done anything with the money other than remove it from his office to his room. Accused testified that he had not intended to convert the money and that he had intended to apply it to future shortages in the warehouse. If no shortages occurred before he "went home," he was going to turn the money over to the exchange officer or put it back into the exchange. No proof inconsistent with this expressed intention of accused with regard to the eventual disposition of the \$400 appears in the record of trial. He had not placed the money in the safe in the main post exchange office, for he feared that if it had been discovered there he would have encountered difficulty in explaining the resulting overage in the account of the main exchange.

In Commonwealth v. Este, cited supra, Justice Holmes, while on the bench of the Supreme Judicial Court of Massachusetts, said:

"Embezzlement retains so much of the character of larceny that it is essential to the commission of the crime that the owner should be deprived of the property embezzled by an adverse holding or use. No doubt questions may arise as to what is a sufficient deprivation or adverse holding ***. But the principle remains; and when property is held at every moment as and for the master's property, fraud as to the source from which it comes, or fraudulent intent as to something else, is not a sufficient substitute for the missing element." (Underlining supplied.)

In the instant case a conclusion that accused held the \$400 in a manner adverse to the interest of the Army Exchange Service would necessarily rest upon a mere suspicion as to what he intended to do with the money in the future. Upon such a conjecture, a conviction of embezzlement cannot properly be rested. Since it appeared, from credible evidence emanating from a source other than accused not discernibly prone to a contravention of the truth, that the circumstances surrounding accused's initial withholding of the \$400 were as consistent with accused's innocence of the crime of embezzlement as with his guilt thereof and that accused had turned over the money, apparently in its original form, not merely by way of restitution or return of the property but while asserting, which assertion was not controverted by any evidence of probative force, that he had held it at all times for the use of the general owner thereof, there is neither occasion nor warrant for an application of the presumption of embezzlement which might otherwise have arisen from accused's

failure to account for the money in the journal of Exchange 101 (State v. McCormick, 70 RI 339, 38A(2d) 777; see State v. Christiansen, 98 Utah 778, 94 P (2d) 472, 475; CM 320308, Harnack).

The evidence relating to the \$3200 shortage in the January, 1947, inventory of Exchange 101-L was apparently introduced for the threefold purpose of showing that the affairs of that Exchange had been conducted in a generally fraudulent manner, that accused was a participant in this fraud and that accused should have replaced the \$400 "withheld" by him upon learning of the shortage. However, it appeared that this shortage was corrected shortly after it came to accused's attention, which would have obviated any practical necessity for applying the \$400 to the account of Exchange 101-L at that time, and the proof as to accused's knowledge of the purported financial manipulations of Lieutenant Scott with respect to the shortage was so conjectural as to lend no material support to the court's conclusion that accused had formed the intention of embezzling the \$400. Although accused's actions with respect to this money may have been contrary to directives governing the proper conduct of post exchange business (see par 20,21, AR 210-65, 12 June 1945), they did not, we think, amount to an embezzlement (CM 271265, Weed, 46 BR 79, 85).

Upon consideration of the foregoing application of the law of embezzlement to the evidence adduced with respect to Specifications 2 and 3 of Charges I and II, we are of the opinion that the findings of guilty thereof should be set aside.

Specification 4, Charge II, and Charge III and its Specification

Under Specification 4 of Charge II accused was found guilty of dealing in black market activities between 18 October 1946 and 12 June 1947 by selling cigarettes, purchased from the Army Exchange Service, to Korean nationals at a profit, "contrary to standing orders and directives," in violation of the 95th Article of War. Charge III and its Specification, of which accused was also found guilty, alleged the commission by accused of the same offense in violation of the 96th Article of War.

Accused had been Assistant Field Exchange Officer of Field Exchange 101 from the middle of October, 1946, until 24 May 1947. Choi, Bong Ili, a Korean national, testified that he had worked as an office boy in the office of Exchange 101. Accused had sent him to the warehouse to get cigarettes some four times. He obtained the cigarettes from the sergeant in charge of the warehouse and sold them to a Korean for occupation script which he turned over to accused. He did not sell any cigarettes for yen but on one occasion had himself bought eight or ten cartons from accused for which he paid 550 yen a carton. These cigarettes also came from the warehouse. The "largest amount" he had obtained from the warehouse

and sold to the Korean was about 25 cartons, for which he obtained 80 or 90 dollars. Accused had told Choi that if he did not get "those" cigarettes he would be "relieved from the office." During the course of one pre-trial interrogation, Choi had stated that he had sold cigarettes for accused only one time. This was a sale of ten cartons for which he obtained Korean yen in exchange. In a later pre-trial interrogation, he had stated that he "No sell cigarettes for American man to Korean man," "No sell cigarettes for Lt. Hammi," "No sell cigarettes for Korean yen," "No sell 10 cartons cigarettes for Lt. Hammi," and "No sell cigarettes any man." He testified that he had not understood the officers who had questioned him and that on the first interrogation he thought that the investigating officer was referring to the cigarettes Choi himself had bought from the accused. The officers who had conducted these investigations testified that Choi had not been placed under oath during the respective interrogations, that no interpreter was used but that Choi appeared to be able to understand questions propounded to him in English.

The sergeant in charge of the warehouse testified that "several times" accused told him to give a Korean boy named Choi, Bong Ili, a quantity of cigarettes. The sergeant complied with these requests and never got an invoice or sales slip to account for the cigarettes, which were taken from stock. He was not paid for these cigarettes, but he had nothing to do "with handling the money," this being done in the exchange office. The largest amount of cigarettes he could recollect having given to Choi for accused was 15 cartons.

After Colonel Ream had completed his inspection of accused's quarters, he accompanied accused to the main field exchange office for the purpose of turning in the Chinese coat. At this time, accused requested permission to pay for 25 cartons of cigarettes which he had taken from the exchange and for which he had not previously paid. Permission was granted, and accused paid the cashier \$18.75 for the 25 cartons of cigarettes. The cashier who received this payment testified that he did not know whether 25 cartons of cigarettes had in fact been turned over to accused.

In the course of a formal investigation conducted by the Inspector General of the 6th Infantry Division, accused, having been warned of his right not to incriminate himself, stated under oath that he had sold "quite a number of cigarettes in excess of his ration" that he had sold cigarettes, which he had obtained from the exchange warehouse, to Koreans, that Choi, Bong, Ili, had sold cigarettes for him, and that \$700 which he had received from sources other than his pay while serving with the 63rd Infantry Regiment had been obtained from the sale of cigarettes to Koreans.

A Korean yen is worth .066667 of one United States dollar (par 15, W D Circ. No. 64, 5 March 1946).

Although, standing alone, the testimony of Choi might not be sufficient

to establish the resale by accused of cigarettes purchased from the Army Exchange Service to Korean nationals, because of Choi's contradictory pre-trial statements viewed in the light of his status as an admitted accomplice (see CM 267651, Boswell, 44 BR 35,42; CM 259987, Loudon, 39 BR 109,114), we believe that such testimony was sufficiently corroborated by accused's admissions, the testimony of the sergeant in charge of the warehouse and the logical inferences to be drawn from the other evidence set forth above. No local "standing orders and directives" prohibiting the resale for profit to Korean nationals of cigarettes purchased from Army Exchange Service agencies were adverted to during the trial nor do any such local orders or directives accompany the record of trial. However, since the court may well have taken judicial notice of Army Regulations having to do with the matter under consideration, which regulations are "standing orders and directives" (CM 307097, Mellinger, 60 BR 199,215), we will do so here. Paragraph 13d, AR 210-65, 12 June 1945, prohibits the resale of merchandise purchased in an Army exchange except for "receiving actual reimbursement without profit for merchandise purchased at an exchange as a matter of economy convenience, or necessity as agent for other members of the military forces." We believe that the specifications here under discussion sufficiently allege a violation by accused of this regulation and that the court was warranted in concluding that the proof established beyond a reasonable doubt accused's guilt of the allegations contained in such specifications. The activities of accused therein decried fall within a class of unlawful conduct generally described as "Black Market" and constitute a violation of both the 96th and 95th Articles of War (CM 282694, Andrews, 24 BR (ETO) 11,15).

Character Evidence

On cross-examination of the defense witness Major Saffold, the prosecution elicited testimony to the effect that the Major did not have confidence in accused. Civilian counsel for accused contended, before the Board of Review, that the reception of this evidence was in contravention of the rule excluding evidence of accused's bad character where accused has adduced no evidence in his own behalf as to his good character and that the introduction of such evidence was error prejudicial to the substantial rights of accused (par 112b, MCM 1928; CM 300845, Robillard, 9 BR (ETO) 105,114).

We are of the opinion that the challenged testimony was elicited within the proper scope of cross-examination and that, therefore, it was not objectionable. In response to questions propounded to him by defense counsel on direct examination, Major Saffold had testified that prior to the disclosure on or about 26 May of the "alleged discrepancies," he had confidence in accused, was satisfied that accused "could discharge his duties" and had seen no reason for not giving accused "a free hand" in the operation of the field exchange. He also testified that he was "very

favorably impressed" with accused's "efficient manner of taking over." It is thus apparent that the defense, for its own purposes, had opened up the question of Major Saffold's trust in accused. It follows, then, that the defense had brought upon itself, and should reasonably have anticipated, whatever unfavorable effect upon accused's case may have resulted from the ensuing cross-examination upon this subject (par 121b, MCM 1928).

5. Records of the Department of the Army show that accused is 20 years of age and is unmarried. He is a high school graduate and attended the University of Utah for one third of a year, studying business administration. As a member of the ASTRP, he attended Stanford University for one third of a year and the University of Minnesota for two-thirds of a year. At the first institution he studied engineering and at the second Japanese. He was engaged in the study of Japanese for use in the Intelligence Service when he was called to active duty from the Enlisted Reserve Corps in October, 1945. On 3 July 1946, upon graduation from the Infantry Officers' Candidate School at Fort Benning, Georgia, he was appointed and commissioned a second lieutenant in the Army of the United States. He was assigned to the Pacific Theater by War Department Orders dated 15 July 1946. His efficiency rating for the 74-day period ending on 31 December 1946, during which period he performed duties as Assistant Field Exchange Officer, 63rd Infantry Regiment, was superior. In civilian life he had been employed as a clerk in a Safeway Store in Salt Lake City, Utah.

6. On 30 September 1947, Mr. Raymond R. Brady, an attorney from Salt Lake City, Utah, appeared before the Board of Review and made oral argument and filed a brief on behalf of accused. Careful consideration has been given to both argument and brief.

7. The court was legally constituted and had jurisdiction over accused and of the offenses. Except as noted above, 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 insufficient to support the findings of guilty of Charge I and its specifications and of Specifications 1, 2 and 3 of Charge II, legally sufficient to support the findings of guilty of Charge II and Specification 4 thereunder and of Charge III and its specification and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is mandatory upon conviction of an officer of a violation of Article of War 95 and is authorized upon conviction of an officer of a violation of Article of War 96.

Robert E. Silvers, Judge Advocate
Carlton E. McAfee, Judge Advocate
Robert E. Silvers, Judge Advocate

(310)

JAGK - CM 325523

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 5 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth J. Hanni (O-1340195), Infantry.

2. Upon trial by general court-martial this officer was found guilty of the embezzlement of an electric air heater and a Chinese silk coat, property of the Army Exchange Service (Spec. 1, Charges I and II), of the embezzlement of 150 cases of Coca Cola, property of the Army Exchange Service, Kunsan Branch, Kunsan, Korea (Spec. 2, Charges I and II) and of the embezzlement of \$400 in occupation currency, property of the Army Exchange Service, Field Exchange Number 101-L (Spec. 3, Charges I and II), in violation of Articles of War 93 and 95. He was also found guilty of dealing in black market activities, by selling cigarettes purchased from the Army Exchange Service to Korean nationals at a profit contrary to standing orders and directives, in violation of Articles of War 95 and 96 (Spec. 4, Charge II, and Charge III and its Spec.). No evidence of previous convictions was introduced. He was sentenced "to pay to the United States a fine of one thousand dollars, to be dismissed 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 ten years." The reviewing authority approved only so much of the sentence as provided for dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its specifications and of Specifications 1, 2 and 3 of Charge II, legally sufficient to support the findings of guilty of Charge II and Specification 4 thereunder and of Charge III and its specification and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof.

Accused was Assistant Field Exchange Officer of Field Exchange 101 from the middle of October, 1946, until 24 May 1947. At this time he was 19 years of age and had "some business training" in high school and "three quarters of accounting in college." Field Exchange 101 was the main post

exchange of the 63rd Infantry Regiment and was located at Kunsan, Korea. Connected with this exchange were several branch exchanges, one of which was Exchange 101-L located at Camp Hillenmeyer, and a warehouse which supplied all the regimental exchanges. The warehouse was situated close by the main exchange in Kunsan. Accused's duties were to receive and check merchandise, to make adjustment vouchers for overages and shortages on incoming shipments, to supervise the break-down of merchandise to the branch exchanges and to make invoices. He received the accounts of the branch exchanges when they came in at the end of the month and took care of the inventories. He also acted as bookkeeper of the exchange and had charge of the warehouse. He had "more or less a free hand" in running the exchange, for the Field Exchange Officer of Exchange 101 was not familiar with post exchange operations, "was only a figurehead" and admitted on the witness stand that "he did not know what was going on" in the exchange. Monthly sales in Field Exchange 101 were generally over \$100,000. Accused's office was in the main post exchange building in Kunsan and he was quartered in a room in an adjacent building used for officers' quarters. He frequently worked on the books of the field exchange in his room.

In December, 1946, Exchange 101-L had a cash overage of \$850. A Lieutenant Scott was in direct charge of this exchange. At a conference held between accused and Lieutenant Scott concerning this overage, each officer agreed to "hold" half the amount, both agreeing that the overage would probably show up in the inventory for the following month. This conference was held in the office of the main exchange in the presence of three enlisted men. There was no appearance of secrecy and no admonitions not to speak about the transaction were made. About 15 January 1947, accused noticed that Exchange 101-L had overpriced certain razor blades on the December inventory, causing a considerable shortage in its account, and thereupon sent that exchange 150 cases of Coca Cola to replace "the 400" which he had withheld. The price of Coca Cola was \$2.55 per case. The Coca Cola came from the warehouse and was not accompanied by an invoice. Property was not supposed to be removed from the warehouse except on invoice or cash sales. The Coca Cola was sold in Exchange 101-L and the proceeds were "put in regular PX money." Accused testified that he did not return the \$400 in cash to Exchange 101-L because there was a small overage at the warehouse that month and he meant to hold the money to apply to future shortages at the warehouse since "it was much easier to hold \$400 than it was to hold \$400 worth of Coca Cola." There were recurring shortages at the warehouse because of inexperienced personnel.

On 24 May 1947, during the course of a formal investigation into the business affairs of the post exchanges of the 63rd Infantry Regiment by the Inspector General of the 6th Infantry Division, Colonel Reese, accused "volunteered" the information that "the \$400" withheld by him from the December, 1946, overage of Exchange 101-L was in a box in his room

and gave the Colonel a full explanation of how it happened to be in his possession. At this time he stated that he intended to hold the money against future shortages at the warehouse. Later, Colonel Reese accompanied accused to the latter's quarters, where accused took the money, which was in occupation currency, out of the box and turned it over to the Colonel.

Accused testified that he kept the money in his room because he had decided that it "wasn't safe" in the exchange office. He did not place it in the safe in the exchange office, for he "didn't want it to get mixed up with" the money of Exchange 101 and feared that an inspection of the safe would show that "there would be too much money there." He did not intend to "convert" the \$400 and had never commingled it with his own funds or with other funds.

The Post Exchange Officer of the 6th Infantry Division, Colonel Ream, aided the Division Inspector General in the investigation into the management of the post exchanges of the 63rd Infantry Regiment. On 28 May he "took Lt. Hanni in my jeep to his room, and went into his room, and I asked him questions relative to all of the items in his room. Those items that he said he owned I did not mention to him. The items that he did not own and were not on invoice from the Exchange are those that I mentioned. Relative to the Post Exchange items that he said he owned and purchased, those I did not mention." Among the items in accused's room, which according to accused's statements to the colonel belonged to the exchange, were an electric heater and a silk brocaded Chinese coat. The heater was on the floor, in plain view, and accused told Colonel Ream that he had taken it from the exchange so that he might keep warm. The silk coat was in accused's closet and as to this item accused stated that he had taken the coat home a few days before to examine it, had set it aside waiting to make up his mind whether or not he wanted to purchase it, had finally decided that he did want to purchase it but had not paid for it "as yet." These coats were "normally" disposed of by lottery. Accompanied by accused, Colonel Ream returned the coat to the main field exchange office.

The heater had been seen in accused's room in April 1947 by the Field Exchange Officer of Exchange 101 who observed that at that time the weather was sufficiently severe to require heating. During the winter, when it was cold and there was no wood to put on the fire, the sergeant in charge of the warehouse had delivered three heaters to the office of Exchange 101 without an invoice at the request of accused. The sergeant had seen accused take the Chinese coat from the warehouse and, from accused's remarks on this occasion, had received the impression that accused was going to take it to the officers' quarters and display it to some of the officers.

Accused testified that he had moved the heater from the exchange office to his room to keep warm while working on post exchange records and that he intended to turn it in when the weather got warmer. He carried the heater on inventory. As to the Chinese coat, he testified that he was going

to show it to some of the officers and then decide whether to buy it. He did not have time "to think about" the garment prior to the time Colonel Ream saw it in his room on 28 May, for he had been called away to attend the investigation at Camp Hillemeier on 24 May, the day the coat had been placed in his quarters, and he had not returned until 28 May. When Colonel Ream inspected accused's quarters, the Colonel went around the room and asked accused whether each item therein belonged to accused or to the exchange. Accused did not misrepresent the picture and in this respect testified, "I imagine if I would have told him they were mine, he wouldn't have known any different. The ones that were mine I told him, the ones that were Post Exchange I told him."

Upon careful consideration of all the foregoing evidence, I am of the opinion that the court did not have before it sufficient proof to warrant a conclusion, based on a moral certainty, that accused intended to deprive the Army Exchange Service permanently of its property in the \$400, the electric heater, or the Chinese coat. As to the 150 cases of Coca Cola, it appears affirmatively that the general owner thereof, the Army Exchange Service, actually was not deprived of its proprietary interest in this merchandise. Therefore, I am of the opinion, as is the Board of Review, that accused cannot stand legally convicted of an embezzlement of these items or any of them.

Choi, Bong Ili, a Korean national, had worked as an office boy in the office of Field Exchange 101. He testified that accused had sent him to the warehouse to get cigarettes some four times. He obtained the cigarettes from the sergeant in charge of the warehouse and sold them to a Korean for occupation script which he turned over to accused. On one occasion he had himself bought eight or ten cartons from accused for which he paid 550 yen a carton. These cigarettes also came from the warehouse. The "largest amount" he had obtained from the warehouse and sold to the Korean was about 25 cartons for which he obtained 80 or 90 dollars.

Although it was shown that Choi had made contradictory pre-trial statements to the effect that he had not sold cigarettes for accused, there was other evidence tending to corroborate his testimony on the witness stand. The sergeant in charge of the warehouse testified that "several times" accused had told him to give Choi a quantity of cigarettes. The sergeant complied with these requests and never got an invoice or sales slip to account for the cigarettes, which were taken from stock. He was not paid for these cigarettes, but he had nothing to do "with handling the money," this being done in the exchange office. The largest amount of cigarettes he could recollect having given to Choi for accused was 15 cartons. At the time Colonel Ream accompanied accused to the exchange office for the purpose of returning the Chinese coat, accused paid \$18.75 for 25 cartons of cigarettes which, he stated, had been taken from the exchange by him and for which he had not previously paid the purchase price. During the course of the investigation before Colonel Reese,

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accused stated under oath that he had sold "quite a number of cigarettes in excess of his ration" that he had sold cigarettes, which he had obtained from the exchange warehouse, to Koreans, that Choi, Bong Ill, had sold cigarettes for him, and that \$700 which he had received from sources other than his pay while serving with the 63rd Infantry Regiment had been obtained from the sale of cigarettes to Koreans.

Paragraph 13d, AR 210-66, 12 June 1945, prohibits, with exceptions not here material, the resale of merchandise purchased in an Army Exchange. I am of the opinion that accused was properly convicted of engaging in black market activities by reselling at a profit cigarettes purchased from the Army Exchange Service contrary to standing orders and directives as alleged.

4. Accused is 20 years of age and is unmarried. He is a high school graduate and attended the University of Utah for one third of a year, studying business administration. As a member of the ASTRP, he attended Stanford University for one-third of a year and the University of Minnesota for two-thirds of a year. At the first institution he studied engineering and at the second Japanese. He was engaged in the study of Japanese for use in the Intelligence Service when he was called to active duty from the Enlisted Reserve Corps in October, 1945. On 3 July 1946, upon graduation from the Infantry Officers' Candidate School at Fort Benning, Georgia, he was appointed and commissioned a second lieutenant in the Army of the United States. He was assigned to the Pacific Theater by War Department Orders dated 15 July 1946. His efficiency rating for the 74-day period ending on 31 December 1946, during which period he performed duties as Assistant Field Exchange Officer, 63rd Infantry Regiment, was superior. In civilian life he had been employed as a clerk in the Safeway Store in Salt Lake City, Utah.

5. On 30 September 1947, Mr. Raymond R. Brady, an attorney from Salt Lake City, Utah, appeared before the Board of Review and made oral argument and filed a brief on behalf of accused. Careful consideration has been given to both argument and brief.

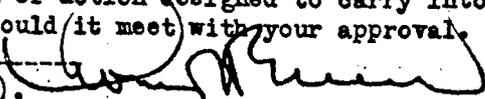
6. For the reasons set forth above, I recommend that the findings of guilty of Charge I and its specifications and of Specifications 1, 2 and 3 of Charge II be disapproved. I further recommend, in view of accused's youth, inexperience and prior clear record and the lack of proper supervision over exchange activities that the sentence as approved by the reviewing authority be confirmed but that the confinement be remitted and the forfeitures be reduced to forfeiture of \$100 pay per month for five months, and that the sentence as thus modified 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 into effect the foregoing recommendation should it meet with your approval.

(GCMO 27, (DA) 22 Jan 1948).

2 Incls

1. Record of trial
2. Form of action


THOMAS H. GREEN
Major General
The Judge Advocate General

CM 325523

Specification 2: In that Captain Robert C. Washburne, Headquarters, Air Rescue Service (62d Army Air Forces Base Unit) Morrison Field, West Palm Beach, Florida, did, at Fort Sam Houston, Texas, on or about 26 March 1947, present for payment a claim against the United States by presenting to Colonel J. R. Vance, Finance Officer at Fort Sam Houston, an officer of the United States, duly authorized to pay such claims, in the amount of \$175.00 for services alleged to have been rendered to the United States by said Captain Robert C. Washburne during March 1947, which claim was false and fraudulent in that said Captain Robert C. Washburne had received a partial payment in the amount of \$200.00 on or about 17 March 1947 and was entitled only to a balance of \$108.48 for said services rendered during March 1947, and said claim was then known by said Captain Robert C. Washburne to be false and fraudulent.

Specification 3: In that Captain Robert C. Washburne, Headquarters, Air Rescue Service (62d Army Air Forces Base Unit) Morrison Field, West Palm Beach, Florida, did, at Morrison Field, West Palm Beach, Florida, on or about 31 March 1947, present for payment a claim against the United States by presenting to Major F. H. Gray, Finance Officer at Morrison Field, West Palm Beach, Florida, an officer of the United States, duly authorized to pay such claims, in the amount of \$108.48 for services alleged to have been rendered to the United States by said Captain Robert C. Washburne during March 1947, which claim was false and fraudulent in that said Captain Robert C. Washburne was not entitled to any payment for services rendered during March 1947 and had already received \$66.52 in excess of the amount due him for said services rendered during March 1947, and said claim was then known by said Captain Robert C. Washburne to be false and fraudulent.

He pleaded guilty to, and was found guilty of, the Charge and the Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that the sentence be commuted to a reprimand and a forfeiture of \$100 pay per month for six months.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Atlantic Division, Air Transport Command Judge Advocate, dated 11 September 1947.

4. The accused is 29 years of age and married. Records of the Army show that he completed two years at Louisiana State University and was graduated from Chenier Business College, Beaumont, Texas, in 1940. He was inducted in the Army on 4 April 1941 and served as an enlisted man until his graduation from the Infantry School, Officer Candidate Course, on 9 June 1942, when he was commissioned second lieutenant, Army of the United States. On 10 November 1942 he was promoted to the rank of first lieutenant and on 16 June 1945 to the rank of captain. He served overseas in the Pacific Theater from 9 March 1944 to 20 November 1945. His performance ratings as set forth in WD, AGO Form 66-2 from 16 July 1942 to 1 December 1946 are as follows: 6 Superiors, 7 Excellents, 2 Very Satisfactories and 1 Satisfactory. He was "fined" and reprimanded under the provisions of Article of War 104, on 7 September 1944, for drunk and disorderly conduct.

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 is authorized upon a conviction of a violation of Article of War 94.

R. Hottelstein, Judge Advocate
John L. O'Brien, Judge Advocate
W. Lynch, Judge Advocate

(318)

JAGH - CM 325551

1st Ind

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

NOV 21 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 Captain Robert C. Washburne (O-1285152), Headquarters Air Rescue Service (62d Army Air Forces Base Unit).

2. Upon trial by general court-martial this officer was found guilty of presenting false claims against the United States (3 Specifications), in violation of Article of War 94. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that the sentence be commuted to a reprimand and forfeiture of \$100 pay per month for six months.

3. A summary of the evidence may be found in the review of the Atlantic Division, Air Transport Command 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 of the sentence. I concur in that opinion.

On three occasions between 31 August 1946 and 31 March 1947, accused presented to certain army finance officers, for payment, pay vouchers in which the amounts claimed due and payable were in excess of the amounts actually due the accused. As a result of these vouchers he was paid a total of \$325 in excess of the pay due him for the periods involved. He was charged with knowingly presenting for payment false and fraudulent claims (3 Specs) against the United States, in violation of Article of War 94.

At the trial he pleaded guilty to the offenses charged and stipulated that all facts alleged in the Specifications were true. In extenuation of his wrongful acts he stated that his wife had incurred debts in the amount of \$500 at department stores in Cincinnati, and that his lawyer informed him that he (accused) was legally bound to pay these debts. In order to meet this obligation he borrowed \$300 from a fellow officer, which loan he was required to repay at the rate of \$50 per month. He further stated that he was supporting his son and for the last five years he had been supporting his grandmother. The latter, during her recent illness, had incurred debts for medical attention in the amount of \$150, which he also had paid.

Restitution of the entire amount, received by accused as a result of presenting the false pay vouchers for payment, has been made.

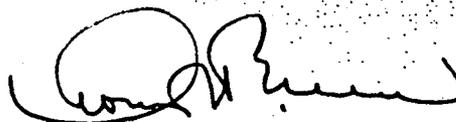
4. The accused is 29 years of age and married. Records of the Army show that he completed two years at Louisiana State University and was graduated from Chenier Business College, Beaumont, Texas, in 1940. He was inducted in the Army on 4 April 1941 and served as an enlisted man until his graduation from the Infantry School, Officer Candidate Course, on 9 June 1942, when he was commissioned second lieutenant, Army of the United States. On 10 November 1942 he was promoted to the rank of first lieutenant and on 16 June 1945 to the rank of captain. He served overseas in the Pacific Theater from 9 March 1944 to 20 November 1945. His performance ratings as set forth in WD, AGO Form 66-2 from 16 July 1942 to 1 December 1946 are as follows: 6 Superiors, 7 Excellents, 2 Very Satisfactories, and 1 Satisfactory. He was "fined" and reprimanded under the provisions of Article of War 104, on 7 September 1944, for drunk and disorderly conduct.

5. I recommend that the sentence be confirmed but in view of all the circumstances of the case, together with the recommendations of the reviewing authority, recommend that it be commuted to a reprimand and forfeiture of one hundred dollars pay per month for six months, and that the sentence as thus commuted be carried into execution.

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

CM 325551

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



THOMAS H. GREEN
 Major General
 The Judge Advocate General

(GCMO 80 D.A., 10 Dec 1947).



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

(321)

JAGG - CM 325560

OCT 30 1947

UNITED STATES)

CARIBBEAN AIR COMMAND

v.)

Trial by G.C.M., convened at
Howard Field, Canal Zone, 26
August 1947. Reprimand and
forfeiture of \$100.00 per month
for five (5) months.

Major CARROLL B. McELROY)
(O-24426), 3rd Base Comple-)
ment Squadron, Albrook)
Field, Canal Zone.)

OPINION of the BOARD OF REVIEW

JOHNSON, SCHENKEN and KANE, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Major Carroll B. McElroy, 3rd Base Complement Squadron, Albrook Field, Canal Zone, did, at Army Air Force Sub-Base, Guatemala City, Guatemala, Central America, on or about 21 June 1947, wrongfully and knowingly violate paragraph 1a (2) of Caribbean Air Command Regulation 55-1, dated 8 May 1947, which sets forth minimum crew requirements for the operation of C-45 type aircraft, by flying a C-45 Aircraft, serial number 44-47530, without the aid of a co-pilot, or an engineer or crew chief qualified to act as co-pilot.

He pleaded not guilty to, and was found guilty of, the Specification and Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be reprimanded and to forfeit one hundred dollars (\$100.00) per month for ten (10) months. The reviewing authority approved the sentence and ordered it executed but remitted so much thereof as is in excess of a reprimand and forfeiture of one hundred dollars per month for five months. The result of the trial was promulgated in General Court-Martial Orders No. 31, Headquarters Caribbean Air Command, Albrook Field, Canal Zone, 8 September 1947.

3. The evidence for the prosecution showed that about 0800 hours, on or about 21 June 1947, at the Army Air Base, Guatemala City, Guatemala, Lieutenant Gold K. Holland observed a C-45 type aircraft in a damaged condition located between the taxi strip and the runway. The position of the plane indicated that it had attempted to take off, in the direction of San Jose, Guatemala (R. 6-8).

Captain J. L. Clements, the Flying Safety and Aircraft Accident Investigating Officer, Albrook Field, Canal Zone, arrived in Guatemala City, on 23 June 1947, where he observed a C-45 type aircraft with the landing gear collapsed and partially sheared off, the left wing, fuselage, and rudder buckled, and the left wing damaged. The damage to the aircraft was in his opinion caused by a collision of this aircraft while moving along the ground or while in flight (R. 10, 11).

Captain Robert L. Root, Assistant Engineering Officer, Albrook Field, Canal Zone, who also went to Guatemala City, on 23 June 1947, observed a C-45 type aircraft, serial number 44-47530, in a badly damaged condition. He testified that in his opinion the damage could have been caused only while the aircraft was taking off or landing (R. 12, 13).

There was introduced into evidence a written pretrial statement signed by the accused (R. 14, 15; Pros. Ex. B). The defense objected to the admission of the document on the ground that the prosecution had not introduced sufficient proof of the corpus delicti to allow the confession to be received in evidence (R. 15, 16). Accused stated that on the morning of 21 June 1947, at Guatemala City, Guatemala, he flew a C-45 aircraft, #44-47530, and was the sole occupant and crew member of the airplane involved. About 1110 hours, on 21 June 1947, he started his pre-flight inspection of the airplane and upon completion he was cleared by the operations officer for a flight of about thirty minutes to San Jose, Guatemala. After clearing the runway his right engine failed, the aircraft swerved, and crashed to the runway, thus inflicting the major damage to the craft. He also stated that he had full knowledge of the provisions of Caribbean Air Command Regulations 55-1 which established the minimum pilot and air view requirements of multi-engine aircraft of his command.

The court took judicial notice of these regulations which were introduced in evidence (R. 14; Pros. Ex. A). The regulations were as follows:

"OPERATIONS

Minimum Pilot and Aircrew Requirements for Multi-Engine Aircraft

(This regulation supersedes CAirC Regulation 55-1, dated 9 December 1946.)

1. In accordance with the provisions of paragraph 1, AAF Regulation 55-5, it is the responsibility of the unit commander to insure that each aircraft under his control is operated with sufficient aircrew personnel to insure successful completion of the flight. In discharging this responsibility, unit commanders in this command will insure that at least the following minimum crew requirements are observed for multi-engine aircraft:

a. On flights during daylight hours of less than 250 miles radius:

- (1) For all aircraft other than C-45 type; pilot, co-pilot, and aerial engineer.
- (2) For C-45 type aircraft; pilot and either co-pilot or engineer or crew chief whose qualifications to act as co-pilot are so stated in orders written by his unit commander.

b. On all night flights or flights of over 250 miles radius; pilot, co-pilot, aerial engineer, and radio operator.

2. The provisions of this regulation will not be construed to require a crew member in an aircraft when there is no provision in the design of the aircraft, for such crew member."

Accused elected to remain silent, and no evidence was offered for the defense (R. 19).

4. The pertinent part of Caribbean Air Command Regulations 55-1, dated 8 May 1947, is as set forth in paragraph 3 above. The evidence for the prosecution shows only that a C-45 type aircraft #44-47530 was found seriously damaged on or about 21 June 1947 at the Army Air Base, Guatemala City, Guatemala. It was indicated that the damage resulted from the plane colliding with the ground, apparently while it was either landing or taking off. Although accused in his pretrial statement admitted the essential elements constituting the offense with which he was charged, it has been consistently held that an accused cannot be legally convicted upon his unsupported confession, and therefore, it was not proper for the court to consider the confession of accused that he flew the airplane without meeting the minimum crew requirements, unless and

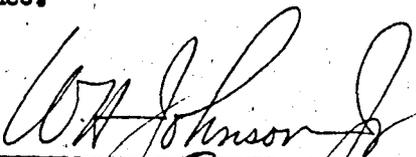
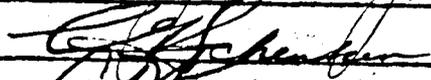
until other competent evidence was introduced tending to show that the precise offense charged had probably been committed, that is, the corpus delicti.

Thus where a soldier was charged with unlawfully selling blankets in violation of Article of War 84 and the sole evidence pointing to the guilt of the accused was his own confession, the Board of Review held that it was not proper for the court to consider the confession with respect to the sale of the property without some other evidence of the corpus delicti. The Board of Review held that the mere fact that property was missing and that accused had an opportunity to take it does not constitute the corroborative evidence necessary to make consideration of the confession proper (CM 193828, Morande, 2 BR 95).

In the instant case there is no corroborative evidence. The record is void of any evidence circumstantial or direct that the accused was the pilot of the aircraft concerned, that he operated such aircraft in violation of standing orders, or that he was even seen around or about the airfield at the time the alleged offense was committed.

The mere fact that the plane was found extensively damaged on the field about the time alleged does not touch the corpus delicti of the offense charged, i.e., that accused flew the plane without a qualified person to act as co-pilot. Under the principle announced in the Morande case, supra, the proof outside the confession is insufficient to corroborate the confession. Accordingly, there being no evidence other than the uncorroborated confession as to the probable commission of the offense charged, consideration of the confession by the court was improper and the remaining evidence is not legally sufficient to support the findings of guilty (CM 187168, Greene; CM 188211, Hornsby; CM 193828, Morande, 2 BR 95; CM 325358, Sanborn).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

	_____	Judge Advocate
	_____	Judge Advocate
	_____	Judge Advocate

JAGQ - CM 325560

1st Ind

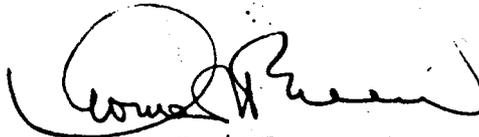
JAGO, Dept. of the Army, Washington 25, D. C. NOV 7 1947

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by Act of Congress of August 20, 1937 (50 Stat. 724, 10 U.S.C. 1522), is the record of trial in the case of Major Carroll B. McElroy (O-24426), 3rd Base Complement Squadron, Albrook Field, Canal Zone.

2. 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. I concur in the opinion of the Board of Review, and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

1. Record of Trial
2. Form of action

(GCMO 55, 20 Nov 1947)



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

(327)

JAGK - CM 325561

7 NOV 1947

UNITED STATES

v.

First Lieutenant LOUIS A.
HINCHEY (01181301), Corps
of Engineers.

TECHNICAL DIVISION, AIR TRAINING COMMAND

Trial by G.C.M., convened at
Geiger Field, Washington, 21,
22 August 1947. Dismissal
and total forfeitures.

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

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that, First Lieutenant Louis A. Hinchey, CE, Squadron TP-7, 463rd Army Air Forces Base Unit, Geiger Field, Washington, did, at Spokane, Washington, on or about 14 April 1947, with intent to defraud, wrongfully and unlawfully make and utter to Master Sergeant Lloyd O. Brentlinger, a certain check, in words and figures as follows, to wit:

Spokane, Washington 14 April 1947 No _____.

Main Office

THE OLD NATIONAL BANK 28-3
of Spokane 1251

Pay to The
Order of M/Sgt Lloyd O Brentlinger \$ 10 ⁰⁰/₁₀₀

Ten _____ and _____ ^{no}/₁₀₀ DOLLARS

(Signed) Louis A Hinchey

1st Lt CE 01181301

809th EAB

and by means thereof, did fraudulently obtain from the said Master Sergeant Lloyd O. Brentlinger the sum of ten dollars (\$10.00), he the said First Lieutenant Louis A. Hinchey, CE, then well knowing that he did not have and not intending that he should have any account with the Old National Bank of Spokane, Spokane, Washington for the payment of said check.

Specification 2: In that First Lieutenant Louis A. Hinchey, CE, Squadron TP-7, 463d Army Air Forces Base Unit, Geiger Field, Washington, did, at Spokane, Washington, on or about 18 April 1947, with intent to deceive Captain James E. Opdyke, AC, Mess Officer, Fort George Wright, Washington, and thereby obtain possession of four (4) checks in the total sum of seventy dollars (\$70.00), wrongfully and unlawfully, make and utter a certain check in words and figures as follows:

18 April 1947 No. _____
CITY NATIONAL BANK, LAWTON, OKLA

Pay To The
Order Of OFFICER'S MESS \$ 70⁰⁰
100

SEVENTY-----and-----No
100 DOLLARS

(Signed) Lt. Louis A. Hinchey

and by means thereof did fraudulently obtain from the said Captain James E. Opdyke, AC, possession of the aforesaid four checks in the total sum of seventy dollars (\$70.00), and he the said First Lieutenant Louis A. Hinchey, CE, then well knowing that he did not have and not intending that he should have any account with the City National Bank, Lawton, Oklahoma, for the payment of said check.

NOTE: Specifications 3 to 10 inclusive differ materially from Specification 1 only as to the date, drawee bank, payee and amount as follows:

<u>SPEC</u>	<u>DATE</u>	<u>DRAWEE BANK</u>	<u>PAYEE</u>	<u>AMOUNT</u>
3	4-21-47	City National Bank Lawton, Oklahoma	Officers' Mess	\$ 15.00
4	4-18-47	" " "	Fort George Wright Officers' Mess	15.00
5	4-18-47	" " "	Cash	15.00
6	4-18-47	" " "	Fort George Wright Officers' Mess	15.00
7	4-27-47	" " "	Officers' Mess	15.00
8	4-26-47	" " "	" "	15.00
9	4-27-47	" " "	" "	15.00
10	4-19-47	" " "	" "	15.00

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

NOTE: The 10 Specifications of this Charge are the same as the Specifications of Charge I.

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

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

Captain John Goldsboro, Assistant Chief of Medicine and Acting Chief of the Neuropsychiatric Section, Squadron X-M, Fort George Wright, Washington, a witness for the accused testified that he had examined the accused and that his diagnosis of accused's condition "is in accordance with Lieutenant Porter's examination, which is on that certificate" (R. 46). Lieutenant Porter's diagnosis of accused was (1) Neurotic depressive reaction, and (2) Emotional instability reaction. Lieutenant Porter was of the opinion that "Lieutenant Hinchey is not insane, possesses sufficient mental capacity to distinguish right from wrong and should be able to adhere to the right."

4. Records of the Department of the Army show the accused to be 40 years of age and divorced. He graduated from high school and attended college two years but did not graduate. Prior to his entry into the service he worked for oil companies and companies engaged in computing geological data relative to the possible location of oil fields by the use of Seismograph and other related instruments. He was inducted into the Army on 8 July 1942 and attained the grade of Sergeant before being sent to Officer Candidate School. On 29 April 1943 he was appointed and commissioned a temporary Second Lieutenant, Field Artillery, Army of the United States. He was promoted to First Lieutenant on 22 May 1945. He served overseas in the Asiatic Pacific Theater from 10 January 1945 to 24 November 1945. On 21 January 1946 he was separated from the service. On 27 November 1945 he was appointed a First Lieutenant, Corps of Engineer Reserve. He was recalled to active duty on 26 November 1946. His efficiency reports average excellent.

5. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused occurred 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

(330)

the sentence. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and authorized upon a conviction of a violation of Article of War 96.

Robert T. Silvers, Judge Advocate

Charles E. McAfee, Judge Advocate

Robert R. Adcock, Judge Advocate

JAGK - CM 325561

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 20 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 Louis A. Hinchey (01181301), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of making and uttering 9 checks (Specs 1 & 3 to 10 inc, Charge I and Charge II) totaling \$130.00 with intent to defraud and of issuing one check in the amount of \$70.00 with intent to deceive and thereby fraudulently obtaining possession of 4 checks (Spec 2, Charge I and Charge II) all in violation of Articles of War 95 and 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the Staff Judge Advocate's review 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 of the sentence.

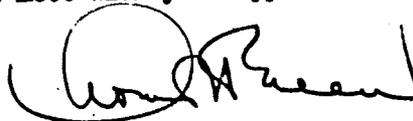
The record of trial shows that on the 14th of April 1947 the accused gave Master Sergeant Lloyd O. Brentlinger a check for \$10.00 and received \$10.00 in cash. On 18 April 1947 the Officers' Mess at Fort George Wright had four checks totaling \$70.00 which had been issued by the accused and returned by the drawee bank unpaid. The accused issued a check in the sum of \$70.00 and received the four checks upon which payment had been refused. Between 21 April 1947 and 27 April 1947 the accused cashed 8 other checks in the sum of \$15.00 each at the Officers' Mess, Fort George Wright. All of these checks were returned by the drawee bank unpaid. The accused did not have an account in the banks upon which the checks were drawn. Restitution has been made.

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

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

2 Incls

1. Record of trial
2. Form of action



THOMAS H. GREEN
Major General
The Judge Advocate General

(G3KO 70, 2 Dec 1947).



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

(333)

JAGK - CM 325564

21 JAN 1948

UNITED STATES)

25TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at Honshu,
Japan, 10, 11, 12 and 13 June 1947.

Private CORNELIUS N. THOMPSON)
(19245265), Company A, 24th)
Infantry Regiment)

Dishonorable discharge and confine-
ment for three (3) years. Penitentiary.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Cornelius Thompson, Company A, 24th Infantry, did, at NAKA, HONSHU, JAPAN, on or about 6 March 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one James T. Coleman, a human being by shooting him with a pistol.

Accused pleaded not guilty to the charge and specification. The court found him:

"Of the Specification of the Charge: Guilty, except the words 'with malice aforethought', 'deliberately', 'with premeditation', and 'feloniously', of the excepted words Not Guilty.

"In that Private Cornelius N. Thompson, Company 'A', 24th Infantry Regiment, did on or about 6 March 1947, unlawfully kill one James T. Coleman, a human being, by shooting him with a pistol.

"Of the Charge: Not Guilty, but guilty of a violation of the 93rd Article of War."

No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, designated the U.S. Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. The only question for consideration here is the legal effect of the findings of the court.

The court, by exceptions in its finding of guilty, took out of the specification upon which accused was arraigned all of the words alleging the crime of murder but left in the words "willfully" and "unlawfully", and then apparently undertook to redraft the specification omitting therefrom, in addition to the excepted words, the word "willfully". The redrafted specification, obviously, alleged no greater offense than that of involuntary manslaughter, whereas the finding, had it not been accompanied by the redrafted specification, would have constituted a determination of accused's guilt of voluntary manslaughter (CM 325046, Weller). Resolving all doubt in favor of accused, we are of the opinion that accused now stands guilty of the offense of involuntary manslaughter rather than that of voluntary manslaughter. That it was in fact the intention of the court to find him guilty of this lesser offense is indicated by its sentence, which is the maximum sentence for the offense of involuntary manslaughter (par. 104c, MCM, 1928).

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the specification of the charge as involves a finding that the accused did, at the time and place and in the manner alleged, unlawfully kill one James T. Coleman, a human being, legally sufficient to support the finding of guilty with respect to the charge and legally sufficient to support the sentence.

Charles T. Silvers, Judge Advocate

Libert E. H. Hoff, Judge Advocate

Harley L. Lanning, Judge Advocate

JAGK - CM 325564

1st Ind

JAN 28 1948

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

TO: Commanding General, 25th Infantry Division, APO 25, c/o Postmaster, San Francisco, California.

1. In the case of Private Cornelius N. Thompson (19245265), Company A, 24th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the finding of guilty of the specification of the charge as involves a finding that the accused did, at the time and place and in the manner alleged, unlawfully kill one James T. Coleman, a human being, in violation of Article of War 93, you will have authority to order the execution of the sentence.

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

✓ (CM 325564).



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.

(337)

JAGH - CM 325571

80 DEC 1947

UNITED STATES)

EIGHTH ARMY

v.)

Trial by G.C.M., convened at
APO 343, 24, 26, and 28 June
1947. To be hanged by the
neck until dead.

Private WILLIE JAMES)
(14127026), Attached Unassigned,)
Headquarters & Headquarters)
Detachment, 2nd Replacement)
Battalion, 4th Replacement Depot)

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

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

Specification: In that Private Willie James, Attached Unassigned to Headquarters and Headquarters Detachment, 2nd Replacement Battalion, 4th Replacement Depot, APO 703, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 13 October 1946, forcibly and feloniously, against her will, have carnal knowledge of Shige Asanuma.

CHARGE II: Violation of the 93rd Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to both Charges and the Specification under each. He was found guilty of Charge I and its Specification, and not guilty of Charge II and its Specification. 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. The reviewing authority approved the sentence, but recommended that it be commuted to a dishonorable discharge, total forfeitures and confinement at hard labor for the term of accused's natural life, 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:

At about midnight 12-13 October 1946, Shige Asanuma, wife of Masaharu Asanuma, awoke and saw a colored soldier sitting in the room of their houseboat at Yokohama, where she was sleeping with her husband and their three children. Upon seeing the soldier she uttered a "surprise cry" which awakened her husband (R 9, 13, 14). The soldier had a knife in his hand with which he made threatening motions and "brought the knife close to my her neck." He kept repeating the words "pom-pom" and "hubba hubba" (R 10). Both she and her husband urged the soldier to leave but "he kept swinging his arm around with the knife in his hand" (R 13).

With respect to her resistance and to the act committed by the soldier, Shige Asanuma testified (R 10) as follows:

"Q. Then did the soldier take any further action by either physically contacting you or by threat?

* * *

A. Yes, he did. He put his hand on my head and kept saying, 'Hubba hubba.'

Q. Did you resist him at that time?

A. He had a knife in his hand at that time and we thought somebody might get hurt, so I did not resist.

Q. Did you have sexual intercourse with the accused?

A. Yes. There was no other choice.

Q. At that time did the soldier, or the accused, still have the knife in his possession?

A. He had the knife in his hand all the way, all the time.

Q. And was that knife being held against your body?

A. Yes."

The above testimony of his wife was corroborated by Masaharu Asanuma, who, with their three children, was in the room during the commission of the offense (R 14).

As to what transpired after the completion of the act, Masaharu testified as follows:

- "Q. What were the soldier's actions upon completion of the act?
- A. He said that he wanted to sleep overnight but I told him to leave, but he just kept repeating, 'No, no,' again, and he took the blankets and went in the hallway and slept.
- Q. And what was your action after that?
- A. As soon as the soldier let loose of the knife, it made me believe that he had fallen asleep; so I jumped out of the small window in front of this room and ran to the Sakuragicho Railway Station to see if I could get in contact with some MP's.
- Q. Did you locate the military police?
- A. Yes, and the military police came with me to the place where I am now staying.
- Q. Was the soldier still asleep at the time that you arrived back at your home?
- A. Yes, he was still asleep and the MP's woke him up" (R 14).

Private First Class Samuel Vanager, the military policeman who apprehended the soldier, testified at the trial and substantially corroborated the latter statements above, of Masaharu Asanuma (R 6).

At the trial neither Shige Asanuma, her husband, nor Private Vanager was able to identify, definitely, the accused as the soldier who committed the offense and was later apprehended on the houseboat. Shige testified that she "believed" accused was the person who violated her on the night of 12-13 October 1946 but, because of poor eyesight, "could not be positive" of it (R 11). The victim's husband, when questioned by the defense as to whether he was positive that accused was the soldier who entered his houseboat on the night in question, stated:

- "A. I am almost sure that it is, and he looks just like the soldier that came to the house on that night, but it was not for such a long time that he was at my house that I could not say for positively sure, but I am almost sure that it is him" (R 15).

Private Vanager, stated upon cross-examination that he could not, if he again saw him, identify the soldier he found asleep in the houseboat (R 7).

(340)

On direct examination, Special Agent Edwin F. Marsullo, Criminal Investigation Division, definitely identified the accused as the soldier who signed a pre-trial statement at about 0415 hours on the morning of 13 October 1946, after having been properly warned of his rights (R 24). On examination by the court the witness qualified his identification by saying that he probably would not be able to pick the accused out from a group of nine or ten other colored soldiers (R 24). The court thereupon caused the prosecution to introduce a known sample of accused's signature (R 27; Pros Ex 3) and, on comparison of the two signatures, the pre-trial statement was admitted in evidence (R 28; Pros Ex 2). It reads as follows:

"I, Private Willie James, 14127026, Company A, Special Training Detachment, Fourth Replacement Depot, make this statement of my own free will and realize that anything I say may be used in future courts-martial proceedings, without promise of reward, threat or force.

"At about 2400 hours I was walking along the canal near the railroad station. I saw a boat and went on it. It was after hours and I wanted a place to sleep. I climbed into the boat from the top. The woman turned on the light and screamed. When the woman screamed, I grabbed the knife and said, "Don't holler." The man woke up and hollered. I then asked, "Me short time. Pom-pom OK?" He said nothing and laughed. I pom-pommed the lady one time. I held the knife in my hand while doing it, but dropped it before I finished. When I first went into the house I drew the knife across my throat to warn the man I wanted him to be quiet.

"When I finished with the woman, I went to sleep. The MP's came and woke me up. I have had this statement read and explained to me by Edwin Marsullo, agent of the CID, and understand same." (R 22).

4. Evidence for the defense:

The defense introduced in evidence a report of proceedings of a Board of Officers convened under authority of paragraph 1, Army Regulations 615-368, at the 4th Replacement Depot, APO 703, on 8 April 1947, to consider accused's qualification for further military service (R 30; Def Ex A). The Medical Officer, who was a member of the Board, was called as a witness for the defense. He stated that while the Board found no evidence of insanity on the part of accused, the weight of evidence showed that he was of low mentality and of unsound judgment and that he gave evidence of habits and traits of character which rendered his retention in the service undesirable (R 32; Def Ex A).

Upon being advised of his rights as a witness, accused elected to remain silent (R 33).

5. After the prosecution and the defense had rested their case, the court directed the former to secure an "expert witness" who could testify orally as to accused's mental responsibility (R 37). The court adjourned for two days and upon reconvening on 28 June 1947, the prosecution introduced in evidence, without objection by the defense, a letter from the Neuropsychiatric Service, 361st Station Hospital, APO 1055, dated 26 June 1947. This letter was signed by Herbert I. Posin, Captain, MC, Chief, NP Service, and reads as follows:

"1. Private first class Willie James, ASN 14 127 026 was today examined by the Neuropsychiatric Service of this hospital.

"2. After consideration of all available data, including three previous psychiatric examinations, and examination and evaluation of the above named soldier, the following conclusions are drawn;

"That this soldier has the mental capacity to understand the nature of the proceedings against him and to take what steps are necessary for his defense;

"That this soldier knows the difference between right and wrong;

"That this soldier knew the difference between right and wrong at the time of the alleged offense and that he had the mental ability to adhere to the right" (R 40; Pros Ex 5).

6. At the end of the prosecution's case the defense made a motion for findings of not guilty as to the Charges and the Specifications. In support of the motion he argued that the prosecution had failed to introduce sufficient evidence to prove that accused was the soldier who had entered the houseboat and committed the alleged offense. The motion was overruled by the court.

7. Accused stands convicted of "forcibly and feloniously, against her will, have carnal knowledge of Shige Asanuma," at, or in the vicinity of Yokohama, on or about 13 October 1946.

At about midnight 12-13 October 1946 a colored soldier entered a houseboat where Shige Asanuma, her husband and their three children were living. They were asleep when he entered the boat, but shortly thereafter Shige awoke and saw the soldier sitting in their bedroom. She uttered a "surprise cry" which aroused her husband and the children began crying. The soldier threatened both her and her husband with a knife which he held in his hand. He "brought the knife" close to Shige's throat and

demanded that she have sexual intercourse with him. She was concerned about the safety of her children and "thought somebody might get hurt, so I didn't resist very much." After the completion of the act he went into the hallway of the boat and went to sleep. He was later found there and arrested by a military policeman.

At the trial, neither the victim, her husband, nor the military policeman could identify the accused, with certainty, as the soldier who was found on the houseboat and who had committed the offense. The evidence further shows, however, that a colored soldier, qualifiedly identified as the accused, made and signed accused's name to a statement, shortly after the offense had been committed, in which he stated that earlier that same night he had entered a boat where a man and a woman were sleeping. He further stated that after threatening them with a knife he had sexual intercourse with the woman and then went to sleep on the boat, where he was later found by the military police. The qualified identification of accused by the eyewitnesses, the identification by name in the execution of the confession, the similarity of the signatures on the confession and accused's known signature, and the correspondence between the facts as related by the witnesses and as related in the confession leave no doubt that accused executed the confession and committed the offense of which he was found guilty.

Evidence relative to accused's mental responsibility was introduced and considered by the court. While this evidence shows that accused is a person of low mentality, it also shows that he is sane and was mentally responsible for the offense of which he was found guilty.

8. The accused is 20 years of age. He enlisted at Fort Jackson, South Carolina, on 5 November 1945, for a period of three years. Although the trial judge advocate stated that he had no evidence of previous convictions to offer, there is included among the allied papers, a record of one previous conviction by summary court-martial for breach of restriction, in violation of Article of War 96, at Camp Lee, Virginia, on 10 February 1946.

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

A. Hattenstein, Judge Advocate
John G. Brown, Judge Advocate
W. J. Jones, Judge Advocate

JAGH - CM 325571

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 5 1947

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Willie James (14127026), Attached Unassigned, Headquarters and Headquarters Detachment, 2d Replacement Battalion, 4th Replacement Depot.

2. Upon trial by general court-martial, the soldier named above was found guilty of the rape of a Japanese woman, in violation of Article of War 92. 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 but recommended that it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of accused's natural life, 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.

At about midnight on 12-13 October 1946, accused entered a house-boat, which was tied up in a canal at Yokohama, Japan, where a Japanese was living with his wife and their three children. The members of the family were asleep when he entered the boat, but shortly thereafter Shige Asanuma, the wife, awoke and saw the accused sitting in their bedroom. She uttered a "surprise cry" which aroused her husband and the children. Accused threatened them with a knife which he held in his hand. He "brought the knife" close to Shige's throat and demanded that she have sexual intercourse with him. Out of fear of injury to herself and her family, she submitted. Upon completion of the act accused left the bedroom, went into the hallway of the boat and went to sleep. The husband escaped through a window of the boat and notified the military police who, shortly after the commission of the offense, found accused on the boat and arrested him.

4. Evidence pertaining to accused's mental responsibility was introduced at the trial. Additional psychiatric reports accompany the record. This evidence shows that accused is a person of low mentality, but also shows that he is sane and was mentally responsible for his acts.

5. The accused is 20 years of age. He enlisted at Fort Jackson, South Carolina, on 5 November 1945, for a period of three years.

(344)

6. In view of accused's age, his low mentality, and the recommendations of the reviewing authority, 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 twenty-five (25) years, and that the sentence as thus commuted be carried into execution. I further recommend that an appropriate United States penitentiary be designated as the place of confinement.

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

CM 325,571

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



THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 29 (DA), 23 Jan 1948).

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

(345)

JAGQ - CM 325576

OCT 3 1947

UNITED STATES

v.

Privates First Class
RICHARD G. PICKRUM
(RA 46049684), and
GEORGE R. LORENZO
(RA 12255094), both of
88th Military Police
Platoon.

TRIESTE UNITED STATES TROOPS

Trial by G.C.M., convened at
Trieste, Italy, 29 July 1947.
PICKRUM: Dishonorable dis-
charge and confinement for
four (4) years. LORENZO:
Dishonorable discharge and
confinement for five (5)
years. EACH: Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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 holding, to The Judge Advocate General.
2. The accused were tried jointly upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that, Private First Class George R. Lorenzo, 88th Military Police Platoon, then assigned Military Police Platoon, 88th Infantry Division, and Private First Class Richard G. Pickrum, 88th Military Police Platoon, then assigned Military Police Platoon, 88th Infantry Division, acting jointly, and in pursuance of a common intent, did, at Gorizia, Italy, on or about, 14 March 1947, feloniously take, steal and carry away, one gold Ladies' wrist watch, value about thirty dollars (\$30.00); one set of Venetian glassware, value about fifteen dollars (\$15.00); two music boxes, value about nine dollars (\$9.00); two cigarette lighters, value about nine dollars (\$9.00); four (4) photograph albums, value about ten dollars (\$10.00); two wallets, value about eight dollars (\$8.00); one cigarette case, value about five dollars (\$5.00); of a total value of about eighty-six dollars (\$86.00), the property of Private First Class Eldege A. Tetreault, Jr.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Accused Lorenzo 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 five years. Accused Pickrum 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 approved the sentences, designated Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for each accused and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

On 14 March 1947 Private First Class Tetreault delivered a parcel to the mail room of the Military Police Platoon, 88th Infantry Division, Gorizia, Italy, for mailing to the United States. The parcel contained a ladies' wrist watch, a set of Venetian glassware, 2 cigarette lighters, 2 music boxes, 4 photograph albums, 2 wallets and a cigarette case (R. 7). The package was addressed to his mother and after some time had elapsed he was notified by her that the package had not been received (R. 10).

Acting upon information received from Tetreault, Corporal Maguire made an investigation concerning the lost parcel and recovered from accused Pickrum one of the photograph albums contained in the package (R. 22). He also recovered the ladies' wrist watch from an Italian girl (R. 23). Accused Lorenzo and Pickrum were then interrogated and after being warned of their rights under the 24th Article of War each made a confession admitting that they had "broken into" the box delivered to the mail room by Tetreault (Pros. Exs. 5 & 6). Accused Pickrum admitted in his confession that he took from the package one music box, a portion of the glassware, one wallet, one cigarette lighter and the cigarette case. Accused Lorenzo admitted in his confession that he took from the box the wrist watch, one photograph album, a portion of the glassware, 1 cigarette lighter and a music box.

Private First Class Maruzzi testified that he purchased from accused Lorenzo the wrist watch in question which he gave to the Italian girl from whom it was recovered by Corporal Maguire (R. 18-19).

Tetreault testified as to the "value" of each item taken by accused without objection by defense as to his qualifications as an expert and according to this testimony the total value of the items stolen amounted to \$86 (R. 7). On cross-examination he testified that he personally purchased the two music boxes but the remaining articles were purchased by others for him (R. 12). All of the items were before the court having been properly introduced in evidence. Maruzzi testified that when he purchased the ladies' wrist watch from accused Lorenzo he paid him \$40 in cash and cancelled a \$40 debt which accused Lorenzo owed him (R. 18).

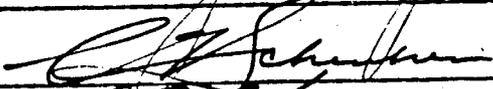
After the accused were advised of their rights as witnesses each elected to remain silent (R. 33).

4. The only question presented by the record is whether the court's finding of value is supported by the evidence. It does not appear that Tetreault was qualified as an expert or that he was otherwise qualified to express an opinion as to the market value of the articles in question. His testimony with reference to the purchase price of the items when the date of purchase is not shown and he did not make the purchases himself is also incompetent to prove their market value (CM 249057 Gould 32 BR 31). It has been uniformly held by the Board of Review that the testimony of the owner of stolen personal property as to its value is not competent unless he is an expert or possesses special knowledge on the subject (CM 192911 Weckerle 2 BR 47; CM 237091 Williams 23 BR 261; CM 268007 McKinney 44 BR 205). It has also been consistently held that to permit the court on its inspection of the articles in question to find the definite market value thereof "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208481 Ragsdale 9 BR 13; CM 209131 Jacobs 9 BR 69).

It necessarily follows that the finding of value of the various articles by the court is not sustained by the evidence. The evidence supports only a finding that the stolen items had some value less than \$20. The maximum confinement at hard labor authorized by the Table of Maximum Punishments for larceny of property of \$20 or less is 6 months (MCM, 1928, par 104c, p. 99).

5. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of the Charge; legally sufficient to support only so much of the findings of guilty of the Specification as involves a finding of larceny by each accused at the time and place and of the ownership alleged of the articles described in the Specification of some value less than \$20; and legally sufficient to support only so much of the sentence as to each accused as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.


 _____, Judge Advocate


 _____, Judge Advocate


 _____, Judge Advocate

(348)

OCT 13 1950

JAGQ-CM 325576

1st Ind.

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

TO: Commanding General, Trieste United States Troops, APO 88,
c/o Postmaster, New York, N. Y.

1. In the case of Privates First Class Richard G. Pickrum (RA 46049684), and George R. Lorenzo (RA 12255094), both of 88th Military Police Platoon, attention is invited to the foregoing holding by the Board of Review which holding is hereby approved. It is recommended that only so much of the findings of guilty of the Specification of the Charge as to each accused relating to value be approved as involves a finding that the property alleged was of some value not in excess of \$20.00, and that only so much of the sentence as to each accused be approved as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Upon taking such action you will have authority to order 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 325576).

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, D. C.

JAGN-CM 325598

UNITED STATES)

v.)

Private RICHARD R. DEAL
 (33961582), Headquarters
 and Service Company, 618th
 Ordnance Base Armament
 Maintenance Battalion.)

PHILIPPINES-RYUKYUS COMMAND

Trial by G.C.M., convened at
 APO 707, 7 August 1947. Dis-
 honorable discharge and con-
 finement for three (3) years.
 Disciplinary Barracks.

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 Charge and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Richard R. Deal, Headquarters and Service Company, 618th Ordnance Base Armament Maintenance Battalion, did, at Ordnance Service Center, APO 900, on or about 1 February 1947, feloniously take, steal and carry away a saxophone, value about \$125 and a trumpet, value about \$40, of a total value of about \$165, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private Richard R. Deal, Headquarters and Service Company, 618th Ordnance Base Armament Maintenance Battalion, did, at (APO 900), Manila, Luzon, Philippine Islands, on or about 1 February 1947, wrongfully and knowingly sell a saxophone, of the value of about \$125 and a trumpet

of the value of about \$40, of a total value of about \$165, property of the United States, furnished and intended for the military service thereof.

Accused pleaded not guilty to the Charge and all Specifications. He was found guilty of Specification 1, except the words and figures "value about \$125" and except the words and figures "value about \$40," both without substitution, and except the words and figures "of about \$165," substituting therefor the words and figures "more than \$50," of the expected words and figures, "not guilty," of the substituted words and figures, "guilty"; guilty of Specification 2 except the words and figures "of the value of about \$125" and except the words and figures "of the value of about \$40" without substitution, and of the words and figures "about \$165," substituting therefor the words and figures "more than \$50," of the expected words and figures, "not guilty," of the substituted words and figures, "guilty"; and guilty of the Charge. 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 three years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence for the prosecution:

Private First Class Donald D. Fox testified that on or about 1 February 1947, in his capacity of "Special Service noncom," he had in his custody certain musical instruments (R. 7). These instruments were kept in a pyramidal tent, having a wooden floor, frame sides covered with galvanized metal, canvas top and heavy wires over the door fastened securely with a padlock (R. 9). On Sunday, 2 February 1947, two of the instruments were missing, a "B-flat Holton saxophone with case and a B-flat Olds trumpet" (R. 8). The witness testified "Immediately I started to find out where these instruments had gone. * * * I found out that men had been working in the supply room and there was a detail of men working in that section and that only the supply sergeant and his assistant had a key. That was all I found" (R. 8). The missing instruments were property of the United States Government intended for use in the military service (R. 8, 9). There was no evidence that the tent was broken into (R. 10). The witness never saw the instruments after he found they were missing (R. 10).

Captain Harry W. Pohl, band officer, testified that on 1 February 1947 he was charged with certain musical instruments. At about that time two of these, an Olds trumpet and "A-flat Holton saxophone" were reported missing from the supply tent (R. 11).

The witness testified further as follows:

"Q. Did you ever see these two instruments after they were reported stolen to you?

A. Yes, sir.

Q. Under what conditions did you see these two musical instruments again?

A. Our provost marshal, Mr. Brown, called me and told me to sign a receipt for these two instruments which he picked up downtown.

Q. Did you sign a receipt?

A. Yes, sir.

Q. Did you receive the instruments at that time?

A. Yes, sir, I did.

Q. To your knowledge were these two instruments you received the same two instruments that were reported missing?

A. To the best of my knowledge, they were.

Q. Is there any way, any manner in which you could identify an Army instrument?

A. During my experience in instruments in the Army, they had a 'U.S.' markings stamped on them.

Q. Did these two instruments that you signed have a 'U.S.' stamp on them?

A. As I recall they had.

Q. Do you know where these two instruments are at the present time?

A. No, sir, I do not.

* * *
EXAMINATION BY THE COURT

Q. You say you were responsible for these instruments?

A. Yes, sir.

Q. Were any of those instruments taken under another officer's authority without your knowledge?

A. Sir, those instruments were taken under my supervision in the evening and the boys rehearsed with them under my supervision too. Then they were brought back. We always use my jeep and brought the instruments back and put them in the supply room. I was always with them at all times.

Q. To your knowledge, these instruments missing, were they brought back and turned over to the supply room?

- A. We had used the instruments a few nights prior to the date these instruments were reported missing. I was personally with the men when they put these instruments in the supply tent.
- Q. You had personal knowledge that these instruments were taken from the supply room?
- A. They were taken from the supply tent, to the best of my knowledge.
- Q. These instruments, if they were brought in court today, could you identify them?
- A. No, I could not. The instruments were not issued to me by serial number. They were issued by name and type.
- Q. You signed for these instruments after they were returned?
- A. Yes, sir.
- Q. But you could not identify them now?
- A. Yes, sir. Colonel, after this or shortly after this situation, they brought over a regular band officer who took over my property and he turned a lot of instruments in. Possibly, he turned them over to the A & R" (R. 12-13).

At about 2000 on 1 February 1947 accused approached Mr. Napoleon Alfonso, pianist, who was playing at a cafe, and offered to sell him some musical instruments for 300 pesos (R. 14). After considerable negotiation a sale was effected for 100 pesos (R. 15). One of the waiters carried the instruments from a truck outside the cafe in which "There was another G.I. with glasses" aside from the accused who was outside the truck (R. 15). The instruments were one Olds trumpet and one Holton saxophone and the only markings on the instruments were the "markings of the manufacturers" (R. 17). Mr. Alfonso testified that both the Holton saxophone and Olds trumpet are common in the Philippines, although on the matter of identification of these particular instruments he testified in part as follows:

- "Q. In what manner could you identify these two musical instruments?
- A. The case of the saxophone is almost worn out and besides the Holton is very seldom in the Philippines.
- Q. It is a very rare instrument here?
- A. Yes, sir, the brand of the Holton because the saxophone that we sell here is the Cone which is better than the Holton. We like the Cone better.

- Q. Have you seen other Holton saxophones?
A. Yes, sir.
- Q. Are they similar to the one you purchased?
A. Yes, sir, because they are manufactured by the same company.
- Q. How about the Olds trumpet, is that familiar in the Philippines?
A. Yes, sir, the Olds trumpet is familiar in the Philippines.
- Q. Have you seen others like it in the Philippines?
A. Yes, sir.
- Q. How could you identify these instruments if they were placed before you as being the instruments that you purchased?
A. Because of the case.
- Q. No, the instruments?
A. Well, because of their markings.
- Q. Is the marking of either one of these two different from that of other ones made by the same concern?
A. It is the same.
- Q. There is no distinctive marking on those horns different from the horns made up by the same manufacturer?
A. I can just tell what type, the horns made before the war but now they might have changed the design.
- Q. These two instruments, the Olds trumpet and the Holton saxophone, could you identify them as the ones which you purchased back in February?
A. I think I could identify them if they will be placed before me.

RECROSS EXAMINATION

* * *

- Q. You have just told the trial judge advocate that if the instruments you purchased were placed before you, you could identify them, now, if I had two instruments of the same kind and same make in my hand could you tell us which is which?
A. You mean the same make?
- Q. Could you tell each one apart?
A. Well, I could tell.

(354)

- Q. I mean if they are Holton-manufactured, the same brand and they look alike?
- A. If both have the same markings, same size, it is hard to tell" (R. 17, 18).

Mr. Alfonso testified further that he bought the instruments on Saturday and on Monday, after he was told they were stolen, he surrendered them to the detectives (R. 17).

Mr. James S. Brown, Warrant Officer, acting Provost Marshal of the Ordnance Service Center on about 1 February 1947, testified that on about the first or second of February he interviewed "a certain orchestra leader in a night club in Manila" with regard to two musical instruments which the leader admitted buying. Following this interview the witness went to the Manila Police Department where he received two musical instruments, a saxophone and trumpet, one manufactured by Frank Holton, the other by Olds. He turned them over to Captain Pohl. He would not be able to identify the instruments if he saw them again and was not sure they were United States Government property as there were no "U.S. markings" on them (R. 29).

First Lieutenant James J. Boland, Investigating Officer, testified that at his request two musical instruments, purported to be those recovered from Mr. Alfonso, were delivered to him for use in the investigation of the reported loss of two instruments from Headquarters and Service Company, 618th Battalion. However, he did not identify these instruments as being the ones which were allegedly stolen and he stated that he did not inspect them closely to determine whether or not there was any distinctive mark on them (R. 19, 20, 21). At the investigation Mr. Alfonso identified these two instruments as being those which were sold to him (R. 20). Lieutenant Boland was also permitted to testify regarding information elicited by him from Private Dale K. Wilkinson in the course of the pre-trial investigation. This testimony, however, was merely to the effect that Private Wilkinson told him and signed a sworn statement that accused on the evening of 1 February requested him to take him to Manila; that accused took with him two "black boxes" in which were musical instruments, which accused stated belonged to him; and that Wilkinson transported accused and the instruments to the cafe in Manila where accused sold them (R. 26, 27). Although this testimony was clearly inadmissible (par. 113, MCM, 1928), since it added nothing material to the prosecution's case, the irregularity of its admission will be disregarded in this discussion.

4. After the prosecution rested, the defense made a motion for a finding of not guilty, in view of insufficient evidence, which was denied. The accused then having been advised of his rights as a witness, elected to remain silent and no evidence was introduced by the defense.

5. With respect to Specification 1, in order to sustain the finding of guilty, it is necessary that the evidence establish that the accused took the property; that he carried it away; that he intended to permanently deprive the owner of the property; and that it was property belonging to the United States, furnished or intended for the military service thereof (pars. 149g, 150i, MCM, 1928). Although the corpus delicti was proven, by competent evidence that the property described in the Specification was taken without the consent of the person having it in custody, the record of trial fails to disclose any legal evidence connecting the accused with the offense. The evidence merely shows that, on the date alleged, accused had in his possession a saxophone and trumpet of the same type as those described in the Specification; that he sold these instruments to Mr. Alfonso, who relinquished them to the Manila Police Department; and that thereafter Mr. Brown, the Provost Marshal, obtained an Olds trumpet and a Holton saxophone from the Police Department and turned them over to Captain Pohl. Although one witness, Captain Pohl, testified that the instruments returned to him had "U.S." stamped on them, all other witnesses stated that they noticed no markings on those accused sold to Mr. Alfonso other than the manufacturers names. The property alleged to have been stolen was not introduced in evidence. It is not necessary in all cases involving theft of property to introduce the stolen property in evidence or display it to the court. When the articles are not introduced in evidence they must be identified by other evidence so that the court can determine beyond a reasonable doubt that the stolen articles were in fact the same articles found or known to have been in the possession of the accused (CM 202976, Baker, 6 BR 389, 392; CM 325090, Hall et al, (1947)). In the instant case there is no evidence that the instruments sold by accused were the same instruments as those stolen from the supply tent of Headquarters and Service Company. The record of trial raises no more than a suspicion that the accused was involved in the offense. It is well established that mere suspicion or conjecture does not warrant a conviction (CM 322967, Huffman et al, (1947)).

As to Specification 2, it is alleged that accused "did wrongfully and knowingly sell a saxophone * * * and a trumpet * * * property of the United States, furnished and intended for the military service thereof." It is apparent from the Specification and the evidence introduced before the court that it was intended to charge the accused with wrongful sale of the identical articles described in Specification 1. Here again the record of trial fails completely to sustain the findings of guilty of the Specification. While it is shown that accused sold certain described musical instruments on the date alleged, the sole testimony to even indicate that these instruments were property belonging to the United States is the statement of Capt. Pohl that "During my experience in instruments in the Army, they had a 'U.S.' markings stamped on them" and his reply to the question as to whether

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these two instruments had "U.S." on them, "As I recall they had." As previously stated, all other witnesses denied these markings.

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.

Edward J. Johnson Judge Advocate.

Frank C. Alfred Judge Advocate.

George T. Bush Judge Advocate.

JAGN-CM 325598

1st Ind

DEC 23 1947

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 Richard R. Deal (33961582), Headquarters and Service Company, 618th Ordnance Base Armament Maintenance Battalion, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated.

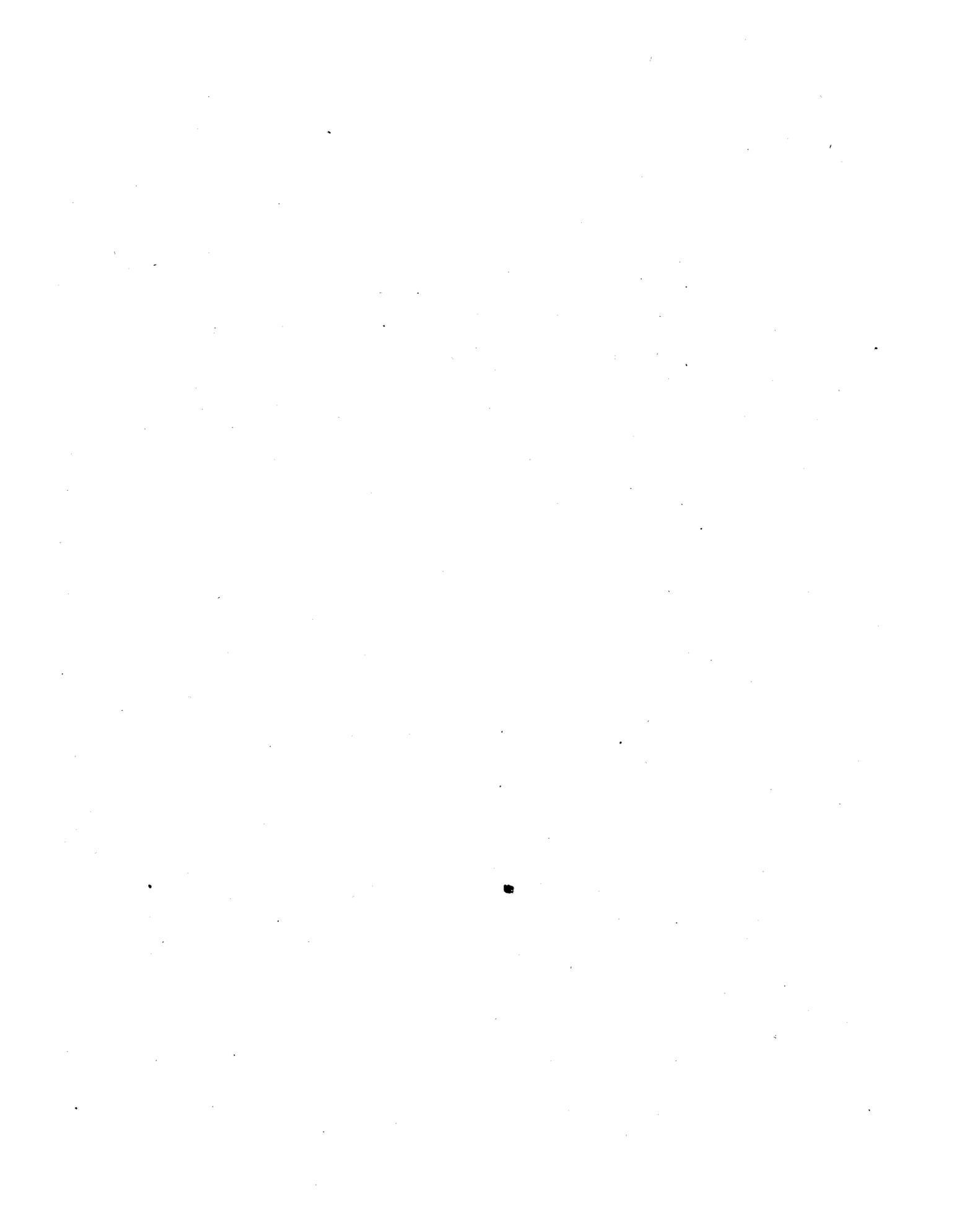
2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of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

(CM 325598).

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.

JAGQ - CM 325603

SEP 24 1947

UNITED STATES

9TH INFANTRY DIVISION

v.

Private First Class
GERALD J. COTE (RA 31399480),
Detachment #1, 1262d ASU, RTC.

Trial by G.C.M., convened at
Fort Dix, New Jersey, 15
August 1947. Dishonorable
discharge and confinement for
two (2) years. Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN and KANE, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that, Private First Class Gerald J. Cote, otherwise known as Jerald J. Cote, Detachment #1, 1262 Area Service Unit, Replacement Training Center, Fort Dix, New Jersey, did, at Fort Dix, New Jersey on or about 5 August 1946, desert the service of the United States, and did remain absent in desertion until he was returned to military control 29 May 1947 at Fort Banks, Mass.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence, designated the 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 only question requiring consideration is whether the record of trial is legally sufficient to support that portion of the sentence imposed by the court and approved by the reviewing authority providing for confinement for two years.

The Specification alleges that the desertion was terminated when accused "was returned to military control, 29 May 1947, at Fort Banks, Massachusetts." The court found the accused guilty as charged and imposed a sentence including confinement for two years. The maximum confinement authorized for desertion terminated by surrender is one and one-half years and for desertion terminated by apprehension, two and one-half years (Par 104c, MCM). The question to be determined is whether the Specification may be considered as alleging termination by apprehension. The evidence clearly establishes that accused was apprehended but if he were not called upon to defend a charge involving apprehension, he cannot be convicted or punished therefor.

It is the opinion of the Board of Review that the words "was returned to military control" imply some degree of involuntary action but are not equivalent to apprehension. A soldier might be returned to military control by his parents or someone other than an apprehending officer.

The following is quoted from CM 230278, Gunning, 17 BR 352, (2 Bull. JAG 98).

"In the finding upon this Specification the court excepted the words 'apprehended at Philadelphia, Pa', substituted therefor the words 'placed in confinement at Fort Dix, New Jersey', and found accused not guilty of the excepted words, but guilty of the substituted words. The court, therefore, made no finding in fact whether accused was apprehended or whether he surrendered prior to his confinement at Fort Dix. The record is legally sufficient to support only so much of the findings of guilty of Specification 2, Charge I, and of Charge I, as finds accused guilty of desertion at the time and place and for the period alleged, terminated in a manner not shown, the maximum punishment for which cannot exceed that fixed for desertion under similar circumstances terminated by surrender. As the accused was absent for more than sixty days, the authorized punishment for his offense is dishonorable discharge, total forfeitures, and confinement at hard labor for one and one-half years. (Par. 104c, M.C.M., 1928, p. 97)."

It is also apparent in the instant case, when the court found accused guilty of the Specification as drawn it did not find in fact that accused was apprehended prior to his return to military control at Fort Banks even though there was evidence to this effect. The record is therefore legally sufficient to support only so much of the findings of guilty of the Specification and the Charge, as finds accused guilty of desertion at the time and place and for the period alleged terminated in a manner not shown, the maximum punishment for which cannot exceed that fixed for desertion under similar circumstances terminated by surrender. As the accused was absent for more than sixty days, the authorized punishment for his offense is dishonorable discharge, total forfeitures and confinement at hard labor for one and one-half years.

4. For the reasons stated above, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

W.A. Johnson, Judge Advocate

C. J. Schell, Judge Advocate

A. D. Kane, Judge Advocate

(362)

#33
JA 13 OCT 47

JAGQ - CM 325603

1st Ind

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

TO: Commanding General, 9th Infantry Division, Fort Dix,
New Jersey

1. In the case of Private First Class Gerald J. Cote (RA 31399480), Detachment #1, 1262d ASU, RTC, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as 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, which holding is hereby approved. Upon reducing the term of confinement to one and one-half years 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 325603).

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.

JAGN-CM 325620

UNITED STATES)

FIRST ARMY)

v.)

Private ALPHONSE J. G. PAUL)
(31487862), Attached Un-)
assigned Headquarters & Head-)
quarters Detachment, 1201st)
Area Service Unit.)

Trial by G.C.M., convened at)
Fort Jay, New York, 28 August)
1947. Dishonorable discharge)
and confinement for five (5))
months. Post Guardhouse.)

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Alphonse J G Paul, attached unassigned, Headquarters and Headquarters Detachment, 1201st Area Service Unit, Fort Jay, New York, then a member of Company A, 4th Signal Battalion, Fort Bragg, North Carolina, did, at the Club Charles, Charles and Preston Streets, Baltimore, Maryland, on or about 20 December 1946, wrongfully and unlawfully wear the Congressional Medal of Honor Ribbon.

Specification 2: In that Private Alphonse J G Paul, attached unassigned, Headquarters and Headquarters Detachment, 1201st Area Service Unit, Fort Jay, New York, then a member of Company A, 4th Signal Battalion, Fort Bragg, North Carolina, did, at Staten Island, New York, on or about 28 January 1947, wrongfully and unlawfully have

in his possession a forged certificate of discharge from the Army of the United States, knowing the same to be forged..

Specification 3: (Finding of not guilty).

Accused pleaded not guilty to the Charge and all Specifications. He was found guilty of Specification 1, guilty of Specification 2 except the words "at Staten Island, New York, on or about 28 January 1947," substituting therefor the words "at Baltimore, Maryland, on or about 20 December 1946," of the excepted words, not guilty, of the substituted words, guilty, not guilty of Specification 3 and guilty of the Charge. 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 one year. The reviewing authority approved the sentence but reduced the period of confinement to five months, designated the Post Guardhouse, Fort Jay, New York, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Specification 1 and the Charge. The only questions requiring consideration are the legal sufficiency of the record of trial to support the finding of guilty of Specification 2 and, the legality of the sentence.

4. Specification 2 of the Charge alleges that accused "did, at Staten Island, New York, on or about 28 January 1947, wrongfully and unlawfully have in his possession a forged certificate of discharge from the Army of the United States, knowing the same to be forged" (Emphasis supplied). While the evidence shows conclusively that the accused did, at the time and place alleged, have in his possession a forged certificate of discharge from the Army of the United States, knowing the same to be forged (Pros. Ex. 1, with attached certificate) it was further shown that the accused also had the same certificate in his possession at Baltimore, Maryland, on or about 20 December 1946 (R. 42, 75, 80). Notwithstanding the proof, insofar as it conforms to the allegations, the court, in accordance with the additional evidence, found accused guilty, by exceptions and substitutions, of committing the alleged offense at Baltimore, Maryland, on 20 December 1946, thereby changing the alleged time and situs of the offense. It therefore becomes material to determine whether the action of the court, with regard to its substituted findings, was authorized.

It is a recognized rule of judicial practice and procedure that a court-martial may make substituted findings in the language of the Specification provided that such action does not change the nature or identity of the offense charged in the Specification or increase the maximum punishment provided for such offense (par. 78c, MCM, 1928).

In the instant case, however, accused was shown to have had the alleged documents in his possession on each of two separate occasions, the first of which occurred over a month prior to the time alleged and at a place far removed from the place alleged. It is obvious, therefore, that the court by its excepted and substituted findings actually found accused not guilty of the offense with which he was charged but guilty of an entirely distinct offense not included within the Specification. When a court by exceptions and substitutions finds an accused not guilty of the offense alleged but guilty of some other offense not necessarily included therein, it in fact finds the accused guilty of an offense for which he was not brought to trial (CM 199063, Martin, 3 BR 325). Such action, of course, is fundamentally illegal and such a finding cannot be sustained.

The maximum punishment authorized for the offense of which accused was convicted under Specification 1 is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (10 U.S.C. 1425).

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 2, legally sufficient to support the findings of guilty of Specification 1 and the Charge, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for five months and forfeiture of two-thirds of his pay per month for a period of six months.

Edward J. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

Joseph J. Brack, Judge Advocate.

(366)

JAGN-CM 325620

1st Ind

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

TO: Commanding General, First Army, Governors Island, New York 4, N. Y.

1. In the case of Private Alphonse J. G. Paul (31487862), Attached Unassigned Headquarters & Headquarters Detachment, 1201st Area Service Unit, I concur in the foregoing holding by the Board of Review and recommend that the finding of guilty of Specification 2 of the Charge be disapproved, and that only so much of the sentence be approved as involves confinement at hard labor for five months and forfeiture of two-thirds pay per month for six months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 325620).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

The Specification alleges that the desertion was terminated when accused "was returned to military control at Fort Dix, New Jersey, on or about 1 November 1946." The court found the accused guilty as charged and imposed a sentence including confinement for two and one-half years which was reduced by the reviewing authority to two years.

The maximum confinement authorized for desertion terminated by surrender is one and one-half years and for desertion terminated by apprehension, two and one-half years (Par 104c, MCM). The question to be determined is whether the Specification may be considered as alleging termination by apprehension. The evidence clearly establishes that accused was apprehended but if he were not called upon to defend a charge involving apprehension, he cannot be convicted or punished therefor.

It is the opinion of the Board of Review that the words "was returned to military control" imply some degree of involuntary action but are not equivalent to apprehension. A soldier might be returned to military control by his parents or someone other than an apprehending officer.

Unless termination of desertion by apprehension is alleged and proved in a desertion case, the findings of the court and the maximum punishment authorized must be that of the lesser degree of desertion terminated by surrender. (CM 325603, Cote, 1947).

The following is quoted from CM 230278, Gunning, 17 BR 352, (2 Bull. JAG 98).

"In the finding upon this Specification the court excepted the words 'apprehended at Philadelphia, Pa', substituted therefor the words 'placed in confinement at Fort Dix, New Jersey', and found accused not guilty of the excepted words, but guilty of the substituted words. The court, therefore, made no finding in fact whether accused was apprehended or whether he surrendered prior to his confinement at Fort Dix. The record is legally sufficient to support only so much of the findings of guilty of Specification 2, Charge I, and of Charge I, as finds accused guilty of desertion at the time and place and for the period alleged, terminated in a manner not shown, the maximum punishment for which cannot exceed that fixed for desertion under similar circumstances terminated by surrender. As the accused was absent for more than sixty days, the authorized punishment for his offense is dishonorable discharge, total forfeitures, and confinement at hard labor for one and one-half years. (Par. 104c, M.C.M., 1928, p. 97)."

It is also apparent in the instant case, when the court found accused guilty of the Specification as drawn it did not find in fact that accused was apprehended prior to his return to military control at Fort Dix even though there was evidence to this effect. The record is therefore legally sufficient to support only so much of the findings of guilty of the Specification and the Charge, as finds accused guilty of desertion at the time and place and for the period alleged terminated

in a manner not shown, the maximum punishment for which cannot exceed that fixed for desertion under similar circumstances terminated by surrender. As the accused was absent for more than sixty days, the authorized punishment for his offense is dishonorable discharge, total forfeitures and confinement at hard labor for one and one-half years.

4. For the reasons stated above, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

W. H. Johnson Jr., Judge Advocate

C. J. Schellum, Judge Advocate

A. T. Kane, Judge Advocate



(370)

JAGG - CM 325621

1st Ind

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

TO: Commanding General, 9th Infantry Division, Fort Dix, New Jersey.

1. In the case of Private First Class Charles H. Lyle (RA 32950163), AUNA, Detachment #3, Area Service Unit, First Army, Fort Dix, New Jersey, attention is invited to the foregoing holding by the Board of Review which holding is hereby approved. It is recommended 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 325621)



THOMAS H. GREEN
Major General
The Judge Advocate General

RECEIVED

File
18 OCT 1947
HPL



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

(371)

JAGK - CM 325634

29 DEC 1947

UNITED STATES)

FORT EUSTIS, VIRGINIA

v.)

Trial by G.C.M., convened at Fort Eustis,
Virginia, 11 and 16 September 1947. Dis-
missal and total forfeitures.

First Lieutenant JOHN H. E.
SLATER (O-1950930), Transpor-
tation Corps)

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

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

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

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

Specifications: In that First Lieutenant John H. E. Slater, Headquarters Transportation School, Fort Eustis, Virginia, was, at Station Hospital, Fort Eustis, Virginia, on or about 20 August 1947, drunk and disorderly while in uniform.

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

Specification 1: In that First Lieutenant John H. E. Slater, ***, having been restricted to the limits of Fort Eustis, Virginia, did, at Fort Eustis, Virginia, on or about 20 August 1947, break said restriction by going to Red Hill Village, Virginia.

Specification 2: In that First Lieutenant John H. E. Slater, ***, did at Red Hill, Virginia, on or about 20 August 1947, drink intoxicating liquor with Technical Sergeant William J. Powers, an enlisted man in the United States Army.

He pleaded guilty to the specification of Charge I except for the word "disorderly", of the excepted word not guilty, and to Charge I, not guilty, but guilty of a violation of the 96th Article of War, and to Specifications 1 and 2 of Charge II and to Charge II, guilty. He was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On 15 August 1947 the accused was in arrest in quarters at Fort Eustis, Virginia. On the same date First Lieutenant Francis J. Kelly, acting upon orders from Colonel Poindexter, deputy commander, called the accused by telephone and informed him that his arrest in quarters had been reduced to restriction to the limits of the post (R 7).

On 20 August 1947 and while still restricted to the post the accused went to the home of Technical Sergeant William James Powers at 93 Red Hill Village, Virginia. During the evening the accused and Sergeant Powers "sat around drinking Tom Collins and whiskey and *** both, ***, became very intoxicated." Subsequently the accused, Sergeant Powers and Mrs. Powers left the Powers' home to return the accused to his quarters in the B.O.Q. at Fort Eustis (R 11-13, Pros Ex 1). Sergeant Powers drove the car to Fort Eustis. At approximately 10:30 p.m. the parties arrived at the station hospital instead of the B.O.Q. occupied by the accused. The accused and Sergeant Powers entered the hospital. Some 20 minutes later they were escorted from the hospital by an unidentified soldier (R 9, Pros Ex 1).

About 10:30 p.m. on 20 August 1947 Private First Class William R. Davidson, Medical Detachment, Fort Eustis, was asleep in Barracks 2 of the station hospital. Between 10:30 and 11:00 p.m. he was awakened by a man who was molesting him. He discovered that this man was the accused. Private Davidson testified as follows:

"Q. Pvt. Davis, in your previous testimony you stated that Lt. Slater was molesting you. Tell the court just how he was molesting you?

"A. He was ahold of my private parts.

"Q. What did you do then?

"A. I told him to leave me alone, sir.

"Q. What did he do when he first came into the room. How did he appear to you, drunk or what?

"A. Sir, I was asleep when he came in.

"Q. The first thing you knew he was molesting you?

"A. That's right, sir.

"Q. Tell the court just exactly when you first saw him?

"A. I was laying in bed asleep, and when I first seen him, I jumped out of bed. He was sitting right on my bunk. That was the first time I seen him.

"Q. Did he say anything?

"A. He asked me for a light first, after we were sitting there.

"Q. After you had got out of bed?

"A. After he was sitting on the bed, sir.

"Q. The first time you knew he was in the room was when he took hold of you?

"A. Yes, sir.

"Q. Then after you got up and sat on the bed, he asked you for a light?

"A. Yes, sir.

"Q. Did you give him that light?

"A. Yes, sir.

"Q. Did you have any conversation with him?

"A. Sir, he asked me for a light and then I gave him the light and he asked me where I was from. I told him that I worked here in the hospital and I lived a good ways away. I asked him where he was from.

"Q. Did you ask him what he was doing in there and what he wanted?

"A. No, sir.

"Q. Did you ever know him before this event?

"A. Never seen him before.

"Q. Who was with him, or was he alone?

"A. He was by himself.

"Q. He came in by himself?

"A. Yes, sir.

"Q. How long was he in your room?

"A. About 15 minutes, sir.

"Q. What took place after he asked for the light?

"A. He put his arm around me a minute or two and I jerked his arm down and we sat there a little bit and he said a few things. Then when we sat there a few minutes, I told him, I says 'I've got to go to bed'. I lay down and couldn't sleep, so I got up and walked into the latrine. When I came out, he was standing over by the bunk. I sat on the bunk and still he came over and bothered me.

"Q. You mean he came over again and bothered you?

"A. Yes, sir.

"Q. How did he bother you the second time?

"A. The same way.

"Q. What did he say to you?

"A. Not a thing.

"Q. What time was this?

"A. This was between 1030 and 11 o'clock.

"Q. How was he dressed?

"A. He was dressed in khaki uniform but he didn't have his tie on nor his hat on.

"Q. Who was with you in the room on the second occasion, anybody else in the room?

"A. There were several guys in the barracks. It wasn't a room, sir.

* * *
"Q. Didn't you tell him to get out or make some effort to have him go away and leave you alone?

"A. Yes, sir.

"Q. How many other men were awakened by the commotion?

"A. Sir, I wouldn't know.

"Q. How did you get him out?

"A. I went up to the sergeant, sir.

* * *

"Q. When he was molesting you, did he say anything to you, ask you any questions or say anything to you?

"A. No, sir, all he said was 'You had a nice one'. That's all."
(R 7,8,14-17)

Staff Sergeant Sherman E. Townsend testified that about 10:30 p.m. on 20 August 1947 Private Davidson "came into my room and said there was some one disturbing him." He went to see about the trouble and saw the accused standing in a corner outside his door (R 9).

4. For the Defense

Character evidence relating to the accused by Colonel Stephen W. Ackerman, Captain John A. Limbeck and First Lieutenant William L. Kelner was introduced by stipulation. From these stipulations it appears that the accused is a superior officer of superior intelligence, capable of being relied upon and of being given assignments that demand a trust. His character and efficiency are excellent (Def Exs A,B,C).

The accused was warned of his rights and elected to testify concerning all of the offenses with which he was charged. He testified that on 15 August 1947 his arrest in quarters was downgraded to restriction to the post. Concerning the events of 20 August 1947 he testified:

"Q. Did you proceed to the home of T/Sgt Powers on or about 20 August?

"A. I did.

"Q. Did you have authority to go to that particular house?

"A. No.

"Q. Why didn't you have authority to go there?

"A. I had been restricted to Fort Eustis.

"Q. Tell the court to the best of your knowledge what happened on that particular night? Who you were with, what you did, as much as you can remember.

"A. I would like to inform the court first of all what I will say corresponds very closely to the statements already made by me in an inquiry which was made into this matter. I went to Sgt. Powers' house on rather a last-minute invitation. I thought I was leaving the Army very quickly and believed at that time I would be out within a week. I was under restriction. Ordinarily I would have asked permission to leave the post. On two previous occasions I had asked for and received permission to go. I knew, however, that the place to which I was going was administratively a part of Fort Eustis and

that is the reason why I failed to check into the matter. I simply took the risk that it would be O.K. and went over there. Powers and Mrs. Powers entertained me. They had some very fine food. We had a bottle of gin. We had a number of drinks before dinner and had this food and one or two drinks after dinner. I should mention that the day of these events had been an extremely hot day and continued so throughout the night, one of those Virginia midsummer days. I do not consider that I had an unusual amount of liquor in volume, but it did hit me suddenly and very hard, particularly after having had this food that I mentioned. I felt extremely sleepy and kept dozing a little and when we returned I believe that I went to sleep in the car as a result of this drinking and the food and the hot weather. When we left their place I understood Powers to say, and Mrs. Powers, that they were taking me directly to my BOQ. We came up in front of this building, there were a couple of lights in front. The general set-up looked rather similar to my own building which has lights burning in its lower rooms at all times in front. I believe, as far as I can recall what took place there, that I did have a strong impression that I was at my own BOQ. *** I can't recall exactly what took place in the Hospital. When I first recognized it was the Hospital, I was walking along a corridor which had windows in either side through which I could look out and I knew I was in a Hospital building. Up to that point I did not definitely recognize it as other than my BOQ. I don't even recall seeing Sgt. Powers in the building. I don't recall the various Hospital personnel who came here before the court and who appeared earlier and have no knowledge of the event which was testified to in the squad room or living quarters by Pvt. Davidson. One very vivid recollection is that I wanted to get off my feet and go to sleep. I wanted to lie down and go to sleep and I do think that if any fight or any difficulty or disturbance or event of the kind that was narrated had occurred, I do think that I would have been conscious of it or conscious enough of it to recall it. I don't recall any disturbance or any event of that kind ***. ***

"Q. Do you remember making any advances to the soldier named Davidson in that particular room that night?

"A. No, I don't even remember being in the room in question.

"Q. And would you or would you not deny that you made any advances to this soldier?

"A. Yes, I would be inclined to deny it because I think that anything of that kind I would have been much more conscious than I was. In other words the story that he tells doesn't match up with my state of mind which was pretty much stupefied." (R 23,24)

On cross-examination he testified:

"Q. You stated in your prior testimony that you did leave the post at Fort Eustis, is that correct?

"A. That's correct.

"Q. You were under restriction at the time?

"A. Yes, sir.

"Q. Did you or did you not drink intoxicants with T/Sgt Powers at his home in Red Hill?

"A. I did.

"Q. Do you remember being at the Station Hospital?

"A. Yes.

"Q. What was your condition?

"A. Well, I would call it a combination of drink, food, and sleep.

"Q. Would you say you were intoxicated?

"A. Not in the ordinary sense. It was the result of intoxicants, and food and being very hot weather. I mean by that that I wasn't intoxicated as one would be if he just went out and drank and drank, maybe a 5th or a couple of 5ths. I don't know how many of you people here have had that experience but it strikes me when the weather is hot, the actual quantity doesn't matter so much, but it can hit you. And the food on top of that would make you very, very sleepy. That was my condition." (R. 25)

5. The evidence establishes, and the accused by his plea of guilty admitted, that on 20 August 1947 he was restricted to the limits of Fort Eustis, Virginia, and that on the same date he breached his restriction by going to the home of Technical Sergeant William J. Powers at Red Hill Village, Virginia; that while visiting at Sergeant Powers' home he drank intoxicating liquor with Sergeant Powers and became drunk; that he was in uniform on this occasion. The accused entered a plea of guilty to the specification of Charge I except the word "disorderly" and guilty of a violation of Article of War 96. It is admitted that the accused was drunk in uniform at the Station Hospital, Fort Eustis, Virginia, on 20 August 1947. The only question for determination is whether or not he was disorderly on this occasion and if such disorderly conduct amounted to a violation of Article of War 95.

The evidence as set forth herein establishes that while at the hospital the accused entered the sleeping quarters provided for the enlisted personnel and took hold of an enlisted man's private parts. This action was repeated a few minutes later under circumstances which indicate deliberate willful action on his part. Such conduct, being of a lewd and lascivious nature, constituted a gross disorder which tended to compromise his standing as an officer and a gentleman and was therefore a violation of Article of War 95 (CM 226247, Leavitt, 15 BR 51; CM 246537, Brewer, 1 BR (NATO-MTO) 399).

6. Records of the Department of the Army show the accused to be 33-4/12 years of age and single. He is a college graduate. Prior to his entry into the service he was teaching English at the University of Washington. He was inducted into the Army in January 1943. He was commissioned a second lieutenant, AUS, Transportation Corps, on 13 June 1945.

On 31 December 1946 he was promoted to first lieutenant. His efficiency ratings are "Excellent" and "Superior."

7. Mr. Thomas H. King, an attorney of Washington, D.C., appeared before the Board of Review on behalf of the accused, made oral argument, and filed a brief.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96 and mandatory upon conviction of a violation of Article of War 95.

Robert D. Sibers, Judge Advocate

Charles E. McAfee, Judge Advocate

Robert E. Johnson, Judge Advocate

(378)

JAGK - CM 325634

1st Ind

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

JAN 5 1948

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 John H. E. Slater (O-1950930), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly while in uniform in violation of Article of War 95, breach of restriction, and drinking intoxicating liquor with an enlisted man in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

The record of trial shows that the accused was restricted to the limits of the post of Fort Eustis on 15 August 1947. He breached this restriction on 20 August 1947 by leaving the post and going to Sergeant William J. Power's home. The accused and Sergeant Powers consumed considerable whiskey and gin. About 11:00 p.m., Sergeant Powers and his wife accompanied the accused to Fort Eustis. They went to the station hospital apparently believing it to be the accused's quarters. While in the hospital the accused entered the sleeping quarters provided for the enlisted personnel and took hold of an enlisted man's private parts. This action was repeated a few minutes later. He stated to the enlisted man, "You had a nice one." The accused was in uniform on this occasion.

On 13 August 1947 this officer was found guilty by general court-martial of removing with intent to conceal and/or destroy a public document, to wit, an official endorsement attached to an efficiency report of Second Lieutenant Walter H. Deburgh, in violation of Article of War 96, and of making a false official statement concerning that incident, in violation of Article of War 95. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. Examination of the record of trial in that case is now pending in my office (CM 325633, Slater).

Mr. Thomas H. King, an attorney of Washington, D.C., appeared before the Board of Review on behalf of the accused, made oral argument, and

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

(381)

JAGK - CM 325635

23 OCT 1947

UNITED STATES)

FORT EUSTIS, VIRGINIA

v.)

Trial by G.C.M., convened at Fort
Eustis, Virginia, 28 August 1947.
Dismissal and total forfeitures.

Second Lieutenant ALFRED
L. RICHARDSON (O-1951709),
Transportation Corps.)

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

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

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

CHARGE I: Violation of the 64th Article of War.

Specification: In that, Second Lieutenant Alfred L. Richardson, 48th Transportation Truck Company (H), having received a lawful command from Captain John Bodo, 48th Transportation Truck Company (H), his superior officer, to personally take T/4 Robert Grant, 48th Transportation Truck Company, to the Infirmary, did at Little Creek Naval Base, Virginia, Annex #3, on or about 5 August 1947, willfully disobey the same.

CHARGE II: Violation of the 63rd Article of War.

Specification: In that, Second Lieutenant Alfred L. Richardson, 48th Transportation Truck Company (H), did, at Little Creek, Virginia, Naval Base, Annex 3, on or about 5 August 1947 behave himself with disrespect toward Captain John Bodo, his superior officer, by saying to him "Who do you think I am, a Pfc, to be running around this damn post. Grant can find it." or words to that effect.

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

3. The 48th Transportation Corps Truck Company (the unit to which the accused was assigned) "was selected as a demonstration unit for the operations at Little Creek Naval Base." The unit was at the Little Creek Naval Base on 5 August 1947 (R. 7). On 3 August 1947 Technician Fourth Grade Robert Grant, 48th Truck Company, suffered a burn on his left wrist. He reported this injury to Captain John Bodo, his company commander, about 6:30 p.m., 5 August 1947 (R. 7, 11). Captain Bodo told the accused "to take Grant personally to the infirmary and have his wrist attended to." The accused replied that he did not know where the infirmary was located. Captain Bodo stated that he did not know the location of the infirmary but that the accused could go to the Transportation Corps Headquarters and inquire as to the location of the infirmary. Captain Bodo then indicated to the accused (by pointing) the location of the Transportation Corps Headquarters. The accused directed Technician Fourth Grade Grant to go and find the infirmary. Captain Bodo heard the accused direct Grant to go to the infirmary. He walked back to the accused and stated "Lieutenant Richardson, I thought that I told you to take this man down to the infirmary and have his wrist attended to." Shortly thereafter Captain Bodo "saw T-4 Grant walking away alone." Captain Bodo then went to the accused and stated "Lieutenant, I thought that I told you twice to take that man to the infirmary." The accused replied "who do you think I am, a Pfc, to be running around this damn post?" The accused raised his voice in making this reply and "he acted belligerent and sarcastic." Thereupon Captain Bodo procured a jeep and took T-4 Grant to the infirmary which was located in the Transportation Corps Headquarters building. Captain Bodo testified on cross examination that the second time he instructed the accused to take Grant to the infirmary he gave him 30 minutes to comply with the order. When the accused replied (as set out above) he then took things into his own hands and took Grant to the infirmary. This was within 15 minutes of the time the second order was given (R. 7, 8, 9).

Technician Fourth Grade Robert Grant testified that Captain Bodo told the accused to locate the dispensary and to take him (Grant) there to have his arm fixed. The accused told Grant to wait until "after the jeep was finished," and that he (the accused) would take him to the infirmary. The accused asked another soldier the location of the infirmary. This soldier stated that there was a first aid man from Fort Eustis at the Headquarters building. The accused then told Grant to go to the infirmary. The Headquarters building was 5 or 6 blocks from the place the order was given. The accused did not take Grant to the infirmary (R. 10, 11).

Private Stephen J. Duppins testified that between 6 and 7 p.m. on 5 August 1947 the accused asked him the location of the infirmary at which time he told the accused that their men did not have to go to the infirmary as there was a Transportation Corps First Aid Man at the Transportation Corps Headquarters. The accused then "told T-4 Grant to go to T.C. headquarters and get his hand fixed and then report back to him" (R.11,12).

4. The accused offered no evidence. The rights of the accused as a witness were explained to him and he elected to remain silent.

5. The Specification, Charge I, alleges that the accused willfully disobeyed a lawful command of his superior officer to personally take Grant to the infirmary. The offense alleged is a willful disobedience manifesting an intentional defiance of authority, of an order, relating to a military duty, given by an authorized superior officer (Par 134b, MCM, 1928; CM 255602, Prichard, 36 BR 151, 157).

The evidence shows beyond a reasonable doubt that the accused received an order from Captain Bodo, his company commander, to personally take Grant to the infirmary. Instead of complying with this order the accused instructed Grant to go to the infirmary. Captain Bodo overheard these instructions at which time he again repeated his order and gave the accused thirty minutes to comply therewith. Before this thirty minutes had elapsed the accused again instructed Grant to go to the infirmary and Grant started to walk to the infirmary. Captain Bodo observed Grant leaving the area by himself at which time he (Captain Bodo) went to accused and reminded him that it was his duty to take Grant to the infirmary. The accused stated "who do you think I am, a Pfc, to be running around this damned post?" Such actions were plainly in direct defiance of the order given and shows that the accused never intended to carry out that portion of the order to personally take Grant to the infirmary.

The evidence also shows that at the time the accused spoke the words to Captain Bodo as set forth in the Specification, Charge II, he raised his voice and was belligerent and sarcastic. Such actions show a disrespectful behaviour on the part of the accused towards his superior officer (CM 255394, Henry, 50 BR 97, 102).

6. Records of the Department of the Army show the accused to be 20 9/12 years of age and single. He is a high school graduate and attended college for one and one half years. He was inducted into the Army on 1 January 1946 and after basic training he was sent to Officer Candidate School. He was appointed and commissioned a temporary second lieutenant, Transportation Corps, Army of the United States, on 22 January 1947. From 3 February 1947 to 9 April 1947 he attended and completed Stevedore Operations Officers Course No. 13 at The Transportation School, Fort Eustis, Virginia. His efficiency report for the period 1 January 1947 to 30 June 1947 is 3.6 (excellent).

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

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firmation of the sentence. Dismissal is authorized upon a conviction of a violation of Articles of War 63 and 64.

Robert D. Sibert, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 325635

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 8 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 Alfred L. Richardson (O-1951709), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of wilful disobedience of a lawful order of his superior officer, in violation of Article of War 64; and of behaving himself with disrespect towards his superior officer, in violation of Article of War 63. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

On the afternoon of 5 August 1947 the accused was ordered by his company commander, a Captain Bodo, personally to take Technician Fourth Grade Grant to the infirmary. The accused directed Grant to go to the infirmary. The commanding officer overheard these instructions and again ordered the accused personally to take Grant to the infirmary within 30 minutes. The accused inquired about the location of the infirmary and again directed Grant to proceed to the infirmary. Captain Bodo saw Grant leaving the area and again reminded accused that he had ordered him to conduct Grant to the infirmary. Accused thereupon assumed a belligerent and sarcastic manner, raised his voice and said: "Who do you think I am, a Pfc, to be running around this damn post?" Thereupon Captain Bodo took Grant to the infirmary.

4. Records of the Department of the Army show that the accused is 20-9/12 years of age and single. He is a high school graduate and attended college for one and one-half years. He was inducted into the Army on 1 January 1946 and after basic training he was sent to Officer Candidate School. He was appointed and commissioned a temporary Second Lieutenant, Transportation Corps, Army of the United States, on 22 January 1947. From 3 February 1947 to 9 April 1947 he attended and completed Stevedore Operations Officers Course No. 13 at The Transportation School, Fort Eustis, Virginia. His efficiency report for the period 1 January 1947 to 30 June 1947 is 3.6 (excellent).

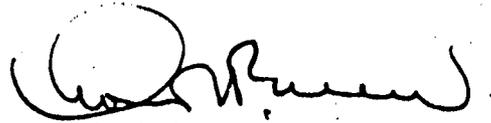
(386)

5. I recommend that the sentence be confirmed but in view of the youth of the accused, his relative short period of service, the fact that he was serving his first assignment to duty with troops as an officer, and all the other circumstances, I recommend that the sentence be commuted to dismissal, a reprimand and forfeiture of \$75 per month for four months and that the sentence as thus commuted be carried into execution but that execution of the dismissal be suspended during good behaviour.

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

CM 325635

2 Incls



THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 46, 19 Nov 1947).

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

JAGH - CM 325636

26 NOV 1947

UNITED STATES	)	HEADQUARTERS, BOLLING FIELD COMMAND
)	
v.	)	Trial by G.C.M., convened at Bolling
	)	Field, District of Columbia on 28
Major GUY A. DEVINE	)	April, 1947, and 7 and 11 August 1947.
(O-382572) Finance Department	)	Dismissal and total forfeiture.

OPINION OF THE BOARD OF REVIEW
Hottenstein, Lipscomb and Lynch, Judge Advocates

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

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

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

Specification 1: In that Major Guy A. Devine, 1st AAF Base Unit, Bolling Field, District of Columbia, did at Augusta, Georgia between the dates of about 2 January 1943 and about 31 December 1945, live in an open and notorious relationship as man and wife with a woman not his wife to wit: one Nell Fleming alias Mrs. Nell Devine.

Specification 2: In that Major Guy A. Devine, 1st AAF Base Unit, Bolling Field, District of Columbia, did, at Washington, District of Columbia, on or about 7 May 1946 in his testimony before Major Donald B. White, IGD, an officer conducting an official investigation, testify under oath in substance that he, the said Major Guy A. Devine, since 7 January 1942, the date upon which he, the aforesaid Major Guy A. Devine, entered the military service, did not correspond with an individual who alleges to be Mrs. Cora Devine, which testimony by said Major Guy A. Devine was false and untrue in that he, the said Major Guy A. Devine, well knew that he had written a letter on or about 11 October 1945 to an individual who alleges to be Mrs. Cora Devine.

CHARGE II: (Nolle Prosequi)

Specification 1: (Nolle Prosequi)

Specification 2: (Nolle Prosequi)

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

Specification 1: In that Major Guy A. Devine, First Army Air Forces Base Unit, Bolling Field, District of Columbia, for the purpose of obtaining the payment of a claim against the United States by presenting to E. G. Mayfield, Jr., Captain, Finance Department, Finance Officer at Camp Gordon, Georgia, an officer of the United States, duly authorized to pay such claims, did, at Camp Gordon, Georgia, on or about 31 December 1945 use a certain paper to wit: War Department Form 336 - Revised, Disbursing Officers Voucher Number 5378-4, which said voucher, as he, the said Major Guy A. Devine, then knew contained a statement that Mrs. Nell Devine was the lawful wife of Major Guy A. Devine, which statement was false, and was then known by the said Major Guy A. Devine to be false, he being then lawfully married to Cora Devine, she being then living.

Specification 2: In that Major Guy A. Devine, First Army Air Forces Base Unit, Bolling Field, District of Columbia, for the purpose of obtaining the payment of a claim against the United States by presenting to L. P. Farrell, Major, Finance Department, Finance Officer at A. P. O. 390, an officer of the United States, duly authorized to pay such claims, did, at A. P. O. 390, on or about 1 November 1945 use a certain paper to wit: War Department Form 336 - Revised, Disbursing Officers Voucher Number 1788, which said voucher, as he, the said Major Guy A. Devine, then knew contained a statement that Mrs. Nell Devine was the lawful wife of Major Guy A. Devine, which statement was false, and was then known by the said Major Guy A. Devine to be false, he being then lawfully married to Cora Devine, she being then living.

Specification 3: In that Major Guy A. Devine, First Army Air Forces Base Unit, Bolling Field, District of Columbia, for the purpose of obtaining the payment of a claim against the United States by presenting to L. P. Farrell, Major, Finance Department, Finance Officer at A. P. O. 390, an officer of the United States, duly authorized to pay such claims, did, at A. P. O. 390, on or about 22 October 1945 use a certain paper to wit: War Department Form 336 - Revised, Disbursing Officers Voucher Number 1563, which said voucher, as he, the said Major Guy A. Devine, then knew contained a statement that Mrs. Nell Devine was the lawful wife of Major Guy A. Devine, which statement was false, and was then known by the said Major Guy A. Devine to be false, he being then lawfully married to Cora Devine, she being then living.

Specification 4: In that Major Guy A. Devine, First Army Air Forces Base Unit, Bolling Field, District of Columbia, for the purpose of obtaining the payment of a claim against the United States by presenting to G. A. Devine, Major, Finance Department, Finance Officer at A. P. O. 390, an officer of the United States, duly authorized to pay such claims, did, at A. P. O. 390, on or about 27 August 1945 use a certain paper to wit: War Department Form 336 - Revised, Disbursing Officers Voucher Number 328-26, which said voucher, as he, the said Major Guy A. Devine, then knew contained a statement that Mrs. Nell Devine was the lawful wife of Major Guy A. Devine, which statement was false, and was then known by the said Major Guy A. Devine to be false, he being then lawfully married to Cora Devine, she being then living.

The accused pleaded not guilty to, and was found guilty of, the Charges and Specifications thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved only so much of the sentence as provides 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. Summary of Evidence For The Prosecution.

In a deposition taken by First Lieutenant Dean L. Donoho, Trial Judge

Advocate, A.P.O. 719, U. S. Army, on 26 May 1947, Socorro Zaragoza, a woman of San Juan, Rizal, Philippines, identified a photograph of the accused, Prosecution's Exhibit 4 for identification, which the defense conceded to be "authentic," to be a true likeness of the person to whom she was married in a civil ceremony on 2 July 1940. (R 27, 45; Pros. Ex. 1) She further identified the accused by the name, James A. Devine, and explained that while they were living together in Cavite a letter was received by him addressed to Guy A. Devine. She testified that after the civil ceremony of marriage with the accused a "—religious marriage was performed by Reverend Father Artemio G. Casas at the Catholic Church of San Juan, on 31 May 1941." She testified further that following her marriage to the accused, she lived with him as man and wife until 14 July 1941. She identified a copy of a religious marriage contract which she stated was signed on 31 May 1941, by herself, by the accused, by Reverend Artemio G. Casas, and by two witnesses, Fernando Llorca and Beatriz Alves. (Pros. Ex. 7 for identification) She also identified a letter which she had received from the accused in November 1945, signed "Guy" and a second photograph upon which the accused had inscribed the words, "To the sweetest wife on earth, James." (Pros. Ex. 2, and Pros. Ex. 6 for identification)

Beatriz Alves, testified by deposition that she was a witness to a religious marriage between Socorro Zaragoza whom she stated was called Cora, and James A. Devine, and that she signed as an attesting witness a marriage contract between them. (R 37; Pros. Ex. 1a) She identified her signature on the marriage contract and she also identified the accused by the first of the photographs of him referred to above. (Pros. Ex. 7 and 4) She further identified a photograph of Socorro Zaragoza and the accused. (Pros. Ex. 6)

Artemio G. Casas testified by deposition that he was a Catholic priest and that he had known Socorro Zaragoza since 1938. He further testified that in 1941, he had performed a marriage ceremony between Socorro Zaragoza and "a certain Mr. Devine." He identified the accused by the photographs previously described as the Mr. Devine to whom he referred. He also testified that a marriage contract was executed and signed by the contracting parties, by himself, and by two witnesses in his presence. He explained that three copies of the contract were executed and that "all three were signed by each and everyone concerned." He further explained that "the original was given to the contracting parties, the second copy for the parish record, the third for the local civil register." He identified the marriage contract and his signature thereon as the "officiating priest." (R 40; Pros. Ex. 1b, 4, and Pros. Ex. 7 for identification)

By stipulation, it was shown that Mrs. Effie Fleming would testify that the accused married her daughter, Nell Fleming, on 2 January 1943, in Augusta, Georgia; that a child was born to Nell Fleming in March 1944; that

the accused went overseas about January 1944; that he returned from overseas about Christmas of 1945 and resumed living with her daughter in the same room and in the same manner as before he had left for overseas. (R 73, See also Pros. Ex. 8 and 20) By similar stipulations it was shown that five other persons would testify that the accused and Nell Fleming lived together as husband and wife in Georgia, following their marriage; that the accused left Augusta, Georgia, for service in India about January 1944, that he returned to Augusta, Georgia on about Christmas 1945; and that thereafter he and Nell Fleming lived together there as husband and wife. (R 51, 52, 74; Pros. Ex. 12, 13, 14, 15 and 21)

A duly certified copy of a Bill For Divorce instituted by the accused in case number 6496, entitled G. A. Devine vs. Cora Z. Devine, in the Chancery Court of Montgomery County, Mississippi, was received in evidence. (R 49; Pros. Ex. 10) In this "Bill For Divorce" the accused asserted under oath on 16 May 1946, that he had been stationed, as a member of the Armed Forces of the United States, in the city of Manila, Philippine Islands, from October 1937 to July 1941. He further stated that on 12 September 1940 he married Cora Z. Devine, a person of Spanish and Filipino descent and that he conducted himself toward her as a "faithful, true and loving husband", but that she deserted him and refused to accompany him to the United States. Because of this alleged desertion on the part of his wife, he requested "a full and complete divorce" from Cora Z. Devine. On 11 June 1946, the accused was granted a final decree of divorce. (R 49; Pros. Ex. 10) Thereafter, on 18 June 1946, after the accused had been divorced from Cora Z. Devine, he married Nell Fleming for the second time. (R 50; Pros. Ex. 11)

Major Donald B. White, an investigational officer, testified that he interviewed the accused on 7 May 1946, and again on 30 August 1946, and that the questions and answers exchanged at these two interviews were written down by a shorthand reporter and subsequently transcribed. The two memoranda of these interviews were received in evidence as Prosecution's Exhibits 18 and 19.

These memoranda contained statements that the accused had been in the Philippine Islands; that he had listed Nell F. Devine as his wife on his pay voucher; that he married Nell Fleming on 2 January 1943, at Augusta, Georgia; that he never drew allowance for any other person; that a marriage relationship did exist between himself and Cora Devine; and that in his first interview with Major White he, the accused, had incorrectly stated that he had not corresponded with Mrs. Cora Devine since 7 January 1942.

On cross-examination, and independent of the memoranda, Major White testified that on 7 May 1946, the accused stated to him that he, the

accused, had not corresponded with a person in the Philippine Islands by the name of Cora Devine whereas in a second interview with the accused on 30 August 1946, the accused admitted that he had written to her. (R 68, 69)

The accused was shown to have executed four pay vouchers dated respectively 31 December 1945, 1 November 1945, 22 October 1945, and 27 August 1945, upon which he had designated Mrs. Nell F. Devine, 1334 Laurel Street, Augusta, Georgia, as his "lawful wife" and dependent. (R 55-62; Pros. Ex. 17)

It was stipulated by and between the prosecution, the defense counsel and the accused that Act No. 3613 of the Philippine Islands Legislature, known as "The Marriage Law," became effective on 4 June 1930, and continued in effect until the Islands became a republic on 4 July 1946. (R 74; Pros. Ex. 22)

After stipulating that Volumes 4 and 35 of the reports of cases determined in the Supreme Court, Philippine Islands, obtained from the Library of Congress, contained authentic copies of the original reports of United States vs. Villafuerte and United States vs. Memoracion, these reports were received in evidence, without objection, as Prosecution's Exhibits 23 and 24. (R 76, 77) The substance of these opinions will be considered later.

4. Summary of Evidence For The Accused.

Mr. Oris F. Kolb, Chief of the Records Section, Service Records Division of the Civil Service Commission testified that he has known the accused since about 1921, and that his general reputation as a law abiding citizen in Mississippi "was very good," and that his reputation in Chillicothe, Missouri, where he had lived for a year as accused's roommate "was excellent". (R 106)

Colonel Hugh Witt, Finance Officer, Army Air Forces, Washington, D. C., testified that he has known the accused "from approximately February 1946, until about the middle of October 1946"; that "his efficiency--was superior" and that "he performed his duty in a quiet, conscientious, effective manner." (R 107)

Major James B. Kissinger, Headquarters, Army Air Forces, Washington, D. C., testified that he met the accused in India in August 1944, that the accused's reputation there and in the Finance Department after he returned to the United States was "fine." He also testified that the accused's "military efficiency and character both were the highest, in [his] estimation." (R 108)

Captain Waldo V. Vaughn, Finance Officer, Bolling Field, D. C., testified that he has known the accused "since on or about 15 October 1946" and that "from [his] observation [he] would say his military efficiency and character are superior." (R 109-110)

Chief Warrant Officer Robert B. Fulton, 1st Army Air Forces Base Unit, Bolling Field, D. C., testified that he has known the accused "since approximately 15 October 1946"; that he worked with the accused since that date; that the accused's reputation for efficiency was "tops"; and "from a character standpoint, it's just as good as anyone's." (R 111)

Efficiency ratings covering the period from 23 May 1942, to 1 June 1946, read from the accused's WD AGO Form 66-2 show that the accused had received ten ratings of "superior" and one "excellent." From the period 30 June 1945 to 18 May 1947 he was rated 6.62, 6.3, 6.3, "Unknown," 5.5, 5.5, 5.5, 5.0. (R 112-112)

5. Specification 1, Charge I, alleges that the accused did, at Augusta, Georgia, between the dates of about 2 January 1943, and about 31 December 1945, live in an open and notorious relationship as man and wife with Nell Fleming, a woman not his wife. Specification 2, of Charge I, alleges that the accused falsely testified under oath, to Major Donald B. White, an investigating officer that he, the accused, had not corresponded with a person alleged to be Mrs. Cora Devine since January 1942, when he knew that he had written to her on 11 October 1945. The four specifications of the Additional Charge alleged respectively that the accused falsely claimed in a pay voucher that Mrs. Nell Devine was his lawful wife when he knew that he was lawfully married to Cora Devine and that she was then alive.

The introduction of the evidence tending to establish each of the above specifications was objected to by the defense at the trial and assigned as error in a brief presented upon behalf of the accused. Each of those assignments of error will be considered under the same number and in the order presented in the brief.

(1) First Assignment of Error

The accused was arraigned on 28 April 1947. On that day the Trial Judge Advocate moved the Court, pursuant to section 695 b, Title 22 U.S.C., to issue a commission to Fayette J. Flexer, First Secretary Consul, American Embassy, Manila, Philippine Islands, to take a deposition of the custodian of certain marriage certificates with the view of determining the genuineness of the certificate in the case of James A. Devine and Socorro Zaragoza. The motion was granted and a commission was issued. The defense

counsel then moved the Court to appoint a special defense counsel from the Philippine Bar to represent the accused at the execution of the commission, but the Court denied the motion and adjourned.

On 7 August 1947, the Court met pursuant to adjournment and the trial proceeded. No reference was made, either by the prosecution or the defense, to the deposition which had been requested at the previous meeting, and the deposition, if taken, formed "no part of the proceedings." Winthrop in considering the use of depositions states that,

"The party by whom the deposition was initiated may omit to offer it, but has no right absolutely to withhold it merely because the testimony given is not favorable or such as was expected. Nor can he introduce only such parts as are favorable or useful to him, omitting the rest. He must offer it as a whole or not at all. And if he does not offer it, the other party may do so if he chooses; if neither offers it, it is not read and forms no part of the proceedings, unless possibly the court may require the same for its information or the elucidation of the case." (Winthrop's Military Law and Precedents, Second Ed. p 355)

Since the requested deposition formed "no part of the proceedings," the accused's rights were in no way injuriously affected thereby. We must conclude, therefore, that the accused's first assignment of error is without merit.

(2) Second Assignment of Error

The defense contends that since Specification 1, Charge I, alleges that the accused lived openly and notoriously as man and wife with a woman not his wife at Augusta, Georgia, between the date of 2 January 1943, and 31 December 1945, and since this offense, if committed at all, was committed "on January 2, 1943," more than two years before the accused's arraignment, it was barred by the two years statute of limitations as set forth in Article of War 39. In other words, the defense stated that the offense in question was not a continuing one. This contention is without merit. (R 16-18) In C.M. 201464, Davis 5 BR 255, 273 the Board of Review in considering the present problem stated, as follows:

"A continuing offense is defined by Winthrop (Reprint 1920, p. 255) as 'one which per se and without regard to the intent, if any, of the offender, involves injury to individuals or the public so long as it is not abated, and is thus viewed as committed indifferently on every and any day of its maintenance'. See also In re Snow, 120 U.S. 274, 281, 285, 286; Armour Packing Company v. United States, 209 U.S. 56, 77. Each offense charged in this case grew from a prolonged and continuous course of action, the very prolongation and continuation of which was the gravamen of the wrongdoing

alleged. It has been held that cohabitation with more than one woman, an offense closely analogous to the wrongful cohabitation, living in a state of adultery and the wrongful masquerading of the woman as a relative, as herein charged, is a continuing offense. In re Snow, supra. It has also been held by the highest authority that where the offense is in its nature a continuing one the statute commences to run only upon the termination of the wrongdoing. Hyde v. United States, 225 U.S. 347, 369; see also 16 C.J. 225. Inasmuch as none of the continuing offenses charged in this case ended more than two years prior to arraignment, the pleas based on the 39th Article of War were properly denied."

In light of the above explanation, and since the offense in question was clearly a continuing one, the statute of limitation did not begin to run against the offense at its inception on 2 January 1943, nor did it begin to run while the accused continued unlawfully to live with Nell Fleming as man and wife.

The defense overlooked, however, as did the prosecution and the Court, certain evidence which shows that part of the offense in question was barred from prosecution. The evidence shows that the accused and Nell Fleming lived together as man and wife at Augusta, Georgia, from 2 January 1943, until about January 1944, at which time the accused went to India where he remained for nearly two years. It is obvious that during the time the accused was in India he was not living as husband and wife with Nell Fleming at Augusta, Georgia. It necessarily follows, therefore, that with the accused's departure for India in January 1944, there was a termination, at least for the time being, of the accused's offense of unlawfully living with Nell Fleming. As a result the period of limitations, within which the accused might be prosecuted for that offense, began to run. And the period of two years required to constitute a legal bar to such a prosecution under Article of War 39 was completed prior to the arraignment of the accused. Accordingly, the record of trial is legally insufficient to sustain that part of the finding of guilty of Specification 1, Charge I, which in affect found that the accused lived in an open and notorious relationship as man and wife with Nell Fleming at Augusta, Georgia between the dates of about 2 January 1943 and about 24 December 1945.

As previously stated, however, the accused upon his return from India resumed his unlawful relationship with Nell Fleming at Augusta, Georgia, and lived with her there as man and wife from about 25 to about 31 December 1945. This period of the commission of the offense charged was not barred from prosecution by the provisions of Article of War 39. The question follows as to whether the shorter period may be substituted for the longer one. The Manual For Courts-Martial in explaining permissible findings and substitution states, as follows:

"One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense." (M.C.M., 1938, par. 78c)

Although the finding that the accused committed the offense at the place alleged between the dates of 25 December 1945 and 31 December 1945, involves the substitution of a new date, the new date is included within the longer period alleged. This finding does not, therefore, change the nature or identity of the offense in question. Accordingly, the record of trial is legally sufficient to support so much of the finding of guilty of Specification 1, Charge I, as involves a finding that the accused committed the offense alleged at Augusta, Georgia, between the dates of about 25 December 1945, and about 31 December 1945.

(3) Third Assignment of Error

The defense asserted that the Court erred in receiving in evidence the depositions of Socorro Zaragoza Devine, Beatriz Alves, and Artemio G. Casas because their depositions were not taken in accord with the only method provided for the taking of depositions of witnesses residing in foreign countries, as required by Rule 15 (d) of the Rules of Criminal Procedure for the District Courts of the United States and Rule 28 (b) and (c) of the Rules of Civil Procedure for the District Court of the United States. This contention is based upon the erroneous assumption that the provision of Articles of War 25 and 26, concerning when and how depositions may be taken for use before military courts and the provisions of the Manual for Courts-Martial concerning that subject, do not apply when the deposition is taken in a foreign country. Obviously, courts-martial, unlike civilian courts, are not confined to territorial limitations. Neither the Articles of War nor the Manual impose any restriction upon a courts-martial's right to have a deposition taken by a duly authorized army officer stationed in a foreign country. This principle was clearly recognized by the Board of Review in 1929. In that year the Board of Review in C.M. 187795, Hammond, 1 BR 83, 94 stated, as follows:

"It was argued by counsel for the defense that such general power did not, in the absence of military occupation, extend to the taking of an oath in a foreign country. The Board of Review believes that the power to administer oaths vested by the 114th Article of War is not subject to territorial limitations, but

even assuming that it is, it appears in this case that the deposition was actually consummated on a military reservation, that is to say, at a place where the Army was serving, within the meaning of the Article above quoted, and that therefore the officer designated to take the deposition was empowered to administer the oath in any event."

The present case falls clearly within the rule set forth above for the reason that the deposition in question was taken at a place in the Philippine Islands where the Army was serving. Accordingly the usual method provided for the taking of depositions to be read in evidence before military courts applied and the requirements of the rules cited for the taking of depositions for use in civilian courts need not be followed. The assignment of error is accordingly without merit.

(4) Fourth Assignment of Error

The defense also objected to the admission of the three depositions taken in the Philippines because of an alleged lack of proper authentication. The concluding part of the deposition and the certificate of authentication is, as follows:

"I Certify that the above deposition was duly taken by me, and that the above-named witness, having been first duly sworn by me, gave the foregoing answers to the several interrogatories, and that he prescribed the foregoing deposition in my presence at APO 719, U. S. Army, this 26th day of May, 1947.

(Name) Dean L. Donoho
1st Lt., Air Corps
(Grade and organization)

Trial Judge Advocate
(Official character, as summary court,
notary public, etc.)

General Court-Martial"

In particular the defense objected to the use of the depositions because they were not impressed with a seal and because no proof was presented of the existence of "Dean L. Donoho, 1st Lt., Air Corps, Trial Judge Advocate, General Court Martial," and because no proof was offered that he was the officer who took the depositions in question and who certified thereto. Although the above described authentication obviously does not conform to that

required in most civilian courts and to that required in federal district courts, it fully complies with long established military practice and with the requirements of Article of War 26. Article of War 26 provides as follows:

"Depositions - Before Whom Taken. - Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths."

In C. M. 187795, Hammond, supra, the Board of Review in 1929, in considering the problem of authentication of depositions stated that,

"The 26th Article of War provides, among other things, that depositions to be read in evidence before military courts may be taken before and authenticated by any officer authorized by the laws of the United States to administer oaths."

Under the authority, therefore, of Article of War 26 the genuineness of the signature of the officer taking and authenticating a deposition is presumed and need not be proved unless evidence to the contrary is presented. There was no such evidence presented in the present case. Accordingly, the depositions in question were duly authenticated.

(5) Fifth Assignment of Error

The defense asserts that the deposition of Socorro Zaragoza should not have been received because it was alleged in Specification 1, Charge II, that she was the wife of the accused and because a wife may not lawfully testify against her husband. Although the defense recognized that,

"A wife may testify against her husband without his consent whenever she is the individual or one of the individuals injured by an offense charged against her husband." (M.C.M. 1928, par. 120d)

it contended that the testimony of Socorro Zaragoza Devine did not tend to establish the guilt or innocence of the accused under Specification 1, Charge I. We fail to see any merit in this contention for the reason that the testimony of the witness in question tends to establish that she was the accused's wife and because that evidence, in the light of the other evidence in the case, tends to show that the accused's conduct in living with Nell Fleming was unlawful. It seems too clear to admit of argument that the

action of a husband in living with a woman not his wife is an injury to the lawful wife within the purview of paragraph 120(d) of the Manual For Courts-Martial. It follows that the testimony of the injured wife in this case was admissible.

(6) Sixth Assignment of Error

The defense further objected to that part of the deposition of Socorro Devine, including the 23rd and 24th interrogations and the answers thereto which identified a letter which she had received from the accused, because the letter was an alleged privileged communication between husband and wife.

In the case of Bowman v. Patrick, 32 Fed 368, the Court held that a letter written by a husband to his wife and subsequently found among the wife's papers by his administrator was privileged. Furthermore, in Wolfe v. United States, 291 U.S. 7, 78 L. Ed. 617, 620 the Supreme Court stated that,

"Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged;—."

In view of the above authority and the essential private character of a letter between husband and wife, it must be concluded that the letter between the accused and Cora Devine which was identified by her contained confidential communications. Confidential communications between husband and wife are inadmissible, even in a criminal case in which one spouse is being prosecuted for an offense injurious to the other. On this point, Section 633, Title 28, U.S.C. provides, as follows:

"Same; husband or wife of defendant in prosecution for bigamy. In any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law. (Mar. 3, 1887, c. 397, sec 1, 24 Stat. 635.)

A similar prohibition is contained in the Manual for Courts-Martial (M.C.M., 1928 par 123b) It follows that the letter in question, prosecution exhibit 2, was improperly received in evidence. Since, however, the letter constituted in effect only an admission that the accused was the husband of Cora Devine and since there are other similar admissions lawfully in evidence, the error in receiving the letter in question did not, except as to Specification 2, Charge I, "—injuriously affect the substantial rights of the accused—." (A. W. 37) The letter, however, as well as the answers of Socorro Devine to interrogations, numbers 23 and 24, did tend to show that the accused had made a false statement concerning his correspondence with her as alleged in Specification 2, Charge I, and accordingly injuriously affected the accused's right to a legal finding under that specification as will be more fully shown in subparagraph (14).

(7) Seventh Assignment of Error

The defense objected to the receipt in evidence of the two memoranda, Prosecution's Exhibits 18 and 19, which were identified by Major White, to be a correct transcription of the questions and answers exchanged at two separate interviews with the accused. The questions and answers contained in each memorandum had been written down by a shorthand reported and subsequently transcribed. The shorthand reporter was not called as a witness, but Major White testified as to both memoranda that, "Immediately after the interview the notes which the reporter took were transcribed and typed out." (R 63, 66) He further testified "—it is customary immediately upon the completion of the typing of the notes to read them over, and if they are not at that time immediately confirmed into the file, they are subsequently." (R 63) He further testified "—it is customary to put it in the safe and later incorporated in the file." When asked the question, "Can you now recall everything that was said at that interview" the witness replied "I cannot recall everything without reference to the record, Sir." (R 63) The logical inference from this answer is that the witness could recall, independent of the two memoranda, some of the questions and answers exchanged at the two interviews. In fact, under cross examination as previously explained, Major White testified that at the first interview the accused stated that he had not corresponded with a person in the Philippine Islands named Cora Devine whereas in the second interview the accused admitted that he had written to her. (R 68, 69)

In view of the witness' demonstrated memory concerning the two interviews, the question arises as to whether the memoranda in question should have been received in evidence. On this problem the Manual provides, as follows:

"Memoranda may be used to supply facts once known but now forgotten or to refresh the memory. Memoranda are therefore of

two sorts: First, if the witness does not actually remember the facts but relies on the memorandum exclusively (as in the case of a bookkeeper using an old account book), then the witness must be able to state that the record accurately represented his knowledge at the time of its making. But it is not necessary that he should himself have made the record if he can state from his present recollection that it was correct when made, and the entries must have been made at or near the time, and the recollection at such time must have been fresh as to the facts recorded. Where the witness's certainty rests on his usual habit or course of business in making memoranda or records, it is sufficient. Second, if the witness can actually remember the facts and merely needs the memorandum to refresh his memory, or a part of it, then the above limitations do not apply. But the court should see to it that no attempt is made to use such a paper to impose a false memory on the court under guise of refreshing it.

"A memorandum of the first sort is admissible. Where the memorandum is of the second sort, the witness will testify without the memorandum itself being admitted in evidence." (M.C.M., 1928; par 119b)

As stated above "Memoranda may be used to supply facts once known, but now forgotten or to refresh the memory. —Where the memorandum is of the second sort, the witness will testify without the memorandum itself being admitted in evidence." In view of this requirement, and since the witness had an independent recollection of at least part of the interviews, he should have been questioned on direct examination concerning the substance of the two interviews and the memoranda used only to refresh his memory, if necessary. It was error, therefore, to place the memoranda in evidence. All of the statements contained in these memoranda, except the two relating to the accused's correspondence with Mrs. Cora Devine, were shown to have been made by the accused on a different occasion from the interviews under consideration and evidence thereof to have been properly received. As to those admissions, therefore, the memoranda were mere surplusage and did not, in view of the other evidence in the record "—injuriously affect the substantial rights of [the] accused," within the purview of Article of War 37. That part of the memoranda however, relative to the two conflicting statements made by the accused, as well as that part of the testimony of Major White concerning those conflicting statements, did, as will be hereafter shown in subparagraph (14), affect the legal sufficiency of the finding of guilty of Specification 2, Charge I.

(8) Eighth Assignment of Error

The defense contends that the Court erred in receiving in evidence the authenticated copy of the divorce decree issued by the Chancery Court

of Montgomery County, Mississippi, and the other legal instruments involved in that proceeding, on the ground that the corpus delecti of the offenses in question had not been established. Even if it be conceded, arguendo, that the corpus delecti had not been established when this evidence was received, no error was committed. Although the accused's Bill For Divorce which was included in the proceedings referred to contained an admission, it did not constitute a confession to the charge of cohabitation with Nell Devins, nor to the offense of wrongfully claiming her as his wife in four of his pay vouchers. Important as the accused's admission was it admitted only one relevant fact, whereas "A confession is an acknowledgement of guilt." (M.C.M., 1928, par 114). In reality, however, the reception of the evidence in question was proceeded by proof of the corpus delecti of the principal crime in issue. The assignment of error is without merit.

(9) Ninth Assignment of Error

The defense contends that the court erred in admitting in evidence the certified, photostatic copies of four pay vouchers alleged to have been signed by the accused and to contain false statements on the ground that a writing is the best evidence of its own contents. (Pros. Ex. 17) The defense relied upon the statement in the Manual which provides that,

"A writing is the best evidence of its own contents, and must be introduced to prove its contents." (M.C.M., 1928, par 116(a))

In the same paragraph, however, the Manual provides further, as follows:

"In the case of a public record required by law, regulation, or custom to be preserved on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without either first proving that the original has been lost or destroyed, or without otherwise accounting for the original."

An examination of the copies of the four vouchers in question show that they were "duly authenticated" and certified by the Acting Chief Clerk of the General Accounting Office by direction of the Comptroller General of the United States, pursuant to, and in accordance with, the applicable provision of the governing Federal Statutes as indicated on the face of the certificates. The signature of the accused on the authenticated copies was proved. It necessarily follows that the authenticated copies were properly received in evidence.

(10) Tenth Assignment of Error

The defense contends that the court erred in admitted statements

tending to show the accused's guilt under Specification 1, Charge I, prior to April 28, 1945. Since this assignment of error is in substance the same as that presented in the second assignment of error it is believed that no further comment is required.

(11) Eleventh Assignment of Error

The defense contends that the court erred in receiving oral testimony from Socorro Zaragoza Devine, Beatriz Alves, and Artemio G. Casas concerning the existence of a marriage contract between James [Guy] A. Devine and Socorro Zaragoza on the ground that the marriage contract or the certificate of consummation of said marriage would constitute the best evidence thereof. In support of this contention, the defense emphasized the fact that the matter in issue involved a marriage in the Philippines and that the law of that country should prevail. It is recognized, as a general rule, that when the question of the validity of a marriage is dependent upon form, that the law of the place of consummation controls. (Strumberg, Conflict of Laws p 257 and case there cited) Accordingly, the substantive law of the Philippines must be examined.

The Philippine Marriage Act was placed in evidence as Prosecution's Exhibit 22. Although it requires that a marriage certificate shall be recorded or registered by the person who solemnizes a marriage, there is no provision in that Act which makes that requirement a condition precedent to the validity of a marriage. Nor is there any provision in the Act which prescribes the method by which it shall be proved or which request that a certificate of marriage be placed in evidence in order to show that a valid marriage existed. Furthermore, Section 27 of that Act provides that,

"No marriage shall be declared invalid because of the absence of one or several of the formal requirements of this Act if, when it was performed, the spouses or one of them believed in good faith that the person who solemnized the marriage was actually empowered to do so and the marriage was perfectly legal."

Certainly the testimony of Cora Devine shows that she considered her marriage with the accused to be "perfectly legal." Furthermore, the accused by procuring a divorce from Cora Devine, gave tangible proof of his faith in the validity of his marriage to her.

Furthermore, the prosecution placed in evidence an opinion by the Philippine Supreme Court in the case of State v. Memoracion and Dalmasco Uri, 35 Philippine Reports 633, Prosecution's Exhibit 24, in which the court held, as follows:

"The question presented by the said assignments of error is whether or not oral testimony is competent proof of a marriage in the case of the crime of adultery. The first assignment of error is based upon the fact that the husband was asked the question whether or not he and the defendant Cecelia Memoracion were married and whether or not they were husband and wife. The appellants contend that his declaration was not competent evidence upon that fact. If a man and a woman are married, the declaration of either of them is competent evidence to show the fact. No witness is more competent than they are.—A witness who is present at the time a marriage takes place is certainly a competent witness to testify as to whether a marriage took place or not. Whether or not his declaration should be accepted depends upon his credibility, but his declaration is admissible for the purpose of showing that fact."

In view of the above evidence of the law of the Philippines, it appears that the evidence in question was admissible even under the adjective law of the Philippines. In this connection it should be observed that in the case of Sy Joe Lieng v. Sy Quia, 16 Phil. 137, 160, cited in the brief of the defense, the Philippine Court was considering a marriage consummated in China and that there is no statement in that opinion inconsistent with the later opinion which was placed in evidence.

In addition to the procedural law of the Philippines concerning the method of proving a marriage, it should be observed that Anglo-American Courts recognize no rule which prefers a marriage certificate to the oral testimony of the eye witnesses to a marriage ceremony. Wigmore in explaining the superior probative value of the oral testimony of the eye witness over that of a certificate has stated, as follows:

"Some heresies die a hard death. With a phoenix-like persistence they arise again and again, after repeated judicial pronouncements which ought to have been final, to plague each new generation and to call for fresh incinerations. One of these is the supposition that, as between possible sorts of eye-witness evidence, the celebrant's certificate or register-entry is preferred to the oral testimony of celebrant, clerk, or bystander. This, if it were the law, would be a genuine rule of preference as between different kinds of testimony (ante, secs. 1286, 1336). But there is no such rule. The marriage-certificate was at common law probably not even admissible (ante, sec. 1645); and it has always been recognized that both certificate and register were of inferior value, inasmuch as further evidence of the identity of the parties named may be required:—" (Wigmore on Evidence, 3rd Ed. Sec. 2088)

In view of the law as stated above and the probative value of the evidence in question, we must conclude that the Court committed no error in receiving the testimony of the eye witness to the marriage of the accused. The eleventh assignment of error is without merit.

(12) Twelfth Assignment of Error

In his twelfth assignment of error, the defense counsel submits several arguments. He contends first that the trial judge advocate attempted "to establish what some of the states know and recognize as a common law marriage." Since the record is, however, replete with evidence of a ceremonial marriage between the accused and Socorro Zaragoza such argument is without foundation.

The defense counsel further contends that there was no proof that the accused and Socorro Zaragoza were not within that relationship which would prohibit their marriage under Section 28 of the Philippine Marriage Act. This argument overlooks the presumption that in the absence of proof to the contrary, a marriage is presumed to be legal. It also overlooks the admissions made by the accused in his Bill For Divorce that he "—is of the White or Caucasian race, and the defendant is also of the White race, but of Spanish and Filipino descent." We must conclude, therefore, that the marriage of the accused to Socorro Zaragoza was not made void because of an incestuous relationship prohibited by Section 28 of the Philippine Marriage Act.

The defense concludes this assignment of error with the argument that the accused's marriage to Nell Fleming in 1943, was presumed to be legal and that this presumption was not overcome by proof to the contrary. The evidence which shows that the accused married Socorro Zaragoza in 1941, and that their marriage relationship continued until the accused was divorced from her in 1946, clearly overcame any presumption which may have existed that his marriage in 1943 to Nell Fleming was legal. The twelfth Assignment of error is without merit.

(13) Thirteenth Assignment of Error

The defense contends that the Court erred in holding that the accused was subject to trial and punishment under Specification 1, Charge I, because of the "provisions of existing law." In support of this contention the defense stated that after the accused had procured a divorce from Cora Z. Devine on 11 June 1946, he married Nell Fleming. In view of this marriage and the provisions of the Code of Georgia and the last proviso of the 39th Article of War, he further contended that the accused could not lawfully be punished. The last proviso of the Article of War 39 provides,

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"That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law."

Section 26-5801 of the Code of Georgia annotated (Book 10), Title 26 and 27, provides:

"Any man and woman who shall live together in a state of adultery or fornication, or of adultery and fornication, or who shall otherwise commit adultery or fornication, or adultery and fornication, shall be severally indicted, and shall be severally punished as for a misdemeanor; but it shall, at any time, be within the power of the parties to prevent or suspend the prosecution and the punishment by marriage, if such marriage can be legally solemnized."

The contention that the existing law of Georgia would relieve the accused from trial for wrongfully living as husband and wife with Nell Fleming because he thereafter was lawfully married to her is clearly erroneous for two reasons. First, the provisions of Article of War 39 relative to existing law refers to existing military law which might bar a prosecution on the date of the enactment of Article of War 39. (See note in M.C.M., 1921, p 149) Second, the offense in question involves a violation of Article of War 95 and is punishable by military law as conduct unbecoming an officer and a gentleman regardless of the law of Georgia or of that of any other state.

(14) Fourteenth and Fifteenth Assignments of Error

The fourteenth and fifteenth assignments of error merely state that the evidence is legally insufficient to sustain the findings of guilty and invite a consideration of the probative force of the evidence as it affects each finding.

Legal and competent evidence relative to the offense of the accused unlawfully living as man and wife with Nell Fleming at Augusta, Georgia, as alleged in Specification 1, Charge I, shows that the accused married Socorro Zaragoza in the Philippines in 1941, and that the marriage relationship so established continued until it was terminated on 11 June 1946. The evidence is equally clear that during the continuance of that marriage relationship, the accused not only entered into a ceremonious marriage with Nell Fleming on 2 January 1943, but that he thereafter lived openly with her as man and wife at Augusta, Georgia, from 2 January 1943, to about January 1944, and that he again lived with her there as man and wife from about 25 December to about 31 December 1945. Although the finding of

guilty which involves the first part of the offense alleged, that is, from about 2 January 1943 to about January 1944, is improper because of the provisions of Article of War 39, as explained in paragraph 2 supra, the evidence is clearly legally sufficient to sustain so much of the findings of guilty of Specification 1, Charge I, as shows the accused guilty of committing the offense charged between the dates of about 25 December 1945 and 31 December 1945.

The evidence relative to Specification 2, Charge I, the specification which alleges that the accused falsely testified under oath to Major White, is legally insufficient to sustain the finding of guilty of that specification. The only evidence tending to sustain that finding consists of the testimony of Major White and that of Mrs. Cora Devine, the accused's lawful wife. The testimony of the accused's wife concerning his correspondence with her, although relevant to the offense in question, was inadmissible. This is true because the offense in question, the making of a false statement under oath, was not an offense against Cora Devine, and consequently she, as the accused's wife was legally incompetent to testify against her husband concerning it (MCM, 1928, par 120d).

The only remaining evidence relevant to the finding in question is the testimony of Major White. His testimony shows that on 7 May 1946, the accused stated that he had not corresponded with a person named Cora Devine since 7 January 1942, and that on 30 August 1946, the accused stated that he had written to Cora Devine and that his previous statement on that subject was an error. This latter statement of the accused was an admission of all the elements of the offense charged in Specification 2, Charge I, and was tantamount, therefore, to a confession of guilt. The Manual provides that, "An accused cannot be convicted legally upon his unsupported confession" (MCM, 1928, par 114g). It follows, therefore, since there was no other evidence lawfully before the court relevant to the offense in issue that the court's finding of guilty of Specification 2, Charge I, can not be sustained.

The evidence concerning the four specifications of the additional charge, each of which allege the making of a false statement in a pay voucher by which the accused claimed Mrs. Nell Devine as his lawful wife, shows that each of the four vouchers was duly executed by the accused and presented for payment by him as alleged. The evidence shows that on the date of each claim that the woman represented by the accused as his wife was not his lawful wife. Cases involving similar factual circumstances have held such a statement as false and as constituting a violation of Article of War 94 without regard to whether the claim itself is false or fraudulent (CM 283737, McIntyre, 55 BR 151; CM 296107, Savini, 58 BR 79). Thus in the instant case there is no contention that the claims involved were false.

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In the discussion of false or fraudulent writings in connection with a claim the Manual for Courts-Martial states that "The false or fraudulent statement should, however, be material" (MCM 1928, par 150d). This statement was not considered in the McIntyre and Savini cases supra, and the question arises as to the application of that statement to the factual situation under discussion. In this connection the falsification of a material fact in "any matter within the jurisdiction of any department or agency of the United States * * *" is denounced by the Statutes of the United States (18 USC, Sec 80). In discussing this statute which is analogous to the fourth subparagraph of Article of War 94 Mr. Chief Justice Hughes stated:

"The statute was made to embrace false and fraudulent statements or representations where these were knowingly and wilfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practises described" (U.S. v. Gilliland, 312 U.S. 86, 93).

A function inherent in any agency of the government which is authorized to adjudicate or approve claims, is to investigate claims. Such an agency should not be impeded in its investigation by false statements of facts material to the claimant's entitlement, nor should it be deceived as to the lack of necessity of investigation by a false statement. In view of this principle, we find the statement in CM 242395, Adams, 27 BR 73-75, as follows:

"It results that normally an officer with a lawful wife is entitled to allowances, whether or not he lives with and contributes to the support of his wife, except that, if it is shown that he caused the separation and is at fault in not contributing to her support, then he cannot claim the status of a married man."

If, in the present case, accused had stated that Cora Devine was his legal wife, which in fact she was, and it appeared that he was living apart from her and was living with Nell Fleming Devine or was holding the latter out as his wife, the need for investigation would be patent. In this view of the case the false statement of accused that Nell Devine was his legal wife was material within the meaning of the Manual for Courts-Martial.

6. The records of the Department of the Army show that the accused is thirty-three years of age. He was born on 18 August 1914, at Coils, Mississippi. He graduated from high school and in 1936 he was graduated

from the Chillicothe Business College. He enlisted in the regular army on 3 July 1936, and was discharged on 27 August 1937. He re-enlisted on 28 August 1937, and was again discharged on 27 August 1940. Thereafter he was employed as a civilian for the Navy Department in the Philippine Islands until 16 August 1941. He was commissioned a second lieutenant, Finance Department, Army of the United States on 22 June 1939, and called for extended active duty on 7 January 1942. He was promoted to the grade of first lieutenant on 26 November 1942, and to the grade of captain on 9 July 1943. Thereafter he was promoted to the grade of major on 6 June 1944. His efficiency ratings for the past five years have generally been "superior."

7. The court was legally constituted and had jurisdiction of the person of the accused and of the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial except as previously explained. In the opinion of the Board of Review the record of trial is legally insufficient to sustain the finding of guilty of Specification 2, Charge I; legally sufficient to support only so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty of the offense therein charged between the dates of about 25 December 1945 and about 31 December 1945; legally sufficient to support the other findings of guilty and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 94 and is mandatory upon conviction of a violation of Article of War 95.

A. H. Hottelstein, Judge Advocate

Abner E. Lipscomb, Judge Advocate

J. W. Lynch, Judge Advocate

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JAGH - CM 325636

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 1945

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 Major Guy A. Devine (O-382572), Finance Department.

2. Upon trial by general court-martial this officer was found guilty of the following offenses:

a. The wrongful living as man and wife with a woman not his wife at Augusta, Georgia, between the dates of about 2 January 1943 and about 31 December 1945, in violation of Article of War 95.(Specification 1, Charge I);

b. Falsely testifying under oath to an investigation officer that he, the accused, had not corresponded with Mrs. Cora Devine since 7 January 1942, in violation of Article of War 95.(Specification 2, Charge I); and

c. Use of vouchers containing false statements that Mrs. Nell Devine was his lawful wife, for the purpose of obtaining payments of claims in four cases, in violation of Article of War 94. (Specifications 1, 2, 3, and 4, Additional Charge).

He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved only so much of the sentence as provides for dismissal from the service and forfeiture of all pay and allowances due or to become due 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 insufficient to support the finding of guilty of Specification 2, Charge I; legally sufficient to support only so much of the finding of guilty of Specification 1, Charge I, as involves a finding that the accused did, at the place alleged, live in an open and notorious relationship as man and wife with a woman not his wife between the dates of about 25 December 1945 and about 31 December 1945; and legally sufficient to support the other findings of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence.

The record shows that the accused married Socorro (Cora) Zaragoza in the Philippine Islands in 1940, and lived with her there as man and wife until his return to the United States in 1941. Thereafter, on 2 January 1943, the accused unlawfully married Nell Fleming at Augusta, Georgia, and lived with her there as man and wife until his departure for service in India in January 1944. The statute of limitation bars punishment for this earlier period during which the accused unlawfully lived with Nell Fleming. While he was in India, Nell Fleming gave birth to a child. The accused returned from India and resumed his unlawful relationship with Nell Fleming at Augusta, Georgia on or about 25 December 1945. This unlawful relationship was continued until the accused procured a divorce from his Filipino wife on 11 June 1946 and thereafter married Nell Fleming for a second time on 18 June 1946. In 1945, during his unlawful relationship with Nell Fleming, the accused falsely represented in four pay vouchers that Nell Devine was his wife. Accused was entitled to payment of these vouchers as a married man, the falsity going only to the identity of his wife.

4. The records of the Department of the Army show that the accused is thirty-three years of age. He was born on 18 August 1914, at Coila, Mississippi. He graduated from high school and in 1936 he was graduated from the Chillicothe Business College. He enlisted in the regular army on 3 July 1936, and was discharged on 27 August 1937. He re-enlisted on 28 August 1937, and was again discharged on 27 August 1940. Thereafter he was employed as a civilian for the Navy Department in the Philippine Islands until 16 August 1941. He was commissioned a second lieutenant, Finance Department, Army of the United States, on 22 June 1939, and was called for extended active duty on 7 January 1942. He was promoted to the grade of first lieutenant on 26 November 1942, and to the grade of captain on 9 July 1943. Thereafter he was promoted to the grade of major on 6 June 1944. His efficiency ratings for the past five years have generally been "superior."

5. The accused has been properly found guilty of openly and notoriously living for six days as man and wife at Augusta, Georgia, with a woman not his wife, and of presenting pay vouchers, for the purpose of obtaining payment of claims, containing false statements that she was his lawful wife. Accordingly, I recommend that the sentence as approved by the reviewing authority be confirmed but since no fraud upon the United States was perpetrated, that the sentence be commuted to dismissal, a reprimand and forfeiture of \$100 pay per month for three months and that the sentence as thus commuted be carried into execution but that execution of the dismissal be suspended during good behavior.

6. Appropriate consideration has been given to a brief presented by the defense counsel upon behalf of the accused.

7. If the recommendations herein are approved I propose to initiate steps to have the officer promptly relieved from active duty.

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

CM 325636

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



THOMAS H. GREEN
Major General
The Judge Advocate General

GCMO 33, (DA), 26 Jan 1948.

