OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

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JUDGE ADVOCATE GENERAL'S DEPARTMENT

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 75

including

CM 325705 - CM 326853

also

CM 323368
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DEPARTMENT OF THE ARMY
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAGK - CM 325705

UNITED STATES	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Paris, France, 3 July 1947. Dismissal and total forfeitures.
First Lieutenant JOHN T. FREDERICK, JR (O-1016927), Cavalry.	)	

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 61st Article of War.

Specification: In that 1st Lt. John T. Frederick, Jr., Hq & Hq Det, 338th QM Bn., did, while on temporary duty at Hqs, AGRC, Paris, France, absent himself without proper leave by failing to return to his proper organization and station as directed from on or about 22 February 1947 until 4 April 1947.

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

Specification: In that 1st Lt. John T. Frederick, Jr., CAV, 338th QM Bn, AGRC, did, at Paris, France, on or about 7 March 1947, present for approval and payment a claim against the United States by presenting to Captain J. E. Morency, F.D., United States Army, finance officer at Headquarters, American Graves Registration Command, ETA, duly authorized to approve and pay such claims, in the amount of $314.45 for base and longevity pay, foreign service pay, subsistence allowance and rental allowance, as being due him for the period 1 February 1947 to 28 February 1947 inclusive, totaling $344.20, less debits totaling $29.75, and did receive payment therefor from said Captain J. E. Morency, F.D., which claim was false and fraudulent in that the said 1st Lt. John T. Frederick, Jr., was entitled only to base, longevity, foreign service, subsistence allowance and rental allowance pay for the period from 1 February 1947 to 21 February 1947, inclusive, and was then known by the said 1st Lt. John T. Frederick Jr., to be false and fraudulent.

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 accused was a member of the 338th Quartermaster Battalion. On 17 February 1947 the accused's Battalion Commander issued letter orders placing him on temporary duty with Headquarters, American Graves Registration Command, APO 887, Paris, France. These orders were to be effective on 18 February 1947 and when the temporary duty was completed the accused was to return to his organization (R. 6, Pres Ex A). Captain H. Ross Bryan testified that between 17 February 1947 and 6 April 1947 he was the Adjutant of the 338th Quartermaster Battalion. The Battalion was stationed at Neustadt, Germany. He identified the letter orders of 17 February 1947 (Pros Ex A) placing the accused on temporary duty. The accused left the organization pursuant to the orders and thereafter the witness never saw the accused until 5 April 1947. Between 17 February 1947 and 5 April 1947 no further orders were issued authorizing the accused to be absent from the organization (R. 6, 7, 8).

It was stipulated that if Major E. M. Foxworth were present and sworn as a witness he would testify that the accused reported to his office, Fiscal Headquarters, AGRC, Paris, France, on temporary duty to complete some unfinished business. This business requiring the accused's presence in Paris was completed on 21 February 1947 and the necessary papers were signed, witnessed and delivered to the accused. From and after 21 February 1947 Major Foxworth did not see the accused (R. 8).

It was stipulated that if Second Lieutenant Jack Firpo were present and sworn as a witness he would testify that he apprehended the accused at the finance office, Headquarters AGRC, Paris, France, about 1550 hours, 4 April 1947 (R. 8).

It was stipulated that if Christian B. J. Legand were present and sworn as a witness he would testify "that he is the chief bookkeeper of the Finance Office, Headquarters, AGRC, Paris. That he knows the accused. That on 7 March 1947 the accused presented himself at the finance office and requested pay for the month of February 1947. That the witness filled out accused's pay voucher for February 1947, based on information furnished by the accused. That the accused signed the voucher on line 16. That the photostatic copy of pay voucher, marked Prosecution's Exhibit 'B' for identification, is a copy of the voucher prepared on 7 March 1947 by the witness. That the accused did not state that he was AWOL during any part of February 1947" (R. 9).

It was stipulated that if Albert Miara-Luki were present and sworn as a witness he would testify "that he is the cashier of the finance office, Headquarters, AGRC, Paris, acting for Captain J. E. Morency, Finance

Deputy, U. S. Army. That he knows the accused. That on or about 7 March 1947 he paid the accused $314.45 upon presentation by the accused of a pay voucher, the copy of which is Prosecution's Exhibit 'B' for identification. That the witness checked the signature of the accused on the pay voucher against his AGO card and did not question him further" (R. 9).

A photostatic copy of the pay voucher referred to in the above stipulations was introduced as Prosecution's Exhibit B, without objection by the defense (R. 9).

It was stipulated "that the document which I hold in my hand, which is marked Exhibit C for identification, is a computation of the pay of the accused for the period February 1 to 28 inclusive and the period 1 February to 21 February 1947 inclusive, and that such computation has been correctly made" (R. 10).

The document referred to in the above stipulation was received in evidence as Prosecution's Exhibit C without objection by the defense (R. 10). This exhibit shows that the total pay of the accused for the period 1 February 1947 to 28 February 1947, less credits, was $314.45 and that the amount due the accused as pay and allowances for the period 1 February 1947 through 21 February 1947 less credits was $213.15. The amount of $101.30 was the unauthorized amount claimed and paid.

4. The accused was warned as to his rights as a witness and elected to testify in his own behalf. He testified that he is 25 years of age and that his home is in Louisville, Kentucky. He was inducted into the Army on 6 August 1942 and commissioned an officer on 13 March 1943. He went overseas on 30 November 1944 with the 69th Division as a plateon leader and participated in two campaigns. Since his assignment to the Graves Registration Command he has been assigned as a Class B Agent Finance Officer and Assistant Headquarters Commandant of the First Field Command. His duties were heavy. He went to Paris to close out some finance accounts and to complete his returns. He completed his temporary duty in Paris on 21 February 1947 and his orders required him to return to his organization. He did not return to his organization and was absent without authority from 21 February 1947 to 4 April 1947. His duties as Class B Agent Finance Officer required him to prepare pay vouchers for officers and he was familiar with the Army Regulation pertaining to their pay and allowances. When he drew his pay for February 1947 he did not realize that he was making a false claim against the government. He drew pay on 30 June 1947 and on this voucher he had the Finance Department deduct $101.30 so that he would repay the government for the amount erroneously overdrawn. The defense offered a copy of this pay voucher in evidence as Defense Exhibit 1. This voucher shows:

"(14) Due United States for AWOL fr 22 Feb 47 to 4 April 47 incl for error part of pay and alws fr 22 Feb 47 to 28 Feb 47 incl on Feb/47 vou # unknown March 47 accts of J E Morency Capt F D $101.30"

The accused further testified that at the time of his return to military control he had a railroad ticket which he intended to use in returning to his unit (R. 11-16).

Upon the conclusion of the accused's testimony both the prosecution and defense announced that they had no further evidence to offer. The court was closed and reopened to receive evidence of previous convictions and the personal data shown on the charge sheet (R. 16, 17). At this time the court permitted the defense to call "witnesses in mitigation." Captain H. Ross Bryan was recalled as a witness for the defense and testified that the duties of accused included Class B Agent Finance Officer, Investigation Officer, Surveying Officer, Battalion S-2, Post Exchange Officer. The accused's standing within the organization as to ability and character was in the "middle third" and excellent. He would like to have the accused in his organization (R. 18). The defense also introduced a letter of commendation from the commanding officer of the Norway Detachment, First Field Command, American Graves Registration Command to the accused commending him for his services from 5 June 1946 to 23 July 1946 (R. 19, Def Ex 3).

5. The evidence shows and the accused admitted that he was absent without leave from his organization from 22 February 1947 to 4 April 1947. In March 1947 he submitted a pay voucher and received pay for the period of 1 February 1947 to 28 February 1947. The accused was absent without leave during part of the month of February. An officer in such a status is not entitled to pay and allowances, for he has rendered no services to the government for which remuneration is due him (10 United States Code 841). The pay voucher submitted by the accused therefore reflected a false claim. The evidence shows that the accused received $101.30 to which he was not entitled. The accused caused this $101.30 to be deducted from his subsequent pay. This repayment however is not a defense to the offense charged. (CM 263258, Keith, 41 BR 221, 226).

The accused testified that he did not realize that in presenting this voucher he was making a false claim; however, the testimony, including his own, belies his lack of knowledge of the falsity of the voucher. He testified that he was familiar with the regulation pertaining to the pay of officers and that his duties required him to prepare pay vouchers. He certainly knew that he was absent without leave.

6. Records of the Department of the Army disclose the accused to be 25 3/12 years of age and single. He was inducted into the Army on 7 August 1942. On 13 March 1943 he was appointed and commissioned a second lieutenant Army of the United States. He was promoted to first lieutenant on 1 April 1945. His efficiency reports are superior and excellent except the one for the period of 1 January 1947 to 23 April 1947 which is unsatisfactory.

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 confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Articles of War 61 and 94.

Christy T. Silvus, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 325705 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 7 1947

TO: Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of First Lieutenant John T. Fredrick, Jr. (O-1016927), Cavalry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 22 February 1947 to 4 April 1947, in violation of Article of War 61; and of presenting a false claim against the United States for pay and allowances for a portion of the time he was absent without leave, in violation of Article of War 94. 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 sentence and to warrant confirmation thereof.

The accused was absent without leave from his organization from 22 February 1947 to 4 April 1947. In March and while absent without leave the accused presented a pay voucher to a finance officer and drew full pay for the month of February 1947. He was not entitled to pay for the period of time he was absent without leave and on this voucher he drew $101.30 to which he was not entitled. He admitted his absence without leave and the fact that he presented the voucher which included a claim for pay and allowances for the period 21-28 February, but stated that he did not realize he was presenting a false claim against the Government. The $101.30 was, prior to trial, deducted from subsequent pay due the accused. The repayment of the money is not a defense to the charge of which he was convicted.

4. On 11 September 1947 a Board of Medical Officers convened at the 317th Station Hospital USAF in Europe, Wiesbaden, Germany, found the accused to be legally sane in all respects but diagnosed his condition as "anxiety reaction, acute severe, evidenced by alcoholism, depression, flight from problems and impaired judgment."

5. Correspondence from the Commanding General of the American Graves Registration Command, European Theater indicates that since the trial of this case the accused was absent without leave from 23 July 1947 to 25 August 1947.

6. I recommend that the sentence be confirmed, but the forfeitures adjudged be remitted and 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

((GCMO 48, 19 Nov 1947)

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

JAGH - CM 325712

UNITED STATES v. Second Lieutenant JAMES E. DORGAN (0-1997061), Medical Administrative Corps	)	MARIANAS BONINS COMMAND Trial by G.C.M., convened at Guam, Marianas Islands, 2 September 1947. Dismissal

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that Second Lieutenant James E. Dorgan, Medical Administrative Corps, 22nd Station Hospital, APO 246, on or about 4 August 1947, found drunk while on duty as Mess Officer.

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

Specification: In that Second Lieutenant James E. Dorgan, Medical Administrative Corps, 22nd Station Hospital, APO 246, was, at 22nd Station Hospital, APO 246, on or about 4 August 1947, drunk in uniform in a public place, to wit the Little Club Caducean, 22nd Station Hospital, APO 246.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the Marianas Bonins Command Judge Advocate dated 14 September 1947, with the exception that in the portion of paragraph 2b set forth on page 3 of the review, the word "witness" should be substituted for the word "accused," wherever the latter word appears.

4. Records of the Army show that accused is 37 years of age and married, with a dependent in addition to his wife. He is a high school graduate and in civilian life was employed in sales work and office management. He had enlisted service from 2 September 1943 to 28 March 1945 when he was commissioned a second lieutenant, Army of the United States. Since 28 March 1945 he has received three "Excellent" efficiency ratings and one "Very Satisfactory."

5. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a wartime violation of the 85th Article of War, and, authorized upon conviction of a violation of the 96th Article of War.

A. J. Rottenstein, Judge Advocate

John G. O'Brien, Judge Advocate

Jno Hyde, Judge Advocate

JAGH - CM 325712 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 1 [illegible]

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 James E. Dorgan (0-1997061), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of being found drunk while on duty as mess officer (Chg I, Spec); and of being found drunk in uniform in a public place, to wit: an enlisted men's club (Chg II, Spec). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Staff Judge Advocate which was adopted, with a minor exception noted, 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 4 August 1947 accused was on duty as mess officer at the 22nd Station Hospital. At about 0930 hours accused was seen drinking from a whiskey bottle in the noncommissioned officers' quarters. Subsequently during his tour of duty accused was found at the bar in the enlisted men's club by First Lieutenant Edward V. Paine. There were a number of enlisted men present. Accused requested Paine to sell him some beer but his request was refused. Accused had the odor of alcohol on his breath and his physical actions, speech, and the appearance of his eyes were not normal. Approximately two hours later at 1315 Lieutenant Paine returned to the enlisted men's club and found accused asleep in a chair, his clothing was disheveled and his hat was under his feet. Lieutenant Paine had to shake accused and shout in order to awaken him. Medical examination of accused an hour later showed that he was intoxicated.

4. Accused is 37 years of age and married. He completed high school and had employment in sales work and office management. He had enlisted service from 2 September 1943 until 28 March 1945 when he was commissioned a second lieutenant, Army of the United States. Efficiency ratings of record are "Excellent" for the period 28 March 1945 to 30 June 1946, and "Very Satisfactory" for the period from 2 April to 20 June 1947.

(12)

5. I recommend that the sentence be confirmed but, in view of all the circumstances of the case, recommend that it be 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 foregoing recommendation into effect, should such recommendation meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 66, 2 Dec 1947).

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

JAGH - CM 325723

UNITED STATES v. Technician Fourth Grade WILLIAM H. ONEY (35237850) and Private OLIVER T. DALLMAN (37037264), both of 567th Composite Service Company, Continental Base Section, European Command, APO 807, U. S. Army	HEADQUARTERS COMMAND EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 23-24 July and 4 August 1947. Each: Forfeiture of Forty Dollars ($40) for three (3) months and confinement for three (3) months. Post Guardhouse

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Oliver T. Dallman and Technician Fourth Grade William H. Oney, both of 567th Composite Service Company, Continental Base Section, European Command, acting jointly and in pursuance of a common intent, did, at Bad Nauheim, Germany, on or about 1 May 1947, feloniously, take, steal, and carry away the following property of the total value of more than $50.00: One (1) Saba Radio, value about $60.00, and one (1) Electric Record-player, value about $30.00, the property of Professor Weber; and one (1) Alarm clock, value about $5.00, one watch with silver case, value about $3.00, and various medical tools and instruments, value about $10.00, the property of Mr. Schadeck, Bad Nauheim Medical Institute.

Specification 2: In that Private Oliver T. Dallman and Technician Fourth Grade William H. Oney, both of 567th Composite Service Company, Continental Base Section, European Command, acting jointly and in pursuance of a common intent, did, at Bad Nauheim, Germany, on or about 2 May 1947, unlawfully enter the building of the German Medical Institute, with intent to commit a criminal offense, to wit, larceny therein.

Each accused pleaded not guilty to the Charge and Specifications and each was found guilty of Specification 1, except the words following "steal and carry away," substituting therefor the words "one electric record-player of a value less than twenty ($20.00) dollars, property of Professor Weber," of the excepted words not guilty, of the substituted words guilty; of Specification 2 guilty, and guilty of the Charge. Evidence of three previous convictions was introduced as to Oney and one previous conviction as to Dallman. Each accused was sentenced to confinement at hard labor for three months and to forfeit forty dollars per month for a like period. As to each accused, the reviewing authority approved only so much of the findings as involved findings of guilty of disorderly conduct tending to bring discredit upon the military service, in violation of the 96th Article of War, approved the sentence, ordered it executed, and designated the Post Guardhouse, Headquarters Command, European Command as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 95, Headquarters Command, European Command, 11 September 1947.

3. The only question presented for consideration is whether the findings of guilty as approved by the reviewing authority involve offenses which are lesser than and necessarily included in the offenses for which each accused was arraigned.

A court may make findings with exceptions and substitutions provided that such action does not change the nature or identity of any offense charged, or where the evidence fails to prove the commission of the offense charged but proves the commission of a lesser offense necessarily included within it (CM 271392, Ebarb, 1 BR (NATO-MTO) 103; MCM 1928, par 78c). This rule applies equally to the power of the reviewing authority (CM 323728, Wester). (See also MCM 1928, par 78c; CM 221993, Baker, 13 BR 261).

In CM 323728, Wester, accused was charged with an assault with intent to do bodily harm with a dangerous instrument, to wit: a knife. The court by exceptions and substitutions found accused guilty of being disorderly in a public place under such circumstances as to bring discredit upon the military service in violation of the 96th Article of War. The Board of Review, in holding the record of trial legally insufficient to support the findings of guilty and the sentence, stated:

"* * * Although it may be said that every assault is a breach of the peace and thus a disorder, it certainly does not follow that every disorder involves an assault. Hence, under the specification as redrafted by the court, even if we exclude therefrom the words 'in a public place,' accused may have been found guilty of some disorder not necessarily extending to or included in an assault.

"From this case may be derived the rule that the particular offense found in order to be properly considered a lesser included offense of that charged must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not found in such offense. It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM, 1928, par. 78c)."

Applying the foregoing principles, it is apparent that the reviewing authority's action in the instant case introduced an offense, the elements of which are not necessarily included in the offenses charged.

4. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the sentence as to each accused.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JACH - CM 325723 1st Ind NOV 25 1947

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

TO: Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724, 10 USC 1522), is the record of trial in the case of Technician Fourth Grade William H. Oney (35237850), and Private Oliver T. Dallman (37037264), both of 567th Composite Service Company, Continental Base Section, European Command, APO 807, U. S. Army.

2. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated, that all rights, privileges, and property of which the accused have 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 76, D.A., 3 Dec 1947)

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

OCT 17 1947

JAGQ - CM 325739

UNITED STATES v. Staff Sergeant RAMON S. MORIN (RA 38092637), and Private First Class ROBERT B. TALLMAN (RA 12273035), both of 788th Ordnance Light Maintenance Company, 88th Infantry Division.	88TH INFANTRY DIVISION Trial by G.C.M., convened at Gorizia, Italy, 26 June 1947. MORIN: Dishonorable discharge and confinement for three (3) years. Penitentiary. TALLMAN: Dishonorable discharge and confinement for two (2) years. Federal Reformatory.

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

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

Specification 1: In that Staff Sergeant Ramon S. Morin, 788th Ordnance Light Maintenance Company and Private First Class Robert B. Tallman, 788th Ordnance Light Maintenance Company, acting jointly, and in pursuance of a common intent, did, at Cividale, Italy on or about 19 May 1947, feloniously take, steal, and carry away four (4) tires, 600x16, Military, Goodyear, serial numbers 1A2Y4931, 567LC041, 159MJA60 and 809L3945, one (1) tires, 600x16 Military, Master Grip, serial number 8E125117, two (2) tires, 600x16 Military, Firestone, serial numbers, 075992AK and 085968AK, one (1) tire, 600x16 Military, Brazil, serial number 82338027, each of the value of about ten dollars and fifty four cents ($10.54), two (2) innertubes 600x16, each of the value of about one dollar and eighty cents ($1.80), six (6) innertubes 750x20, each of the value of about three dollars and three cents ($3.03), one innertube 900x16, of the value of

(18)

about three dollars and forty six cents ($3.46) and one (1) disc and wheel assembly of the value of about six dollars and six cents ($6.06), the total value of about one hundred fifteen dollars and sixty-two cents ($115.62), property of the United States furnished and intended for the military service thereof.

Specification 2: In that Staff Sergeant Ramon S. Morin, 788th Ordnance Light Maintenance Company and Private First Class Robert B. Tallman, 788th Ordnance Light Maintenance Company, acting jointly, and in pursuance of a common intent, did, at Torreano, (Udine), Italy, on or about 19 May 1947, wrongfully and knowingly sell four (4) tires, 600x16 Military, Goodyear, serial numbers 1A2Y4931, 567LC041, 159MJA60 and 809L3945, two (2) tires, 600x16, Military Firestone, serial numbers 075992AK and 085968AK, one (1) 600x16, Military, Master Grip, serial number 8E125117, one (1) tire, 600x16, Military Brazil, serial number 82338027, each of the value of about ten dollars and fifty four cents ($10.54), one (1) innertube, 600x16, of the value of about one dollar and eighty cents ($1.80) and one (1) disc and wheel assembly of the value of about six dollars and six cents ($6.06) total value of about ninety-two dollars and eighteen cents, ($92.18) property of the United States furnished and intended for the military service thereof.

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

Specification: In that Staff Sergeant Ramon S. Morin 788th Ordnance Light Maintenance Company and Private First Class Robert B. Tallman, 788th Ordnance Light Maintenance Company, acting jointly, and in pursuance of a common intent, did, at Torreano, Italy, on or about 19 May 1947 wrongfully and knowingly attempt to sell one (1) innertube 600x16 of the value of about one dollar and eighty cents, ($1.80), six (6) innertubes 750x20 each of the value of about three dollars and three cents, ($3.03), one (1) innertube 900x16 of the value of about three dollars and forty six cents ($3.46), total value of about twenty three dollars and forty-four cents, ($23.44), property of the United States furnished and intended for the Military service thereof.

Each accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any 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 accused Morin to confinement at hard labor for three years and accused Tallman to confinement at hard labor for two years. The reviewing authority disapproved so much of the findings of guilty of Specification 1, Charge I, as finds each accused guilty of larceny of two (2) tires, 600 x 16, Military, Goodyear, serial numbers 159MJA60, 809L3945; one tire 600 x 16, Military Brazil, serial number 82338027; each of the value of about ten dollars and fifty-four cents ($10.54); and larceny of property of a total value in excess of eighty-four dollars ($84.00) and disapproved so much of the findings of guilty of Specification 2, Charge I, as finds each accused guilty of wrongfully and knowingly selling two (2) tires, 600 x 16, Military, Goodyear, serial numbers, 159MJA60, 809L3945; one tire 600 x 16, Military Brazil, serial number 82338027; each of the value of about ten dollars and fifty-four cents ($10.54); and of wrongfully and knowingly selling property of a total value in excess of sixty dollars and fifty-six cents ($60.56), approved the sentence as to each accused, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for accused Morin and the Federal Reformatory, Chillicothe, Ohio as the place of confinement for accused Tallman, and forwarded the record of trial for action under Article of War 50½.

3. On 19 May 1947, the two accused were engaged in hauling unserviceable tires from a warehouse in Cividale, Italy, to a salvage lot where the tires were collected for sale to Italians through ARAR (R. 10). Upon leaving the warehouse with a load of tires, accused were followed by CIC agents (R. 15). The truck did not go to the salvage lot but turned off and went to a place called Torreano where several tires were unloaded and taken into a house (R. 17, 22). After leaving Torreano, the accused's truck was chased and stopped, and accused were ordered to return to the area where they had disposed of the tires. They returned to a bar and identified one of the Piccaro brothers as the receiver of the tires (R. 25). Eight tires were recovered, one of which consisted of a complete wheel assembly with innertube (R. 26). These eight tires and one wheel together with ten tubes found in accused's truck, were received in evidence (R. 41, 45).

Francisco Piccaro, an Italian civilian, testified that accused Morin sold him the tires mentioned above for 50,000 lires. In addition, accused Morin tried to sell him two broken innertubes but he would not buy them (R. 29-31). When accused Morin was taken into custody as above mentioned, he surrendered 50,500 lires which were placed in an envelope and received in evidence (R. 42, 43; Ex. 1A).

Pretrial statements made by each accused were received in evidence without objection (R. 50). In these statements both accused admitted taking the tires and selling them to an Italian in Torreano for 50,000 lires (Exs. 3 and 4).

The court took judicial notice of the value of tires, tubes, and wheel assembly as shown in the Ordnance Pricing Catalogue (R. 9).

4. Two questions are presented in this record of trial; (1) whether the sale of the tires and the attempted sale of the tubes were separate offenses and (2) whether the court's finding of value as approved by the reviewing authority is supported by the evidence.

The only evidence as to the attempted sale of innertubes (Spec., Charge II) is the testimony of Francisco Piccaro that accused Morin tried to sell him two broken innertubes but he would not buy them (R. 31). It is apparent from all the circumstances in the case that the offering of the tires and tubes was in effect a single transaction. Paragraph 80a, Manual for Courts-Martial, provides:

> "If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect."

This provision has been held to be "a positive and mandatory rule of limitation" (CM 313544, Carson, 5 Bull. JAG 202) and therefore, the maximum punishment authorized for the sale of the tires and the attempted sale of the tubes (Spec. 2, Charge I, and Spec., Charge II) must be limited to the maximum authorized punishment for the more important aspect of these two offenses.

In regard to the question of value, the values alleged in the specifications are identical with the Government Price Lists for new "tires, tubes and wheels." It is undisputed that these "tires, tubes, and wheels" were the property of the United States furnished and intended for the military service.

However, the evidence is clear and uncontradicted that all of the property was "salvage items" and was being transported from the warehouse in the Ordnance Company area to a "dump" where property of this character was being collected for sale as salvage. In fact they had been used by the Government to the extent that they were no longer considered serviceable and therefore were being sold as salvage. Under such circumstances it was obvious error for the court to find the value of the items in question to be the same as the replacement price for new items as stated in Government Price Lists. The theory that the value as stated in Government Price Lists may be used by the court in finding the value of Government property alleged to have been stolen or sold is based on the fact that such property is distinctive in character and usually has no fixed value on the open market and therefore its replacement cost to the Government is a proper measure of its value. Such theory, however, cannot be applied where the evidence is clear that the property alleged to have

been stolen is salvage and reclaimed items which are no longer in serviceable condition and the value of which is obviously much less than the cost of its replacement in kind by new and unused property (CM 195454, Fisher, 2 BR 241 and cases therein cited.)

The only other evidence in the record as to the value of the property in question was the testimony of Captain Stovall that the value of the tires in question in the open market in Italy would be higher than the Government Price List values and that the tires were sold by accused for 50,000 lire to Italian civilians. It has been uniformly held by the Board of Review that the testimony of a witness as to the value of property is not competent unless he is an expert or has special knowledge on the subject (CM 268007, McKinney, 44 BR 205). There is no evidence in the record that Captain Stovall was so qualified. The fact that the stolen property was sold to Italian civilians in an obvious "black market" transaction is insufficient to establish the true market value of the property and proof of value cannot be sustained by reason of the fact that the property itself was offered in evidence. To permit the court on its inspection alone to find definite market value of articles "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).

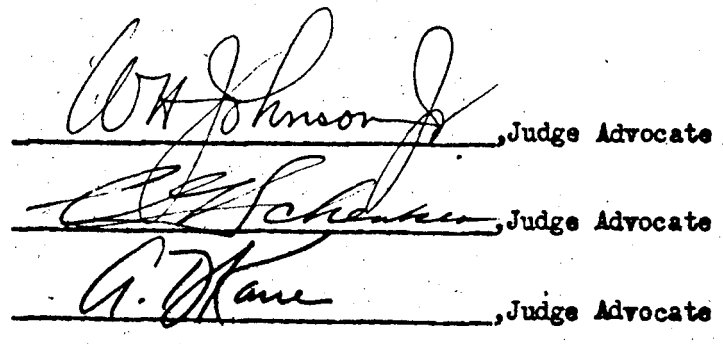
It necessarily follows therefore that the findings by the court of the value of the property described in all three Specifications is not sustained by the evidence. The evidence supports only findings that the stolen property alleged in each Specification had some value not in excess of $20. The maximum confinement at hard labor authorized by the Table of Maximum Punishments for larceny, wrongful sale of stolen property, and wrongfully attempting to sell stolen property of a value of $20 or less is six months for each offense.

The only other question for consideration is whether the failure of the court to swear witnesses Desa and Tinsley constituted error which prejudiced the substantial rights of the accused. Neither of these two witnesses testified as to any material issues in the case and the guilt of each accused as to Charge I and the Specifications thereunder is proved beyond any reasonable doubt by other sworn and competent testimony, including the full confessions of accused which admit these offenses and which were obtained after a thorough and adequate warning as to their rights under the 24th Article of War. Under these circumstances failure to swear these two witnesses does not constitute fatal error as the legal evidence in the record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the findings of

guilty (CM 258073, Allen, 5 BR (ETO) 235, 3 Bull. JAG 185; CM 239133 McMahan, 25 BR 55) and cases therein cited.

As each offense of which accused were convicted can legally sustain confinement at hard labor for a period not in excess of six months, confinement in a penitentiary, Federal reformatory or correctional institution is unauthorized as confinement imposed under separate Specifications cannot be aggregated so as to authorize penitentiary confinement (CM 187850, Taylor, 1 BR 99).

5. For the reasons stated above, the Board of Review holds the record of trial is legally sufficient to support the findings of guilty of the Charges and only so much of the findings of guilty of each Specification as to each accused relating to value as involves a finding that the property described in each Specification was of some value not in excess of $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 at some place other than a penitentiary, Federal reformatory or correctional institution for one year.



_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 325739 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 4 19[illegible]

TO: Commanding General, 88th Infantry Division, APO 88, c/o Postmaster, New York, New York

1. In the case of Staff Sergeant Ramon S. Morin (RA 38092637) and Private First Class Robert R. Tallman (RA 12273035), both of 788th Ordnance Light Maintenance Company, 88th Infantry Division, I concur in the foregoing holding by the Board of Review and recommend that only so much of the findings of guilty as to each accused of the Specifications, Charge I and the Specification, Charge II, relating to value be approved as involves findings that the property described in each Specification was of some value not exceeding $20, 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 one year in a place other than a penitentiary, Federal reformatory or correctional institution. 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 325739).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
R/T

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

JAGK - CM 325757

2 DEC 1947

UNITED STATES v. Staff Sergeant BURA T. JESTER (RA 34920320) and Private JOHN T. CHRISTIAN, JR. (RA 14233941), both 6th Quartermaster Company, 6th Infantry Division, APO 6	6th INFANTRY DIVISION Trial by G.C.M., convened at Pusan, Korea, 21 August 1947. Dishonorable discharge (suspended), total forfeitures and confinement as to accused Jester for three (3) years, and as to accused Christian one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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1. The record of trial in the case of the above-named soldiers has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the finding and sentence as to accused Jester, and legally insufficient to support the finding and sentence as to accused Christian. The record has now been examined by the Board of Review.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Staff Sergeant Bura T. Jester, 6th Quartermaster Company, 6th Infantry Division APO 6, and Private John T. Christian, 6th Quartermaster Company, 6th Infantry Division APO 6, acting jointly and in pursuance of a common intent, did at APO 6 on or about 29 May 1947, feloniously take, steal and carry away seventy three (73) sheets value of over fifty dollars ($50.00), the property of the United States intended for use by the Military service thereof.

He pleaded not guilty to and was found guilty of the specification and the charge. 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 a period of one year. The reviewing authority approved the sentence and ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, 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. 60, Headquarters 6th Infantry Division, 8 September 1947.

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

An inventory of the supplies of accused's organization, completed 6 June 1947, showed a shortage of approximately 70 sheets. No prior inventory showed a shortage of sheets (R 16,17).

On the evening of 29 May 1947 a guard, Private First Class Benford, saw some Koreans carrying a bundle across the railroad tracks near his post. They were about 75 yards away from him and off his post which he could not leave. He challenged them and they ran off, dropping the bundle. The bundle looked like a burlap sack. This incident occurred at about 7:45 p.m. Upon relief at 8:00 p.m. the guard reported the incident to accused Jester, who was sergeant of the guard (R 5,6).

About 8:50 p.m. accused Jester had Private First Class West relieve accused Christian at Post #1 for about 15 minutes. Post #1 was at the Dispatcher's Shack "in the Q.M." While he was on this post, Private First Class West saw 3 or 4 vehicles go out the gate, but he did not know the occupants of the vehicles (R 8,9). West had previously been on guard and had been regularly relieved at 8:00 p.m. At this time he heard accused Jester say that he was "going down and see what the Korean people got out of the box-car, stuff that was stolen out of the box-car that night" and upon being questioned further West stated that Jester had said he was going to see about sheets, as the "stuff" which was stolen (R 18).

A Korean tailor testified that on the evening of 29 May an American soldier, whom he thought was the accused Jester, came to his shop with some white cloth which he wanted to sell (R 19,21). The Korean saw only one piece of the cloth (R 20) but thought that there were, roughly, 100 pieces. There is a laundry in the same building (R 21). The "white cloth" looked something like Prosecution's Exhibit 1 (R 21). While the Korean and the soldier were talking an American with an interpreter came in and arrested them, taking them to "the American Police Station," together with the cloth (R 19).

The Chief Agent of the Criminal Investigation Division, Thornton E. Ireland, testified that on the evening of 29 May it was reported to him that an American soldier was attempting to sell "G.I." sheets in a Korean shop. He sent two agents to the shop. He then testified, "They picked up Staff Sergeant Jester and seventy-three sheets" at the shop (R 10). Mr. Ireland was then shown two bundles which he stated "are the sheets which we picked up in this Korean shop." Ireland marked the sheets and counted them. There were 73; Two bundles of sheets were then admitted in evidence as Prosecution Exhibit 1 (R 11). Later the court permitted the description of Prosecution Exhibit 1 to be changed from "Two bundles of sheets" to seventy-three sheets (R 15). At this time prosecution stated, "Agent Ireland has already testified to the fact that there were seventy-three sheets, two bundles of which have already been brought in as

Exhibit 1." Ireland had testified (R 10), upon being shown the sheets, that "Each package contains 6 sheets." They were similar to government sheets, had been counted by the witness and kept locked in the supply room (R 11). The value of government sheets, according to official supply catalog, is $1.50 each (R 13-16).

Agent Ireland identified a pre-trial statement of the accused Christian, and testified that it was taken after his rights under the 24th Article of War had been explained to accused. The statement was admitted without objection as Prosecution Exhibit 3 (R 12).

The statement of the accused, in material part, reads as follows:

"On 29th May 1947 I was on guard at the 6th QM company area at post #1. At about 1950 hours the guard at post #3 told me that Sgt. Jester was looking for a truck. About 2030 hours, Sgt. Jester came to Post #1 where I was standing guard and asked me if I had a truck. I told him that I didn't. Then Sgt. Jester asked me if I would get a truck and drive him up to the laundry if he would get me relieved of guard. I said yes, so I went to the 'Guard Shack' and changed caps. I asked him what he wanted me to do and Sgt. Jester told me that he wanted me to bring a bundle up to a Korean laundry for him. I got a trip ticket for a truck and we drove out the front gate of the 6th QM in the truck. Sgt. Jester told me to drive around to Post #3. I told Sgt. Jester that I didn't want to be involved in this in any way. I stopped the truck and backed in towards gate #3 of the 6th QM company area. Sgt. Jester got out and pretty soon I heard something being put in the back of the truck. Following this Sgt. Jester got in the front of the truck with me and told me to drive to the Korean laundry which was nearby. Upon arriving at this laundry, I stopped the truck and Sgt. Jester got out and took this bundle from the back of the truck into the laundry shop. Then Sgt. Jester told me to take the truck back to the company. I did this and went back on guard.

"Q. On what relief was this guard at post #3 who told you that Sgt. Jester wanted a truck?

"A. He was on the 1st relief.

"Q. What was this guard's name?

"A. I don't know.

"Q. Do you know what was in this bundle?

"A. No.

"Q. Was this bundle, property of the U. S.?

"A. I'm not sure but the way it was packed it seemed to me that it was U.S. Gov't. property.

"Q. Do you know why Sgt. Jester wanted to take this bundle up to the Korean laundry?

"A. He never told me, but I think he was going to sell it.

"Q. Did you see Sgt. Jester make any transaction at the laundry?

"A. No, I didn't stay there that long.

"Q. Is there anything else you would care to add to this statement?

"A. No."

4. After his rights as a witness had been duly explained to him, Christian elected to remain silent and no evidence was presented in his behalf.

5. The question for determination is whether the accused Christian, who, at the suggestion of Jester, secured a truck and transported the government property from the military area to the Korean business district where Jester attempted to negotiate a sale is equally guilty with Jester of the larceny thereof. If Christian's conduct amounts to that of an aider and abettor to Jester in the theft, then he is a principal equally responsible in law, for Title 18 U.S.C. 550 provides that "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." The Federal rule has been consistently followed in military law (Winthrop's Mil. Law and Precedents, Reprint, p. 108; CM 285969, Sanders, 10 BR (ETO) 255, 266). If Christian knew, prior to or at the time during which he associated himself with Jester and operated the truck for the transport of the property, that Jester was then and there effecting a larceny of the property he is guilty of larceny as an aider and abettor (CM 321915, McCarson). For the answer to this further question we look not only to Christian's admissions, made to the investigating officer about four days after the event, but to the attendant circumstances surrounding the offense and the reasonable inferences to be drawn therefrom. The offense occurred during the nighttime and a member of the guard had apprehended a Korean attempting to flee from the warehouse area with the "stolen property." Jester suggested to Christian, who had a driver's permit and who was then standing guard, that if he would get a truck to transport some property to a Korean laundry he, Jester, would secure a relief for him. Christian agreed to the proposition, changed his cap, and secured a trip ticket for the truck. He had to drive the truck out of the main gate and by having a trip ticket, and by appearing to be a truck driver on a lawful mission no interference from the guards thereat might be reasonably anticipated. Sometime before he backed the truck up to the track for Jester to load the property he told Jester that he "didn't want to be involved in this in any way." If "this" was a lawful mission such remark was entirely unnecessary and meaningless. Although it may express a degree of reluctance or fear of detection or apprehension, the

remark shows that Christian realized that he was involved and that the contemplated act or acts were unlawful. Christian further stated to the investigating officer that "he never told me but I think he was going to sell it," referring to the property. As used by the accused the verb "think" might be construed as relating more particularly to his opinion at the time the statement was given, viz, four days after the larceny. The court had no reason to believe however that subsequent to the offense Christian had been apprised of matters not within his knowledge at the time of its occurrence and had formed an opinion contrary to that which he held on the prior occasion. Although Jester was sergeant of the guard and Christian was a private thereof, Jester's suggestion does not appear to have been put forth in the form or nature of an order nor did Christian intimate that such was the case. Assuming that Christian acted in compliance with what he construed as an order from his military superior, if he had knowledge that Jester was about to effect a larceny of Government property, Christian acted at his peril, such an order being manifestly beyond the scope of the sergeant's authority (Par. 148(a), MCM 1928; CM 265848, Baugh, 4 B/R (NATO) 359, 365).

We believe the evidence, considered in the light most favorable to the accused, is such that the court was justified in concluding, beyond any reasonable doubt, that at the time and place of the commission of the offense alleged, the accused Christian knew that his contributions thereto were in furtherance of Jester's scheme to take, steal and carry away the property (Jin Fuey Moy v. United States, 254 U.S. 189,192, 41 Sup. Ct. 98; Greenberg v. United States, 297, Fed 45; 22 C.J.S. sec. 88(a) 157,158).

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the finding of guilty and the sentence as to the accused Christian.

Robert E. Gilbert, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stebbins, Judge Advocate

(30)

JAGK - CM 325757 1st Ind

JAGO, Board of Review No. 2, 12 December 1947

TO: The Judge Advocate General.

1. For his information.

2. The record presents cogent mitigating circumstances with respect to the accused Christian. He is a young soldier, eighteen years of age and had served scarcely a year in the Army at the time of the offense. Jester had been in the Army about four years and was approximately twenty-five years of age. Jester was sergeant of the guard and Christian was a private thereof. Jester might reasonably be presumed to have exercised an appreciable influence on Christian as "old soldier to young recruit." The evidence does not show that Christian was to share in the proceeds of the sale. The court recognized the degree of culpability in fixing the period of confinement of Jester at three years and, of Christian, at one year. Considering the foregoing circumstances the Board of Review recommends that Christian be given immediate consideration for clemency, including restoration to duty.

Chester D. Silvers
CHESTER D. SILVERS
Lt Col, JAGD
Chairman, Board of Review No. 2

12/19/47

I Concur
HHG

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

JAGN-CM 325759

U N I T E D S T A T E S v. ARTHUR PUSH, a person serving with the armies of the United States in the field.	))))))))	THIRTEENTH AIR FORCE Trial by G.C.M., convened at APO 714, 23 May 1947. Discharge the Civil Service with prejudice, total forfeitures and confinement for five (5) years. Federal Reformatory.

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

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1. The record of trial in the case of the person named above has been examined by the Board of Review and is legally sufficient to support the findings of guilty.

2. The only matter requiring consideration is the legality of the sentence.

3. The accused, a civilian employee, serving with the armies of the United States in the field, was duly convicted of larceny of government property in violation of Article of War 94. He was sentenced "to be discharged the Civil Service with prejudice, 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" (Emphasis supplied).

4. The specific question presented is whether so much of the sentence as provides, "to be discharged the Civil Service with prejudice," is legal. This question was considered in CM 286338, Lang, 28 BR (ETO) 149, and it was there held:

> "As accused is not a member of the armed forces of the United States he is not subject to dishonorable discharge or dismissal from the service of those forces (SPJGJ CM 247640, 16 March 1944, III Bull. JAG 97). To the extent

> that the court in its sentence essayed to adjudge dismissal of accused from the service of the United States Government, as opposed to dismissal from the military service, it of course clearly exceeded its authority (Winthrop's Military Law and Precedents (Reprint, 1920), pp. 405, et seq., and 433). It follows that that portion of the sentence adjudging that accused be dismissed from the service of the United States Government was illegal and void."

Since the circumstances and the sentence in the Lang case, supra, are analogous to those in the instant case, the decision of the Board of Review expressed therein is applicable in the instant case and for the reasons therein stated so much of the sentence as provides that accused be discharged the Civil Service with prejudice is illegal and cannot be sustained.

5. For the reasons above stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and its Specification and legally sufficient to support only so much of the sentence as provides for total forfeitures and confinement at hard labor for five years.

Edward F. Johnson, Judge Advocate.

(SICK IN QUARTERS), Judge Advocate.

Joseph T. Busick, Judge Advocate.

JAGN-CM 325759 1st Ind 18 NOV 1947
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Thirteenth Air Force, APO 719,
c/o Postmaster, San Francisco, California.

1. In the case of Arthur Push, a person serving with the armies of the United States in the field, I concur in the holding by the Board of Review and recommend that only so much of the sentence be approved as involves forfeiture of all pay and allowances due or to become due and confinement at hard labor for five 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 325759).

17791

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.

JAGK - CM 325762

20 OCT 1947

UNITED STATES	)	PORT OF LEGHORN
v.	)	Trial by G.C.M., convened at Leghorn, Italy, 14-17 July 1947. Dismissal, total forfeitures, fined $2,000 and confinement for five (5) years. MTOUSA Disciplinary Center.
First Lieutenant EDWARD B. EDWARDS (O-1014033), Air Corps.	)	

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

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

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

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

Specification 1: In that First Lieutenant Edward B. Edwards, Armored Infantry, 870th Quartermaster Laundry Company, did, in conjunction with Private First Class Joseph H. Thompson, 870th Quartermaster Laundry Company, at or near Leghorn, Italy, on or about 22 January 1947, wrongfully and unlawfully conspire and agree together to commit a criminal offense against the United States to wit: larceny of property of the United States.

Specification 2: (Finding of Not Guilty).

Specification 3: In that First Lieutenant Edward B. Edwards, Armored Infantry, 870th Quartermaster Laundry Company, did, at or near Leghorn, Italy, on or about 23 April 1947, wrongfully have in his personal possession the following weapons:

Two Thompson sub-machine guns, Cal. 45
One German trench knife, 9 1/4" long
One U.S. Army trench knife, M1918
One U.S. Carbine, Cal. .30
One U.S. Cal. 30 rifle,

in violation of MTOUSA Circular Number 137, dated 16 August 1946.

Specification 4: In that First Lieutenant Edward B. Edwards, Armored Infantry, 870th Quartermaster Laundry Company, did, in conjunction with Private First Class Joseph H. Thompson, 870th Quartermaster Laundry Company, at or near Leghorn, Italy, on or about 22 January 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.

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

Specification 1: In that First Lieutenant Edward B. Edwards, Armored Infantry, 870th Quartermaster Laundry Company, did, in conjunction with Private First Class Joseph H. Thompson, 870th Quartermaster Laundry Company, at or near Leghorn, Italy, on or about 22 January 1947, feloniously take, steal and carry away military clothing, 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 First Lieutenant Edward B. Edwards, Armored Infantry, 870th Quartermaster Laundry Company, did at or near Leghorn, Italy, on or about 22 January 1947, wrongfully and knowingly, by sale, dispose of military clothing of the value in excess of Fifty Dollars ($50.00) property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Charges and Specifications excepting Specification 2 of Charge I of which he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of two thousand ($2,000) dollars and to be confined at hard labor at such place as the reviewing authority might direct for a period of ten (10) years. The reviewing authority approved only so much of the finding of guilty of Specification 3 of Charge I as involved a finding of guilty of wrongful possession of two Thompson sub-machine guns, one carbine and one rifle in violation of the circular alleged, approved the sentence but remitted five years of the confinement adjudged and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence contained in the Staff Judge Advocate's review. Specification 1 of Charge I alleged no overt act in furtherance of the conspiracy therein charged. Section 37 of the Federal Criminal Code (18 U.S.C. 88) has not changed the nature of the offense of conspiracy but has added the requirement that an overt act to effect the object be charged and proved. (CM 273791, Gould, 47 BR

29, 65; Marino v U. S., 91 Fed (2nd) 691). Therefore in cases falling within the terms of the cited Federal statute, the overt act is more than a mere requirement of proof but is an essential element of the crime of conspiracy. (Brady v U. S., 24 Fed (2nd) 405, 407). The offense of common law conspiracy, viz, a combination of two or more persons to do an unlawful act or to effect an unlawful object by any means, or to do a lawful act or to effect a lawful object by unlawful means or in an unlawful manner, is not punishable as such by tribunals which can take cognizance only of statutory crimes if there is no statute adopting the common law (Harrisen v Moyer, 224 Fed. 224). And although it be conceded in the present case that common law conspiracy is not included in the "crimes and offenses not capital" clause of Article of War 96, Italy, the locus dilecti, not having adopted the common law, yet the agreement entered into between accused and Thompson was clearly of a nature prejudicial to good order and military discipline and tended to bring discredit upon the military service. Such conduct therefore constituted a violation of other prohibitions contained in Article of War 96. CM 296630, Siedentop, 58 BR 191, 199; CM 320681, Watke.

There is no showing that Thompson was ever acquitted of the conspiracy with accused and therefore the rule that acquittal of all but one of the alleged conspirators amounts to a general acquittal, is not applicable.

Although the offense of conspiracy is one which from the nature of the offense requires the concurrence of two or more persons in its commission, it does not follow that one person alone cannot be prosecuted and convicted therefor, yet for one reason or another, his co-conspirator is not tried (72 ALR 1180-1192).

The evidence amply sustains the findings of guilty of wrongful possession of firearms in violation of the circular alleged, the wrongful application of the government motor vehicle (Specs 3 and 4, Charge I); the larceny of military clothing and wrongful disposition by sale thereof (Specs 1 and 2 and Charge II).

4. Records of the Department of the Army show that the accused is 29 years of age and married. He attended high school but did not graduate therefrom and was employed in the United States Postal Service prior to entering the Army. He attended the Armored Force School at Fort Knox, Kentucky, received an academic rating of "very satisfactory" and on 21 November 1942 was commissioned a second lieutenant, AUS. On 15 January 1944 he was promoted to first lieutenant. All efficiency reports rate him as "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 were committed during the trial. The Board of

Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation of Articles of War 94 and 96.

Robert T. Silvey, Judge Advocate

Carlos E. McAfee, Judge Advocate

On Leave, Judge Advocate

JAGK - CM 325762 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Edward B. Edwards (O-1014033), 870th Quartermaster Truck Company.

2. As approved by the reviewing authority, this officer was found guilty of unlawfully conspiring with an enlisted man to commit a larceny of property of the United States; of wrongfully having in his possession two Thompson sub-machine guns, one U.S. carbine and one U.S. rifle, in violation of MTOUSA Circular No. 137, dated 16 August 1946; and of willfully applying to his own use one motor vehicle of the value of over $50, property of the United States furnished and intended for the military service, all in violation of the 96th Article of War (Specs 1, 3, 4, Charge I); of larceny of military clothing of the value of over $50; and of the wrongful disposition by sale of the stolen property, in violation of Article of War 94 (Specs 1, 2, Charge II). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay to the United States a fine of $2,000.00 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 but remitted five years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the 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 as approved by the reviewing authority and to warrant confirmation of the sentence.

The accused was Assistant Security Officer of the 61st Quartermaster Base Depot located in the vicinity of Tombolo, Italy, and exercised supervision over the guards assigned to protect United States property at the depot. Private First Class Joseph H. Thompson was Corporal of the Guard. During the latter part of January 1947, the exact day not being shown, the accused and Thompson entered into an agreement to remove military clothing from the government warehouses and sell the same to civilians. In furtherance of the conspiracy the accused arranged for his girl friend, one Bianca Cantarutti, with whom he was living and whom he was supporting, to make the necessary contacts with the civilians, neither the accused nor Thompson being versed in the Italian language. Bianca made contact with one Gino Barsotelli who agreed to purchase the clothing and she arranged for a rendezvous at the house of the Crespi family near Coltano, Italy, where the goods would be delivered. About three days after the agreement had been entered into, and at about 0230 hours in the morning, accused

and Thompson went to a government warehouse and loaded three bales of woolen OD clothing in a jeep which was assigned to the 61st Quartermaster motor pool, and took the property to the Crespi residence. Gino purchased two bales of OD trousers from accused and paid him 500,000 lire, of which 400,000 lire was payment of an old debt and 100,000 lire was for the trousers. Thompson sold some woolen OD shirts to other persons present but Gino asserted that the accused took no part in this transaction. On the following morning Thompson went to accused's quarters where Bianca, at the direction of accused, handed Thompson 75,000 lire for his part of the transaction. A bale of woolen OD trousers or shirts was shown to contain from 40 to 60 of the respective items. The shirts were of the value of $4.35 each and trousers of the value of $5.70 per pair.

The accused and Thompson are colored. After an extensive investigation by the CID, Thompson made a statement leading to the arrest of accused. After the accused was confined, a search was made of his quarters. Two Thompson sub-machine guns were found under the mattress of his bed and an M-1 rifle and a carbine were found in a closet. The court-martial took judicial notice of Circular 137 MTOUSA, 16 August 1946, prohibiting military personnel from having in their possession firearms and other weapons unless specifically authorized. It was shown that the mentioned circular had been posted on the bulletin board of accused's company and that he had not been authorized to have such weapons in his possession. The accused did not testify at his trial. A brief by counsel for accused which was forwarded with the record of trial has been considered. Thompson was apparently tried by special court-martial.

4. I recommend that the sentence as approved by the reviewing authority be confirmed but that the fine be remitted and the period of confinement be reduced to three years and that as thus modified the sentence be carried into execution. I further recommend that an appropriate United States Penitentiary be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 54, 20 Nov 1947)

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

JAGQ - CM 325773

20 JAN 1948

UNITED STATES	FOURTH AIR FORCE
v.	Trial by G.C.M., convened at Hamilton Field, California, 6 August 1947. Dishonorable discharge and confinement for two (2) years. United States Disciplinary Barracks.
Private First Class DWAINE L. CRUISE (RA 39325937) Squadron A, 401st Army Air Forces Base Unit, Hamilton Field, California	

HOLDING by the BOARD OF REVIEW
JOHNSON, BAUGHN 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.

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

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

Specification 1: In that Private First Class Dwaine L. Cruise, Assigned Squadron A, 401st AAF Base Unit, Hamilton Field, California, did at Hamilton Field, California on or about 16 October 1946 fraudulently present for payment to A. H. Miller, Colonel, Finance Department, an officer of the United States duly authorized to pay such claims, a claim against the United States for pay and allowances due him for the month of August, 1946, in the amount of one-hundred-forty-one and seventy-five/one hundredths ($141.75) dollars for the services alleged to have been rendered the United States in the grade of Technical Sergeant with over three years service, which claim was false and fraudulent in that the accused was then a Private First Class with over three years service and was then known by the said Private First Class Dwaine L. Cruise to be false and fraudulent, thus defrauding the United States of fifty-seven and seventy-five/one-hundredths ($57.75) dollars, good and lawful money of the United States.

Specifications 2-5, same as Specification 1, with pertinent details as follows:

Specs.	Finance Officer	Month
2	Major R. E. Powell	Sept. 46
3	" " " "	Oct 46
4	" " " "	Nov 46
5	" " " "	Dec 46

CHARGE II: Violation of the 96th Article of War. (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

He pleaded not guilty to all Charges and Specifications and was found not guilty of Charge II and its Specification but guilty of Charge I and the five Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to be confined at hard labor at such place as the reviewing authority may direct for four years and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted so much thereof as is in excess of dishonorable discharge and confinement at hard labor for two years, designated Branch, United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

Warrant Officer Junior Grade Louis H. Carlson, testified that he has sixteen years service in the Army in personnel work and that he is the officer in charge of the Enlisted Branch, 401st Army Air Forces Base Unit, Hamilton Field, California (R 7). He identified accused's service record and stated that an entry therein showed that accused reenlisted in the Army on 23 October 1945 as a Private First Class at Fort Benning, Georgia, and that subsequent entries therein showed that he was transferred to the Reception Center at Camp Beale, California, by orders dated 24 October 1945 and from Camp Beale to Portland Army Air Base in February 1946 (R 8-9). The service record further showed that accused was transferred from Portland Army Air Base to Overseas Replacement Depot, Kearns, Utah by orders dated 2 July 1946 and that no further entries appear in the service record (R 9). There was introduced in evidence as Prosecution Exhibit 1 the Special Orders transferring accused from Camp Beale to Portland Army Air Base in the grade of Private First Class. This witness further testified that if a soldier's service record is lost upon his transfer a temporary service record is compiled from a sworn statement made by the soldier in question and identified a temporary service record pertaining to accused which contained an entry showing accused enlisted

in the grade of technical sergeant at Fort Benning, Georgia (R 10). This temporary service record contained a sworn statement or affidavit made by accused from which the temporary service record was compiled and which was introduced in evidence as Prosecution Exhibit 2 (R 12). This exhibit shows that it was executed by accused on 27 January 1947 at McChord Field, Washington, and shows that his present grade at that time was Technical Sergeant. Thereafter witness identified Prosecution Exhibit 3 as a War Department AGO Form 20 (Classification Card) which showed accused's grade as a private first class on 21 March 1946 and stated that the information contained in Form 20 concerning the grade of accused prior to the time the form was executed is obtained by personal interview with him (R 13). Prosecution Exhibit 3 shows that accused executed this Form 20 on 29 January 1946.

Chief Warrant Officer Malcolm K. Marsh testified that he is Classification and Assignment Officer of the 401st Army Air Forces Base Unit, Hamilton Field, California; that when an enlisted man's records are lost upon transfer a new Form 20 is compiled from a personal interview with the soldier concerned and identified Prosecution Exhibit 4 as accused's Form 20 executed on 20 November 1946, which shows him as a Technical Sergeant on that date (R 17). Prosecution Exhibit 4 further showed that accused was a Technical Sergeant on 21 January 1946 and remained in that grade until 27 January 1947 (R 18). He further testified on cross-examination that if in the interview with a soldier whose records were lost that the soldier stated he was a Technical Sergeant such information would not be entered on Form 20 until further proof was obtained (R 19), but that he would accept an entry in a service record as such proof.

The prosecution introduced in evidence over the objection by the defense Prosecution Exhibits 5 and 6 which are certificates over the signature of The Adjutant General that the records in his office show that the accused enlisted on 24 October 1945 in the grade of private first class (Pros. Ex. 5) and that he was formerly inducted into the military service 9 February 1943 at Portland, Oregon, reported for active duty 15 February 1943, promoted to private first class 7 September 1945 and honorably discharged 23 October 1945 as a private first class for the purpose of reenlisting in the Army (Pros. Ex. 6).

Major Ralph E. Powell, Finance Department Disbursing Officer, Hamilton Field, California, identified Prosecution Exhibits 7 to 11, inclusive, as the pay vouchers of accused from June 1946 to December 1946, inclusive, testified that they were in proper order for payment

and that the signature of accused represented that he received the money (R 23-26). Prosecution Exhibit 7 shows that accused was paid at Camp Kearns, Utah for the months of June and July as a private first class having been transferred there in grade from Portland Army Air Base, 8 July 1946 and Prosecution Exhibits 8 to 11, inclusive, show that he was paid at Hamilton Field, California, for the months of August to December 1946, inclusive, as a Technical Sergeant. Prosecution Exhibit 10 showing receipt of pay and allowances as a Technical Sergeant for the month of November 1946 shows that accused was transferred "in gr fr Kearns, U. 17 Sep 46." Witness further stated on cross-examination that the officer having custody of the enlisted man's service record verifies the soldier's grade before he is paid and that the pay vouchers are not filled out by the enlisted personnel receiving the money (R 26).

First Lieutenant Earl M. McCrary, testified that he was in charge of the Incoming Pay Roll and Travel Pay Section, Hamilton Field, California, and that when pay rolls are prepared in his office the information relative to the rank of the soldier is taken from the Form 20 or the service record and a temporary service record is considered sufficient authority for this purpose.

4. Evidence for the Defense.

The accused after being duly advised of his rights as a witness (R 29) elected to testify under oath and stated that he has been in the Army since 1943, is married and has one child. He was paid in the grade of Technical Sergeant at Camp Kearns, Utah, and to the best of his knowledge that same information was used to pay him in that grade when he was transferred from that installation to Hamilton Field, California. Special Orders No. 17, Army Air Forces Overseas Replacement Depot, Hamilton Field, California, dated 21 January 1947 was introduced in evidence as Defense Exhibit A which showed the transfer of accused in the grade of Technical Sergeant to McChord Field, Washington and he complied with this order (R 30). He "filed" for dependency discharge under AR 615-362 in the grade of Technical Sergeant while at Hamilton Field as evidenced by Defense Exhibit B, copy of such request dated 13 December 1946. When he reported to Camp Beale, California in January of 1946 he was told that he held "MOS's of 821 and 283" which called for the rank of Technical Sergeant and that he would be promoted to that grade. He saw the published order promoting him before he left Camp Beale and reported to Portland Army Air Base wearing Technical Sergeant's stripes. He did not have a copy of the promotion order as the officer told him the orders would be placed in his 201 file and forwarded to the Portland Army Air Base. There were only six copies of the order published and when he reported at Portland Army Air Base wearing Technical Sergeant stripes he was told to remove them as his records showed that he was a private first class. He reported the matter to a Colonel Phillips who stated that he

would get it "straightened out" but accused was transferred to Camp Kearns, Utah, in the grade of private first class before it was accomplished (R 32).

When he reported to Camp Kearns in June 1946, he told the officer in charge that he had been promoted to Technical Sergeant at Camp Beale and the officer sent a "TWX" to Camp Beale and received a reply which verified his rank as a Technical Sergeant (R 31, 39) and thereafter he was paid as a Technical Sergeant at Camp Kearns (R 40) which included back pay for the difference between the pay of a private first class and that of a Technical Sergeant (R 32). Accused admits that the signature appearing on Prosecution Exhibit 7 wherein he was paid as a private first class at Camp Kearns is his signature but does not remember receiving pay at that installation as a private first class because "all that money was paid back to me when the records were straightened out, the difference between the pay of a private first class and technical sergeant" (R 41).

First Lieutenant Joseph G. Rock, testified that accused was in his section and that he performed his duty in a "very excellent" manner and had a good knowledge of supply.

5. The evidence is uncontroverted and accused admits that he received pay and allowances as a Technical Sergeant for the months of August to December, 1946, inclusive. The first question to be decided in this case is whether there is sufficient competent evidence in the record from which the court could reasonably infer that accused was not entitled to the pay and allowances in the grade of Technical Sergeant and that he knew that the claim for such pay and allowances was false and fraudulent. In deciding these questions the Board of Review is well aware of the rule that it is prohibited from weighing the evidence in cases forwarded for action under Article of War 50½ and that if there is sufficient competent evidence in the record of trial to support the findings of guilty the record must be held legally sufficient.

It is recognized that the burden of proving that a particular individual was not promoted or was not married or was not in any given status at a particular time is a difficult burden to meet. Proof that an accused was of a particular grade or was single or was in an absent without leave status on a particular date gives rise to a presumption that such status continues until the presumption in question is rebutted. Prosecution Exhibit 1 shows that accused was transferred to Portland Army Air Base on 1 February 1946, as a private first class. Prosecution Exhibit 3 (WD AGO Form 20) shows that from 21 March 1946 to 15 July 1946 he was a private first class and Prosecution Exhibit 7 (Pay Roll Individual Insert Sheet - Enlisted Men) shows that he was paid at Camp Kearns, Utah, for the months of June and July 1946, as a private first class. These exhibits are

competent evidence which raise a presumption that on those dates accused was serving in the grade of private first class and if such presumption is not rebutted by competent evidence in the record they would be sufficient to sustain the findings of guilty.

Prosecution Exhibits 8, 9, 10 and 11 merely show what the accused admits, viz., that he did receive at Hamilton Field, California, pay and allowances as a Technical Sergeant for the periods charged in Specifications 1 to 5, inclusive, of Charge I. Prosecution Exhibits 2, 5 and 6 are of no evidentiary value and should not have been admitted in evidence as the latter two exhibits are clearly hearsay and inadmissible as such and Exhibit 2 is irrelevant for the reasons hereinafter stated.

It must be remembered that the issue in this case is whether accused was entitled to pay and allowances in the grade of Technical Sergeant for the months of August to December 1946, inclusive. As above stated the prosecution's evidence showed that he was a private first class as late as July 1946 and created a presumption that he remained in that grade unless the contrary is shown. This brings us to the important question in the case. Prosecution Exhibit 10 (Pay Roll Individual Insert Sheet - Enlisted Men) showing receipt of pay and allowances by accused as a Technical Sergeant for the month of November 1946, bears the following entry on the line entitled Remarks "Trsfd in gr fr Kearns, U. 17 Sep 46." The accused did not prepare this voucher and cannot be charged with the statements thereon (CM 320998, Farrar, 28 May 1947). As Exhibit 10 is competent evidence the entry in question must be considered as rebutting the presumption that accused's grade remained that of private first class unless it can be shown that he caused the entry in question to be made or that it was based upon information obtained from the accused which he knew to be false and fraudulent. It is contended that information as to accused's grade as shown by these records was based upon accused's Form 20 (Pros. Ex. 4) or his temporary service record made up from Prosecution Exhibit No. 2 and is accordingly traced to statements made by him which he knew to be false. When this contention is analyzed however it becomes apparent that the evidence does not sustain such a conclusion. Accused can only be charged with making the statements on his Form 20 which were on that document when he executed it and as it was not signed by accused until 20 November 1946 and he had previously been paid at Hamilton Field as a Technical Sergeant for August, September and October 1946, it cannot be said that this Form 20 formed the basis for these previous payments. Prosecution Exhibit No. 2, the affidavit from which accused's temporary service record was compiled, could not have been the source of any information used to pay accused for the periods charged as it was not executed until January 27, 1947, after accused had been transferred from Hamilton Field to McChord Field, Washington. In fact the record of trial is completely devoid of any testimony or documentary evidence showing what information was used to pay accused in the

higher grade for the periods charged. True his two Form 20s are inconsistent as to his grade but neither of them show he made any statement as to his grade on or about the date he began to draw Technical Sergeant's pay at Hamilton Field. It is therefore the opinion of the Board of Review that the record does not contain sufficient competent evidence from which the court could infer that accused was not a Technical Sergeant on the dates he drew pay and allowances in that grade at Hamilton Field, California.

In CM 320998, Farrar, 28 May 1947, accused was charged with four specifications alleging that he "did unlawfully pretend" to the finance officer that he was a Technical Sergeant "well knowing that said pretenses were false and by means thereof did fraudulently obtain" pay and allowances in the grade of Technical Sergeant. After holding that the evidence was legally insufficient to support the findings of guilty of these allegations the Board of Review said:

> "* * * There are, however, additional grounds for holding the record legally insufficient to support Specifications 1, 2, 3, and 4 relating to obtaining money by false pretenses. The only evidence that any false pretenses were made to Captain Shimmel, as alleged, are the payrolls themselves. Accused's signatures thereon merely acknowledge receipt in cash of the amounts in the columns 'amount paid' set opposite his name. Accused did not make up the payrolls, nor is there any evidence that the information in them came from him. They were all certified as correct by an assistant personnel officer. Accused's signature, for all that appears in the evidence, was not placed on the payrolls until he was paid. It cannot be assumed that he signed before he was paid, or that the signing was, or was intended to be, anything more than a receipt. It does not purport to be a certification of the correctness of any payroll entry (CM 251348, Gaston, 33 BR 211). No other statement or act that could be considered a pretense was shown to have been made by accused to Captain Shimmel, as alleged.
>
> "It is necessary, in a charge of obtaining money by false pretenses, that it be proved that the pretense was made to the person alleged, and that he believed it to be true and paid the money on the strength of it. Nothing in this case shows, even assuming the signing of the payroll to constitute a false statement, that it was, as alleged, by means thereof that the money was paid. It would appear that Captain Shimmel, or persons in his office at least, relied on the certification of the payroll by the assistant personnel officer, which is the primary purpose

of requiring such certification.

"There is no evidence that accused made pretenses to Captain Shimmel which accused knew were false and which Captain Shimmel believed to be true, and by means of them was induced to pay money to the accused. In CM 151223, Thompson, it was held that though accused made a false pretense, as the evidence showed the property allegedly obtained thereby was probably in fact obtained on the strength of another and different statement, which was not proved false, the record was legally insufficient to support the findings of guilty."

While accused in this case is not charged with obtaining money under false pretenses, he is charged with fraudulently presenting for payment to the finance officer "a claim against the United States". While it may be contended that the above quotation is dictum, nevertheless the instant case clearly falls within the principle therein enunciated. The fraudulent claims which accused in this case is charged "with presenting" are the payrolls on which he was paid for the months from August to December 1946, inclusive (Pros. Exs. 8 to 11, incl.). These exhibits show on their face that accused merely receipted for the money and that the correctness of the vouchers was certified to by a commissioned officer. There is no evidence in the record that accused made any representations to the certifying officer relative to the grade in which he was entitled to be paid and it cannot be assumed that in the presentation of the fraudulent claims (if they be such) to the finance officer, that any act or statement of accused was the basis or source of the false information contained in the pay vouchers (CM 251348, Gaston, 33 BR 211).

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

W H Johnson Jr, Judge Advocate

Wilmer T. Hughes, Judge Advocate

C M Kane, Judge Advocate

JAGQ - CM 325773 1st Ind FEB 26 1946

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

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

1. In the case of Private First Class Dwaine L. Cruise (RA 39325937), Squadron A, 401st Army Air Forces Base Unit, Hamilton Field, California, 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. Upon taking such action you will have authority to order a rehearing.

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 325773)

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH - CM 325799

19 DEC 1947

UNITED STATES	)	THE ARMORED CENTER
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 28-31 July and 4-5 August 1947. Dismissal, total forfeitures, and confinement for three (3) years
Captain JAMES F. O'CONNER (0-1106372), Corps of Engineers	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

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

Specification: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky,) did, at Fort Knox, Kentucky, in the month of January 1947, feloniously embezzle by fraudulently converting to his own use one (1) Motorola Combination Radio and Phonograph of the value of $154.00, the property of the 522nd Armored Engineer Company, entrusted to him by the 522nd Armored Engineer Company as custodian thereof by virtue of his office as commanding officer of said company.

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

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

Specification 2: (Finding of guilty disapproved by the reviewing authority).

Specification 3: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at Fort Knox, Kentucky, on or about 1 April 1947, feloniously embezzle by fraudulently converting to his own use thirty five (35) sacks of Kosmos Portland Cement of the value of $22.05 and fifty (50) cement blocks of the value of $5.00, total value $27.05, the property of the United States, furnished and intended for the military service thereof, entrusted to him, the said Captain James F. O'Conner, by reason of his office as commanding officer of the 522nd Armored Engineer Company.

Specification 4: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at Fort Knox, Kentucky, at divers time during the period 1 April 1947 to 29 May 1947, feloniously embezzle by fraudulently converting to his own use 18,603 board feet of salvage lumber of the value of $774.12, twenty five (25) sacks of Kosmos Portland Cement of the value of $15.75, 18½ squares of 100 square feet each salvage asphalt strip shingles roofing material of the value of $37.00, two hundred fifty (250) cement blocks of the value of $25.00, three (3) rolls building paper saturated felt roofing material No 479 of the value of $12.00, five hundred fifty (550) fire brick of the value of $16.50, salvage water pipe and miscellaneous fittings of the value of $25.80, ten (10) salvage doors, sixteen (16) salvage window frames and windows of the value of $208.00, and twelve hundred (1200) feet of 3/4 inch hemp rope, of the value of $48.00, total value $1,132.17, the property of the United States, furnished and intended for the military service thereof, entrusted to him the said Captain James F. O'Conner, by reason of his office as commanding officer of the 522nd Armored Engineer Company.

Specification 5: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at Fort Knox, Kentucky, at divers time during the period of 1 April 1947 to 29 May 1947, feloniously embezzle by fraudulently converting to his

own use two (2) hams of the value of $15.82, ten (10) pounds of beefsteak of the value of $3.75, one hundred (100) pounds of flour of the value of $6.00, twenty four (24) biscuits of the value of $.10 and two (2) whole chickens of the value of $3.48, of the total value of $29.15, the property of the United States, furnished and intended for the military service thereof, entrusted to him, the said Captain James F. O'Conner, by reason of his office as commanding officer of the 522nd Armored Engineer Company.

Specification 6: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at Fort Knox, Kentucky, on or about 15 April 1947 knowingly, willfully and wrongfully apply to his own use and benefit six (6) 2½ ton 6 x 6 GMC cargo trucks of the value in excess of $50.00, property of the United States furnished and intended for the military service thereof.

Specification 7: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at Fort Knox, Kentucky, on or about 28 May 1947 knowingly, willfully and wrongfully apply to his own use and benefit one (1) 2½ ton GMC cargo truck No. 5 of the value in excess of $50.00 property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky) did, at Fort Knox, Kentucky, from on or about 1 February 1947 to on or about 31 March 1947, wrongfully and unlawfully and during duty hours, use the services of Private First Class Eugene B. Renfro for his, the said Captain James F. O'Conner, own personal benefit and again, by requiring the said Private First Class Eugene B. Renfro to work for him, Captain O'Conner, as a carpenter.

Specification 2: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at or near Elizabethtown, Kentucky, from on or about 25 April 1947 to on or 30 April 1947, wrongfully and unlawfully and during duty hours, use the services of Private John Willman for his, the said Captain James F. O'Conner, own personal benefit and gain, by requiring the said Private John Willman to work for him, Captain O'Conner, as a carpenter.

Specification 3: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at or near Elizabethtown, Kentucky, from on or about 1 April 1947 to on or about 28 May 1947, wrongfully and unlawfully and during duty hours, use the services of Sergeant Woodrow Howard, Sergeant Collie Baker and Sergeant Arie Hart Jr for his, the said Captain James F. O'Conner's, own personal benefit and gain, by requiring the said Sergeant Woodrow Howard, Sergeant Collie Baker and Sergeant Arie Hart Jr to work for him, Captain O'Conner, as carpenter.

Specification 4: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at or near Elizabethtown, Kentucky, from on or about 18 May 1947 to on or about 28 May 1947, wrongfully and unlawfully and during duty hours, use the services of Sergeant R. Moore for his, the said Captain James F. O'Conner's, own personal benefit and gain, by requiring the said Sergeant R. B. Moore to work for him, Captain O'Conner, as a carpenter.

Specification 5: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Headquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), did, at Vine Grove, Kentucky, on or about 28 May 1947, wrongfully and by deceit, secure from Mr. Richard L. Brizendine a false and falsely receipted bill in words and figures, to wit:

STATEMENT
Route 2
VINE GROVE, KY., March 10, 1947

CAPTAIN JAMES OCONNER

ELIZABETH TOWN, KY.

In Account with

B R I Z E N D I N E ' S G A R A G E
Gas and Oils

Phone 173-R-3

1000	Ft	2x4x8	70.00
1000	ft	2x4x10	70.00
1000	ft	2x4x12	70.00
2000	ft	Flooring	150.00
5000	ft	Sheating T. G.	350.00
1500	ft	Drop Siding	105.00
5000	ft	2x6x8-10-12	350.00
10		Used Doors	80.00
16		Used Window Frames	128.00
3		Leads Scrap Lumber	15.00
			1388.00

PAID IN FULL
APRIL 10,1947
/s/ R L BRIZENDINE

Specification 6: In that Captain James F. O'Conner, Attached Unassigned, Headquarters and Heaquarters Detachment, School Troops, The Armored School, (formerly of the 522nd Armored Engineer Company, School Troops, The Armored School, Fort Knox, Kentucky), having taken an oath in an investigation before Robert W. Alexander, Major, CMP,

Summary Court-Martial Officer, that he did depose truly, did, at Fort Knox, Kentucky, on or about 28 May 1947, willfully, corruptly, and contrary to such oath, depose in substance that " - - I wish to state that a considerable quantity of building material and supplies which I had purchased from Mr. Brezendine, at Vine Grove, had been stored in my company warehouse - -" which affidavit was a material matter and which he did not then believe to be true.

He pleaded not guilty to Specification 5, Charge II, except the words and figures "twenty-four (24) bisciuts of the value of $.10" of the excepted words, guilty, and not guilty to all other Specifications and the Charges. He was found guilty of Charge I and its Specification; Charge II and Specifications 3, 6, and 7 thereunder; Specifications 1 and 2, Charge II, by exceptions and substitutions, Specification 4, Charge II, except the words and figures "18,603" and "$774.12", "twenty-five (25) sacks of Kosmos Portland Cement of the value of $15.75, three (3) rolls building paper saturated felt roofing material No 479 of the value of $12.00, ten (10) salvage doors, sixteen (16) salvage window frames and windows of the value of $208.00, twelve hundred (1200) feet of 3/4 inch hemp rope, of the value of $48.00, and total value $1,132.17", substituting for the first two excepted figures the figures "18,161" and "$749.07", respectively, and for the words "ten (10) salvage doors, sixteen (16) salvage window frames and windows of the value of $208.00", the words and figures "ten (10) salvage doors, seven (7) double sash windows with frames at the value of $137.00" and for the words "total value $1,132.17" the words and figures "total value $990.37", of the excepted words not guilty, of the substituted words guilty; Specification 5, Charge II, except the words and figures "two (2) hams of the value of $15.82 and ten (10) pounds of beefsteak of the value of $3.75" and the words and figures "total value of $29.15", substituting therefor respectively the words and figures "one (1) ham of the value of $7.91, four (4) pounds of beefsteak of the value of $1.50, of the total value of $18.99", of the excepted words not guilty, of the substituted words guilty; Charge III and Specifications 1, 3, 4, 5, and 6 thereunder; Specification 2, Charge III, except the words "from on or about 25 April 1947 to on or about 30 April 1947", and substituting therefor the words "at divers times during the months of March and April 1947", of the excepted words not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge II, approved the sentence but remitted seven years of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

The evidence pertinent to the approved findings of guilty is substantially as follows:

Accused is in the military service and during the first five months of 1947 was commanding officer of the 522nd Armored Engineer Company and of the 995th Treadway Bridge Company, Fort Knox, Kentucky (R 8, 229). During the period from November 1946 until the end of June 1947 Sergeant Loyd E. Smith was in charge of the 522nd Armored Engineer Company warehouse. Between November 1946 and March 1947 a considerable amount of salvage lumber of differing measurements, pipe and fittings, approximately 250 fire bricks, and a quantity of 94-pound bags of Kosmos Portland Cement were stored in the warehouse (R 10-11). At unspecified times quantities of asphalt shingles, doors, door frames, window frames and cement blocks were stored in the warehouse (R 15, 84, 123, 138, 139, 237). Sergeant Smith did not know of any property other than government property being stored in the warehouse (R 17, 18). During March 1947 a number of buildings at Fort Knox had been released "for salvage by troops" and at a time not specified Building T-1745 was released for the same purpose (R 45, 286). From February through May 1947 various members of the two organizations of which accused was commanding officer were engaged in tearing down buildings at Fort Knox (R 44, Pros Ex 1; R 46, 57, 70, 71, 81, 137). The materials of which the building were constructed were trucked to the 522nd Engineer Company Warehouse and there stored. Among the materials stored were lumber, asphalt shingles, pipe and fittings, doors and windows (R 44, Pros Ex 1; 47, 58, 59, 72, 82, 137). During March or April 1947 accused hired David Cleaver, a civilian, to do some hauling for him (R 116). On a number of occasions, at accused's direction Cleaver went to places at Fort Knox where buildings were being dismantled and at accused's direction Cleaver's truck would be loaded with materials from the buildings (R 44, Pros Ex 1; R 142); and on other occasions Cleaver had his truck loaded with materials at the 522nd Engineer Company Warehouse (R 23, 44, Pros Ex 1; R 83). In each instance the materials were taken to a building site in Elizabethtown, Kentucky, which accused claimed he owned (R 127). The materials transported by Cleaver were sized lumber, pipe and fittings, approximately 260 concrete blocks, 35 assorted sized bundles of asbestos shingles, window frames, door frames, two doors, and brick siding (R 24, 122-124). When Cleaver picked up loads at the warehouse his truck would be driven into the warehouse and the door closed (R 23, 24, 122). During the latter part of March or the first part of April 1947 Sergeants Smith and Howard, acting under accused's instructions, loaded 35 bags of cement and 50 cement blocks from the 522nd Armored Engineer Warehouse onto a "G.I." truck and took the load to accused's building site at Elizabethtown (R 15, 16, 95, 101, 102). On 15 April at accused's direction six 2½-ton Army trucks, were loaded with salvage materials at the company warehouse, driven to his building site in Elizabethtown, and unloaded. Accused had previously indicated to Sergeant Smith the materials he wanted. Among the materials loaded were sized lumber, seven windows, seven doors, 40 to 60 cement blocks, and window frames (R 17, 18, 73, 74, 84-86, 155-158, 163-165, 174, 175). On 28 May accused had another 2½-ton truck load of lumber transported from his company warehouse to his building site (R 25, 26, 236, 237). At his direction the bumper markings had been obliterated from the truck (R 229, 232). In the meantime Charles H. Gregor, CID Agent, had

been informed of accused's plan to carry away material and placed himself in a vantage point to observe the operation. He saw the truck being loaded in the presence of accused and then followed the truck to the destination, accused's building site in Elizabethtown. There he saw a house "seven-eighths" completed. There was also a considerable amount of building materials at the site (R 241). Gregor later saw accused sign the trip ticket for the driver of the truck (R 242). Subsequently Gregor seized all the materials at the site and placed them in the Provost Marshal Compound where they were segregated (R 242). Also placed there were other building material and a Motorola Combination Radio Phonograph taken by Gregor from accused's quarters at Fort Knox (R 243).

After hearing the foregoing evidence the court adjourned from the regular courtroom, reconvened at the compound and was shown the seized materials (R 254). The combination radio-phonograph was demonstrated to be in working condition (R 261). Later the court also convened at accused's building site in Elizabethtown and there observed the building (R 261).

Prior to the introduction of evidence concerning value as to the items alleged in Specifications 3 and 4 of Charge I the following colloquy took place:

> "PROSECUTION: At this time the prosecution would like to advise the court it contemplates calling as its next two witnesses the two engineers who testified before this court yesterday. It is requested that the Law Member advise the court the circumstances as follows: That in a case of this nature that the burden of proof is on the prosecution to show by the preponderance of the evidence before the court that any or all of the property concerned was and is government property. It is also requested the court be advised that the witnesses included in their evaluation all of the property found a part of the building at the building site, - this building site which the court visited yesterday. It is requested that the court be advised in assessing and evaluating the estimate to be given by the witnesses before this court that they consider the evidence of the prosecution's witnesses with respect to the property; that is, lumber and building material involved in the building or present in the Provost Marshal Compound and also consider the evidence of their own observation of the type of building materials that they found in the Provost Marshal Compound and in the building site and that in their deliberations upon the findings they consider and give weight to only so much of the estimates and evaluations of these witnesses as in their opinion and decision they find to have been proved by the prosecution beyond a reasonable doubt or by the preponderance of the evidence to be and have been government property.

"LAW MEMBER: The court will be so advised." (R 265-266).

Mr. Wesley H. Cowley, a civil engineer, Assistant Senior Engineer at Fort Knox testified as to the value of the materials viewed by the court at the Provost Marshal Compound in pertinent part as follows:

"A. * * * the third item is thirty-five bags of Portland cement, price $22.05; eleven squares, one hundred square feet per square, salvage asphalt strip shingle roofing at $2.00 per square, $22.00; * * * 9,600 feet board measure salvage lumber at $40.00 per thousand, $384.00; two hundred and fifty each salvage cement blocks .10¢ each, $25.00; one lot of pipe and fittings (salvage), $25.80; ten each salvage doors - two at $8.00 each and eight and $2.00 each, making a total of $32.00."

* * * *

"A. (Continued) one hundred and eighty each firebrick at $.03 ea, $5.40; Two thousand board measure one inch dimension lumber (new) at $80.00 a thousand, $160.00, making a total of $725.44." (R 268).

Mr. Alton R. Wyman, architectural engineer at Fort Knox, testified as to the value of the materials incorporated in accused's building at Elizabethtown in pertinent part as follows:

"A. I found four hundred and twenty five concrete blocks of a size 8"x8"x16" which I valued at .15¢ a piece for a cost of $63.75; I estimated there were four hundred and ninety each of common brick which I estimated at three cents each for a cost of $14.70; * * * I summarized the lumber incorporated in the building as 8 and 9/10's thousand board feet which I estimated to be worth $40.00 a thousand for a cost of $356.00. I counted seven sash, double hung, six light each, which I estimated at $15.00 each for a cost of $105.00. I counted three single sash, six light each with the frame, which I estimated at $9.00 each for a cost of $27.00. I counted two doors with frame which I estimated at $20.00 a piece for a total of $40.00. I estimated there were seven and a half squares of asphalt shinges which I estimated at $4.00 a square for a total of $30.00. * * *" (R 271-272).

Under date of 4 August 1946 the following entries were made in the Council Book of the 522nd Armored Engineer Company:

"I certify that the following items of Unit Fund property are physically present in this organization.

"First of August 1946--One Radio Motorola $154.00."

The page on which the entries were made was signed by accused (R 133).

During January 1947 accused took a Motorola Radio-Phonograph from the 522nd day room. Corporal Charles L. Justice was in the day room at the time and at accused's request helped accused place the radio in his car. At the time accused stated that the radio was not working right (R 274). The instrument was not thereafter seen in the company area and on 28 May 1947 was recovered in accused's quarters by CID Agent Gregor.

Around the latter part of February Private First Class Eugene B. Renfro, 995th Treadway Bridge Company, was directed by accused to cut 146 studs "6'6"" long from "2x4" lumber that was stored at the 522nd Warehouse (R 146, 147). This task was completed in four or five days and upon its completion Renfro was ordered by accused to cut 110 2x6x13 floor joists. Renfro finished the joists in two or three weeks (R 149). Subsequently Renfro, on accused's direction, cut 55 rafters and approximately 30 more studs (R 151, 152). Renfro completed all his work for accused around the last of March or the first of April (R 21, 152). He did this work for accused during regular duty hours and was not on pass (R 147). About the time this work was completed accused came to the warehouse and instructed Sergeant Smith that a 2½-ton "G.I." truck would be down to take the studdings, rafters, and joists to his place at Elizabethtown. Subsequently these materials were taken away from the warehouse in two truck loads (R 21, 22).

Beginning about the 15th or 20th of March Private D. J. Willman was required to work for accused at the latter's building site in Elizabethtown. Willman was informed that accused wanted a man to work on his house, and was taken there by accused. He worked for a period of five days and again for a period of six days. The last day Willman worked for accused he was on pass, but during the other days he worked for him he was not on pass. He did not receive any pay or promise of pay (R 51-53), but accused did purchase his noon day meals (R 55). Prior to working at Elizabethtown, Willman had taken two loads of materials there and had unloaded them under accused's supervision. The materials had originally been taken from dismantled buildings at Fort Knox (R 49-50).

From approximately 1 April to 28 May Sergeants Howard, Baker, and Hart, all members of accused's organization were required by accused to work on the house he was erecting in Elizabethtown. Howard was asked by accused to accompany the latter to the building site in the first instance (R 104). Baker testified that accused asked him to work on the house (R 182, Pros Ex 5). Hart was called out for a detail sometime during May and was taken to the building site at Elizabethtown by accused in the latter's car (R 180). Baker estimated that during this period he worked on the house about fifteen or twenty days, and stated that some of the work was performed on his own time, and some during duty hours. Other than a loan of $5.00, which had not been repaid, Baker received no compensation from accused (R 182, Pros Ex 4).

Howard stated that he worked on accused's house twenty to twenty-five days between 1 April and 28 May (R 105). He did no work on Sundays and but once on a Saturday (R 106). He did not receive any compensation from accused but did owe accused $4.00 (R 112).

Hart worked on the house a total of about twelve days in the period alleged and on none of these days was he on pass (R 181). He did not receive any compensation (R 182).

During May Sergeant R. V. Moore was told by Sergeant Baker that he was wanted for the detail working on accused's home. Moore was subsequently taken to Elizabethtown by accused and worked on the house about ten or twelve days (R 167, 171). He worked there on two Saturdays but not on Sunday(R 169). Moore did not receive any compensation for his work (R 173).

The men working on accused's house were transported to and from the house by accused, and their lunches were procured by accused.

During March, April, and May, accused on different occasions took food from the combined mess of the 995th Treadway Bridge Company and the 522nd Armored Engineer Company. One evening while the cook was making biscuits, accused came in the mess hall and after stating that they were "good biscuits," put a "couple dozen" of them in a bag and took it out the door with him. (R 61). On about 1 April while "K.P.'s" were bringing rations to the ice box accused removed two chickens from a crate, put them in a sack and left the mess hall (R 62, 63, 203, 204). On or about 20 April accused took a 14 or 15-pound ham from the company's ice box, and after wrapping it, put it in his car (R 203). On another occasion in March or April accused went to the company ice box with one of the cooks. The cook put some meat in a paper sack and gave it to accused (R 215, 216), and the latter went out carrying the sack (R 210). On 19 May right after rations had been delivered to the mess accused had a conversation with Corporal Gilbert who was working in the mess hall (R 223). Subsequently Gilbert had Private First Class William L. Swinea carry a hundred-pound bag of flour,which Gilbert declared to be excess,into the toolroom. Some time later accused and Gilbert took a sack from the toolroom and put it in accused's car. It was similar to the sack which Swinea had placed in the toolroom. Swinea testified that there were no other sacks in the toolroom similar to the one containing the flour (R 224, 225).

The court took judicial notice of the price lists of the ration warehouse, Fort Knox, Kentucky, for the months of April and May 1947. The lowest price for beef during the two-month period of April and May was $0.37 per pound, for ham $0.54 per pound, and for flour $0.06 per pound.

About 5:30 or 6:00 o'clock on the evening of 28 May 1947 accused went to the home of Richard L. Brizendine, Vine Grove, Kentucky, and told Brizendine that he had bought some lumber and lost the bill, and wanted

the bill replaced (R 279). Brizendine had formerly been in business with his brother-in-law, a man by the name of Sanson. They had been engaged in wrecking buildings at Fort Knox, but had quarreled and ended the partnership (R 280, 282). The partnership had terminated a week or ten days prior to accused's visit (R 284). Accused had been drinking and Brizendine asked him if he could not wait until the next day for the duplicate bill (R 280, 282). Finally Brizendine made out a bill the entries on which were dictated to him by accused (R 280). The bill was dated "March 10, 1947" and was for lumber and other building materials in the sum of $1388.00, and showed that it had been paid in full "April - 10 - 1947" over Brizendine's signature (R 247, Pros Ex 10). Brizendine admitted that he knew accused had not bought that much because he "would have heard about it" (R 282).

It was stipulated that if Mr. Alvis A. Sanson were present in court he would testify that:

> "* * * sometime subsequent to the first of January 1947 on various occasions he has sold to Captain James. F. O'Conner, the accused in this case, certain undetermined quantities of building materials and lumber of a total value of approximately $15.00. (R 289).

On the evening of 28 May 1947 accused was interrogated by Major Robert W. Alexander, the Provost Marshal at Fort Knox. He had heard the 24th Article of War read to two men who were being questioned and, just prior to his interrogation, accused stated to Major Alexander that he understood his rights. During his interrogation accused produced the bill he had received from Brizendine and stated that he had paid for all the material and could not see the purpose of the investigation. Accused subsequently made a written statement under oath which was admitted in evidence without objection (R 245, Pros Ex 9, R 292). In pertinent part he stated:

> "* * * I admit that in the course of the past few months I did appropriate to my own use a limited amount of Government property. Although I am in a position to specifically state the amount involved, I would estimate that this property did not exceed the sum of seventy-five dollars in value. The men who drove the Government vehicles and transported this Government property to my house in Elizabethtown, did so without knowledge of the fact that they were carrying Government equipment for my personal use. They merely acted pursuant to my orders. In addition to the above mentioned Government property, I wish to state that a considerable quantity of building material and supplies which I had purchased from Mr Brenzendine, at Vine Grove, had been stored in my Company Warehouse and when removed from there may have given the impression that I was taking Government property with which to build my house in Elizabethtown. The men from my Company who did carpentering on my house did so willingly and will be paid for their time as has been my

intention from the start. In so far as the Memphis Convoy is concerned, this Convoy only made a slight detour on its way to Memphis, but did not make a special trip just to haul supplies or equipment to my house in Elizabethtown. I wish to make it clear that I absolve all the men in my company from any connection with this entire affair. In so far as any statements about my having taken food from the Mess Hall is concerned, I wish to clarify this by stating, in the past year during which I have been in command of this company, I have never taken any food from the kitchen by power of my authority as Commanding Officer. The few items that I have taken from the Mess Hall were given to me by the Mess Sgt and in my opinion these items were in excess of those required by the troops." (Pros Ex 9).

4. Evidence for the defense:

After being apprised of his rights as a witness accused elected to testify under oath in his own behalf. He testified that he had taken the Motorola Combination Radio and Phonograph from the day room to have it repaired (R 311, 312). On cross-examination, however, he admitted that the last time the radio was repaired was four to five weeks prior to the 28th of May (R 333). With reference to the salvage materials in the warehouse accused claimed that two officers who "did not have custody but they had direct charge of the cement, salvage lumber, etc.," told him to "use this for whatever place you see fit" (R 313). He admitted taking 24 biscuits from the mess hall but stated he believed that otherwise they would have been wasted as it was after meal time (R 314). He denied taking beefsteak, flour or chickens from the mess, but stated that he was accustomed to storing his commissary purchases of perishables in the mess refrigerator until he would leave for his quarters at the end of the day (R 314). With respect to the misapplication of government trucks on 15 April 1947 he stated "those trucks went by and unloaded this lumber at said site in Elizabethtown. They were enroute to Memphis and were not delayed over an hour enroute" (R 314, 315). When reminded by defense counsel that only four of the trucks were dispatched for Memphis he testified that:

"As brought out in this trial before when you spoke of those other two trucks, when I discovered them there and asked why they were not going to Memphis, they said they had been directed to come back. I had no knowledge whether they were supposed to to or not until I got back." (R 315).

With reference to the misapplication of a truck referred to in Specification 7, Charge II, accused stated that he used the truck to make a trip to Elizabethtown (R 315).

As to the work performed by Private First Class Renfro none of that work was for accused's benefit and none of the materials upon which Renfro worked was used in accused's home in Elizabethtown (R 315, 323).

With reference to requiring Sergeants Baker, Howard, Hart, and Moore to perform work for him during duty hours accused testified:

"Q. Under Specification 3, Charge III, Captain O'Conner you are charged again for using for your own benefit the services of Sergeant Howard, Sergeant Baker, and Sergeant Hart, under the same conditions as carpenters to work for you at the Green Hill site. What have you to say about that?

"A. They did work for me.

"Q. Were they on pass too?

"A. To the best of my knowledge, I don't think this Sergeant Howard and Sergeant Moore were on pass all the times they worked for me. Sergeant Hart was on maybe a couple of afternoons or different afternoons. A few times he did not have a pass; it was VOCO. He was standing around in the area chewing his thumbs and I asked him to go with me. This Sergeant Baker - I don't remember; I actually don't remember about Baker. Baker was out there most of the time that we were there which was over a period of several days at different intervals. Some days it would be half a day; some days it would be two hours; and some days it would be all day. I believe that I told Sergeant Baker that he was relieved from duty in the company when he was working out there.

"Q. Then under Specification 4, Charge III, you are charged with using the services of Sergeant Moore for your own personal benefit and gain from on or about 18 May 1947 to on or about 28 May 1947. What have you to say in regard to that?

"A. That time I remember I implied to Sergeant Moore he was relieved from duties within the company at such time as he worked there on VOCO." (R 316).

As to receiving a falsely receipted bill from Brizendine accused claimed he was "pretty well oiled up" at the time, and in his testimony was vague concerning the incident (R 316). He admitted signing his pre-trial statement but stated that he did not make it (R 317). On recross-examination accused claimed that he had stored in his company warehouse some building materials purchased on the Post from Brizendine or Sanson. He did not recall, however, who had placed it in the warehouse for him (R 335, 336).

Accused also testified that he had thirty-one months of combat duty, nine months in Europe, and twenty-two months in the Asiatic Theater (R 317). He was awarded the Silver Star, the Bronze Star Medal, and the Purple Heart with one cluster. He is married and the father of three children (R 318).

It was stipulated that Mr. Gilprin, Vice President of the Deeks Lumber Company, would testify that:

> "* * * on or about the 24th day of May 1947 Captain James F. O'Conner of the Green Hills Section purchased from the Deeks Lumber Company, Incorporated, twenty (20) 1x4x10's number one poplar boards, value of $10.05 and four (4) rolls of number 479 felt, saturated, total value of $29.00, all of a total value of $39.05. It is further stipulated that the number 479 appeared on the rolls of roofing material or felt observed by the prosecution and the members of the court in the Provost Marshal Compound." (R 303).

First Sergeant Abe Trussel, 522nd Armored Engineer Company, testified that he was with the accused for about three and one-half hours on the evening of 28 May 1947 and that they consumed about a quart of liquor (R 301, 303). He further stated, however, that the conversation between them that evening was normal (R 305).

Technician Fifth Grade William A. Hollingworth, 522nd Armored Engineers, testified that during January and Febraury he worked on the Motorola Combination Record Player in the company day room. Because electrical current in the day room was fed by a "drop line" the repair he was trying to make could not be accomplished. Accused at that time told Hollingworth that his home was fed by a "main line" (R 297).

Private George A. Krueger testified that on three occasions he had worked on a Motorola Radio Record Player in accused's quarters. The last time he had repaired it was on 1 April (R 295, 296).

5. Accused was found guilty of embezzling a Motorola Combination Radio and Phonograph, property of the 522nd Armored Engineer Company of a value of $154.00 (Spec, Chg I). The evidence shows that in January 1947 accused, who was commanding officer of the 522nd Armored Engineer Company, took a Motorola Combination Radio and Phonograph from his company day room. The instrument had been previously entered in the company fund council book, over accused's signature, as property of the fund. The instrument was subsequently recovered in accused's quarters on 28 May 1947. Accused tried to account for his exclusive possession of the instrument by stating that he had taken it to his quarters to have it repaired. The evidence shows, however, that prior to its recovery almost two months had elapsed since it had been repaired. When the instrument was observed by the court it was in working condition. The circumstances justify the inference that accused intended to deprive the owner (the company in this case) of the property permanently. Accused by virtue of his position of company commander was custodian of the company fund and its property (Par 11c, AR 210-50, 13 December 1945). His removal of the property from the

company with the intention permanently to deprive the company of it constituted the offense of embezzlement. There was no evidence presented as to the value of the combination radio and record player and hence the finding of a specific value was not warranted. The court, however, saw the radio, and the fact that the instrument was in working order was demonstrated to the court. Under the circumstances it may be inferred that the instrument was of some value.

Accused was found guilty of embezzling property of the United States furnished and intended for the military service thereof as follows: 35 sacks of Kosmos Portland Cement of a value of $22.05, and 50 cement blocks value $5.00, total value $27.05 (Spec 3, Chg II); 18,161 board feet of salvage lumber of a value of $774.11; 18½ squares of 100 square feet each of salvage asphalt shingles of a value of $37.05; 250 cement blocks of a value of $25.00; 550 fire brick of a value of $16.50, salvage water pipe and miscellaneous fittings of a value of $25.80; and 10 salvage doors and 7 double sash windows with frames of a value of $137.00, of a total value of $990.37 (Spec 4, Chg II).

The evidence in support of these two specifications shows that considerable salvage lumber and other building materials either new or salvage were stored in the warehouse maintained by accused's company. Some of the salvage material was received from buildings released to the 522nd Engineers for dismantling. As to Specification 3, Charge II, the evidence clearly shows that on the date alleged, at accused's direction, 35 sacks of Kosmos cement and 50 cement building blocks were removed from the warehouse and brought to his building site in Elizabethtown, Kentucky.

As to Specification 4, Charge II, the evidence shows that at the times alleged substantial quantities of material of the type described by the findings of the court were removed from the warehouse on accused's order and were also brought to the building site in Elizabethtown. Some materials were taken to accused's building site from the scene of salvage operations. As to all the material taken by or at accused's direction, he had such care and control thereof as to warrant the court in finding him guilty of embezzlement. There is insufficient evidence, however, to justify the amounts of the materials found by the court under Specification 4, and the values found by the court under Specifications 3 and 4. Recapitulating the evidence pertinent to these two specifications we find evidence supporting the amounts of materials found to be taken under Specification 3 and evidence supporting the taking of substantial amounts of the materials found under Specification 4.

Materials taken from accused's quarters at Fort Knox and his building site at Elizabethtown were brought to the Provost Marshal Compound at Fort Knox and there viewed by an expert who appraised the value of this material. The court, too, viewed the material at the compound. Another expert inspected the building being erected by accused and appraised the materials contained therein as to amount and value. The court also viewed the building. The two experts testified as to their appraisals. Prior to their

testimony, however, the trial judge advocate declared, and the law member acquiesced in the declaration, that as to the value of the materials in the Provost Marshal Compound and in the building at Elizabethtown, the court was to give weight "to only so much of the estimates and evaluations of these witnesses as in their opinion and decision they find to have been proved by the prosecution beyond a reasonable doubt or by the preponderance of the evidence to be and have been government property." The specific amounts of materials found by the court under Specification 4 are shown only in the appraisals by the two experts, and while the court by viewing the materials and the building may have been in a position to find that the materials in those specific amounts were government property, the materials and the building were not introduced in evidence. Consequently, there is insufficient evidence to support the findings as to amounts. This is especially true in view of the innuendo contained in the instruction of the trial judge advocate that not all the materials appraised by the experts and viewed by the court were government property.

The instruction of the trial judge advocate was open to further attack in that he stated that the government could prove the property involved to be government property by a preponderance of the evidence. That the property involved was government property is an element of the offense charged. "In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof. * * * The rule as to reasonable doubt extends to every element of the offense" (MCM 1928, par 78). The instruction of the trial judge advocate, adopted by the law member, that the court could find that the property involved was government property by a preponderance of the evidence was clearly erroneous.

The lack of evidence as to which materials viewed by the court were government property vitiated the findings of specific values in Specifications 3 and 4 and specific amounts in Specification 4. The evidence introduced at the trial, however, justifies an inference that the materials taken were of substantial value.

Accused was found guilty of embezzling government rations from his company (Spec 5, Chg II). It may be reasonably inferred from the evidence that at the times alleged accused took one ham, two chickens, some meat, two dozen biscuits, and 100 pounds of flour from his company kitchen. Accused as company commander had rightful custody and certain control of the rations and his acts of taking the specific items found by the court constituted embezzlement of these items. Except as to the flour the evidence as to weights is not shown by competent evidence. Price lists of the commissary at Fort Knox show that the lowest price of flour during the times alleged was $0.06 a pound. The taking of twenty-four biscuits of a value of $.10 was established by accused's plea of guilty to so much of the specification as pertained to the biscuits. As to the other items a finding of some value only is justified, and as to all the items, some value in excess of $6.10.

In Specifications 6 and 7, Charge II, accused was found guilty of the misapplication of government vehicles. With respect to these specifications accused's testimony is sufficient in and of itself to convict him. The evidence and accused's own testimony show that at the times alleged accused used government 2½-ton trucks for the purpose of haulding materials from Fort Knox to his building site in Elizabethtown. Such use constitutes misapplication. The replacement cost of any vehicle of the type used by accused is in excess of $50.00.

Accused was found guilty of wrongfully and unlawfully using the services of enlisted men for his own benefit during duty hours (Specs 1, 2, 3, 4, Chg III). In the case of one of the enlisted men, Renfro, accused had him prepare studs, joists, and lumber from the salvage lumber in the warehouse. Accused stated that the products of Renfro's labor were to be used in his house at Elizabethtown. Sometime after his remark the studs, joists, and timber were removed from the warehouse, and the evidence introduced indicates that they were taken to accused's building site at Elizabethtown. Renfro's work was performed during duty hours and during the period alleged.

As to the other enlisted men the evidence shows that accused required them to work on his building in Elizabethtown during the periods found by the court. Except on a few occasions the work was performed during duty hours and when the men, by their testimony, were not on pass. Accused, in his testimony, stated that the men, if not on pass, had received a "VOCO" from him. Pre-supposing that accused's testimony in this respect was other than an afterthought, it would create a novel situation if an officer could avail himself of soldier labor during normal duty hours by virtue of his own "VOCO." A pass or "VOCO" ennures to the benefit of the person to whom it is given and not to the officer granting it. Otherwise, as in this case, the purported pass or "VOCO" is not in fact a pass or a "VOCO."

Offenses of this type, where an officer requires enlisted men to work for him for his benefit, are usually found to be violations of the 96th Article of War. The facts in the case, however, in the opinion of the Board justify a finding of guilty of a violation of the 95th Article of War. This officer's gross abuse of his position in requiring enlisted men to erect a house for him during duty hours, under the circumstances of this case, constitutes conduct unbecoming an officer and a gentleman.

Accused was found guilty of wrongfully and by deceit securing from Richard Brizendine a false and falsely receipted bill which in effect showed that accused had purchased, and paid for $1388.00 worth of building material (Spec 5, Chg III). The evidence shows that on the evening of 28 May 1947 accused, who was under the influence of liquor at the time, stated to Brizendine that he had lost a bill furnished him on the purchase of materials from Brizendine, and wished to procure a duplicate. Brizendine had until recently been in partnership with his brother-in-law, one Sanson and the partnership had been engaged in salvage operations at Fort Knox. Brizendine

at first hesitated but finally executed a bill as dictated by accused and acknowledged receipt of the amount claimed by it. The bill was rendered as in account with "Brizendine's Garage." Brizendine testified that he would have known if the amount of materials listed on the bill had been sold to accused by the partnership. If the materials had been sold by Brizendine he necessarily would have had such knowledge. Under the circumstances of the case it is inconceivable that accused's false representations induced Brizendine to execute and receipt the bill in question.

Finally accused was found guilty of perjury (Spec 6, Chg III). The evidence shows that on 28 May 1947, sometime after his visit with Brizendine, accused was taken to the Provost Marshal's office and questioned concerning the materials recovered from accused's quarters and building site in Elizabethtown, earlier in the day. During the questioning accused showed the Provost Marshal the receipted bill he had received from Brizendine earlier that evening, in order to account for the materials. Subsequently accused made a written statement which he subscribed under oath. The oath was administered to him by the Provost Marshal who testified that at the time he was a summary court officer. In his statement accused, among other things, stated that "a considerable quantity of building material and supplies which I had purchased from Mr. Brizendine, at Vine Grove, had been stored in my company warehouse." It was alleged that this extract from his written statement was false. The record shows that in fact accused did not buy any materials from Brizendine but did buy in excess of $15.00 worth of materials "in certain undertermined quantities," from one Sanson, Brizendine's partner. As to accused's statement that he stored the material in the warehouse, one witness, Sergeant Smith, the noncommissioned officer in charge of the warehouse, testified that he had no knowledge of any property other than government property being stored in the warehouse. Accused in his testimony stated that he had made a purchase of materials from Sanson at Fort Knox and had the materials stored in the company warehouse.

Prior to being sworn accused showed the Provost Marshal a receipted bill for lumber and other materials in the amount of almost $1400.00, to account for his possession of building materials. This was not nor could it be alleged as part of his sworn statement.

There remains for consideration the question of purchase and storage as averred by accused. The accused's statement that he had purchased from Brizendine is not considered as false in view of the fact that he had purchased from Brizendine's partner. The question of quantity is relative and a claim of "a considerable quantity" may not be considered false as against evidence of "certain undertermined quantities." The evidence that accused did not store materials which he had purchased in the warehouse is purely negative in character and is limited to one witness, and on the merits, without regard to technical defects, the allegation of perjury is not supported by the evidence (Par 149h, MCM 1928).

6. Records of the Army show that accused is 41 years of age, married, and the father of three children. He was graduated from Notre Dame University in 1931 with a BS degree in Mechanical Engineering. In civilian life

he was employed as a construction supervisor. He had enlisted service from 4 March to 11 November 1942. On the latter date he was commissioned a second lieutenant and subsequently promoted successively to first lieutenant and captain. His efficiency index as of 30 June 1946 was 40.0, the adjectival equivalent of which is "excellent." For the period 1 July 1946 to 31 December 1946 he was rated as excellent, and for the period 1 January 1947 to 30 June 1947, unsatisfactory. He has been awarded the Silver Star, the Bronze Star Medal, and the Purple Heart.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Other than as hereinbefore indicated no errors adversely affecting the substantial rights of accused were committing during trial. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 5 and 6, Charge III; legally sufficient to support only so much of the finding of guilty of the Specification of Charge I, as involves a finding that the accused embezzled the radio, alleged of some value, only so much of the finding of guilty of Specification 3, Charge II, as involves a finding that accused embezzled the materials alleged of some substantial value, only so much of Specification 4, Charge II, as involves a finding that accused embezzled substantial amounts of the materials alleged of some value, and only so much of Specification 5, Charge II, as involves a finding that accused embezzled the foods alleged of some value in excess of $6.10, legally sufficient to support the findings of guilty of the other specifications and the charges, and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, and dismissal, total forfeitures, and confinement at hard labor for three years, are authorized upon conviction of violations of the 93rd and 94th Articles of War.

A. Hottenstein, Judge Advocate

John G. O'Brien, Judge Advocate

[illegible], Judge Advocate

JAGH - CM 325799 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 7 1948

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 Captain James F. O'Conner (O-1106372), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of embezzlement of company fund property, of the value of $154.00 (Chg I, Spec); wrongful disposition of Government property (Chg II, Specs 1, 2); embezzlement of Government property (Chg II, Specs 3, 4, 5); and misapplication of Government property (Chg II, Specs 6, 7); wrongful use of soldier labor during duty hours to his own benefit (Chg III, Specs 1, 2, 3, 4); securing by deceit of a false and falsely receipted bill (Chg III, Spec 5); and perjury (Chg III, Spec 6). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge II (wrongful disposition of Government property), approved the sentence but reduced the period of confinement to three years, and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 5 and 6, Charge III (securing by deceit a receipt and perjury); legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, and Specification 3, Charge II, relating to value, as involves a finding, in each case, of some value; only so much of the finding of guilty of Specification 4, Charge II, as involves a finding that accused did, at the time and place alleged, embezzle, by fraudulently converting to his own use, substantial amounts of property entrusted to him as alleged, of the description and ownership found, of some value; and only so much of the finding of guilty of Specification 5, Charge II, as involves, a finding of guilty of embezzlement, at the time and place alleged, of 100 pounds of flour of a value of $6.00, 24 biscuits of a value of $.10 and substantial amounts of other property of the type alleged of a total value in excess of $6.10; and legally sufficient to support all other approved findings of guilty and the sentence. I concur in that opinion.

Accused was commanding officer of the 522nd Armored Engineer Company, and the 995th Treadway Bridge Company, Fort Knox, Kentucky, during the first five months of 1947. In January he removed a Motorola Combination Radio-Phonograph belonging to the 522nd Armored Engineer Company Fund from the company dayroom stating that it was not "working right." The

instrument was subsequently removed from accused's quarters at Fort Knox on 28 May 1947. At that time it was in working condition. The last time it had been repaired was on or about 1 April 1947. Accused's retention of the instrument was such that the court was justified in finding that he intended to deprive permanently the rightful owner of its possession.

During February and March 1947 troops under accused's command were demolishing buildings at Fort Knox and the materials salvaged from the buildings were stored in a warehouse assigned to the 522nd Engineers. There were also stored in the warehouse other building materials. At accused's direction several truckloads of materials were taken from the warehouse to a building site owned by accused in Elizabethtown, Kentucky. On 15 April 1947, 6 2½-ton government trucks were utilized for this purpose and on 28 May 1947 one 2½-ton government truck was similarly employed. Accused also employed a civilian truckman to transport materials from the warehouse to Elizabethtown, and in some instances the civilian truckman transported the materials to Elizabethtown direct from the scene of the dismantling operations. As to the property involved in Specification 3, Charge II, value was not established, and as to the property involved in Specification 4, Charge II, amounts and values of the property involved were not established. As to the property involved in Specification 4, Charge II, I am of the opinion, however, that the evidence warrants a finding of some value in excess of $50.00.

The evidence shows that the materials embezzled by accused were utilized in the erection of a house, and in this operation accused at various times during February, March, April, and May 1947, utilized soldier labor during duty hours. Compensation was not paid to the soldiers so utilized.

During April and May 1947 accused took various items of food from the company mess of the 522nd Armored Engineer Company, including 100 pounds of flour worth $6.00, and 24 biscuits of a value of $.10.

On 28 May 1947 accused received a receipted bill in the amount of $1288.00 for building materials from Richard L. Brizendine, Vine Grove, Kentucky. Accused stated that he had lost a previous bill and wished to replace it. Accused had in fact purchased approximately $15.00 worth of building materials of "certain undetermined quantities" from one Sanson, Brizendine's former partner. From Brizendine's testimony it may be inferred that he in fact knew that accused had not made a purchase from him or from his partner of building materials of the value recited in the bill he furnished accused. Under the circumstances the Board is of the opinion that the bill was not secured by deceit.

At an investigation held in the evening of 28 May 1947, accused stated under oath that he stored in the company warehouse a considerable quantity of building materials purchased from Brizendine. The evidence adduced at the trial was not sufficient to establish the falsity of this statement.

4. Accused is 41 years of age, married, and the father of three children. He was graduated from Notre Dame Unitersity in 1931 with a Bachelor of Science degree in Mechanical Engineering. In civilian life he was employed as a construction supervisor. He had enlisted service from 4 March to 11 November 1942. On the latter date he was commissioned a second lieutenant and was subsequently promoted successively to first lieutenant and captain. His efficiency index as of 30 June 1946 was 40.0, the adjectival equivalent of which is "excellent." For the period 1 July 1946 to 31 December 1946 he was rated as excellent, and for the period 1 January 1947 to 30 June 1947, unsatisfactory. He has been awarded the Silver Star, the Bronze Star Medal, and the Purple Heart.

5. I recommend that the findings of guilty of Specifications 5 and 6, Charge III, be disapproved; that only so much of the findings of guilty of the Specification, Charge I, and Specification 3, Charge II, relating to value, be approved as involves a finding, in each case, of some value; that only so much of the finding of guilty of Specification 4, Charge II, be approved as involves a finding that accused did, at the time and place alleged, embezzle, by fraudulently converting to his own use, substantial amounts of property entrusted to him as alleged, of the description and ownership found, of some value in excess of $50.00; that only so much of the finding of guilty of Specification 5, Charge II, be approved as involves a finding that accused did, at the time and place alleged, embezzle, by fraudulently converting to his own use, 24 biscuits of a value of $.10, 100 pounds of flour of a value of $6.00, and substantial amounts of other property, of the description found, all entrusted to him as alleged, of some value, all of the ownership alleged, of a total value in excess of $6.10 but not in excess of $20.00; and that the sentence as modified by the reviewing authority be confirmed and carried into execution and that an appropriate United States disciplinary barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 21 (DA) ,20 Jan 1948).

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

JAGK - CM 325810

19 NOV 1947

UNITED STATES	)	AMERICAN GRAVES REGISTRATION COMMAND
v.	)	Trial by G.C.M., convened at Paris, France, 3, 4, 6, 10 September 1947. To be hanged by the neck until dead.
General Prisoner MANUEL MARTINEZ	)	

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

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

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

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

Specification: In that General Prisoner Manuel Martinez, formerly of the 541st Quartermaster Company (S), United States Forces, European Command, did, at Paris, France, on or about 22 May 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Henri Geliot, a human being, by shooting him with a pistol.

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

Specification 1: In that General Prisoner Manuel Martinez, formerly of the 541st Quartermaster Company (S), United States Forces, European Command, did, at Paris, France, on or about 24 April 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Pierre Bourenkoff, the sum of 4000 francs, French currency, value about $33.62, the property of the said Pierre Bourenkoff.

NOTE: Specifications 2 to 11 of Charge II differ materially from Specification 1 only as to date, name of person robbed, the property stolen and the value of the property as follows:

SPEC	DATE	NAME OF PERSON ROBBED	DESCRIPTION OF PROPERTY TAKEN	VALUE
2	4-25-47	Remy Rouyer	2200 French francs Watch	$18.49 Less than $20

SPEC	DATE	NAME OF PERSON ROBBED	DESCRIPTION OF PROPERTY TAKEN	VALUE
3	4-30-47	Joseph Djiovianni	3500 French francs Watch	$29.42 Less than $20
4	(Finding of Not Guilty on Motion by Defense).			
5	5- 6-47	Pierre Dangeraux-Dorly	700 French francs Watch	$5.88 Less than $20
6	5- 6-47	Maurice Lambert	400 French francs Watch	$3.36 Less than $20
7	5- 6-47	Berthe Bazier	1000 French francs Sun Glasses	$8.40 Less than $20
8	5- 6-47	Olive Debiasi	750 French francs	$6.30
9	5- 7-47	Laurent Weynant	Watch	Less than $20
10	5- 7-47	Cornelie Weynant	1000 French francs	$8.40
11	5- 7-47	Germaine Vicente	250 French francs	$2.10
12	(Finding of Guilty disapproved by the Reviewing Authority).			

CHARGE III: (Finding of Not Guilty on Motion of Defense).

Specification: (Finding of Not Guilty on Motion of Defense).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 4, Charge II and not guilty of Charge III and its Specification, but guilty of all other Specifications and Charges. No evidence of any previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

About 9:00 p.m., on the 22nd of May 1947 the accused was observed to stop in front of and peer into the L'Escale Bleue, a bar located at 16 Rue Victor Masse, Paris, France (R. 78-84). Within a few minutes of midnight on the same date, Henri Geliot, the proprietor of the L'Escale Bleue, instructed the bar maid, Therese Lacheroix, to turn out the lights preparatory to closing the bar for the night. Mr. Geliot was standing in front of the door waiting for his orders to be carried into effect when the accused entered the bar, pushed Mr. Geliot to one side and closed the door. He then produced and flourished a pistol. Mr. Geliot said, "Are you mad?" and grabbed the accused's wrist. The accused pulled away from Mr. Geliot and struck him with the pistol. Mr. Geliot continued to

struggle with the accused. The accused fired the pistol and Therese was of the opinion that the shot struck Mr. Geliot in the right thigh. He then fired several other shots. The accused was using an automatic pistol. The firing ceased and the accused began to examine the pistol and "he was pulling something." Mr. Geliot instructed the bar maid to call the police. While the accused was "busy with his pistol," Therese Lacheroix threw two glass tumblers filled with ice at the accused, striking him on the head. She then ran from the bar and returned with the police (R 50-58, 68, 69).

Lucien Franck, cook at the L'Escale Bleue, was present at the time the accused entered the bar on 22 May 1947. He testified as to the shooting of Mr. Geliot and stated that he went to the kitchen in order to try to leave the building by way of the kitchen door. While in the kitchen he "heard glasses fall and broken glasses." The shooting stopped and he looked into the bar room. He saw the accused lift Mr. Geliot and fire a shot into his body. He hid in the kitchen and when he came out the accused was gone. He waited at the door until "everybody came running" and then left to contact Mr. Geliot's son. During the day of 22 May 1947, he saw Mr. Geliot in the possession of some 5000 franc notes (R 69, 70).

Prior to closing the bar and after the last customer had departed, Mr. Geliot was seen counting the money he had taken in during the day. The receipts included notes in denominations of five hundred and one thousand francs. Miss Lacheroix did not know how much money Mr. Geliot received on 22 May 1947 but her tips, which usually amounted to approximately 10 per cent of the money taken in were between 1900 and 2000 francs (R 55,56). The last customer of the bar prior to the time the accused entered, tendered a thousand franc note to pay for coffee and Mr. Geliot made change from his pocket. Mr. Franck, who observed the transaction, did not notice what Mr. Geliot did with his money after making change (R 68,69). When Therese Lacheroix returned to the bar with the police she observed that Mr. Geliot's "pockets had been turned inside out and the man had gone" (R 51). The right hand coat pocket and right hand pants pocket were turned inside out (R 61). The pants pockets were soaked in blood (R 100).

Mr. Geliot was taken to the hospital where it was ascertained that he had on his person 10,000 francs, a pair of glasses, a ring, a tie pin, identification papers and other miscellaneous items. The 10,000 francs were in denominations of 1000 francs and smaller notes (R 101,102).

Mughette CiPierre, the witness who observed the accused peering into the L'Escale Bleue in the early part of the evening of 22 May 1947, returned to the bar at about midnight. As she approached the bar she saw the accused come out of the bar and run away. The accused "had a light jacket and he was full of blood, and he had on a shirt approximately the same as yours, and khaki trousers." She looked into the bar and saw Mr. Geliot lying on the floor. She remained in the area until the police came (R 80,81).

On 22 May 1947, the accused occupied room 24 of the Hotel du Vert-Galant located at 75 Rue des Martyrs. About midnight he entered the hotel, took a key from the key board and went to his room. The accused had a cut on his forehead and his jacket was stained with blood. He staggered as he walked (R. 103, 115, 119). Raquel Marie Gendre, the manager of the Vert-Galant hotel saw the accused when he entered the hotel. She observed that he took the wrong key from the board and directed her sister to take the proper key to him. She followed the accused to his room where he told her that he had been fighting. While the accused was washing his wound she saw a pistol on a table. This pistol had blood on it (R. 119, 120). Suzanne Gendre, a maid at the hotel Vert-Galant, testified that she followed the accused to his room and gave him the proper key. The accused was bleeding from a cut on the forehead. He said that he had been fighting. The accused placed a pistol on a "glass plate" and she removed it to a table. She assisted the accused in washing the blood from his face. The accused gave her 500 francs to clean up the room (R. 115-117). Doctor Jacques Mazel was called to the hotel to attend the accused. The accused had a cut over the eye. This cut was about three centimeters long. Doctor Mazel attempted to stitch the wound but the stitches would not hold. The accused was conscious but rather dazed (92-96, 116, 117, 126, 127). He stopped the bleeding and left. The accused paid Dr. Mazel 400 francs for his services (R. 117).

Micheline Maupied was in the hotel room of accused while his wound was being attended to by Dr. Mazel. She put a bandage over the wound. The accused was waiting for a taxicab to take him to a hospital. While waiting for the taxicab the accused said "I have just killed a man three hundred meters away from here." They went downstairs where the accused was arrested (R. 126, 127).

Maurice Locoz, a police inspector, arrested the accused as he came downstairs to the lobby of the hotel du Vert-Galant. The clothing worn by accused was not bloodstained. The accused was taken to a police station and searched. They found a pistol and "a bundle of French bank notes." These bank notes were "full of blood." The money consisted of "ten 5000 denomination bills" and one Belgian note for 1000 francs (R. 109, 110, 113).

Technician Fourth Grade Joseph J. Godek, Army Investigator, Security Intelligence Section, Army Graves Registration Corps, European Area, identified the accused as Private Manuel Martinez, a member of the Military Service of the United States. He further testified that he was familiar with the area surrounding the bar L'Escale Bleue and the Hotel du Vert-Galant. These two mentioned places are within 500 yards of each other (R. 122, 123).

By stipulation the report of Dr. Paul, a physician with the Ministry of Justice, was received in evidence as Prosecution's Exhibit H (R. 123). This report, dated 29 May 1947, was the result of a post mortem examination made on the body of Henri Geliot and provided in part:

"From the post mortem examination performed on Geliot's body it results that the victim had been shot. The bullet entering the forepart of the left side of the thorax, below the collar bone, went from left to right, from front to back, injured the left and right lungs and went out from the right side of the back part of the thorax, at the level of the sharp end of the blade bone, causing an abundant hemorrhage, which resulted in the victim's death."

It was stipulated that an examination of the clothing of the deceased Henri Geliot would disclose that -

"There is a trace of a hole in the lapel of the coat. Another hole is to be seen on the back of the coat (right hand side). Another hole appears in the lower part of the coat, beneath the right pocket. The material and lining are bloodstained. The trousers are also damaged. Five lacerations are to be seen on the left trouser-leg, at forty centimeters beneath the belt. The right trouser-leg is also torn in two places. The trousers are damaged at their front part, and bloodstained inside and outside. The undershirt is soaked with blood, and torn. The gray shirt is torn on the left side, on the back and below. The woolen sweater is bloodstained. A hole appears in the left side front and right side back. Another woolen sweater is damaged as the foregoing one. The shorts are also bloodstained and there is a hole between the legs." This examination was made on the 23rd May 1947.

It was also stipulated that an examination of the room number 24 of the Hotel du Vert-Galant, located at 75 Rue des Martyrs, Paris, France, conducted on 23 May 1947, disclosed the following:

"This room is located on the second floor. Upon going up the stairs, we noticed some drops of blood on the stairs between the first and second floor. Other drops of blood are to be seen on the carpet leading to room 24. This room is located at the rear end of the corridor, last door at the left-hand side. Within the room other drops of blood are to be seen on the floor. The blanket and sheets are bloodstained. In the toilet-closet, a khaki shirt and a beige jacket are floating in the bidet filled with water. This water is red with the blood from the clothes. We took these clothes as evidence. We did not find any other clothing, body linen or toilet-item in the room."

Evidence relating to Specifications 1, 2, 3, Charge II.

The evidence relating to these Specifications disclose that the accused and a colored person would hire a taxicab and direct the driver to take them to a certain address in Paris, France. At some point during the trip and at a relatively dark place on a street the accused would produce a pistol and then he and his companion would require the driver to hand over his valuables (R. 14, 18, 21, 22).

In the manner outlined above the accused and his companion committed the following robberies.

DATE	PERSON ROBBED	ARTICLES TAKEN	VALUE
24 April 1947	Pierre Bourenkoff	4000 francs	$33.62 (R. 14-17)
25 April 1947	Remy Rouyer	2200 francs Watch	$18.49 (R. 17-20) (No value shown)
30 April 1947	Joseph Djiovianni	3500 francs Watch	$29.42 (R. 21-24) (No value shown)

Evidence relating to Specification 5, Charge II.

About midnight on 6 May 1947 the accused and a companion entered the Bar LeBridge in Paris, France. The accused closed the door and pulled out a pistol. One of the men directed the patrons of the bar to give up their money. The accused stayed by the door with the pistol while his companion gathered the money and personal property belonging to the persons present. Pierre Dangeraux-Dorly was relieved of between 900 and 1000 francs and a watch. The patrons of the bar were forced to go into the "men's room." When they emerged therefrom the accused and his companion had departed (R. 25-27).

Evidence relating to Specifications 6, 7 and 8, Charge II.

Between 10:00 and 10:30 p.m., on 6 May 1947 the accused and a negro companion entered a combination bar and restaurant located at 36 Rue Condorcet in Paris, France. The accused produced a pistol. Either the accused or his companion said in broken French "don't move." The colored man then proceeded to take the money and other personal property from the people in the cafe. On this occasion 400 francs and a watch were taken from Maurice Lambert (R. 28-31); 1000 francs and a pair of sunglasses from Berthe Bazier (R. 40-42); 750 francs from Oliva De Biasi. The 750 francs were in a plate on a table and represented tips received during the day (R. 42-45).

Evidence relating to Specifications 9, 10, 11, Charge II.

Between 11:00 and 12:00 p.m., on 7 May 1947 the accused and a negro companion entered a bar located at 9 Rue de I'Isly, Paris, France. They ordered two drinks of cognac and tendered 200 francs in payment. The man behind the bar made change and upon receiving change the accused produced a pistol. The patrons were forced behind the bar. The accused held the pistol while the negro searched them. Money was taken from the cash register. At this time a gold watch was taken from Laurent Weynant (R. 31-33); 1000 francs from Cornelie Weynant (R. 34-37) and 250 francs from Germaine Vicente (R. 37-40).

4. For the Defense.

Nelly Poupard lived at the hotel Vert-Galant. She knew the accused as "Tony." The accused stayed at the hotel numerous times during the month of May 1947. The accused smoked cigarettes which had "hashish" mixed into the tobacco. The "hashish" was originally in tablet form but the accused would crush the tablets into a powder and mix it with his cigarettes. "* * * he smoked that nearly all the time." The use of this drug made the accused rather angry (R. 141, 142). Mme. Berthe Pillault also saw the accused at the Hotel Vert-Galant during May. He smoked cigarettes to which "hashish" had been added. The accused habitually smoked this type of cigarette (R. 143, 144).

Joseph J. Godek was recalled as a defense witness and testified that he had examined the records of the S.I.S. and that these records did not disclose any armed robbery charges against the accused prior to 22 May 1947. He further testified that he investigated cases involving the possession or use of Marijuana by U. S. Military Personnel and that Marijuana is available in Paris, France and has been found in the possession of military personnel (R. 144-145).

Lucien Franck was recalled as a witness for the defense. He was shown a "corduroy light tan jacket" which was marked as Defense Exhibit 1. Mr. Franck was unable to identify this jacket as being the one worn by the accused on the night Mr. Geliot was killed. He testified that the coat the accused wore on that occasion was about the same color as the coat shown him. The bar maid had told him that she was of the opinion that the accused was wearing a military jacket at the time, however he thought that it was a civilian jacket (R. 145, 146).

Siegfried Kurz, an interpreter employed by the "American" Army, accompanied the defense counsel when he interviewed the bar maid of the L'Escale Bleue in August 1947. On this occasion the bar maid stated that the accused was wearing an American military uniform and further that she saw the accused fire a bullet into the head of the deceased after he had fallen to the floor (R. 147).

Defense Exhibit 1, a light tan corduroy sport coat, was introduced into evidence after it was stipulated that it was found in the accused's room at the time of his apprehension (R. 151).

It was stipulated that if Private William Stribling, 1519 Engineer Construction Battalion, now in Western Germany, were present he would testify that on numerous occasions between 10 May 1947 and 21 May 1947 he observed the accused smoking what is commonly known as "reefer" cigarettes containing hashish or marijuana (R. 152). Ten 5000 franc French notes and one 1000 franc Belgian note were introduced in evidence as Defense Exhibit 2. It was stipulated that these notes were the ones taken from the accused after his apprehension. These notes were withdrawn but the description thereof shows them to be bloodstained (R. 152, Def. Ex. 2).

It was stipulated that if Lieutenant Robert W. W. Graves, Medical Corps, were present his testimony would conform to his prior statement which was marked Defense Exhibit 3. The data contained in this Exhibit relates to the effects of marijuana and was abstracted from Goodman and Gilman's "The Pharmacological Basis of Therapeutics," in which it is stated that "Marijuana is obtained from the flowering tops of hemp plants. Other names for it include Hashish, Marihuana and bhang. The central effect of the drug is to combine elements of excitation and depression, and varies with the personality of the individual" (R. 153, Def Ex 3).

The rights of the accused as a witness were explained to him and he elected to make the following unsworn statement.

"I, Manuel Martinez, the accused in this case, with the assistance of my defense counsel, have prepared and present this my unsworn statement in defense of charges against me now on trial.

"I was born on 3 January 1921 in Toledo, Ohio, and was one of a family of seven children including myself, three brothers and three sisters, of which I was the third oldest. My two older brothers were also members of the U. S. Army during the present War, serving in combat in the Pacific Theater with the rank of sergeant and are now discharged from the service and living in Toledo, Ohio. My father was of Spanish descent and a tailor by trade. I never went to school and at the age of thirteen went to work with a cleaning and pressing company in Toledo and lived with my family and worked with this one company continuously until I was inducted into the military service of the United States at Fort Benjamin Harrison. My mother died in 1931.

"I do not remember the year of my induction into the military service. I volunteered for parachute troop service and received such training in Fort Benning, Georgia. I was sent overseas, I think, in 1944, and joined the 101 Airborne Division in England. I was in combat service with D Company, 501st Battalion, 101 Airborne Division in December 1944 in Belgium and continued to serve with that unit during hostilities. I was then transferred to the 502 Regiment and returned to the ZI in August 1945. I was eligible and was discharged from service. Then reenlisted for three years and was in June 1946 sent to Germany and in July assigned to 56 QM Base Depot. Prior to my present enlistment I was never court martialed for any offense.

"I was stationed at Giessen, Germany and was assigned duties as a cook without any previous experience or training in the Army. After assignment as a cook I began to drink intoxicating liquors heavily and became involved in trouble. During the month of April I was in Germany at Frankfurt, Weslan, Wiesbaden, Hanover and Cologne, living with German civilians most of the time and often eating in transient messes in Frankfurt and Cologne.

"I came to Paris about the first of May this year with 9,500 franc French notes, which I had received from a soldier friend from the sale of two German cameras that I sold. I also had about $200.00 in scrip money and a PX watch that cost me $68.00. I sold my watch for about 7,000 francs, and met a soldier on furlough to whom I gave scrip money to buy PX items. These we sold for francs and shared the proceeds of the sale. I planned to go to Belgium and bought a 1,000 franc Belgium note from an Algerian for 3,500 francs French. A soldier from Germany asked me if I could get a pistol for him and I bought an Army Colt pistol with some ammunition from the Algerian for 2,000 French francs about 17 May 1947 with the intention of making a profit on it.

"On return to Germany, on reenlistment, I started using marijuana, which soldiers on furlough to France were able to obtain and bring back to Germany. It was obtained in tablet form for about 40 francs a tablet from Algerians who called it "gief". When I came to Paris I started using it frequently by breaking up the tablets and mixing it with tobacco to make cigarettes. These cigarettes were called "reefers" and I smoked them very often at the hotel at 75 Rue Martyers in Paris.

"On May 22 I was smoking these reefer cigarettes in the afternoon. About seven o'clock in the evening I went to a picture show next to the hotel with a girl that I knew by the name of Simon. After the picture show and about nine o'clock we went to a restaurant near St. Michel and had supper. After supper we took a taxi to St. Paul where Simon left me. I had been drinking cognac all day as well as smoking reefer cigarettes. From St. Paul I went to Stalingrad where I got some more marijuana and smoked one or two cigarettes. From there I went toward Pigalle and remember stopping in one or two cafes to drink cognac. I do not remember going into Cafe L'Escale Bleue or anything that might have happened there. I first noticed that I was injured on the forehead and bleeding badly when crossing Boulevard Clichy. I went to the hotel at 75 Rue Martyrs and to the room formerly occupied by a friend known as Bill Stribling. Someone called a doctor who came and attended to my injuries but was unable to stop the bleeding. He recommended that I go to a hospital. I was wearing a corduroy light tan coat which was covered with blood from my forehead. I took the coat off and put it in some water to soak out the blood. Several girls that stayed in the hotel were in the room while I was there and after the doctor left I was alone in the room as all the girls left and went to the room of a girl that I knew by the name of Michel. The doctor said that I would have to go to the hospital and one of the girls was to call a taxicab for me. After the doctor left and before the girls left the room Michel asked me to give her my money as the police were coming. I did not make any statement to her at any time about having killed a man. I did not look out of the window of my room at any time that night. I paid the doctor 400 francs for his services and

received 600 francs change from him for a 1,000 franc note. Of this change I gave 500 francs to the chambermaid for cleaning up the room as it was much soiled with blood from my injury. I asked a girl by the name of Zina for 100 francs to pay the taxicab and she got this money from another girl in the hotel.

"As I was leaving the hotel to go to a hospital I was arrested by the French police.

"The next day I was taken to the cafe at 16 Rue Victor Masse where pictures were taken of me and the barmaid. Pictures of me were also taken at the police station. On the 27th of May I was taken to a French hospital and the wound on my forehead treated by a French doctor. On the same day, but before I went to the hospital about 14 people came to the police station to identify me as being involved in armed robberies. At this time I was the only American or person dressed in American military clothes that was presented for identification. At this time I was identified by witnesses, who have appeared in this case on the armed robbery charges. At the time of such identification I was the only one present who was handcuffed and who had a bandage on his forehead. Two days later I was again identified by some of the same people when some U. S. Army SIS personnel were present in uniform. On this occasion I was not handcuffed, but was in the same clothes that I had worn at previous identification and the same that I had worn when the pictures were taken for the newspapers. The military personnel present at this time were different in complexion and stature from myself.

"At the French police station I was beaten to make me tell the circumstances of the alleged murder of Henri Geliot and the various robberies alleged against me. All I could tell them was that I got the marijuana at a place near Stalingrad in Paris.

"I know that I had ten 5,000 franc notes and one 1,000 franc Belgian note prior to the alleged murder of Henri Geliot. I also had one or two 1,000 franc notes. I had no other money after the alleged murder and never gave any money to anyone other than to the doctor for his services. When I paid the doctor I took all my money out of my pocket and as my hands were bloody the money became bloodstained.

"I was under the influence of marijuana and liquor on the evening of 22 May to such an extent that I remember nothing that might have happened in the cafe at 16 Rue Victor Masse on the night.

"I did not commit any of the robberies charged against me in this case.

"I make this unsworn statement because of my lack of education and inability to understand and answer questions that might be asked on cross examination. I have no recollection of what might have happened on the night of May 22 after 10 o'clock, and I have heard so much told to me that is supposed to have happened, so I fear that I might not be able to answer all questions truthfully as I would like to. However, the statements herein made are the same I would make if I were sworn to tell the truth and are true."

5. The evidence establishes beyond any doubt that on 22 May 1947 the accused entered the L'Escale Bleue bar in Paris, France, and after closing the door, produced and flourished a pistol. The proprietor of the bar, Henri Geliot, grasped the wrist of accused and struggled with him. The accused shot and killed Mr. Geliot. Lucien Franck, a cook, and Therese Lacheroix, a bar maid, were in the bar at the time the accused entered. The cook hid in the kitchen while the bar maid threw two glass tumblers at the accused striking him on the head. She then ran from the bar to call the police. The cook looked into the bar from the kitchen and saw the accused fire a shot into the body of Mr. Geliot. Thereafter the actions of accused, prior to his leaving the bar, were not observed by any witness. The evidence also shows that when the police arrived two of the deceased's pockets were wrong side out thus indicating that these pockets had been searched. These pockets were bloodstained. When the accused was apprehended he was found in the possession of money which was bloodstained. The evidence as a whole indicates that the killing of Henri Geliot occurred during an armed robbery or an attempted armed robbery.

> "'Robbery is the taking, with intent to steal, of the personal property of another, <u>from his person</u> or in his presence, against his will, <u>by violence</u> or intimidation' (MCM, 1928, par. 149<u>f</u>, p.170 (Underscoring supplied).
>
> "'Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse' (MCM, 1928, sec.148<u>a</u>, p.162).
>
> "'<u>Malice</u> does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life * * *. The use of the word "<u>aforethought</u>" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. <u>It is sufficient that it exist at the time the act is committed</u>. (Clark).
>
> Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceeding or coexisting with the act or omission by which death is caused: <u>An intention to</u>

cause the death of, or grievous bodily harm to, any person, * * *; knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person * * *, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony' (MCM, 1928, par.148a, pp. 163-164) (Underscoring supplied)."

"Robbery inherently involves the element of violence upon the person and it is a probable, natural and reasonable consequence of an attempt to commit robbery that a human life will be destroyed (United States v. Boyd, 45 Fed. 851,862 - reversed on other grounds in 142 U.S. 450; Marcus v. United States, 86 Fed. (2d) 854,861).

* * * *

"'In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law' (Winthrop's Military Law & Precedents - Reprint - p.673)." (CM 306769, 5 BR (ETO) 103, 112).

The defense contends, in effect, that on the 22nd of May 1947 the accused was under the influence of drugs and liquor to such a degree that he remembered nothing and therefore could not be guilty of murder. In his unsworn statement the accused did not deny the killing of Henri Geliot but stated that due to the use of Marijuana he did not remember going into the Cafe L'Escale Bleue or anything that might have occurred therein. In support of this contention the defense offered proof that the accused habitually smoked cigarettes containing Marijuana, referred to as "reefers."

As opposed to the statement of the accused that on the day in question he was unable to remember events due to his indulgence in liquor and smoking of "reefer" cigarettes, his actions indicate a clear comprehension of what was transpiring. Following the killing the accused went to his hotel and washed the blood from his face, changed clothes, submitted to medical treatment, paid the doctor for his services, paid a hotel maid to clean the blood from his room, stated to a woman acquaintance that he had killed a man within 300 meters from the hotel and started to a hospital to have a wound dressed all of which indicates that he was well aware of what he was doing.

Accused's degree of drunkenness or the extent to which he was under the influence of drugs at the time of the commission of the homicide was a

question of fact for determination in the first instance at least by the court hearing the case. Our examination of the record leads us to the belief, beyond a peradventure of a doubt that at the time the accused committed this homicide he was not so far under the influence of drugs or liquor as to be unable to harbor malice prepense in his mind (CM 269224, Wagoner, 45 BR 13, 23; CM 294675, Minnick, 26 BR (ETO) 11; CM 319168, Poe).

The Board of Review is of the opinion that the evidence amply establishes the commission by accused of the crime of murder as charged in Specification 1 and Charge I and of the robberies alleged in Specification 1 to 3 and 5 to 11 inclusive of Charge II.

The robberies charged in Specifications 6, 7 and 8 of Charge II occurred during a holdup of a cafe and are substantially part of one transaction. Likewise the robberies charged in Specification 9, 10 and 11 of Charge II occurred during the holdup of another cafe and are substantially part of that transaction. Although these Specifications represent a type of multiplication of charges which the Manual for Courts-Martial seeks to discourage (MCM, 1928, par 27, p 17) such needless multiplication did not adversely affect the accused's substantial rights, for, under the circumstances herein, it cannot be considered that the sentence adjudged was affected by such multiplication. The rule against multiplicity of charges is procedural (CM 323089, Gale). It would have been proper to allege the offenses charged in Specifications 6, 7 and 8 in one Specification and the offenses alleged in Specifications 9, 10 and 11 in another Specification.

Miscellaneous matters.

The defense made the following challenge:

> "The accused challenges the entire court, on the ground that the copy of the charges served on the accused together with the indorsement thereon shows that this trial was referred for general court-martial appointed by paragraph 1, Special Orders 106, Headquarters A.G.R.C., dated 8 August 1947. I understand the present court now sitting is appointed by Special Orders 103 dated 4 August, Headquarters A.G.R.C. This court has no jurisdiction of this case. After the case has been referred to one court, the accused would necessarily have to be advised of any amendment or change of the court and given proper time to prepare for trial before another court."

The indorsements to the charge sheet show that on 3 September 1947 the case was referred for trial to the court which in fact heard and decided the case. Charges had been preferred and investigated. Although the defense counsel stated he "challenged the entire court" the reasons given in support thereof tend to support a plea for a continuance.

The court overruled this blanket challenge. This ruling was correct. The procedure relating to challenging members of the court requires that

challenges be made to individual members and voted upon by those not challenged (CM 260637, Arthur, 39 BR 381, 392; Article of War 31; Par 58f, MCM, 1928.

The defense also moved for a continuance because the case was referred for trial on 3 September 1947 and because "essential witnesses had not been made available to the defense." The court overruled this motion. The charge sheet shows that on 21 July 1947 the charges were referred to a court for trial. They were withdrawn from this court and referred to a new court on 25 August 1947 and on 3 September 1947 referred to the court which tried the accused. It is within the discretion of the appointing authority to make changes in the personnel of a court appointed by him and this discretion extends to the appointment of a new court (Par 37, MCM, 1928). The accused was served with charges on 23 July 1947. According to the accompanying papers, the defense counsel on 27 August 1947 forwarded to the appointing authority a request for severance of the robbery and murder charges. The witness named by the defense counsel as being not available was Madame Gendre, a hotel manager. The Trial Judge Advocate stated that he had been unable to contact this witness. Madame Raquel Marie Gendre, the hotel manager, and her sister Suzanne Gendre, a maid, appeared as witnesses on the second day of the trial (R. 115, 118). At the close of the testimony on the first day of the trial the Trial Judge Advocate announced that he had succeeded in locating Madame Gendre and that she would be a witness on the following day. The defense was afforded ample opportunity to cross examine these witnesses. It did not claim surprise or indicate in any manner that it had not been afforded an opportunity to interview the witness. The granting of a continuance is discretionary with a court-martial, and its refusal to grant a continuance will not be questioned in an absence of a showing of an arbitrary abuse of discretion by the court. We have considered the record and find in it nothing to indicate that the accused had not had ample time to prepare his defense and to meet the charges against him (CM 260637, Arthur, supra).

6. The charge sheet shows the accused to be 26-6/12 years of age. The date of his original induction into the Army is not shown. However, he was discharged on 29 November 1945 and reenlisted 30 November 1945 to serve three years.

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

Charles E. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Stanzyk, Judge Advocate

JAGK - CM 325810 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAR 11 1948

TO: The Secretary of the Army

1. Herewith transmitted are the record of trial, the opinion of the Board of Review and the views and recommendations of The Judge Advocate General in the case of General Prisoner Manuel Martinez.

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.

The accused was found guilty of the murder of Henri Geliot, a French civilian, in violation of Article of War 92, and of ten robberies (six separate transactions) in violation of Article of War 93. The offenses occurred in Paris, France, during the months of April and May 1947, at which time the accused was an escaped general prisoner. 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.

The record reveals a most brutal murder in effecting a robbery of the deceased, Henry Geliot. I recommend that the sentence be confirmed and carried into execution under the direction of and at a time and place to be designated by the Commanding General, Headquarters, European Command.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Drft ltr sig S/A
3. Form of Ex action

(GCMO 75, (DA) 26 March 1948).

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

JAGQ - CM 325838

OCT 10 1947

UNITED STATES v. Technical Sergeant KINGDON L. COLLINS, SR. (RA 11004218), 899th Engineer Aviation Company, APO 239.	1ST AIR DIVISION Trial by G.C.M., convened at APO 239, 17 July 1947. Dishonorable discharge and confinement for one (1) year. United States Disciplinary Barracks.

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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Technical Sergeant Kingdon L. Collins Sr., 899th Engineer Aviation Company, APO 239 Unit 2, did at 899th Engineer Aviation Company, APO 239 Unit 2, on or about 12 June 1947, feloniously take, steal and carry away one radio, value about $23.75, the property of Corporal Marshall Cooper.

Specification 2: (Finding of not guilty).

Accused pleaded not guilty to the Charge and all Specifications and was found guilty of the Charge and Specification 1 but not guilty of Specification 2 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 one year. The reviewing authority approved the sentence, designated Branch, United States Disciplinary Barracks, Camp McQuaide, California, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question presented by the record is whether the court's finding of value is supported by the evidence. The competent evidence adduced at the trial consisted of testimony of the owner of the stolen radio that he purchased it in March or April 1947, that he paid "about $23.75, something like that" for it (R. 16) and a stipulation by the prosecution, defense and the accused as follows:

> "that the values in the specifications of the Charge are thereabouts" (R. 6).

No evidence was adduced as to where the radio was purchased, whether it was new or used at the time of purchase, whether it was in operating condition at the time it was stolen and it was affirmatively shown that the radio was stolen two or three months after it was purchased. Under these facts the testimony of the owner as to approximately what he paid for the radio was incompetent to establish market value. 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 has special knowledge on the subject (CM 268007, McKinney, 44 BR 205).

The stipulation as to values as shown in the record of trial is meaningless. While it probably was intended as proof that the values of the radios involved were approximately as alleged in the specifications it might well be interpreted to mean nothing more than that the values "alleged" in the specifications were approximate values. Even stretching the construction of the stipulation most favorably to the prosecution it can only be taken as proof that the value of the radio stolen was about $23.75. To rely upon this ambiguous stipulation for proof of value of over $20 necessary to support a sentence of confinement for one year without any competent supporting evidence would be manifestly unfair to the accused and would injuriously affect his substantial rights.

Nor can the proof of value be sustained by reason of the fact that the radio itself was offered in evidence. To permit the court on its inspection alone to find definite market values of articles "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 radio by the court is not sustained by the evidence. The evidence supports only a finding that the stolen radio had some value of $20 or less. The maximum confinement at hard labor authorized by the Table of Maximum

Punishments for larceny of property of the value of $20 or less is 6 months (MCM, 1928, par. 104c, p. 99).

4. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the finding of guilty of the Charge; legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding of larceny by the accused at the time and place and of the ownership alleged of the radio described in the Specification of a value not more than $20; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

W. A. Johnson Jr., Judge Advocate

C. G. Schelhouse, Judge Advocate

A. T. Kane, Judge Advocate

OCT 22 1947

JAGQ - CM 325838 1st Ind

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

TO: Commanding General, 1st Air Division, APO 239, c/o Postmaster, San Francisco, California

1. In the case of Technical Sergeant Kingdon L. Collins, Sr. (RA 11004218), 899th Engineer Aviation Company, 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 involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Upon taking such action you will have authority to order 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 325838).

THOMAS H. GREEN
Major General
The Judge Advocate General
2N/CC

1 Incl
Record of Trial

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

OCT 15 1947

JAGQ - CM 325924

UNITED STATES v. Private First Class LAWRENCE W. SCOTT (39728726), Unassigned, formerly of 743rd Antiaircraft Artillery Gun Battalion.	)	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Headquarters PHILRYCOM, APO 707, 20, 22 August 1947. Dishonorable discharge and confinement for eighteen (18) months. United States Disciplinary Barracks.

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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private First Class Lawrence W. Scott, unassigned, then of 743rd Antiaircraft Artillery Gun Battalion, alias Staff Sergeant Louis Scott, did, without proper leave, absent himself from his organization at Luzon, Philippine Islands from about 3 February 1947 to about 25 June 1947.

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

Specification: In that Private First Class Lawrence W. Scott, unassigned, then of 743rd Antiaircraft Artillery Gun Battalion, alias Staff Sergeant Louis Scott, did, at Kamuning, Quezon City, Luzon, Philippine Islands, on or about 22 June 1947, feloniously take, steal, and carry away sixty-two pieces of galvanized iron sheets, value about ninety dollars, property of the Quezon City Government.

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

Specification: (Disapproved by Reviewing Authority).

Accused pleaded guilty to Charge I and the Specification thereof except the words "alias Staff Sergeant Louis Scott" and not guilty to the remaining Charges and Specifications. He was found guilty of Charge I and the Specification thereof, guilty of Charge II and the Specification thereof, except the words "galvanized" and "value about ninety dollars", substituting for the latter words "value of less than fifty dollars but more than twenty dollars", and guilty of Charge III and the Specification thereof. 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 disapproved the findings as to Charge III and the Specification thereof, reduced the period of confinement to eighteen months, approved the sentence as thus modified, designated Branch, United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

On 3 February 1947, while accused was attached to the Troop Processing Unit, Paranaque Replacement and Disposition Center, APO 354, he absented himself without leave from his station (Pros. Ex. 1; R. 7) and remained in that status until he was confined at Camp Rizal on 25 June 1947 (Pros. Ex. 2; R. 7). When he was turned over to military authorities by the Philippine police he had a Class "A" pass and an "ID" card both of which were made out to Staff Sergeant Louis Scott (Pros. Exs. 3, 4; R. 9, 10).

On 22 June 1945, Mr. Diosdado Ronquillo, Detective, Quezon City Police Department, as a result of a report received by him, went to the school building at Kamuning, Quezon City. There he found accused with six Filipinos "tearing down the school building". He asked accused if he had authority to tear down the building and accused replied that he was authorized to do so by his commanding officer. When accused was brought to the station it was found that accused was absent without leave and that the building was owned by the Quezon City government (R. 14, 15). Accused was "tearing" galvanized iron sheets off of the building and when witness arrived at the scene numerous pieces had been loaded on a truck. When the truck was brought to the station the sheets were counted and there were sixty-two pieces (R. 15). The building was subsequently torn down by the Quezon City government (R. 16). Witness saw accused tear down the iron sheets and carry them to the truck and he was directing the work of six Filipinos in loading the truck (R. 18). In addition to the sixty-two pieces on the truck, there were other pieces detached from the building

which had not yet been loaded on the truck (R. 19). The accused in a sworn confession (Pros. Ex. 5; R. 12) said in part:

> "On 22 June 1947 I had two Filipinos with me and went to a vacant building on Sampalos Ave. in Quezon City. We started to tear the building down. I took twenty two (22) pieces of galvanized iron sheets to my residence. The following day I had six (6) Filipinos with me and started to take more galvanized iron sheets on a truck. About that time detective from the Quezon City Police Station apprehended us."

Accused having been advised of his rights as a witness elected to remain silent.

4. The competent evidence clearly establishes the guilt of accused as to Charge I and the Specification thereof; to wit, absence without leave from 3 February 1947 to 25 June 1947.

As to Charge II and the Specification thereof alleging larceny of sixty-two pieces of galvanized iron sheets, value about ninety dollars, property of the Quezon City Government, the facts clearly establish the wrongful taking of the property as alleged. The sole question for consideration is whether the wrongful taking as shown by the evidence constituted larceny under Article of War 93.

Paragraph 149g, Manual for Courts-Martial, 1928, defines larceny as:

> "the taking and carrying away, by trespass, of <u>personal property</u> which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein." (Clark) (Underscoring supplied).

Larceny as defined by Article of War 93 is common law larceny and in military law the elements of the offense do not vary in meaning according to the laws of the place where the offense is committed, for to follow this practice would destroy the unity so necessary for a prompt and certain administration of military law (CM 210619, <u>Jewell</u>, 9 BR 283).

Manual for Courts-Martial, 1917 at page 261 states: "Under the common law <u>personal property</u> only can be stolen. Thus, where trees,

fences, crops, or fixtures are cut down or severed by a trespasser and immediately taken away by him, there is no larceny." (Underscoring supplied).

In analyzing the crime of larceny, Bouvier states at page 1866:

> "The property must be personal; there can be no larceny of things fixed to the soil; 1 Hale, P.C. 510; but as the taking and carrying away would necessarily terminate the character of the property as realty even if it were such, the important point of this distinction is that if the severance from the realty of anything which is a part thereof, or annexed thereto, so as to go with the realty by descent, or in case a severance is made by the wrongdoer himself, so that the taking and carrying away is a continuous act, the offense is not larceny, because the taking and carrying away is not of the personal property of another, that which was severed not having been in his possession as a chattel, but only as the portion of a realty;"

To the same effect see 36 C.J. 736:

> "A second requisite is that the thing taken must be personal property, and not something partaking of realty; for larceny as an offense is concerned with personal property only".

The evidence in the instant case clearly shows that accused was "tearing" down a building and either himself or through his Filipino helpers was loading the iron sheets from the building upon a truck. The evidence of the city detective and the confession of accused show that the tearing down and taking away was a continuous transaction. At one point in the record of trial (R. 19) there is evidence that some of the sheets were detached from the building but not loaded on the truck. However, these sheets are not the subject of the charge of larceny in this case. Accused is charged with the theft of sixty-two sheets of steel which were on the truck when accused and his Filipino helpers were apprehended.

5. For the reasons stated above the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of Charge II and the Specification thereof, legally sufficient to support the findings of guilty of Charge I and the Specification thereof, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

W H Johnson Jr, Judge Advocate

C G Johnson, Judge Advocate

A D Kane, Judge Advocate

OCT 22 1947

JAGQ - CM 325924 1st Ind

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

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

1. In the case of Private First Class Lawrence W. Scott (39728726), unassigned, formerly of 743rd Antiaircraft Artillery Gun Battalion, attention is invited to the foregoing holding by the Board of Review which holding is hereby approved. It is recommended that the findings of guilty of Charge II and its Specification be disapproved, and that only so much of the sentence be approved as involves 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 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 325924).

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.

JAGQ - CM 325947

22 October 1947

UNITED STATES v. Private First Class BOBBY O. HALL (RA 18229768) and Private JOHN G. STANKO (12256632), both of Company D, 752nd Tank Battalion.	PORT OF LEGHORN Trial by GCM, convened at Leghorn, Italy, 18-19 August 1947. Each: Dishonorable discharge (suspended), total forfeitures and confinement for three (3) years. Branch United States Disciplinary Barracks, Green Haven, New York.

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, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence as to each accused, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as to each accused.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private John G. Stanko and Private First Class Bobby O. Hall, both of Company D, 752nd Tank Battalion, acting jointly and in pursuance of a common intent, did, in conjunction with Michele Zampella, Crescenzio Sorrentino and Antonio Grosso, Italian civilians, at or near Tombolo, Italy, on or about 17 July 1947, feloniously take, steal and carry away, three (3) bales of clothing of a value in excess of Fifty Dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Upon arraignment, each accused pleaded former jeopardy as a bar to trial, which pleas were denied by the court. Each accused then pleaded not guilty to, and was found guilty of, the Specification and Charge. Evidence of one previous conviction was introduced as to accused Hall and no evidence of previous convictions was introduced as to accused Stanko. 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 five years. The reviewing authority approved the sentences but remitted two years of the confinement as to

each accused, ordered the sentences as thus modified executed but suspended as to each accused that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, and designated Branch United States Disciplinary Barracks, Green Haven, New York, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 60, Headquarters Port of Leghorn, APO 512, 20 September 1947.

3. The pleas of former jeopardy were based on the theory that each accused had been punished for this offense under Article of War 104 (R. 5-10). The evidence offered by defense did not sustain these pleas (R. 13-14) and they were properly denied by the court (R. 15).

4. Depot 5L52 was a Clothing and Equipment Warehouse at the 61st Quartermaster Base Depot, Tombolo, Italy (R. 27). Both accused were properly posted and served as guards at Depot 5L52 from 2300 17 July to 0100 18 July 1947 (R. 15-16). During their tour of duty, the Officer of the Day inspected the accused's posts and saw some Italians in the depot inside the fence. The two accused were on the outside of the fence about 12 to 15 feet from the Italians. "The Italians were sitting down and the two soldiers were standing with their weapons" (R. 27-28).

Two of the Italians mentioned above testified at this trial that about 2315 17 July 1947 five Italians approached Depot 61 and upon receiving a signal from the accused, four of the five Italians jumped the fence "one or two meters" from accused, and entered the depot (R. 17-18). The fifth Italian remained outside with the two accused. The four men inside threw three bales of trousers over the fence (R. 18). The two accused told them to hurry (R. 19). After the bales were thrown over the fence, the two accused pointed the machine gun at the Italians and asked for the money — "they wanted 50,000 lire a bale" (R. 19, 23-24). The Italian who had remained outside went to get the money and when he failed to return, the two accused asked one of the four inside the fence to go and get the money (R. 19). He gave the accused his identity card (R. 21), jumped over the fence and departed (R. 19). Following his departure, the Officer of the Day arrived and took the three remaining Italians into custody (R. 19-20).

A statement was made by accused Hall to a CID agent and same was received in evidence against Hall only, without objection (R. 31; Pros. Ex. 1). In this statement, Hall explained that from 1700 to 1900 17 July 1947, he was on duty at Post 13 and accused Stanko was on Post 12. During this tour Stanko told him that he "had made a deal with an Italian to get into the depot (5L52) for his next tour". After some debate, they agreed to let the Italians into the depot. At about

2330, they gave the signal and five Italians came out of the woods. They let four of the Italians climb over the fence and about fifteen minutes later, they threw three bales of United States Army clothing over the fence. The Italian who had remained outside dragged the bales into the woods. The two accused then held the four Italians inside at the point of their guns and allowed the Italian on the outside to go for the money — "Pvt Stanko and I were supposed to receive 50,000 lire for each bale, a total of 150,000 lire, for three (3) bales". Later, when the first man did not return, they let another man go with the understanding that he would find the first man and bring back the money. A few minutes later, the Officer of the Day arrived and the accused turned the remaining three Italians over to him. Accused Hall concluded his statement, "I can truthfully state that I never took any money from any Italian" (Ex. 1).

Sometime after 2300, 17 July, three bales of cotton OD trousers were found in the road outside the depot at Posts 12 and 13 which were guarded by two accused (R. 30). (It was stipulated that these three bales of trousers, field, cotton OD, were of a value in excess of $50 — R. 15).

5. The corporal of the guard on the night in question testified that accused Stanko told him between 1700 and 1900 that day that he was going to let some Italians into the depot to get some bales and they would catch them when they tried to get out. Stanko told the corporal to come around to his post between 2300 and 0100. Before the corporal could get around to Stanko's post he received a call to the effect that the Italians had already been caught (R. 32-34). A truck driver overheard this conversation between Stanko and the corporal of the guard and testified in corroboration thereof (R. 35). A guard on another post also testified that both accused told him of their plan to let some Italians in the depot and "capture them with the goods." (R. 36). The company armorer testified that he issued 30 rounds (instead of the usual 15 rounds) to accused Stanko because he reported he was expecting to catch some "guineas" coming out of the depot (R. 38).

After being advised of their rights as witnesses, both accused elected to remain silent (R. 39).

6. The acts of the four Italians in removing the several bales of OD trousers from the Quartermaster warehouse, their throwing them over the fence, and the dragging of these bales into the woods on the outside of the Depot constituted the complete offense of larceny. The testimony of two of the Italian accomplices and the statement made by accused Hall show that the two accused consented to the removal of this

merchandise from their guard posts and that they expected to receive 150,000 lire as their part in the booty. This direct evidence establishes that both accused were accessories to the offense.

The evidence offered by the defense indicated that accused planned to allow the Italians to remove the merchandise in order to "catch them with the goods." This theory of defense was not mentioned in accused Hall's statement to the CID agent four days after the offense. The theory also fails to explain why the accused did not hold all five Italians when they first caught them with the goods or why they permitted two of the Italians to depart from the scene of the crime. The court was fully justified in concluding that accused were not holding the three Italians because of the offense they had committed, but rather they were holding them as hostages for the 150,000 lire which had been promised as their part of the profits.

The Board of Review holds that the court was fully justified in disregarding the proffered defense that accused were planning to entrap the Italians and that they did not intend to participate in the spoils of the larceny. To reach any other conclusion would require the Board of Review to weigh the evidence and thus usurp the authority vested only in the court and the reviewing authority. The defense in this case is quite similar to a plea of "confession and avoidance" and in such cases it is the province of the court to weigh the evidence and determine the guilt or innocence of accused. In such cases where the testimony adduced is equivalent to a defense of "confession and avoidance" there can never be a conflict of evidence between the prosecution and defense but such fact does not mean that the court is prohibited from weighing the evidence in such cases and reaching a determination where as in this case the record of trial contains sufficient competent evidence to support the findings of guilty.

7. The Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentences.

W A Johnson Jr, Judge Advocate

C E Schulman, Judge Advocate

A M Kane, Judge Advocate

JAGQ - CM 325947 1st Ind

JAGO, Dept of the Army, Board of Review No. 4 10/27/47

TO: The Judge Advocate General

For his information.

W. H. JOHNSON, JR
Lt Colonel, JAGD
Chairman, Board of Rev. No. 4

10/31/47

10/31/47

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

JAGH - CM 326002

[illegible] NOV 1947

UNITED STATES	)	XXIV CORPS
v.	)	Trial by G.C.M., convened at APO 235, 18 September 1947. Dismissal
Major GEOFFREY LAVELL (0-22049), Infantry	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major Geoffrey Lavell, Infantry, Headquarters XXIV Corps, did, at Seoul, Korea, on or about 25 August 1947, at about 0130 hours, wrongfully and in violation of Circular 27, Headquarters United States Army Forces in Korea, 22 February 1947, enter and remain in a woman's room, in the Nai Ja Apartments, a women's billet, under circumstances unbecoming an officer and a gentlemen and of a nature to bring discredit upon the military service.

Specification 2: (Finding of not guilty).

Specification 3: In that Major Geoffrey Lavell, Infantry, Headquarters XXIV Corps, a married officer, did, at the Nai Ja Apartments, Seoul, Korea, on or about 25 August 1947, wrongfully conduct himself in a manner unbecoming a married officer and gentlemen by going to and being found in bed, in an almost wholly undressed state, with Miss Pauline Dalton, a woman not his wife, under circumstances of a nature to bring discredit upon the military service.

He pleaded not guilty to the Charge and Specifications thereunder and was found guilty of Specifications 1 and 3 and the Charge and not guilty of Specification 2. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of evidence and law contained in the review of the XXIV Corps Judge Advocate, APO 235, dated 23 September 1947.

4. Records of the Army disclose that the accused was born at Silverbow, Montana, on 9 May 1917. He was appointed a cadet of the United States Military Academy on 1 July 1935 and upon graduation on 12 June 1939, was appointed a second lieutenant, Coast Artillery Corps, Regular Army. He was subsequently promoted in successive temporary ranks to that of major on the following dates, respectively: 2 October 1940, 26 March 1942, and 30 November 1942. On 21 September 1942, he was awarded the Soldiers' Medal. His efficiency reports from 13 September 1939 to 31 March 1947 show adjectival ratings as follows: 5 - very satisfactory, 7 - excellent, 2 - superior. He has one previous conviction for being drunk and disorderly in uniform in a public place on 31 October 1944.

5. Accompanying the record of trial is a letter, dated 22 September 1947, to the reviewing authority, signed by all members of the court that tried accused, recommending clemency by reason of accused's good record and pointing out that he has been separated from his wife since May 1944. Also accompanying the record of trial are letters to the appointing authority, from Colonel John N. Robinson, GSC, Lieutenant Colonel Walter F. Choinski, GSC, and Lieutenant Colonel Harold A. Cassell, Infantry, attesting accused's proficiency and recommending clemency, together with correspondence showing that, as of 21 August 1947, a divorce suit was pending against accused.

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 and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon a conviction of a violation of Article of War 95.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH - CM 326002 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Geoffrey Lavell (0-22049), Infantry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully, and in violation of standing orders, entering and remaining in a women's billet (Spec 1) and wrongfully conducting himself in a manner unbecoming a married officer by being found in bed with a woman not his wife (Spec 3), both in violation of Article of War 95. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the XXIV Corps Judge Advocate, dated 23 September, 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 25 August 1947 at about 0015 hours, the accused, who was married, and Miss Pauline Dalton entered the latter's apartment in government billets for female personnel at Seoul, Korea. Both appeared to be intoxicated. A military policeman and a clerk of the billets (both enlisted men) informed Miss Dalton that accused would have to leave as it was after hours, and this admonition was repeated directly to the accused by the civilian manager of the billets. The accused left the area of the billets but shortly afterward the manager saw him approach the building and advised him not to enter as it would get both him and the lady in trouble. The accused agreed and left the area. Sometime before 0130 hours Miss Dalton's roommate admitted accused to the apartment occupied by herself and Miss Dalton. She went to take a shower and reported to the military policeman who in turn advised the manager that accused was in the apartment. The Sergeant of the Guard appeared at about this time and the three men went to Miss Dalton's bedroom door and called "Major" several times. Receiving no response, they entered and found the accused and Miss Dalton in bed. The accused was clad only in his undergarments and Miss Dalton was almost nude. The accused then dressed. He gave his name to the manager but asked

him not to report the incident.

Circular 27, Headquarters USAFIK, dated 22 February 1947, was duly promulgated to the command of which accused was a member and was posted on the bulletin board of the accused's billets and on the doors of the individual apartments. The pertinent provisions of the circular clearly prohibited men visitors from being in the billets of female personnel at the time and under the circumstances in question.

4. Records of the Army show that the accused was born at Silverbow, Montana, on 9 May 1917. He was appointed to the United States Military Academy on 1 July 1935 and, upon graduation on 12 June 1939, was commissioned a second lieutenant, Coast Artillery Corps, Regular Army. He was subsequently promoted in successive temporary ranks to that of major on the following dates, respectively: 2 October 1940, 26 March 1942, and 30 November 1942. On 21 September 1942, he was awarded the Soldiers' Medal. His efficiency reports from 13 September 1939 to 31 March 1947 show adjectival ratings as follows: 5 - very satisfactory, 7 - excellent, 2 - superior. He has one previous conviction for being drunk and disorderly in uniform in a public place on 31 October 1944.

5. Accompanying the record of trial is a letter, dated 22 September 1947, to the reviewing authority, signed by all members of the court that tried accused, recommending clemency by reason of accused's good record and pointing out that he has been separated from his wife since May 1944. Also accompanying the record of trial are letters to the appointing authority from Colonel John N. Robinson, GSC, Lieutenant Colonel Walter F. Choinski, GSC, and Lieutenant Colonel Harold A. Cassell, Infantry, attesting accused's proficiency and recommending clemency, together with correspondence showing that, as of 21 August 1947, a divorce suit was pending against accused.

6. I am disinclined to recommend clemency in this case in view of accused's previous conviction for being drunk and disorderly in uniform and because accused was twice warned on the night in question not to enter or remain in the apartment. I therefore recommend that the sentence be confirmed and carried into execution.

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

CM 326002

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 97, (DA) 23 Dec 1947).

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

OCT 27 1947

JAGQ - CM 326004

UNITED STATES	)	MILITARY DISTRICT OF WASHINGTON
v.	)	Trial by G.C.M., convened at Fort Myer, Virginia, 1 October 1947. Dismissal and confinement for two (2) years and six (6) months. United States Disciplinary Barracks.
First Lieutenant JAMES L. SHELBY, JR. (0-2005274), Quartermaster Corps.	)	

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 by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that First Lieutenant James L. Shelby, Jr. Quartermaster Corps, Office of the Quartermaster General, did, on or about 13 March 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 12 August 1947.

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

Specification: In that First Lieutenant James L. Shelby, Jr. Quartermaster Corps, Office of the Quartermaster General, did, at Washington, D. C., on or about 17 December 1946, with intent to defraud, wrongfully and unlawfully make and utter to John Staren a check in words and figures as follows, to wit:

Weatherford, Texas Dec 17 19 46 No.

THE CITIZENS NATIONAL BANK 5
68-82

PAY TO THE
ORDER OF John Staren $ 1400.00

no DOLLARS
Fourteen Hundred Dollars and

/s/ James L. Shelby
Capt QMC

and by means thereof, did fraudulently obtain from John Staren one Oldsmobile automobile, of the value of about $1,400.00, he the said First Lieutenant James L. Shelby, Jr. then well knowing that he did not have and not intending that he should have any account with the Citizens National Bank for the payment of said check.

Accused pleaded not guilty to, and was found guilty of, the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two (2) years and six (6) months. The reviewing authority approved the sentence, designated Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

On 13 March 1947 accused absented himself without leave from his station, 9100 TSU, QMC, Washington, D. C. (Pros. Ex. 1; R. 50). In addition to the duly authenticated extract copy of the morning report which was received in evidence, his unauthorized absence was testified to by the Personnel Officer, Office of the Quartermaster General (R. 47, 48). Accused, after being warned of his rights under the 24th Article of War, orally admitted to an agent of the Criminal Investigation Detachment that he had been absent without leave for five months (R. 32). In a written statement accused admitted that he left Washington, D. C., on 11 March 1947, arrived in Chicago, Illinois, on 13 March 1947 and returned to Washington, D. C., on 15 March 1947. He then went by bus to Philadelphia, where he boarded a train for Chicago. He went to Winona, Minnesota and stayed until 2 April 1947 and then went to La Crosse, Wisconsin, for "about a week" and returned to Chicago where he accepted

employment and remained until he was apprehended by Agent Leindecker, 4th Criminal Investigation Detachment, Washington, D. C., on 12 August 1947. At the time he was apprehended accused had been working for "the past four weeks as a bartender" (Pros. Ex. No. 3; R. 36).

In December 1946, accused came to the place of business of Mr. John Staren in Washington, D. C. and offered to purchase an Oldsmobile car that Mr. Staren owned (R. 12). After certain telephone conversations between accused and Mr. Staren, Lieutenant Frame from Camp Lee, Virginia, came to Mr. Staren and gave him a check in the amount of $1400 signed by accused. Mr. Staren then delivered the car and title to Lieutenant Frame. After the check was deposited by Mr. Staren for collection it was returned to him on 24 December 1947 as "unpaid and unhonored". Thereafter Mr. Staren visited accused several times at Camp Lee, Virginia, and in each instance accused told him that he would honor the check the following day. After these visits Mr. Staren brought the matter of the alleged worthless check to the attention of Colonel Martineau of the Disciplinary Section, Adjutant General's Office. At that time it was ascertained that accused was stationed in Washington and Mr. Staren contacted him several more times to try and get the check made good but to no avail (R. 13). The check in the amount of $1400 drawn on the Citizens Bank of Weatherford, Texas, signed "James L. Shelby, Capt. Q.M.C.", was introduced in evidence (Pros. Ex. 2; R. 47). Mr. Staren paid $2,250 for the Oldsmobile car (R. 17) and accused never paid him for it (R. 13) nor returned it to him (R. 14). The agreed purchase price for the car was $2800 (R. 24A) and accused sent Mr. Staren two checks totalling $2,800 and both were dishonored (R. 24A). The checks were given to Mr. Staren by Lieutenant Frame; the check (Pros. Ex. 2) was made out except as to the payee in which space Mr. Staren placed his name, indorsed the check and deposited it at "the bank for collection" (R. 44, 45).

After being advised of his rights accused made an oral pre-trial statement admitting that he had issued two fraudulent checks to Mr. John Staren (R. 32). In a subsequent written statement, accused admitted writing two checks for $1400 on the Citizens National Bank, Weatherford, Texas, knowing that he had no account at this bank; he gave these checks to Lieutenant Frame in a sealed envelope and explained the envelope should be delivered to Mr. Staren who would turn over a 1946 Oldsmobile and title to Lieutenant Frame for accused. Thereafter he promised Mr. Staren on several occasions that he would make the checks good. He sold the car to a Captain Francisco for $1600 and went absent without leave (Pros. Ex. 3; R. 36).

4. Evidence for the Defense.

Master Sergeant James P. Worrell testified that he had worked directly under accused since March or April 1946; that in the opinion of

the witness accused is an excellent officer with character excellent and efficiency superior and that he would deem it a privilege to serve under accused at any time (R. 57). Numerous documents (Defense Exs. A-N) including commendatory letters from superior officers, efficiency reports and other evidence of the high degree of accused's manner of performance of military duties were introduced in evidence (R. 58-62).

Accused after being warned of his rights as a witness elected to make an unsworn statement that he had been in the Army a little over seven years of which a little more than five years was in an enlisted status (R. 63) and that at the time of his alleged absence he did not intend to desert the service of the United States (R. 64). He was having domestic difficulties; "was in a mess about the automobile"; was under a terrific strain and went absent without leave because it was the "easiest way out of it". He desires to continue in the service regardless of the outcome of this case if the Army will have him either "as an officer or as an enlisted man" (R. 64).

5. The competent evidence clearly establishes the guilt of accused as to Charge I and the Specification thereof viz., desertion on 13 March 1947 terminated by apprehension on 12 August 1947. The prolonged absence and the fact that he was apprehended while engaged in a civilian occupation at a place far distant from his proper station justified the court in inferring an intent to remain permanently absent (Par. 130, MCM, 1928). Intent to desert could also be found by the court from the evidence that his alleged passing of fraudulent checks had been reported to higher authority and he knew he was under investigation for this offense (CM 270462, Ricker, 45 BR 300).

As to Charge II and the Specification thereof Mr. Staren testified that after negotiating with the accused relative to the sale of the car a Lieutenant Frame came to his place of business, gave him the check and took delivery of the automobile and the title thereto. That after the check was returned to him dishonored he had numerous discussions relative to the check with accused and accused promised each time to make the check good. He further testified that he was never paid for the car. Accused in a sworn confession (Pros. Ex. 3) stated:

> "About 0900, 17 Dec. 46, I wrote 2 checks for $1400.00 on the Citizens National Bank, Weatherford, Tex. knowing I did not have an account at the above mentioned bank. I then gave these checks to Lt. Frame in a sealed envelope and explained the envelope should be delivered to Mr. Staren who would turn a 1946 Oldsmobile motor number #8-17442H and title over to Lt. Frame to be delivered to me."

Paragraph 114a, Manual for Courts-Martial, 1928, provides in pertinent part:

> "An accused cannot be legally convicted upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself."
>
> "This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense."

In a case similar to the one under review CM 273299, Briscoe, 7 BR (ETO) 1, accused was found guilty of the making and uttering of certain checks well knowing that he did not have, and not intending that he should have, sufficient funds in the bank to pay such checks. The evidence showed that the checks had been returned to the payee bank with a notice of protest reciting that nonpayment was by reason of "No Account". The checks were introduced in evidence and accused's company commander who had indorsed one of the checks received the check back from the bank with notice that the check had been dishonored. The company commander discussed the matter with the accused and accused told him that the money necessary to cover the checks was to be deposited in accused's account by his stepfather. The Board of Review held at page 8:

> "Under the circumstances of the case under consideration, the possession by the bank and indorser, respectively, at the time of trial, of the checks described in the specifications, and their introduction in evidence (regardless of the admissibility of the notice of protest attached, which it is unnecessary here to consider), while not sufficient if standing alone to support findings of guilty ***, is certainly sufficient to corroborate the admissions of accused, and, together with such admissions, to support the findings of guilty in this case."

The testimony of Mr. Staren that the check was returned to him dishonored although not competent evidence that accused had no account at the bank or that his account was overdrawn was nevertheless evidence that something was apparently wrong with the check. This together with accused's numerous promises to Mr. Staren to make the check good, his

failure to do so, and the admission in his unsworn statement that when he went absent without leave one of the things bothering him was "This mess I was in about the automobile" is sufficient evidence to establish the corpus delicti and sustain the admission in evidence of the confession of accused.

Accused was charged with making and uttering a check dated 17 December 1946, drawn on The Citizens National Bank in the amount of $1400, payable to John Staren. The evidence shows, however, that the check when delivered to Mr. Staren by Lieutenant Frame had the payee's name left blank. Mr. Staren filled in his name, indorsed the check and deposited it in his bank. The evidence is compelling that accused knew the check was to be delivered to Mr. Staren by Lieutenant Frame in exchange for Mr. Staren's car.

In a similar case, CM 226219, Rickards, 15 BR 27, accused was charged with making and uttering checks without funds. The Board of Review said at page 36:

> "The evidence does not in any way establish the identity of the persons to whom the checks described in Specifications 5, 7 and 9, Charge II, were uttered or the identity of the persons from whom the proceeds of the checks were fraudulently obtained. The genuineness of the indorsements on the various checks was not proved. Inasmuch as the gravamen of the offenses in question lay in the making, uttering and cashing of the particular checks with fraudulent intent, all of which is proved, the variance with respect to Specification 1, and the failure with respect to Specifications 5, 7 and 9 to establish the identity of the persons defrauded, is not fatal to the conviction in any case. There can be no question as to the identity of the offenses and the proof is such that the record of trial would support pleas of former jeopardy should accused be again charged with offenses involved in the making and uttering of the checks".

To like effect are CM 276285, Lucas, 48 BR 265; CM 271588, Blackburn, 46 BR 121 and CM 269689, Storm, 45 BR 55.

There can be no doubt in the instant case that accused was thoroughly familiar with the offense of which he was charged and the variance in the Specification and proof did not injuriously affect his substantial rights. Nor was there error in introducing evidence of the second check in the amount of $1400 as such evidence tended to prove the intent on the part of accused.

The evidence clearly sustains beyond a reasonable doubt the findings of guilty of Charge II and the Specification thereof.

During the course of the trial Captain George E. Wilkins, a member of the court, improperly injected himself into the proceedings on two occasions. The first occurred when a witness stated that the Quartermaster General's Office was in the Pentagon Building and Captain Wilkins corrected the witness by stating that the Office of the Quartermaster General was "located at Second T, Southwest, Temporary A, B and formerly C Building" (R. 43). This was an immaterial matter having no bearing on the issues of the case. Later in the trial when the defense was seeking to show that Captain Jeffords had no written authority to prepare morning reports and to authenticate extracts thereof for the Office of the Quartermaster General, Captain Wilkins said (R. 53):

> "Sir, for the information of the court, job sheets are written on various officers assigned to the Office of the Quartermaster General."

The trial judge advocate immediately objected and advised Captain Wilkins that if he was to testify he should take the stand as a witness and leave the court. Captain Wilkins stated that he would be glad to take the stand. The defense objected on the grounds that if Captain Wilkins testified and left the court the membership of the court would be reduced to the prejudice of the accused. Captain Wilkins then said (R. 55):

> "I merely want to make a statement to clarify the functions within the Quartermaster General's Office."

The Law Member then said:

> "Any statement made by the Captain will be stricken from the record and disregarded."

The prosecution then challenged Captain Wilkins for cause on the basis that the record showed he had formulated an opinion concerning a material issue, to wit, the validity of the extract copy of the morning report. The defense strongly opposed the challenge on the grounds that it would prejudice the defense. Captain Wilkins was not sworn, nor did he testify with respect to the challenge. The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot. The challenge was not sustained and Captain Wilkins

resumed his seat (R. 56). The court's action in not sustaining the challenge was proper. The original absence of accused was proved by competent direct evidence and the extract copy of the morning report was surplusage. Captain Wilkins offered only to testify as to the routine activities of the Quartermaster General's Office and there was no showing that his knowledge of such activities disqualified him to act as a member of the court or in any way prejudiced the accused, particularly in view of the strenuous objection which the defense made to his withdrawal from the court.

In the opinion of the Board of Review, Captain Wilkins in both of his statements in open court did not become a witness for the prosecution and the statements made by him in open court did not injuriously affect the substantial rights of accused.

6. War Department records show that accused is 26 years of age and married. He entered the service as a member of the National Guard of Texas on 20 May 1940 and achieved the rank of Master Sergeant. He was given a battle field commission as Second Lieutenant, Quartermaster Corps, on 17 June 1945. He has had twenty-three months service overseas, eight of which were as an officer. He was promoted to First Lieutenant on 4 December 1945. He is entitled to the American Defense Medal, the Good Conduct Medal, the Meritorious Unit Citation and The European Theater Ribbon with five battle stars. He was placed on inactive duty on 2 November 1945. He returned to extended active duty at his own request on 25 April 1946. He has five efficiency ratings from 7 September 1945 to 18 April 1947, four of which are excellent and one is superior. The Board of Review has considered a communication on behalf of accused submitted by Lieutenant Colonel James H. Caruthers, QMC, under whom accused served for five years, requesting clemency for accused with respect to the confinement imposed because of the superior record of accused as an enlisted man and as an officer and because this is the first offense, military or civil, with which accused has been charged.

7. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 58, and is mandatory upon conviction of a violation of Article of War 95.

W A Johnson Jr, Judge Advocate

C E Greenhow, Judge Advocate

A. D. Rave, Judge Advocate

JAGQ - CM 326004 1st Ind

JAGO, Dept of the Army, Washington 25, D. C. [illegible] 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 James L. Shelby, Jr. (0-2005274), Quartermaster Corps.

2. Upon trial by general court-martial, this officer was found guilty of desertion on 13 March 1947, terminated by apprehension on 12 August 1947, in violation of Article of War 58, and of falsely making and uttering with intent to defraud a check in the amount of $1400, and thereby fraudulently obtaining an automobile, in violation of Article of War 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years and six months. 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 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. On December 17, 1947, accused had a conference with Mr. John Staren in Washington, D. C., relative to the purchase of Mr. Staren's Oldsmobile car for $2800. Accused then returned to Camp Lee, Virginia, and after several telephone conversations with Mr. Staren accused gave a Lieutenant Frame an envelope containing two checks each in the amount of $1400, drawn on the Citizens Bank of Weatherford, Texas, signed "James L. Shelby, Captain, Q.M.C." He instructed Lieutenant Frame to deliver the checks to Mr. Staren and pick up an Oldsmobile car and the title thereto. Lieutenant Frame did as directed and received the car which was turned over to accused. Mr. Staren filled in his own name as payee, indorsed the checks, deposited them in his bank for collection and they were subsequently returned as "unhonored and unpaid". Accused did not have an account at the bank. Mr. Staren thereafter had numerous conversations with the accused at Camp Lee and the accused repeatedly promised to make the checks good. After this had been going on for sometime Mr. Staren took the matter up with the Disciplinary

Section, Adjutant General's Office. It was then ascertained that accused was stationed in Washington. Mr. Staren then made additional contacts with accused who promised to make the checks good. Mr. Staren was never paid for the car and it was never returned to him. Accused sold the car to a Captain Francisco for $1600, went absent without leave on 13 March 1947 as soon as he had cashed Captain Francisco's check and proceeded to visit various points in the Middle West. He was apprehended by an agent of the Criminal Investigation Division in Chicago, Illinois, on 12 August 1947 at which time he had been employed for four weeks as a bartender. Accused after being advised of his rights under Article of War 24 admitted both verbally and in writing the commission of the offenses stated above. In an unsworn statement at the trial he claimed that he had been having domestic troubles, that he "was in a mess about the car" and that absenting himself was the easiest way out of his difficulties. Accused desires to continue in the service regardless of the outcome of this case if the Army will have him either "as an officer or as an enlisted man."

5. War Department records show that accused is 26 years of age and married. He entered the service as a member of the National Guard of Texas on 20 May 1940 and achieved the rank of Master Sergeant. He was given a battle field commission as Second Lieutenant, Quartermaster Corps, on 17 June 1945. He has had twenty-three months service overseas, eight of which were as an officer. He was promoted to First Lieutenant on 4 December 1945. He is entitled to the American Defense Medal, the Good Conduct Medal, the Meritorious Unit Citation and The European Theater Ribbon with five battle stars. He was placed on inactive duty on 2 November 1945. He returned to extended active duty at his own request on 25 April 1946. He has five efficiency ratings from 7 September 1945 to 18 April 1947, four of which are excellent and one is superior. The Board of Review has considered a communication on behalf of accused submitted by Lieutenant Colonel James H. Caruthers, QMC, under whom accused served for five years, requesting clemency for accused with respect to the confinement imposed because of the superior record of accused as an enlisted man and as an officer and because this is the first offense, military or civil, with which accused has been charged.

6. Accused was examined on August 25, 1947, by a Board of Medical Officers appointed pursuant to paragraph 1b, AR 600-500, and was found "to be mentally capable of discerning the difference between right and wrong, both at the time of the examination and at the time the offenses were committed; to have the capacity to keep from doing wrong and to have the mental ability to understand the nature of the proceedings against him and to do what was necessary to present his defense."

7. Accused has committed serious offenses involving moral turpitude which cannot be condoned. I recommend that the sentence be confirmed

but in the light of his previous excellent service both as an officer and as an enlisted man I recommend that one year of the confinement adjudged be remitted and that as thus modified, the sentence be carried into execution. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls.
1. Record of Trial
2. Form of Action
3. Ltr fr Lt. Col. James H. Caruthers, QMC.

(GCMO 56, D.A., 20 Nov 1947).

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

JAGK - CM 326005

UNITED STATES v. Technicians Fifth Grade CRECENCIO C. DeLEON (RA18107529), and ELBERT L. SHIELDS (RA 35487761); and Private First Class ALVIN J. CLARK (RA16210387), all of Company A, 77th Signal Service Battalion.	BERLIN COMMAND Trial by G.C.M., convened at Berlin, Germany, 15 August 1947. SHIELDS: To be reduced to grade of Private and to forfeit $47.00 per month for six (6) months. CLARK: To be reduced to the grade of Private and to forfeit $60.00 per month for six (6) months. DeLEON: Sentence disapproved.

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 has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the finding of guilty and the sentence as to the accused Shields and Clark. 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 were tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Technician Fifth Grade Crecencio C. DeLeon Company "A", 77th Signal Service Battalion, APO 742-A, US Army, Technician Fifth Grade Elbert L. Shields, Company "A", 77th Signal Service Battalion, APO 742-A, US Army, and Private First Class Alvin J. Clark, Company "A", 77th Signal Service Battalion, APO 742-A, US Army, acting jointly, and in pursuance of a common intent, did, at Berlin, Germany, at or near 29 Joachimsthalerstrasse, Berlin W 15, on or about 15 June 1947, by force and violence and by putting them in fear, feloniously take, steal, and carry away from the person of Marta Mueller, about 1500 marks, the property of Marta Mueller, value about $150.00, and from the person of Katharina Longerich one wrist watch the property of Katharina Longerich, value unknown.

Each accused pleaded not guilty of the Charge and Specification. The court made the following findings:

"Of the Specification and Charge: Not guilty, but guilty of violation of the 96th Article of War, and the charge sheet is amended to read:

"Charge: Violation of the 96th Article of War.

"Specification: In that T/5 Crecencio C. De Leon, Company 'A', 77th Signal Service Battalion, APO 742-A, US Army, T/5 Elbert L. Shields, Company 'A', 77th Signal Service Battalion, APO 742-A, US Army, and Private First Class Alvin J. Clark, Company 'A', 77th Signal Service Battalion, APO 742-A, US Army, were at 29 Joachimsthalerstrasse, Berlin W 15, on or about 15 June 1947, disorderly in uniform in a public place, to wit: the Pension Fortuna."

No evidence of any previous convictions was introduced. The accused DeLeon was sentenced "to forfeit forty-five dollars ($45) per month for a period of six months and to be reduced to the grade of private; the accused Shields was sentenced to forfeit forty-seven dollars ($47) per month for a period of six months and to be reduced to the grade of private; and, the accused Clark was sentenced to forfeit sixty dollars ($60) per month for a period of six months and to be reduced to the grade of private." The reviewing authority's action provided: "the findings of guilty as to Technician Fifth Grade DeLeon is disapproved. The sentences of Technician Fifth Grade Shields and Private First Class Clark are approved and will be duly executed." The result of trial was published in General Court-Martial Order No. 96, Headquarters, Berlin Command, Office of Military Government for Germany (US), APO 742, U.S. Army, 24 September 1947.

3. The only question presented for our consideration is whether the offense of which the accused were found guilty may be considered lesser than and necessarily included in the offense for which they were arraigned. Charged with robbery, the accused were found guilty of being disorderly in uniform in a public place. Although it may be said that every robbery is a breach of the peace and thus a disorder, it certainly does not follow that every disorder involves a robbery. Hence, under the specification as redrafted by the court, the accused may have been found guilty of some disorder not necessarily extending to or included in a robbery.

"The particular offense found in order to be properly considered a lesser included offense of that charged must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not contained in such offense. It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM, 1928, par. 75c)." (CM 323728, Wester).

Moreover, the redrafted specification herein is not worded in such a way that the Board of Review may cut down the offense there found to one which would be necessarily included in the robbery charged, for, since we may not resort to the proof for this purpose but must stay within the terms of the specification, we have no means of determining the type or kind of disorder of which the court may have intended to find the accused guilty (CM 323728, Wester, supra). The findings of guilty of the substituted specification and the sentence based thereon must, therefore, be set aside.

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

Robert E. Silver, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert J. Hanger, Judge Advocate

JAGK - CM 326005 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 1 1947

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724, 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Technician Fifth Grade Elbert L. Shields (RA 35487761), and Private First Class Alvin J. Clark (RA 16210387), both of Company A, 77th Signal Service Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentences and recommend that the findings of guilty and the sentences be vacated, and that all rights, privileges and property of which each 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 75, DA., 3 Dec 1947).

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

JAGK - CM 326012

7 November 1947

UNITED STATES	)	MARIANAS BONINS COMMAND
v.	)	Trial by G.C.M., convened at Guam, 17 September 1947. Dismissal.
Major BARRY A. RYAN (0-453198), Infantry.	)	

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 84th Article of War.

Specification: In that, Major Barry A. Ryan, Infantry, Headquarters, Marianas Bonins Command, did at Guam, Marianas Islands, on or about 1 September 1947, willfully destroy one glass automobile window of the value of about $3.40, issued for use in the military service of the United States, by kicking the said window with his feet.

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

Specification: In that Major Barry A. Ryan, Infantry, Headquarters, Marianas Bonins Command, was at Guam, Marianas Islands, on or about 1 September 1947, drunk and disorderly in uniform in a public place, to wit: Marine Highway Number One.

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

Specification 1: In that Major Barry A. Ryan, Infantry, Headquarters, Marianas Bonins Command, did at Guam, Marianas Islands, on or about 1 September 1947, wrongfully strike Sergeant James Farrow, Jr. a military police noncommissioned officer who was then in the execution of his office, by hitting the said Sergeant Farrow in the eye with his fist and kicking the said Sergeant Farrow in the groin with his feet.

Specification 2: In that Major Barry A. Ryan, Infantry, Headquarters, Marianas Bonins Command, did at Guam, Marianas Islands, on or about 1 September 1947, wrongfully assault Captain Wilfrid P.

Als, Assistant Provost Marshal, Marianas Bonins Command, who was then in the execution of his office, by choking the said Captain Als with his hands.

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 pay to the United States a fine of $500. The reviewing authority approved the sentence but remitted the fine and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of evidence contained in the Staff Judge Advocate's review. With regard to Charge I and its Specification it will be observed that the accused was found guilty of willfully destroying a glass window of a military vehicle by kicking said window with his feet in violation of Article of War 84. This Article provides that "Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct." (Underscoring supplied). It has been traditionally held that Article of War 84 is not applicable to officers, and the 1921 MCM provided specifically that the Article applied only to enlisted men. (Sec. 434, p 394, MCM, 1921; CM 323887, Christopher; Article of War 1). The willful destruction of public property by an officer is however a violation of Article of War 96 and the fact that the Specification is laid under the wrong article has no bearing upon the sentence and is not prejudicial to accused's rights. (CM 191638, Giles, 1 BR 269; CM 244802, VanDorn, 50 BR 7, 8).

It may be considered that the assaults charged under Article of War 96 and the willful destruction of the glass window are part of the same acts or transactions involved in the finding of guilty of Charge II and its Specification but this does not amount to an illegal multiplication of Charges. The same facts or circumstances may give rise to two or more offenses. (CM 247496, Egalnick, 30 BR 361, 372; CM 281663, Hindmarsh, 22 BR (ETO) 223, 229).

4. The accused is 28 years of age, married and has two children. He graduated from Michigan State College in 1940 and was employed by International News Service prior to being ordered to duty as a second lieutenant, Infantry, AUS, on 23 January 1942. On 16 October 1945, as a member of the 33rd Infantry Division he was awarded the Silver Star for heroism in action against the enemy in the vicinity of Tiptop, Baguio, Mountain Province, Luzon, Philippine Islands, from 2 May to 9 May 1945. He was subsequently awarded the Bronze Star Medal for meritorious service against the enemy on Northern Luzon, Philippine Islands. His efficiency ratings are decidedly "superior."

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 during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings as to Charge I and its Specification as involves a finding of guilty of the Specification in violation of Article of War 96, legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction for a violation of Article of War 95 and authorized for violation of Article of War 96.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Lefroyd, Judge Advocate

JAGK - CM 326012 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 10 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 Major Barry A. Ryan (0453198), Infantry.

2. Upon trial by general court-martial this officer was found guilty of willfully destroying a glass window of a government automobile by kicking it with his feet, in violation of Article of War 84; of being drunk and disorderly in uniform on a public highway at Guam, in violation of Article of War 95; of striking Sergeant James Farrow, Jr., and choking Captain Wilfred P. Als in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay to the United States a fine of $500. The reviewing authority approved the sentence but remitted the fine and forwarded the record for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Staff Judge Advocate which was adopted by the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification (destruction of government property) as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence.

On the evening of 1 September 1947 the accused and his wife together with another couple attended the Navy Officers' Club in Agana, Guam, Marianas Islands, where they had dinner. They consumed a considerable amount of liquor. At about 2230 hours, as the parties were returning to their quarters in accused's automobile via Marine Highway No. 1, Sergeant James Farrow, Jr., a military police on duty observed the automobile to be swerving from one side of the road to the other and endangering traffic then on the road. He followed accused's car and after several unsuccessful attempts was able to stop it. The accused was driving and Sergeant Farrow saluted him and requested to see his driver's license. The accused became belligerent, ordered Farrow to hold the position of salute until accused should return it and cursed him. Farrow did not hold the position of salute and seeing that accused was drunk, Farrow attempted to remove the keys from his car. The accused thereupon struck Farrow in the face, kicked him and called him vile names. Captain Wilfred P. Als, Assistant Provost Marshal appeared on the scene, told the accused that he was under arrest and that he was taking him to the police station. Captain Als was shown to have had 27 years' experience as a civilian policeman for the

District of Columbia before entering the Army. He forcibly took the accused in custody. The accused grasped Captain Als by the neck and choked him but he was finally subdued and placed in a patrol car. On the way to the military police station the accused kicked out a glass window in the patrol car. All of the witnesses observing the accused were of the opinion that he was excessively intoxicated.

The accused testified in his behalf. He asserted that he and his wife and another couple had gone to the club and consumed some liquor on the evening in question but that it was not a drinking party. On the way home he had to stop the car several times because one of the occupants had become sick. When stopped by the military police he did not consider that the arresting policeman showed the proper courtesy. He did not have the "faintest memory" of the events that followed. He had a young baby at his home in addition to an older child and had lost considerable sleep while assisting his wife in the care of the children. Accused stated further that he had been suffering from nervous exhaustion. He admitted that he undoubtedly presented "an extremely disreputable appearance" on the evening in question but stated that it was his first experience and resulted from intoxication plus abnormal mental and physical strain.

4. The accused has a creditable civilian and military record. His WD AGO 6066-1 card contains fifteen superior and two excellent ratings. He completed Ranger Combat Training and served with the 130th Infantry, 33rd Infantry Division, in the Pacific Theatre. On 16 October 1945 he was awarded the Silver Star for heroism in action against the enemy in the Philippines. He was also awarded the Bronze Star Medal for meritorious service in the same theatre.

In a letter to the reviewing authority dated 20 September 1947, all of the members of the court-martial recommended that clemency be extended the accused and asserted that he is a valuable officer who is held in high esteem by his associates. The members further expressed the opinion that the offenses herein were isolated incidents from which he had learned a very valuable lesson.

I recommend that the sentence as approved by the reviewing authority be confirmed but that it be commuted to a reprimand and forfeiture of $50 pay per month for three months and that the sentence as thus commuted be carried into execution.

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

CM 326012

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 73, (DA) 2 Dec 1947).

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

JAGK - CM 326039

7 APR 1948

UNITED STATES v. Private First Class JOHN E. McCARTHY (RA 37897295) and Private GERARD A. LaBORDE (RA 38659887), both Troop A, 1st Medical Squadron, 1st Cavalry Division	1ST CAVALRY DIVISION Trial by G.C.M., convened at Camp Drake (Tokyo) Japan, 19 May 1947. Each: Dishonorable discharge (suspended) and confinement for six (6) years. Disciplinary Barracks

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

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

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

As to both accused:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Gerard A LaBorde, Troop "A", 1st Medical Squadron, APO 201, and Private First Class John E. McCarthy, Troop "A", 1st Medical Squadron, APO 201, acting jointly, and in pursuance of a common intent, did at Tokyo, Japan, on or about 29 March 1947, without authority wrongfully take and carry away one truck, 1/4 ton, 4x4, #212826, value about $1051.00, property of the Royal Australian Air Force.

As to accused LaBorde:

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

Specification: In that Private Gerard A. LaBorde, Troop "A",

1st Medical Squadron, APO 201, having taken an oath before an investigating officer, 2nd Lt. Rodney R. Confer, a competent officer, that he would testify truly, did at 1st Medical Squadron, APO 201 on or about 14 April 1947, willfully, corruptly, and contrary to such oath testify in substance that he was not in the 1/4 ton truck when it drove up, and that he was not in possession of said 1/4 ton truck, which testimony was a material matter and which he did not then believe to be true.

As to accused McCarthy:

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

Specification: In that Private First Class John E. McCarthy, Troop "A", 1st Medical Squadron, APO 201, having taken an oath before an investigating officer, 2nd Lt. Rodney R. Confer, a competent officer, that he would testify truly, did at 1st Medical Squadron, APO 201 on or about 14 April 1947, willfully, corruptly, and contrary to such oath testify in substance that he was not in the 1/4 ton truck when it drove up, and that he was not in possession of said 1/4 ton truck, which testimony was a material matter and which he did not then believe to be true.

Each accused pleaded not guilty to and was found guilty of all charges and specifications thereunder. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for six years. The reviewing authority approved the sentence as to each accused and ordered it duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. He designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, 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. 64, Headquarters First Cavalry Division, APO 201, Camp Drake (Tokyo) Japan, dated 20 September 1947.

3. Briefly stated, the evidence with respect to the original charge and its specification shows that at about 2000 hours on the night of 29 March 1947, Flight Lieutenant Charles W. Carter of the Royal Australian Air Force parked a 1/4 ton 4x4 truck (jeep) 212826, property of his organization, near a cafe in Tokyo, Japan. Shortly thereafter he observed that the jeep was missing from its parking place. No one had been authorized to take or use the jeep. Report was made of the incident and several hours later the accused were apprehended riding in the vehicle near Camp Drake, also in Tokyo. The direct evidence and reasonable inference therefrom show that the initial taking and subsequent use of the vehicle was the joint act of the accused as alleged.

The specification in question alleges that the accused did jointly "without authority wrongfully take and carry away ***" the described vehicle of the ownership and value alleged. It will be readily observed that the offense denounced by the pleading is not a larceny of the vehicle, nor does it contain all the elements necessary to constitute the statutory offense denounced by Section 22-2204, District of Columbia Code, entitled "Unauthorized Use of Vehicles" (CM 321542, McCullough, 6 Bull JAG 175; CM 322047, Porter).

In CM 326588, Sattler, CM 329178, Evans, and CM 329200, Staley, the Board of Review held that a specification which merely alleges "wrongful taking and carrying away" of property of another charges no more than a disorder for which the maximum punishment, authorized by paragraph 104c, Manual for Courts-Martial, 1928, is confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

4. Under the Additional Charges and their specifications each accused was found guilty of having taken a false oath upon a material matter before "an investigating officer, 2nd Lt. Rodney R. Confer, a competent officer." Since it is not alleged in this pleading that Lieutenant Confer was duly appointed to conduct a pre-trial investigation under Article of War 70 and that the false testimony in question was given during the course of such an investigation, we need not here determine whether an Article of War 70 investigation is a "proceeding in the course of justice." It is obvious that the specification of the Additional Charge in the case of each accused fails to allege the offense of common law perjury in violation of Article of War 93 (par 149i, MCM, 1928).

Do these specifications, however, sufficiently allege the offense of "statutory" perjury, that is, that a false oath on a material matter was taken before a "competent *** person, in any case in which a law of the United States authorizes an oath to be administered"? (18 USC 231) In this connection it will be noticed that Article of War 114 provides:

> "*** any officer detailed to conduct an investigation, *** shall have power to administer oaths ***" (Underscoring supplied),

and that in 18 USC 558 it is further provided:

> "In any presentment or indictment for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and *** before whom the oath was taken, averring such *** person to have competent authority to administer the same, *** without setting forth *** the commission or authority of the *** person before whom the perjury was committed." (Underscoring supplied)

We construe the above quoted language of Article of War 114 to mean

that an officer detailed to conduct an investigation has authority to administer oaths only when such oaths are administered during the course of the investigation. Moreover, we remark that the Federal statute simplifying the requisites of pleading in perjury cases still requires that the substance of the offense denounced be set forth in the allegations as well as an averment that the person administering the oath had competent authority to do so (Hill v. United States, 54 F (2d) 599, 602).

The substance of the offense of "statutory" perjury before an officer detailed to conduct an investigation is, obviously, that false testimony was given, under oath, before such an officer in the course of the investigation (United States v. Clark, 25 Fed Cas No 14,804). In the instant case, we find no allegation of such an offense. Lieutenant Confer is described, in general terms, as "an investigating officer" and "a competent officer." Even if we were to construe the phrase "an investigating officer" as the equivalent of an allegation that the Lieutenant was "an officer detailed to conduct an investigation," which construction would appear to be warranted in the light of the further assertion that he was "a competent officer," the allegations still fail to set forth that the false oath denounced was taken under circumstances wherein his competence to administer oaths as an investigating officer would have been in full force and effect under the provisions of Article of War 114. Consequently, we conclude that the specifications in question fail to allege the offense of statutory perjury, or false swearing, for, as the Board of Review said in CM 325541, Morgen:

> "However, it is not sufficient that a criminal pleading may or may not state an offense, according to whatever interpretation the beholder may choose to place upon it. It must, in order to legally support a conviction of crime, unfailingly and unequivocally set forth an offense, without regard to whatever proof may appear in the record, and cannot, in any manner, be open to an interpretation that it may decry acts which are not subject to a criminal penalty."

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 of the Additional Charge and its specification as to each accused; legally sufficient to support the findings of guilty of the Original Charge and its specification, and legally sufficient to support only so much of the sentence as to each accused as provides for confinement at hard labor for a period of four months and forfeiture of two-thirds pay per month for a like period.

(Dissent), Judge Advocate

Gilbert E. Stengel, Judge Advocate

Harley A. Lemming, Judge Advocate

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

JAGK - CM 326039

7 APR 1948

UNITED STATES v. Private First Class JOHN E. McCARTHY (RA 37897295) and Private GERARD A. LaBORDE (RA 38659887), both Troop A, 1st Medical Squadron, 1st Cavalry Division	1ST CAVALRY DIVISION Trial by G.C.M., convened at Camp Drake (Tokyo) Japan, 19 May 1947. Each: Dishonorable discharge (suspended) and confinement for six (6) years. Disciplinary Barracks.

DISSENTING OPINION
of
Lieutenant Colonel C. D. Silvers, Judge Advocate

I concur in the opinion of my brother judge advocates with respect to the original charge and its specification and concur in the results reached in the case, however, for reasons hereinafter stated, I am unable to concur in so much of the majority opinion as concludes that the specification to the Additional Charge, as to each accused, fails to allege an offense cognizable in military law. These specifications are identical except as to the name of the accused and allege that each -

> "*** having taken an oath before an investigating officer, 2nd Lt. Rodney R. Confer, a competent officer, that he would testify truly, did *** willfully, corruptly, and contrary to such oath testify in substance that he was not in the 1/4 ton truck when it drove up, and that he was not in possession of said 1/4 ton truck, which testimony was a material matter and which he did not then believe to be true."

As I construe the majority opinion, it maintains that the specifications are fatally defective because of a failure to aver that (1) Lieutenant Confer was detailed to conduct the investigation and (2) that the oath was given in the course of the investigation, citing Hill v. United States, 54 F (2d) 599,602, in support of the first proposition and United States v. Clark, 25 Fed. Case No. 14,804, in support of the second.

Hill v. United States, supra, was a conviction for perjury under Section 501 of the act of June 7, 1924 (38 U.S.C.A., sec. 552), wherein the circuit court of appeals, in discussing the indictment said at page 602,

"Again, there is no averment that James Talty had competent authority to administer the purported oath as appears in the affidavit supra. This averment seems to be a necessary one under the statute, which abbreviates the common law form of indictment for perjury and sets forth the substance of what it shall contain. (18 USC 558)"

The indictment was therefore held fatally defective for the reason stated.

United States v. Clark, supra, was a conviction for perjury under the act of April 30, 1790, C 9, Sec. 18 (now obsolete), which denounced perjury "committed on his or her affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the United States ***" (underscoring supplied). The indictment alleged that the offense was committed "on a hearing before Judge John Davis then and ever since being Judge of the District Court of the United States." On appeal the circuit court held that this indictment was fatally defective because it failed to allege that the false oath was given before a court of the United States and the court further stated, "A court is not a judge, nor a judge a court. *** A court is defined as a place in which justice is judicially determined." The Supreme Court of the United States, in citing with approval the decision in the Clark case, supra, said in Todd v. United States, 158 U.S. 278, 284, "The statute does not punish every perjury but only a perjury done in a court of the United States."

I am of the opinion that neither of the above cited cases have any direct bearing on the validity of the specifications herein, for the specifications under consideration each allege that the false oath was given "before an investigating officer, 2nd Lt. Rodney R. Confer, a competent officer." Of course an investigating officer is an officer detailed to conduct an investigation, otherwise, he is merely an officer. And the allegation of competence is patent. To say that these pleadings are fatally defective because they fail to allege that Lieutenant Confer was detailed as investigating officer, and that the oath was given during the course of the alleged investigation, in my opinion, unnecessarily and unreasonably tortures the plain language and import of the pleadings. But if such super refinements in pleading were ever required at common law they have been eliminated by 18 U.S.C. 558 and more particularly by paragraph 87b, MCM, 1928, providing that:

"*** 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. ***" (p. 74).

It will also be noted that the specifications herein follow very literally the Form No. 96 set forth on page 250, MCM, 1928, denouncing perjury. I am therefore of the opinion that each specification to the Additional Charge alleges false swearing in violation of Article of War 96 (par 152c, p 191, MCM 1928), and it is unnecessary to determine whether the investigation was a "course of justice" so as to bring the offense within the purview of common law perjury. (See also CM 198262, Miller, 3 BR 223, 225, holding that the giving of false testimony before an administrative board not authorized by a law of the United States to examine witnesses under oath is, depending upon the circumstances, prejudicial to good order and military discipline or conduct of a nature to bring discredit upon the military service, and punishable under Article of War 96 as a lesser offense to perjury denounced under Article of War 93.)

With respect to the proof adduced to sustain the findings of guilty of the additional charges and specifications, there was received in evidence, without objection, the sworn statement of each accused as follows:

"HEADQUARTERS, 1ST MEDICAL SQUADRON
APO 201

Camp Drake (Tokyo) Japan
14 April 1947

S T A T E M E N T

"Personally appeared before me, the undersigned authority for administering oaths in cases of this character, PFC, JOHN E McCARTHY, RA 37 897 295, Troop 'A', 1st Medical Squadron, APO 201, who, having been warned of his rights under the 24th Article of War, and having been duly sworn according to law, deposes and says as follows:

"Pvt LoBORDE and I came from Tokyo on the train to Asaka Train Station, got off the train and walked into Camp to our Troop. We went to the kitchen where Tec 5, HERKERT and Pfc GUIDO were baking pie. We went into see if we could get something to eat, this was around 10 o'clock. From the kitchen we went to the latrine where we met Pfc LESTER SOUTHERN and talked to him a little. Then we decided to go outside the gate of Camp and fool around. We were walking up this road when a jeep came down the road and turned down this road we were on, we thought it was the MP's so we stepped off the road by some trees and bushes. The jeep stopped and shut off his lights and whoever was in the jeep took off we stepped out, walked past the jeep and were about 15 feet or so from it. The MP's came up and stopped us and asked us where we were going, we said we were out fooling around. They asked us where the trip ticket was to that jeep, we said we didn't know that we didn't have the jeep. They said

come on and made us get in and they started the jeep and took us up to MP Headquarters and they made out papers on us. We were locked up in the stockade overnight and the O.D. from our Squadron came over and got us out the next morning. We have been under arrest of quarters since.

"I swear that this statement is true.

"Further deponent sayeth not.

/s/ John E. McCarthy
JOHN E McCARTHY - RA 37 897 295
PFC, Troop "A", 1st Med. Sq.

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 14 DAY OF APRIL 1947.

/s/ Rodney R. Confer

RODNEY R CONFER
2nd Lt., Cav.
Investigating Officer"

(Exhibit "A")

"HEADQUARTERS, 1ST MEDICAL SQUADRON
APO 201

Camp Drake (Tokyo) Japan
14 April 1947

S T A T E M E N T

"Personally appeared before me, the undersigned authority for administering oaths in cases of this character, Pvt. GERRARD A LaBORDE, RA 38 659 887, Troop 'A', 1st Medical Squadron, APO 201, who, having been warned of his rights under the 24th Article of War, and having been duly sworn according to law, deposes and says as follows:

"After we came back from town we came to Camp and went to the kitchen and asked the boy in the kitchen for something to eat and he told us he didn't have anything left. So we went to the latrine. Then we went out of the gate to find some girls. We were standing up by the road and we saw a jeep coming down the road so we got on the side. We thought it was the M.P.'s but it wasn't. I don't know where the guy went that got out of the jeep but when we got to the jeep the M.P. came up to us.

"When we started to walk off, he told us to stop. When we did he told us to get in the jeep. Then they brought us to camp.

"We got to Camp about 21:43 or 22:00, that was before the M.P. got us.

"Further deponent sayeth not.

GERARD A LaBORDE RA 38 659 887
Pvt, Troop 'A', 1st Med. Sq.

/s/ Gerard LaBorde

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 14 DAY OF APRIL 1947.

/s/ Rodney R. Confer

RODNEY R CONFER
2nd Lt., Cav.
Investigating Officer" (Exhibit "B")

The proof required to establish the offense of false swearing is as follows:

"(a) that accused was sworn in a proceeding or made an oath to an affidavit; (b) that such oath was administered by a person having authority to do so; (c) that the testimony given or the matter in the affidavit was false, as alleged and (d) the facts and circumstances indicating that such false testimony or affidavit was willfully and corruptly given or made." (MCM, 1928, par 152c).

It is alleged that each accused falsely swore "*** in substance that he was not in the 1/4 ton truck when it drove up, and that he was not in possession of said 1/4 ton truck ***." The prosecution's witnesses testified that on the occasion in question the accused were seen in an "RAAF" jeep near gate 5 at Camp Drake and that they dismounted and started down a road. Shortly thereafter they were apprehended by the military police who took them to the operations office. Statements made by the accused to the military police on the occasion in question, 29 March 1947, whether true or false, cannot form the basis of the "false oath" to Lieutenant Confer on 14 April 1947. It may be assumed that on the former occasion they stated to the military police that they had not been in the jeep and did not have possession of it. But neither affiant stated to Lieutenant Confer, in words or substance, "that he was not in the 1/4 ton truck when it drove up, and that he was not in possession of said 1/4 ton truck." Each recited circumstances which might convey the impression that the person or persons in the jeep were other than the accused but they merely failed to make a full and complete disclosure to Lieutenant Confer whether they had been riding in the jeep. Failure to make a full and complete disclosure is not tantamount to making specified and particularized false statements (CM 245866, Wallis, 29 BR 317,322). In the present

case, although the accused could not, at one and the same time, be standing by the road when a jeep approached and be inside of the jeep, yet they could experience both situations at comparatively short intervals of time. The statements are obviously too vague and indefinite as to time, place and identity of the vehicle as to allow a determination that they are false without resorting to pure conjecture. Findings of guilty cannot be premised upon suspicion or probabilities but can only be sustained if the evidence, whether direct or circumstantial, is such as to exclude every reasonable hypothesis except that of accused's guilt (CM 314174, Agens, 64 BR 39,41; CM 314758, Bickham). The findings of guilty of the Additional Charge and its specification as to each accused fail therefore for lack of substantial proof of the falsity of the sworn statements.

For the foregoing reasons, I conclude, as did my brethren, that the record of trial is legally insufficient to support the findings of guilty of the additional charge and its specification as to each accused; legally sufficient to support the findings of guilty of the original charge and its specification, and legally sufficient to support only so much of the sentence as to each accused as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

Robert T. Bilbo, Judge Advocate

JAGK - CM 326039 1st Ind MAY 2 0 1948

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat 732) is the record of trial in the case of Private First Class John E. McCarthy (RA 37897295) and Private Girard A. LaBorde (RA 38659887), both Troop A, 1st Medical Squadron, 1st Cavalry Division.

2. Upon trial by general court-martial the accused were found guilty of wrongfully taking and carrying away one 1/4 ton truck, property of the Royal Australian Air Force, in violation of Article of War 96 (Chg and Spec) and of perjury (or false swearing) before an investigating officer in violation of Article of War 93 (Add'l Chg and Spec). Each was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six years. The reviewing authority approved the sentence as to each accused and ordered them duly executed, but suspended the execution of the dishonorable discharge as to each until the soldier's release from confinement. He designated the U. S. Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 64, Headquarters First Cavalry Division, APO 201, Camp Drake (Tokyo), Japan, dated 20 September 1947.

3. Two members of the Board of Review are of the opinion that the specification to the Additional Charge, as to each accused, fails to allege an offense, and that the record of trial does not support the findings of guilty of this charge and specification. In his dissent the third member of the Board expresses the opinion that each specification sufficiently alleges false swearing in violation of Article of War 96, a lesser included offense to perjury as denounced under Article of War 93, but that the proof fails to show that the accused made the false oaths alleged. For the reasons stated in the dissent I concur in the opinion of the Board that the record is legally insufficient to support the findings of guilty of the Additional Charge and its specification as to each accused.

With respect to the Charge and its specification alleging the wrongful taking and carrying away of a motor vehicle, the Board of Review is of the opinion that the specification alleges no more than disorderly conduct punishable by a maximum sentence of confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. I do not concur in the opinion of the Board in this regard. The decision

turns on what is considered the proper manner of alleging the offense commonly referred to as "joy riding" (Sec. 22-2204, Code of the Dist. of Col.). At the time of this trial and in accordance with prior standing instructions from this office, pleading containing the phrase "take and use without the consent of the owner" was construed in the military service as sufficient to denounce the offense of "joy riding" as defined by the District of Columbia Code, for which a sentence including confinement for five years is authorized. Subsequent to the trial of accused a more restrictive definition of this offense was considered preferable and the various commands were advised by this office to follow a form of specification which included the words "feloniously" and "for his own use and benefit," and in the light of the restrictive definition and prescribed form of pleading offenses as herein pleaded have recently been treated as mere disorders (CM 329178, Evans; CM 329200, Staley). These holdings are not controlling here. I am of the opinion that in this case accused were fully apprised that the offense intended to be charged was that of "joy riding" as denounced by the Code and that confinement at hard labor up to five years is legally authorized.

It may be observed that the acts of the accused consisted in the unauthorized taking of a vehicle from its parking place near a night club in Tokyo and driving it, for a very short period, to Camp Drake, a comparatively short distance. Accused have served almost one year of the confinement imposed.

I recommend that the findings of guilty of the Additional Charge and its specification as to each accused be vacated; that so much of the sentence as to each accused as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years be vacated, and that all rights, privileges and property of which the accused have been deprived by virtue of those portions of the findings and sentence so vacated be restored. In view of the minor nature of the offense of which accused were properly convicted, I further recommend that the period of confinement in each case be reduced to 18 months.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 116, 2 June 1948).

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

JAGN-CM 326116

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Otsu, Honshu, Japan, 10
Private STEPHEN S. NETROYE	)	September 1947. Dishonorable
(12077176), Company F,	)	discharge and confinement for
35th Infantry Regiment.	)	three (3) months. Post Stockade.

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private Stephen S Netroye, Company F, 35th Infantry, did, at Otsu, Honshu, Japan, on or about 14 August 1947, wrongfully enter an off limits area, to wit: A Japanese trolley car.

Charge II: Violation of the 61st Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 2 of Charge I and Charge I, and not guilty of all other Charges and Specifications. Evidence of five

previous convictions having been introduced, accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three months. The reviewing authority approved the sentence, designated the 25th Infantry Division Stockade as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. It is clearly established by the evidence contained in the record of trial that on 14 August 1947, at about 1945 hours, accused was sitting on the floor of a Japanese trolley car near Otsu, Japan (R. 5, 7, 8). The only question to be determined is whether there is sufficient legal evidence in the record of trial to sustain the finding of the court that such trolley car was "an off limits area," as alleged.

The only evidence in the record which might reasonably be construed as tending to establish such fact is hereinafter set out in full.

Private Albert Merenstein, a witness for the prosecution, testified:

"Q. Was this car marked in any way?
A. Yes, sir.

Q. In what way?
A. The sign on the front door said, 'Off limits to Occupation Forces.'

* * *

Q. How did you identify it as and off limits trolley?
A. As soon as I went in the trolley car there was a white sign saying, 'Off Limits to Occupation Forces'" (R. 5-6).

Private First Class Carl L. H. Harris, a witness for the prosecution, testified:

"Q. Was the trolley marked in any way?
A. Yes, sir, Off Limits" (R. 7).

The accused elected to make an unsworn statement, in pertinent part, as follows:

"* * * we were headed for Service Area. When I approached the trolley I didn't think it was off limits as I had seen GI's ride on it before. When I got on the conductor told me that I would get off at the next station. At the next station the MP's took me off the trolley * * *" (R. 8).

4. Since the "wrongful" nature of accused's act is not otherwise alleged or proven it appears that the essence of the offense alleged is that accused, in entering the trolley car, violated an order by competent authority prohibiting such entry by him. In order that a finding of guilty can be sustained it must appear from the evidence in the record of trial that there was such an order and that accused, at the time of his entry, knew or should have known of its terms (see par. 134b, MCM, 1928). The evidence in this record only establishes that there was at least one sign, posted somewhere on the trolley car, stating "Off Limits to Occupation Forces." From the testimony that accused, when apprehended, was seated on the floor of the car, coupled with the negative pregnant contained in his unsworn statement, it might be reasonably inferred that accused knew of the existence of the sign at least sometime prior to his apprehension, but there is no evidence to establish the essential fact that the sign constituted a lawful order promulgated by competent authority. In the absence of such proof the findings of guilty of Charge I and of Specification 2 thereof, cannot be sustained (CM 321838, Omufryk et al, (1947)).

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

Edward J. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

Joseph J. Busick, Judge Advocate.

JAGN - CM 326116 1st Ind

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 Stephen S. Netroye (12077176), Company F, 35th Infantry Regiment, I concur in the 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 326116)

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.

JAGV - CM 326119

19 DEC 1947

UNITED STATES v. General Prisoner ROBERT J. BARKER (33945044), formerly 25th Military Police Platoon, 25th Infantry Division.	25TH INFANTRY DIVISION Trial by G.C.M., convened at Honshu, Japan, 7 August 1947. Dishonorable discharge and confinement for five (5) years. Penitentiary. (Dishonorable discharge executed on previous court-martial).

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Robert J. Barker, 25th Military Police Platoon, 25th Infantry Division, APO 25, did, acting in conjunction with Private Robert E. Gibson, Company H, 35th Infantry, on or about 15 June 1947 at the 25th Infantry Division Stockade, Osaka, Honshu, Japan, attempt to commit a felony, to wit, sodomy.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions was introduced, only one of which was admissible. 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 years. The dishonorable discharge of the accused having been executed by reason of a sentence resulting from a previous trial by a general court-martial, the reviewing authority approved the sentence except for that portion adjudging dishonorable discharge, directed its execution and designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War may direct, as the place of confinement. The sentence was published in General Court-Martial Orders No. 88, Headquarters 25th Infantry Division, 13 September 1947.

3. The only questions requiring consideration in the present case concern the legality of the sentence and the designation of the United States Penitentiary as the place of confinement.

4. The offense of an attempt to commit sodomy is not listed in the table of maximum punishments (par 104c, MCM, 1928). The offense of sodomy is listed in the table of maximum punishments in which it is stated that the maximum limit of punishment is confinement for five years.

Paragraph 104c, MCM, 1928, provides in part:

> "The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed. Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service." (Underscoring supplied).

It has been held that Sec 22-103, District of Columbia Code (1940 Edition), providing that an attempt is punishable by confinement for not more than one year, is not applicable and, since the offense of an attempt to commit sodomy is not listed in the table referred to and is included in and closely related to the offense of sodomy, it is punishable as for sodomy. (CM 192456, Ciambrone, 1 BR 369; CM 196922, Killalea; CM 209651, Palmer, 9 BR 121; CM 212056, Smith, 10 BR 199; CM 218818, Artibee, 12 BR 153; CM 227873, Royster, 16 BR 1).

5. Article of War 42 provides:

> "Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also the period of confinement authorized and adjudged by such court-martial is more than one year * * *."

There is no statute of the United States of general application, nor is there a statute for the District of Columbia, providing a penalty of confinement for more than one year for an attempt to commit a criminal offense. It follows that a penitentiary cannot be designated as the place of confinement for an attempt to commit sodomy. (CM 212056, Smith, 10 BR 199; CM 218818, Artibee, 12 BR 153; CM 227873, Royster, 16 BR 1, supra).

6. It is of no consequence that the accused was a general prisoner under a legal sentence for escape and robbery promulgated by No. 69, GCMO, Headquarters 25th Infantry Division, 7 July 1947, wherein a penitentiary was properly designated as the place of confinement. The fact that accused was a general prisoner under such a sentence of confinement in a penitentiary

as a result of a conviction for an independent offense in an independent proceeding does not authorize confinement in a penitentiary upon a subsequent conviction of a separate offense for which penitentiary confinement is not otherwise authorized (CM 215729, Lamons, 11 BR 29; CM 240973, Allen, 26 BR 179). In the case last cited the Board of Review stated:

> "Article of War 42, in paragraph 90, Manual for Courts-Martial, 1928, authorizes confinement in a penitentiary for several offenses, one of which may be punished by such confinement, only where the various convictions are the result of a single trial. The fact that a man had been previously legally sentenced to confinement in a penitentiary does not authorize the designation of a penitentiary as the place of confinement upon a subsequent conviction for an offense not otherwise so punishable, CM 143326, 1921."

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

Wilmot T. Baughn, Judge Advocate

George S. Springston, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGV - CM 326119 1st Ind

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 General Prisoner Robert J. Barker (33945044), formerly 25th Military Police Platoon, 25th Infantry Division, I concur in the foregoing holding by the Board of Review and recommend that a place of confinement other than a penitentiary, Federal reformatory or correctional institution be designated. Upon taking such action you will have authority to order execution of the sentence as thus modified.

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

(CM 326119)

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 326143

NOV 5 1947

UNITED STATES v. Second Lieutenant WILLIAM E. GAHAGAN (0-1824298), Headquarters, Reserve Command, 3rd Armored Division, Fort Knox, Kentucky.	THE ARMORED CENTER Trial by G.C.M., convened at Fort Knox, Kentucky, 24 September 1947. Dismissal and confinement for six (6) months. Post Guardhouse.

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 by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that 2nd Lieutenant William E. Gahagan, Headquarters Reserve Command, 3d Armored Division, Fort Knox, Kentucky, formerly of Headquarters 71st Training Battalion, Replacement Training Center, Fort Knox, Kentucky, did, without proper leave, absent himself from his command at Fort Knox, Kentucky from about 14 May 1947 to about 16 June 1947.

Specification 2: In that 2nd Lieutenant William E. Gahagan, Headquarters Reserve Command, 3d Armored Division, Fort Knox, Kentucky, formerly of Headquarters 71st Training Battalion, Replacement Training Center, Fort Knox, Kentucky, did, without proper leave, absent himself from his command at Fort Knox, Kentucky from about 7 July 1947 to about 15 August 1947.

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

Specification: In that 2nd Lieutenant William E. Gahagan, Headquarters Reserve Command, 3d Armored Division, Fort Knox, Kentucky, having been duly placed in arrest in quarters, on or about 20 June 1947, did, at Fort Knox, Kentucky, on or about 7 July 1947, break his said arrest before he was set at liberty by proper authority.

Accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence, designated the Post Guardhouse, Fort Knox, Kentucky, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 48.

3. On 15 May 1947, accused absented himself without leave from his organization at Fort Knox, Kentucky (Ex. 1), and remained in that status until he returned to military control at Pittsburgh, Pennsylvania, on 16 June 1947 (Ex. 2). He was placed in arrest in quarters at Fort Knox on 20 June 1947 (Ex. 3). On 7 July 1947, he breached this arrest and again went absent without leave (Exs. 4 and 5), and returned to military control at Philadelphia, Pennsylvania, on 15 August 1947 (Ex. 6).

4. After being advised of his rights as a witness, accused was sworn and testified as follows: He was inducted in 1942 and commissioned a Second Lieutenant in the Spring of 1943 (R. 22-23). He admitted both unauthorized absences and the breach of arrest as alleged (R. 28) and related a long, involved story as to the reasons he considered it necessary for him to commit these offenses. Part of his testimony related to his sick wife who had two miscarriages, part involved his semi-invalid sister who became pregnant by a married man, and a portion related to overpayments he had received from the Army (R. 25-28). The wrong suffered by his sister preyed especially on his mind and at the time of trial, accused still felt that the only solution was for him to go out and kill the man responsible therefor (R. 30, 46), even though he knew such action would be wrong (R. 30, 46). His testimony was "I will get hung before I let those things go on" (R. 30).

First Lieutenant Robert V. Fitzgerald, Neuropsychiatrist, Station Hospital, Fort Knox, Kentucky, testified that he examined accused for a week in June and for two weeks in September 1947. He found that accused was sane but that "he is ill-equipped to meet life's difficulties because

of a personal disorder" (R. 32). His ability to resist an impulse is impaired but not completely absent (R. 38).

In rebuttal, the prosecution offered a witness who had worked with accused for four or five months and found that "accused was likeable, congenial, and got along well with enlisted men" (R. 58).

5. The two unauthorized absences and the breach of arrest were established by extract copies of morning reports, the testimony of the Officer of the Day and another officer, and the admissions made by accused while on the witness stand.

Accused's defense of insanity on the theory of "irresistible impulse" was supported by accused's own testimony but was contradicted by his own expert witness, the neuropsychiatrist at the Fort Knox Station Hospital. The testimony of accused alone does not raise a reasonable doubt as to accused's mental condition and the court's findings of guilty show that it did not have any reasonable doubt as to accused's mental responsibility for the offenses charged.

6. Department of the Army records show this officer is 39 years of age and married. He did not attend high school and enlisted in the Regular Army 10 June 1926. He was separated from the service 18 November 1926 on account of minority. He again entered the service 9 March 1942 and was commissioned a second lieutenant in March 1943. He served with the 808th Tank Destroyer Battalion, 65th Infantry Division in the European Theatre and was awarded the Bronze Star Medal on 9 June 1945 for participation in military operations against the enemy. He was relieved from active duty 6 March 1946 and recalled at his own request 17 October 1946. His efficiency reports show ratings of 3.2, 4.7 and 1.0.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized for conviction of a violation of Articles of War 61 and 69.

O H Johnson Jr, Judge Advocate

On Leave, Judge Advocate

A D Kane, Judge Advocate

JAGQ - CM 326143 1st Ind

JAGO, Dept of the Army, Washington 25, D. C. NOV 19 1947

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William E. Gahagan (0-1824298), Headquarters, Reserve Command, 3rd Armored Division, Fort Knox, Kentucky.

2. Upon trial by general court-martial, this officer was found guilty of two offenses of absence without leave (Specs. 1 and 2, Charge I), in violation of Article of War 61, and of breach of arrest (Spec., Charge II), in violation of Article of War 69. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence, designated the Post Guardhouse, Fort Knox, Kentucky, as the place of confinement, and forwarded the record of trial pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that accused absented himself without leave from his organization at Fort Knox, Kentucky, on 15 May 1947 and remained in that status until he returned to military control at Pittsburgh, Pennsylvania, on 16 June 1947. He was placed in arrest in quarters at Fort Knox on 20 June and on 7 July he breached the arrest and again went absent without leave. He returned to military control at Philadelphia, Pennsylvania on 15 August 1947.

Accused testified that he went absent without leave on both occasions and broke his arrest for the reasons that his wife was sick and that his semi-invalid sister was pregnant by a married man, which preyed on his mind and he felt that the only solution was for him to find the man responsible for his sister's condition and kill him.

The neuropsychiatrist, Station Hospital, Fort Knox, Kentucky, testified that he had examined the accused in June and September 1947,

and found him mentally capable of distinguishing right from wrong and of adhering to the right, but "ill-equipped to meet life's difficulties because of a personal disorder".

5. Department of the Army records show this officer is 39 years of age and married. He did not attend high school and enlisted in the Regular Army 10 June 1926. He was separated from the service 18 November 1926 on account of minority. He again entered the service 9 March 1942 and was commissioned a second lieutenant in March 1943. He served with the 808th Tank Destroyer Battalion, 65th Infantry Division in the European Theatre and was awarded the Bronze Star Medal on 9 June 1945 for participation in military operations against the enemy. He was relieved from active duty 6 March 1946 and recalled at his own request 17 October 1946. His efficiency reports show ratings of 3.2, 4.7 and 1.0.

6. I recommend that the sentence be confirmed but that the forfeitures and confinement imposed be remitted and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 68, 2 Dec 1947).

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

(159)

JAGK - CM 326147

17 DEC 1947

UNITED STATES)	UNITED STATES AIR FORCES IN EUROPE
)	
v.)	Trial by G.C.M., convened at Bad Kissingen, Germany, 18,19,20,21 August 1947. Dismissal, total forfeitures and confinement for one year.
Captain GEORGE E. NAGLE (0-332177), Air Corps)	

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

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

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

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

Specification 1: In that Captain George E. Nagle, Headquarters and Headquarters Squadron, XII Tactical Air Command, APO 62, US Army, did, at Charleroi, Belgium, on or about 14 February 1946, wrongfully and unlawfully enter into a marriage contract with Ugolina Anna Monti, a person other than his living legal spouse, whom he had married at Miami, Dade County, Florida, on or about 31 October 1942.

Specification 2: (Finding of not guilty).

Specification 3: In that Captain George E. Nagle, Headquarters and Headquarters Squadron, XII Tactical Air Command, APO 62, US Army, did, at Bad Kissingen, Germany, APO 62, US Army, on or about 4 May 1946, wrongfully and with intent to deceive the Community Commander, Bad Kissingen Military Community, personally sign a document, to wit:

(Front)
BAD KISSINGEN MILITARY COMMUNITY
DEPENDENTS PASS No. 49
NAME ... Mrs George E. Nagle
HEAD OF FAMILY ... Capt George E. Nagle
(Rank) (Name)
(PHOTOGRAPH) UNIT ... XII TAC
TELEPHONE ... 2017
RELATIONSHIP ... Wife
Not

GEORGE E NAGLE
USA 49

AUTH TO DRIVE
CIV VEHICLE NO.
EXPIRES... 1 Jan 1947

(Back)
AUTH FOR USE ONLY BY PERSON NAMED ON FRONT NON-TRANSFERABLE. MISUSE OR ABUSE OF PRIVILEGE WILL CAUSE SUMMARY FORFEITURE.

BY ORDER OF COMMUNITY COMMANDER:

4 May 1946 (Date) s/ E.D. TUTTLE
Capt, CMP
(Provost Marshall)

My dependent and I understand and agree to abide by all regulations governing dependents in this Community. I am responsible personally and financially for activities of any dependent of this family.

s/ GEORGE E. NAGLE
Capt, JAGD
(Head of Family)

which said document was, as he then well knew, false as to material information contained thereon.

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

NOTE: The three specifications under this charge are identical with the three specifications under Charge I.

Accused refused to plead to the charges and specifications and the trial proceeded after the law member stated that the record should indicate that the court entered a plea of not guilty for the accused on all charges and specifications. The court found the accused not guilty of Specification 2 under Charge I and Specification 2 under Charge II, but guilty of all other specifications and guilty of each charge. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and forwarded the record of trial under Article of War 48 with a recommendation that in event the sentence was confirmed "the unexecuted portion of the sentence relating to confinement at hard labor be remitted."

3. Evidence for the Prosecution

Prosecution Exhibit 2 was admitted in evidence without objection. This exhibit consisted of an exemplified copy of a marriage license and a certificate of marriage taken from the records of the County Judge Court, Dade County, Florida, and duly certified by the judge of the County Judge's Court and the clerk of the County Judge's Court of Dade County, Florida. The license, dated 30 October 1942, authorized a marriage between George E. Nagle and Angela Iturralde. The certificate of marriage shows a marriage between George E. Nagle and Angela Iturralde on 31 October 1942 at Miami, Florida. The original record from which this copy was taken is recorded in Marriage Book 42, page 179, in the Office of the County Judge of Dade County, Florida (R 32,33, Pros. Ex 2).

On 14 February 1946, George Edward Nagle and Ugolina Monti were married at the town hall, Charleroi, Belgium. Roger Barbier, a Belgian national, testified, by deposition, that he witnessed the marriage between George Edward Nagle and Ugolina Monti and that he was present at the request of the accused (Pros Ex 3).

Hermand Escormure of Charleroi, Belgium, testified by deposition that he was the alderman and registrar of vital statistics for the City of Charleroi. The Belgian law requires that all marriages be registered. He is the official custodian of the "recorded marriage ceremonies." Prosecution Exhibit 1 is a copy of a marriage certificate,which copy is signed by the witness. The original certificate was on file in his office and in his custody. This certificate shows a civil marriage between George Edward Nagle and Ugolina Anna Monti (Pros Ex 4).

Prosecution Exhibit 1 was received in evidence over the objection of defense that it was a copy, not the best evidence and obtained by information obtained by an unlawful search and seizure. This exhibit purports to be a duly certified and authenticated copy of the marriage certificate identified by Hermand Escormure.

During February 1946 the accused made a trip to Belgium. Before leaving on this trip the accused told Mr. Edward McGrath that "he was going to try to marry Lina while there." When the accused returned from Belgium he showed Mr. McGrath "a marriage certificate and stated that he had been married by a Belgian registrar." Mr. McGrath asked the accused about his wife in the States and the accused replied that he would get Lina home and straighten things out some way (R 72,73).

Lieutenant Colonel Melvin Hollidge, Air Inspector for the XII Tactical Air Command, testified that in May 1947, on orders of the Commanding General, he conducted an investigation relating to the marital status of the accused. The accused was warned of his rights under the 24th Article of War, at which time he stated that he was familiar with the Article. During this investigation the accused stated that he was married and that his wife resided in Cuba. Her name was Iturralde (R 58,59).

On 30 April or 1 May 1947 the accused and Lina Monti were in Colonel Hollidge's office. Colonel Hollidge directed Major Ford of his office to request the CID agents to secure certain papers pertaining to the accused. Colonel Hollidge wanted these papers in connection with the investigation (R 76,77).

Andrew L. Lexa, a special agent of the CIC, received a request to "locate the residence of Lina Monti and if possible to obtain a marriage certificate. Agent Lexa and Agent John Pore, accompanied by two other CIC agents and a military policeman went to Lina Monti's residence located at 4 Schloss Strasse, Bad Kissingen, Germany, but she was not at home. Agent Pore talked to a sister of Lina Monti and asked her for Lina's marriage certificate. The sister secured the document and delivered it to him. He asked her if she wanted a receipt and she replied, "No" (R 78,79,86-91). This marriage certificate was offered in evidence as Prosecution Exhibit 10. The defense objected to the introduction of this exhibit upon the grounds that it had been obtained by an illegal search and seizure. In support of this objection the defense called Ugolina Monti as a witness and she testified that she lived at No. 4 Schloss Strasse. The marriage certificate (Pros Ex 10) is the property of the accused. This certificate was at 4 Schloss Strasse the day she went to the Air Inspector's Office. The Air Inspector asked her address, after which he gave a note to a major. Upon leaving the Air Inspector's Office "we went to the house at 4 Schloss Strasse and five men had come and got the papers" (R 92). Eugene Pontura testified that about the last of April 1947 the accused rented a room at her house located at No. 4 Schloss Strasse. This room was for Lina Monti's use. The accused paid the rent. When the five men came for the papers two men remained in the kitchen with her and three men went with "the sister" (R 80-83).

Prosecution Exhibit 10 was received in evidence and by stipulation this exhibit was withdrawn and a translation of page 3 thereof was substituted in lieu thereof (R 128). This exhibit is a certificate of a marriage between George Edward Nagle and Ugolina Anna Monti performed at the town hall of the City of Charleroi on 14 February 1946. The certificate was made by the "registrar" of the City of Charleroi.

Mrs. Angela Iturralde Nagle testified, by deposition taken on 3 July 1947, that she resides in Havana, Cuba. She married Captain George E. Nagle in October 1942 and has been known as Mrs. Nagle since that time (R 52, Pros Ex 5). The defense objected to this deposition and moved to strike it on the ground that Mrs. Nagle could not be a witness against her husband. This motion was denied (R 52).

It was stipulated that WDAAF Form 128 Personal Affairs Statement, dated 19 September 1947, contained a true signature of the accused (Pros Ex 7). This form was introduced as Prosecution Exhibit 8 and

shows Angela Nagle of Havana, Cuba, as the wife of accused. It also shows a Class E Allotment of $150.00 to Mrs. George E. Nagle, Havana, Cuba.

First Lieutenant Dan Moyer, Finance Department, identified War Department Finance Department Form 3 as being a pay card pertaining to the accused. This card and the information appearing thereon was required to be kept by regulations. This card was admitted in evidence as Prosecution Exhibit No. 9 (R 63-65). This exhibit shows among other things: (1) Angela Nagle as wife of accused, (2) that accused drew pay for the period of January through August 1946, (3) a Class E Allotment of $150.00.

Edward Donald Tuttle, Group A, Civilian Censorship Division, APO 407, testified that in 1946 he was a captain in the Army of the United States and Provost Marshal of the s tation in Bad Kissingen, Germany. His duties included issuing passes for "indigenous employees and dependents." Passes for dependents were issued upon application by the head of a family and proof of dependency. The pass form was prepared and the dependent then appeared for the purpose of being photographed. The photograph of the dependent was attached to the pass, after which it was signed by the Provost Marshal for the community commander and by the head of the family applying for the pass. Prosecution Exhibit 11 is dependents pass No. 49 issued on 4 May 1946. This pass bears the signature of Captain Tuttle as provost marshal and the signature of the accused as the head of the family (R 112, Pros Exs 11 and 15). The photograph on this pass is that of a woman who is designated as Mrs. George E. Nagle.

Station Regulation 210-1, 15 April 1946, entitled "Military Community, Bad Kissingen General" was received in evidence as Prosecution Exhibit 16. It was stipulated that this regulation was a regulation of the command. Paragraph 5b of this regulation requires dependents to carry local identification cards.

Frau Hampel, housekeeper at the Wirsing Hotel, testified that the accused occupied Room 23 of the hotel from 23 February 1946 to 1 June 1947. She saw Lina Monti in the accused's room in the hotel "many times." She identified Prosecution Exhibit 11 as a pass shown to her by Lina Monti (R 101).

4. For the Defense

The defense offered no evidence relative to Specification 1 of each charge. Inasmuch as the accused was found not guilty of Specification 2 of each charge the evidence relating to this offense will be omitted.

Edward McGrath, formerly a first lieutenant in the United States Army, but now a civilian employee of the Army, testified that he reported for duty at Bad Kissingen about 24 April 1946. Colonel Turner was the commanding officer. About the end of the year 1946 and in December 1946 or

January 1947 he was present at Colonel Turner's house for dinner. Eight people were present on this occasion including the accused and Lina Monti. During the evening -

> "Captain Nagle, I and the Colonel, and sat around and talked. The conversation went along the lines of *** who was courting whom, and discussed most every one we knew, including ourselves." (R 135)

> "We were talking, sir, about the irregularities on the station as far as social life was concerned, in respect to what was going on with frauleins, that is the way the conversation came up and we went down the list in an informal way and I think then, I am quite sure that was the way Captain Nagle's and Lina's status came in. George planned a trip to Belgium with Lina. Believe they were talking about getting in, getting over the border, and in and out of Belgium, I believe. The conversation got around to their marital status, or lack of it.
> "Q. What was said about the marital status?
> "A. I believe the colonel mentioned inasmuch as they weren't, did he encounter any difficulty getting over the border and back again." (R 137)

Mr. McGrath identified Prosecution Exhibit 11 as a pass shown to him by the accused on 4 May 1946 at which time the accused "said it was from Captain Tuttle's office and he needed the pass for Lina and showed it to me" (R 138).

A citation awarding the accused the Army Commendation Ribbon for meritorious service as Assistant Staff Judge Advocate XII Tactical Air Command from 1 November 1945 to 25 August 1946 was introduced as Defense Exhibit B (R 140).

The accused was warned of his rights as a witness and elected to remain silent (R 141).

5. Miscellaneous Matters

Jurisdiction over the accused

The accused entered a plea to the jurisdiction of the court claiming that the National Security Act of 1947 (Public Law 253, 80th Congress, approved 26 July 1947) established a separate air force and for that reason the members of the Air Forces are not subject to the Articles of War. The court overruled this plea (R 11).

The National Security Act of 1947 became effective on 18 September 1947. The court which tried the accused was appointed by paragraph 19,

Special Orders No. 65, Headquarters United States Air Forces in Europe, 7 March 1947. The sentence was adjudged on 21 August 1947. The reviewing authority approved the sentence on 9 October 1947. The plea to the jurisdiction of the court was therefore premature but we deem it necessary to discuss the matters of jurisdiction because the National Security Act became effective prior to the approval of the sentence by the reviewing authority.

Article of War 2 (a) provides that "All officers, *** warrant officers, *** and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service ***" are subject to the Articles of War. It is to be noticed that Congress found it necessary to specifically exempt persons under the "Naval Jurisdiction" from the operation of this Article, with certain exceptions not here material.

In Section 201 (b) of the National Security Act it is provided that "The National Military Establishment shall consist of the Department of the Army, the Department of the Navy, and the Department of the Air Force ***." Section 207 (a) provides that "Within the National Military Establishment there is hereby established an executive department to be known as the Department of the Air Force ***." And Section 208 (c) of the act, after transferring Air Corps and Army Air Forces personnel to the new Air Force and continuing under the jurisdiction of the Air Force other personnel now under the authority of the Army Air Forces, provides that "Personnel whose status is affected by this subsection shall retain their existing commissions, warrants, or enlisted status in existing components of the armed forces unless otherwise altered or terminated in accordance with existing law; and they shall not be deemed to have been appointed to a new or different office or grade, or to have vacated their permanent or temporary appointments in an existing component of the armed forces, solely by virtue of a change of status under this subsection ***." It is significant that no new body of law was enacted for the discipline of the Air Force nor were its personnel declared not subject to the Articles of War. It is therefore considered to be the plain intendment of Congress that personnel of the newly created Air Force are to be treated as members of the "military service" within the meaning of that term in Article of War 2. In a sense, as far as military jurisdiction is concerned, the term "military service" may be considered as synonymous with the term "military establishment," except insofar as naval and marine personnel are expressly excepted from such jurisdiction. And this is so without regard as to whether personnel of the Air Force are "transferred" thereto or "continued under the jurisdiction" thereof, for in either case such personnel had been volunteers or had been lawfully called, drafted, or ordered into or to duty in the "military service," where they still remain. The legal nature of their contract (or status) is not changed,

for Section 208(c) also provides that "No such change in status shall alter or prejudice the status of any individual so assigned, so as to deprive him of any right, benefit, or privilege to which he may be entitled under existing law." As far as the legal rights (as distinguished from functions) of any individual assigned to the Air Force from the Army are concerned, the change effected by the statute is merely one of redesignation of title, or reassignment within the military service. (See also Sec. 305(a).) It is apparent, from the above discussion, that one who volunteers in the Air Force after the act goes into effect will likewise be subject to the Articles of War.

From what we have said above concerning the interchangeability of the words "military establishment" and "military service," there seems to be no legal reason why an appropriate Air Force officer may not be considered a commanding officer of "any district or of any force or body of troops" within the meaning of Article of War 8, providing for the appointment of general courts-martial, or why he may not fall within the categories described in Articles of War 9 and 10, providing for the appointment of special and summary courts-martial, respectively.

Article of War 50½ provides for the appellate review of general court-martial cases by the Board of Review (in some cases by The Judge Advocate General's Office - Military Justice Division) and The Judge Advocate General. Under the National Security Act this practice may be continued with respect to Air Force cases for an indefinite period, unless the Secretary of Defense otherwise directs, for, since appellate review of general court-martial cases arising in the Army Air Forces is not a function "assigned to or under the control of the Commanding General, Army Air Forces," such function need not be transferred to the Department of the Air Force within two years after the effective date of the act, or at all, unless the Secretary of Defense deems it "necessary or desirable" for the operations of the Air Force. (Sec. 207(f), Sec. 208(e), and Sec. 209.)

The Board of Review is of the opinion that all personnel of the Air Forces are subject to the Articles of War under the provisions of the National Security Act of 1947; that the provisions of this act did not divest the Commanding General of the United States Air Forces in Europe (or other commanding officers similarly situated) of the power to appoint courts-martial or to review the findings and sentences of courts-martial previously appointed by him and that the appellate procedure provided for in Article of War 50½ remains vested in The Judge Advocate General of the Army until such time as it may be transferred to the Department of the Air Forces by appropriate action of the Secretary of Defense (JAGF 1947/7021).

The defense also entered a plea to the jurisdiction of the court upon the grounds that Articles of War 95 and 96 are unconstitutional in that neither Article sets forth any specific offense and that by charging the specific offense of bigamy under these articles the Army is in fact legislating (R 12). The court properly overruled this plea. The offense of

bigamy is a violation of Articles of War 95 and 96 (CM 228971, Tatum, 17 BR 1,3; CM 259005, Poteet, 38 BR 197,207).

Motion to Elect and Motions to Strike

The accused made a motion "to have the trial judge advocate to elect under which Article of War he will proceed, the 95th or the 96th." This motion was denied (R 15). The defense then moved to strike the charge and specification under the 96th Article of War upon the same grounds as stated in his motion to "elect." This motion was denied (R 15,17). When this motion was denied the defense then moved to strike the charge and specifications under the 95th Article upon the grounds stated. In court-martial trials motions to elect are not granted (MCM, 1928, par. 71a). In arguing these motions the defense counsel stated that the accused was being prosecuted twice for the same offense and that it amounted to "double jeopardy" and a "multiplicity." The specification of Charge I (violation of AW 95) and Charge II (violation of AW 96) are identical and cover the same events and transactions. This is not an illegal multiplicity of charges as the same facts and circumstances may give rise to two or more offenses, and an officer may be charged with and found guilty of violation of the 95th and 96th Articles of War, although the separate offenses stem from the same set of facts (CM 281663, Hindmarsh, 22 BR (ETO) 223,229; CM 323254, Guilfoyle). We conclude that no error resulted in denying these motions.

Unlawful Search and Seizure

The defense objected to the introduction of Prosecution Exhibit 10 (marriage certificate of accused and Ugolina Anna Monti) in evidence on the ground that it had been obtained by an illegal search and seizure (R 74). This document was obtained in the manner set forth on page 4 of this opinion. The defense also objected to all evidence presented by the prosecution which was secured as a result of information obtained from the documents alleged to have been unlawfully seized. The court treated the latter motion as a motion to suppress. These objections were overruled (R 128).

The Commanding General, U.S. Forces European Theater, issued Standing Operating Procedure No. 96, dated 25 November 1946, relating to the arrest, search and seizure of all persons in the United States Occupied Zone of Germany. The portions of this directive relative to this case are as follows:

"SECTION I - GENERAL

1. Purpose. The purpose of this directive is to establish a uniform procedure in the US occupied zone of Germany for law enforcement agencies to follow in regard to arrest and to search

and seizure after arrest. All US Army law enforcement agencies will be governed by this directive.

2. Authority. All persons in the US occupied zone of Germany are subject to arrest, search, and seizure by the Army's law enforcement agencies except those persons specifically referred to in Category 4. (Par 4, Sec III)

"SECTION II - PROCEDURE FOR ARREST, SEARCH AND SEIZURE

* * *

2. Search and Seizure. a. Before a search of any person or his billet or residence is made, the law enforcement agent should have reasonable grounds for believing that the person subject to search has property on his person or in his billet or residence, the possession of which is unlawful, or has property which is needed as evidence to complete the investigation of a serious crime. If either of these circumstances exists and a search is deemed necessary, the following procedure should be used.

b. (1) In the case of an officer or enlisted man, consent for the search should be obtained, if practicable, from the person's commanding officer. In the case of a US civilian or Allied civilian employed by the US, consent should be obtained, if practicable, from the preson's immediate officer supervisor. In the case of a dependent, consent for the search should be obtained, if practicable, from the commanding officer or officer supervisor of the person on whom he or she is dependent. In all cases, however, some responsible person should be present when the search is made.

(2) In the case of enemy, ex-enemy or neutral residences which are not in military compounds, searches will be performed by the German police, except when an offender or vital evidence involved in a serious crime may disappear before the arrival of German police, or when entry is necessary to prevent the commission of a serious crime.

* * *

"SECTION III - APPLICATION

The provisions of this standing operating procedure will apply to all persons in the US occupied zone of Germany and the Bremen Enclave. ***"

The defense requested the court to take judicial notice of this directive and it was shown to the law member (R 122,127). There was no ruling by the court on this request. The court was authorized to take judicial notice of this directive as was the reviewing authority. Since the court and reviewing authority may have taken judicial notice of this directive we will do so here (CM 320957, Boone; CM 316886, Chaffin; CM 301154, Hufendick, 15 BR (ETO) 137,141). The evidence shows that the marriage certificate was obtained from a room which had been rented by the accused and where he spent considerable time. He also permitted Lina Monti to occupy the room. Under such circumstances this room may

be regarded as a residence of the accused. The Air Inspector conducting an investigation under the orders of the Commanding General ordered that the document be located and brought to his office. Responsible officers were present at the time the document was obtained. It thus appears that the provisions of Directive 96 were complied with and that no unreasonable or unlawful search or seizure occurred in relation to Prosecution Exhibit No. 10. Having determined that no unreasonable or unlawful search or seizure occurred it necessarily follows that the motion to suppress the other evidence was properly denied.

Copy of a Foreign Document

The defense objected to Prosecution Exhibit 1 on the grounds that it was a copy and not the best evidence. This document purports to be a copy of a certificate of marriage between the accused and Ugolina Anna Monti taken from the marriage register ("Registres Aux Actes De Mariages") of the town of Charleroi, Belgium. It is certified to be a true copy ("Pour Extrait Conforme") by M. Escarmur, the custodian of the records ("L'Echevin, Officier de l'Etat-Civil"). M. Jean Chaval, an official of the Ministry of Foreign Affairs of Belgium in effect certified under the seal of that ministry and as the official designated to make such certification ("Le fonctionnaire delegue") that M. Escarmur was the officer in charge of the records in question and that his certification was genuine, according to law and in proper form ("Vu pour legalisation de la signature de M. Escarmur ***"). The United States Consul, resident in Belgium, in turn certified that the seal of the Ministry of Foreign Affairs and the signature of Jean Chaval was genuine. Attached to this exhibit was a translation thereof into English, which translation was stipulated to be a true translation of the document (R 45).

In New York Life Insurance Company v. Aronson et al (38 Fed Supp 687), copies of several Polish birth certificates, authenticated by various Polish officers and the Vice Consul of the United States at Warsaw, Poland, in substantially the same manner as the marriage certificate in this case, were received in evidence over objection. In discussing the admissibility of these documents to prove the dates of birth therein recorded, the court said:

> "The basic allegation of the complaint is that the policies upon which the annuity certificates were issued were obtained pursuant to a misstatement of the age of Tessie Landaw, in that her application for the policies recited the date of her birth as August 6, 1879, when in fact she was born on February 13, 1874.
>
> "The Pennsylvania Insurance Act of 1921, P.L. 682, sec. 410(e) 40 P.S.Pa. sec. 510(e), incorporated as one of the provisions of each policy, is as follows: 'If the age of the Insured has been misstated, the amount payable hereunder shall be such

as the premium paid would have purchased at the correct age.'

"(1) The court has had no difficulty whatever in determining that Tessie Landaw, the insured, was born in 1874, and not in 1879, as stated. This fact is established by the deposition of her brother, Thomas (Tweia or Tewel anglicized) Rozenthal, and by duly certified copies of the birth records of Augustow, Poland. By the records it appears that Tauba Chaja Rosenthal was born on February 13, 1874. The uncontradicted testimony was that the first name, 'Tauba' was the Polish-Jewish equivalent of 'Tessa' or 'Tessie'.

"Objection was made to the introduction of the several birth records offered and received in evidence, the reason assigned being: 'There is no record of the law under which these were kept or that the person making the same was the custodian of the records at the time the entry was made, or that he was required by law to keep such records.'

"(2) The objection is without merit, as it undertakes to prescribe requirements for the introduction of foreign records not specified in either Rule 44 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, or the Federal Act of 1936, 28 U.S.C.A. sec. 695e. By Rule 44, an official record kept in a foreign state or country may be evidenced by a copy attested by the officer having custody of it, accompanied by a certificate that such officer has the custody of it, the certificate being made by the secretary of embassy, consul *** or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. The Act of 1936 is substantially of like import. The records in the instant case were first attested by the Registrar of Vital Statistics of Non-Christian Denominations, with his seal of office attached. The authenticity of the Registrar's signature and seal, and that the birth certificate had been issued in accordance with the pertinent Polish laws, was certified under his seal of office by the County Commissioner Augustow; and, in turn, the genuineness of the signature and seal of the County Commissioner of Augustow, and that the document had been issued in accordance with the proper laws, was certified under the signature of the Governor's Agents and the seal of the Governor of the Province in which Augustow was situated. And further, the Chief of Department of the Ministry of the Interior of Poland certified to the genuineness of the signature of the representative and seal of the Governor of Bialystok Province. And, finally, the Vice Consul of the United States at Warsaw, Poland, under his seal, certified that the signature of the Acting Minister of the Interior is true and genuine and that he was duly authorized to perform such acts. In view of these certifications, the records were properly admitted under the requirements of Rule 44 and the Act of 1936, and common law."

In Barber v. International Company (73 Conn 587, 48 A 758, 764) the court in discussing the mode of authenticating official copies of foreign documents at common law said:

"Whether there has been a proper authentication of foreign ones (official copies of documents found in foreign registries or public offices) must, therefore, be determined by the courts as occasion may require, in such cases as arise, under the guidance furnished by the rules of common law or the usages of nations. The object of any such authentication is to afford satisfactory evidence that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy, having due authority to make such certification. Any evidence is sufficient for this purpose which is calculated to give reasonable assurance of the facts in question. Of this nature is whatever legitimately tends to prove that the document was obtained from the office where the original is kept; that the signature of the certificate was made by the individual whose name is thus subscribed; that he held, at the time, the official position indicated by his subscription, and that it was one of the functions of those holding that position to certify to such copies ***. It is difficult and expensive to produce oral testimony to the points, and hardly less so to resort to written depositions. *** It is also one of the proper and essential functions of consuls, under the rules of international law, to aid in the authentication of documents of foreign origin, for use in their own country. *** 3 Calvo, Le Droit International (5th Ed) sec. 1423. *** The notarial certificate (affixed to the copies in question or a notary public of London, England) tended legitimately to identify the signature of Mr. Cleave (the assistant registrar of joint-stock companies having custody of the original), and to establish his official character. The certificate under the seal of the American consulate (at London) tended legitimately to establish the official character of the notary. Each officer was acting in a manner conformable to the usages of nations. The proof made was therefore calculated to give reasonable assurance that the document certified was a true copy of an original contract on file in the office of the Registrar of joint-stock companies, and constituted prima facie evidence of those facts." (Parenthetical statements supplied.)

We believe that Prosecution Exhibit 1 was duly certified to be a true copy of the record of marriage of accused and Ugolina Anna Monti on file in a foreign public office and that such certification was sufficiently authenticated to be acceptable in evidence under the principles set forth above. Official records of births, deaths and marriages, foreign as well as domestic, have generally, without the aid of statute, been received as proof of the events which gave occasion to the making of them (Duncan v. United States, 68 F (2d) 136,140; New York Life Insurance Company v. Aronson, supra; Bozicevich v. Kenilworth Mercantile Co., 58 Utah 458, 199 Pac 406,407, 17 ALR 346; Hunt v. Supreme Council, 64 Mich 271, 31 NW 576; Kearney v. Thomas, 225 N C 156, 33 S.E. (2d) 871; Burnaby v. Baillie, L R 42 Ch D 283, 296). In the instant case, the official character of the marriage record in question was directly established by the testimony of the custodian to the effect that the law of Belgium required the registration of all marriages. We need not, therefore, launch upon a discussion as to whether any lesser degree of proof in this respect would satisfy the provisions of 28 U.S.C., 695 e (see New York Life Insurance Co. v. Aronson, supra).

Properly certified and authenticated copies of such records, although secondary evidence as compared with the originals, are not within the exclusionary operation of the best evidence rule, for the courts, recognizing the practical and technical difficulties inherent in a requirement that the originals of public records be produced, particularly where they are lodged in depositories beyond the jurisdiction of the forum, have determined that the desired attainment of the ends of justice would not be materially endangered by placing reliance upon certifications made by public officers under circumstances where a motive for controverting the truth could hardly be anticipated (Kearney v. Thomas, supra; CM 262042, Pepper, 5 BR (ETO) 125,152). We might also point out that proof of marriage by official record is not, in relation to testimonial proof by one who had witnessed the event, a seconardy method of establishing the ceremony. Both record and oral proof are of a primary evidential nature and neither is to be excluded, under the best evidence rule, by reason of the availability of the other (Wigmore on Evidence (3rd Ed.) s. 2088).

Jurisdiction of the Offense

The defense contends that the court-martial sitting in Germany was without jurisdiction to try the accused for the offense of bigamy because the alleged bigamous marriage occurred in Belgium. This contention is without merit. The court had jurisdiction over the accused as we have heretofore indicated. Courts-martial, unlike civilian courts, are not confined to territorial limitations and can try persons subject to their

jurisdiction for an offense which constitutes a violation of military law irrespective of the place where the offense occurred (CM 324235, Durant, Perlstein v. United States et al, 57 F. Supp. 123, affirmed 151 F (2d) 167, certiorari denied, 328 U.S. 777; Winthrop's Military Law and Precedents, Vols. 1 and 2, Reprint 1920, Ch. VIII, pp. 81,82, 83).

Wife Testifying Against Husband

The defense moved to strike the deposition of Angela Iturralde Nagle (Pros Ex 5) on the ground that a wife was an incompetent witness against a husband.

The Manual for Courts-Martial, 1928, provides:

> "Wife and husband may testify in favor of each other without limitation; but unless both consent, neither wife nor husband is a competent witness against the other, except as follows: 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. Thus in such cases as bodily injuries inflicted by him upon her, bigamy, polygamy, or unlawful cohabitation, abandonment of wife and children, or failure to support them, or using or transporting her for 'white slave' or immoral purposes, the wife may testify against her husband; but she can not be compelled to do so."

(Par 120d, MCM, 1928; see also 28 U.S.C. 633.)

In contemplation of law a witness, whose deposition has been taken, testifies when the deposition is admitted in evidence and not when the deposition is taken (CM 270942, McDonald, 46 BR 1,11). The Board of Review is of the opinion that when Angela Iturralde Nagle gave her deposition and permitted it to be presented to the court without making any objection she elected to testify against her husband and this being a bigamy case her testimony was competent evidence.

Specification 1 of Charge I and Specification 1 of Charge II

These specifications allege the offense of bigamy in violation of Articles of War 95 and 96.

> "Bigamy is willfully and knowingly contracting a second marriage where the contracting party knows that the first marriage is still subsisting" (CM 258630, Reynolds, 5 BR (ETO) 259,263).

This offense has long been recognized as a violation of Article of War 95 as well as a violation of Article of War 96. The essential elements of the offense are:

(1) A valid marriage entered into by the accused prior to and undissolved at the time of the second marriage.

(2) Survival of the first spouse, to the knowledge of the accused.

(3) A subsequent marriage to a different spouse.

The marriage of accused to Angela Iturralde Nagle on 31 October 1942 was established by a duly authenticated copy of their marriage certificate and the testimony of Angela Iturralde Nagle. Mrs. Nagle's testimony also establishes that she was alive at the time of trial. A marriage once contracted is presumed to continue in the absence of proof of death or legal dissolution (Tatum, supra). That the accused knew that Angela Iturralde Nagle was alive was shown by the admissions of the accused to his friends, the pay card, War Department Finance Department Form 3, and the AAF Personal Affairs statement, both of which show Angela Nagle of Havana, Cuba, as his wife. The pay card shows that accused was paid for the months of January 1946 through August 1946 and that a Class E Allotment of $150.00 was paid during these months. The AAF Personal Affairs Statement of accused (Pros Ex 8) shows a Class E allotment of $150.00 to Mrs. George E. Nagle, Havana, Cuba.

The marriage of the accused Ugolina Anna Monti on 14 February 1947 was shown by the records of the City of Charleroi, Belgium, as well as by the testimony of one of the attending witnesses.

Specification 3 of Charge I and Specification 3, Charge II

It was stipulated that the accused signed the dependent's pass set forth in these specifications. This pass was for Mrs. George E. Nagle. This pass was in the possession of Lina Monti and the accused told Mr. McGrath that he needed this pass for Lina. Dependent passes were authorized by the community commander and issued by the provost marshal. The information on the pass was obviously false. The legal wife of the accused was in Cuba. The pass was in Lina Monti's possession and the accused stated it was for Lina. There is no evidence that this pass was ever presented or shown to the community commander. However it was issued by the provost marshal acting for the community commander. The pass was issued for the purpose of permitting the person whose picture appeared thereon and who was designated as Mrs. George E. Nagle to enter and leave the military community. The right of any person to enter or leave this community was under the direction of the community commander. Under such circumstances it can properly be inferred that the statements appearing on the dependent's pass were made for the purpose of deceiving the community commander relative to the right of this person to enter and leave the community. The securing of this pass from the provost marshal by supplying false information was tantamount to making false representations to the community commander at the time the pass was obtained (CM 315736, Risoli).

The defense attempted to show that the community commander knew of

the accused's marital status and for that reason the statements appearing on this pass could not deceive him. The evidence adduced by the defense indicates that in December 1946 or January 1947 the community commander knew of accused's marital status. The pass in question was issued on 4 May 1946. There is no evidence to show that the community commander had knowledge of accused's marital status at the time the pass was issued. We conclude that the accused signed the dependent's pass with intent to deceive the community commander and that the pass contained material false statements and that the accused knew that the statements were false.

6. Records of the Department of the Army show the accused to be 36-7/12 years of age and married. He graduated from the University of Washington with an LL.B degree in 1936 and engaged in the practice of law at Seattle, Washington, from 1936 to 1942. He was inducted into the Army on 7 March 1942. He attended Air Force Officers Candidate School and upon graduation was appointed and commissioned a temporary second lieutenant, Air Corps, Army of the United States, on 28 October 1942. On 20 July 1943 he was promoted to first lieutenant and on 27 June 1944 he was promoted to captain. He graduated from the Judge Advocate's School on 11 July 1944 and on 5 September 1944 he was detailed to The Judge Advocate General's Department. His efficiency reports average "Excellent."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.

Chester L. Bilsing, Judge Advocate

Carlos E. McAfee, Judge Advocate

Robert E. Lee Boyd, Judge Advocate

JAGK - CM 326147 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 5

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 George E. Nagle (0-332177), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of bigamy and of signing with the intent to deceive the community commander at Bad Kissingen, Germany, a dependent's pass, which pass contained material statements which were known by accused to be false, each offense in violation of Articles of War 95 and 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 one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48 with a recommendation that the unexecuted portion of the sentence relating to confinement be remitted.

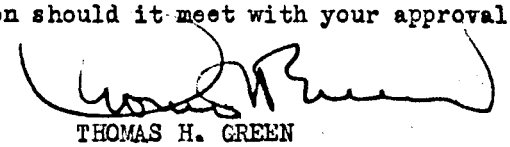
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

On 31 October 1942 the accused married Angela Iturralde. While this marriage existed and on 14 February 1946 the accused married Ugolina Anna Monti at Charleroi, Belgium, thus committing bigamy.

On 4 May 1946 the accused secured a dependent's pass for Ugolina Monti under the name of Mrs. George E. Nagle. This pass was issued by the provost marshal acting for the community commander at Bad Kissingen, Germany. The accused signed this pass knowing it contained material statements which were false, which statements were intended to deceive the community commander relative to Ugolina Monti's right to enter and leave the community as a dependent of the accused.

4. I recommend that the sentence be confirmed but that the confinement and forfeitures adjudged be remitted and as thus modified the sentence be carried into execution.

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



BM 326147
2 Incls
1. Record of trial
2. Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 25, (DA) 21 Jan 1948).

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

JAGH CM 326170 — 5 January 1948

U N I T E D S T A T E S	)	UNITED STATES ARMY MILITARY GOVERNMENT IN KOREA
v.	)	Trial by G.C.M., convened at Seoul, Korea, 4 October 1947. Dismissal and total forfeitures.
Captain PURCELL R. DAVIES (0-244801), Infantry	)	

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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Purcell R. Davies, 500th Transportation Railway Grand Division, United States Army Military Government in Korea, having taken an oath in a trial by General Court-Martial of Chief Warrant Officer James R. Baldwin, that he would testify truly, did at Seoul, Korea, on or about 28 August 1947, willfully, corruptly and contrary to such oath, testify in substance that Chief Warrant Officer Baldwin and Captain Hansen were in his quarters but no argument between Baldwin and Hansen took place, and that they were on friendly terms when they left his room at his request; that Captain Hansen returned to accused's room but that no other person returned or entered the room while Captain Hansen was present. That accused did not thereafter carry on a conversation with Chief Warrant Officer Baldwin. That Captain Hansen only remained a few minutes in the room, which testimony was a material matter and which he did not then believe to be true.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of 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:

The evidence pertinent to the findings of guilty is substantially as follows:

Accused is in the military service and was a member of the 500th Transportation Railway Grand Division (R 21). On 28 and 29 August 1947 Carolyn Gallamore acted as reporter in the trial by general court-martial of Chief Warrant Officer James R. Baldwin, and as such was sworn as reporter by the trial judge advocate, a Captain McAuliffe. Miss Gallamore identified Prosecution's Exhibit A as an exact transcription of the trial in Baldwin's case. She stated that the original had been sent to The Judge Advocate General in Washington, D.C. The prosecution introduced Prosecution's Exhibit A into evidence with the request that it be withdrawn at the end of the trial. The exhibit was admitted without objection by the defense. (R 7).

The following stipulations relating to the trial of Chief Warrant Officer Baldwin were agreed to by the prosecution, defense, and accused:

> "* * *on 28 August 1947 a general court martial was convened at this command by order of Brigadier General Helmick; that that court held a session on the 28th and 29th of August 1947 for the trial of the United States versus Chief Warrant Officer James R. Baldwin; and that that court consisted of the following: Colonel Terrill E. Price, Cavalry, President and Law Member, Lieutenant Colonel Archibald W. Melchior, Infantry, Lieutenant Colonel Seth Wiard, Ordnance, Lieutenant Colonel Harry D. Bishop, Field Artillery, Lieutenant Colonel Charles A. Stanley, Signal Corps, Lieutenant Colonel Matthew Thompson, Air Corps, Lieutenant Colonel Camille H. Duval; Coast Artillery Corps, Major John L. Ryan, Jr, Quartermaster Corps, Captain Leonard H. Sims Jr, Coast Artillery Corps, First Lieutenant Harold M. Ward, Corps of Engineers, Captain Dennis P. McAuliffe, Field Artillery, TJA, First Lieutenant George J. Reuss, Infantry, Assistant TJA, Captain Stanley F. Parr, Infantry, Defense Counsel, Captain Thomas M. Johns, CMP, Assistant Defense Counsel, and Major Denny F. Scott, Special Defense Counsel.* * *"

* * *

> "* * * if Captain Dennis P. McAuliffe, 026609, FA, were present in court at this time he would testify in substance as follows: that

he was the duly appointed Trial Judge Advocate in the case of the United States versus Chief Warrant Officer Baldwin, August 28th and 29th, 1947; that in performance of his duty as Trial Judge Advocate that he administered an oath to Captain Purcell R. Davies, 0244801, 500th Transportation Railway Grand Division, the oath in words being, 'You swear that the evidence you shall give in the case now in hearing shall be the truth, the whole truth and nothing but the truth, so help you God,' and that further after administering that oath to Captain Davies, Captain Davies took the stand as a witness in the case of the United States versus Chief Warrant Officer Baldwin and that in response to the questions propounded him by Captain McAuliffe as Trial Judge Advocate as appears from Prosecution Exhibit A that the accused in this trial, Captain Purcell R. Davies, answered as appears from the record in Prosecution Exhibit A." (R 8)

and

"* * * in the previous trial of Chief Warrant Officer James R. Baldwin there was charged a violation of the 93rd Article of War; that Specification 1 of Charge I reads as follows: 'In that Chief Warrant Officer James R. Baldwin, 500th Transportation Railway Grand Division, United States Army Military Government in Korea, did, at Seoul, Korea, on or about 1 August 1947, with intent to do him bodily harm commit an assault upon Captain Eugene J. Hansen by willfully and feloniously biting off a part of the lobe of the right ear of Captain Eugene J. Hansen.' The Specification of Charge II, Violation of the 96th Article of War, reads as follows: 'In that Chief Warrant Officer James R. Baldwin, 500th Transportation Railway Grand Division, United States Army Military Government in Korea, was, at Seoul, Korea, on or about 1 August 1947, drunk and disorderly at the Junior Officers Barracks, APO 235.' The Specification of Charge III, Violation of the 63rd Article of War, is as follows: 'In that Chief Warrant Officer James R. Baldwin, 500th Transportation Railway Grand Division, United States Army Military Government in Korea, did, at Seoul, Korea, on or about 1 August 1947, behave himself with disrespect toward Captain Purcell R. Davies, his superior officer, by saying to him "you are a son of a bitch" or words to that effect.' And that the court found on those charges and specifications: to the Specification of Charge I and Charge I, not guilty; to the Specification of Charge II and Charge II, guilty; to the Specification of Charge III and Charge III, not guilty. * * *" (R 29,30)

Accused's testimony at the previous trial was read to the court. In substance he had testified that at 6:45 on the evening of 1 August 1947 he went to the Officers' Lounge of the Railroad Grand Division and stayed there for about an hour and a half. There were also in the lounge

Captain Hansen, Mr. Baldwin, Lieutenant Stokes, Lieutenant Parker and Captain Chambers. Accused admitted he was drinking beer and whiskey while in the lounge. After leaving the lounge he went to his room with Mr. Baldwin and Captain Hansen. After being in accused's room for ten minutes Baldwin and Hansen left at accused's request. While Baldwin and Hansen were in accused's room the conversation was of a friendly nature and Baldwin and Hansen appeared to be on friendly terms when they left (R 9,10). Accused did not recall "any further exchange," with Mr. Baldwin that evening (R 12). Approximately fifteen minutes later Captain Hansen re-entered accused's room holding a handkerchief to his ear and "blood was dripping." Nobody entered the room with Hansen on the second occasion. Accused did not remember whether Baldwin appeared in the room during Hansen's second visit. Accused also testified that he did not recall anybody calling him a "son-of-a-bitch," and that he did not remember telling anyone not to call him "a son of a bitch" (R 10). Accused could not honestly say that at any time on or about 1 August 1947 Baldwin called him "a son of a bitch." He denied that any enlisted men came into his room and did not remember whether Captain Hansen was given first aid in the room. He would have known if other people had come in his room with Captain Hansen and none came (R 11,12).

Technical Sergeant Harry B. Crouch testified that on the evening of 1 August 1947 he was in his quarters at the Headquarters Building. His quarters were on the ground floor and officers' quarters were on the second floor (R 14). Between 10:00 and 10:30 Lieutenant Raines asked him to come upstairs to give "a hand with a couple of drunks." (R 15) Crouch and Captain Chambers went upstairs. Crouch found Captain Hansen in the hallway and took him into accused's room. At the time Captain Davies was the only other person in the room (R 15,16). Captain Hansen's ear was bleeding and Crouch pressed a cloth against the ear to stop the flow of blood (R 16).

A few minutes after Crouch and Hansen entered accused's room Captain Chambers and Mr. Baldwin also entered (R 16). At one time Crouch heard accused say, "don't call me a son of a bitch." (R 17) On cross-examination Crouch reiterated that Mr. Baldwin was in the room and not at the threshold. However, accused was not facing the door (R 19).

Captain George E. Chambers testified that on the evening of 1 August 1947 at about 2215 hours he went to accused's room. When he entered there were present accused, Captain Hansen and Sergeant Crouch (R 22). His attention was called to Captain Hansen because there was blood on the latter's shirt, neck, and ear, and Sergeant Crouch was applying a wet rag to his ear (R 22,23). Accused was sitting on his bed and when Mr. Baldwin came up to the door of the room accused told him to stay out (R 23). Baldwin "took exception" to accused's direction, however, Captain Chambers did not hear Baldwin call accused "a son of a bitch." (R 23,24)

Captain Eugene J. Hansen testified that on the evening of 1 August 1947 he was in the Officers' Lounge of the 500th Railway Grand Division with accused, Mr. Baldwin, and Lieutenant Parker. While there Hansen had some words with Mr. Baldwin (R 26,27). When Hansen left he went to accused's room where accused had preceded him (R 26). While Hansen was talking with accused Baldwin came to the room and used abusive language toward Hansen (R 26). Accused told Baldwin to leave and Baldwin then started to use abusive language toward accused (R 26). Hansen could not remember the content of the abusive language. Accused then told both Hansen and Baldwin to leave (R 26). Hansen and Baldwin left the room and in the hall engaged in a fight. Hansen testified that he did not re-enter accused's room that night (R 25,28).

4. Evidence for the defense:

Accused elected to testify in his own behalf substantially as follows:

He had been in the military service more than twenty-five years and had never been court-martialed. He recalled the testimony he had given at the court-martial of Chief Warrant Officer Baldwin and would not change his testimony in that case in any respect inasmuch as he related what he actually had seen and remembered.

Major Robert N. Carl testified that accused's truthfulness had never been questioned in his presence.

5. Accused stands convicted of perjury in that at the trial of Chief Warrant Officer James R. Baldwin he, willfully, corruptly, and contrary to his oath testified in substance that Baldwin and Captain Hansen were in his quarters but no argument between Baldwin and Hansen took place, and that they were on friendly terms when they left his room at his request; that Captain Hansen returned to accused's room but that no other person returned or entered the room while Captain Hansen was present, that accused did not thereafter carry on a conversation with Chief Warrant Officer Baldwin, and that Captain Hansen only remained a few minutes in the room.

The elements of proof in perjury are as follows:

> "Proof.--(a) That a certain judicial proceeding or course of justice was pending; (b) that the accused took an oath or its equivalent in such proceeding, or course of justice, as alleged; (c) that such oath was administered to the accused in a matter where an oath was required or authorized by law, as alleged; (d) that such oath was administered by a person having authority to do so; (e) that upon such oath he gave the testimony alleged; (f) that such testimony was false, and material to the issue or matter of inquiry; and (g) the facts and circumstances indicating that such false testimony was willfully and corruptly given." (Par 149i, MCM 1928)

The usual method of proving perjury involves the introduction in evidence of the record of trial of the case in which the perjury is alleged to have been committed. From the record of trial of that case the court in the instant case and the Board of Review on review may find elements (a),(b), (c),(d), and (e). In addition the materiality requirement of element (f) may be found only by reference to the record of the former trial. The record of former trial, too, constitutes a circumstance from which element (g) may be found.

In this case there has not been adherence to the usual method of proving perjury. The former record of trial was introduced into evidence with permission to withdraw it at the end of the trial. The record of trial in the former case has not accompanied the record of trial in this case. The testimony of this accused in the former case is, however, set forth verbatim in the instant record, as are also the composition of the court, the name of the accused, the dates on which the former trial was held, the fact that the trial judge advocate administered an oath to this accused prior to his testimony in the former case, and the issues tried in the former case, There was also testimony that the record of trial in the former case, United States v. Baldwin, was forwarded to the Office of The Judge Advocate General. There has been found in the Office of The Judge Advocate General general court-martial case CM 325476, Baldwin. It has been determined beyond peradventure of doubt that this is the case in which was committed the alleged perjury attributed to the accused in the instant case. A fortiori, the copy of a record of trial introduced into evidence and withdrawn in the instant case was a copy of CM 325476, Baldwin. Under the circumstances outlined this Board may utilize the record of trial in CM 325476 in its determination of the existence of elements (a),(b),(c),(d), and (e), the element of materiality required in element (f), and in its examination of the circumstances surrounding the alleged false testimony.

Examination of the record of trial in this case and the record of trial in CM 325476, Baldwin, shows that a legally constituted general court-martial, with both the members of the court and the personnel of the prosecution having been duly sworn, was engaged in the trial of Chief Warrant Officer James R. Baldwin who was being tried for aggravated assault upon Captain Eugene J. Hansen, in violation of Article of War 93; being drunk and disorderly, in violation of Article of War 96; and disrespect toward the accused in the instant case, in violation of Article of War 63. In the course of the trial accused was sworn as a witness by the trial judge advocate and testified.

Baldwin's trial arose from certain events which occurred on the evening of 1 August 1947. The evidence adduced by the prosecution as to those events shows that, on the evening of 1 August 1947, accused, Baldwin, and Captain Hansen with other officers were in the Officers' Lounge of the 500th Railway Grand Division. Accused left the lounge and went to his

room in the same building. He was followed there by Captain Hansen and shortly afterward by Baldwin. Baldwin was abusive to Captain Hansen and later to accused. Accused asked both Hansen and Baldwin to leave. Hansen and Baldwin left and in the hall had a fight. Sergeant Crouch found Hansen in the hall with his ear bleeding and took him into accused's room, where they were joined in a few minutes by Captain Chambers, and shortly thereafter by Baldwin. After about fifteen minutes all but accused had left the room. Hansen denied that he came back to accused's room after he had been asked to leave. Accused in his testimony at the former trial stated that Hansen did re-enter the room.

At the former trial accused testified that after he had left the Officers' Lounge for his room on the night of 1 August he was joined by Hansen and Baldwin; that there was no argument in his room, and that Hansen and Baldwin left his room amicably. This testimony is at variance with that given by Hansen at the instant trial. Hansen's testimony, however, lacks the corroboration required by law.

Accused also testified that when Hansen returned to his room he was unaccompanied. Accused would have known if others came to the room but no one came except Captain Hansen. Accused's testimony is susceptible to but one inference, that while Hansen was in the room no other person entered it. In fact three other persons came to the room, one of them being Baldwin. Baldwin was on trial for being drunk and disorderly on the evening of 1 August 1947. The court was entitled to know his conduct and demeanor during the period in question. Accused's denial of seeing other persons in his room when Hansen re-entered the room when, in fact, Baldwin among others was there constituted false testimony as to the issue of Baldwin's behavior at a time when that behavior was in question. In this sense accused's false testimony was material. From the circumstances accused may be charged with the knowledge that his testimony was false and hence willful and corrupt (Wharton's Criminal Law, 12th Ed, Vol II, Sec 1512).

Accused also testified that he did not recall any further exchange with Baldwin after the latter left accused's room with Hansen. In substance he denied having any further conversation with Baldwin on the evening in question. There was testimony by one witness that at some time during Baldwin's second appearance in the room that accused said, "Don't call me a son of a bitch." It was not shown, however, to whom accused addressed these words. Another witness, Captain Chambers, testified that accused told Baldwin not to enter the room. Chambers took steps to see that Baldwin returned to his own room. The circumstance that accused had previously, by his own admission, ordered Baldwin to leave the room, and the other circumstances shown by the record offer ample corroboration of Chamber's testimony to the effect that accused spoke to Baldwin. For the reasons previously stated accused's testimony that he had no further conversation with Baldwin as alleged constituted perjury.

The remaining averment of false testimony that Captain Hansen remained in the room but a few minutes is not considered false in light of the uncertain testimony regarding the length of the stay.

6. Records of the Army show that the accused is forty-eight years of age and single. He was born in South Wales, Great Britain, and was naturalized in 1927. He attended high school and commercial college and was employed from 1921 to 1941 as a shipping clerk, painter, welder, and trainman. He was appointed a second lieutenant, Pennsylvania National Guard, on 8 August 1927; entered upon active duty as a first lieutenant on 17 February 1941, and was promoted to his present rank on 1 May 1942. There is no record of prior delinquencies in military or civil life.

7. Accompanying the record of trial is a recommendation for clemency, dated 6 October 1947, signed by four of the nine members of the court that tried accused.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. 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 Specification of the Charge as finds the accused guilty of the Specification except the words "Chief Warrant Officer Baldwin and Captain Hansen were in his quarters but no argument between Baldwin and Hansen took place, and that they were on friendly terms when they left his room at his request" and "That Captain Hansen only remained a few minutes in the room" in violation of Article of War 93, legally sufficient to support the sentence and to warrant confirmation of the sentence. A sentence to dismissal and forfeiture of all pay and allowances due or to become due is authorized upon a conviction of a violation of Article of War 93.

A. Wattenstein, Judge Advocate

John F. O'Brien, Judge Advocate

Jos Lynch, Judge Advocate

JAGH CM 326170 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 for your action the record of trial and the opinion of the Board of Review in the case of Captain Purcell R. Davies (0-244801), Infantry.

2. Upon trial by general court-martial this officer was found guilty of perjury in violation of Article of War 93. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of the Charge as finds the accused guilty of that Specification except the words "Chief Warrant Officer Baldwin and Captain Hansen were in his quarters but no argument between Baldwin and Hansen took place, and that they were on friendly terms when they left his room at his request" and "That Captain Hansen only remained a few minutes in the room" in violation of Article of War 93; legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused testified as a witness for the prosecution in the trial by general court-martial of Chief Warrant Officer James R. Baldwin, who was charged with assault with intent to do bodily harm, drunk and disorderly conduct, and disrespect toward his superior officer, and was found guilty of being drunk and disorderly. The accused testified at that trial that Mr. Baldwin and a Captain Hansen had been in accused's quarters during the evening of 1 August 1946, that no argument took place between them, that they left the room on friendly terms, that Captain Hansen later returned to the room, that no other person returned with him nor was there while he was there and that accused did not thereafter that evening talk to Mr. Baldwin, and that Captain Hansen remained in the room for only a few minutes. At the trial now under consideration, evidence was adduced showing that accused's testimony at the previous trial was false in that Mr. Baldwin and Captain Hansen did quarrel while they were in accused's room, that they and at least two other persons returned to the room and that the accused then talked to Mr. Baldwin. The evidence as to the quarrel between Hansen and Baldwin in accused's room was without the corroboration required by law, and the evidence as to the length of Hansen's second visit to accused's room was inconclusive.

4. Records of the Army show that the accused is forty-eight years of age and single. He was born in South Wales, Great Britain, and was naturalized in 1927. He attended high school and commercial college and was employed from 1921 to 1941 as a shipping clerk, painter, welder and trainman. He was appointed a second lieutenant, Pennsylvania National Guard, on 8 August 1927, entered upon active duty as a first lieutenant on 17 February 1941, and was promoted to his present rank on 1 May 1942. There is no record of prior delinquencies in military or civil life.

5. Accompanying the record of trial is a recommendation for clemency, dated 6 October 1947, signed by four of the nine members of the court that tried accused.

6. The only possible mitigating circumstance appears to be that accused testified as he did because he feared incriminating himself and implicating his associates. I do not consider this sufficient to warrant clemency. I therefore recommend that the sentence be confirmed but that the forfeitures be remitted, and that as thus modified, the sentence be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 60, DA, 4 March 1948).

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

JAGK - CM 326219

26 NOV 1947

UNITED STATES)	FLYING DIVISION, AIR TRAINING COMMAND
)	
v.)	Trial by G.C.M., convened at Randolph Field, Texas, 18 September 1947. Dismissal.
)	
First Lieutenant WINTHROP C. BOWLES (O-586552), Air Corps)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that First Lieutenant Winthrop C. Bowles, Air Corps, did, at Fort George G. Meade, Maryland, on or about 12 November 1945, desert the service of the United States and did remain absent in desertion until he was returned to military control on or about 19 March 1947.

He pleaded not guilty to the charge and specification. He was found guilty of the specification except the words "desert the service of the United States and did remain absent in desertion," substituting therefor, respectively, the words "absent himself without leave from the service of United States and did remain absent without leave," of the excepted words, not guilty, of the substituted words, guilty, and of the charge, not guilty, but guilty of violation of the 61st Article of War. 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 approved only so much of the sentence as provided for dismissal from the service 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.

4. Records of the Department of the Army show that the accused is 28 years of age and unmarried but is the father of a child by a

former marriage. Prior to 1942 he was a teletype operator for a western railroad. He enlisted in the Army in August 1942, served as a clerk typist and was commissioned a second lieutenant, AUS, at Miami Beach, Florida, in April 1944. He did not experience any overseas service. Two efficiency reports rate his character of service as "Excellent."

5. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 61.

Chester D. Silvers, Judge Advocate

Carlos E. McGee, Judge Advocate

Gilbert E. Hickmott, Judge Advocate

JAGK - CM 326219 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. DEC 3 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 Winthrop C. Bowles (O-586552), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 12 November 1945 to 19 March 1947, in violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved only so much of the sentence as provided 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 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.

On 12 November 1945 the accused, then a member of 1322nd SCU Company A, 4th Battalion (SC), Fort George G. Meade, Maryland, absented himself without authority from his organization and station and remained absent, without authority, until he was returned to military control on or about 24 March 1947 at Williams Field, Chandler, Arizona.

The accused testified at length in his behalf. He stated that he left Fort Meade on the date in question with the intention to commit suicide. He had experienced domestic difficulties, had been drinking heavily, and had become despondent. He lost his nerve, wandered about the country dressed in civilian clothing and during the latter part of his absence he stayed in a mountainous section of Arizona. He was taken into custody by military police at Phoenix, Arizona, at a time when he asserted he was trying to locate a military post to turn himself over to the authorities.

The defense offered in evidence a copy of W.D.A.G.O. Form 8-118 (Disposition Board Proceedings for Officers) and the clinical history relative to the accused. The Board found "No disease (observation for nervous and mental disease)." The clinical history sets forth a detailed

account of social maladjustment, domestic difficulties and excessive use of intoxicating liquor.

4. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

Cm 326219

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 90 (DA) 18 Dec 1947).

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

NOV 14 1947

JAGQ - CM 326396

UNITED STATES	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at Fritzlar, Germany, 31 July 1947. Forfeiture of Fifty ($50.00) dollars pay.
	)	
First Lieutenant WOODROW M. JARSHAW (0-1180561), Headquarters 12th Constabulary Squadron.	)	

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 having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence, has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that First Lieutenant Woodrow M. Jarshaw, Headquarters 12th Constabulary Squadron, did, in the vicinity of Karlsruhe, Germany, on or about 16 June 1947, wrongfully operate a sedan type vehicle at a speed of approximately sixty five (65) miles per hour in violation of Circular Number 160, Headquarters United States Forces European Theater, dated 2 November 1946.

CHARGE II: Violation of the 61st Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to both Charges and Specifications and was found guilty of Charge I and its Specification but not guilty of Charge II and its Specification. He was sentenced to forfeit $50 of his pay. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and ordered it executed, the result of trial being promulgated in General Court-Martial Orders No. 415, Headquarters United States Constabulary, dated 10 October 1947.

3. Evidence for the Prosecution.

On 16 June 1947 a "speed trap" was in operation on the autobahn approximately five miles north of Karlsruhe, Germany (R. 26). The "speed trap" was organized as follows: Three stations all with interlinking telephone communication were located along the "autobahn." Two enlisted men were detailed to each of the three stations comprising the "speed trap" (R. 21). The procedure of the operators of the "speed trap" was for the men at Station No. 1 to call over an inter-phone system to the men at Station No. 2, advising them that a vehicle was approaching at an apparently excessive speed and at the moment the vehicle "passed" Station No. 1 the personnel at that station would call "time" (R. 26). At that moment the personnel of Station No. 2 who were equipped with field glasses would observe the vehicle previously described and announced by the personnel of Station No. 1 from the instant it passed Station No. 1 until it had negotiated the distance to Station No. 2. When the vehicle so observed "passed" Station No. 2 the personnel of that station would announce over the intercommunication system "finish" (R. 26). The personnel of Station No. 3 who were equipped with a "stop watch" and "speed chart" computed the speed of the vehicle being observed by the two previous stations by "clocking" the elapsed time between hearing the word "time" as announced by Station No. 1 and the word "finish" as announced by Station No. 2 and if its speed was excessive they would stop the vehicle (R. 22-26).

On 16 June 1947, Sergeant Garman and Technician Fifth Grade Royce were operating Station No. 3 of the "speed trap". While so on duty Royce was notified by Station No. 1 that a blue Ford sedan was approaching that post; was informed to "get ready" and thereafter the word "time" was relayed over the intercommunication system to him by Station No. 1. He "pushed" the stop watch and allowed it to run until he was advised by Station No. 2 that the blue sedan had passed that station by the word "finish" (R. 26). He further testified that the stop watch showed that fifty-one seconds elapsed between the code words "time" and "finish". The blue sedan in question was driven by accused and was stopped at Station No. 3 as the distance of one mile covered in fifty-one seconds indicated that it was exceeding the speed limit of fifty miles per hour, as provided in Circular 160, Headquarters United States Forces European Theater, 2 November 1946 (R. 27-29).

Both Garman and Royce testified that the distance between Stations No. 1 and 2 was one mile but on cross-examination admitted that they had never measured the distance and that they had no personal knowledge of the fact but had merely been told the distance by the engineers who constructed the "trap".

The accused after being duly advised of his rights as a witness elected to remain silent (R. 35).

4. The offense with which accused is charged is that he operated a vehicle at approximately sixty-five miles per hour in violation of the above cited circular. It is a mathematical certainty that if the distance between Stations No. 1 and 2 was a mile and that accused covered the mile in fifty-one seconds he is guilty as charged. The record is devoid of any competent evidence, however, that the distance between Stations No. 1 and 2 was a mile. The testimony of the only two witnesses to this fact was admitted to be only "what they were told" and therefore clearly hearsay and inadmissible. Further, neither of these witnesses saw the accused pass Station No. 2 and relied entirely upon the code signal from that station to determine when accused had covered the measured mile and used that information to compute his speed. Consequently, the result obtained by the personnel at Station No. 3 was based upon the hearsay statement of the enlisted men posted at Station No. 2.

Neither the personnel at Station No. 2 nor the engineers who had measured the mile in question testified at the trial and therefore the testimony by the enlisted men at Station No. 3 to the fact that accused covered the distance between Stations No. 1 and 2 in fifty-one seconds amounted to a conclusion based entirely upon the hearsay statements of the personnel at Stations No. 1 and 2 and further in the absence of competent testimony as to the actual distance between Stations No. 1 and 2 the computations of the personnel at Station No. 3 are of no value to prove the offense charged.

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

W H Johnson Jr, Judge Advocate

On Leave, Judge Advocate

J. I. Kaw, Judge Advocate

JAGQ - CM 326396 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. NOV 20 1947

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, 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 First Lieutenant Woodrow M. Jarshaw (0-1180561), Headquarters 12th Constabulary Squadron.

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 82, D.A., 10 Dec 1947).

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

NOV 6 1947

JAGQ - CM 326406

UNITED STATES	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at Liege, Belgium, 15 July 1947. Dishonorable discharge and confinement for eleven (11) years. Penitentiary.
	)	
General Prisoner JOHN W. SELLS	)	

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.

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

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

Specification 1: (Nolle Prosequi).

Specification 2: In that General Prisoner John W. Sells, having been duly placed in confinement, at Paris, France, did, at or near Brussels, Belgium, on or about 20 February 1947, while enroute under guard from Paris, France, to Liege, Belgium, escape from confinement before he was set at liberty by proper authority.

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

Specification 1: In that General Prisoner John W. Sells, did, at or near Dinant, Belgium, on or about 26 January 1947, knowingly and willfully misappropriate a truck tractor 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 General Prisoner John W. Sells, did, at or near Brussels, Belgium, on or about 22 February 1947, knowingly and willfully misappropriate a 1/4 ton 4x4 vehicle,

of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

CHARGE III: Violation of the 93rd Article of War. (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

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

Specification: In that General Prisoner John W. Sells, did, at Brussels, Belgium, on or about 8 May 1947, wrongfully strike Charles Lorent in the face with his head.

Accused pleaded not guilty to Specification 1 of Charge II, Specifications of Charges III and IV, and Charges III and IV, and guilty to all other Specifications and Charges. He was found not guilty of Charge III and the Specification thereof and guilty of all other Specifications and Charges. 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 11 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question presented by the record is whether confinement in a penitentiary is authorized for the offenses of which the accused was convicted.

4. Article of War 42 provides in relevant part:

"* * * no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910," (18 USC 468) "or by the law of the District of Columbia * * *."

5. The offenses of escape from confinement (Specification 2, Charge I) and assault and battery (Spec., Charge IV) are not offenses of a civil

nature punishable by penitentiary confinement for more than one year under Article of War 42 supra and penitentiary confinement is not authorized for the offenses alleged in these specifications.

There remains for consideration whether the findings of guilty of misappropriation in violation of Article of War 94, alleged in Charge II and Specifications thereunder, warrant confinement in a penitentiary.

It has been held in CM 319499, Smith, that misappropriation is not one of the offenses denounced by 18 U.S.C. 87 or any other section of the United States Criminal Code, or by the law of the District of Columbia. Although the evidence shows that accused was guilty of misapplication, which is denounced by 18 U.S.C. 87, he was not so charged and he cannot be punished as though he were convicted of misapplication.

The fact that accused is already under a sentence of a previous court-martial wherein a penitentiary was designated as the place of confinement does not authorize the designation of a penitentiary in the execution of a subsequent sentence (Par. 399(5) Dig Ops JAG 1912-40).

Accordingly, the Board of Review is of the opinion that penitentiary confinement is not authorized by Article of War 42 for any offense of which accused was found guilty in this case.

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

W. H. Johnson Jr., Judge Advocate.

On Leave, Judge Advocate.

W. N. Kane, Judge Advocate.

JAGQ - CM 326406 1st Ind

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

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

1. In the case of General Prisoner John W. Sells, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Under the provisions of Article of War 50½. you now have authority to order the execution of the sentence, provided a place other than a penitentiary, Federal reformatory or correctional institution is designated as the place of confinement.

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

(CM 326406).

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.

JAGQ - CM 326409

OCT 31 1947

UNITED STATES	)	UNITED STATES CONSTABULARY
v.	)	Trial by G.C.M., convened at Wetzler, Germany, 6 August 1947. Dishonorable discharge and confinement for one (1) year. United States Disciplinary Barracks.
Private GEORGE GLENZA (13132944), 7749 Staging Area	)	

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.

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

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

Specification: In that Private George Glenza, did, at Giessen, Germany, on or about 30 March 1947, feloniously take, steal, and carry away, one Hamilton wrist watch with brown leather strap, value about $89.00; $940.00 in Military Payment Certificates; 10 cartons of cigarettes, value of about $8.00; 4 pairs of nylon stockings, value of about $6.00; 40 rolls of photographic film, value of about $15.00; 20 chocolate bars, value about $1.00; 1 alarm clock, red, Swiss make, metal, with music box, value about $6.25; 1 Namur light meter, value about $10.00; 1 Sparton Radio, value about $22.50; all the property of one Sergeant August J. Belleggia.

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

Specification: In that Private George Glenza, did, at Nidda, Germany on or about 19 April 1947, wrongfully and unlawfully impersonate a staff sergeant with the intention of evading arrest.

Accused pleaded not guilty to all Specifications and Charges. He was found guilty of Charge I and the Specification thereof, except the words

"$940.00 in Military Payment Certificates; 10 cartons of cigarettes, value of about $8.00; 4 pairs of nylon stockings, value of about $6.00; 40 rolls of photographic film, value of about $15.00; 20 chocolate bars, value about $1.00; 1 alarm clock, red, Swiss make, metal, with music box, value about $6.25; 1 Namur light meter, value about $10.00; 1 Sparton Radio, value about $22.50;" and guilty of Charge II and the Specification thereof. Evidence of three 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 approved the sentence, reduced the period of confinement to one year, designated the Branch United States Disciplinary Barracks, Green Haven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. On the night of 29 March 1947, a number of items, including a Hamilton wrist watch, property of Sergeant August J. Belleggia, were removed from Sergeant Belleggia's room (R. 7). During that evening, accused was seen in the vicinity of Sergeant Belleggia's room (R. 17). On 19 April 1947, accused was apprehended in possession of the aforementioned watch (R. 24). When he was first approached by the Military Police, accused was wearing staff sergeant's chevrons, represented himself to be "Sergeant Garrett", and produced a furlough order and other papers containing the name of Sergeant Garrett. "He finally admitted that his name was Glenza" (R. 24).

The defense offered no witnesses and the accused elected to remain silent (R. 27).

4. In regard to the Specification of Charge I, the evidence is clear that Sergeant Belleggia's wrist watch was stolen as alleged and recovered in accused's possession 21 days later. "The possession of the fruits of crime, recently after its commission, justifies the inference that such possession is guilty possession, and although only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence" (CM 192031, Allen, 49 BR 28).

The only evidence of value of the watch was the owner's testimony as to its cost. It has been uniformly held by the Board of Review that the testimony of a witness as to value of property is not competent unless he is an expert or has special knowledge of the subject matter (CM 268007, McKinney, 44 BR 205). There is no evidence in the record that Sergeant Belleggia was so qualified. It has also been held that proof of value cannot be sustained by reason of the fact that the property itself was offered in evidence. To permit the court on its inspection alone to find

definite market value of articles "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, Bagsdale, 9 BR 13; CM 209131, Jacobs, 9 BR 69).

It necessarily follows therefore that the finding by the court of the value of the watch in question is not sustained by the evidence. The evidence supports only findings relative to value that the stolen property had some value not in excess of $20. The maximum confinement at hard labor authorized by the Table of Maximum Punishments for larceny of property of a value of $20 or less is six months.

In regard to the Specification of Charge II, the evidence shows that when apprehended on 19 April 1947, accused was wearing staff sergeant's chevrons, represented himself to be "Sergeant Garrett", and "he finally admitted his name was Glenza". Accused's admission to the Military Police that his name was Glenza does not exclude the possibility that he was a Sergeant and standing alone, it does not establish the fact that accused was not Sergeant Glenza. It does not prove the allegation that he did wrongfully impersonate a staff sergeant. There was evidence that at the date of trial (6 Aug. 47), accused was a private but the record is void of any evidence as to accused's correct grade on 19 April 1947, the date the offense was alleged to have occurred.

5. For the reasons stated above, the Board of Review holds that the record of trial is legally sufficient to support the finding of guilty of Charge I and only so much of the finding of guilty of the Specification thereof relating to value as involves a finding that the property described therein was of some value not in excess of $20; not 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 involves dishonorable discharge, forfeitures of all pay and allowances due or to become due, and confinement at hard labor for six months.

C H Johnson Jr, Judge Advocate

E F Scheuer, Judge Advocate

A D Kane, Judge Advocate

NOV 7 1947

JAGQ - CM 326409 1st Ind

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

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

1. In the case of Private George Glenza (13132944), 7749 Staging Area, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. It is recommended that the findings of guilty of Charge II and its Specification be disapproved; that only so much of the finding of guilty of the Specification, Charge I, relating to value be approved as involves a finding that the property involved was of some value not in excess of $20; and that only so much of the sentence be approved as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 326409).

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 326418

18 NOV 1947

UNITED STATES	)	88TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Gorizia, Italy, 11 September 1947. Dismissal and total forfeitures
Second Lieutenant CLAYTON A. MILLER (O-1699984), Headquarters and Headquarters Company, 349th Infantry	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Clayton A. Miller, Headquarters and Headquarters Company, 349th Infantry, then Company I, 349th Infantry, did, at Buttrio, Italy, on or about 14 August 1947, feloniously embezzle by fraudulently converting to his own use, Company Funds, of the value of $120.67, the property of Company I, 349th Infantry, entrusted to him as Company Commander, Company I, 349th Infantry.

He pleaded not guilty to, and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to 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 the evidence and the law contained in the review of the 88th Infantry Division Acting Judge Advocate, dated 25 September 1947.

4. Records of the Army show that accused is 24 years of age and unmarried. He was graduated from high school and was employed as a soda dispenser, office machine operator, and restaurant manager. He had enlisted service from 17 February 1943 until 1 January 1947 when he was commissioned a second lieutenant, Army of the United States. His one efficiency rating of record is "Satisfactory."

5. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of 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. Dismissal is authorized upon conviction of a violation of Article of War 93.

A H Feldstein, Judge Advocate

John G O'Brien, Judge Advocate

J W Lynch, Judge Advocate

JAGH-CM 326418 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clayton A. Miller (0-1699984), Headquarters and Headquarters Company, 349th Infantry.

2. Upon trial by general court-martial this officer was found guilty of embezzling company funds of a value of approximately $120.67 in violation of Article of War 93. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On or about 23 June 1947, accused was assigned as Commanding Officer of Company I, 349th Infantry, and received and receipted for the company funds, in the amount of $120.67. The personnel of the company consisted of accused and the first sergeant. On 9 August 1947 accused was relieved and on 11 August 1947 his successor requested the transfer of the company funds. Accused asked to be permitted to go to Gorizia to obtain the money and hand it over the following morning. The permission was granted but accused failed to appear the next day. On 15 August accused was ordered to turn over the funds but stated that he was unable to do so, as he had spent the funds for his own use.

Accused testified that he had kept the funds in his wallet mingled with his own money. On 2 August 1947 he went to Gorizia, became intoxicated, and when he recovered his sobriety his wallet was empty.

4. Records of the Army show that accused is 24 years of age and unmarried. He is a graduate of high school and in civilian life was employed as a soda clerk, office machine operator, and restaurant manager. He had enlisted service from 17 February 1943 until 1 January 1947 when he was commissioned a second lieutenant, Army of the United States. His one efficiency rating of record is "Satisfactory."

5. On 3 June 1947 this officer was found guilty of being found drunk on duty in violation of Article of War 85. He was sentenced to be dismissed the service and to forfeit $130.00 of his pay per month for six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The record of trial in that case is now in my office (CM 325566, Miller).

I recommend that the sentence in the instant case be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution. I further recommend that no further action be taken in the former case, CM 325566, Miller.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 71, D.F., 2 Dec 1947).

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

JAGQ - CM 326442

NOV. 4 1947

Major THOMAS H. ST. CLAIR (0-384975), Headquarters 3rd Battalion, 1st Infantry Regiment	6TH INFANTRY DIVISION Trial by G.C.M., convened at Pusan, Korea, 29 September 1947. Dismissal and total forfeitures.

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 by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Major Thomas H. St Clair, Headquarters 3rd Battalion, 1st Infantry Regiment, APO 6 Unit 1, was, at APO 6 Unit 1, on or about 31 August 1947, in a public place, to wit, Taegu, Korea, drunk and disorderly while in uniform to the discredit of the military service.

Specification 2: In that Major Thomas H. St Clair, Headquarters 3rd Battalion, 1st Infantry Regiment, APO 6 Unit 1, was at APO 6 Unit 1, on or about 31 August 1947, in a public place, to wit, Camp Skipworth, Korea, drunk and disorderly, while in uniform, to the discredit of the military service.

Accused pleaded not guilty to, and was found guilty of the Charge and Specifications, except the words "in a public place" substituting therefor the words "in camp", in Specification 2. 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.

Accused attended a party at the Noncommissioned Officers Club, Camp Skipworth, Korea, given for the officers of his regiment on 30 August 1947.

When the party was over at 2400 accused, accompanied by five noncommissioned officers went to the quarters of First Sergeant Kavanaugh where he sent one of the men to his quarters for three "fifths" of whiskey (R. 6, 7). The liquor was consumed by the group and accused was drunk (R. 8, 13, 20, 26). The group then departed from Kavanaugh's quarters at about 0400, entered a jeep and proceeded to Taegu to an "off limits" area where they entered a house of prostitution and accused went "upstairs" (R. 7, 8, 28). The military police stopped the jeep on its way to Taegu because it was "overloaded" but accused told them he would "take full responsibility for it * * * just let it go at that or he would make it rough for us" (R. 30). Later, while the group were in the "off limits area" they were again approached by military police, advised of the restriction and accused stated that he would accompany the military police to see Captain Ramsey but he did not want them to take the noncommissioned officers as "Captain Ramsey would see it my way and he would come out on top" (R. 34). Thereafter accused and his companions returned to Camp Skipworth where they ate breakfast and then retired.

On the trip to Taegu and while accused was in the "red light" district he wore no insignia of rank although he was otherwise dressed in regulation khaki uniform.

During the pretrial investigation accused made the following sworn statement:

> "On the night of 30 August 1947, the NCO Club gave a party and invited all officers to it. I had not been drinking for some time. I attended the party at the NCO Club and became very intoxicated, beyond everything that I had done before. Somehow or other I became involved with those NCO's and one of whom was 1st Sgt Kavanaugh, Company 'M'. We were stopped twice by the MP's, once for an overloaded jeep and once in the red light district. I do not remember how we happened to go to the red light district but I told the MP's there, I would take care of things and we left and came back to camp." (Pros. Ex. 1).

4. <u>Evidence for the Defense</u>.

After accused's rights as a witness were explained to him he elected to testify under oath (R. 44, 45) that when the party at the Noncommissioned Officer's Club ended:

> "The officers of the 3rd Battalion left in a group and went from the Non-Com Club to the Military Government Club in

downtown Taegu, a drive of approximately eight or nine minutes. When I arrived at the Military Government Club, I went over and presented my respects to the Regimental Commander and his wife, and after leaving their table, stood up and realized I was rapidly feeling the effects of the liquor, and, in fact, I even began to get a little sickish, so I went up to the bar where Captain Ramsey was standing. I asked if I could use his jeep to go home. This was, as I recall, around ten o'clock. I went downstairs of the Military Government Club and got in the jeep and told the driver to take me to my quarters. Some where between the MG Club and Camp Skipworth I apparently blanked out. I have three distinct flashes of memory regarding that night, and three only. One, as I recall, I was talking to Sergeant Kavanaugh; how I met him, I do not recall. I recall hearing the siren on the Military Police jeep, and seeing a jeep pull up behind us and seeing their headlights. I recall a jeep driving up and pulling to a halt in downtown Korea. That's all I remember about the evening." (R. 46).

Accused's commanding officer testified that he would classify accused as a "moderate drinker" and that until this incident occurred he considered him an excellent officer.

5. The evidence is clear and uncontradicted that accused was drunk on the evening in question. This fact is admitted by him in his statement to the investigating officer. While in such condition he drank with five enlisted men in their quarters until approximately 0430 hours. He furnished the liquor and after it was consumed, removed his insignia of rank, rode with them in a jeep to a house of prostitution in an "off limits" area and on two occasions became involved with the military police advising them to "just let it go or he would make it rough on them". Such conduct was clearly disorderly and of such character as to bring discredit on the military service (CM 250868, Anderson, 33 BR 83; CM 264595, Evans, 42 BR 137 (193)). Each element of the offenses charged was proved beyond a reasonable doubt.

The explanation of accused regarding his behavior on the evening in question admits his intoxicated condition and even if believed by the court was not a defense to the charge but strictly in mitigation thereof.

6. Department of the Army records show accused is 32 years of age and married. He graduated from high school in Tacoma, Washington, and attended College of Puget Sound for one year. He enlisted in the

Washington National Guard in 1933, remained in that status until he was appointed a Second Lieutenant, Cavalry, N.G.U.S., 6 October 1939 and entered active service 19 February 1941 as a Captain, Infantry, N.G.U.S. He was promoted to the grade of Major on 2 December 1942 and served one year in the European Theatre. He was relieved from active duty on 2 March 1946 and recalled at his own request on 4 October 1946. The only two efficiency ratings available are superior.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. Dismissal is authorized for conviction of a violation of Article of War 96.

E. H. Tomson Jr, Judge Advocate

On Leave, Judge Advocate

A. D. Kane, Judge Advocate

JAGQ - CM 326442 1st Ind

J.A.G.O., Dept of the Army, Washington 25, D.C. NOV 3

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 Thomas H. St. Clair (O-384975), Headquarters 3rd Battalion, 1st Infantry Regiment.

2. Upon trial by general court-martial in Korea this officer was found guilty of being drunk and disorderly in a public place and in camp, 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 accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. I concur in that opinion.

4. The evidence shows that accused after attending a party at the Noncommissioned Officers Club, Camp Skipworth, Korea, went with five enlisted men to the quarters of a first sergeant where he sent one of the enlisted men to his quarters to obtain three bottles of whiskey. The liquor was consumed by the group and accused was drunk. The group then departed from the sergeant's quarters at approximately 0400, entered a jeep and proceeded to Taegu to an "off limits" area where they entered a house of prostitution. The Military Police stopped the jeep on its way to Taegu because it was "overloaded" but accused told them he would take full responsibility and to "just let it go at that or he would make it rough for us". While the group were in the "off limits" area they were again approached by the military police, advised of the restriction and accused stated that he would go with the military police but he did not want them to take the noncommissioned officers as "Captain Ramsey would see it my way and he would come out on top". Thereafter accused and his companions returned to camp where they ate breakfast and retired. On the trip to Taegu and while accused was in the "off limits" area he wore no insignia of rank although he was otherwise dressed in regulation khaki uniform.

The accused testified under oath that he became very intoxicated at the Noncommissioned Officers' Club "beyond anything" that he had done

before and remembers talking to the first sergeant, being stopped by the military police, but otherwise has no recollection of any of the happenings on the evening in question.

5. Department of the Army records show accused is 32 years of age and married. He graduated from high school in Tacoma, Washington, and attended College of Puget Sound for one year. He enlisted in the Washington National Guard in 1933, remained in that status until he was appointed a Second Lieutenant, Cavalry, N.G.U.S., 6 October 1939 and entered active service 19 February 1941 as a Captain, Infantry, N.G.U.S. He was promoted to the grade of Major on 2 December 1942 and served one year in the European Theatre. He was relieved from active duty on 2 March 1946 and recalled at his own request on 4 October 1946. The only two efficiency ratings available are superior.

6. I recommend that the sentence be confirmed but in view of all the circumstances recommend that it be commuted to dismissal, reprimand and forfeiture of $100 pay per month for four months and that as thus commuted the sentence be carried into execution, but that execution of that portion of the sentence adjudging dismissal be suspended during good behavior.

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

CM 326442

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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(GCMO 49 (DA) 19 Nov 1947).

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

JAGK - CM 326443

9 FEB 1948

UNITED STATES	)	88TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Cormons, Italy, 23 September 1947. Dismissal.
First Lieutenant CLIFFORD C. MORRISON (O-1177105), Infantry	)	

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

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

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

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that First Lieutenant Clifford O. Morrison, Service Company, 349th Infantry, being the senior officer in a vehicle at the time of an accident, did, at Gorizia, Italy, on or about 30 July 1947, wrongfully leave the scene of the accident without rendering assistance to Giuseppe Grendene, an Italian civilian, who had been struck by the vehicle.

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its specification but guilty of Charge II and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

On 30 July 1947 First Lieutenant John J. Bean, Service Company, 349th Infantry, Cividale, Italy, authorized Sergeant Latour to use a company jeep. This jeep was driven by Private Skerlock (R 27). Private Skerlock drove the jeep from Udine, Italy, to Gorizia, Italy, with two sergeants as passengers. While passing the Garibaldi Cafe in Gorizia,

Private Skerlock saw the accused. The accused "hollered or something." Private Skerlock drove the two sergeants to 84 Corso Roosevelt and received instructions to return at 10:30 p.m. and in the meantime park the jeep "at the Division car park." On his way to the motor park Private Skerlock stopped at the Garibaldi Cafe and asked the accused "how he was enjoying his furlough." The accused was on leave on 30 July 1947. The accused and Private Skerlock went to a bar on the outskirts of Gorizia and drank "a beer." They remained at the bar about an hour, after which they returned to the Garibaldi Cafe where they ate some sandwiches. From the Garibaldi Cafe they went "to the castle on the hill" where they had a drink. At one cafe they met Privates Teebin and Kemble. About 7:30 p.m. the accused and the three privates went to an old bar near the 339th Field Artillery Area. This was an officer's bar and they stayed about 15 minutes. The accused drank a beer. They left this bar and drove to a bar in San Andrea where they remained about 10 minutes. When they left this bar, Private Skerlock drove the jeep, the accused was seated next to the driver, and Privates Teebin and Kemble were in the back. They proceeded along the road about a mile, at which time they met an Italian riding a bicycle. The jeep struck and injured this Italian (R 7-16,18-20). The accident occurred about 8 p.m. Private Skerlock testified concerning the accident, "I was doing over 20 when he came around the turn. I blew my horn and pulled off the road and he cut back in front of me" (R 17). Private Skerlock stopped the jeep and went to the aid of the injured man. The man was bleeding about the head but was conscious. He was put on a truck and sent to a hospital where he died the following day (R 11). Privates Kemble and Teebin assisted Private Skerlock in giving aid to the injured man and in sending him to the hospital (R 19,20).

When the jeep stopped after the accident the four occupants dismounted. Private Kemble testified concerning the accused: "He jumped out of the jeep and I said, 'take off, there is no need for you to get into any trouble.'" The accused started walking down the road. When Private Kemble made this statement to the accused "he was on the way around the jeep and I told him to take off." Private Kemble then stated, "I told these guineas to get an ambulance and they came back with a truck. I helped put him on the truck and they drove off" (R 20). On cross-examination he stated:

> "Q. You have testified that you had some conversation with Lt. Morrison at the time, something about that he was a fine officer.
>
> "A. I didn't tell him that he was a fine officer. I just thought he was. I just said, 'Take off'.
>
> "Q. Where was he at the time?
>
> "A. He just stepped out of the jeep.
>
> "Q. Was there some attention being given to the civilian then?
>
> "A. No, the Lieutenant was the first one out and I went after him.
>
> "Q. Did you tell him assistance would be rendered?
>
> "A. No, but I figured he knew what I was going to do. I was taking charge." (R 21).

Luigi Palmerini, a civilian, testified that on 30 July 1947 he was at San Andrea where the Italian Grendene was "run over by an American jeep." He was about 200 meters from the scene of the accident when he became aware of it. He saw some soldiers "trying to help the old man." He also saw the accused going towards town while he was going to the accident. The accused was "running and walking undecidedly" (R 22).

4. For the Defense

No evidence was offered for the defense. The accused was warned of his rights and elected to remain silent (R 33,34).

5. Discussion

Private Skerlock was the driver of a jeep which had been properly dispatched on an official mission of transporting two sergeants to the town of Gorizia, Italy. He delivered his passengers to the proper place about 4 p.m., 30 July 1947, and was instructed to park the jeep at the Division car park and return for his passengers at 10:30 p.m. On his way to the designated parking area Private Skerlock stopped at a cafe and talked to the accused who was on leave. They had something to drink and then went to other bars and cafes for drinks and food. At one cafe they were joined by Privates Kemble and Teebin. The accused and the three privates continued their course of conduct until about 8 p.m., at which time the jeep collided with and injured an aged Italian civilian.

Army Regulations provide:

> "In case of injury to persons or damage to property, the driver of a vehicle will stop the vehicle and render such assistance as may be needed complying when practicable with state and local regulations for reporting of accidents. ***" (par 25a(1), AR 850-15, 1 Aug 1945.)
>
> "(2) The name of the commanding officer of the station to which the driver's vehicle is assigned, the vehicle number, and the driver's name will be furnished to all persons injured, and to the driver of any vehicle, and to owners of any property involved in the accident by presentation of the identification card attached to Standard Form 26 (Driver's Report - Accident - Motor Transportation)." (par 25a(2), AR 850-15, 1 Aug 1945.)

The quoted provisions of the Army Regulations are comparable to the statutes of the various States and Title 40, Section 609, District of Columbia Code, imposing specific duties on the driver of a motor vehicle in case of injury to person or damage to property. But the duties, if any, of a passenger who might be riding in an automobile under the circumstances mentioned do not appear to be so clearly defined by regulation or statute. In CM 301581, Shelton, 13 BR (ETO) 1, 4-5, a case involving the failure to render aid by all of the occupants of a military

vehicle which had run down and seriously injured a soldier, the Board of Review stated:

> "*** the three accused were engaged in a joint enterprise. *** The duty of the driver to stop and render assistance in case of injury to a person, is an incident of the operation of a government vehicle. Under these circumstances each occupant was equally responsible with the driver for the latter's failure to render the necessary assistance to the injured soldier as required by the regulation and directive mentioned (CM ETO 393, Caton and Fikes; CM ETO 2788, Coats and Garcia). The findings of guilty are therefore sustained on the grounds stated."

In the instant case it will be noted that Private Skerlock, the driver of the vehicle in which the accused was a passenger, immediately brought the vehicle to a stop and that he, Kemble and Teebin rendered assistance to the injured person. We assume that proper assistance was in fact rendered because there is no indication to the contrary.

The specification of Charge II alleges, and the accused was found guilty of,

> "*** being the senior officer in a vehicle at the time of an accident, did, *** wrongfully leave the scene of the accident without rendering assistance to Giuseppe Grendene, *** who had been struck by the vehicle."

The accused was the first person to dismount from the vehicle after Grendene had been run over. He took no action whatever with respect to the injured person, but at the suggestion of Kemble "took off *** down the road."

The duty of the accused under the circumstances shown transcends that of the driver and other occupants of the vehicle. As an officer of the U.S. Army, being present and in command of the vehicle when the emergency arose, the duty plainly devolved upon him either to render the necessary assistance personally or to take such action, within the scope of his authority, as reasonably appeared necessary under the circumstances. Failing to do either he not only abdicated the responsibility inherent in his office, but deprived the gravely wounded civilian of any benefit which his exercise of leadership might thereby have provided. This is "the wrongful leaving" denounced in the specification, and the court's finding.

However, we believe that accused's misconduct, under the circumstances in this case, was not "of the immoral, dishonorable or disreputable character necessary to sustain a charge" under Article of War 95 (see Footnote No. 16, p. 711, Winthrop's Mil. Law and Precedents, 2nd Ed., Reprint), for there is some indication in the record that accused had reason to assume that his enlisted companions would render aid to the victim. Such an assumption on his part would render his actions somewhat less offensive to accepted

standards of moral decency than the type conduct which is customarily decried as a violation of Article of War 95. Nevertheless, we are of the opinion that the conduct of accused as exhibited by this record of trial was prejudicial to good order and military discipline and that it also had a definite tendency to bring the military service into disrepute. In short, we conclude that the finding of guilty of the specification herein is sustainable as a violation of Article of War 96.

Our opinion in this regard is not to be construed as amounting to a declaration that in no case of an officer "wrongfully leaving the scene of an accident" could the offense amount to a violation of Article of War 95.

6. Department of the Army records show that the accused is 34 years of age and has a total service of approximately eleven years. He served as an enlisted soldier from June 1935 to September 1942 and was commissioned a second lieutenant in February 1943.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings as finds the accused guilty of the specification in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation of Article of War 96.

Charles T. Aikens, Judge Advocate

Gilbert E. Albright, Judge Advocate

Harley A. Cummings, Judge Advocate

JAGK - CM 326443 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. FEB 12 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 First Lieutenant Clifford O. Morrison (O-1177105), Infantry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully leaving the scene of an accident without rendering assistance to Giuseppe Grendene, an Italian civilian who had been struck by the vehicle in which accused was riding, in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

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

On the evening of 30 July 1947 the accused and Privates Skerlock, Teebin and Kemble were riding in a Government vehicle in the vicinity of Gorizia, Italy. They visited various bars where they procured and drank intoxicating beverages. Private Skerlock had procured the vehicle on his own initiative and he was doing the driving. During the course of the evening they ran over and fatally injured a 71-year old Italian named Giuseppe Grendene who was riding his bicycle along the highway. After striking the Italian, Skerlock brought the vehicle to a stop and the accused dismounted from the vehicle. Private Kemble thereupon stated to the accused, "Take off, there is no need for you to get into trouble." The accused immediately left the scene and the three enlisted men made arrangements for the Italian to be taken to a civilian hospital where he died the next day. The accused, who appears to have been drunk, apparently assumed that the enlisted men with him would render the necessary aid to the wounded Italian.

The accused's leaving the scene under the circumstances shown was not such an immoral, dishonorable or disreputable act as to amount to a violation of Article of War 95, but it was clearly an act prejudicial to good order and military discipline in violation of Article of War 96. Although aid was rendered by the enlisted men, the accused nevertheless abdicated his functions of leadership and command at the time of the emergency and deprived the injured person of whatever aid such leadership might have

afforded.

The accused has served in the Army about 11 years. He was commissioned a second lieutenant in February 1943. He has a reasonably creditable record and there is no record of any previous convictions. I recommend that only so much of the findings of guilty of Charge II and its specification be approved as involves a finding of guilty of that specification in violation of Article of War 96, and that the sentence be confirmed but commuted to a reprimand and forfeiture of $75 of accused's pay per month for a period of three months.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 59, Da, 4 March 1948).

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

JAGH - CM 326445

UNITED STATES	)	88TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Gorizia, Italy, 4 September 1947. Dismissal
First Lieutenant BURNICE E. BARNETT (0-2000599), Infantry	)	

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

CHARGE I: Violation of the 90th Article of War.

Specification: In that First Lieutenant Burnice E. Barnett, Company M, 350th Infantry Regiment, did at Tarcento, Italy on or about 20 July 1947, wrongfully use provoking speech, to wit "You are a lying son-of-a-bitch" or words to that effect, against First Lieutenant Fred C. Kaune, 350th Infantry Regiment, over the telephone.

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

Specification 1: In that First Lieutenant Burnice E. Barnett, Company M, 350th Infantry Regiment was at Tarcento, Italy on or about 20 July 1947 in a public place, to wit, the street of Via Monte Grappa in front of house No. 6, conspicuously disorderly.

Specification 2: In that First Lieutenant Burnice E. Barnett, Company M, 350th Infantry Regiment, did at Tarcento, Italy on or about 20 July 1947, with intent to deceive Technical Sergeant Rinaldo Di Tullio, of the Special Police, 350th Infantry Regiment, officially state to the said Technical Sergeant Di Tullio, that "he did not know anything about two shots having been fired" which statement was known by the said Lieutenant Barnett to be untrue and made with disregard of a knowledge of the facts.

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

Specification: In that First Lieutenant Burnice E. Barnett, Company M, 350th Infantry Regiment, did, at Tarcento, Italy on or about 20 July 1947, through carelessness, discharge a firearm, to wit, a caliber .38 rifle, Schoenauer, M1905, in front of and outside of his quarters at No. 6 Via Monte Grappa.

He pleaded not guilty to, and was found guilty of, the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

Accused is in the military service and on 20 July 1947 was stationed at Tarcento, Italy. At about 0350 hours a call was made from accused's quarters to the officers' club for Captain Pruitt (R 27). The Italian employees were unable to understand the call and First Lieutenant Fred C. Kaune answered the phone. The party calling asked for Captain Pruitt and when Lieutenant Kaune said that Captain Pruitt was not available the other party called Lieutenant Kaune "a lying son-of-a-bitch." On Lieutenant Kaune's inquiry the other party identified himself as the accused. Kaune disclaimed the epithet used against him, whereupon accused reiterated that Kaune was "a lying son-of-a-bitch," challenged Kaune to "come down" if he wanted to make "something of it," and gave Kaune his address (R 12). The operator who had placed the call overheard part of the conversation and heard the party who identified himself as accused call Lieutenant Kaune "a lying son-of-a-bitch" (R 30).

Kaune had Private First Class Ralph L. Reece drive him to accused's quarters on Via Monte Grappa (R 12, 33, 41). They were accompanied by Private Robert G. Ellis (R 33, 41). Kaune dismounted from the jeep across the street from accused's home and observed accused sitting on the steps of the house. Accused was holding an object which appeared to be a shotgun (R 14, 35, 42). Kaune mentioned to accused that the latter had wanted to speak to him. Accused said that he did, placed the object in his hands inside the door of the house and advanced to the road. As they met Kaune believed that accused was going to strike him and struck accused, knocking him to the ground. Accused came up "again swinging" and Kaune knocked him to the ground again. This time Kaune helped accused to his feet saying, "I thought you wanted to talk it over." Accused replied, "Yes, lets talk it over." They stood with their hands down and the accused tripped Kaune who fell to the ground, whereupon accused started to strangle him. Kaune struck accused in the face and the latter released his hold (R 14-15, 36-37, 44). Accused crawled to the gate outside his house, regained his feet and ran into the house (R 37, 44). Kaune and the two enlisted men went back to their jeep, drove off, and subsequently heard two shots spaced ten or fifteen seconds apart (R 16, 37-38, 44-45).

At about 4:00 a.m., 20 July 1947, Technical Sergeant Rinaldo Di Tullio of the "SP Platoon" heard two shots fired and accompanied by Private First Class Billy Darnell investigated the shots. He talked with an Italian woman who was in accused's house. Accused opened a window and asked what Di Tullio wanted. Di Tullio inquired if accused had heard any shots and accused replied that he had not. On being asked if he had a weapon in the house accused replied he had a pistol and gave it to Di Tullio to examine. Di Tullio's examination disclosed that the pistol was empty and had not been fired recently (R 49, 55).

4. Evidence for the defense:

Accused elected to testify under oath in his own behalf. His testimony pertinent to the issues of the case is substantially as follows:

Accused called the officers' club some time around 3:30 or 4:00 in the morning of 20 July 1947 to talk to Captain Pruitt. Lieutenant Kaune answered and said that Captain Pruitt was not available. There was some mention made about punching someone on the nose and accused challenged Lieutenant Kaune to come down and punch his nose and at Kaune's request gave Kaune his address. When Kaune arrived by jeep accused went out into the road to meet him. Accused was blinded by the lights from the jeep and raised his hand to shade his eyes. As he did so he was knocked down by Kaune. When Kaune was picking him up accused figured he was going to be hit again so he hit Kaune. In the meantime accused's wife and young son had been disturbed and were screaming, so accused made a retreat and went into his house, whereupon, Lieutenant Kaune left in his jeep. Before going to bed accused decided to unload his rifle and went outside the house. He unlocked the safety and the rifle fired. He investigated to see if it had hit anything, then pulled the trigger again as he thought it was empty but the rifle fired a second time. When Sergeant Di Tullio arrived he asked accused, "Do you know anything about shooting down here?" Accused replied, "Was there?" In response to Di Tullio's request accused allowed Di Tullio to inspect a pistol (R 70). Later when Lieutenant McCarthy came to his house accused did not want to talk about the affair because he had been drinking and was confused (R 71, 75). On examination by the court he denied that he called Lieutenant Kaune "a lying son-of-a-bitch" (R 81).

5. Accused was found guilty of using provoking speech against a fellow officer (Spec, Chg I). The evidence shows that at the time, place, and under the circumstances alleged accused talked with Lieutenant Kaune by telephone, inquiring for a Captain Pruitt. When Kaune said that Captain Pruitt was unavailable, accused called Kaune "a lying son-of-a-bitch." Lieutenant Kaune testified to this effect and his version of the conversation was corroborated by the telephone operator who placed the call. Accused's denial of using the language alleged is equivocal and unconvincing. That the language used was provoking within the provisions of Article of War 90 is self-evident.

Accused was found guilty of being conspicuously disorderly in a public place in violation of Article of War 95 (Spec 1, Chg II). The evidence shows that after the telephone conversation above related Lieutenant Kaune proceeded to accused's quarters where he met accused on the road. There Kaune knocked accused to the ground twice before accused retaliated. Kaune testified that accused had "impressed" him "with the idea that he was going to swing," so Kaune struck him first. Accused testified that he was blinded by the jeep lights and raised a hand to shade his eyes. There is no doubt but that Kaune struck the first blow and there is no doubt that before attempting to talk the matter over with accused he knocked the latter down twice. At this point accused took the aggressive and both men went to the ground. The affray took place in the early morning hours in the presence of two enlisted men and accused's wife. It is not to be supposed that accused and his adversary met to exchange pleasantries or for any other purpose except the fray which took place. This was a case of mutual assault and battery and accused's part in it constituted disorderly conduct. However, in view of the circumstances that the fray took place under cover of darkness and before a small audience which did not include persons outside the military establishment, accused's disorderly conduct may not be considered as conspicuous, and does not demonstrate his moral unfitness to be an officer. In this respect the record of trial, therefore, does not support a finding of guilty of an offense in violation of Article of War 95. (CM 237229, Baldwin, 23 BR 337).

Accused was found guilty of discharging a firearm through carelessness (Spec, Chg III). The testimony of accused shows that after his fight with Lieutenant Kaune and prior to retiring for the night, he decided to unload his rifle. In the process of so doing he discharged the rifle twice. The court could find under the circumstances that accused did not exercise the requisite care in unloading his weapon and hence the finding of guilty of discharging a firearm through carelessness was warranted.

Accused was also found guilty of making a false statement to a "Special Policeman" in violation of Article of War 95. There was evidence that Technical Sergeant Di Tullio, a member of the "SP Platoon," heard two rifle shots at the time accused discharged his rifle. Di Tullio investigated the shots and in the course of his investigation questioned accused and asked if the accused had heard the shots. Accused denied hearing any shots. In his testimony accused stated that when he was asked if he heard any shots he countered with the question "Was there?" In view of Di Tullio's testimony which was corroborated by another enlisted man it may be concluded that accused did deny hearing any shots. The falsity of the denial is established by accused's own testimony.

The Board is of the opinion, however, that, because of the events which proceeded it, and the other circumstances, accused's false statement did not constitute conduct in violation of the 95th Article of War. Accused in his testimony indicated that he had been drinking on the evening in question, and his actions as shown by the record of trial are corroborative of

an intoxicated condition. He had also been given a physical beating and the hour was late. There is a possibility that under normal conditions accused would not have made the false statement shown. For the reasons stated the Board is of the opinion that accused's conduct in this instance constituted a violation of Article of War 96.

6. Records of the Army show that accused is 27 years of age, married, and the father of a 4-year old boy. He completed the seventh grade of school. In civilian life he was employed as a truck driver and farmer. He had enlisted service from November 1938 until 6 January 1945 when he was commissioned a second lieutenant. He was subsequently promoted to first lieutenant in May 1945. He served in combat in the European Theater and was awarded the Bronze Star Medal. His efficiency ratings of record are "excellent" and "superior."

The Board has considered a letter pertaining to clemency on behalf of accused addressed to The Adjutant General, dated 12 November 1947 from the Honorable William Langer, United States Senate.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors adversely affecting the substantial rights of accused were committed other than as hereinbefore noted. 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, Charge III and its Specification, Specification 1 of Charge II, except the word "conspicuously," and Specification 2 of Charge II; legally insufficient to support the finding of guilty of Charge II, but legally sufficient as to the Specifications under Charge II to support a finding of guilty of a violation of Article of War 96. Dismissal is authorized upon conviction of violations of Articles of War 90 and 96.

A. Hoffenstein, Judge Advocate

John G. O'Brien, Judge Advocate

M. Lynch, Judge Advocate

JAGH - CM 326445 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 the record of trial and the opinion of the Board of Review in the case of First Lieutenant Burnice E. Barnett (0-2000599), Infantry.

2. Upon trial by general court-martial this officer was found guilty of using provoking language against another officer in violation of Article of War 90 (Chg I, Spec); of being conspicuously disorderly in a public place, and of making a false statement to a special policeman, in violation of Article of War 95; and of discharging a firearm through carelessness, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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, Charge III and its Specification, and Specification 1, Charge II, except the word "conspicuously", and Specification 2, Charge II; legally insufficient to support the finding of guilty of Charge II, but legally sufficient to support a finding of guilty of a violation of Article of War 96 as to the Specifications under Charge II; legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

During July 1947 accused was stationed at Tarcento, Italy. At approximately 0330 hours, 20 July 1947 accused called the Officers' Club at Tarcento from his quarters. Accused asked to speak with a Captain Pruitt. Lieutenant Kaune who took the call informed accused that Captain Pruitt was not available, whereupon accused called Lieutenant Kaune "a lying son-of-a-bitch." Lieutenant Kaune disclaimed the epithet and threatened to punch accused in the nose. Accused reiterated that Kaune was "a lying son-of-a-bitch," told Kaune to come on down if he "wanted to make something out of it." and gave his address to Kaune. Subsequently Kaune went to accused's quarters and at Kaune's invitation accused came out on the road to meet him. Accused was hit by Kaune and knocked to the ground twice. After Kaune had assisted accused to his feet the second time, accused launched an attack and both men went to the ground. When accused's wife started to scream accused stopped fighting and entered his house, and Kaune left in his jeep. Accused after entering his house decided to unload his rifle. He took the rifle outside and when he unlocked the safety the rifle fired. Believing the rifle to be then unloaded he pulled the trigger and the rifle fired a second time. Subsequently when Technical Sergeant Di Tullio, a member of the Special Police Platoon, investigated the shots, accused told Di Tullio that he had not heard any shots. There was evidence that accused had been drinking on the night in question.

The Board of Review is of the opinion that under the circumstances shown by the record of trial accused's disorderly conduct was not "conspicuous" and that neither the disorderly conduct nor the false statement constituted a violation of the 95th Article of War, but that they both constitute violations of the 96th Article of War.

4. Accused is 27 years of age, married, and the father of one child. He completed the seventh grade of school. In civilian life he was employed as a truck driver and farmer. He had enlisted service from November 1938 until 6 January 1945 when he was commissioned a second lieutenant. He was promoted to first lieutenant in May 1945. He served in combat in the European Theater and was awarded the Bronze Star Medal. His efficiency ratings of record are "excellent" and "superior."

The Board of Review considered a letter pertaining to clemency on behalf of accused addressed to The Adjutant General, dated 12 November 1947 from the Honorable William Langer, United States Senate. In his review of the record of trial the staff judge advocate expressed the view that the evidence was not legally sufficient to support the finding of guilty of Specification 1, Charge II (disorderly), and that the sentence was excessive but could not be commuted by the reviewing authority.

5. I recommend that only so much of the finding of guilty of Specification 1, Charge II, be approved as involves a finding that accused was at the time and place alleged disorderly in violation of Article of War 96, and that only so much of the finding of guilty of Specification 2, Charge II, be approved as involves a finding of guilty of that Specification in violation of Article of War 96, and that the sentence be confirmed, but in view of accused's prior excellent record and all the circumstances of the case, recommend that it be commuted to a reprimand and forfeiture of $50.00 of his pay per month for three months.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 19 (DA) 20 Jan 1948).

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

NOV 13 1947

JAGQ - CM 326450

UNITED STATES	)	ANTILLES DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at Fort Brooke, Puerto Rico, 25-26 September 1947. Dishonorable discharge and confinement for four (4) years. Penitentiary.
	)	
Technical Sergeant ALEJANDRO TORRES BAEZ (RA 30414326) 7509 Service Unit Fort Brooke, Puerto Rico	)	

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.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Technical Sergeant Alejandro Torres Baez, 7509th Service Unit, Fort Brooke, Puerto Rico, did, at Barrio Amparo, Hato Rey, Puerto Rico, on or about 23 July 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per annum with Miguel Angel Benitez, a civilian and a minor.

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 four years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence.

Inasmuch as the Board of Review holds that there was prejudicial error committed at the trial, the evidence need not be summarized.

4. The record of trial shows that accused voluntarily took the witness stand to testify under oath but expressly limited his testimony to the circumstances relative to the procuring of his alleged confession (R. 67). After proper direct and cross-examination of accused well within the confines of this limitation the following occurred:

"PROSECUTION: I believe the witness is subject to cross examination on the whole offense.

"DEFENSE: He cannot testify to anything in connection with the fact. If the accused testifies in denial or explanation of the offense, then he can be cross examined on the whole offense. He testified only to his own statement.

"PROSECUTION: But he told. . . .

"DEFENSE: He said: 'The way the statement is done is not the way I had it in longhand.' I would like to call your attention to page 126 and 127 of the manual.

"LAW MEMBER: When the accused testifies in denial or explanation of any offense charged or any fact tending to prove his guilt of that offense, even though it has not been the subject of direct testimony, it is properly the subject of cross examination. (Paragraph 395 (34), page 223, Digest of Opinion, JAG, 1912-40)

"DEFENSE: Can I give my explanation of this, on 395 (34), when the accused testifies of anything he is charged or any fact proving he is guilty of that offense?

"LAW MEMBER: The statement that the accused made is evidence to this case. Therefore, when he testifies as to any of the contents of this statement--as to the manner in which it was derived and anything else--he is subject to cross examination on the whole offense, subject to objection by any member of the court. It is objected to. The court will be closed.

"The court was closed and upon being opened, the president announced the following:

"PRESIDENT: The ruling of the law member is sustained. The witness may be cross-examined." (R. 71-72).

Accused was then subjected to examination by the court, prosecution and defense regarding his whereabouts, companions and conduct on the night of the alleged offense. During this examination accused did not make any incriminating statements and did not testify concerning any facts which had not been previously testified to by either prosecution or defense witnesses. Consequently, this holding is not based in any degree upon whether the evidence elicited from accused was necessary to support the findings of guilty. In fact the offense charged was proved by competent evidence without any consideration being given to accused's testimony regarding his guilt or innocence. The sole question presented in this case is, "Were the substantial rights of accused violated when he was required to testify regarding the merits of the case when he had voluntarily taken the witness stand to testify only for a limited purpose?"

It has been uniformly held by the Board of Review that an accused has the right to testify for a limited purpose without being subject to examination regarding the merits of the case and to refuse him such privilege constitutes fatal error (CM 275738, Kidder, 48 BR 145). The fairness of the above rule was considered in Grantello v. United States, 3 Fed. 2nd, 117 (C.C.A. 8th, 1924) wherein the court held that an accused who testified only "that his name was Frank Grantello" was not subject to examination and that it was fatal error for the court to comment on his failure to testify on the merits, concluding that:

> "It is a fundamental principle of our government, repeatedly emphasized and applied by the Supreme Court, that the provisions of its Constitution and statutes for the protection of the rights and privileges of its citizens accused of crimes shall not be limited, qualified, or frittered away, but shall be fairly and broadly construed and enforced for their protection."

This decision clearly recognizes the right of an accused to testify for a limited purpose provided he does not testify concerning facts relative to his guilt or innocence. It must be conceded therefore that the examination of accused on the merits of the case when he had taken the stand for a limited purpose only was highly improper and constituted serious error.

It has been held fatal error for the prosecution to call upon an accused to testify (CM 312517, Kosydar, et al. (9 Oct. 1946);

CM 317428, Satterwhite, et al. (19 Feb. 1947)). While these cases may be distinguished from CM 273817, Johnson, et al, 6 BR (ETO) 291; CM 246543, Bishop, et al, 2 BR (NATO-MTO) 9) in which contrary results were reached, it is considered that the principles set forth in the Johnson and Bishop cases, supra, are not controlling and should no longer be followed. It is recognized that in these cases the accused was called to the stand by the prosecution while in the instant case he voluntarily took the witness stand at his own request to testify for a limited purpose and was thereafter subjected to examination on the merits of the case over objection by the defense.

The Board of Review is of the opinion however that such a distinction is of no consequence. It cannot be denied that an accused has a right both under the Constitution of the United States and the provisions of the 24th Article of War to refrain from testifying regarding the merits of his case. This right was denied to the accused in the instant case and he was compelled to give testimony regarding his guilt or innocence when he had not voluntarily elected to do so. This amounted to a violation of his rights under the Constitution of the United States and the 24th Article of War and cannot be considered as falling within that class of nonprejudicial errors covered by the 37th Article of War. This constitutional guarantee can only be effectively enforced by excluding all evidence obtained in violation of accused's right against self incrimination. It must be remembered that accused in this case desired to exercise his right to testify concerning the manner in which his alleged confession was procured without subjecting himself to cross-examination on the merits. Any ruling of a court-martial which circumvented his right to so limit his testimony would jeopardize his constitutional guarantee against self incrimination, a right which the courts are under a solemn obligation to guard. So obnoxious to the law is the use of an involuntary confession that the Supreme Court of the United States has stated:

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy; governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions, by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." (Ashcraft v. Tennessee, 88 Law Ed. 858).

Since the ruling of the law member denied to accused the right to limit his testimony to the facts showing the manner in which his confession was procured without being compelled to testify as to his guilt or innocence his fundamental constitutional right against self incrimination, as distinguished from a mere error of procedure, was violated. The right against self incrimination provided by the fifth amendment to the Constitution of the United States and Article of War 24 is so fundamental that its infringement constitutes a lack of due process which is not rectified by the fact that the record of trial contains other clear and compelling evidence of guilt.

The Board of Review is cognizant of CM 282871, Marquez, 11 BR (ETO) 105, in which a contrary decision was reached on identical facts on the theory that the evidence other than that erroneously elicited from the accused was of such probative force as virtually to compel a finding of guilty and therefore, the error of requiring the accused to testify to the merits when he had taken the stand for a limited purpose only was not prejudicial to his substantial rights under the provisions of the 37th Article of War. For the reasons stated the principle enunciated in the Marquez case supra, should no longer be followed.

5. The Board of Review holds that the record of trial is legally insufficient to support the findings of guilty and the sentence.

W H Johnson Jr, Judge Advocate

On Leave, Judge Advocate

A M Kane, Judge Advocate

JAGQ - CM 326450 1st Ind

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

TO: Commanding General, Antilles Department, APO 851, c/o Postmaster, Miami, Florida.

1. In the case of Technical Sergeant Alejandro Torres Baez (RA 30414326), 7509th Service Unit, Fort Brooke, Puerto Rico, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated.

2. Upon taking the action recommended above you will have authority under Article of War 50½ to direct a rehearing.

3. When copies of the published order in this case are forwarded to this office 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 326450).

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.

(237)

JAGK - CM 326457

15 JAN 1948

UNITED STATES	THIRTEENTH AIR FORCE
v.	Trial by G.C.M., convened at 4th Air Depot, APO 714, 19 June 1947. Dishonorable discharge (suspended) and confinement for six (6) months and twenty (20) days. Disciplinary Barracks.
Private First Class MIGUEL BORRERO (RA 30430768), Headquarters and Base Service Squadron, 4th Air Depot.	

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

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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 sufficient to support only so much of the sentence as involves confinement at hard labor for three months and twenty-four days and forfeiture of two-thirds pay per month for a like period. The record of trial 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 61st Article of War.

Specification: In that Private First Class Miguel Borrero, Headquarters & Base Service Squadron, 4th Air Depot, APO 714, did, without proper leave absent himself from his organization at Nichols Field, Philippines, from about 1030 hours, 3 April 1947 to about 0730 hours, 10 April 1947.

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

Specification: In that Private First Class Miguel Borrero, ***, having been duly placed in arrest of quarters, on or about 0730 hours, 10 April 1947, did, at Nichols Field, Philippines, on or about 1700 hours, 10 April 1947, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Private First Class Miguel Borrero, ***, did, at APO 714, Nichols Field, Philippines, on or about 10 April 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Dagupan, Pangasinan, Philippines, on or about 11 May 1947.

He pleaded not guilty to Charges I and II and their specifications, guilty to the Specification of Charge III, except the words "desert the service of the United States and did remain absent in desertion until apprehended at Dagupan," substituting the words, "absent himself without leave from 10 April 1947 to 11 May 1947," and not guilty to Charge III but guilty of a violation of the 61st Article of War. He was found guilty of Charges I and II and their specifications, guilty of the Specification of Charge III except the words "desert the service of the United States" and "in desertion," substituting therefor "without proper leave absent himself from his organization" and not guilty of Charge III, but guilty of a violation of the 61st Article of War. He was sentenced on 19 June 1947 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 and twenty days. The reviewing authority approved the sentence and ordered it executed but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of War might direct, as the place of confinement. The result of trial was promulgated in Corrected General Court-Martial Orders No. 51, Headquarters Thirteenth Air Force, APO 719, dated 1 October 1947.

3. The only question which it is necessary to discuss is the legality of the sentence as approved. The approved findings of guilty of Charges II and III and of the specification under each involve two separate offenses which are but different aspects of the same act. The breach of arrest was concurrent with the inception of the absence without leave on 10 April 1947. In CM 323305, Raabe, the Board of Review stated in a case involving the quantum of punishment permissible in a case involving two offenses which were different aspects of the same act:

> "The escape from confinement was concurrent with the initial absence without leave 11 April 1947. The two offenses are different aspects of the same act (Bull. JAG, Vol. V, page 203, CM 313554, 1946). For the purpose of punishment they must be construed together and are punishable only in the greater aspect thereof." (See also CM 313544, Carson, 63 BR 137; CM 325739, Morin.)

The foregoing principle appears to be applicable to the present case.

The maximum authorized punishment for absence without leave from command, station, or camp for not more than sixty days is confinement at hard labor not to exceed three days for each day of absence and forfeiture of two-thirds pay for a like period (par. 104b, 104c, MCM, 1928). The total number of days of confinement authorized under Charge III, therefore, is 93 days or three months and three days. The maximum authorized punishment for breach of arrest is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period (par. 104c, MCM, 1928). Therefore, as between the two offenses (Charges II and III),

the absence without leave constitutes the more serious aspect of the act and punishment should be imposed only with reference to that offense (par. 80a, MCM, 1928, page 67). Accused was also found guilty of absence without leave for seven days (Charge I and its Spec.). The total number of days of confinement authorized for this offense is twenty-one days. Hence, the total number of days confinement authorized for Charges I and III is 114 days, or three months and twenty-four days. A dishonorable discharge is not authorized under the Table of Maximum Punishments for the offenses of which the accused was found guilty (par. 104c, MCM, 1928, pp. 97,98,102).

4. For the foregoing reasons 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 involves confinement at hard labor for three months and twenty-four days and forfeiture of two-thirds of the accused's pay for a like period.

Christy B. Silvers, Judge Advocate

Gilbert E. Ashcroft, Judge Advocate

Harley A. Lamming, Judge Advocate

JAGK - CM 326457 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 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 Borrero (RA 30430768), Headquarters and Base Service Squadron, 4th Air Depot.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and twenty-four days and forfeiture of two-thirds of the accused's pay for a like period, and, for the reasons stated therein, recommend that so much of the sentenceas is in excess of confinement at hard labor for three months and twenty-four days and forfeiture of two-thirds pay for a like period be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of so much of the sentence as is 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 36 (DA), 5 Feb 1948).

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

JAGH - CM 326481

UNITED STATES v. Corporal FRANK R. W. ALDRICH (RA 15043244), Company "A", 701st Military Police Service Battalion	)	ARMY ADVISORY GROUP, CHINA Trial by C.C.M., convened at Nanking, China, 15-19 August 1947. Dishonorable discharge and confinement for life. United States Penitentiary

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN, and LYNCH, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that and Corporal Frank R. W. Aldrich, Company "A", 701st Military Police Service Battalion, did, acting in conjunction with Staff Sergeant Joseph Cervone, Company "A", 701st Military Police Service Battalion, at or near Nanking, China, on or about 2 August 1947 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Kuo Fa Ting, a human being by throwing him off a bridge.

Specification 2: In that and Corporal Frank R. W. Aldrich, Company "A", 701st Military Police Service Battalion, did, acting in conjunction with Staff Sergeant Joseph Cervone, Company "A", 701st Military Police Service Battalion, at or near Nanking, China, on or about 2 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Wong Sho Bam, a human being by throwing him off a bridge.

Upon arraignment accused pleaded not guilty to the Specifications and the Charge. After the prosecution had rested, the accused further pleaded as follows:

> "Of Specification 1 of the Charge: Guilty, except the words, 'with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation. Of the excepted words: Not Guilty. Of the remaining words: Guilty.
>
> "Of Specification 2 of the Charge: Guilty, except the words, 'with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation,' substituting therefor the word 'unlawfully.' Of the excepted words: Not Guilty. Of the substituted word: Guilty." (R 155).

He was found guilty of Specification 1, and the Charge, as to Specification 1; guilty of Specification 2 except the words "with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation" substituting therefor the word "unlawfully," and as to Specification 2, not guilty of the Charge but guilty of a violation of the 93rd Article of War. 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 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 50½.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Army Advisory Group (China) Judge Advocate, dated 16 September 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 both the offense of murder and manslaughter, recognized as offenses of a civil nature and so punishable by penitentiary confinement by Sections 273, 274, and 275, Criminal Code of the United States (18 USC 452, 453, and 454).

M Gottenstein, Judge Advocate

John F. O'Brien, Judge Advocate

W Lynch, Judge Advocate

1st Indorsement

J.A.G.O., Dept. of the Army To the Commanding General, Army Advisory Group, APO 909, c/o Postmaster, San Francisco, California

1. In the case of Corporal Frank R. W. Aldrich (RA 15043244), Company "A", 701st Military Police Service Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. A radiogram is being sent advising you of the foregoing holding and my approval thereof. Please return the said holding and this indorsement and, if you have not already done so, forward therewith five copies of the published order in this case.

(CM 326481).

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

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

(245)

JAGK - CM 326505

18 DEC 1947

UNITED STATES v. Private FRANK M. ZELINSKI (RA 43044483), 756th Engineer Parts Supply Company	HEADQUARTERS COMMAND EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 28-31 July and 4 August 1947. Dishonorable discharge and confinement for life. Penitentiary.

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

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1. The Board of Review has examined the record of trial in the case of the 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 Frank M. Zelinski, 756th Engineer Parts Supply Company, did, at Wolfgang, Germany, on or about 2 May 1947 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Jan Kaminski, a human being by shooting him with a deadly weapon, to wit a Carbine.

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

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and its specification but not guilty of Charge II and its specification. Evidence of one previous conviction by summary court-martial was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

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

4. Discussion

It is stated by the Staff Judge Advocate in his review that the

charges were referred for trial "By command" of an officer who had ceased to be the appointing authority before the crime was committed and was not therefore the commanding officer having general court-martial jurisdiction over the accused. The charge sheet shows that on 8 July 1947 the charges were referred for trial to Major Elmer B. Gower, trial judge advocate of general court-martial appointed by paragraph 35, SO NO. 145, Hq. Command, APO 757, U.S. Army, 8 July 1947, "By Command of Brigadier General Ryan." The court-martial referred to, and which tried the accused, was appointed on 8 July 1947 "By Command of Brigadier General Duff" and on 17 October 1947 Brigadier General Duff took action on the record as Commanding General, Headquarters Command, European Command. There is no question but that the commanding officer, Headquarters Command, European Command, had general court-martial jurisdiction over the accused and of the offense. It therefore appears that the draftsman of the first indorsement to the charge sheet erroneously inserted the name "Ryan" where there should have been inserted "Duff." Inasmuch as the record shows that the officer appointing the court and who took action on the findings and sentence must have been Brigadier General Duff, who then commanded Headquarters Command, European Command, the erroneous statement that the charges were referred to trial "by command of Brigadier General Ryan" is patently an erroneous statement of fact and did not affect the jurisdiction of the court trying the case. Even if such irregularity was other than a mere typographical error, it was cured by way of ratification when Brigadier General Duff took action approving the proceedings (CM 271153, Karsanoff, 46 BR 61,68; CM 302139, Stubinski, 14 BR (ETO) 257, 268; CM 314939, Greene; CM 198108, Casey, 3 BR 159,163-165).

The death of the Polish guard, Jan Kaminski, in the early morning hours of 2 May 1947, as a result of gunshot wounds inflicted upon him, was adequately shown by competent evidence. On the same date, and after being duly advised of his rights, the accused signed and swore to a statement asserting that he had overpowered the guard, identified as Kaminski, that he took from him his carbine and fired one or more shots into his body, that the guard fell on his face or stomach and that he (accused) thereupon continued firing the weapon into the guard's back until he had emptied the magazine. On 4 May 1947 and after being advised of his rights, the accused signed and swore to another confession, setting forth facts substantially as in his previous confession except that he repudiated a statement in his prior confession that two other named soldiers were with him at the time he shot the guard. On 9 May 1947 the accused voluntarily reinacted his version of the homicide by leading the investigators through the physical details thereof, and explaining his actions. On 10 May the accused made and signed another confession wherein he set forth other details of the homicide, gave a brief history of his past life and recited matters having to do with the alleged felonious assault of which he was acquitted. During the trial and with the assistance of counsel he prepared and signed an unsworn statement which was submitted at the close of the trial. As heretofore stated, the

confessions are shown to have been voluntary on the part of accused and there is no contention by the defense to the contrary.

The record contains no adequate evidence respecting the circumstances surrounding the homicide aside from accused's confessions and his unsworn statement. In none of these highly incriminating statements is it contended that he fired in self-defense, nor do the circumstances justify such conclusion. He stated substantially in his confessions that on the afternoon of 1 May 1947 he drank some schnapps after coming off guard, that during the night he went to the post where the Pole was standing guard and conversing with a girl, that he did not know either of the parties and when he made amorous advances toward the girl the Pole brought his weapon to port arms, protested his advances and appeared to be mad. It was then that he "really started after him" and the guard fired his piece into the air. He took the gun away from the guard, fired the first shots into the front of his body and the latter into his back after he had fallen. He then left the place, broke the carbine over a concrete block and threw the pieces into a bomb crater.

From the foregoing the court was justified in concluding, beyond a reasonable doubt, that the killing was willful, deliberate and with malice aforethought, amounting to murder in law (CM 323197, Abney; CM 325492, Moseley).

In his unsworn statement to the court the accused stated that he had never denied killing the person identified as Jan Kaminski but he asserted that although his signed statement of 10 May 1947, appears to be a complete confession to murder, the term was meant to be the same as "killing," and that he signed the statement without questioning the phraseology. He stated further that on the occasion of his killing Kaminski he had been drinking liquor which had produced a strange effect upon him, that when he made advances toward the girl, Kaminski appeared to "go into a sudden fit of anger and raised his gun and began cursing me and we argued back and forth." He felt that the guard "also was acting like a drunken person." The statement continues as follows:

> "*** However when he fired the carbine and proceeded to curse me violently, still holding his carbine up, it made me so mad that I lost control of my senses and rushed in upon him and took his carbine away from him and shot him before I could think. I had never seen the man before and had no animosity towards him and firmly believe that the unusual effect of the unknown brand of liquor I had been drinking caused me to so lose control of my senses temporarily. I had no conscious knowledge of shooting him after he fell following the first shot but only realized it after I had emptied the carbine and was standing over him holding it." (R 310, Def Ex C)

It is obvious that the accused, after having made three voluntary confessions to acts which he believed at the trial amounted to murder in law, undertook, by his unsworn statement, to add thereto circumstances intended to reduce the offense to voluntary manslaughter. Although the court-martial, for purposes heretofore shown, was authorized to accept the accused's version of the killing as shown by his confessions, it was not bound to accept his version thereof as set forth in the unsworn statement. The unsworn statement was not evidence and was only entitled to such consideration as the court deemed warranted (par 76, 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 to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Charles E. Gilbert, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schmidt, Judge Advocate

1st Indorsement

December 26, 1947

JAGO, Dept. of the Army

To the Commanding General, Headquarters Command, European Command, APO 757, c/o Postmaster, New York, New York.

1. In the case of Private Frank M. Zelinski (RA 43044483), 756th Engineer Parts Supply Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. It is recommended that in view of the accused's age, his prior acceptable service and other circumstances that the period of confinement be reduced to 25 years.

3. A radiogram is being sent advising you of the foregoing holding and my approval thereof. Please return the said holding and this indorsement and, if you have not already done so, forward therewith five copies of the published order in this case.

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

(CM 326505)

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

(251)

JAGQ - CM 326540

NOV 1 ? 1947

UNITED STATES v. Privates ALWIN E. IRWIN (RA 15357258) and ROBERT L. SCHMELING (RA 15254337), both of Headquarters and Headquarters Company, 3d Armored Division, Fort Knox, Kentucky	)	THE ARMORED CENTER Trial by G.C.M., convened at Fort Knox, Kentucky, 30 September 1947. Each: Dishonorable discharge and confinement for three (3) years. United States 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.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Robert L. Schmeling, Headquarters and Headquarters Company 3d Armored Division, and Private Alwin E. Irwin, Headquarters and Headquarters Company, 3d Armored Division, acting jointly, and in pursuance of a common intent, did, at Fort Knox, Kentucky, on or about 29 August 1947, feloniously take, steal and carry away one Tele-Tone Radio, value about ($15.00) fifteen dollars, property of Private Tom W. Belton, Company D, 32nd Tank Battalion, 3rd Armored Division; One Parker 51 pen, value about ($12.50) twelve dollars and fifty cents; one wallet and allied papers, value about ($5.00) five dollars, one cigarette lighter, value about ($4.50) four dollars and fifty cents, one belt, value about ($.30) thirty cents, and ($5.00) five dollars, lawful money of the United States, all property of Private Robert N. Carner, Company D, 32nd Tank Battalion, 3d Armored Division; One white Emmerson portable radio, value about ($30.00) thirty dollars, property of Private Robert Thomas Stebbins, Company D, 32nd Tank

Battalion, 3d Armored Division; One wallet and allied papers, value about ($4.00) four dollars and ($13.00) thirteen dollars, lawful money of the United States, all property of Private Robert G. Osterhout, Company D, 32nd Tank Battalion, 3rd Armored Division; One toilet article kit and toilet articles, value about ($5.00) five dollars, property of Private Raymond Endries, Company D, 32nd Tank Battalion, 3d Armored Division; One Courtland wrist watch with broken silver band, value about ($45.00) fourty-five dollars, and one cigarette lighter, value about ($1.75) one dollar and seventy-five cents, all property of William A. Eagan, Company D, 32nd Tank Battalion, 3d Armored Division; One brown billfold and allied papers, value about ($3.00) three dollars, property of Clarence M Dobbe, Company D, 32nd Tank Battalion, 3d Armored Division; One wallet and allied papers, value about ($5.00) five dollars, one cigarette lighter, value about ($5.00) five dollars, and ($10.) ten dollars, lawful money of the United States, all property of Private George N. Dahlgren, Jr., Company D, 32nd Tank Battalion, 3d Armored Division; One wallet and allied papers, value about ($5.00) five dollars, two (2) United States collar insignia, value about ($.50) fifty cents, two (2) packages of Old Gold cigarettes, value about ($.40) forty cents, and ($10.25) ten dollars and twenty-five cents, lawful money of the United States, all property of Private Bernard O Sinclair, Company D, 32nd Tank Battalion, 3d Armored Division; One Ronson lighter, value about ($5.75) five dollars and seventy-five cents, one wallet, value about ($5.00) five dollars, and one fountain pen, value about ($9.40) nine dollars and forty cents, all property of Private Arthur A. Daliege, Company D, 32nd Tank Battalion, 3d Armored Division; One kit, value about ($5.00) five dollars, one razor, value about ($.79) seventy-nine cents, and one set toilet articles, value about ($.50) fifty cents, all property of Private Billy C Vaughn, Company D, 32nd Tank Battalion, 3d Armored Division; One wallet and allied papers, value about ($5.00) five dollars, property of John E. Baker, Company D, 32nd Tank Battalion, 3d Armored Division; One billfold and allied papers, value about ($3.00) three dollars, lawful money of the United States, all property of Private Marlyce G Creel, Company D, 32nd Tank Battalion, 3d Armored Division; One cigarette case, value about ($1.00) one dollar, one cigarette lighter, value about ($1.75) one dollar and seventy-five cents, lawful money of the United

States, all property of Private John L. Lyons, Company D, 32nd Tank Battalion, 3d Armored Division; One wallet and allied papers, value about ($3.50) three dollars and fifty cents, one key case, value about ($1.00) one dollar, and ($.50) fifty cents, lawful money of the United States, all property of Private Ivor W Langdon, Company B, 32nd Tank Battalion, 3d Armored Division; One wallet and allied papers, value about ($5.00) five dollars, One Remington Razor (electric), value about ($15.00) fifteen dollars, one pipe, value about ($2.00) two dollars, and one Eversharp pencil, value about ($1.00) one dollar, all property of Private Alvin P. Lawrence, Company B, 32nd Tank Battalion, 3d Armored Division; One cigarette case, value about ($1.50) one dollar and fifty cents, property of Private Homer E. Mosson, Company B, 32nd Tank Battalion, 3d Armored Division; One suitcase, value about ($12.95) twelve dollars and ninety-five cents, two (2) suits, civilian underwear, value about ($1.00) one dollar, one sweater, value about ($2.95) two dollars and ninety-five cents, one belt, value about ($1.50) one dollar and fifty cents, and one razor sharpener, value about ($1.00) one dollar, all property of Private Keith R Sorenson, Company D, 32nd Tank Battalion, 3d Armored Division; One wallet with allied papers, value about ($5.00) five dollars, and ($30.00) thirty dollars, lawful money of the United States, all property of Private Ralph L. Owens, Company D, 36th Tank Battalion, 3d Armored Division; One pocketbook with allied papers, value about ($5.00) five dollars, property of Private James O Wilds, Company D, 36th Armored Infantry Battalion, 3d Armored Division; One billfold with allied papers, value about ($12.00), property of Private Charles F Wallander, Company D, 36th Armored Infantry Battalion, 3d Armored Division; One billfold with allied papers, value about ($15.00) fifteen dollars, property of Private Paul Thomas, Company D, 36th Armored Infantry Battalion, 3d Armored Division; all for a total value of about ($334.79) three hundred and thirty-four dollars and seventy-nine cents.

Each accused pleaded not guilty to the Charge and Specification. Each accused was found guilty of the Charge and Specification, except the words "one Parker 51 pen, value about ($12.50) twelve dollars and fifty cents"; "one wallet and allied paper value about ($5.00) five dollars"; substituting therefor the words and figures "one wallet and allied papers, value about ($2.00) two dollars"; "one belt value about ($.30) thirty cents; and ($5.00) five dollars lawful money of the United States";

"one wallet and allied papers, value about ($4.00) four dollars" substituting therefor the words and figures "one wallet and allied papers, value about ($2.00) two dollars"; "and ($13.00) thirteen dollars, lawful money of the United States"; "and one cigarette lighter, value about ($1.75) one dollar and seventy-five cents"; "one brown billfold and allied papers, value about ($3.00) three dollars" substituting therefor the words and figures "one brown billfold and allied papers, value about ($2.50) two dollars and fifty cents"; "one wallet and allied papers, value about ($5.00) five dollars" substituting therefor the words and figures "one wallet and allied papers, value about ($2.00) two dollars"; "and ($10.00) ten dollars lawful money of the United States"; "two (2) packages of Old Gold Cigarettes value about ($.40) forty cents and ($10.25) ten dollars and twenty-five cents lawful money of the United States"; "one wallet, value about ($5.00) five dollars, and one fountain pen value about ($9.40) nine dollars and forty cents"; "one razor, value about ($.79) seventy-nine cents and one set toilet articles value about ($.50) fifty cents"; "one wallet and allied papers valued about ($5.00) five dollars" substituting therefor the words and figures "one wallet and allied papers, value about ($2.00) two dollars"; "one billfold and allied papers, value about ($3.00) three dollars, lawful money of the United States" substituting therefor the words and figures "one billfold and allied papers, value about ($2.00) two dollars"; "one cigarette case, value about ($1.00) one dollar, one cigarette lighter, value about ($1.75) one dollar and seventy-five cents, lawful money of the United States all property of Private John L. Lyons, Company D, 32nd Tank Battalion, Third Armored Division; "one wallet and allied papers, value about ($3.50) three dollars and fifty cents, one key case, value about ($1.00) one dollar, and ($.50) fifty cents lawful money of the United States all property of Private Ivor W. Langdon, Company D, 32nd Tank Battalion, Third Armored Division"; "one wallet and allied papers, value about ($5.00) five dollars" substituting therefor the words and figures "one wallet and allied papers, value about ($1.75) one dollar and seventy-five cents"; "and one eversharp pencil, value about ($1.00) one dollar"; "one cigarette case, value about ($1.50) one dollar and fifty cents property of Private Homer E. Mosson, Company D, 32nd Tank Battalion, Third Armored Division"; "two (2) suits civilian underwear value about ($1.00) one dollar"; "and one razor sharpener value about ($1.00) one dollar"; "one wallet with allied papers, value about ($5.00) five dollars and ($30.00) thirty dollars, lawful money of the United States all property of Private Ralph L. Owens, Company D, 36th Tank Battalion, Third Armored Division"; "one billfold with allied papers, value about ($12.00), property of Private Charles F. Wallander, Company D, 36th Infantry Battalion, Third Armored Division; one billfold with allied papers, value about ($15.00) fifteen dollars property of Private Paul Thomas, Company D, 36th Armored Infantry

Battalion, Third Armored Division; all for a total value of about ($174.40) one hundred and seventy-four dollars and forty cents. Two previous convictions, one by summary court-martial and one by special court-martial for absence without leave were introduced as to accused Schmeling and one previous conviction by special court-martial for absence without leave was introduced as to accused Irwin. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved the sentence as to each accused, designated Branch United States Disciplinary Barracks, Fort Knox, Kentucky, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question presented by the record is whether the court's finding of value is supported by the evidence. The only evidence adduced at the trial relating to the value of the numerous items involved consisted of testimony of the owners of some of the articles as to what they considered their value to be and a stipulation that the items listed in the specification "of a value of less than $20 are of a value of less than $20 and that the aggregate of all amounts totaled in the specification is an amount over $50" (R. 6). No evidence was adduced as to the condition of the articles which were the subject matter of the larceny.

The stipulation that the aggregate value of all of the articles listed in the specification was over $50 becomes of little or no effect in view of the court's finding of guilty which excepts approximately half of the articles so listed in the specification. Consequently, the stipulation cannot be held to mean that the value of the articles of which the accused were found guilty of stealing were of a value in excess of $50.

It has been uniformly held by the Board of Review that the testimony of the owner of stolen property as to its value is not competent unless he is an expert or has special knowledge on the subject (CM 268007, McKinney, 44 BR 205). Nor can the proof of value be sustained by reason of the fact that the articles themselves were offered in evidence. To permit the court on its inspection alone to find definite market value of articles "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 articles by the court to be in excess of $50 is not sustained by the evidence. The evidence supports only a finding that the stolen

property had some value not in excess of $20. The maximum confinement at hard labor authorized by the Table of Maximum Punishments for larceny of property of the value of $20 or less is six months.

4. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support the finding of guilty of the Charge; legally sufficient to support only so much of the finding of guilty of the Specification relating to value as involves a finding of some total value not in excess of $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.

W H Johnson Jr, Judge Advocate

On Leave, Judge Advocate

G M Maw, Judge Advocate

JAGQ - CM 326540 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 13 NOV 1947

TO: Commanding General, The Armored Center, Fort Knox, Kentucky.

1. In the case of Privates Alwin E. Irwin (RA 15357258) and Robert L. Schmeling (RA 15254337), both of Headquarters and Headquarters Company, 3d Armored Division, Fort Knox, Kentucky, I concur in the foregoing holding by the Board of Review and recommend that only so much of the finding of guilty of the Specification of the Charge relating to value be approved as involves a finding of some total value not in excess of $20, 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 326540).

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

1 Incl
Record of Trial

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

JAGQ - CM 326588

DEC 29 1947

UNITED STATES v. Private EDWIN C. SATTLER (RA 36279580), 63d Bombardment Squadron, 43d Bombardment Group, Davis-Monthan Field, Tucson, Arizona.	EIGHTH AIR FORCE Trial by G.C.M., convened at Tucson, Arizona, 6 October 1947. Dishonorable discharge and confinement for one (1) year. United States Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOHNSON, ALLEN 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.

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 96th Article of War.

Specification 1: In that Private Edwin C. Sattler, 63rd Bombardment Squadron, 43rd Bombardment Group (Very Heavy), did, at Davis-Monthan Field, Tucson, Arizona, on or about 23 August 1947, wrongfully take and carry away two pair socks, white, cotton, value about $0.30; four pair under-shorts, white, jockey type, value about $2.00; one pair shoes, low quarter, value about $1.00; one pair swimming trunks, value about $3.00; one pair socks, white, gym, value about $0.35; one football, value about $5.00; one football pump, value about $0.50; one bag, zipper, value about $1.00; three scarfs, souvenir, value about $5.25; one pillow cover, souvenir, value about $1.00; one book, Modern Sex Manual, value about $0.50; two stamps, rubber, value about $1.00; one jar Vicks VapoRub, value about $0.10; one sewing kit, value about $0.25; one stamp pad, value about $0.25; one

set toilet articles, value about $1.50; of a total value of about $23.00, property of Private First Class Lawrence F. Frankowski.

Specification 2: In that Private Edwin C. Sattler, 63d Bombardment Squadron, 43d Bombardment Group (Very Heavy), did, at Davis-Monthan Field, Tucson, Arizona, on or about 23 August 1947, wrongfully take and carry away one duffle bag, value about $2.53; one jacket, field, wool, olive drab, value about $14.91; one raincoat, value about $5.65; one pair shoes, size 8-E, value about $4.42; three undershirts, value about $1.17; one suit, working, one-piece, value about $4.18; one pair socks, cotton, value about $0.27; three caps, wool, olive drab, value about $3.12; one athletic supporter, value about $0.43; one pair gymnasium pants, value about $1.12; of a total value of about $37.80, property of the United States.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and the Specification thereof, guilty of Charge II, guilty of Specification 1 of Charge II "except the words 'value about' and the figure for each item, and the words and figure 'of a total value of about $23.00', substituting for the words 'value about' and the figure for each item the words 'of some value' and the words and figure 'of a total value of less than $20.00'" and guilty of Specification 2 of Charge II except the words "'one jacket, field, wool, olive drab, value about $14.91'; 'one pair gymnasium pants, value about $1.12' and 'of a total value of about $37.80'; substituting therefor the words 'of a total value of about $21.77'." Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year and three months. The reviewing authority approved the sentence, reduced the period of confinement to one year, designated Branch United States Disciplinary Barracks, Camp McQuaide, California, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Each of the above specifications allege that accused did, on or about 23 August 1947, "——wrongfully take and carry away——" certain personal property of a value and of an ownership therein described. Specifications 1 and 2 arose out of the same act and should not have been charged separately. Paragraph 27, Manual for Courts-Martial, 1928, states:

"the larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification;"

and Paragraph 149g states:

"Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons".

Since the acts alleged in Specifications 1 and 2 constitute in law but a single "taking and carrying away", a single penalty should be assessed (CM 232424, Smith, 19 BR 81).

The wording of these specifications suggests two questions. First, what offense, if any, is alleged by the words, "did wrongfully take and carry away"; second, if an offense is alleged by the words "did wrongfully take and carry away" what is the maximum penalty, if any, which may be imposed for that offense?

The offense of larceny is defined, as follows:

"Larceny is 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 permanently of his property therein."

It is apparent from a consideration of the above definition that the act of wrongfully taking and carrying away property is included within the offense of larceny. It is equally apparent, however, that such a wrongful taking and carrying away of property differs from larceny in that one essential element of larceny, the taking "with intent to deprive such owner permanently of his property therein" is not involved. Furthermore, we find that such a wrongful taking and carrying away of property although obviously an invasion of another's interest in property, has not been recognized as a crime at common law. This does not mean, however, that such an act may not be a violation of military law. Article of War 96 expressly provides that,

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service — shall be taken cognizance of by a — court-martial."

The Manual for Courts-Martial also provides that,

> "The disorders and neglects [contemplated under Article of War 96] include all acts or omissions to the prejudice of good order and military discipline not made punishable by the preceding articles" (MCM, 1928, par. 152a).

Since a wrongful taking and carrying away of property is not made punishable under any article of war except 96, and since it is beyond question that a wrongful taking and carrying away of property is an act to the prejudice of good order and military discipline, such an act is a punishable disorder within the provision of Article of War 96, and such has been the consistent holding of the Boards of Review (CM 207466, Philpott, 8 BR 341; CM 249998, Patka, 32 BR 265; CM 274647, Trujillo, 47 BR 243).

The second question, concerning the maximum punishment which may be imposed for the offense of a wrongful taking and carrying away of property, requires an examination not only of Article of War 96, but of the Table of Maximum Punishments in the Manual for Courts-Martial. Article of War 96 provides that all disorders to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service shall be "punished at the discretion" of the court. The Table of Maximum Punishments, however, placed limitations upon the punishment which is authorized by the Articles of War.

Although the offense of a wrongful taking and carrying away of property is not listed in that table, the instructions accompanying it provide as follows:

> "c. Maximum punishments.—The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed. Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service."

It appears from the foregoing provision that the punishment for a lesser included offense not listed in the Table is limited to the maximum prescribed for the offense within which it is included. However, in those cases in which the lesser included offense is closely related to another listed offense there is an additional limitation, viz., the maximum prescribed for the other listed offense. If the maximum authorized for the listed closely related offense is less than for the including offense the lesser maximum must prevail else the additional limitation will become meaningless. Criminal statutes and their equivalents must be strictly construed.

It follows that if there is any offense listed in the Table of Maximum Punishments which is closely related to the offense of which accused was found guilty and for which the maximum authorized punishment is less than that for larceny (within which the offense of wrongfully taking and carrying away is lesser included) the maximum limitation of punishment provided for that closely related offense will govern. Such a closely related offense is found here in the offense of "Disorderly under such circumstances as to bring discredit upon the military service" listed in the Table of Maximum Punishments (under AW 96) and punishable by maximum confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. The offense of wrongfully taking and carrying away the property involved was in essence a disorder, a tortious act which under the circumstances alleged was prejudicial to good order and discipline and was of a nature to bring discredit upon the military service. Whether or not it was a mere disorder in the sense of the Table of Maximum Punishments it was of similar import in its criminal aspects and of similar gravity from the standpoint of the wrong committed and its effect upon the military establishment. The type, character and value of the property and the circumstances under which it was taken as alleged are factors to be considered in determining whether the offense found is in law and fact closely related to the listed offense of "disorderly under such circumstances as to bring discredit upon the military service". Applying the above principle to the facts and circumstances of the present case it is considered that the offense therein charged and proved is very closely related to the listed offense in the Table of Maximum Punishments and punishment therefor is accordingly limited.

The offense found, it may be asserted and assumed, is also related to the offense of larceny though it lacks the gravamen of that offense, the animus furandi, or intent to steal. But assuming that there is more than one closely related offense, the limitations for the less grave offense must be applied, for the prescribed maximum limitation for "any" closely related offense, under the quoted terms of the Manual, must govern.

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

W A Johnson Jr, Judge Advocate

On Leave, Judge Advocate

R. I. Kane, Judge Advocate

(264)

JAGQ CM 326588 1st Ind

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

TO: Commanding General, Eighth Air Force, Fort Worth, Texas

1. In the case of Private Edwin C. Sattler, (RA 36279580), 63d Bombardment Squadron, 43d Bombardment Group, Davis-Monthan Field, Tucson, Arizona, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

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

(CM 326588).

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.

JACK - CM 326604

16 JAN 1948
PORT OF LEGHORN

UNITED STATES v. Private THOMAS A. GUSIK (RA 15220411), 7156th Engineer Guard Company (Overhead).	Trial by G.C.M., convened at Leghorn, Italy, 9 October 1947. Dishonorable discharge and confinement for life. Federal Reformatory.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Salvatore Montalbano, a human being, by shooting him with a carbine.

Specification 2: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Teodoro Moro, a human being, by shooting him with a carbine.

He pleaded not guilty to and was found guilty of the charge and both specifications thereto. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of the Army might direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence

During the times hereinafter mentioned, the accused's unit was employed in the capacity of guarding Engineer Depot E2L 76 at Tirrenia, Italy. On 11 August 1947 the accused was regularly assigned as a member of the second relief on the guard roster for 12 August 1947. It was stipulated that Prosecution Exhibit 1 was a true copy of the special orders for the guards on 12 August 1947. Pertinent provisions of these special orders were as follows:

"SECTION III - SPECIAL ORDERS FOR POSTS

1. Post #1,2,3,4,5,6,7,8,9,

(a) My post is a 24 hour fence post. In case the lighting system becomes out of order, I will immediately report this incident to the Sergeant of the Guard.

(b) The tower being in the center of my post, I will walk halfway between the tower on my right and left.

(c) I will check the fence line for holes and will notify the Sergeant of the Guard if any are found.

(d) Any person loitering near the fence after the hours of darkness will be fired upon after challenging.

(e) Between 1700 hours and 0800 hours no unauthorized persons or vehicles will be in my area.

(f) I will check with the Sergeant of the Guard, by telephone, every hour on the hour.

(g) In case any person is in my area I will call "halt". If the person fails to halt I will fire a warning shot in the air. If the person still fails to halt I will shoot to kill.

(h) In case of fire I will immediately notify the Sergeant of the Guard."

First Lieutenant Walter P. Birmingham was detailed as the Officer of the Day. The accused was assigned Post No. 4. Private First Class Frank Zahurones was also on the second relief and was assigned Post No. 5 (R 6, Pros Ex 2).

At about 1900 hours on the evening of 11 August 1947, the accused and Private William E. Hoagland, who was on the third relief of the guard roster heretofore mentioned, secured passes and went to the hotel at Tirrenia. Near the hotel they met two Italians and the accused asked them if they knew "Franco." They replied in the affirmative. The accused told them to tell Franco that he would be on guard at Post 4 the following night on the second relief and that if Franco came to the post and whistled "Angelina" he (accused) would in turn whistle another verse of "Angelina" "for them to come in." Private First Class Hoagland testified that he was present and heard the conversation aforementioned, that they were at the time standing about 300 yards from the hotel and that the purpose of the proposed transaction was "To get tires, I guess." The accused and Hoagland returned to camp at about 2100 hours and Hoagland testified

that as they traveled back the accused "told me he was going to get Franco because Franco had screwed him out of a wrist watch". Accused had not told the witness "how" he was going to "get" Franco (R 7-8). On cross-examination the witness Hoagland stated that he did not know why these men (Italians) were going to the depot (R 9).

Di Pinto Luigi, an Italian whose home was near Naples, testified that at about 0300 hours on 13 August 1947 he and his brother Franco, Alvaro, Marcello, Salvatore Montalbano ("Siciliano") and Teodoro Moro went to Post 4 at the Engineer Depot in Tirrenia, Italy, to get six tires "as was arranged *** with the sentinel on Post 4, who made the arrangements with my brother." The witness stated that his brother Franco had previously gone to the depot for the purpose of getting tires or other property. There was a wooded area near Post No. 4 and the witness asserted that as they approached this Post "Franco" went forward to talk with the sentinel while he and the other Italians remained in the woods to the rear. Luigi identified the accused in court as having been the sentinel whom he saw conversing with Franco. The sentinel then walked toward Post No. 5 "because he thought there was an inspection." Marcello entered an opening that had been cut in the fence and "three or four seconds" later shots were fired from the direction of Post No. 5 and "they were standing beside me - there were two dead people." Luigi identified Prosecution Exhibit 3 as a photograph of "Siciliano" and Prosecution Exhibit 4 as a photograph of Moro, and stated that these were the persons who had been killed by the shots coming from the direction of Post No. 5. In response to a question as to whether the sentinel gave any command such as "halt" before the shooting the witness replied, "nothing" (R 7-12,17).

On cross-examination Luigi stated that at the time of the conversation between his brother Franco and the accused, "the five of us were about 200 meters of distance." Thereafter, Franco called them to the fence while the sentinel was present and "He told us to cut a hole in the fence and then walked away toward Post 5." Upon examination by the court the witness asserted that he had seen the accused two or three times prior to the night of 13 August 1947, having been introduced to him by his brother Franco. The witness was asked, "Was there any signal given before your brother went over to the fence on the night of 13 August 1947?" Luigi replied, "Yes, he was whistling Angelina *** my brother answered and then he went over to him" (R 14).

Alessandri Alvaro of Marina di Pisa identified two photographs marked Prosecution Exhibits 3 and 4 and stated that the bodies shown thereon were those of Salvatore Montalbano and Teodoro Moro, respectively. He knew an Italian named Franco who "is gone." The witness stated that he was present when Moro and Montalbano "got shot." Franco, Luigi, Marcello and a "certain Ciro" were also present. The following questions propounded to the witness and his answers thereto are quoted from the record:

"Q. For what purpose did you go to the Engineer Depot on that morning?

"A. The previous day I had given 80,000 lira to an American.

"Q. What American?

"A. I don't know him. I have already told that to the commanding officer.

"Q. For what purpose did you go to the Engineer Depot with these other Italians on that morning?

"A. For what reason?

"Q. Yes.

"A. They asked me to come along with them. They said, 'There is an American who is going to give us some tires'.

"Q. Do you know where Post No. 4 is at the Engineer Depot?

"A. Yes.

"Q. Was that where the shooting took place?

"A. Yes, the shooting happened between Post No. 4 and Post No. 5.

"Q. As you approached Post No. 4 that morning, was any signal given by anyone of your group?

"A. Yes.

"Q. What signal?

"A. Franco was whistling 'Angelina.'

"Q. Was there a sentry on Post No. 4 at that time?

"A. Yes.

"Q. Could you recognize that man if you were to see him again?

"A. I couldn't recognize him. The lieutenant has already shown me him but I wasn't able to.

"Q. Did the sentry on Post No. 4 return any signal to Franco?

"A. Yes.

"Q. What signal?

"A. 'Angelina' - he was whistling that also." (R 18)

The witness stated that after the whistling of "Angelina" Franco and Moro went to the fence and talked with the sentinel of Post No. 4 for two or three minutes. Subsequently, Franco returned to where the other parties were waiting and they also went to the fence. The sentry then walked toward Post No. 5. Alvaro asserted that one of the parties went through the fence and "At the same time I was crossing through the fence he began firing." The hole had been cut by Marcello with pliers. "While the hole was being cut the sentry was right there nearby." "The sentry told us to enter and I entered and the shooting began." The sentry walked toward Post No. 5 and the shooting came from the direction of Post No. 5. No command to halt was ever heard by the witness who stated that Moro and Montalbano were "hit by the firing" and that another was wounded (R 20). On cross-examination Alvaro stated that they had an appointment from 11 o'clock to 1 o'clock on the same evening with an American called "Bobby," that Franco and Moro had gone inside the camp and "then an inspection came and made them get out."

After the two men were shot the witness heard an American say, "From today onwards nobody is going to enter the depot again" (R 21-22).

First Lieutenant Walter P. Birmingham, 1170th Engineer General Service Regiment, the Officer of the Day at the Depot on 13 August 1947, testified that he had inspected the guard at "around two o'clock" and that about one-half or three quarters of an hour later he was awakened by shooting near Posts No. 4 and 5. He dressed and accompanied by the sergeant of the guard went to the scene of the shooting, which was near the accused's post, No. 4. He heard moaning around the fence and "instructed the sergeant of the guard and Gusik to go outside the depot and see what it was." They brought back one dead Italian and one who appeared to be dying. Lieutenant Birmingham identified and there was received into evidence without objection as Prosecution Exhibit 3 a photograph of the dead Italian. He identified Prosecution Exhibit 4 as a photograph of the wounded Italian. Lieutenant Birmingham did not examine in detail the bodies brought to him nor did he investigate the shooting. He asserted, "The man admitted it." The President of the court directed the following question to the witness: "When you say he admitted firing the shots, do you mean the accused?" To which the witness replied, "Yes, sir." The officer immediately ordered an ambulance and had the bodies taken to the Italian civilian hospital in Pisa (R 22-26).

Dr. Ideale del Carpio of Pisa, Italy, testified that he was a "teacher of legal medicine at the University." On 13 August 1947 he had performed an autopsy on the body shown by Prosecution Exhibit 3. Death was caused by gunshot wound in the lungs producing interior hemorrhage. He also performed an autopsy on the body shown by Prosecution Exhibit 4. Death of this person was caused by interior hemorrhage brought about by gunshot wound in the lungs and heart. Prosecution Exhibit 4 was received in evidence without objection (R 26-27).

On cross-examination, Dr. Carpio was asked if he could render an opinion as to the caliber of the bullets which penetrated the bodies of the deceased persons. He responded by stating that "as regards Montalbano, it was a trespassing wound." The diameter of the entrance wound appeared to be between seven and eight millimeters. "As regards Moro, we had two entrance holes," one in the anterior of the thorax which "was large and did not correspond to what should have been the caliber of the bullet. The outside of the slug was rather fringed and we could not identify the weapon according to the lines." From an examination of the bullets he determined that the weapon "was a long one of medium caliber." The witness stated that the "pieces" were in the institute at Pisa subject to the disposal of the authorities. The projectiles were not produced or further identified (R 27).

Private Ursl B. Parker was a member of the same company as the accused and was his tentmate. Parker testified that sometime in the afternoon of 12 August 1947 he told the accused that some Italians were to come to his post, No. 2, that night and that if the accused desired he would send them over to his post. The accused replied, "OK." Parker was on the third relief, "eleven until one o'clock." The accused was to be on Post

No. 4. Parker was not sure if they discussed the object to be obtained by the appearance of the Italians. He stated, "I am not exactly sure, sir, but I know when anyone goes to that post, it is for tires." Parker knew Franco and asserted that he told the accused that they would be whistling "Angelina" as the signal. Franco came to Parker's post at "11:15" and had some other Italians with him. He told Franco that if he "couldn't do anything" on his post "he could go over to Tom's post and work there." By "Tom" he referred to "Gusik." When the "OD" came Franco left and Parker did not see him anymore (R 28-30).

Private First Class Frank Zahurones, 7156th Engineer Guard Company, testified that on the morning of 13 August 1947 he was the guard at Post No. 5, which was adjacent to the accused's post, from three o'clock until five o'clock. Post No. 5 was a stationary post. Post No. 4 was a walking post. Zahurones stated that while the accused was walking his post he heard "Gusik" whistling "Angelina." "Pretty soon over the fence in the woods someone whistled the same tune." Someone in the woods said "Tom," and close by there went forth a reply, "Franco." The accused was about 100 feet from the witness who asserted that he heard no other sound until "the shots came." He did not hear the command "halt" given at any time. About five minutes intervened between the time he heard the word "Franco" and the sound of the shots. Zahurones testified further as follows:

"Q. Did you see any Italians enter the depot about that time or just before the shooting?
"A. No, sir, I didn't.
"Q. Did you fire any shots?
"A. Yes, sir, I fired thirty rounds.
"Q. How long was that after Gusik had fired?
"A. He fired about fifteen or twenty rounds and then I started to shoot.
"Q. In which direction?
"A. Up toward the woods.
"Q. In which direction was Gusik firing?
"A. I believe he was firing toward the woods too." (R 32)

On cross-examination the witness testified as follows:

"Q. What were you firing at Zahurones?
"A. I couldn't see nothing. I was just firing out toward the woods.
"Q. Did you see or hear anything out in the direction that you fired?
"A. Over the fence I heard the woods crash. I was shooting out that way through the trees.
"Q. What type of weapon were you armed with?
"A. A carbine.

"Q. What type was the accused armed with?
"A. A carbine." (R 32)

Zahurones stated further that he recognized the accused's voice and that it was he who had called out, "Franco," but that he did not see anyone at that time. There were "about" four rows of vehicles between his position and "the post occupied by the accused" (R 33). In response to further questioning, Zahurones stated that he was about 100 feet from the accused when he heard the "conversation" but that he was about 12 feet away when the first shots were fired. The accused was about "four feet away from the fence" (R 34). On recross-examination the witness stated that he fired above the fence line into the woods but in the same general direction as the accused. He heard no shots until the accused began firing, but he did not see the accused when accused started firing because of the "vehicle" between him and accused (R 34,35). The defense directed the following question and received the indicated answer from Zahurones:

"Q. Did you start firing simultaneously with the accused or did you start after he stopped?
"A. We were both shooting at the same time." (R 36)

Upon being reexamined by the court the witness stated that he was about fifty feet from the fence when he fired, and that he fired "right straight toward the fence and above the fence." He did not see "anything" along the fence as he "ran down." While firing, he held his piece at an angle of 45 or 50 degrees (R 36-37).

On 15 September 1947, Robert M. Urdinarrain, an agent of the Criminal Investigation Division, Leghorn, Italy, interviewed the accused. He testified that at this time he read to the accused the 24th Article of War, made no threats or promises to him, and that the accused made a written statement consisting of two pages which he voluntarily signed. Without objection, this statement was received in evidence as Prosecution Exhibit 5. It reads as follows:

"PORT OF LEGHORN
Office of the Provost Marshal
CRIMINAL INVESTIGATION DIVISION
APO 782 U.S. ARMY

"STATEMENT OF Pvt. THOMAS A. GUSIK, RA 15220411, 7156th Engr. Guard Co Ovhd

In the Case 47/220
Given at 1600 hours (Time) 15 September 1947 (Date) C.I.D. Office, Leghorn (Place)
In the presence of ROBERT M. URDINARRAIN, Agent, C.I.D.

"Officer taking statement: Thomas A. GUSIK. Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used against you, should this investigation result in a trial. Do you understand what I have just said? (Answer): YES.

"I arrived in the Port of Leghorn on 26 December 1946. I was then sent to the 149th Replacement Depot, later on on 28th December 1946 I was transferred to the 88th Division to the 913th Field Artillery I then left the 88th Division on March 7th 1947. I was then stationed on Depot 2L76, with the 913th F.A., later I became the 7156 Engr. Guard Company. While I was with the 7156th, I came to know a certain FRANCO. I got to know him sometime in May 1947; the way I got to know this FRANCO was on May 1947, when he first approached me, and asked me if I wanted to sell any gas or tires. Then, in the month of June 1947, I made my first deal, with FRANCO, I told FRANCO what post I was going to be on, and at what time to come in. I do not recall the date and time, only that it was the early morning hours. I let FRANCO and two Italians named DI PINTO LUIGI, and MARCELLO get into the Depot. On this deal, the three Italians did not steal anything, due that they had not brought any tool with them, because they intended to take tires out. After this, FRANCO would approach me, but I did not make any deal with him, because I did not know what post I would be on. Then on the 11th of August 1947, I knew what Post I was going to be on. I then got a pass and went out to look for FRANCO, to tell him to bring his gang, so that the deal could be pulled. Instead I met MORO who I knew was one of FRANCO's men. I told MORO to tell FRANCO that I would be on Post #4, from 0300 hours to 0500 hours, 13th August 1947. MORO then told me that he would see FRANCO and tell him. I also told MORO to tell FRANCO to whistle the tune of Angelina; the tune Angelina was used in both deals, I was involved. I was shown a statement given by WILLIAM E. HOAGLAND, by Agent URDINARRAIN, dated 4 September 1947, on one page and sworn to, on the 12th of August 1947, and confirmed the same on every detail, except the part where I said I'll get FRANCO. I have identified the photograph shown to me by Agent URDINARRAIN, as one of the two men I had spoken to as was mentioned in HOAGLAND statement. One of these two men, I later shot on 13th August 1947. I have seen this same man with FRANCO, when he approached me. Pvt. PARKER told me before going on guard the next day, that he also had made a deal with FRANCO. On 13th August 1947, I went on duty at 0300 hours, on Post #4. As soon as I got on my Post, I started to whistle "Angelina." While whistling (Angelina), I kept walking

along the fence line, waiting for FRANCO to whistle (Angelina) so that I could give him the OK to come inside of the Depot. About half an hour later, I heard someone whistling (Angelina). I knew it was FRANCO and his gang. A few minutes later, FRANCO came out to the fence. FRANCO then told me "Where can I let them in?" I replied that he could not come in, because the O.D., Lt. BIRMINGHAM, was checking the area. FRANCO was mad because I had made a deal with him and then I did not want to go through with the deal. FRANCO then walked off into the woods. I then started to go towards Post #5, when someone fired upon me. I crawled under the stone crusher. I stayed under the stone crusher for a while, then I got behind the stone crusher, then I got up and walked towards Post #5, where ZAHURONES was. On my way to ZAHURONES, I heard someone by the fence, it sounded like someone was cutting the wire fence. I then saw some civilians enter the area. I shouted "Halt" but no one stopped. I then halted the civilians the second time. This time, the civilians started to go through the fence. I then fired at the civilians. I fired between twn to fifteen rounds, in my first burst, being that my gun had jamed (Cal.30 Carbine T-4 No. 000571). On my second burst I fired about fifteen rounds. I then fired another clip, in order to get the Cpl. of the Guard to come to my Post, I fired three clips in all. The Cpl. of the Guard arrived (Cpl. [illegible]KIO). The Cpl. and myself went outside of the fence, and brought in the two wounded Italians. After we had brought the two wounded Italians, I recognized one of the Italians to be the same man in the photography shown to me in the C.I.D. Office. Later, the ambulance arrived and the two Italians where taken to the Hospital. I am positive that the shots fired from my gun killed the two Italians, because I was the closer one to them, and the first one to fire. Even thought I had dealt with this group, headed by FRANCO, the reason I shot the two men was because they did not halt; the reason why I shot them was because they did not stop after I had hollered halt twice. The Halt business came after I had spoken to them the first time. I knew that PARKER was involved in about three or four deals, or more, because he told me so. I do not remember the exact details. I know that he was involved with many other members of the guard details, I do not remember the names.

Signature /s/ Thomas A. Gusik

"Subscribed and sworn to before me
this 15th of September 1947

/s/ John S. Strano 2nd Lt., C.M.P.
(Name) (Rank)
SUMMARY COURT

"I certify that the 24th Article of War was read and thouroughly explained to the deponent by me prior to any questioning.

Signature /s/ R. M. Urdinarrain"

Urdinarrain examined Prosecution Exhibits 3 and 4 and stated that these were the photographs shown to accused at the time he made the foregoing statement (R 38).

After being advised of his rights as a witness in his own behalf by the court, and after he had conferred with counsel, the accused stated: "Sir, I wish to remain silent." No witnesses were presented by the defense (R 39).

After the court was opened, and the President had announced the findings of guilty and the sentence, the following colloquy occurred:

"President: The Court will recommend clemency in this case of Pvt Gusik.
"Prosecution: That is the unanimous opinion of the court?
"President: It is."

The court thereupon adjourned on 9 October 1947 to meet at the call of the President.

4. Discussion

The functions of a general court-martial, duly constituted to hear and determine accusations against persons subject to military law, is briefly stated in the oath or affirmation administered to every member of the court prior to the trial of an accused. This oath is set forth in Article 19 of the Articles of War and is quoted in part as follows:

"You A.B. do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the Government of the Armies of the U.S., and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding and the custom of war in like cases; ***."

In the present case, the concurrence of at least two-thirds of the members present and voting was required for a conviction under each specification and the charge (AW 43; Stout v. Hancock, 146 Fed. (2nd) 741). Furthermore,

"In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof." (MCM, 1928, par. 78, page 62.) The provisions of the Manual for Courts-Martial are no less applicable to a general court-martial than the Articles of War, insofar as such provisions are not inconsistent with the Articles of War (AW 38). (See also Sec. 1, Ch. II, Act of June 4, 1920 (41 Stat. 787), as amended.) A general court-martial, duly constituted and appointed by competent authority, having heard the evidence of sworn witnesses and having passed upon the strength, credibility and tendency of the evidence, has found that the accused did on 13 August 1947 near Tirrenia, Italy, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill Salvatore Montalbano and Teodoro Moro, human beings, by shooting each with a carbine. The unanimous recommendation of the members of the court that clemency be granted the accused and the causing of such recommendation to be forwarded with the record of trial is authorized by military law (MCM, 1928, par. 81, p. 68), and is not, in any respect, inconsistent with the court's findings of guilty. Nor do the reasons which the court set forth as the basis for its recommendation tend to impeach its findings. Those reasons were stated as follows:

(a) The sentence was a mandatory sentence.

(b) The past record of the accused being of a very good nature until the time of the present offense.

(c) The young age of the accused, he being eighteen (18) years of age.

(d) The fact that the accused was on guard duty, regularly posted at the time of the offense.

Although the fact would appear tragic and shocking to the normal concepts of proper human behavior, we know of no reason why a soldier 18 years of age, in full control of his mental faculties, with a prior excellent record and being on guard duty could not, if he chose to do so, commit the crime of murder.

The function of the Board of Review in the Office of The Judge Advocate General in considering the legal sufficiency of a record of trial pursuant to the third paragraph of Article of War 50½, in which appellate category the present review falls, has been well defined and often stated.

"The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of the courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference. ***.

"We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen. ***" (CM 212505, Tipton, 10 BR 237,244. See also CM 205920, McCann, 8 BR 239, 246; CM 322220, Prentiss.)

Bearing in mind the foregoing principles of law, we now consider the proof with respect to whether there be a reasonable basis for such inculpatory inferences as would tend legally to establish the findings of guilty. Two Italians known as Salvatore Montalbano and Teodoro Moro, members of a group engaged in illegal activities of which "Franco" was the leader, were mortally wounded on 13 August 1947 by gunfire at a place near the fence of Post No. 4 at Engineer Depot E 2L 76 at Tirrenia, Italy. They are shown to have died within a short period of time after having been fired upon. The accused was the guard on Post No. 4 at the time of the shooting and, according to Lieutenant Birmingham, the Officer of the Day, the accused readily admitted firing the fatal shots. After observing the hole cut in the fence near the bodies, and cognizant of the provisions of accused's special orders as heretofore set forth in this review, the Officer of the Day might well have assumed, even without ascertaining to a finality whether the accused had complied strictly to the letter of his orders by properly challenging the victims, that the killing was justified by the exigencies of the military service. He appears to have taken no action beyond having the bodies removed to the hospital and reporting the incident. This was on the morning of 13 August 1947. On 15 September 1947 the accused made his voluntary statement to agent Urdinarrain. According to this statement, he had made his first "deal" with Franco in June 1947, allowing Franco, Luigi and Marcello to come into the depot, but they did not steal anything because they had no tools to remove the tires. On 11 August 1947 he procured a pass and went out to notify Franco to bring his gang so a "deal could be pulled." He met Moro whom he knew to be a member of Franco's gang, told him he would be on Post No. 4 from 0300 hours to 0500 hours on 13 August 1947 and asked him to tell Franco to whistle a tune of "Angelina," the signal they had used on their previous "deal." When the accused went on guard he began whistling

the prearranged signal. About half an hour later, there was a response in kind from the woods, then Franco came to the fence. The statement of the accused as to the events transpiring after Franco came to the fence, and the testimony of the prosecution witnesses are in sharp conflict. Although admitting the firing of the fatal shots, the accused asserted that he told Franco that he could not come in because Lieutenant Birmingham was checking the area. Franco thereupon went back to the woods, the accused walked toward Post No. 5 and "someone fired upon me." He got under a stone crusher and stayed for a while, then came out and walked toward Zahurones on Post No. 5. He saw some civilians enter the area and he asserts that he shouted the command "halt" twice and when they started to go through the fence he fired about 15 rounds at them. After clearing his piece he fired a second burst of about 15 rounds. The accused stated that the reason he did this was because they did not stop after he "hollered halt twice." He was shown a statement made by Private First Class Hoagland and confirmed the same in every detail "except the part where I said I'll get Franco." It is significant that no witness in the case, including Zahurones, who was standing from 12 to 100 feet from the accused, ever heard any command "halt" or in fact any form of challenge given prior to the first burst of fire. Zahurones heard the accused whistling "Angelina" and the responding tune coming from the woods. He heard the word "Tom" coming from the outside and the reply "Franco" which sounded "close" to him, but he "didn't hear anything else until the shots came." The court-martial resolved the conflict of evidence against the accused, it being apparent that by the findings of guilty of murder the court rejected accused's statement that he refused the Italians entrance, that he was fired upon from the woods, that he shouted "halt" twice and that he fired because the Italians failed to obey his command. It elected to believe the evidence showing that the Italians were told by the accused to come to the fence, to cut the wire and to enter, that while they were in the process of effecting their entry, accused, without warning, willfully and deliberately fired upon them and that two of their number were killed by shots fired from accused's weapon. We cannot reasonably conclude that the court did not have ample and substantial evidence upon which to base the findings of fact implicit in its verdict.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. ***" (MCM, 1928, par. 148a.)

The general rule is that the acts of one done in good faith, that is, without malice, in compliance with the orders of his superior are justifiable unless such orders are palpably unlawful or unless the acts are in excess of the authority delegated to him. And even though, in contemplation of the law, a particular act be in excess of his authority, reliance in good faith upon orders of a superior may well work a mitigation of a criminal offense thereby committed, as, if the act be a homicide, it may be manslaughter rather than murder (CM 265848, Baugh, 4 BR (NATO-MTO) 359, 365; CM 237827, Green, 1 BR (ETO) 345,368; U.S. v. Clark, 31 Fed. 710, 716; 40 C.J.S., p. 967 and cases there cited; State v. Finch, 177 N.C. 599, 99 S.E. 409, 414).

> "That the act charged as an offense was done in obedience to the order - verbal or written - of a military superior, is, in general, a good defense in military law. The act, however, must have been duly done - must not have been either wanton or in excess of the authority or discretion conferred by the order. Thus an officer or soldier ordered to suppress a mutiny or disorder or to make an arrest, a guard ordered to keep in custody a prisoner, or a sentinel ordered to prevent prisoners from passing his post, will not be justified in taking life or resorting to extreme violence, where the object of the order can be effectually accomplished by more moderate and customary means; otherwise where the forcible resistance of the party, his persistence in disregarding warnings, his sudden flight, etc., render it impracticable to seize or stop him without extreme violence or the use of a deadly weapon" (Winthrop's Military Law and Precedents (Reprint), p. 296).

In United States v. Clark, supra, the court quoted with approval the language of Mr. Justice Woodbury in Wilkes v. Dinsman, 7 How. 89, which was an action of trespass against Commodore Wilkes for causing the plaintiff to be whipped and imprisoned for disobedience of orders, near the Sandwich Islands, as follows:

> "In respect to those compulsory duties while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been and never should be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. The officer, being entrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided to him in cases without his jurisdiction, or in a manner not confided in him, as with malice, cruelty or willful oppression, or, in the words of Lord Mansfield, that he exercised it as if 'the heart is wrong.' In short, it is not enough to show that he committed an error of judgment, but it must have

been a willful and malicious error."

It will be seen, therefore, that, indispensable to the shield of immunity from criminal responsibility afforded one for homicide committed pursuant to lawful orders of his superior, and in the performance of a public duty, are the following:

(a) That the order or authority was lawful or of such character that he had a right under the circumstances to believe and did believe it to be lawful,

(b) That he acted reasonably within the scope of such authority, and

(c) Not with malice, cruelty, or by willful oppression flowing from a wicked heart.

Neither the validity nor the lawful character of accused's orders heretofore set forth is questioned. Upon the evidence the court determined that when accused fired some thirty rounds at the civilians "near the fence" he was not acting reasonably within the scope of his authority and furthermore that such shooting was accompanied by malice aforethought. With respect to the first proposition it has already been pointed out that none of the witnesses present at or near the scene of the homicide heard any challenge or warning of any description given prior to the shooting. And the proximity of the parties to each other and the fact that they heard other words spoken would indicate most strongly that had any challenge been given they would have heard it. Consequently, we believe the court was warranted in coming to the conclusion that accused was not acting reasonably in due performance of his duties as a sentinel. As to the question of malice aforethought, that term has been variously defined by the courts and text writers and although the language employed may vary, the meaning is predominately the same. In the early case of United States v. Carr (25 Fed. Cas., pp. 306-309), wherein the authority of a sergeant of the guard to kill a drunken and riotous soldier was considered, the learned Circuit Judge, in charging the jury defined malice aforethought as follows:

"Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart; a purpose to do a wicked act, and it may be either express or implied in law. Express malice is when one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases

when no malice is expressed, the law will imply it, as when a man willfully poisons another; in such a deliberate act the law implies malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause. Although the malice in murder is what is called 'malice aforethought', yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill or do great bodily harm is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a long period." (See also Comm. v. Chance, 174 Mass. 245, 252; Turner v. Comm. 167 Ky. 365, 180 S.W. 768.)

It will be recalled that Private First Class Hoagland, the accused's companion on pass the day before the homicides were committed and who overheard the conversation by the accused with the Italian (Moro), testified that as they returned to camp some few hours later the accused told him that he was going to get "Franco" because "Franco" had "screwed him out of a wrist watch." The accused asserted that he was shown a statement dated 4 September 1947 given by Private First Class Hoagland to agent Urdinarrain and "confirmed the same on every detail, except the part where I said I'll get Franco." Even if the foregoing be construed as a denial that he had made the statement which Hoagland testified to at the trial, yet the court was fully authorized in resolving this question of fact against the accused. In the light of the succeeding events, the statement amounts to express malice in law, although we are of the opinion that the facts and circumstances of the shooting as heretofore set forth, were such that the court could imply malice aforethought. (State v. Orr, 175 N.C.773, 94 S.E.721; People v. Klein, 305 Ill. 141, 137 N.E. 145; State v. Finch, supra.)

4. It is vigorously contended that the record contains incompetent evidence to such extent as to vitiate the findings of the court. Counsel have set out in detail such questions and answers as were considered incompetent and prejudicial to the accused's rights. We have given careful consideration to the portions of the testimony to which reference was made but deem it unnecessary to reiterate each in this opinion. It is stated that some of the questions propounded on direct examination were leading, that the responses to other questions obviously were based on hearsay, some tending to show the commission of other offenses for which the accused was not on trial, that the answers given to some of the questions were not responsive and that other matters testified to were irrelevant and immaterial. It is conceded that the record contains some leading questions on direct examination. We cannot, however, lose sight of the realities of the trial, held on foreign soil. An interpreter was required and the common difficulties were encountered in the use of different languages. It is conceded

that some of the answers were not responsive to the questions propounded and that the matter elicited from the witnesses was in some instances irrelevant, immaterial and, perhaps, based on conclusion.

"The rule prohibiting leading questions in the examination in chief is to be liberally construed, and while as a rule leading questions are excluded, exceptions are recognized where witnesses are hostile, where they are weak of memory, where they are called to contradict, and where such a mode of questioning is logically consistent with a fair and honest development of the case, within, however, the discretion of the trial court." (Wharton's Crim. Ev., 11th Ed., Vol. 3, p. 2136.)

Article of War 37 provides in part as follows:

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

The question therefore is reduced to a determination, under the 37th Article of War, as to whether the errors alluded to injuriously affected the accused's substantial rights. For answer to this question the Board of Review has consistently applied the "compelling evidence rule" as is hereinafter set forth:

"It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C.M. 127490 (1919).

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record

and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C.M. 130415 (1919)." (CM 211829, Parnell, 10 BR 142-143. See also CM 258073, Allen, 5 BR (ETO), 233, 236-237.)

Applying the above rule to the instant case, and eliminating from our consideration all evidence which might reasonably be considered of doubtful admissibility, we are of the opinion that the remaining competent evidence is of sufficient probative force as virtually to compel the findings of guilty and that such findings should not be disturbed (CM 258073, Allen, supra).

It is contended by counsel for the accused in their brief that "conceding that the court had a right to disbelieve the accused's statement that he cried 'Halt,' especially in view of the evidence to the contrary, the evidence gives rise to no other inference than that he shot in order to prevent the unlawful entrance of the Italians into the depot. Since he failed to comply with the Post Special Orders requiring him to 'challenge' before firing (Pros Ex 1), he is deprived of whatever protection those orders would have afforded him. He stands, then, in a position of one who shoots in order to prevent the commission of a felony attempted by force or surprise. Such a killing is justifiable and does not constitute a crime (MCM 1928, par. 148a; Clark and Marshall, Law of Crimes (4th Ed. 1940), Sec. 266)." (Defense Brief, p. 10.) Although it is true that a homicide may be justifiable when committed in good faith in order to prevent the perpetration of a violent felony attempted by force or surprise, even though the particular felony is directed primarily against property and not against the person (Ex parte Dickson, 14 Fed (2d) 609; Comm. v. Beverly, 237 Ky. 35, 34 S.W. (2nd) 941, 40 C.J.S., p. 960-961), an exhaustive review of the cases wherein this principle of law has been invoked discloses factual situations entirely different from those shown to exist in the instant case, for here the court had before it ample and compelling evidence that the accused did not take the lives of his victims in order to prevent a felony, but, rather, that he was impelled to fire the fatal shots out of personal venom towards the group of Italians of which the two deceased were a part, a venom in no wise connected with accused's call of duty and which is denounced by the law as the malice aforethought which forms the essential ingredient of the crime of murder. (CM 281592, Tracey, 54 BR 179.)

Counsel appearing before the Board of Review in behalf of accused have argued that the record of trial is barren of evidence tending to establish that accused took the lives of the two Italians with premeditation. Premeditation is not an element of murder either at common law or under the 92nd Article of War. There are no degrees of murder in military law (CM 319168, Poe; CM 294141, Wesley, 16 BR (ETO) 327, 332; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 304; MCM 1928, par. 148a). However, we are of the opinion that the record contains ample proof of premeditation.

It was argued by able counsel in their appearance before the Board of Review that the accused did not have adequate counsel at the trial and that defense counsel displayed such apathy or indifference to accused's interests as to amount to a deprivation of his right to counsel. We find no substantial basis in the record for this conclusion. The assistant defense counsel appears to have been excused from the trial for reason of being on other official business. Upon being tried by general court-martial an accused is entitled to one or more assistant defense counsels "when necessary" (AW 11). The record shows that the accused stated that he desired to be defended by the regularly appointed defense counsel and the question of the necessity for the presence of an assistant was never raised. It is a matter of record in this office that the defense counsel in this case has had prior experience in court-martial practice and although the record of trial does not show whether he was a qualified lawyer in civilian life, a license to practice law in the civil courts is not a prerequisite to the performance of the duties of either trial judge advocate or defense counsel in a military court (AW 17; Romero v. Squier, 133 Fed (2d) 528). We cannot reasonably conclude that the election of the accused to remain silent, after having had his rights as a witness explained to him, and after conferring with his counsel, was other than the exercise of prudence and sound judgment on the part of the defense. And the failure of the defense to present any witness does not raise any presumption that there were any witnesses whose testimony would have improved the accused's position. With respect to character evidence the court assumed and declared in its recommendation to the reviewing authority that the accused's past record was "of a very good nature up until the time of the present offense." It is the duty of defense counsel for the accused before a military court to perform such duties as usually devolve upon a counsel for a defendant before civil courts in criminal cases and "to represent the accused with undivided fidelity" (MCM 1928, par. 45b, p. 35). Although legal minds might differ as to the most advantageous manner in which to defend any given case, we find no reason to conclude that defense counsel herein failed to perform his duties as heretofore stated.

We have given careful consideration to all other matters presented by counsel for the accused by way of brief and oral arguments upon their appearance before the Board of Review.

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

or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Schmidt, Judge Advocate

1st Indorsement

January 26, 1948

J.A.G.O., Dept. of the Army To the Adjutant General.

1. In the case of Private Thomas A. Gusik (RA 15220411), 7156th Engineer Guard Company (Overhead), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. This office has been advised that the necessary records ordinarily retained in the field for preparation of General Court-Martial Orders have been lost in transportation by aircraft and it is therefore recommended that the required General Court-Martial Orders in this case be published by the Department of the Army.

3. In view of all the circumstances of the case, including the youth of the accused, and the fact that all of the members of the court-martial recommended clemency in a letter to the Reviewing Authority, I have recommended to the Secretary of the Army that the period of confinement be reduced to sixteen years. The Secretary of the Army has concurred in this recommendation. A draft of General Court-Martial orders in conformity with the foregoing action is inclosed.

4. The return to this office of the holding together with five copies of the published Department of the Army General Court-Martial Orders is requested.

(CM 326604).

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

1 Incl
Draft of GCMO

(GCMO 32, DA., 26 Jan. 1948).

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

JAGQ - CM 326609

NOV 18 1947

UNITED STATES	)	SECOND ARMY
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 8 October 1947. Dismissal and confinement for two (2) years. United States Disciplinary Barracks.
First Lieutenant JOHN T. HALFERTY (0-1550395), Headquarters and Headquarters Company, 2101st Area Service Unit, Fort George G. Meade, Maryland.	)	

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 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 61st Article of War.

Specification: In that First Lieutenant John T. Halferty, Headquarters and Headquarters Company, 2101st Area Service Unit, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about 2 August 1947 to about 16 August 1947.

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

Specification 1: In that First Lieutenant John T. Halferty, Headquarters and Headquarters Company, 2101st Area Service Unit, did, at Baltimore, Maryland, on or about 11 March, 1947, with intent to defraud, wrongfully and unlawfully make and utter to Fleetwood, Incorporated, Baltimore, Maryland, a certain check in words and figures as follows, to wit:

11 March 1947 No.

Northern New York Trust Co.
Watertown, New York

Pay to the order of Cash $20.00

Twenty and oo/xx Dollars

/s/ John T. Halferty
Gibsons 1136U.S. Bond 1st Lt. Ord. Dept. 0-1550395

and by means thereof, did fraudulently obtain from Fleetwood, Incorporated Twenty Dollars and no cents ($20.00) in payment of said check, he, the said Lieutenant Halferty then well knowing that he did not have and not intending that he should have an account in the Northern New York Trust Company, Watertown, New York, for the payment of said check.

Specifications 2 through 11, same as Specification 1, with pertinent details as follows:

Spec. No.	Amount	Date	Payee
2	$30	11 Mar 47	Cash
3	20	9 Jul 47	Cash
4	15	10 Jul 47	Cash
5	25	12 Jul 47	Cash
6	15	15 Jul 47	Cash
7	25	24 Jul 47	Governor Tyler Hotel
8	20	25 Jul 47	" " "
9	11.66	26 Jul 47	" " "
10	25	26 Jul 47	Cash
11	25	28 Jul 47	Cash

Accused pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence, designated Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Accused absented himself without leave from his organization on 2 August 1947 and remained in that status until he returned to military control on 16 August 1947 (Pros. Exs. 1 to 5, incl.).

During the period from 11 March to 28 July 1947, accused cashed eleven checks at Baltimore, Maryland, Radford and Charlottesville, Virginia, in amounts varying from $11.66 to $30. The eleven checks amounted to $231.66, for which accused received cash. All of the checks were drawn on the Northern New York Trust Co., Watertown, New York, in which bank accused did not maintain an account, it being stipulated that his account in said bank was closed in December 1946 and was not thereafter reopened (Pros. Exs. 6 to 18, incl.). All of the checks were dishonored by the drawee bank; returned to the persons who cashed them for accused and there is no evidence to the effect that they have been redeemed.

4. Evidence for the Defense.

After being advised of his rights as a witness accused elected to make an unsworn statement through his attorney (R. 22) to the effect that he graduated from high school at the age of 17 and two years later enlisted in the Army in 1940. He served therein as an enlisted man until he attended Officers Candidate School and was commissioned a second lieutenant in July 1942. He served thirty-two months in the Pacific Theater and was treated seven times for malaria. Since his return to the United States he has had no recurrent attacks other than occasional minor ones which are adequately treated by the taking of quinine (R. 22).

5. The offense of absence without leave was proved beyond any reasonable doubt by accused's plea of guilty and the introduction in evidence of the duly authenticated extract copy of the morning report of his organization.

The offenses of uttering the eleven worthless checks drawn on a bank in which accused did not have an account were proved beyond any reasonable doubt by his pleas of guilty and the testimony and stipulations received at the trial. Accused's unsworn statement made through his special defense counsel is merely a plea for clemency, setting forth accused's war record and calling attention to the fact that he now has the responsibility of returning to civilian life and making a living for himself and prospective wife.

Accused was examined prior to trial by the Chief of the Neuropsychiatric Section, Station Hospital, Fort George G. Meade, Maryland,

and found to be sane and responsible with intelligence above normal limits but lacking in judgment and insight. No issue of insanity was raised at the trial.

6. Department of the Army records show that accused is 27 years of age, married, and the father of one child four years of age. (Accused claims that he was divorced in June 1947, and that he is planning to marry a girl from his home town.) He graduated from high school in 1938 and was unemployed until he enlisted in the Army in July 1940. He was commissioned a Second Lieutenant on 24 October 1942 upon graduation from Officer Candidate School (Ordnance) and was promoted to First Lieutenant on 28 August 1943. He served 32 months in the Pacific Theater and received five battle stars. He was also awarded the Philippine Liberation ribbon with one star. He was relieved from active duty on 30 January 1946 and returned to active duty on 19 September 1946. He was reprimanded under Article of War 104 for being absent without leave on 9 December 1946 and fined $75 under Article of War 104 for a second absence without leave from 13-16 June 1947. Accused was tried by a general court-martial on 26 June 1947 and convicted of issuing eight bad checks amounting to $202.20 (CM 324460). Because of procedural errors in the record of trial the findings and sentence had to be disapproved. His personnel file contains only one efficiency report wherein he was rated 3.4 for the period from 19 September 1946 to 31 December 1946.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 96.

W H Johnson Jr., Judge Advocate.

E. A. Schumann, Judge Advocate.

A. Kane, Judge Advocate.

JAGQ - CM 326609 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 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 John T. Halferty (0-1550395), Headquarters and Headquarters Company, 2101st Area Service Unit, Fort George G. Meade, Maryland.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of being absent without leave from his organization from 2 August 1947 to 16 August 1947 (Spec. of Original Charge), in violation of Article of War 61, and of making and uttering eleven checks, aggregating $231.66, on a bank in which he had no account and fraudulently obtaining the proceeds, (Specs. 1-11, Additional Charge), in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence, designated Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

4. The evidence shows that accused absented himself without leave from his organization at Fort George G. Meade on 2 August 1947 and remained in that status until 16 August 1947 (Spec., Original Charge).

The evidence further shows that accused cashed eleven checks totaling $231.66 in amounts varying from $11.66 to $30, all of which were drawn on the Northern New York Trust Co., Watertown, New York, in which bank accused had no account. The eleven checks were dishonored by the bank and returned to the persons who cashed them for accused. There is no evidence that they have been redeemed.

Accused was examined prior to trial by the Chief of the Neuropsychiatric Section, Station Hospital, Fort George G. Meade, Maryland, and found to be sane and responsible with intelligence above normal limits, but lacking in judgment and insight. No issue of insanity was raised at the trial.

5. Department of the Army records show that accused is 27 years of age, married, and the father of one child four years of age. (Accused

claims that he was divorced in June 1947, and that he intends to marry a girl from his home town. He graduated from high school in 1938 and was unemployed until he enlisted in the Army in July 1940. He was commissioned a Second Lieutenant on 24 October 1942 upon graduation from Officer Candidate School (Ordnance) and was promoted to First Lieutenant on 28 August 1943. He served 32 months in the Pacific Theater and received five battle stars. He was also awarded the Philippine Liberation ribbon with one star. He was relieved from active duty on 30 January 1946 and returned to active duty on 19 September 1946. He was reprimanded under Article of War 104 for being absent without leave on 9 December 1946 and fined $75.00 under Article of War 104 for a second absence without leave from 13-16 June 1947. Accused was tried by a general court-martial on 26 June 1947 and convicted of issuing eight bad checks amounting to $202.20 (CM 324460). Because of procedural errors in the record of trial the findings and sentence were disapproved. His personnel file contains only one efficiency report wherein he was rated 3.4 for the period from 19 September 1946 to 31 December 1946.

6. By a continued course of conduct, culminating in the present trial by general court-martial, accused has demonstrated his unfitness to be an officer. I recommend that the sentence be confirmed and carried into execution and that a United States disciplinary barracks be designated as the place of confinement.

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

CM 326609

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 81 (DA) 10 Dec 1947).

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

JAGK - CM 326647

UNITED STATES	)	PHILIPPINES-RYUKYUS COMMAND
	)	
v.	)	Trial by G.C.M., convened at Headquarters PHILRYCOM, APO 707, 26 August 1947. Dismissal and to pay a fine of $500.00.
	)	
Captain DAVID H. CHENAULT (O-450100), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
SILVERS, ACKROYD and LANNING, 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 69th Article of War.

Specification: In that Captain David H. Chenault, 557th Quartermaster Service Company (PS), having been duly placed in arrest at Camp Rizal, Luzon, Philippine Islands, on or about 18th July 1947, did, on or about 18 July 1947, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Captain David H. Chenault, 557th Quartermaster Service Company (PS), did, without proper leave, absent himself from his post at Camp Rizal, Luzon, Philippine Islands, from about 5 July 1947, to about 18 July 1947.

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

Specification: In that Captain David H. Chenault, 557th Quartermaster Service Company (PS), did, at Manila, Philippine Islands, on or about 18 July 1947, wrongfully appear in khaki uniform without insignia, shoulder patch or cap.

He pleaded not guilty to and was found guilty of all charges and specifications. He was sentenced to pay the United States a fine of five hundred dollars and to be dismissed the service. Evidence of three previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Inquiry concerning sanity

Prior to entering pleas to the general issue defense counsel moved the court to inquire into the accused's sanity in accordance with the provisions of "Paragraph 63 and 75 MCM 1928" as amended, and counsel made an offer of proof in support of his motion. The motion was granted and the court proceeded to hear psychiatric testimony concerning the issue raised.

Captain John C. Robinson, MC, Chief of the Neuropsychiatric Section, 10th General Hospital, Philippine Scouts, a witness called by the court at the suggestion of counsel for the accused, identified a psychiatric report he had made of the accused on 22 July 1947 which was received in evidence as Defense Exhibit "A" (R 7). This report contained a diagnosis "Paranoid State" and recommended "Evacuation to the U.S. at the earliest possible time for further institutional care and treatment." Captain Robinson also identified a psychiatric report, including a clinical abstract, which he had made concerning the accused and which was dated 11 August 1947. This report was received in evidence as Prosecution Exhibit 1 (R 8). The psychiatric findings in this report are as follows:

"a. The diagnosis is: Situational Maladjustment, chronic, moderate, manifested by aggressive symptoms and a paranoid attitude. Moderate stress of Army duties and lack of understanding. Predisposition unknown. Marked impairment.

"b. That the officer at the time of the alleged offense now pending was so far free from mental defect, disease, or derangement so as to be able concerning the particular actions charged to distinguish right from wrong. He was so far free from mental defect, disease, or derangement so as to be able concerning the actions charged to adhere to the right. He is now so far free from mental defect, disease, or derangement so as to be able to cooperate intelligently in his defense."

/Sgd/ John C. Robinson
JOHN C ROBINSON
Captain, MC
Chief of Neuropsychiatric Section" (P.Ex. 1)

The witness was examined at length as to the possible conflict in the diagnoses contained in the two exhibits and he asserted that the latter diagnosis was complete and accurate, properly reflecting his finding as to the accused's mental condition (R 9).

The court closed and deliberated on the issue of accused's sanity. When the court was opened the law member announced that "it is the opinion of the court that the accused is sane and that at the present time he is able to distinguish right from wrong and to adhere to the right. The trial will proceed" (R 10).

4. Evidence for the Prosecution

On or about 21 May 1947 the accused, a member of the 557th Quartermaster Service Company, P.S., was placed on temporary duty with the 8122nd Service Detachment (AGRS-FEZ), APO 707 (R 27; Def Ex B). In compliance with orders he reported for duty with the latter organization (R 58). There was received in evidence a certified extract copy of the morning report of the 8122nd Service Detachment dated 8 July 1947 as follows:

"Chenault David H (INF)
O-450100 Capt
Dy to AWOL 0800 hrs effective 5 July 47

I certify that this morning report is correct:

E. J. Brucher
Major QMC" (R 24-25; Pros Ex 2)

There was also received in evidence a certified extract copy of the morning report of the same unit for 18 July 1947 as follows:

"Chenault David H (INF)
O-450100 Capt
AWOL to Confinement as of 2330 hrs

I certify that this morning report is correct:

E. J. BRUCHER
Major QMC" (R 25; Pros Ex 3)

Major Edward J. Brucher, QMC, 8122nd Service Detachment, APO 707, testified that he was the Chief, Administrative Branch, American Graves Registration Service and Personnel Officer of his unit; that the foregoing were true copies of the morning reports for the dates shown relating to the accused and that the exhibits bore his signature. The entries were made on the basis of information received by him in his official capacity (R 26). The defense objected to the introduction of the exhibits

on the ground that they did not show that the accused was on temporary duty with the reporting organization (R 25, 26).

Upon his being returned to military control on 18 July 1947 the accused was placed in arrest of quarters by his commanding officer, Colonel James A. Murphy, QMC (AGRS-FEZ) who explained to the accused that he must remain in his quarters until 0800 hours Monday morning, at which time he was to report to Colonel Murphy at his office (R 12-14).

About three hours after the accused was placed in arrest of quarters Major James H. Jackson, Executive Officer (AGRS-FEZ) noticed the accused and an enlisted man standing beside a red weapons carrier which was parked in the Headquarters area. The vehicle was suddenly driven off and at the same time the two parties disappeared. Major Jackson got into a vehicle and gave chase. He overtook the red weapons carrier about one and one-half miles from camp on Highway 54 and as he passed the vehicle he observed the accused sitting in the rear seat holding his hands over his face. The accused had no insignia of any description on his uniform. Major Jackson was not sure of the accused's status at that time and did not attempt to stop the weapons carrier (R 20-21). Later the same evening Sergeant Erhardt H. Free, 738th Military Police Battalion, made a search for the accused and the red weapons carrier. He found the carrier parked near "Tony's Bar, on Highway 3." The accused was inside the bar and was dressed in a suntan uniform without insignia of rank and shoulder patch. He had no cap with him (R 39, 41; Pros. Ex 7). The accused had not been released from arrest in quarters (R 13).

5. For the Defense

The defense offered and there was received in evidence without objection a certified true copy of WD AGO Form No. 549, "Prisoners information and data record" showing that on 18 July 1947 the accused was confined (PAU Stockade) at about 2000 hours and that he was released "to organization on 19 July 1947" (R 44; Def Ex H). On motion of the defense there was received in evidence a certified true copy of a memorandum dated 19 July 1947 from Colonel James A. Murphy to Major General George F. Moore, Commanding General, Philippines-Ryukyus Command, stating that the writer had personally confined the accused because he had previously breached his arrest of quarters (R 48; Def Ex I).

Captain William A. Gupton, MC, 538th Medical General Dispensary, testified that on 19 July 1947 the accused was brought to the dispensary. His eyes were bloodshot but he did not appear intoxicated to the point of drunkenness. The medical officer had recommended that the accused be evacuated to the United States for institutional care and

treatment. The defense offered in evidence as Exhibit "K" the clinical report including blood alcohol tests concerning the accused. The prosecution objected on the ground that the documents offered were immaterial to the issues. The law member sustained the objection (R 52). The defense thereupon called Captain John C. Robinson, MC, who had previously testified. The witness identified, and there was admitted in evidence as Defense Exhibit "J", a copy of "Patients Disposition Form" showing that on 14 August 1947 the witness, as "Chief of Service" (Medical) had recommended that the accused be "discharged to duty" (R 53).

The accused's rights as a witness were duly explained to him by the law member and after consulting counsel he elected to testify as a witness in his own behalf. He stated that on the afternoon of 18 July 1947 he was "turned over" to Major Jackson at about 1600 hours. He was taken to Colonel Murphy's office where the Colonel "said a lot of things about what has been happening since I have gone." Colonel Murphy thereupon "instructed me to report to my quarters and to report back to him Monday morning at 8 o'clock." He (accused) did not "believe" that he was breaking arrest when he went to "Tony's Place" on the same evening. He was wearing a cap when he went to "Tony's" but had forgotten his collar insignias. To the best of his "knowledge" the cap had captain's bars on it. He had dressed hastily that evening forgetting to apply collar insignia to his uniform but his cap had been lost in the cafe (R 57-60).

6. Special Matters

Attached to page 63 of the record is a certified copy of a letter to the reviewing authority dated 27 August 1947 and signed by the president of the court which recites, in paragraph 1, that the court-martial appointed to try the accused had inquired into the sanity of the accused, that it had found that at the time of the alleged offenses and of the trial that the accused was sane and mentally responsible for his acts. The court had found him guilty of all specifications and charges and sentenced him accordingly. Paragraph 2 recites that:

> "2. The Court believes that the sentence is commensurate with the offenses. The court accepted for consideration evidences of three (3) previous convictions; however, there is reason to believe that the accused suffers from psychiatric disturbances. The record of his conduct indicates that he is unfit for military service, either by reason of the psychiatric disturbances or an unwillingness to adjust himself to Army life

and accept the responsibilities incumbent upon all officers. However, because there is a possibility that he is mentally incapable, the court recommends that the accused be committed to an institution where facilities are available to observe his type of case and if such observation provides conclusive evidence that he is not mentally responsible for his acts, that the sentence of this Court be set aside and the accused be separated from the Service under appropriate regulations."

It will be seen from the foregoing that the members of the court-martial, in an abundance of caution recognized the possibility that accused could be suffering from psychiatric disturbances which further observation might reveal were of such degree as to render him not mentally responsible for his acts. The court's very practical suggestion cannot be reasonably construed as a repudiation of or in derogation of its judicial action. In short it is not an expression of a reasonable doubt as to the accused's sanity as the term "reasonable doubt" is construed in law. It is no more than a frank recognition that with peculiar regard to the mental processes of a given individual there is no such thing as infallibility of judgment. For somewhat analogous situations see CM 327732, Jackson; CM 320478, Vance.

7. Discussion concerning the evidence

Duly authenticated extract copies of the morning reports of the organization to which the accused was assigned are sufficient to show, prima facie, that the accused was absent without authority for the period alleged. The objection of the defense to the admission of the documents on the ground that they did not show that the accused was on temporary duty with the reporting organization is without merit, there being no evidence that he had ever been relieved from duty with such organization. And the fact that the officer signing the report did not have personal knowledge of the matter recorded would not ipso facto render the documents inadmissible (CM 320957, Boone).

Although the accused testified in effect that he did not "understand" that Colonel Murphy had placed him in arrest of quarters, the court, upon ample evidence indicating the contrary, resolved the question of fact against him.

With respect to Charge III and its specification, there is no specific evidence in the record tending to show that under the circumstances the accused was required to wear "insignia, shoulder patch or cap", we conclude however, that the requirement of the customs of the service

that an officer appearing in public places in uniform wear the appropriate insignia of his rank and organization, including the appropriate head dress, is so obvious a proposition as to require no specific proof thereof. And although minor irregularities in the wearing of the uniform are generally attributed to the common frailties of mankind, if such irregularities are deliberate and, as in this case, intended to conceal the true status of the person, a more serious situation is presented.

The evidence shows beyond a reasonable doubt that the accused absented himself without authority from his proper organization for the period alleged; that he breached his arrest by going to the place shown and that he wrongfully appeared in uniform without the appropriate insignia and cap as alleged.

8. Department of the Army records show that the accused is 38 years of age and is married. He has no children. Prior to enlisting in the Army in 1939, he had completed three years of high school. He was commissioned a second lieutenant (Inf) in 1941 upon completion of Officer Candidate School. His efficiency reports average "excellent".

9. The court was legally constituted and had jurisdiction over the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 69, 61 or 96.

Chester D. Silvers, Judge Advocate

Gilbert E. Goldhammer, Judge Advocate

Harley A. Lemming, Judge Advocate

JAGK - CM 326647 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. FEB 26 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 Captain David H. Chenault (0-450100), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for the period 5 July 1947 to 18 July 1947 in violation of Article of War 61, breach of arrest in violation of Article of War 69, and of wrongfully appearing in khaki uniform without insignia, shoulder patch or cap in violation of Article of War 96. Evidence of three previous convictions was introduced. He was sentenced to be dismissed the service and to pay to the United States a fine of $500. 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 or about 21 May 1947 the accused, a member of the 557th Quartermaster Service Company (Philippine Scouts) was placed on temporary duty with the 8122nd Service Detachment (American Graves Registration Service - Far Eastern Zone) and reported to the latter organization for duty. On 5 July 1947 he absented himself without authority from the 8122nd Service Detachment and remained absent until he was returned to military control on or about 18 July 1947. Upon being returned to military control he was placed in arrest of quarters by his commanding officer. He went to his quarters but a short time thereafter he procured a government vehicle used by the Post fire department and together with an enlisted man departed for a bar known as "Tony's Place," some miles from his organizational headquarters and in the vicinity of Manila, P.I. A few hours later the vehicle was recovered by military police and the accused was taken into custody at "Tony's Place." When apprehended the accused was dressed in Khaki suntan uniform but without insignia of rank or shoulder patch. He did not have a cap. The circumstances surrounding his failure to wear the proper dress of his rank and organization appears to have been deliberate and with a view to concealing his identity.

This officer has been convicted by general court-martial on three prior occasions since his appointment as a second lieutenant in November 1941.

On 3 December 1947, while awaiting final action on his sentence herein,

the accused went absent without leave from his station at Brooke General Hospital, Fort Sam Houston, Texas, and remained absent without leave until 16 December 1947. He was subsequently tried for this offense and sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. In the event the dismissal herein is confirmed and carried into execution no further action need be taken on the subsequent sentence.

At my request a Board of Medical Officers was convened by the Commanding General, Brooke General Hospital, on 2 January 1948 and found the accused to have been mentally responsible both at the time of the alleged offenses and at the present time. The Board diagnosed his condition as:

> "Acute situational maladjustment, manifested by inability to meet the stress and strain of officer status and requirements in peacetime Army, escape to alcoholism, and passive obstructive behavior; improved."

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 62 (DA), 4 March 1948).

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

(303)

20 APR 1948

JAGH CM 326738

UNITED STATES v. Private First Class ROBERT N. FILLINGHAM, RA 36486989, and Private ROY E. OMEY, RA 37816195, both of 513th Military Police Service Platoon.	HEADQUARTERS, BERLIN COMMAND, OFFICE OF MILITARY GOVERNMENT FOR GERMANY (US) Trial by G.C.M., convened at Berlin, Germany, 30 September - 1 October 1947. Fillingham: Confinement for six (6) months and to forfeit $35.00 per month for a like period. Berlin Command Stockade. Omey: Dishonorable discharge (suspended), total forfeitures and confinement for twelve (12) months. United States Disciplinary Barracks, Fort Knox, Kentucky.

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

1. The record of trial in the case of the soldiers named above has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the sentence as to the accused Fillingham and legally sufficient to support the sentence, in part, as to the accused Omey. 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 were tried upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Roy E. Omey, 513th Military Police Service Platoon, and Private First Class Robert N. Fillingham, 513th Military Police Service Platoon, acting jointly, and in pursuance of a common intent, did, at Berlin, Germany, on or about 5 September 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Walter Strowig, German civilian, one (1) briefcase containing about seven thousand Reichsmark (7000/00 R.M.) and one (1) set of keys, the property of Walter Strowig, all of the value of over fifty ($50.00) dollars.

Each accused pleaded not guilty to the Charge and Specification. Each was found of the Specification, "Guilty, except the words, 'by force and

violence and by putting him in fear, feloniously take, steal and carry away from the presence of,' substituting therefor, respectively, the words, 'wrongfully take the property of,' of the excepted words, Not Guilty, and of the substituted words, Guilty", and, of the Charge, "Not Guilty, but Guilty of violation of the 96th Article of War." Accused Fillingham was sentenced to be confined at hard labor, at such place as the reviewing authority may direct, for six months, and to forfeit $35.00 per month for a like period. Accused Omey 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 twelve months. As to accused Fillingham, the reviewing authority approved the sentence, ordered it executed and designated the Berlin Command Stockade, or elsewhere as the Secretary of the Army may direct, as the place of confinement. As to accused Omey, the reviewing authority approved the sentence, ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated The Branch United States Disciplinary Barracks, Fort Knox, Kentucky, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 106, Headquarters, Berlin Command, Office of Military Government for Germany (US), Berlin, Germany, APO 742, US Army, dated 25 October 1947. So much of the sentence as to accused Fillingham as provides for forfeitures in excess of thirty-five ($35.00) dollars per month for four (4) months and confinement at hard labor in excess of four (4) months was later remitted by General Court-Martial Orders No. 4, dated 21 January 1948.

3. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as to each accused, and the sentence, as modified, as to the accused Fillingham. The only question requiring consideration is, whether, in the case of accused Omey, his sentence to dishonorable discharge, total forfeitures and confinement at hard labor for 12 months is legal for the offense of which he was convicted.

Omey was originally charged with committing the offense of robbery, but, by exceptions and substitutions, he was found guilty of the lesser included offense of wrongfully taking the property in question, in violation of Article of War 96. The offense of "wrongfully taking" another's property is not listed among the offenses for which a specific punishment is prescribed by the Table of Maximum Punishments, but it is a lesser included offense of larceny (CM 241045, Cleaver, 26 BR 190). It remains to be determined, therefore, whether the maximum punishment for that offense is governed by the limit of punishment prescribed for the greater crime of larceny, which is also a lesser included offense of robbery, or by the limit of punishment prescribed for a lesser offense, closely related thereto, if one is listed, pursuant to paragraph 104c, of the Manual for Courts-Martial.

This matter was considered at length in CM 326588, Sattler, (1948). In that case, Sattler was found guilty of "wrongfully taking and carrying away" certain personal property, in violation of Article of War 96. The Board of Review in discussing this offense and the measure of punishment legally applicable thereto, stated:

> "It is apparent from a consideration of the above definition that the act of wrongfully taking and carrying away property is included within the offense of larceny. It is equally apparent, however, that such a wrongful taking and carrying away of property differs from larceny in that one essential element of larceny, the taking 'with intent to deprive such owner permanently of his property therein' is not involved. Furthermore, we find that such a wrongful taking and carrying away of property although obviously an invasion of another's interests and property, has not been recognized as a crime at common law. This does not mean, however, that such an act may not be a violation of military law. * * *.
>
> * * *
>
> "Since a wrongful taking and carrying away of property is not made punishable under any article of war except 96, and since it is beyond question that a wrongful taking and carrying away of property is an act to the prejudice of good order and military discipline, such an act is a punishable disorder within the provision of Article of War 96, and such has been the consistent holding of the Boards of Review. (CM 207466, Philpott, 8 BR 341; CM 249998, Patka, 32 BR 265; CM 274647, Trujillo, 47 BR 243).
>
> * * *
>
> "It follows that if there is any offense listed in the Table of Maximum Punishments which is closely related to the offense of which accused was found guilty and for which the maximum authorized punishment is less than that for larceny (within which the offense of wrongfully taking and carrying away is lesser included) the maximum limitation of punishment provided for that closely related offense will govern. Such a closely related offense is found here in the offense of 'Disorderly under such circumstances as to bring discredit upon the military service' listed in the Table of Maximum Punishments (under AW 96) and punishable by maximum confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. The offense of wrongfully taking and carrying away the property involved was in essence a disorder, a tortious act which under the circumstances alleged was prejudicial to good order and discipline and was of a nature to bring discredit upon the military service. Whether or not it was a mere disorder in the sense of the Table of Maximum Punishments it was of similar import in its criminal aspects and of similar gravity from the standpoint

of the wrong committed and its effect upon the military establishment. The type, character and value of the property and the circumstances under which it was taken as alleged are factors to be considered in determining whether the offense found is in law and fact closely related to the listed offense of 'disorderly under such circumstances as to bring discredit upon the military service'. Applying the above principle to the facts and circumstances of the present case it is considered that the offense therein charged and proved is very closely related to the listed offense in the Table of Maximum Punishments and punishment therefor is accordingly limited.

"The offense found, it may be asserted and assumed, is also related to the offense of larceny though it lacks the gravamen of that offense, the animus furandi, or intent to steal. But assuming that there is more than one closely related offense, the limitations for the less grave offense must be applied, for the prescribed maximum limitation for 'any' closely related offense, under the quoted terms of the Manual, must govern."

Under the particular circumstances in the Sattler case, the Board of Review found that the offense of "wrongfully taking and carrying away" the property of another was an offense, closely related to the offense of "Disorderly under such circumstances as to bring discredit upon the military service," which is an offense listed in the Table of Maximum Punishments (under AW 96) and made punishable by maximum confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

In the instant case, the court expressly excluded from its findings the words "by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of," substituting therefor the words "wrongfully take the property" in violation of Article of War 96. Accordingly, we are of the opinion that the principles enunciated in the Sattler case are applicable in the instant case and that the maximum punishment authorized for the offense of which accused Omey was convicted is confinement at hard labor for four months and forfeiture of two-thirds of his pay per month for a like period.

4. 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 as to each accused and the sentence as modified as to accused Fillingham, and legally sufficient to support only so much of the sentence as to accused Omey as provides for confinement at hard labor for four months and forfeiture of two-thirds of his pay per month for a like period.

A. Hottenstein, Judge Advocate

J. W. Lyne, Judge Advocate

Joseph J. Brack, Judge Advocate

JAGH CM 326738 1st Ind MAY 1 0 1948

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Private First Class Robert N. Fillingham, RA 36486989, and Private Roy E. Omey, RA 37816195, both of 513th Military Police Service Platoon.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as to the accused Omey as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. I concur in the opinion of the Board and recommend that so much of the sentence in the case of Private Roy E. Omey as is in excess of confinement at hard labor for four months and forfeiture of two-thirds of his pay per month for a like period be vacated and that all rights, privileges and property of which he has been deprived by virtue of that portion of the sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 112, June 1, 1948).

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

JAGN-CM 326744

UNITED STATES v. Private MARIANO F. SCALETTA (12117352), Headquarters Detachment, 7822 Station Complement Unit.	))))))))	1ST U. S. INFANTRY DIVISION Trial by G.C.M., convened at Munich, Germany, 14-15 August 1947. Dishonorable discharge and confinement for eighteen (18) months. Disciplinary Barracks.

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

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

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

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

Specification: In that Private Mariano F. Scaletta, Headquarters Detachment, 7822 Station Complement Unit, did, at Munich, Germany, on or about 6 May 1947, desert the service of the United States and did remain absent in desertion until he was apprehended near Rome, Italy, on or about 11 May 1947.

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

Specification: In that Private Mariano F. Scaletta, Headquarters Detachment, 7822 Station Complement Unit, having been duly placed in confinement in Munich, Germany, on or about 26 April 1947, did, at Munich, Germany, on or about 6 May 1947, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 92nd Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private Mariano F. Scaletta, Headquarters Detachment, 7822 Station Complement Unit, did, in conjunction with Technician Fifth Grade Golson T. Turner, at Munich, Germany, on or about 6 April 1947, with intent to do him bodily harm, commit an assault upon Alfred Schmidt, by wilfully and feloniously hitting the said Alfred Schmidt in the face and body with his fists, and by stabbing him in the back, arm, and thigh, with a dangerous weapon, to wit, a knife.

Accused pleaded not guilty to all Charges and Specifications. The court found him: "Of Specification 1, Charge I, guilty except the words 'in desertion', and substituting therefor, the words, 'without leave'. Of Charge I, guilty, except, substituting for the word '58th', the word, '61st'. Of the Specification to Charge II, guilty, of Charge II guilty. Of the Specification to Charge III not guilty. Of Charge III, not guilty. Of Specification 1 to Charge IV, not guilty. Of Specification 2 to Charge IV, guilty except by deleting the words, 'and by stabbing him in the back, arm, and thigh, with a dangerous weapon, to wit, a knife'. Of Charge IV, Guilty. As regards Charge I, the finding is not guilty of violation of the 58th Article of War, but guilty of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eighteen months. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The only question for consideration here is the legal effect of the findings of the court as to Charge I and its Specification.

4. By execution of the stated exceptions and substitutions as contained in the court's findings we may reconstruct the Specification of Charge I as follows:

"In that * * * did * * * on or about 6 May 1947, desert the service of the United States and did remain absent <u>without leave</u> until he was apprehended near Rome, Italy, on or about 11 May 1947."

Although the court, by its findings, has thus found the accused guilty of deserting the service of the United States, it is palpably clear that it was their intention, as expressed by the subsequent substitution of the words "without leave" for "in desertion," and even more clearly by their express finding that the accused was thereby guilty of a violation of Article of War 61, but not guilty of a violation of Article of War 58, to find the accused guilty only of absence without leave for the period alleged.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of absence without leave for the period alleged in violation of Article of War 61, and legally sufficient to support the findings of guilty of all other Charges and Specifications and the sentence.

Edward J. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

_____, Judge Advocate.

JAGN-CM 326744 1st Ind
JAGO Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 1st U. S. Infantry Division, APO 1,
c/o Postmaster, New York, N. Y.

1. In the case of Private Mariano F. Scaletta (12117352), Headquarters Detachment, 7822 Station Complement Unit, I concur in the foregoing holding by the Board of Review and recommend that only so much of the findings of guilty of Charge I and its Specification be approved as involves findings of guilty of absence without leave at the time and place and for the period alleged, terminated as alleged, in violation of Article of War 61. 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 326744).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 326834

5 JAN 1948

UNITED STATES v. First Lieutenant ROBERT A. KINDALL (O-1574276), Quartermaster Corps.	KOREA BASE COMMAND Trial by G.C.M., convened at Korea Base Command, APO 901, 2 October 1947. Dismissal and total forfeitures.

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

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that 1st Lt. Robert A. Kindall, 501st Quartermaster Laundry Detachment, APO 59, was, at the POL Reserve Area, APO 59, on or about 9 August 1947, found drunk while on duty as POL Officer.

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

Specification: In that 1st Lt. Robert A. Kindall, ***, was at APO 59, on or about 9 August 1947, disorderly in uniform in a public place, to wit, POL Reserve Area.

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

Specification 1: (Finding of not guilty).

Specification 2: In that 1st Lt. Robert A. Kindall, ***, did, at APO 59, on or about 9 August 1947, wrongfully use abusive and threatening language towards Mr. Negley S. Long, WDC, by saying to him, 'Get out and stay out or I'll kick your ass,' or words to that effect, to the prejudice of good order and military discipline, which action was unbecoming an officer and gentleman.

CHARGE IV: Violation of the 63d Article of War.

Specification: In that 1st Lt. Robert A. Kindall, ***, did, at APO 59, on or about 9 August 1947, behave himself with disrespect

toward Capt. Steven A. Hudock, his superior officer, by saying to him, 'Come on out and settle this thing here', or words to that effect.

CHARGE V: Violation of the 64th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that 1st Lt Robert A. Kindall, ***, having received a lawful command from Lt. Col J. A. McDonough, his superior officer, to roll up his sleeve and submit to a blood test, did at APO 59, on or about 9 August 1947, willfully disobey the same.

Accused pleaded not guilty to all charges and specifications. He was found not guilty of Specification 1 of Charge III and Specification 1 of Charge V but guilty of all other specifications except the words "which action was unbecoming an officer and gentleman" of Specification 2, Charge III. He was found guilty of all charges except Charge III of which he was found not guilty but guilty of a violation of Article of War 96 thereunder. 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 approved the sentence but remitted the confinement adjudged and forwarded the record for action under Article of War 48.

3. Evidence for the Prosecution

On 9 August 1947 Major Robert C. Hughes, Ordnance, was field officer of the day for the Korean Base Command and in the performance of his duties he visited the POL Reserve Dump at Inch'on, Korea. He arrived at the dump at about 1030 hours and found the accused, who was in charge of the dump conversing on the telephone in a loud and excited manner. When the telephone conversation was concluded the accused requested Major Hughes to go with him to a distant place in the area and inspect some oil which had apparently been rejected by some unit. Major Hughes complied with the request but observed that the accused's manner was not courteous and that some of his conversation was irrational. He sensed a strong odor of liquor on his breath. In the opinion of Major Hughes the accused was unfit for duty (R 6-8). A member of the court asked the witness to state whether the accused, on the occasion mentioned, was drunk or sober, and defined drunkenness as such state of intoxication as would cause physical impairment to a degree rendering the victim unfit for a tour of guard duty. The defense objected to the definition. The witness repeated his former testimony that the accused was irrational and under the influence of alcohol. The court pressed Major Hughes for a direct answer and he replied that "using that definition, he was drunk" (R 9).

Captain Steven A. Hudock, 78th Quartermaster Base Depot, the Assistant S-3, had a telephone conversation with the accused on the morning of 9 August 1947 and requested information by noon regarding the grade and amount of oil which was in stock at the dump. Later the accused called the captain and remonstrated vigorously against complying with his request. Captain Hudock procured a vehicle and went to the dump where he had an interview with the accused. The captain admonished the accused, who appeared resentful and angry, to display proper military respect. The accused thereupon said, "Why don't you come out here and settle this like a man?" This incident occurred in the presence of some fifteen enlisted men, and the captain construed the accused's language and conduct as being definitely a challenge to fight. Captain Hudock did not step outside or otherwise accept the "challenge." He smelled a strong odor of liquor on the accused's breath and requested him to go with him to see Colonel Dugan, but the accused refused. The Captain left the scene and as he drove away he heard obscene and vulgar statements which he believed to have emanated from the accused (R 11-16).

T/5 Robert G. Schuster, a witness for the prosecution, was the driver who drove Captain Hudock to the POL dump on the occasion in question. He heard the accused say, "Let's get out and talk this over man to man", but he did not construe the language as a threat. As they were driving away the accused "hollered *** come back here, you son-of-a-bitch, and I will lick you" (R 18-20).

Mr. Negley S. Long, DAC, employed as a fireman with the 515th Engineer Utilities Detachment, visited the POL Reserve Dump on the morning of 9 August 1947 to inspect some fire fighting equipment. He went to the office to make a phone call and came in contact with the accused who appeared to be angry and "like a man who had been drinking." The accused told him in a loud voice to "Get out and stay out and don't come back." The witness was not positive as to the accused's condition with respect to sobriety and could not recall other details of the incident (R 21-28).

At about 1200 hours on 9 August 1947, Captain William B. Mote, 78th Quartermaster Base Depot, in compliance with orders from Colonel Fitzgerald, went to the POL Reserve Dump and relieved the accused. When he arrived the accused was involved in an altercation with Mr. Long and he heard the accused tell him to "get out or I will kick your ass clear to the end of the street" (R 30). Captain Mote directed Long to leave immediately in order to settle the controversy. He did not hear the accused curse Captain Hudock but heard him state in effect that if the Captain came back he was going to "throw him out or whip him and if necessary he would use his gun on him." In the opinion of Captain Mote, the accused w as "fatigued from service and the result of liquor brought about his condition" (R 28-34).

Lieutenant Colonel Joseph A. McDonough, 78th Quartermaster Base Depot, went to the POL Reserve Dump at about 1200 hours on 9 August 1947

and told the accused that he was making an investigation of his alleged drunkenness and advised him of his rights. The accused stated that he should investigate Captain Hudock. He observed incoherence in the accused's speech and manner and concluded that the accused was drunk. The accused stated, "I always drink, that is my trouble." Colonel McDonough asked him how much he had consumed and he replied, "six or eight beers" (R 35). After some difficulty he persuaded the accused to accompany him to the dispensary for a blood test. When they arrived at the dispensary the accused refused to roll up his sleeve in order that the medical officer might draw blood from his arm. Colonel McDonough gave him a direct order to roll up his sleeve and repeated the order several times. He refused to comply with the order and resisted the attempts of the medical officer to take a sample of his blood. No blood was procured although it appears that a needle was injected into the accused's wrist (R 36). Colonel McDonough testified further that while he was conducting his investigation the accused's manner was "quite contemptuous" and he used a "long string of adjectives" in upbraiding Captain Hudock (R 38).

Captain Donald L. Creed, M.C., the officer who attempted to take the blood alcohol test from accused, heard Colonel McDonough order the accused to roll up his sleeve, and stated that the accused refused to comply with the order. He was unable to procure a sample of accused's blood and could not express an opinion as to whether the accused was drunk or sober (R 42-43).

4. For the Defense

Captain Steven A. Hudock was called as a witness for the defense. Counsel asked him if he had not previously sworn that he heard the accused call him a vile name. He stated that he had testified that he "thought" the accused called him a vile name as he drove away from the dump. Counsel asked the officer if the POL Dump was open to the public. He replied that a few Koreans and their families lived near the railroad, "in the midst of the POL Dump." These civilians had passes to go in and out of the dump. The Captain further stated that "the POL is not a public place. It is an army installation, sir." On examination by the court the witness stated that it was his opinion that the POL was not a public place. He had seen several hundred civilians working at the dump. On the occasion in question the witness believed that the accused was in uniform (R 47-49).

Captain William B. Mote was also called as a witness for the defense. He testified that prior to the incident in question the accused had performed his duties "very satisfactorily" and that he was of the opinion that accused could perform duty satisfactorily in the future (R 51).

The accused, at his own request, was sworn as a witness. He testified that at about 1000 hours on 9 August Sergeant Shurtleff came from the depot

headquarters to the dump to inquire about S.A.E.-30 oil. He told the sergeant that they did not have any of the desired oil. The sergeant stated that he would make a report of such fact to Captain Hudock. Later he got a phone call from Captain Hudock who made some remark and hung up. Captain Hudock came down to see accused and after some discussion he (accused) said to the Captain, "Step over here and we will talk this over among ourselves." The Captain invited him to go to see Colonel Dugan but he could not leave the dump. Mr. Long came into the office and asked about a broken ladder on the fire truck. After some discussion Long stated that he would report the matter to Colonel Quimet. The accused asserted that he told Long to "go ahead, to get out and not come back." Colonel Mc Donough came up and said, "I was sent down to investigate you." He explained to the accused his rights under Article of War 24, took him to a doctor who tried to stick a needle in the upper portion of his arm. He resisted and the doctor finally inserted the needle in his wrist but could not get any blood. He refused to let them puncture his arm again. The accused stated that he was dressed in khaki uniform on 9 August 1947, that he did not intend to fight Captain Hudock, that Captain Mote was his immediate superior and Lieutenant Colonel McDonough his troop commander (R 52-53).

On cross-examination the accused stated that he had received immunization shots above his elbow but "at that particular time I did not want to take it up there." He denied that he was drunk on the occasion in question. The trial judge advocate asked the accused if he did not tell Colonel McDonough that "Captain Hudock is the officer that should be investigated." The accused replied, "No. I said Captain Hudock and I should be investigated" (R 56).

No further evidence was presented by either side.

5. Discussion

Prior to pleading to the general issue the defense entered a plea in abatement as to Specification 2 of Charge V on the ground that there was no showing of a compliance with "Army Regulation 600-10, 2e(9), Changes 3." We note that AR 600-10, 8 July 1944, superseded AR 600-10, 2 June 1942, including Change 3, 15 November 1943. Paragraph 2e(9), AR 600-10 (Change 4), 17 September 1946, appears to have been in effect at the time of the alleged offense. This paragraph is captioned, "Refusal of medical, surgical, or dental treatment by persons subject to military law" and sets forth procedure to be followed "if a person in the military service refuses to submit to medical or surgical (including dental) operations, treatment or diagnostic procedures***." We deem it unnecessary to determine the effect of a failure to comply with the administrative provisions of the Army Regulation to which reference is made, for in our opinion, although the procedure involved in taking an intravenous blood alcohol test may, in a sense, be construed as a "diagnosis" of the patient's condition, it is not the type medical or surgical operation, treatment or diagnostic procedure contemplated by the regulation. Paragraph 122b, MCM, 1928, page 130,

provides in part:

"b. Compulsory self-incrimination.

"*** it would be appropriate for the court to order the accused to expose his body for examination by the court or by a surgeon who would later testify as to the results of his examination. Upon refusal to obey the order, the accused's clothing might be removed by force." (See also Holt v. United States, 218 U.S. 245.)

The foregoing provision of the Manual therefore authorized a form of compulsory "diagnosis" by a surgeon. The Army Regulation referred to is concerned principally with whether or not the person refusing medical treatment shall be retained in the military service as is shown by the following language: "Whether disciplinary action is taken or not, such other action within the law or regulations as may be appropriate with a view to the persons discharge or retirement may be taken or initiated." The court therefore properly overruled the plea in abatement.

The accused admitted that he had taken the inoculations required by regulations and that they were given in the upper portion of his arm. He stated that "at that particular time I didn't want him to take it up there." His refusal to comply with the order was therefore willful and arbitrary. It is obvious however that the accused was under the influence of liquor, which condition is worthy of consideration as indicating his state of mind (par 126(a), MCM 1928).

The defense objected to the definition of drunkenness interposed by the president of the court, viz., such a state of intoxication as renders one unfit for guard duty. Paragraph 145, Manual for Courts-Martial, 1928, in discussing the offense of drunk on duty in violation of Article of War 85 defines drunkenness as follows:

"*** any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article."

It would appear that the foregoing definition from the Manual is more comprehensive and far reaching than that interposed by the court. Considering all the facts and circumstances we are of the opinion that the accused's rights were not prejudiced by the somewhat isolated definition given by the court rather than by making reference to the general definition set forth in the Manual. Various definitions of drunkenness were stated and discussed by the Board of Review in CM 194563, Ondrick, 2 BR 161,168, wherein it was pointed out that the degree of intoxication required for a finding of guilty of drunkenness, as set forth in the Manual, is certainly less than the degree of intoxication required for a finding of

guilty of drunkenness as the term is defined by numerous civil courts and lexicographers. As we construe the proof, the record amply supports the finding of guilty of the specification and Charge I when measured by the definition of drunkenness as set forth in the Manual.

Although there is no clear cleavage between the evidence relied upon to support the findings of guilty of Charge II and its Specification (disorderly in uniform) and Specification 2 of Charge III (using abusive and threatening language toward Mr. Long) the substantial rights of the accused were not thereby affected, inasmuch as a conviction of any one of the charges and specifications was sufficient to support the sentence in its entirety (CM 247391, Jeffery, 30 BR 337,341).

The POL Reserve Area was sufficiently shown to have been a public place as that term is applied in military law, Captain Hudock's opinion notwithstanding to the contrary. It has been held that the term "public place" includes an armory where military personnel were quartered and a dispensary where only enlisted men on duty are present (CM 250293, Riley, 32 BR 311, 318-319). In the instant case, not only military personnel but certain authorized civilians had access to the area.

The evidence shows and the accused admitted that he was in uniform and on duty at the time and place alleged in the specifications. His somewhat irrational actions, hostile and belligerent attitude, threatening language and his admitted refusal, after having been taken into custody and given an order, to allow the medical officers to take an alcohol blood test are sufficient beyond a reasonable doubt to sustain the findings of guilty that he was drunk on duty in violation of Article of War 85; disorderly as alleged, that he used abusive and threatening language toward Mr. Long, in violation of Article of War 96; that he used disrespectful language toward Captain Hudock in violation of Article of War 63, and willfully disobeyed the order of Colonel McDonough to roll up his sleeve and submit to a blood test, in violation of Article of War 64.

5. Department of the Army records show that the accused is 32 years of age and married. He attended college for one year and enlisted in the Army 25 July 1935 and served three years, reverting to the ERC as a staff sergeant. He was recalled to duty in February 1941 and after completion of Officer Candidate School was commissioned a second lieutenant on 3 July 1942. His efficiency reports vary from "Very Satisfactory" to "Superior." Since 13 June 1945 the accused has served in the Pacific Theater.

6. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of

Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 85 in time of war and authorized upon conviction of a violation of Articles of War 63,64 and 96.

Christy T. Silvus, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert E. Lekoyt, Judge Advocate

JAGK - CM 326834 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 9 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 First Lieutenant Robert A. Kindall (O-1574276), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of being found drunk on duty, in violation of Article of War 85; disorderly in uniform in a public place, and wrongfully using abusive and threatening language toward a War Department civilian employee in violation of Article of War 96; using disrespectful language toward his superior officer in violation of Article of War 63; and of willful disobedience to a lawful command of his superior officer in violation of Article of War 64. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, remitted the confinement, and forwarded the record for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

4. On 9 August 1947 the accused, a colored officer, was on duty as officer in charge of the P.O.L. Reserve Dump at Inch'on, Korea. Captain Steven A. Hudock sent a sergeant to the dump to get some S.A.E.-30 oil. The accused told the sergeant that they did not have the oil in stock, and subsequently Captain Hudock engaged in a heated conversation with the accused by telephone, but the matter was not settled. Captain Hudock procured a jeep and went to the dump where he protested to accused for his alleged discourteous conduct. The accused invited him to step outside and settle the controversy, indicating physical encounter. Mr. Negley S. Long, a civilian employed by the Army as a fireman, entered accused's office and inquired about some firefighting equipment. The accused ordered him to get out and to not return. Captain Mote, who overheard the conversation, testified that the accused told Mr. Long to get out or "I will kick your ass to the end of the street." Captain Hudock left the area and as he was leaving the accused used threatening and obscene language toward him. The evidence is convincing that the accused was drunk. He had a strong odor of liquor on his breath and the field officer of the day, Major Hughes, stated that

he talked to the accused and that his conversation was at times irrational. The accused's commanding officer, Lieutenant Colonel Joseph A. McDonough, took him in custody and after some difficulty was able to take him to a dispensary for a blood alcohol test. The accused refused, after being ordered several times, to allow the medical officer to inject the needle into the upper portion of his arm and no test was made.

Testifying in his own behalf, the accused denied that he was drunk on the occasion. He admitted having an argument with Captain Hudock and of ordering Mr. Long out of the office. He denied however that he challenged anyone to fight. The accused offered explanations for his conduct including his refusal to obey the order to roll up his sleeve and submit to the blood test. He had taken immunization shots in the upper arm prior to this occasion but "at this particular time" he did not want the needle injected into his arm. The record does not show that any reference was ever made by any of the parties to the matter of race.

5. The accused has had about nine years total service. He was commissioned a second lieutenant, AUS, in July 1942. No record of previous convictions was introduced at the trial. However, his 201 file shows that on 15 January 1945 he was found guilty by general court-martial convened at Fort Riley, Kansas, of showing disrespect toward his superior officer and was sentenced to restriction to the limits of his post for three months and to forfeit $75 per month for nine months. The papers accompanying the record of trial disclose that on 12 July 1947 the commanding officer of the 78th Quartermaster Base Depot reprimanded the accused under Article of War 104 for a failure to report for duty on "officer patrol" as ordered by proper authority.

6. On 12 December 1947 Jesse O. Dedmon, Jr., attorney of Washington, D.C., appeared before the Board of Review in behalf of accused, made oral argument, and filed a brief which has been considered.

7. I recommend that the sentence be confirmed but in view of the accused's extended period of service, the fact that a major portion of the alleged offenses may reasonably be construed as having arisen out of his intoxicated condition, I recommend that the sentence as modified be commuted to dismissal, a reprimand and forfeiture of $100 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.

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

(GCMO 26, (DA) 22 Jan 1948)

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, D. C.

JAGN-CM 326838

9 DEC 1947

UNITED STATES v. Private JOSEPH E. MOSS (12256792), 90th Transportation Harbor Craft Company.	KOREA BASE COMMAND Trial by G.C.M., convened at APO 901, 12 September 1947. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Private Joseph E. Moss, 90th Transportation Harbor Craft Company, APO 59, on detached service with the 23rd Transportation Truck Company, APO 59, from 17 February 1947 to 2 July 1947 inclusive, did, at APO 59, on or about 16 April 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at APO 235 on or about 20 July 1947.

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

Specification: (Disapproved by Reviewing Authority).

CHARGE III: Violation of the 93rd Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Private Joseph E. Moss, 90th Transportation Harbor Craft Company, APO 59, on detached service with the 23rd Transportation Truck Company, APO 59, from 17 February 1947 to 2 July 1947 inclusive, did, at APO 235, on or about 12 July 1947, with intent to deceive Private First Class Marvin W. Moore, 582nd Salvage Collection Company, APO 59, falsely state to the said Private First Class Marvin W. Moore, 582nd Salvage Collection Company, APO 59, that he, Private Joseph E. Moss, was an agent of the Counter Intelligence Corps.

Specification 2: In that Private Joseph E. Moss, 90th Transportation Harbor Craft Company, APO 59, on detached service with the 23rd Transportation Truck Company, APO 59, from 17 February 1947 to 2 July 1947 inclusive, did, at Inch'on and Seoul, Korea, between about 16 April 1947 and 20 July 1947, have illicit sexual intercourse numerous times with Suh Kei Soon, a Korean National Female, the same being to the prejudice of good order and military discipline.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge III and its Specification, guilty of the Specification of Charge II "except the words "M-1, Inland Division, Serial Number 473224,'" and guilty of all other Charges and Specifications, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for twenty-five years. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, approved only so much of the sentence "as provides for confinement at hard labor for five (5) years, dishonorable discharge, and forfeiture of all pay and allowances due or to become due," designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification. There remain to be considered only the legal sufficiency of the record of trial to support the findings of guilty of Charge IV and its specifications, and that portion of the sentence providing for confinement at hard labor in excess of two and one-half years. Only so much of the evidence contained in the record of trial as is pertinent to these questions will be summarized.

4. Private First Class Marvin W. Moore, a witness for the prosecution, testified in substance as follows: That on or about 12 July he was visiting, on pass, in Seoul, and there casually met accused with whom he had been acquainted for some time (R. 10, 13); that at that time he had heard rumors accused was in an absence without leave status (R. 14-15); that accused invited him to spend the night with him, and when witness expressed fear of "the MP's" accused said "don't worry about the MP's" and further stated "he was a C.I.C. and they wouldn't bother him" (R. 11). Relative to the effect of such representations by accused upon him, this witness further testified:

"Q. Did he make any actions while you were with him that would convince you that he was or was not a C.I.C. agent?
A. No, sir, he didn't.

Q. You know what a C.I.C. Agent is?
A. No, sir.

Q. It didn't make any difference to you whether he was a C.I.C. agent or a soldier, did it?
A. I don't know, sir.

Q. It wouldn't have made any difference to you whether he was AWOL, a C.I.C. agent, or what?
A. Yes, it would have made a difference. If he was AWOL and I knew it, I was supposed to have turned him in" (R. 15).

Respecting the actions of accused as alleged in Specification 2 of Charge IV it was proven by the properly admitted extra-judicial pre-trial statement of accused, and by the testimony of Suh Kei Soon, the female involved, that accused cohabited with the said Suh Kei Soon during the period alleged, and that the pair engaged in sexual intercourse on frequent occasions during that period (R. 40; Pros. Ex. 3). Witness Suh Kei Soon further testified on cross-examination as follows:

"Q. Were you married to the accused?
A. Yes.

Q. Did you have a ring ceremony?
A. Yes, I had.

Q. Were your family present at the wedding?
A. Just father and mother and my brother" (R. 41).

At this point the line of questioning was stopped by the law member who stated it was improper as related only to a matter not

covered in direct examination, and no other evidence concerning marriage was adduced.

5. In Specification 1 of Charge IV it is alleged, in essence, that accused did "with intent to deceive * * * Moore, * * * falsely state to * * * Moore, * * * that he * * * [accused] was an agent of the Counter Intelligence Corps." It is noted that the Specification contains no charging words and the accused's intentions, by such deceit, are not alleged.

In order that an act may be punished as a violation of Article of War 96 it must be sufficiently alleged to indicate, and it must be sufficiently proven, that it is a prejudicial disorder or neglect, or discrediting conduct, or a crime or offense not capital, within the purview of that article. Certainly the Specification in question does not allege a crime or offense not capital, as that phrase is interpreted in the Manual for Courts-Martial (par. 152c, MCM, 1928), nor is such a crime or offense proven by the evidence. The evidence precludes any supposition that the false statement was in any way official even if it had been so alleged. Likewise, the evidence precludes any finding that false statement was fraudulently made, even if it had been so alleged. In fact, although it may be inferred from the evidence, there is no direct proof that the statement was actually false, since the assignment of a soldier to the 90th Transportation Harbor Craft Company, in Korea, cannot support a presumption he was not, at the same time, a regularly constituted agent of the Counter Intelligence Corps. However, conceding the establishment of the falsity of the statement as alleged, we are forced to the conclusion that in the light of the evidence the Specification in this case fails to state any offense. In view of such conclusion we refrain from a discussion of the obvious misapplication of Section 22-1306, District of Columbia Code, as a measure of punishment.

6. In Specification 2 of Charge IV it is alleged, in essence, that accused did "have illicit sexual intercourse numerous times with Suh Kei Soon, a Korean National Female, the same being to the prejudice of good order and military discipline."

The prosecution first established the fact of intercourse by the pre-trial statement of accused (Pros. Ex. 3). The female in question was then called as a witness by the Trial Judge Advocate, at which time the defense objected on the ground that she was the wife of accused, and thus not competent, without accused's consent, to testify against him. Then ensued the following colloquy:

"LAW MEMBER: Can the defense produce proof of the fact that a proper and legal wedding ceremony was performed?

DEFENSE: He could bring evidence of a common-law

wife and of a Korean wedding ceremony, a double-ring ceremony. The girl has his ring on at the present time. I believe his ring is in the stockade. Mostly he claims her as a common-law wife, admitting that he was living with her and that she was his wife.

LAW MEMBER: The objection of the defense will be overruled on the grounds that a marriage not acceptable to the laws of our country will be in effect an illegal marriage.

DEFENSE: The laws of our country recognize common-law marriages.

LAW MEMBER: Certain states of the union see fit to recognize common-law marriages within the states of the union. The objection will be overruled" (R. 38).

In view of the other evidence in the record we do not deem it necessary here to pass upon the propriety of this action by the court, and we hereinafter presume this witness was properly allowed to testify. The effect of such testimony is simply to establish that she is married to the accused (the date of such marriage not being fixed) and that she had frequently engaged in sexual intercourse with him.

We are aware of no law which makes the act of sexual intercourse per se criminal. Thus it was incumbent upon the prosecution to prove that such acts were "illicit" as alleged, and so prejudicial to good order and military discipline. This it utterly failed to accomplish. The evidence of prosecution witnesses, in fact, tends to affirmatively show such acts were perfectly lawful insofar as the offense charged is concerned. From the evidence, and the statements of defense counsel, it might well be presumed that accused in entering into a Korean wedding ceremony with Suh Kei Soon, intended to emulate Puccini's Pinkerton, but that supposition, even if established as fact, cannot relieve the prosecution of its burden of proving the sexual relations of these parties to have been "illicit." In the absence of such proof we are constrained to hold the record of trial legally insufficient to support the finding of guilty of the Specification in question.

7. The maximum punishment authorized for the offense of desertion, after more than six months service, terminated by apprehension, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years (par. 104c, MCM, 1928).

8. For the reasons stated the Board of Review holds the record

of trial legally sufficient to support the findings of guilty of Charge I and its Specification, legally insufficient to support the findings of guilty of all other Charges and Specifications, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years and six months.

/s/ Edward T. Johnson, Judge Advocate

/s/ Frank C. Alfred, Judge Advocate

/s/ Joseph F. Brack, Judge Advocate

CERTIFIED A TRUE COPY

Walter D. Sowa

WALTER D. SOWA
Captain, Inf
Summary Court

DEC 26 1951

JAGN-CM 326838 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Korea Base Command, APO 901, c/o Postmaster, San Francisco, California.

1. In the case of Private Joseph E. Moss (12256792), 90th Transportation Harbor Craft Company, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Specifications 1 and 2 of Charge IV and Charge IV be disapproved, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years and six months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 326838).

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 326843

27 JAN 1948.

UNITED STATES v. Privates MARIUS B. HAMILTON (RA 42152460), Company "K", 24th Infantry, JAMES EDWARDS JR. (RA 16209153), and NORMAN L. TOWNS (RA 15233097), Headquarters Company, Second Battalion, 24th Infantry.	25TH INFANTRY DIVISION Trial by G.C.M., convened at Gifu, Honshu, Japan, 12 September 1947. HAMILTON and EDWARDS: Dishonorable discharge and confinement for fifteen (15) years. TOWNS: Dishonorable discharge and confinement for twenty (20) years. Penitentiary.

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

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

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

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

Specification 1: In that Private Marius B. Hamilton, Company "K" 24th Infantry, and Private James Edwards, Junior, Headquarters Company, Second Battalion, 24th Infantry, and Private Norman L. Towns, Headquarters Company, Second Battalion, 24th Infantry, acting jointly and in pursuance of a common intent, did at ICHINOMIYA, HONSHU, JAPAN, on or about 4 August 1947, by force and violence and by putting her in fear, feloniously take steal and carry away from the presence of Yasuda Shizue, the approximate sum of 1,600 Yen, lawful Japanese Imperial currency, value of about $36.00, the property of Tetsuo Hatori.

Specification 2: In that Private Marius B. Hamilton, Company "K" 24th Infantry, and Private James Edwards, Junior, Headquarters Company, Second Battalion, 24th Infantry, and Private Norman L. Towns, Headquarters Company, Second Battalion, 24th Infantry, acting jointly and in pursuance of a common intent, did, at ICHINOMIYA, HONSHU, JAPAN, on or about 4 August 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Oshima Iwasaburo, the approximate sum of 700 Yen, Lawful Japanese Imperial Currency, the property of Oshima Iwasaburo, value about $14.00.

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

Specification: In that Private Marius B. Hamilton, Company "K", 24th Infantry, and Private James Edwards, Junior, Headquarters Company, Second Battalion, 24th Infantry, and Private Norman L. Towns, Headquarters Company, Second Battalion, 24th Infantry, acting jointly and in pursuance of a common intent, having been duly placed in confinement in 24th Infantry Post Stockade on or about 4 August 1947, did at KAGAMIGAHARA AIRFIELD, GIFU, HONSHU, JAPAN, on or about 4 August 1947, escape from said confinement before they were set at liberty by proper authority.

As to accused Towns only:

ADDITIONAL CHARGE: Violation of the 64th Article of War.

Specification: In that Private Norman L. Towns, Headquarters Company, Second Battalion, 24th Infantry, did, at KAGAMIGAHARA AIRFIELD, GIFU, JAPAN, on or about 11 August 1947, lift up a weapon, to wit a head stay, cot, canvas, folding, against First Lieutenant James J. Dwyer, his superior officer, who was then in the execution of his office.

Each accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of two previous convictions was introduced as to accused Hamilton and Edwards and evidence of three previous convictions was introduced as to accused Towns. Accused Hamilton and Edwards were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for fifteen (15) years. Accused Towns was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for twenty (20) years. The reviewing authority approved the sentence of each accused, 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 50½.

3. Evidence for the prosecution shows that the three accused, Privates Hamilton, Edwards and Towns, all members of the military service, were prisoners in the Regimental Guard House, 24th Infantry, APO 25, Unit 2, on 4 August 1947 (R. 7, 8; Pros Ex 1). The same morning Private First Class Martin Anderson, Company "K", 24th Infantry, a member of the guard, took the accused and another prisoner, Richard Lee, to the dispensary for treatment (R. 8). While at the dispensary, according to Private Anderson:

"I left to pick up the sick book from the office and when I returned three of the prisoners were gone" (R. 8).

The three missing prisoners were "Towns, Edwards and Hamilton" (R. 8). The guard was unable to find any of the three at the dispensary and, following a report of the incident, a subsequent search of the stockade, dispensary and camp areas failed to disclose their whereabouts (R. 7-9, Pros Ex 1).

At approximately 7:55 p.m., on 4 August 1947 two American soldiers, later identified as accused Hamilton and Edwards, were seen entering the Toh-Hoh Theatre, Ichinomiya Aichi Prefecture, Japan (R. 13-15). One of the soldiers, subsequently identified as the accused Edwards, picked up a box containing 1600 Japanese Yen in the theatre ticket office. Yasuda Shizue, a Japanese National, was the ticket girl in the Toh-Hoh Theatre at the time (R. 13, 21-23). The latter first testified that the soldier "picked up the money on his own accord" and did not frighten or hurt her, but upon more extensive examination by the court, the witness testified the soldier pushed her and that she was afraid of the soldier (R. 22). Three soldiers were seen running from the theatre and thereafter the Ichinomiya Police were notified of the incident (R. 13).

The same night three American soldiers appeared at the home of Oshima Iwasaburo, a tea room owner, at No. 14, 1, Chome, Miya-Machi, Ichinomiya Aichi Prefecture, Japan. One of the soldiers identified as accused Edwards, displayed a 100 Yen note (R. 23, 24). Iwasaburo, thinking the soldier wanted food or smaller change, accepted the 100 Yen note and obtained ten notes of ten Yen denomination from his money box in the kitchen. At that time, accused Edwards, standing behind Iwasaburo, "took 700 Yen" (R. 23, 24). Both Iwasaburo and his wife protested the taking, saying "Don't take our money" (R. 23). As the accused Edwards, who had taken the money, left the kitchen and joined the other two, identified as accused Hamilton and Towns, in the next room, the two Iwasaburos continued their protests (R. 24).

With respect to details attendant to the taking of the money Oshima Iwasaburo testified:

<u>Prosecution</u>

"Q. Did any of the soldiers hit you?
A. No.

"Q. Did any of the soldiers twist your arm?
A. No.

"Q. Were you afraid of the soldiers?
A. No, I was not afraid of the soldier, I was afraid that they may have had weapons." (R. 23)

<u>Examination by the court</u>

"Q. Were you afraid of the soldiers?
A. At first I was afraid of the soldiers, because I could not speak English." (R. 24)

"Q. Did they do anything to make you fear?
A. Yes.

"Q. What?
A. When I asked the soldier 'Not to take my money', the soldier pushed me.

"Q. Why did you think that the soldier had a weapon?
A. I guess he had a weapon." (R. 25)

The court properly took judicial notice that Japanese Yen were of the value alleged in the Specification (R. 23). As a result of a call from the Japanese police, agents of CID, U. S. Army, proceeded to the theatre at Ichinomiya and then to Inazawa, some five miles distant (R. 15, 16, 19). That same night, Agent Ronald Jefferson of the CID apprehended the three accused, Hamilton, Edwards and Towns near Inazawa (R. 16, 19, 20). Agent Jefferson, together with Agent Donald C. Garrett, searched the three accused and found approximately 2100 Yen. Of the amount 75 or 80 Yen was found on the accused Edwards and the remainder on accused Towns (R. 16, 19, 20).

In addition to the identification at the trial of accused Edwards and Hamilton by Esaki Seiichi, an employee of the Toh-Hoh Theatre (R. 13), identification of accused Edwards by Yasuda Shizue, the ticket girl at the theatre (R. 21) and identification of all three accused by Oshima Iwasaburo, the tea room owner (R. 23, 24), Agents Garrett and Jefferson testified relative to identifications of the three accused by the above three witnesses at Nagoya on 5 August and at Regimental Military Police Headquarters on 13 August 1947 (R. 18-20).

At the 24th Infantry Stockade following the noon meal on 11 August 1947, it was reported to First Lieutenant James J. Dwyer, the Police and Prison Officer, that accused Towns had been disorderly in the mess hall. Lieutenant Dwyer thereupon gave orders for accused Town's solitary confinement for a twenty-four hour period. Upon learning that accused had refused to go into the cell, Lieutenant Dwyer "went to the Stockade, took accused by the arm and told him to go into solitary confinement" (R. 9, 10). The accused struck Lieutenant Dwyer's hand away and then went to the rear of his cot and procured a stick or cot stay. The accused lifted up the cot stay and stated that he would strike Lieutenant Dwyer if the latter did not leave him alone (R. 10, 11, 12). Lieutenant Dwyer ordered him to drop the weapon several times and finally the accused did (R. 10, 11). Physical force was thereafter required in order to put the accused in solitary confinement (R. 10, 11).

4. Captain William A. Bobo, 24th Infantry, was called as a witness for the defense and testified as to his presence at an identification parade in the Provost Marshal's office the second week in August (R. 17).

From the group of men, which included the three accused, Esaki Seichi and the Japanese woman identified only two soldiers, according to Captain Bobo. The latter could identify only the accused Towns as being one of the two identified at that time by the Japanese (R. 17, 18).

After being advised of their rights, the three accused elected to remain silent (R. 25).

5. The competent evidence adduced in support of each of the two specifications alleging robbery (Spec 1 & 2, Chg I) shows that in each instance the factual basis for the element of force and violence and putting in fear amounted merely to a sudden seizure or a "snatching" of the property.

> "Robbery is defined in paragraph 149 of the Manual for Courts-Martial, 1928, as the:
>
> > 'taking with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation.'
>
> It is further provided:
>
> > 'The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking.'
>
> and that:
>
> > 'Where an article is merely <u>snatched</u> out of another's hand * * * and no other force is used and the owner is not put in fear, the offense is not robbery.'"

Of similar import is the recent case of CM 328009, <u>Boldon</u>, <u>May</u>, <u>Hayes</u>, <u>McCray</u> and <u>Sneed</u>, (December 1947) wherein the Board of Review stated:

> "In the instant case the accused 'snatched' the weapon from the guard. No other force was used to obtain the weapon and it was not until accused had obtained control of the carbine and placed a live round in the chamber that the guard was placed in fear. It thus appears that force and violence were not used <u>in the taking</u> and that accused was not put in fear <u>until the taking was accomplished</u>. The instrument subsequently used to put the guard in fear was the subject of the alleged robbery and its taking could not therefore be contemporaneous with placing the guard in 'fear'." (Underscoring supplied)

In deciding the above case the Board of Review set forth the following comment from the case of <u>Routt</u> v <u>State</u> (Ark.), 34 S.W. 262, 263:

"'* * * We need not discuss the authorities further, for there are numerous cases holding that where the property is obtained by artifice, trick, or by merely snatching from the hand, and where the only display of force is used to prevent the retaking of the property by the owner, the crime is not robbery. Thomas v. State, 91 Ala. 36, 9 South. 81; Shimm v. State, 64 Ind. 423; State v. John, 5 Jones (N.C.) 163; State v. McCune, 70 Am. Dec. 176, and note; Rex v. Harman, 2 East, P.C. 736; 2 Bish. New Cr. Law, Sec. 1167; 1 Whart. Cr. Law, Sec. 854. In this case the money was obtained by snatching from the hand. There was no force, or display of force, or putting in fear, until Holt drew his pistol to prevent Morgan from leaving the car with the money. Morgan then drew his pistol, but this was done, not to force Holt to surrender the possession of the money, for he had already parted with it, but only to prevent him from regaining possession. The proof, we think, clearly shows that Routt and Morgan were guilty of larceny, but it is not sufficient to sustain a conviction of robbery.'"

The testimony of Yasuda Shizue, the ticket girl at the theatre, upon whose meager testimony the fact of that alleged robbery is entirely dependent, is void of any reference to force, violence or fear prior to, or in any manner related to, the taking of the money box. Her answer to a leading question by the court, in direct contradiction to her answer upon direct examination, that she was frightened or afraid of the soldier, is not sufficient to satisfy the requirements set forth in the above precedents, and neither is her isolated remark that at some undisclosed time the soldier pushed her.

Similarly, the testimony of Oshima Iwasaburo, the tea room owner and sole witness to that purported robbery, is insufficient to show more than a taking of the money by the soldier while standing behind the witness, while the other two participating soldiers stood in the next room. It is evident that Iwasaburo was not pushed until after the soldier had possession of the money and the victim and his wife had joined in a protest of the taking (R. 23, 25).

The proof is sufficient in each instance however to establish the lesser included offenses of larceny of 1600 Yen, value about $36.00, from the theatre, chargeable to accused Edwards and Hamilton, the only two accused competently identified, and larceny of 700 Yen by all three accused from Oshima Iwasaburo, both in violation of Article of War 93 (CM 328009, Boldon, May, Hayes, McCray and Sneed, supra). In connection with the proof of the Specification last mentioned, it is clear that the accused were acting jointly and as the result of a preconceived design.

6. With reference to the Specification of Charge II, wherein accused were charged with escape from confinement, it is essential to note that "confinement imports some physical restraint" and that the gravamen of

the offense alleged is the "* * * completed casting off of the restraint of confinement" (Par 139a and b, MCM, 1928, p. 153, 154). Evidence adduced in support of this specification clearly shows that the three accused were taken by a member of the guard to the dispensary for treatment, and that the guard left the three, together with another prisoner, while he took the sick book to the office. Upon his return, he discovered that three of the four prisoners were missing. It is thus manifest from the record that the accused were under no physical restraint at the time of their departure and did not cast off or break away from any physical restraint. There being no proof of this essential element of the offense, the record fails to support the Specification and the Charge (CM 201493, Smith, 5 BR 155, 156, and cases therein cited).

7. The evidence is legally sufficient to support the Additional Charge and Specification thereunder wherein accused Towns was found guilty of lifting up a weapon against his superior officer then in the execution of his office.

8. In view of the foregoing, penitentiary confinement is not authorized for accused Hamilton, Edwards, or Towns. Article of War 42 provides, in part, as follows:

> "Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year:" (Underscoring supplied)

Neither Specification 1 nor Specification 2 of Charge I, as modified, authorized confinement for more than one year. There is no maximum punishment prescribed for the offense alleged in the Specification of the Additional Charge, of which accused Towns was found guilty, (CM 153372, Phillips, 1922) but it is not recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year within the statutory limitations, above set forth.

9. For the reasons stated the Board of Review holds that the record of trial, insofar as it relates to accused Towns, is legally insufficient to support the findings of guilty of Specification 1 of Charge I; legally sufficient to support only so much of Specification 1 of Charge I as to accused Hamilton and Edwards as involves findings that each accused did, while acting jointly and in pursuance of a common intent, feloniously take

steal and carry away 1600 yen, value about $36.00, at the time, place and of the ownership alleged; legally sufficient to support only so much of the finding of guilty of Specification 2 of Charge I as to each accused as involves findings that each accused did, while acting jointly and in pursuance of a common intent, feloniously take, steal and carry away 700 yen, value about $14.00, at the time, place and of the ownership alleged; legally sufficient as to each accused to support the finding of guilty of Charge I: legally insufficient as to each accused to support the findings of guilty of the Specification of Charge II and Charge II; legally sufficient to support the findings of guilty of the Specification of the Additional Charge and the Additional Charge (pertaining to Towns only); legally sufficient to support only so much of the sentences as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one (1) year and six (6) months in a place other than a penitentiary, Federal reformatory or correctional institution as to accused Hamilton and Edwards; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty (20) years in a place other than a penitentiary, Federal reformatory or correctional institution as to accused Towns.

W. H. Johnson Jr, Judge Advocate

Wilmot T. Baughn, Judge Advocate

A. D. Kane, Judge Advocate

JAGQ - CM 326843 1st Ind

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 Marius B. Hamilton (RA 42142460), Company K, 24th Infantry, Private James Edwards, Jr. (RA 16209153), Headquarters Company, 24th Infantry, and Private Norman L. Towns (RA 15233097), Headquarters Company, Second Battalion, 24th Infantry, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated recommend:

As to accused Hamilton and Edwards:

That only so much of the findings of guilty of Specification 1 of Charge I be approved as finds that accused Hamilton and Edwards, acting jointly and in pursuance of a common intent, did, at the time and place alleged, feloniously take, steal and carry away the property described in the Specification, of the value and ownership alleged;

That only so much of the findings of guilty of Specification 2, Charge I be approved as finds that accused Hamilton and Edwards, acting jointly and in pursuance of a common intent, did, in conjunction with accused Towns, at the time and place alleged feloniously take, steal and carry away the property described in the Specification, of the value and ownership alleged;

That the findings of guilty of Charge II and its Specification be disapproved;

That only so much of the sentence, as to accused Hamilton and Edwards, 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 six months at a place other than a penitentiary, Federal Reformatory or correctional institution.

As to accused Towns: That the findings of guilty of Specification 1, Charge I, and Charge II and its Specification be disapproved;

That only so much of Specification 2, Charge I be approved as finds that the accused, did, in conjunction with Hamilton and Edwards, at the time and place alleged, feloniously take, steal and carry away the property described in the Specification, of the value and ownership alleged;

That only so much of the sentence as to accused Towns be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, Federal Reformatory or correctional institution.

Upon taking such action, you will have authority to order into execution the sentence as thus modified as to each accused.

2. In the case of the accused Towns, nineteen and one-half years of the confinement are dependent upon findings of guilty of the Specification of the Additional Charge and the Additional Charge. Although there is no prescribed maximum punishment for that offense, perhaps the nearest comparable offense from the standpoint of seriousness, under the circumstances herein disclosed, is the offense of willful disobedience of the lawful order of a commissioned officer, in violation of the same Article of War. Accordingly, and in view of all of the circumstances in the case, it is believed that the period of confinement as to accused Towns should be reduced to five years.

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

(CM 326843)

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.

(341)

JAGV CM 326853

19 MAR 1948

UNITED STATES v. Captain KENNETH C. ANDERSON (0-1285872), Corps of Military Police.	ROME AREA MTOUSA Trial by G.C.M., convened at Rome, Italy, 1,3-8 July 1947. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
HOTTENSTEIN, O'BRIEN and LYNCH, Judge Advocates

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

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

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

Specification 1: In that Captain Kenneth C. Anderson, Corps of Military Police Headquarters Rome Area Mediterranean Theater of Operations United States Army then Deputy Provost Marshal said Headquarters did at Rome Italy in or about the last week of February and the first week of March 1947 by fraud wrongfully convert to his own use one one quarter ton motor vehicle bearing markings ROME AREA MTOUSA PM 1 property which came into his possession and under his control in the execution of his office and under color and claim of authority as a Captain of the Corps of Military Police Army of the United States and Deputy Provost Marshal Rome Area Mediterranean Theatre of Operations United States Army in violation of Section 97 United States Criminal Code being the Act of 4 March 1909 Chapter 321 Section 97 35 Statutes 1106 being Section 183 Title 18 United States Code the statute in such case made and provided.

Specification 2: In that Captain Kenneth C. Anderson Corps of Military Police Headquarters Rome Area Mediterranean Theatre of Operations United States Army having taken an oath in an investigation made pursuant to and under the authority of the 70th Article of War before Colonel James J. Carnes Infantry a competent officer that he would testify truly

did at Rome Italy on or about 8 April 1947 willfully corruptly and contrary to such oath testify in substance and effect that he had placed eventually on a certain jeep formerly known as ROME AREA MTOUSA PM 1 and in his possession custody and control and then the subject of inquiry by said investigating officer five wheels tires and tubes which he bought from one Lawrence R Clark which testimony was a material matter and which said Captain Anderson did not then believe to be true in violation of Section 125 United States Criminal Code being the Act of 4 March 1909 Chapter 321 Section 125 35 Statutues 1111 being Section 231 Titel 18 United States Code the statute in such case made and provided.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that Captain Kenneth C Anderson Corps of Military Police Headquarters Rome Area Mediterranean Theatre of Operations United States Army did at Rome Italy on or about 15 March 1947 with intent to deceive Lieutenant Colonel Charles H Middleton Inspector General and Geno Evangelisto Chief Agent Criminal Investigation Division said Headquarters officially state under oath to said Lieutenant Colonel Middleton and said Geno Evangelisto in substance and effect that a certain jeep purchased by him from one Lawrence R Clark and previously located in the military police impounding lot at Rome Italy was turned in to Ordnance at Rome Italy with more equipment than that certain other jeep formerly known as ROME AREA MTOUSA PM 1 was retained within the possession custody and control of said Captain Anderson which statement was known by said Captain Anderson to be false and untrue in that said jeep known as ROME AREA MTOUSA PM 1 was a fully equipped vehicle with extra fifth wheel and tire and tube and extra and additional twin horns and two extra and additional front running lights and siren while said jeep turned in to Ordnance was a stripped vehicle that it was not equipped with any wheels or tires or tubes or top or rear seat or right front seat or battery or spark plugs or ignition wiring.

Specification 4: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications and was found guilty of Additional Charge I and the Specifications thereunder and Specification 3 of Additional Charge II, except the words "and Geno Evangelisto, Chief Agent Criminal Investigation Division," and the words, "and said Geno Evangelisto.", of the excepted words not guilty, and not guilty of Additional Charge II but guilty of a violation of Article of War 96, and not guilty of the remaining 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. (The Charges were designated as Additional Charges in the charge sheet and were so referred to throughout trial but will be referred to hereinafter without use of the word "Additional." Accused was not arraigned on any other Charges).

3. The record of trial contains much in the way of cumulative and immaterial evidence which will not be summarized.

4. Evidence for the prosecution.

a. As to Specification 1, Charge I.

At the time of the events herein concerned, the accused was Deputy American Provost Marshal, Rome Area Allied Command (R 51,75,344). Among the vehicles used by the Provost Marshal Section was a one-quarter ton truck or "jeep," which was designated by bumper markings as "Rome Area MTOUSA PM 1" and was commonly referred to and will be referred to hereafter as "PM 1" (R 60,94). The origin of "PM 1" was unknown, except that it had initially been designated as "PM 2" and was assigned to a Sergeant Hackmeister and the "PM" designation indicated that it was among a group of vehicles which had been impounded by military police for various reasons and had not been claimed (R 81,93,135,345). "PM 1" was used principally by the accused in his capacity of Deputy Provost Marshal and was under his immediate care and custody (R 344) but it was also used by others (R 52,80) and was supplied at the motor pool, maintained at government shops, and was sometimes dispatched by trip ticket (R 80,251). On August 1946 the accused stated to another officer that he owned "PM 1." The jeep then had an official organization registration sticker on the windshield. (R 73).

On 21 September 1946 there was received in the Rome Area Provost Marshal impounding lot, which was under accused's charge, a jeep bearing markings "LRC" (American civilian) and license number 20219571. ("LRC" are the initials of Mr. Lawrence R. Clark (R 315)). This jeep was in a stripped condition, that is, without wheels, tires, battery, seat cushions, wiring, spark plugs and coil (R 63,80;137-9; Pros Ex 10).

On 16 January 1947, according to a property turn-in slip, a stripped jeep bearing War Department No. 20219661 was turned in to the Ordnance Property Officer, Rome Area, MTOUSA, from the American Provost Marshal. The property turn-in slip evidencing this transaction bears the name of accused as organization supply officer but the signature is not in accused's handwriting and is followed by the undecipherable initials of the subscriber (R 122, Pros Ex 9). There was admitted in evidence a copy of a letter dated 15 January 1947 from the accused, as American Deputy Provost Marshal, to the Rome Area Medium Maintenance Shop No. 1, requesting that certain vehicles, including one described as "Jeep LRC 20219661, Found Stripped," which had been impounded for over fourteen days, be removed. The letter also bears a notation over the signature of T/5 H.E. Fray (one of the personnel of the addressee organization) acknowledging receipt of the vehicles (R 123, Def Ex G).

On 3 January 1947 accused purchased from Mr. Lawrence R. Clark a jeep with motor number 166010 (R 53, Pros Ex D). According to accused's pre-trial statement, this jeep had been stolen from Clark, recovered by the military police, and impounded. Late in January, the accused decided to have the vehicle repaired, covered and painted, but found that "through some error" it had been "turned into Ordnance as a recovered vehicle." Accused inquired about the vehicle but was advised that it was not known where the vehicle could be recovered (R 122, Pros Ex 9). Because of accused's inquiry, a search was made for the jeep but it was not found (R 127). Vehicles so turned in to Ordnance as abandoned property were evacuated to Leghorn and thereafter could not be recovered(R 127).

Sometime in the last two weeks of February 1947, the accused, accompanied by an interpreter, took "PM 1" to the shop of Mario Mattielo, bodymaker, at Rome, where it was painted light blue in color, upholstered in blue patterned cloth, equipped with doors and a light tan canvas top and otherwise refurnished (R 42, Pros Ex 1 and 2; R 67). It was redelivered to accused early in March. Mattielo received 50,000 lire for the work (R 67).

In September 1946 the accused talked with a Mr. James C. Lowry, a civilian, about selling to the latter a 1946 Pontiac automobile. Between the 10th and 15th of February 1947 the accused and Lowry entered into a contract of sale and Lowry made a down payment of $500.00 on the purchase price (R 144,178,181). The automobile was originally registered in Mrs. Anderson's name and, on 5 March 1947, she executed the bill of sale (R 145,146). The automobile was delivered to Lowry on 4 March 1947 (R 144).

On 6 March 1947 the accused applied to the Office of the Provost Marshal for registration of a one-quarter ton 1943 4-cylinder vehicle, motor number 166010, serial number 24219661, and on that date there was

issued to accused and his wife, over accused's signature acting for the Provost Marshal, a registration certificate (Registration No. C-0526), for a Ford jeep with motor and serial number undesignated. (R 46, Pros Ex 4; R 47, Pros Ex 5). The registration card for the Pontiac automobile was marked void at the same time (R 226, Pros Ex 20). There was also issued a windshield sticker bearing the registration number, "US-C-0526" (R 226). The letters "US" on the sticker indicated a civilian vehicle. The letters "USA" appeared on the stickers for military vehicles (R 45). This sticker was placed on "PM 1" and the registration number also appeared on the rear bumper of "PM 1" (Pros Ex 8; R 50; Pros Ex 1). No inspection was made by the clerk who typed the registration certificate and sticker to determine if the description of the vehicle purportedly registered corresponded with "PM 1" (R 227). The vehicle described in the registration papers was the "LRC" or Clark jeep which had been impounded and turned in to Ordnance (Pros Ex 4,5,6,8,9,10; Def Ex D,E,F, G; R 317).

On 14 or 15 March 1947 accused's commanding officer received from the accused the jeep formerly designated as "PM 1" and delivered it to an agent of the Criminal Investigation Division (R 39,40). Although the vehicle had been completely repainted, removal of the surface paint on the front bumper disclosed the lettering "Rome Area MTOUSA PM 1" (Pros Ex 1; R 94). Examination showed the motor number to be PB 419 or 2419 (R 51). The jeep had on its windshield a registration sticker bearing the letters and figures "US-C-0526," and on the back of the sticker appeared accused's name as owner, his organization, and the date of issuance by the Provost Marshal (R 50; Pros Ex 1). On or about 14 March 1947 the accused telephoned to the Criminal Investigation Division agent to whom the vehicle had been delivered and said, "How about that damn jeep of mine? I don't want you scratching any paint off the bumpers, looking for numbers and spoiling the paint job" (R 97). He later telephoned to inquire when he would get his jeep back, explaining that it was necessary in the meantime for him to obtain transportation from the motor pool (R 50).

On 15 March 1947 the accused, in an exculpatory statement to an officer of the Inspector General's Department and after being warned of his rights, substantially admitted the conversion of "PM 1." (See paragraph 4c, infra).

b. As to Specification 2, Charge I.

On 8 April 1947 Colonel James J. Carnes was appointed as investigating officer to conduct an investigation under the provisions of Article of War 70 in connection with the court-martial charges pending against accused. The investigation was conducted on the same date. During the course of the investigation, the accused was sworn and advised of his

rights under Article of War 24. He testified, among other things, as follows: "* * * I removed the tires, wheels and tubes which were on the jeep /"PM 1"/ and turned them in as recovered stolen property, replacing them with other tires, wheels and tubes obtained from the MP Ordnance and eventually I placed on the jeep 5 tires, wheels and tubes which I bought from Mr. Clark (R 157, Pros Ex 13).

The evidence as to the falsity of accused's statement is as related in subparagraph 4a, supra, together with the following:

The wheels on "PM 1" were "O.D" or "brownish" in color and had white painted stripes around them before they were repainted (R 62,66, 96). The wheels were removed from the vehicle when it was taken to be painted and did not remain in the shop overnight because of the danger of theft. The same or other wheels were returned later and painted (R 68). Mr. Mattielo (the bodymaker) did not know whether the same wheels that were taken off the jeep were returned and put on it (R 68). On scraping the blue paint off the wheels of "PM 1" in court, there was disclosed a two centimeters wide white rim on each wheel (R 69). (There is seeming discrepancy as to the color of the wheels on the jeep when it was exhibited to the court. The wheels are referred to in the testimony as blue in color; however, a picture with descriptive notations thereon, which was apparently substituted in the record in lieu of Prosecution Exhibit 1 (the jeep) shows the wheels as light tan in color, and the review of the staff judge advocate refers to them as of that color.)

c. As to Specification 3, Charge II.

On 15 March 1947 the accused, after having been duly sworn and advised of his rights, signed a written statement in the course of an investigation being conducted by Lieutenant Colonel C. H. Middleton, an officer of the Inspector General's Department, with respect to the accused's possession of PM 1 (R 114, Pros Ex 7; R 118, Pros Ex 8). The statement is in pertinent part as follows:

"4. Q. Captain, there is apparently some discussion relative to whom a jeep you are now using belongs. As I understand it the jeep is registered through the Provost Marshal office as CO 526. Will you tell me in your own words just how you came into possession of this jeep and when?

A. In the early part of January 1947 I bought a jeep from Mr. Lawrence R. Clark of the Microfilm Division in the Allied Commission building in Rome. This vehicle had been stolen from Mr. Clark and recovered by the military police and placed in the military police impounding lot. In the latter part of January 1947 when I sold my privately owned automobile, I went to take the jeep that I had bought from

Mr. Clark and have it repaired, painted, and top put on it for my personal use. At that time I found that through some error the jeep that I purchased from Mr. Clark had been turned into Ordnance as a recovered vehicle. In questioning Ordnance I found that they did not know where the vehicle could be recovered. I don't recall with whom I talked at the time. In a previous conversation with Captain Thum I had been told that these recovered jeeps which were turned in to him that a jeep body was a jeep body. Due to the fact that I had in my possession at the time an unidentified jeep which had been turned over to me by Capt. Fisher, former Deputy Provost Marshal, Rome Area, with the statement that it was his jeep and that I was welcome to use it as long as I wanted it, I felt that due to the fact that the larger portion of the equipment on the jeep had been placed there by me and to the fact that a jeep with more equipment had been turned into Ordnance that there would be nothing wrong and there would be less trouble retaining the jeep in my possession which I did. I have spent over 100,000 lire in equipping and repairing of the vehicle which is now in the possession of the CID.

* * *

9. Q. Did you realize when you substituted another jeep for the one you purchased from Mr. Clark that you could be accused of larceny of government property?
   A. No, sir, I did not because Ordnance received a jeep with just as much or more equipment as this jeep when I received it.

10. Q. How much of your own personal money had you spent on the jeep known as "PM #1" prior to the date of 3 January 1947?
   A. I don't recall, sir, but I can tell you what I put on the jeep.

11. Q. Will you tell me what you put on the jeep?
   A. I had the spot light put on. I had the two small driving lights put on the bumper. I had the seat put in and covered. In addition to that I had another engine put in the jeep, sir.

12. Q. Where did you secure the property for this work including the engine?
   A. The new engine did not cost me anything. The engine was put in by the motor pool out there and was secured from Ordnance. They gave me a new engine for the old one that was returned. That was last summer, sir.

* * *

21. Q. Was there any agreement between yourself and anyone in the Ordnance to accept what I have been informed was a stripped jeep in replacement for the one you now have marked CO 526?
    A. Definitely not, sir.

22. Q. Is there any other information you can give in assisting me to bring this investigation to a close?
    A. The only thing I can say is if I had any intention to defraud the government I would not have started on this one jeep. When I actually took over as Deputy Provost Marshal during that time there were 16 vehicles out there that had been impounded and marked as PM 1 to 16 inclusive. I turned all of those vehicles into Ordnance retaining only the one jeep marked "PM #1" because the units at that time did not have enough vehicles to maintain the radio patrols, company duties, and assigned duties with the Provost Marshal section. The jeep "PM #1" has always been used by the entire military police headquarters and enlisted men and was still being used by those same men after having been repaired and painted by me in place of the jeep turned into Ordnance." (Pros Ex 8)

Considerable evidence was introduced as to the equipment and the source of the equipment on "PM 1" at the time of the alleged conversion but, for reasons hereafter indicated, such evidence is considered immaterial and will not be detailed. The remainder of the material evidence as to this Specification and Charge is as stated in the preceding subparagraphs of paragraph 4 of this opinion.

5. Evidence for the defense.

The accused, after being advised of his rights (R 341) elected to make an unsworn statement (R 342-362). He stated that, as the result of making one mistake in twelve years of service, he is being harassed and persecuted and he intimated that one of his principal witnesses (Mr. Clark) was offered a bribe and intimidated by a staff officer of the command. He related that he arrived in Rome in January 1945 and was assigned for duty with the Provost Marshal Section. Captain Benjamin A. Fisher was Deputy Provost Marshal. Captain Fisher had a jeep which bore the words "Lady Millicent" in large yellow letters on the panel underneath the windshield. He kept the jeep for his own personal and official use and, when not being used, it was usually parked inside a portico of the Excelsior Hotel. Captain Fisher was scheduled to return to the United States and told the accused, on the latter's inquiry, that he guessed he would have to leave the jeep as he had no papers on it and that accused

could have it (R 343). Accused did not know whether Captain Fisher meant that he had purchased the jeep. Accused obtained the jeep on 9 March 1946, when Captain Fisher left, and on 11 March 1946 accused was appointed Deputy Provost Marshal. He continued to park the jeep at the Excelsior Hotel and later, by special permission, in the Embassy grounds. (Accused thereafter in his statement referred to the "Lady Millicent" jeep as "PM 1.") The Provost Marshal Section used several vehicles, some of which had been impounded and not identified and some issued by Ordnance. Among them was a jeep designated as "PM 2" which was used by a Sergeant Hackmaster and bore certain special equipment that, according to Hackmaster, had been purchased by him. Accused gave Hackmaster a pistol for this equipment when the latter left the organization and it was installed on "PM 1." "PM 2" was subsequently wrecked and a jeep designated as "PM 3" was redesignated "PM 2." This "PM 2" and several other vehicles were turned in to Ordnance as surplus late in 1946 because of orders from headquarters. This left the section with a vehicle shortage. Accused then recalled that he had signed a memorandum receipt for another jeep which was being used by a military police company, so he obtained that jeep, placed it in use in the Provost Marshal section, and designated it "PM 2." This jeep was turned in when he was relieved from the Provost Marshal section. It and "PM 1" were similarly equipped. "PM 1" was the only vehicle left in the section that was not "on paper." It had a wooden top when received from Captain Fisher but the top was damaged and top heavy and was removed. Accused endeavored unsuccessfully to obtain a top from the motor pool and, as winter came on, it became increasingly difficult to use the vehicle (R 346). He requested permission of the Chief of Staff to buy a top but this was denied. He particularly desired a top because he planned to install a two-way radio in "PM 1" (R 351).

In November 1945 accused purchased a 1946 Pontiac in the name of and through his wife who was then in the United States. In September 1946 accused learned that his wife was to join him in November or December. She was to ship the Pontiac but accused understood two or three months would pass before it arrived so he began to look for a jeep to use in the meantime. Mr. Lawrence R. Clark's jeep was stolen at about this time and accused was instrumental in obtaining the release of the Clark jeep from Italian police and having it brought to the impounding lot. Accused examined the jeep at the impounding lot and found it was without wheels, tires, tubes and that the battery was damaged.

Sometime in the latter part of 1946 accused talked with Mr. James Lowry about selling the Pontiac to the latter. The Pontiac arrived on 9 December 1946, eight days before the arrival of accused's wife. On 31 December 1946 Mr. Lowry discussed the sale of the Pontiac with accused and his wife. Accused decided to sell it because he knew he would not remain in Italy much longer. He then talked to Mr. Clark about the

impounded jeep and purchased it for 30,000 lire. A bill of sale for the jeep was executed on 3 January 1947. Clark said he would try to get tires and wheels for the jeep and accused agreed to pay $50.00 in scrip for them. In January 1947 Clark advised the accused that he had the wheels and tires, accused received delivery of them at Clark's office, took them to his quarters at the Ambassador Hotel and placed them in a clothes closet in his bedroom. Sometime between 15 and 20 February 1947 Lowry requested a bill of sale for the Pontiac. Accused desired to keep the car until he had taken a trip with his wife and a Major and Mrs. McDougle. Accused, his wife, and Lowry went to Major McDougle's quarters and a bill of sale was drafted and signed. Accused agreed to deliver the Pontiac on 4 March 1947 and he received $500 from Lowry in down payment (R 348). Accused, his wife and Mrs. McDougle went to Sorrento about 21 February 1947 and to Florence on 26 February 1947, returning to Rome on 1 March 1947, and delivery of the Pontiac to Lowry was made on 4 March 1947. The sale was registered at the United States Consulate on 5 March 1947. About 24 February 1947 (between the trips to Sorrento and Florence) accused went to the impounding lot to inspect the Clark jeep and discovered it was missing. On investigation, he found in the Provost Marshal's Office correspondence, which he had not previously seen, indicating that the jeep had been turned in to Ordnance. He was advised on inquiry to Rome Area Ordnance that the jeep had probably been returned to surplus stock at Leghorn. About 1 March 1947 a Sergeant Kellett told accused that he was looking for a jeep that he wanted to buy from Clark and accused told him the vehicle had been turned in to Ordnance by mistake. Accused did not pursue the subject further as he considered it none of his business (R 350).

Accused had intended to remove his personally owned spotlight, driving lights, twin horns and seats from "PM 1" for use on the Clark jeep. This being no longer possible, he decided to remove the wheels from "PM 1," turn the wheels into the military police company, install the wheels and tires he had purchased from Clark and have the vehicle painted and a top made, then use "PM 1" as his own until he left Rome or found the Clark jeep. If he found the Clark jeep or was ordered to leave Rome he would remove his wheels and other equipment from "PM 1" and turn it in as a recovered stripped jeep. Pursuant to this plan, he took "PM 1" to a body shop where it was to be painted. A top was also to be installed. Mr. Ascoli accompanied him and acted as interpreter. The painting was to be completed by 4 March 1947. Accused caused a truck to be sent to the body shop where the wheels and tires were removed and returned to the Provost Marshal's Office and placed in the evidence room where accused later saw them (R 351). Accused received the jeep with the work completed at about 2130 hours, 4 March 1947. He paid 50,000 lire to the shop owner (R 352).

On 6 March accused took the papers he had received when he purchased the Clark jeep to the traffic clerk at the Provost Marshal's Office and told him to register the jeep. Accused did not examine the registration

papers and did not notice that the motor and serial numbers had been left off the registration card or that his wife's name appeared as co-owner. He placed the sticker on the windshield because a vehicle identification was required. He later told two men in the motor pool that the blue jeep was "PM 1." Accused continued to use it as he previously had and he told the personnel in his section that they were free to use it but were to get the key from him (R 355). Major Vollendorff (accused's commanding officer) obtained the registration papers from accused and took them and the blue jeep to an agent (Geno Evangelisto) of the Criminal Investigation Division on 13 or 14 March 1947 (R 355).

Accused's statement to Colonel Middleton to the effect that the Clark jeep had more or as much equipment as "PM 1" was made on the basis of his visualization of "PM 1" if the extra equipment was removed and its wheels turned in to the military police company (R 359).

Corporal Fred F. Kane testified that he arrived in the Rome area in December 1945 and was on duty in the traffic section of the Provost Marshal's Office with the accused as his commanding officer (R 288). Captain Fisher (then Deputy Provost Marshal) had a jeep which he used for business and personal purposes (R 289). This jeep was light green in color (R 301), had a wooden top (R 295), and the words "Lady Millicent" appeared below the windshield in large, flowery, yellow letters (R 290). It had no special horns, lights or spotlight (R 295). Captain Fisher usually kept the jeep at the Excelsior Hotel (R 289). He left the Rome Area about March 1946 and accused was appointed Deputy Provost Marshal (R 289). At about this time the witness heard Captain Fisher tell another officer and the accused that he would leave the jeep with or give it to the accused (R 294,297). After Captain Fisher left, the accused used the jeep and continued to park it at the Excelsior Hotel (R 290,298). The wood top was removed in March 1946 (R 312). In the fall of 1946 the accused caused the jeep to be painted "O.D" in color and the words "Rome Area MTOUSA PM 1" were painted on the bumper (R 290, 300). Thepainting was done at the motor pool (R 290). The witness saw a USA War Department number on "PM 1" after accused acquired it (R 300). On examination of "PM 1" at the trial, the witness detected traces of the War Department number, the letter "M" in yellow paint in the words "Lady Millicent," and the letter and figure "PM 1" where the blue paint was removed (R 304,306). Sergeant Hackmaster used a jeep that was designated as "PM 2" and had special equipment consisting of a spotlight, a set of horns and two road lights (R 295). When Hackmaster left his organization in May or June 1946 the special equipment was removed from "PM 2" and the witness later saw it on "PM 1" (R 299). The witness understood that the accused had traded a .38 cal. pistol for the equipment. He had seen such a pistol in accused's possession and later saw it in Hackmaster's possession (R 292). Hackmaster "gave" "PM 2" to Captain Scott and it was later wrecked and turned in to Ordnance (R 293).

Two civilian witnesses, both of whom were former officers, testified to the effect that accused took over the "Lady Millicent" jeep from Captain Fisher about December 1945 or January 1946 and received official permission to park it at the Excelsior Hotel where Fisher customarily parked it (R 272-280; 280-285).

Captain Clare L. Scott testified that he took over "PM 2" from Sergeant Hackmaster when the latter left the Rome Area in April or May 1946. "PM 2" was later damaged and was eventually turned in to Ordnance. Captain Scott then used another jeep that was designated "PM 2" (R 263-265).

Major Darrel B. McDougle testified that between the 10th and 15th of February 1947, Mr. James Lowry, the accused and accused's wife came to the witness' quarters where a bill of sale transferring accused's Pontiac automobile to Lowry was drafted and executed (R 178). Accused received a down payment of $500.00 (R 181). Delivery of the Pontiac was to be made on March 4th (R 179). The witness and his wife accompanied accused and his wife on a trip to Sorrento before the car was delivered to Lowry (R 179,180).

Mr. Lawrence R. Clark, a War Department civilian employee, identified an "Application for Auto Registration" dated 24 August 1946 (Def Ex F) by which he applied for military registration of his personally owned jeep bearing motor number 166010 and serial number WD 20219661 (R 317). He had paid $788.25 for the jeep in May 1946. This jeep was stolen from the witness about 5 September 1946 and, on being recovered by Italian police, was taken to the American Provost Marshal impounding lot (R 318). When it was first seen by Clark after being recovered, it was without wheels, tires and back seats, the top fabric was not on the frame and the battery was damaged (R 318). The accused notified Clark of the recovery of the jeep and the two men inspected it at the impounding lot about a week later (R 319). The witness made several attempts to sell the jeep and, at a Christmas party in 1946, agreed to sell it to a Sergeant Kellett (R 333), but the transaction was not completed (R 333). On 3 January 1947 the witness executed a bill of sale transferring the jeep to accused (R 320, Def Ex D). The consideration paid was 30,000 lire (R 334). The witness told accused he had hopes of obtaining wheels and tires and, if he did, would sell them to accused (R 339). He had previously made an arrangement with a woman employed by the Embassy who was to obtain the wheels and five new tires. She was unable to procure new tires but did get five used tires which, with the wheels, were delivered to the witness, who then sold them to the accused for $50.00 (R 320,327,335,338,340). They were delivered to accused about three weeks after the jeep was sold (R 320). The witness did not recall whether the wheels had white rims (R 322). The witness was arrested in connection with this case on 1 July 1947 but did not know why he was arrested (R 323). (Objection by the prosecution to further

questioning by the defense along this line was sustained over the contention of the defense that it intended to show that the witness had been intimidated and that there was prejudice and ill-will involved in the bringing of charges against accused (R 322-326)).

Carminie Gentili testified that he was a floor porter at the Hotel Ambassador when accused lived there (R 229). In the latter part of January 1947 he helped accused move five wheels and tires into the hotel. They were placed in a cupboard in the accused's quarters (R230).

Paul P. Ascoli, an Italian civilian, testified that he was formerly employed as Captain Fisher's clerk and, when accused became Deputy Provost Marshal, was employed as his clerk (R 195,196). Captain Fisher had a jeep designated as "Lady Millicent" which he used for business and personal purposes (R 196). Accused took over the jeep Captain Fisher left (R 196) and it was thereafter painted "O.D." in color, designated "PM 1," the wood top was removed, and a spotlight that was taken from the Hackmaster jeep was installed (R 197,203). In March 1947 Ascoli, who acted as accused's interpreter, accompanied accused in "PM 1" to the bodymaker's shop where "PM 1" was painted (R 197,207). Accused told Ascoli that he wanted to use "PM 1" until the jeep which had been turned in by mistake was returned and that he wanted a top placed on "PM 1" that could be easily removed (R 208). The jeep was left outside the body shop and accused and the witness returned to the former's office. Ascoli then returned to the shop with a truck, "PM 1" was moved into the shop, and the five wheels and tires were removed, taken to military police headquarters and placed in the evidence room (R 197). The witness did not know whether the wheels and tires were later taken from the evidence room (R 198). He did not see "PM 1" again until after it had been painted blue and was being used by accused and others (R 198,199).

Staff Sergeant William G. Quinn (Sergeant Major of the Provost Marshal Section) testified that the blue winterized jeep was used for official purposes by personnel in the section in the same manner as "PM 1" had been used (R 245,246). He gave Ascoli permission to place the wheels and tires in the evidence room and saw them there several times afterward (R 246). The wheels and tires were in the evidence room on or about 14 March 1947 but were not there at the time of trial (R 247).

Private First Class McCabe, registration clerk, testified that it was customary for the accused, as Deputy Provost Marshal, to sign several vehicle registration cards in advance of their issuance (R 224). On 6 March 1947 accused gave the witness a bill of sale bearing Mr. Clark's name and the witness typed the necessary registration forms

without receiving any special instructions from the accused (R 222,223). He also cancelled the registration on the Pontiac (R 223). Accused did not request him to leave any numbers off the registration certificate and he did not know why he left them off (R 225). He did not inspect the vehicle being registered (R 227).

Several witnesses testified that jeeps in the Rome Area other than military police or provost marshal jeeps had wheels with white stripes on the rims (R 193,235,238,240,242).

Several officers testified that accused's character and military record was good (R 180,191,218,220,258,260,261,262).

6. Accused was found guilty of embezzlement as denounced in 18 U.S.C. 183 (Chg I, Spec 1). The evidence shows that accused who, in the course of his duties as Assistant Provost Marshal in Rome had acquired the use and possession of a motor vehicle described as"PM 1", subsequently altered the appearance and structure of the vehicle, and registered it in his and his wife's names using motor numbers belonging to another vehicle. The finding of guilty of Specification 1, Charge I, is supported by the evidence. Accused was, however, previously tried for embezzlement of the same vehicle on 28 and 29 April 1947, by a duly constituted court-martial under a specification alleging that the accused did "in or about February 1947, feloniously embezzle by fraudulently converting to his own use and benefit one one-quarter ton motor vehicle bearing marking Rome Area MTOUSA PM 1 of the value of more than fifty dollars * * * the property of the United States of America entrusted to him by the United States of America," in violation of Article of War 93. He was found guilty of the Specification except the words "feloniously embezzle by fraudulently converting" and "of the United States of America," substituting therefor respectively the words "fraudulently convert" and "of a person or persons unknown," and not guilty of the Charge but guilty of a violation of Article of War 96. He was sentenced to be reprimanded and to pay a fine of $1500.00. The reviewing authority disapproved the sentence and ordered a rehearing before another court. It is apparent that the offense of which he was found guilty in the first instance was one necessarily included in that charged, and under the circumstances of the case, an offense less than that of embezzlement.

In the instant case accused was found guilty of a violation of 18 U.S.C. 183 which provides as follows:

> "183 (Criminal Code, section 97) Embezzlement by internal revenue officer.
>
> "Any officer connected with, or employed in, the Internal Revenue Service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States and any officer

of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both. (Feb. 3, 1879, ch. 42, 20 Stat. 280; Mar. 4, 1909, ch. 321, § 97; 35 Stat. 1106.)"

The offense thus denounced is embezzlement (Hoback v. U.S., 284 F. 530, 532; Hubbard v. U.S., 79 F 2d 850,852,854).

Although embezzlement as set forth in section 183, supra, applies solely to officers of the United States and their assistants this factor and the lack of requirement of value in section 183, do not alter its identity from the offense of embezzlement as denounced by Article of War 93. It may be seen, therefore, that accused could not again be found guilty of the offense of which he was acquitted and so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty of embezzlement is a nullity.

Paragraph 89, Manual for Courts-Martial, 1928, provides, however, that if convicted of the offense originally charged on a rehearing although he had been acquitted of that offense at the first trial but convicted of a lesser included offense, the conviction in the rehearing may be valid as far as concerns the conviction of such lesser included offense. The findings in the rehearing constitute embezzlement because the acts upon which the findings are predicated are found to be in violation of Section 183, Title 18, United States Code. It follows then that only so much of the finding of guilty of Specification 1, Charge I, as excludes the element that the acts were in violation of the Code is sustained by the record of trial. The offense which remains after the exclusion, namely, that accused did, at the time and place alleged, by fraud wrongfully convert to his own use the property alleged, which came into his possession and under his control under the circumstances alleged, is identical to the offense of which he was found guilty at the first trial, and is supported by the record of trial.

7. It is to be noted that even if the offense of which the accused was found guilty at the first trial is treated as embezzlement, the sentence imposable solely by virtue of the findings of guilty of Specification 1, Charge I, would not be affected. If the finding of guilty at the first trial was one of embezzlement, then it was proper to order the rehearing on a charge of embezzlement and a finding of guilty thereon would, in our opinion, be sustainable; however, because of the limitation

prescribed by Article of War 50½ with respect to sentences on rehearing, the sentence imposed by virtue of the second trial on the basis of a finding of guilty of embezzlement alone could not exceed that imposed by virtue of the first trial.

8. Specification 2 of Charge I, alleging the offense of statutory perjury (see sec 231, Title 18, USC (1940 ed); sec. 125, U.S. Criminal Code), states in substance that the accused falsely testified to an investigating officer that he placed on "PM 1" five tires and tubes which he had purchased from Lawrence R. Clark. The evidence of the falsity of accused's testimony is based largely on the inference that accused, having converted "PM 1", also converted the tires that were on it at the time of the conversion. Evidence was also adduced that the wheels on "PM 1" had white rim stripes before they were painted and that the painted wheels before the court showed traces of similar stripes; however, the probative value of this evidence is greatly modified by the evidence that jeeps with white rim stripes on the wheels were not uncommon in the Rome Area and further weakened by the apparent discrepancy as to the color of the wheels on "PM 1" (whether green or light tan) when they were before the court as evidence. The accused, in his unsworn statement, contended that he placed on "PM 1" the wheels and tires purchased from Clark. Accused's statement might in itself be entitled to little weight but it is corroborated in several respects. Clark testified that he sold five wheels and tires to the accused; Gentili testified that he assisted the accused to move five wheels and tires into a storage space in accused's quarters; Ascoli testified that he removed five wheels and tires from "PM 1" and left them in the evidence room at headquarters; and Sergeant Quinn testified that he had knowledge of the tires being left there by Ascoli and that they were still there on 14 March 1947. The several defense witnesses were obviously friendly to the accused but their testimony was not directly rebutted or otherwise shown to be unworthy of belief. We are disposed, therefore, to accept their testimony as true and to give considerable weight to the evidence of the defense as to the issue involved.

It is unnecessary for us to determine whether this case falls within the rule followed by some courts that circumstantial evidence alone will not support a conviction of perjury (see Allen v. U.S.; 194 Fed 664, 39 LRA (NS) 385, 15 ALR 634). It is sufficient to point out that the prosecution's evidence as a whole is wholly lacking in that positive and direct testimony normally required to support findings of guilty of perjury. The inference of guilt arising from the prosecution's evidence is far from convincing in the light of the positive evidence of the defense. Considering the lack of evidence for the prosecution and the weight of the evidence for the defense, we are impelled to the conclusion that the evidence fails to prove accused's guilt of Specification 2 of Charge I beyond a reasonable doubt.

9. Specification 3 of Charge II (false official statement under oath) is somewhat inartfully phrased but was apparently designed to charge that accused falsely stated to Colonel Middleton that, in substance, the Clark jeep was turned in to Ordnance with more equipment on it than was on "PM 1" as it was retained or at the time of the alleged conversion by the accused.

The evidence shows that accused in his statement to Colonel Middleton first told of his purchase of the Clark jeep and of it being turned in to Ordnance. He next stated that he had in his possession an unidentified jeep that had been turned over to him by Captain Fisher. In the following sentence he stated:

> "I felt that due to the fact that the larger portion of the equipment [on PM 1] had been placed there by me and to the fact that a jeep with more equipment [the Clark jeep] had been turned into Ordnance that there would be nothing wrong and there would be less trouble retaining the jeep in my possession which I did."

At this point in the interrogation it is not altogether clear whether accused meant that the Clark jeep had more equipment than "PM 1" when he received "PM 1" from Fisher or when "PM 1" was finally converted. The former appears more likely as accused had just referred to his acquisition of "PM 1" from Captain Fisher. Accused, however, subsequently clarified the ambiguity in response to a question by the Inspector General, as follows:

> "Q. Did you realize when you substituted another jeep for the one you purchased that you could be accused of larceny of government property?
>
> A. No sir, I did not because Ordnance received a jeep with just as much or more equipment as this jeep when I received it." (Underscoring supplied)

In the light of the foregoing, it appears that accused's statement was to the substance and effect that the Clark jeep had as much or more equipment on it when it was turned in to Ordnance as "PM 1" had on it when the accused received it from Captain Fisher, and not, as was alleged in the Specification, that the Clark jeep had more equipment on it than "PM 1" had at the time it was converted.

It is well established that, in perjury cases, the matter sworn to must be proved substantially as alleged, and a material variance in this regard is fatal (48 C.J. 888; Wharton's Criminal Law, Vol. 2 (12th Ed), sec 1579). This principle is as applicable to false official statement cases as to perjury cases.

The mentioned variance between the allegation and proof in this case is, in our opinion, material and fatal. It was incumbent on the prosecution to show that accused made the statement alleged with respect to the condition of "PM 1" at the time he converted it. To prove that his statement in fact referred to the condition of "PM 1" at a considerably earlier period manifestly does not meet the requirement of proof, particularly as it appears that the condition of equipment on "PM 1" was changed substantially during the period it was in accused's possession. It is, therefore, the opinion of the Board of Review that the evidence is insufficient to support the findings of guilty as to Specification 3 of Charge II.

Assuming that there was no variance and without deciding the issue on the basis of the following comments, it seems appropriate to observe that the Board of Review entertains some doubt whether the evidence shows that accused's statement was made with intent to deceive. Such intent is a necessary element of the offense charged. It should be noted that accused did not definitely state to the investigating officer what equipment was on the Clark jeep but did refer to it as a "jeep body" and that he made no comment when the Inspector General described it as a "stripped" jeep. On the other hand, accused told what equipment he had caused to be placed on "PM 1", and the interrogation as a whole proceeded on the basis that "PM 1" was a fully equipped and operating vehicle at the time it was converted. The subject of wheels and tires was not mentioned. It is also to be noted that accused's allegedly false statement to the effect that the Clark jeep had "more" equipment on it than "PM 1" was almost immediately modified by his use of the words "as much or more" instead of "more." Accused's supposedly false statement, when read in connection with his testimony as a whole, appears to be more of an argument or self-serving opinion than a statement of particularized fact and might well be considered to fall within the category of those absolvatory reckless or incomplete statements that are not ordinarily regarded as forming the basis for a prosecution for perjury or one of its associated offenses (see 48 C.J. 830). That the accused freely admitted the principal fact concerning the commission of the offense under investigation belies to some extent any attempt on his part to deceive the investigating officer with respect to a relatively immaterial matter.

10. When the court convened on the morning of 1 July 1947, the defense counsel, Lieutenant Colonel Wellen, moved for a continuance of one week. He stated that it was not until 27 June that he had been advised that "I would probably be the special defense counsel in this case." He further stated that the one day he had had an opportunity to work on the case was insufficient time in which to prepare a case of this nature. A continuance until 3 July was granted. Upon reconvening on 3 July the defense counsel moved for a continuance until 8 July 1947, stating that, due to the law involved in the case, "I am not prepared to defend the accused at this time." The court denied his motion for a

further continuance but stated that, "in fairness to the accused the court wishes to remind the counsel of the fact, of which they are probably cognizant, that at any time during the procedure which will follow if they feel that the material rights of the accused are being jeopardized in the direct or cross-examination of witnesses or in matters of legal discussion, that the court will again entertain a motion for a continuance." During the session on 4 July the defense counsel renewed his motion for a further continuance on the ground that he had not talked to the new witnesses for the defense and had not had an opportunity to fully acquaint himself with the facts of the case. His motion was denied by the court. At 1645 hours on 5 July, defense counsel asked for a recess until the following morning, stating that "Captain Anderson is in bad shape physically and is completely worn out." The court adjourned until 1030 hours, 6 July 1947. On reconvening, a medical officer who had examined accused at the court's request, testified that "he showed evidence of having been under mental and physical stress over a period of about a week. I felt that his condition was not of a serious enough nature that a night's sleep would not remedy." He further testified that he felt that accused's condition would not be aggravated if the trial continued. A motion by the defense counsel for a recess until 7 July was denied.

"The right to prepare for trial is fundamental. To deny this right is to deny a fair trial." (CM 324240, Blossomgame). In the instant case the offenses upon which accused was tried were based upon his alleged conduct in converting a vehicle which was in the care and control of the Government, and his alleged conduct in connection with investigations concerning the conversion. Except as to the conversion of the vehicle which accused substantially admitted in his unsworn statement to the court and for which, apparently, there was no defense on the merits, the defense counsel presented an extremely able defense. Accused gained an outright acquittal as to three of the offenses charged and, as to two of the other offenses upon which conviction was had, matters pertaining thereto presented by the defense were persuasive of the conclusion of the Board, that these findings of guilty are not supported by the record of trial. It would thus appear that further delay in the trial of this case would not have resulted in a more favorable outcome to accused.

11. The defense submitted several challenges for cause and motions to strike, none of which require discussion in this opinion except as previously herein indicated.

12. In view of our opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge I and Specification 3 of Charge II, the sustainable sentence in this case must be based on the remaining findings of guilty of wrongful conversion under Specification 1 of Charge I. The sentence must be one which might have been approved by the reviewing authority on disapproval

of the excessive portion of the sentence adjudged at the second trial, that is, one that is included in the sentence as imposed by the court and one that the court might have imposed (see par 87b, (p 76), MCM, 1928). Thus, had the reviewing authority disapproved the dismissal as a clearly excessive portion of the second sentence, he might have approved, as an included portion of the total forfeiture imposed, a lump sum forfeiture of $1500.00 (see par 87b, (p 77), MCM, 1928). A lump sum forfeiture is authorized in officer cases (SPJGW 1945/2858; CM 323769, Ross). The question is then presented whether a sentence to pay a lump sum forfeiture of $1500.00 is in excess of or more severe, within the meaning of Article of War 50½, than a sentence to pay a fine of $1500.00. It is to be noted parenthentically that the conclusion in CM 313847, Beezley, 63 BR 307, to the effect that a sentence to pay a fine does not include a sentence to pay a forfeiture and may not be so mitigated is not controlling as to this case. The Beezley case involved a change by the reviewing authority in the species or general nature of the sentence imposed by the court, that is, from a fine to a forfeiture; whereas, in this case, no change is contemplated in the species or general nature of the sentence adjudged on rehearing and the fine imposed by the first court is pertinent to our consideration only to the extent that it may limit the severity of the sustainable sentence.

As stated in the Beezley case, the principle difference between a fine and a forfeiture is that the former imposes a pecuniary liability in general, not necessarily affecting pay, which may be collected by the government in the way it collects other debts due it; whereas a forfeiture deprives an accused of his right to receive an amount of his pay to which he would otherwise be entitled and is of no force or effect after the entitlement to pay ceases (also see Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, p. 427; Par 125, TM 27-255; SPJGA 1943/16000). A fine may be recovered by stoppage of pay (SPJGW 1945/2858; par 13, C 3, 9 Oct 1947, AR 35-1800; SPJGW 1945/7550) on the principle of the right of set-off (see SPJGL 1945/4495). As both a forfeiture and fine are in effect recoverable from pay, the only substantial difference between the effects of the two penalties lies in the fact that a fine is a general obligation which continues after entitlement to pay ceases. It follows that, other things being equal, a sentence to a lump sum forfeiture is not a more severe penalty than a sentence to pay a lump sum fine of the same amount and, therefore, that a sentence in this case that the accused pay a forfeiture of $1500 is legally sustainable.

13. Records of the Army show that this married officer was born at Sadler, Texas, on 20 December 1916. He was graduated from the Whitesboro, Texas High School in 1935 and enlisted in the Regular Army on 2 July 1935. He served continuously and, having attained the grade of staff sergeant, was appointed a warrant officer (Junior Grade) (Regular Army) on 15 May 1942. On 25 June 1942 he was commissioned a

second lieutenant. He was promoted to first lieutenant on 26 November 1942 and to captain on 21 November 1944. On 27 December 1946 he was awarded the Army Commendation Ribbon for meritorious service in the Mediterranean Theater from 21 January 1946 to 30 November 1946. No previous disciplinary action is indicated. His efficiency reports show three adjectival ratings of superior and thirteen of excellent.

14. The court was legally constituted and had jurisdiction of the accused and, except as otherwise indicated, of the offenses. Except as herein indicated, 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 Specification 2 of Additional Charge I and Specification 3 of Additional Charge II and Additional Charge II, and legally sufficient to support only so much of the findings of guilty of Specification 1 of Additional Charge I, as involves finding that accused did, at the time and place alleged, by fraud wrongfully convert to his own use the property alleged which came into his possession and under his control under the circumstances alleged, and legally sufficient to support only so much of the sentence as provides that accused forfeit Fifteen Hundred Dollars ($1500.00) of his pay.

H. Hottenstein, Judge Advocate

(Dissent), Judge Advocate

W. Mynch, Judge Advocate

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

(362)

JAGV CM 326853

19 MAR 1948

UNITED STATES v. Captain KENNETH C. ANDERSON (O-1285872), Corps of Military Police.	ROME AREA MTOUSA Trial by G.C.M., convened at Rome, Italy, 1,3-8 July 1947. Dismissal and total forfeitures.

DISSENTING OPINION BY
O'BRIEN, Judge Advocate

1. It is stated in paragraph 6 of the foregoing opinion that the Specification of which the accused was found guilty on rehearing and which purported to be pleaded as a violation of section 97 of the U. S. Criminal Code is in fact the offense of embezzlement as denounced by Article of War 93. It is further stated, in substance, that the accused may not legally be found guilty of embezzlement as denounced by Article of War 93 as he was acquitted of that offense at the first trial. It is concluded, however, that, as the accused was found guilty at the first trial of a lesser and included offense of embezzlement, a finding of guilty of so much of the findings on rehearing as involves that lesser and included offense may be sustained. My point of difference with my colleagues lies in the fact that the undefined lesser and included offense which they consider legally sustainable as the result of the rehearing includes all the elements of embezzlement and, lacking only the reference to section 97, supra, is in the precise words of the Specification under which the accused was tried and found guilty on rehearing and which, according to the Hoback and Hubbard cases, supra, constitutes a charge of embezzlement. In this connection, it should be observed that paragraph 6 of the majority opinion holds in effect that the inclusion by the pleader of a reference to section 97, supra, in the Specification on which the accused was tried on rehearing did not change the identity of the offense and that it remained embezzlement as denounced by Article of War 93. The reference to the code section was mere surplusage in the first instance. It would seem to follow that exclusion of a reference to section 97, supra, from the finding of guilty on rehearing does not change the identity of the offense and that it, too, remains embezzlement, that is, the identical offense of which, according to the opinion, the accused was found not guilty at the first trial. If that is correct, then manifestly accused's plea of former jeopardy should be sustained. (See as to application of the test of identity of offenses in determining questions of double jeopardy: Morey v. Commonwealth, 108 Mass. 433;

Ex parte Rhinelander, 11 Fed Supp 298; Dist of Col v. Buckley, 128 F 2d 17, Gaviene v. U.S., 220 U.S. 388; CM 211260, Grochowiak, 10 BR 43,48).

2. On consideration of the substance of the findings of the court at the first trial in the light of the Hoback and Hubbard cases, supra, (also see Moore v. U.S., 160 U.S. 268, Grin v. Shine, 187 U.S. 181) and the numerous opinions of this office defining embezzlement (CM 317327, Nash, 66 BR 277, 310; CM 262750, Splain, 4 BR (ETO) 197; CM 258071, Rhodes, 4 BR (ETO) 391), and as intimated in paragraph 7 of the opinion, it is my view that the finding of the first court may reasonably be considered a finding of guilty of embezzlement and that, therefore, the finding of guilty on rehearing is sustainable. That is, I believe, the substantive effect of the opinion of the majority members and with such a conclusion I would not feel impelled to dissent. I do not concur, however, with so much of the opinion as may imply that the offense which the majority members find legally sustainable is not embezzlement or that the accused may legally be found guilty of that offense if, as indicated by the opinion, the finding of the court at the first trial was in fact an acquittal of embezzlement.

3. I concur with the views of the majority members except as indicated in the foregoing paragraphs.

John G. Gibney, Judge Advocate.

JAGH CM 326853 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAR 25 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 Captain Kenneth C. Anderson (0-1285872), Corps of Military Police.

2. Upon trial (rehearing) by general court-martial this officer was found guilty of embezzlement as denounced in Section 183, Title 18, United States Code (Additional Charge I, Spec 1), of statutory perjury (Additional Charge I, Spec 2), and of false swearing (Additional Charge II, Spec 3), in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review, one member concurring in the result but differing in his reasons for the result, is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Additional Charge I (perjury), and Specification 3, Additional Charge II (false swearing), legally sufficient to support only so much of the finding of guilty of Specification 1, Additional Charge I (embezzlement) as involves a finding of guilty of wrongful conversion by fraud, in violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves a sentence to forfeit $1500.00 pay. I concur in that opinion.

Accused was assistant Provost Marshal, Rome Area, MTOUSA, and as such had the use of a one-quarter ton vehicle which was designated as "PM 1." During the first part of 1947 he purchased a jeep from L. R. Clark, a civilian. This jeep had been stolen from Clark and stripped. It was recovered by the military police and impounded. Inadvertently the Clark jeep, after accused had purchased it and while it was impounded, was turned in to Ordnance. Accused was unable to recover it. He then decided that inasmuch as the Government had acquired a jeep from him he would use "PM 1." When he first acquired "PM 1" for use in his official duties he had added to it a substantial amount of equipment which he had acquired by barter. After the loss of the Clark jeep he took "PM 1" to a body builder and had extensive alterations made on it. At the time he took the jeep to the body builder he had the wheels removed and placed in the evidence room in the military police building,

and subsequently purchased a set of wheels from Clark which were placed on "PM 1." After the vehicle had been altered he registered it in his own and in his wife's name, using the motor number of the Clark jeep.

Accused was originally tried on the following Charge and Specification:

Charge: Violation of the 93rd Article of War.

Specification: In that Captain Kenneth C. Anderson Headquarters Rome Area Mediterranean Theatre of Operations United States Army did at Rome Italy in or about February 1947 feloniously embezzle by fraudulently converting to his own use and benefit one one quarter ton motor vehicle bearing marking Rome Area MTOUSA PM 1 of the value of more than fifty dollars but less than one thousand dollars the property of the United States of American entrusted to him by the United States of America.

The court made the following findings: "Guilty, except the words 'feloniously embezzle by fraudulently converting' and 'of the United States of America' substituting therefor respectively the words, 'fraudulently convert' and 'of a person or persons unknown'; of the excepted words, Not Guilty; of the substituted words, Guilty. Of the Charge: Not Guilty, but Guilty of a violation of the 96th Article of War." He was sentenced to pay the United States a fine of $1500.00. The reviewing authority disapproved the sentence and ordered a rehearing. The offense charged in Specification 1, Additional Charge I (rehearing) was similar to that of which he was found guilty on the original trial, with an additional allegation of violation of 18 United States Code 183 (embezzlement). So much of the finding of guilty of Specification 1, Additional Charge I, as involves the additional allegation must fall (AW 50½).

In the course of an investigation accused stated under oath to the investigating officer that he had placed on "PM 1" five tires and tubes which he had purchased from Clark. It was alleged that this statement was false (Additional Charge I, Spec 2). The evidence in support of the finding of guilty was circumstantial and was based on the fact that the wheels found on "PM 1" after its conversion by accused were, before being repainted by the body builder, of the same color as the wheels on the "PM 1" prior to its conversion. Other evidence showed, however, that jeeps with wheels painted in the same manner as those of "PM 1" prior to its conversion were quite common in the Rome Area at the time. Clark testified that he sold five tires and wheels to accused. There is direct evidence that five tires and tubes were removed from "PM 1" at the body maker's shop and that they were placed in the evidence room of accused's organization. It is apparent that the prosecution's evidence in the

case is not of such quality as will support an inference of guilt.

Accused in a sworn statement to Lieutenant Colonel Middleton, the Inspector General, Rome Area, MTOUSA, stated: "I felt that due to the fact that the larger portion of the equipment [on PM 1] had been placed there by me and to the fact that a jeep with more equipment [the Clark jeep] had been turned in to Ordnance that there would be nothing wrong and there would be less trouble retaining the jeep in my possession which I did." From this statement it was alleged that accused falsely stated to Lieutenant Colonel Middleton that, in substance, the Clark jeep was turned in to Ordnance with more equipment on it than was on "PM 1" as it was retained or at the time of the alleged conversion by the accused (Additional Charge II, Spec 3). The false statement charged varies from the statement upon which it is based. From the words used by accused it could be inferred that he stated that the Clark jeep when turned in to Ordnance had more equipment on it than "PM 1" when he first acquired the latter. In any event there is ambiguity in the words used. This ambiguity was later clarified by accused in the course of his statement to Lieutenant Colonel Middleton when he declared "* * * Ordnance received a jeep [the Clark jeep] with just as much or more equipment as this jeep (PM 1) when I received it." With this clarification the statement actually made by accused differed, therefore, from the statement attributed to him. Since there was evidence that, subsequent to his acquisition of "PM 1" and prior to his conversion of it, accused added considerable equipment to it, it may be seen that the statement actually made by accused was not proven to be false. The variance between the allegation and the proof as to the offense charged renders the finding of guilty of the offense a nullity.

The legal findings of guilty do not sustain the sentence. The only finding of guilty which may be approved, wrongful conversion by fraud, in violation of Article of War 96, was the basis for the sentence adjudged against accused in the first trial. The sentence in this case may not, therefore, exceed the sentence imposed at the first trial. The first sentence adjudged was to be reprimanded and to pay the United States a fine of $1500. It follows that only so much of the sentence on rehearing, dismissal and total forfeitures, as involves a forfeiture of $1500.00 is legally authorized (AW 50½).

4. The accused was born at Sadler, Texas, on 20 December 1916, and is married. He was graduated from the Whitesboro, Texas High School in 1935 and enlisted in the Regular Army on 2 July 1935. He served continuously and, having attained the grade of staff sergeant, was appointed a warrant officer (junior grade) (Regular Army) on 15 May 1942. On 25 June 1942 he was commissioned a second lieutenant. He was promoted to first lieutenant on 26 November 1942 and to captain on 21 November 1944. On 27 December 1946 he was awarded the Army Commendation Ribbon for meritorious service in the Mediterranean Theater from 21 January 1946 to 30 November 1946. No previous disciplinary

action is indicated. His efficiency reports show three adjectival ratings of superior and thirteen of excellent.

5. I recommend that the findings of guilty of Specification 2, Additional Charge I, and Specification 3, Additional Charge II, be disapproved; that so much of the finding of guilty of Specification 1, Additional Charge I, be disapproved as involves a finding of violation of 18 USC 183 (embezzlement), and that only so much of the sentence be approved as involves forfeiture of fifteen hundred dollars ($1500.00) pay.

Under the provisions of paragraph 104, MCM, 1928, there may not be adjudged against an enlisted man in a sentence which does not include dishonorable discharge, a lump sum forfeiture in excess of two-thirds of his pay for one month. While the cited paragraph is applicable only to enlisted men, the policy considerations which resulted in the prohibition apply equally well to an officer who is not under a sentence to dismissal. I therefore recommend that the sentence as approved be commuted to a reprimand and forfeiture of $250.00 pay and that the sentence as thus commuted be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 83, 29 March 1948).

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

JAGH CM 323368

6 MAY 1948

UNITED STATES v. Captain VINCENT F. COCHRANE (0-450426), Headquarters and Headquarters Troop, 71st Constabulary Squadron, APO 154.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Bad Cannstatt, Germany, 6 May 1947. Dismissal, total forfeitures and confinement for twenty (20) years.

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 Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Captain Vincent F. Cochrane, Headquarters and Headquarters Troop, 71st Constabulary Squadron, APO 154, US Army, did, at Schwabisch Hall, Germany, on or about 25 March 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Roy L. Konrad, Headquarters and Headquarters Troop, 71st Constabulary Squadron, APO 154, US Army, a human being, by shooting him in the head with a 7.65 pistol, make unknown.

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 dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to twenty years, and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of evidence and law contained in the review of the United States Constabulary Judge Advocate, dated 29 May 1947, with following additional comments:

Included with the record of trial is a letter dated 15 May 1947, signed by Nelson M. Holden, Captain, Field Artillery, Assistant Defense Counsel,

addressed to the Commanding General, United States Constabulary, requesting a rehearing on the basis of five inclosed statements. He further states that:

> "2. It is understood by the defense and the accused that these statements do not constitute new evidence. It is felt, however, that their importance warrant a re-hearing as the defense counsel did not bring out these points, the reason is unknown, in the interest of the accused."

Four of the mentioned inclosures, signed respectively by First Lieutenant Peter J. Koeniger, Second Lieutenant Theodore W. Edginton, First Lieutenant James C. Rogers, and Captain Stanley C. Tyrrell, indicate that the accused, on the night of the offense, drank a considerable quantity of intoxicating liquor at an officers club and, about one hour prior to the shooting, was drunk to the extent that he was boisterous, quarrelsome and staggering. The affidavit of Captain Roy M. Gramling discloses, in substance, that he interviewed accused shortly after the commission of the alleged offense and that accused, because of drunkenness, could not talk coherently or stand without swaying, that accused fell asleep during the interview and could not be aroused without difficulty.

The reason for requesting a rehearing in this case is somewhat obscure as it is not expressly claimed that the evidence is legally insufficient to support the findings or that errors or irregularities occurred during the trial. Further, assuming that a reviewing or confirming authority might disapprove the findings and sentence and order a rehearing on the basis of newly discovered evidence (see CM 315477, Wisniewki; CM 274516, Phillipp, 47 BR 199,207); it is to be noted that the additional evidence here submitted, having been available to the accused at the time of trial and being merely cumulative to and corroborative of evidence already adduced at the trial, may not be considered as newly discovered evidence (Clark's Crim Proc (2d Ed) p 587; 12 C.J.S. 1227). It is further to be noted that the mentioned letter admits that the statements accompanying it do not constitute new evidence. We conclude, therefore, that a rehearing was not requested, and is not justified, on the basis of insufficiency of evidence, error or irregularity during the trial, or newly discovered evidence.

Implicit in the mentioned letter is the contention or suggestion by the assistant defense counsel that the defense counsel was remiss in the performance of his duties because he failed to introduce the additional evidence as to accused's drunkenness. The issue, so far as drunkenness was concerned, was not merely whether accused was drunk, for that was substantially admitted, but, instead, whether he was so drunk as not to be able to entertain malice when the offense was committed. In this connection, the defense called two eyewitnesses of the homicide who testified fully as to accused's drunkenness at that time, and it had previously been

stipulated that accused consumed approximately thirty ounces of whiskey during the preceding four and one-half hours. That evidence, together with the other evidence adduced, presented a very complete picture of accused's insobriety and his ability to entertain a general intent at the time of the shooting. The additional evidence set forth in the mentioned statements discloses nothing more as to accused's ability to entertain malice when the offense occurred. It is, therefore, merely cumulative as to drunkenness and of no appreciable probative value on the ultimate issue of ability to entertain general intent. Under these circumstances, it does not appear that defense counsel could have accomplished any useful purpose by presenting the mentioned evidence. His failure to do so manifestly did not influence the outcome of trial. It follows that disapproval of the findings and sentence and ordering a rehearing is not warranted by reason of any incompetency or lack of diligence on the part of the defense counsel. The additional evidence is, of course, pertinent for clemency consideration.

4. Records of the Army show that accused is twenty-nine years of age and married. He was born at Cuyahoga Falls, Ohio, and attended high school for two years at Kent, Ohio. He enlisted in the Regular Army on 26 August 1937, was ordered to active duty as a second lieutenant, Army of the United States, on 1 October 1941, and was promoted to first lieutenant on 18 July 1942 and to captain on 1 November 1945. He served in Europe in combat and was awarded the Silver Star Medal, Bronze Star with Oak Leaf Cluster, and Purple Heart Medal with three Oak Leaf Clusters. He has one previous conviction for unlawfully carrying and discharging a weapon on 29 August 1946. For the period from 7 October 1941 to 31 December 1946 his efficiency has been rated as excellent except for three entries of very satisfactory covering a period of five and one-half months in 1943.

5. The Board has considered numerous communications requesting clemency for the accused, together with letters in accused's behalf from Honorable Walter B. Huber, Honorable Frances P. Bolton, and Honorable Robert Crosser, House of Representatives; and oral presentation by Honorable John S. Cooper, United States Senate, and oral and written representation by the Legal Committee, Joint Veterans' Commission of Cuyahoga County, Ohio.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence as modified by the reviewing authority and to warrant confirmation thereof. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. The reviewing authority was authorized to reduce the period of confinement to 20 years.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH CM 323368 1st Ind

JAGO, Department of the Army, Washington 25, D.C. MAY 12 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 Captain Vincent F. Cochrane (0-450426), Headquarters and Headquarters Troop, 71st Constabulary Squadron, APO 154.

2. Upon trial by general court-martial this officer was found guilty of murder, in violation of Article of War 92. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to twenty 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 review of the Staff Judge Advocate which was adopted, with certain additions noted, in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority, and to warrant confirmation of the sentence. I concur in that opinion.

Late in the evening of 25 March 1947, the accused entered a restaurant at Schwabisch Hall, Germany, with the deceased, Private Roy L. Konrad. The accused was so drunk that he staggered and swayed. Several other enlisted men were present in the restaurant and some of them engaged in a noisy disturbance. The accused, for no apparent reason, pointed his pistol at one of the men and pulled the trigger but the pistol failed to discharge. Shortly afterward, the accused, apparently in an attempt to gain the attention of or to frighten the enlisted men by firing over their heads, discharged his pistol four times. Three of the shots passed over their heads but the fourth struck the deceased in the head, causing his death. The accused said something to the effect that he had not intended to hit the deceased and gave instructions that medical assistance be called. He then left the restaurant, threw his pistol in a canal, and was proceeding toward his home when apprehended.

The evidence does not disclose any animosity on the part of the accused toward the deceased and it appears that accused was quite drunk. It does not appear, however, that the accused was so drunk as not to be able to comprehend the inherently lethal nature of his act and entertain the malice requisite to murder.

4. Although it did not appear at the time of trial that accused was insane, he was subsequently, at the request of my office, given a complete mental examination by a board of medical officers. The report of examination shows that accused was mentally responsible for his acts at the time of commission of the offense and possessed sufficient mental capacity to cooperate in his own defense.

5. Records of the Army show that accused is twenty-nine years of age and married. He was born at Cuyahoga Falls, Ohio, and attended high school for two years at Kent, Ohio. He enlisted in the Regular Army on 26 August 1937, was ordered to active duty as a second lieutenant, Army of the United States, on 1 October 1941, and was promoted to first lieutenant on 18 July 1942 and to captain on 1 November 1945. He served in Europe in combat and was awarded the Silver Star Medal, the Bronze Star Medal with one Oak Leaf Cluster, and the Purple Heart Medal with three Oak Leaf Clusters. He has one previous conviction for unlawfully carrying and discharging a weapon on 29 August 1946. For the period from 7 October 1941 to 31 December 1946 his efficiency has been rated as excellent except for three entries of very satisfactory covering a period of five and one-half months in 1943.

6. Consideration has been given to communications in behalf of the accused submitted by the following persons: The accused's wife, mother and father; Honorable Walter B. Huber, Honorable Frances P. Bolton, and Honorable Robert Crosser, Members of Congress; Honorable Blake C. Cook, Judge, Court of Common Pleas, Portage County, Ohio; Honorable Alf C. Lovell, Mayor of Kent, Ohio; Mrs. Elsie Shindle; Mr. L. P. Stiver; Mr. Joseph C. Siegferth; Mr. Russell J. Otto; Mrs. Blanche Moore; Mr. Charles A. Horning; Miss Stella Cousins; Mr. A. J. Spangler; Mrs. Alice Mott; Mrs. Britton S. Johnson; Mr. Frank C. Hull. Also, an application for clemency was presented to the Board of Review by Honorable John S. Cooper, United States Senate, and oral and written presentations on behalf of accused were made by the Legal Committee, Joint Veterans' Commission, Cuyahoga County, Ohio.

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

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

CM 323368

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 118, 4 June 1949).

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

CM 324272

4 MAR 1948

UNITED STATES v. Colonel EDWARD J. MURRAY (0-166578), Headquarters Far East Command, APO 500.	EIGHTH ARMY Trial by G.C.M. convened at Yokohama, Japan, 14 April to 29 May 1947. Dismissal, total forfeitures and confinement for eight (8) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, JOHNSON AND ACKROYD, Judge Advocates

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

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

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

Specification: In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, having been assigned as Custodial Officer for Headquarters, Eighth United States Army, of the United States Vaults, Bank of Japan, did, on or about 20 March 1946, at or in the vicinity of Tokyo, Honshu, Japan, wrongfully, knowingly, willfully and without proper authority appropriate to his own use about Five Hundred (500) diamonds, of a value of about Two Hundred Thousand Dollars ($200,000.00), property in the custody of the United States, charged to him as Custodial Officer, Headquarters Eighth United States Army, to be held for the United States.

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

Specification 1: In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of Tokyo, Honshu, Japan, on or about 20 March 1946, wrongfully appropriate to his own use the following property in the custody of the United States, viz, about Five Hundred (500) diamonds, of the value of about Two Hundred Thousand Dollars ($200,000.00).

Specification 2: In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of Tokyo, Honshu, Japan, on or about 19 January 1947, wrongfully appropriate to his own use the following property in the custody of the United States, viz, about Four (4) diamonds, of the value of about Ten Thousand Dollars ($10,000.00).

Specification 3: In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of San Francisco, California, United States of America, on or about 4 April 1946, without proper authority, wrongfully, knowingly and willfully introduce into the United States, without paying customs duty thereon, about Five Hundred (500) diamonds, of a value of about Two Hundred Thousand Dollars ($200,000.00).

Specification 4: In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of San Francisco, California, United States of America, on or about 3 February 1947, wrongfully, knowingly and willfully execute a United States Customs Declaration which he then and there well knew to be false in that he failed to schedule in said United States Customs Declaration Four (4) diamonds, of a value of about Ten Thousand Dollars ($10,000.00), which he then and there introduced into the United States.

Specification 5: In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of San Francisco, California, United States of America, on or about 3 February 1947, without proper authority, wrongfully, knowingly and willfully introduce into the United States, without paying customs duty thereon, about Four (4) diamonds, of a value of about Ten Thousand Dollars ($10,000.00).

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except that the amounts involved in the Specification, Charge I, and Specifications 1 and 3, Charge II, were reduced from $200,000 to $84,000 and in Specifications 2, 4, and 5, Charge II, from $10,000 to $8,000. 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 ten years. The reviewing authority approved the sentence, reduced the period of confinement to eight years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial pursuant to Article of War 48.

3. Summary of Evidence for the Prosecution

Shortly after the occupation of Japan, the Eighth United States Army was directed to seize all stocks of diamonds held or controlled by the

Japanese Government (R. 177, 347-8). Thereafter, on 21 November 1945, accused was designated by Letter Orders of the Eighth Army as "officer in charge of four vaults of the Bank of Japan, Tokyo, used as depositories by U. S. Forces for certain seized enemy property" and charged with "complete and undivided responsibility for everything pertaining to the vaults and their contents as of 0800, 22 November 1945" (R. 14, Ex.2).

In February 1946, a representative of the General Accounting Office made an audit of the Bank of Japan, including "an investigation of the activities and records * * * of the custodian of the vault" (R. 100). The auditor found that the vaults contained a great variety of precious stones, including a large quantity of diamonds in two wooden boxes (R. 100). These diamonds had been removed from their original containers at accused's direction in connection with an inventory. Instead of returning the diamonds to their original wrappings, the wrappings were discarded with a resulting loss of identity of ownership of, or notations concerning, the individual stones (101, 104, 111-113). The diamonds were carried on the custodian's records as 23,700 carats in bulk (R. 114). There was no accounting as to the number, types, or classifications of these diamonds. The only records were four "tally-in" sheets dated between 1 and 5 November 1945, which was prior to the time the accused assumed his custodial duties (R. 101, 114-6). These tally-in sheets were incomplete and they did not show the source of all the diamonds. In addition, the diamonds on hand were greatly in excess of those shown on the tally-in sheets (R. 115-116). So far as the auditor could recall, no diamonds were listed on tally-in sheets after accused became custodian (R. 117). The auditor told accused that the lack of a proper accounting system was unfair to the accused and to the Supreme Commander of the Allied Powers. Accused replied that it would be almost impossible to make an accounting of the diamonds and that "it would take more than two years to do it." (R. 102) The auditor further found that accused was "understaffed"; that he had no one capable of establishing a system of diamond accountability; and he accordingly recommended that diamond experts be called in for that purpose (101, 106).

In keeping with this recommendation, two experts were sent from the Smithsonian Institute, Washington, D. C., "to classify and evaluate diamonds and other gems held by the Custodian in the Bank of Japan." They were assisted by four Japanese. Work was commenced on 3 June 1946 and completed on 25 October 1946 (R. 77). The diamonds were appraised according to (1) size, (2) color, (3) quality, and (4) cut (R. 78). Complete accountability was established for all diamonds on hand, which amounted to over 250,000 carats (R. 82).

Prior to the arrival of the diamond experts, accused was relieved as custodian on 22 March 1946, and returned to the United States on temporary duty (R. 14, Ex. 3). Upon his return to Japan, he was again designated (8 July 1946) as custodian (R. 15, Ex. 4). He held that assignment until he was relieved on 17 January 1947 prior to his return to the United States for reassignment (R. 15, 16, Ex 5).

Upon his arrival at San Francisco aboard the SS Westminister Victory on 3 February 1947, accused was met by four Customs Officials and one Criminal Investigation Division Agent. The Customs Officials had received confidential information that accused might "have illegally introduced certain diamonds into the United States on his previous return from Japan." Under normal circumstances, officers returning to the United States are not required to file individual baggage declarations, but because of the afore-mentioned confidential information, declarations were required from each of the 22 officers aboard the SS Westminister Victory (R. 16).

The baggage declaration which was filed by accused listed articles amounting to $153 (Ex 8, R. 39). During its preparation, accused was told to declare all items, regardless of whether they were purchases or gifts (R. 23). Upon its completion, he was asked if his declaration represented all the articles he had acquired abroad, and his answer was "yes." (R. 16.) While undressing preliminary to being searched, accused removed a paper packet from the watch pocket of his trousers and placed it on the bunk in front of the Customs Agent. Upon examination, it was found to contain two large stones and two small stones which accused identified as diamonds (R. 17). Accused admitted that these four diamonds were not listed on his baggage declaration (R. 17). Accused was then advised "of his constitutional rights" and was taken to the office of the Supervising Customs Agent where he was further examined and his written, sworn statement obtained (R. 18-19).

In this statement, accused explained that he "acquired" the aforementioned four stones as "war loot in Japan" about the end of November or the first of December 1945; that "they were stones captured from the Japanese and /he/ took some of them"; that at that time he was in charge of the Eighth Army vaults in the Bank of Japan at Tokyo; that he brought an unknown number of stones to the United States when he arrived on 4 April 1946; that three or four of these were sold and that he still had the residue; that he would "guess" the total value of the stones he brought in to be "maybe $25,000"; that he did not obtain the gems from the Eighth Army vaults; and when asked where he did acquire them, he replied, "That's a question I can't answer." He did not know whether he intended to dispose of these diamonds when he acquired them, but he stated that "it was not my intention to offer the stones as a lot." He knew that it was illegal "to smuggle things in" and when asked what prompted him to take these stones, he answered:

> "Just a chance to make some quick money and the feeling that soldiers are entitled to a little loot. That's not a legitimate feeling I know." (Pros Ex 9, R. 35-38.)

Supplementing his written statement, accused stated that when he had previously brought a quantity of diamonds to the United States on the SS Marine Robinson, 4 April 1946, he had made a Customs declaration,

but had not listed the diamonds thereon (R. 27, 56). He then took the agents to a vault where these diamonds had been deposited and the diamonds found there were seized by the Customs Agents (R. 56, 24, 74).

Accused also stated that he had sold 3 or 4 diamonds to Matthew S. Black in San Francisco for $13,000 and Mr. Black's check in this amount dated 9 May 1946, payable to Mrs. E. J. Murray was received in evidence (R. 45, 71, Ex 11). Four diamonds were seized from Mr. Black by Customs Officials on 7 February 1947 (R. 22).

It was stipulated that Exhibit No. 1 consisted of the jewels seized from accused by U. S. Customs Agents at San Francisco on 3 February and from Mr. Black on 7 February 1947 (R. 22, 74-75). This exhibit was received in evidence (R. 28). It was further stipulated that Exhibit No. 1 contained 541 stones, at least 500 of which were diamonds having a total value of $92,534.40, at New York wholesale prices as of June 1946 (R. 91). The description, class, weight, and value of each diamond were also stipulated (R. 89-91). According to these stipulations, the four diamonds found in accused's possession on 3 February 1947 had a total value of $8,164.60; the four diamonds recovered from M. S. Black had a total value of $17,404.20; and the balance of the diamonds recovered from accused had a total value of $66,965.60 (R. 22, 75, 91).

Accused was returned to Japan where he was further interviewed by representatives of the Eighth Army Inspector General's and Staff Judge Advocate's Offices (R. 50). Accused's oral statements are summarized as follows:

> He was assigned as custodian of the Eighth Army vaults in the late Fall of 1945, relieved about April 1946 when he returned to the United States on temporary duty; came back to Japan in August 1946 and resumed his custodial duties until again relieved and returned to the United States for reassignment (R. 56).
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> His duties as custodian included receiving various valuable articles from tactical organizations of the United States and Allied Powers in Japan. During the last part of 1945 and early 1946, the vaults were in a confused condition because there was inadequate personnel to handle the volume of gold, diamonds, and precious stones which was being received. Diamonds were received in bags and boxes and all he could do was give a receipt for a box or a bag "said to contain diamonds" (R. 56).
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> No one had an opportunity to take any of these valuables out of the bank of Japan except himself and one other officer; they were never checked when they left and it would have been possible for him to have taken diamonds from the building without detection (R. 56).
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> He outlined the developments upon his arrival at San Francisco on 3 February 1947 and stated that his statements to the Customs

Officers were "perfectly voluntary" (R. 56). When asked where he had acquired the diamonds, "he stated that he did not buy the diamonds, that he did not find them, that no one had given them to him, that he had no idea who they belonged to, that if the diamonds now in the vaults of the Bank of Japan were captured enemy property, then the diamonds which he introduced into the United States were captured enemy property, but if the diamonds contained in the vaults of the Bank of Japan were not captured enemy property, then the diamonds he introduced into the United States were not" (R. 56).

He had acquired all of the diamonds at one time, around December 1945; he was the only one involved; the diamonds did not belong to any individual (R. 56-57), they were not obtained by trading with the enemy and he never received any diamonds anywhere outside the Building of the Bank of Japan (R. 63).

He did not think that the diamonds which were seized by the Customs Agents could be identified by receipts in the Bank of Japan (R. 66-67).

A director of Koeki Eidan testified that from 15 August until December 1944, the Japanese Government engaged in a diamond buying program through Koeki Eidan, a corporate agency of the Japanese government, and other agencies. Koeki Eidan made its purchases through department stores in six cities and thereby acquired diamonds weighing a total of 160,000 carats. Records of purchases were kept, but they were destroyed by fire in May 1945 (R. 181-194).

On 18 October 1945, Koeki Eidan surrendered nine thermos jugs and one paper envelope containing diamonds weighing a total of 106,000 carats. The transfer took place at the Mitsui Trust Company and "then the American soldiers took the diamonds and placed them in a truck or a jeep and took them to (the underground vaults of) the Bank of Japan." Receipts were requested but none were received (R. 118-120). Thereafter other diamonds were surrendered from time to time (R. 352).

Seven diamonds in Exhibit No. 1 weighing 18.44 (R. 338, 409), 10.76 (R. 203), 8.09 (R. 305), 6.26 (R. 205), 5.14 (R. 203), 4.72 (R. 247) and 4.30 (R. 203) carats, respectively, were identified as having been purchased on behalf of Koeki Eidan in connection with the Japanese government diamond purchasing program. These identifications were made by examiners employed by Koeki Eidan and by appraisers employed in department stores which had acted as buying agencies. One of the diamonds identified was included in the four found in accused's possession on 3 February 1947 (R. 22, 75, 90, 91, 305, 306), and four were included in the diamonds that accused had brought to the United States in April 1946 (R. 89, 90, 91, 202, 203, 205) and the other two were among those seized from Mr. Black (R. 22, 75, 91, 343).

Takeo Kume, a jeweler for 45 years and an importer of diamonds for 20 years, testified that he was employed as diamond appraiser for Koeki

Eidan from August 1944 to March 1945 and during that period he recorded in a personal notebook the weight, width, depth, and purchase price of 15 unusual stones which were purchased by Koeki Eidan (R. 200, 215, 225). He thereupon identified four diamonds in Exhibit 1 as being similar in weight, width, depth, and price to diamonds described in his notebook (R. 203, 205, 211-212, 227). He testified that it was very unusual to find four stones of identical measurements in Japan and there was no doubt in his mind that the four stones he selected from Exhibit 1 were the same ones described in his notebook as being purchased by Koeki Eidan (R. 227, 235).

Hirozo Suzuki, a jeweler for over 25 years, was employed as a diamond appraiser by the Matsuya Department Store in connection with the Japanese government diamond buying program. He identified one of the diamonds in Exhibit 1 as the same stone he had purchased on 27 October 1944 from Koyo Fuminami. He also identified the purchase slip which was prepared in connection with this purchase (Ex. 16). The stone was an emerald-cut, canary-yellow diamond which made a deep impression because of its color and shape. He had never handled an emerald cut diamond of the same weight and did not think there was another stone like it in Japan (R. 237-255). Mrs. Koyo Fuminami also identified the diamond in question as one she bought in Canada in 1929 and sold in October 1944 to the Matsuya Department Store (R. 256-259). This diamond was one of the diamonds seized from Mr. Black (R. 22, 75, 91).

Brigadier General Patrick H. Tansay testified that he had been Civilian Property Custodian, SCAP, since 9 March 1946; that when diamonds were delivered to the Bank of Japan vaults, they were under the Eighth Army custodian, that there was no way that military personnel could legitimately acquire Koeki Eidan diamonds, that there was no law against civilians having diamonds, that "large amounts of diamonds" were turned in after witness took office, that Colonel Murray was not authorized to take any diamonds from Japan to the United States (R. 348, 354).

4. Summary of Evidence for the Accused.

By cross-examination of prosecution's witnesses, the following evidence was adduced:

(1) Accused's baggage declaration on 3 February 1947 (Ex. 8) bears no notation of imposition of a duty or fine (R. 40).

(2) That when Koeki Eidan surrendered its diamonds to the Eighth Army on 18 October 1945, there were many other diamonds in Japan which were not in custody of Koeki Eidan (R. 181-194).

(3) That it was not unlawful for Allied Nationals in Japan to possess diamonds (R. 177, 349).

(4) That there was no Army record that the diamonds seized by the Customs Agents were ever in the custody of the United States or in the Eighth Army vaults (R. 85).

(5) The Army records in the Bank of Japan disclosed no shortage of diamonds (R. 84).

(6) Accused repeatedly told Customs Agents that the diamonds did not come from Eighth Army vaults and everyone present was satisfied at that time with his answer (R. 48).

(7) That nothing in the Customs investigation developed that the diamonds had been charged to accused as Custodian of Vaults (R. 47).

(8) That accused cooperated with Customs authorities to the "Nth degree" except as to recalling where he obtained the stones (R. 49).

(9) That accused was not offered an opportunity to amend his baggage declaration (R. 122-3).

The defense introduced copies of orders authorizing and directing accused to proceed to the United States in March 1946 and January 1947 (Def Ex. 1, 2, and 3, R. 386-388).

Three Japanese, who were experienced in weighing diamonds, testified that they had visited the Eighth Army vaults in the Bank of Japan and had found diamonds there which weighed 4.30, 4.68, 4.72, 5.15 and 10.77 carats, these being weights almost identical with four of the seven diamonds identified by the prosecution's witnesses as having been purchased in connection with the Japanese Government Program and found in Exhibit 1. None of these three witnesses measured the five diamonds they found at the vaults nor did they observe or testify to their exact cut or color (R. 389-402).

Three Army officers testified that accused's reputation among people who knew him was good and that he was successful in handling a difficult assignment at Iloilo, East of Panay (R. 403-4).

It was stipulated that Colonel James G. Devine, if present, would testify that he was assistant to accused from 6 November 1946 to 17 January 1947 when he succeeded accused as Custodian of Eighth Army Vaults; that there was no determined shortage in the diamond account when he signed for the property in the vaults; and that in his opinion accused was honest, sincere, and thorough (R. 405).

After being advised of his rights as a witness, accused made an unsworn statement as follows:

"I did not take these diamonds from the Eight Army vaults in the Bank of Japan and so far as I know they were never there. To the best of my knowledge they were never in the custody of the United States until they were delivered to customs agents at San Francisco on 3 February 1947. They were all

acquired at one time and I was the only person involved. I was not aware of their great value and kept them in my room at the Dai Iti Hotel in a small cardboard calling-card box. When I went home on temporary duty in March, 1946, I carried the box in my pocket and after arrival gave it to my wife. We freely showed the stones to relatives, friends and visitors along with other souvenirs such as Samurai swords, pistol, pottery, lacquer ware, wood cuts, etc. My wife became dubious as to the value of some of the stones and took them to Mr. Black, a diamond broker, for appraisal. He offered to buy them at a price which astonished her by its size. She refused to sell at the time, but some days later returned and sold four stones to him. I had been carrying several loose stones in my pocket, and four of them I brought back with me when I returned to Japan in June, 1946. These are the four stones I gave to customs agents on board the Westminister Victory 3 February 1947. A few small stones which had been given to a friend were not available when I was at San Francisco in February, 1947, but before being returned to Japan I left instructions to deliver them to customs authorities. I understand this has been done and therefore all stones which I had in my possession are now accounted for." (Def Ex. 5, R. 407)

5. Sufficiency of Proof — Specification of Charge I and Specification 1 of Charge II.

The accused was found guilty of the Specification of Charge I and Specification 1 of Charge II of the wrongful appropriation 20 March 1946, of 500 diamonds in the custody of the United States of an established value of $84,000. Both specifications describe the same offense, but the specification of Charge I is alleged as a violation of Article of War 95, whereas Specification 1, Charge II, is alleged as a violation of Article of War 96. In order to warrant the confirmation of these findings it is necessary that the evidence show beyond a reasonable doubt that the accused did, on or about 20 March 1946, wrongfully and willfully appropriate to his own use 500 diamonds which were then in the custody of the United States.

The uncontroverted evidence shows that the accused was appointed on 21 November 1945 "officer in charge" of four vaults in the Bank of Japan which were then being used as depositories for certain seized enemy property, including a large quantity of diamonds. The tally-in sheets which purported to show the diamonds in the vaults at the time of the accused's appointment were incomplete and the diamonds in the vaults were found to be greatly in excess of the 23,700 carats listed on the tally-in records. It appears that no diamonds were listed on tally-in sheets after the accused became custodian and that the original wrappings which had accompanied the diamonds at the time of their delivery to the vaults, and which might have shown the identity or the source of their

ownership, had been destroyed. Upon the recommendation of an auditor, an appraisal of the diamonds in the vaults was made between 3 June and 25 October 1946, with the result that such diamonds were then reported as being in excess of 250,000 carats.

A large quantity of diamonds deposited in the vaults of the Bank of Japan was shown to have been purchased for the Government of Japan by Koeki Eidan, a Japanese government agency, through a number of local department stores. The evidence clearly shows that the accused was relieved of his duties as custodian at the bank vaults on 22 March 1946, and that he immediately thereafter returned to the United States bringing with him over 500 diamonds. The accused stated that he had acquired all of these diamonds about December 1945, which was approximately a month after he became custodian of the vaults. Although he denied that he had taken any of these diamonds from the vaults of the Bank of Japan, he stated that if the diamonds in the Bank of Japan were captured enemy property, then the diamonds introduced by him into the United States were also captured enemy property. He also stated that he had never received any diamonds anywhere outside of the Bank of Japan. When he was questioned as to why he had taken the 500 diamonds, he replied:

> "Just a chance to make some quick money and the feeling that soldiers are entitled to a little loot. That's not a legitimate feeling, I know."

The above evidence shows beyond a reasonable doubt that the accused wrongfully acquired over 500 diamonds of a value of $92,534.40 while officer in charge of the vaults of the Bank of Japan, and that he admitted that he had not acquired them from trading with the enemy. Despite this evidence showing that the accused had wrongfully acquired the property in question, it is essential to a confirmation of the court's findings of guilty, that the proof also established that the 500 diamonds in question were in the custody of the United States.

Highly relevant to the question of the custody of the diamonds are the statements of the accused. Although he denied that the diamonds were in the custody of the United States, it is not shown that he understood the meaning of the term. He admitted that the diamonds were captured enemy property and that he had received them during the time when he was custodian of the vaults. By his further statement that he had not obtained the diamonds by trading with the enemy and that he had never received any diamonds anywhere outside the building of the Bank of Japan, he narrowed to one place the scene of his wrongful appropriation. Obviously, if he had never received any diamonds anywhere except in the Bank of Japan, it follows that he received them there. It is equally obvious that the accused, as an officer of the United States Army and as custodian of the vaults of the Bank of Japan, could not receive any so-called war loot or diamonds belonging to the enemy except in his

official capacity, and that consequently any diamonds which he received came automatically into the custody of the United States. (CM 324235, Durant, and authorities therein cited.) The fact that he may have violated his trust by appropriating them to his own use without physically placing them in the vaults is immaterial. An agent cannot defeat a misappropriation by merely failing to place property in a designated receptacle. The custodianship of a principal is established the moment property designed for the principal reaches the agent's fingers, slippery though they may be.

The principles of evidence require, however, that there shall be evidence, independent of the statements of the accused, tending to establish that the alleged appropriation was probably committed. On this point the Manual for Courts-Martial states that:

> "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." (M.C.M., 1928, par. 114.)

The evidence shows that at the time the accused was appointed as custodian at the vaults of the Bank of Japan, a great quantity of diamonds had been surrendered by Koeki Eidan, and that after accused became custodian, other quantities were surrendered by the afore-named Japanese government agency. Although there are no records to identify these diamonds or to show the accountability of the accused therefor, seven of the 527 diamonds received as Prosecution's Exhibit No. 1 were identified as having been purchased in 1944 by Koeki Eidan, and five of these seven diamonds were shown to have been recovered from accused. Of these seven identifications, two must be rejected from our consideration. This is true because two of the identified diamonds were among the four diamonds seized from Mr. Black, the jeweler in California who purchased four unidentified diamonds from the accused's wife, and because the four diamonds seized were not clearly shown to have been the same diamonds which were delivered by the accused's wife to Mr. Black. There remains, however, for consideration, clear evidence establishing that five of the diamonds surrendered by the accused had been purchased by the Koeki Eidan, as an agency for the Japanese government. In view of this fact, and the proof that a great quantity of diamonds had been surrendered by that Japanese governmental agency into the custody of the United States and placed in the vaults of the Bank of Japan, there is shown to exist a strong and reasonable probability, independent of any statement of the accused, that the five identified diamonds found in his possession in the United States were wrongfully missing from the vaults of the Bank of Japan and from the custody of the United States.

The justification and logic for such a conclusion was early recognized in English law. In the case of Rex v. Burton, Dears Cr. C. 282, the defendant was found coming out of a warehouse with pepper in his pockets. The pepper was of a sort similar to that on the next floor above in the warehouse, but it could not be shown that any pepper was missing. In admitting this evidence, Maule, J., said:

> "If a man go into the London docks sober without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine was missed." (Quoted in Wigmore on Evidence, 3rd Ed., Vol 1, p. 599.)

The evidence in the instant case, similar to the evidence in the case quoted above, is thus sufficient, particularly when viewed in the light of accused's admissions, to establish that the five diamonds in question had been wrongfully and unlawfully removed from the custody of the United States.

It follows that since the five diamonds were part of a larger number of diamonds to which the accused had access and over which he had custody, and since they were also part of the five hundred and twenty-seven diamonds found in his possession, all of which were admittedly procured in the building of the Bank of Japan, the court was warranted in concluding that the accused had wrongfully taken the five hundred diamonds, as well as the five identified diamonds. In CM 317327, Durant 66 BR 277, 306, the Board of Review in considering a similar problem, made the statement as follows:

> "* * * Evidence of possession by accused of part of the property allegedly stolen, the circumstances indicating that such part was in fact stolen by her, coupled with proof that accused and her accomplices had access to it all, is a sufficient corroboration of her confession that she and her accomplices, acting together, had stolen the whole (CM 314092, Bishop; CM 257990, Mosser, 3 BR (ETO) 177, 185; CM 262039, Cochran, 4 BR (ETO) 321, 322). * * *" See also: CM 319591 Pogue, 68 BR 385 and CM 307143 Klingensmith 60 BR 379, 1st Ind.

In view of the convincing character of the evidence, the Board of Review concludes that the evidence sustains, beyond a reason of doubt, the findings of guilty of the Specification of Charge I and Specification 1 of Charge II, and Charge I and II.

6. Sufficiency of Proof — Specification 2, Charge II

Under Specification 2, Charge II, the accused was found guilty of having wrongfully appropriated on 19 January 1947 four diamonds in the custody of the United States.

The four diamonds in question were taken from the accused on the occasion of his second return trip to the United States on 3 February 1947. One of the diamonds was identified as having been purchased for the Japanese Government by the Koeki Eidan and all the evidence as discussed in paragraph 5 supa indicates that these four diamonds were in the custody of the United States and were appropriated by the accused, as were the 500 diamonds.

The only problem which the finding in question presents is whether the four diamonds were appropriated on or about the date alleged. On the one hand, the accused stated that all the diamonds surrendered by him had been taken by him on one occasion in December 1945, prior to his first return trip to the United States on 4 April 1946. He explained further that he had returned to Japan with the four diamonds leaving the five hundred odd diamonds in the United States, and thereafter returned to the United States with the four diamonds a second time. On the other hand, the evidence shows that he was released as custodian of the vaults on 17 January 1947, and that shortly thereafter the four diamonds were found secreted upon his person on the occasion of his re-entry into the United States.

In view of these facts, and since the accused had by his own conduct separated the four diamonds from the 500 diamonds and had taken the four diamonds from Japan near or about the date alleged, it was reasonable to allege the wrongful appropriation of the four diamonds as a separate transaction and equally reasonable for the court to have found that the appropriation occurred, that is, was completed, on or about the date charged.

The purpose of stating the date of an offense in a specification is to assist in apprising the accused of the particular act in question and to fix the time thereof for the purpose of the statute of limitations. It is believed that the specification under consideration meets these requirements, and that it alleged within a reasonable range the date of the actual misappropriation (M.C.M., 1928, par 27). In CM 204879, Flishcher, 8 BR 121, the Board of Review in considering the appropriateness of alleging an embezzlement as occurring over a period of March 1, 1934, to about July 31, 1935, stated:

> "* * * The practice of charging embezzlement in the manner followed in the specification objected to has been approved by the Federal courts as well as by the Board of Review on the ground that so long as the commission of the offense is laid within the statute of limitations the time of the same is immaterial, and it would be futile to require the pleader to allege a specific, definite time. Sec. 1564 (3), Dig. Ops. JAG, 1912-30, and authorities therein cited, including Moore v. United States, 160 U. S. 258."

Since it is reasonable to infer that the offense was committed on or about the alleged date, the Board of Review is of the opinion that the evidence sustained beyond a reasonable doubt the findings of guilty of Specification 2 of Charge II, and Charge II.

7. Sufficiency of Proof — Specifications 3 and 5, Charge II.

Under Specification 3, Charge II, the accused was found guilty of wrongfully and willfully introducing on 4 April 1946, five hundred diamonds of a value of $84,000 into the United States without paying customs duty thereon. Under Specification 5, Charge II, the accused was found guilty of committing the same offense on 3 February 1947 by introducing four diamonds of a value of $8,000 into the United States.

Section 1593 (a), Title 17, United States Code, makes it an offense for anyone to smuggle or clandestinely introduce into the United States, any merchandise which should have been invoiced. Section 1593 (c) provides that in prosecutions for violations under this section, possession of such uninvoiced goods "shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession thereof to the satisfaction of the jury."

"A person becomes guilty of smuggling by avoiding the first opportunity to make a declaration and pay the duty." Rogers v. United States 180 F. 54, 58, 31 LRA (NS) 264.

The facts in instant case are almost identical with those in the case of Newman v. United States (CCA NY 1921) 276 F. 798, certiorari denied 258 U.S. 623. Newman was found guilty of smuggling on the following facts: After preparing his declaration, Newman was asked by a Customs inspector whether he had declared everything and he gave an affirmative reply. Two other Customs officials asked similar questions and received like answers. He was then taken back to his cabin and searched. Thirteen undeclared diamonds were found concealed in fountain pens and in a tube of toothpaste. The Circuit Court of Appeals held that -

> "When, after repeated inquiry made on the pier, Newman persisted that he had nothing to declare, at a time when his written declaration had been made to Maxton, and when he made no mention therein of these diamonds, the act of smuggling was complete."

The defense made no effort to deny the facts relating to the introduction of diamonds into the United States as alleged, but strongly urged that Public Law 633 passed by the 77th Congress (50 U.S.C. 801, 802) exempted military personnel from Customs regulations and the acts of accused were therefore neither wrongful nor illegal.

Public Law 633 provides, in part, as follows: "Under such regulations as the Secretary of the Treasury may prescribe, the personal and

household effects of any person in the service of the United States, or of his family, or of any person evacuated to the United States under Government orders, may be brought into the United States or any of its possessions pursuant to Government orders or instructions, without the payment of any duty or tax imposed upon or by reason of importation."

The following regulations were promulgated by the Secretary of Treasury pursuant to the provisions of section 1 of the act (Treasury Decision 50678):

Sec. 8.26b FREE ENTRY OF PERSONAL AND HOUSEHOLD EFFECTS OF CERTAIN CLASSES OF PERSONS IN THE SERVICE OF THE UNITED STATES, OF THEIR FAMILIES, AND OF EVACUEES.

"(a) Under Public Law 633, approved June 27, 1942, free entry may be accorded to the personal and household effects of any person evacuated to the United States under Government orders and to the personal and household effects of any person in the service of the United States, or of his family, which are forwarded to the United States by reason of Government instructions regarding the movement of the owner or the articles, whether or not the owner returns to this country.

"(b) The act does not apply to articles imported for sale (Underscoring supplied), but the term "personal effects" as used therein is not confined to that class of articles described in the first provisions of paragraph 1798, Tariff Act of 1930, as amended (U.S.C. 1940 ed. sec. 1201, par. 1798): nor is any period of use, such as is prescribed by paragraph 1632, Tariff Act of 1930 (U.S.C. 1940 ed. sec. 1201, par. 1632), applicable to household effects entered under this act.

"(c) All articles for which free entry is claimed under the act shall be entered or withdrawn in accordance with the requirements prescribed by the Tariff Act of 1930. The Bureau has not prepared forms of declarations or certificates to be filed in connection with such entries or withdrawals. Collectors of customs shall, therefore, accord free entry under the statute upon the production of satisfactory proof that the articles are entitled to the benefit thereof.

"(d) Certified or other invoices shall not be required for articles accorded free entry under the act."

The defense counsel called the attention of the court to Eighth Army Circular 314 dated 10 December 1945 which in turn referred to War Department letter, File AG 524, 13 August 1945, OB-S-D-M 23 August 1945, subject "Processing of Baggage." The Circular stated as follows:

"Considerable difficulty is being experienced with military personnel, particularly senior officers, with regard to customs regulations on entering the United States. Unless specifically exempted, personnel returning to the United States are subject to customs inspections." (Underscoring supplied.)

The War Department letter, referred to above, quotes the above-mentioned Public Law 633 and outlines detailed instructions for the processing of baggage of military personnel returning to the United States.

It should be noted that both Treasury Department and War Department regulations specifically state that "articles acquired abroad for resale * * * are not entitled to duty free admission under the provisions of the Act cited above" (par 11c, WD letter and par. c of Treasury Decision 50678, R 374).

Accused's statement that he acquired the diamonds because he thought he could make some quick money and his admitted sale of four diamonds for $13,000 clearly indicates that the stones were acquired for resale and were not duty free under Public Law 633 and the regulations issued pursuant thereto.

Although paragraph 22 of the above-mentioned War Department letter states that "by mutual agreement between the War Deparmment and the Bureau of Customs, baggage * * * except for dutiable or restricted articles will not normally be submitted to further inspection by customs officers at United States ports;" and paragraph 31 thereof provides that baggage "will be released from customs at the United States ports without further inspection, unless the customs official concerned * * * has reason to believe that some special reason exists for examining a particular piece or lot of baggage", paragraph 33 authorizes port commanders to make spot inspections at any time.

Paragraph 35 provides for the withdrawal of the following items found in baggage during inspections:

"b. Captured materials trophies not accompanied by a certificate of retention (as required by 12C (4) above).

* * * * * * * * * *

"d. Items, the shipment of which is prohibited or restricted by competent authority."

Paragraph 37 states that "any items which are not deemed to be entitled to duty free admission under Public Law 633 (see Par 11) will be turned over to the Customs Officials."

The War Department letter also refers to War Department Circular 155, Sec. VI, 26 May 1945, which authorizes military personnel to retain certain captured enemy material "in accordance with the instructions contained herein." Pertinent portions of these instructions are quoted as follows:

> "1d. It is not the intention of these instructions to permit the return of war trophies for sale or barter in the United States. The return of several of any similar items of enemy equipment by an individual under this regulation may be considered an indication of intent to traffic in war trophies and can be cause for confiscation of all such items shipped or brought into the United States by the individual."

> "4. * * * trophies not prohibited * * * must have a certificate, signed by his superior officer * * *. The signed duplicate certificate will be taken up by * * * or the Customs Bureau * * *."

> "8b. All captured enemy Army material brought or shipped to the United States in violation of the instructions contained herein will be seized by the Customs Bureau * * *."

It is apparent from the above quotations that military personnel were not granted a blanket exemption from Customs regulations; that under Public Law 633 and the regulations of the Treasury and War Departments, military personnel were required to make Customs declarations and to pay duties on property acquired abroad for resale; that inspections of baggage were authorized both overseas and at the port of entry into the United States; and that articles discovered during such inspections which were not entitled to duty free admission were to be turned over to the Customs Officials.

The Board of Review is of the opinion that the record of trial establishes beyond any reasonable doubt that the accused illegally introduced diamonds into the United States on the two occasions as alleged, in violation of Section 1593(a), Title 17, U. S. Code and sustains the findings of guilty of Specifications 3 and 5 of Charge II, and Charge II.

8. Sufficiency of Proof — Specification 4, Charge II.

Under Specification 4, Charge II, the accused was found guilty of having wrongfully and willfully executed a United States Customs Declaration on 3 February 1947, when he knew it was false in that he had failed to schedule in his declaration four diamonds at a value of $8,000.

The evidence shows beyond question that the accused executed the alleged declaration upon his entry into the United States on 3 February 1947, and that he failed to list thereon four diamonds which he then had upon his person of a value of $8,000. For an officer to make such a

false declaration, regardless of whether he was legally required to do so, was conduct of a nature to bring discredit upon the military service. The findings of guilty of Specification 4, Charge II, and Charge II are clearly sustained.

9. Pretrial Interview

When the accused was returned under guard to Japan in February 1947, he was interviewed by the Inspector General and a representative from the office of the Staff Judge Advocate. At the beginning of this interview, the accused stated that "He would rather not say anything without the advice of counsel." The Inspector General told him that he was not entitled to counsel in this type investigation and that there were certain questions which he would be required to answer. The Judge Advocate's representative told the accused that "he certainly had the right to refuse to make a statement or answer questions which might tend to incriminate him," but he could be required to answer questions as to his name, rank, etc. Accused replied, "Well, I want to cooperate. I don't want to be obstinate. Suppose you ask me some questions." (R. 59) Accused thereupon answered various questions, but declined to answer a question concerning the exact source of the diamonds found in his possession (R. 70).

It appears, therefore, that the accused after first objecting to this interview willingly proceeded with it, but declined to reveal the source of the diamonds found in his possession. In view of these facts and the rank and experience of the accused as an officer, the Board of Review is of the opinion that his substantial rights were not injuriously affected by the interview.

10. Appearance of Counsel and Matters Outside the Record

On 21 October 1947 Mr. Burr Tracy Ansell of the law firm of Ansell and Ansell presented a brief and oral argument to the Board of Review. Careful consideration has been given to both argument and brief. In support of his brief and oral argument, Mr. Ansell presented two affidavits signed by Major Ralph S. Johnson, the defense counsel for the accused, and one affidavit by Mr. Frederick C. Taylor, the brother-in-law of the accused. One of the affidavits of Major Johnson tends to impeach the fairness of the court by accusing General Chase, the president of the court, of asking Brigadier General Patrick H. Tansey in a telephone conversation the following question: "Is there anything that your office can do to gather more evidence to help us get a conviction?"

The second affidavit of Major Johnson and the affidavit of Mr. Taylor seek to attack the fairness of the trial judge advocate in his pretrial conferences with certain Japanese expert witnesses concerning their identification of certain diamonds by quoting the Staff Judge Advocate as having said, "I have certainly had to sweat them out, and even at that, I am not so sure about their standing up when they actually appear as witnesses."

As a result of the filing of the above-described affidavits, an investigation was conducted by Brigadier General Richard D. Tindall of the Inspector General's Department. During this investigation, sixty-five witnesses were interrogated concerning the matters in question. This investigation shows that Major Johnson, the defense counsel, disavows the more important part of his affidavit by denying that General Chase used the words "to help us get a conviction" although he insisted that General Chase "practically used those words." All the persons who were present on the occasion when General Chase allegedly made the statement in question either denied that he made that statement or did not hear such a statement made. Each of the witnesses who testified as experts in identifying certain diamonds reaffirmed their testimony and asserted that no pressure had ever been brought to bear upon them to testify in any particular manner.

From a consideration of the entire investigation report concerning this case, it appears that the accusations presented in the affidavits previously described were unwarranted and without substance. It further appears from the statements of many affiants, including every member of the court, that the accused was given a fair and impartial trial as required by law.

11. War Department records show that this officer is 56 years of age, married, and has one daughter. He finished two years of high school and five years of correspondence school. After serving three years as an enlisted man in the California National Guard, he was commissioned a Second Lieutenant 19 June 1916 and served on the Mexican Border. He has had continuous National Guard service since that time, receiving his promotion to Colonel on 9 November 1937. He was called to active duty on 3 March 1941. He was awarded a Bronze Star Medal on 27 February 1945, a Silver Star Medal on 11 June 1945, and the Legion of Merit on 28 June 1946. Prior to active Military duty, accused was employed (1924-1941) as a bridge engineer with the California State Highway Department.

12. The court was legally constituted and had jurisdiction over the accused and the subject matter of the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and legally sufficient to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lifsgood, Judge Advocate

W H Johnson, Judge Advocate

Gilbert P. Hood, Judge Advocate

JAGQ - CM 324272 1st Ind MAR 5 1949

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Colonel Edward J. Murray (O-166578), Infantry.

2. On trial by general court-martial this officer was found guilty of the following offenses:

a. Wrongful appropriation to his own use on 20 March 1946 of about 500 diamonds in the custody of the United States, of a value of $84,000, intrusted to him as custodian of the vaults of the Bank of Japan, in violation of Article of War 95 (Spec., Charge I);

b. Wrongful appropriation to his own use, on 20 March 1946, of 500 diamonds (same property and value as 2a) in the custody of the United States (Spec. 1, Charge II); and similar appropriation of four diamonds, on 19 January 1947, of a value of $8,000, in violation of Article of War 96 (Spec. 2, Charge II);

c. Wrongfully introducing 500 diamonds of a value of $84,000 into the United States without paying customs duties thereon, on 4 April 1946, and of repeating this offense on 3 February 1947, by the wrongful introduction of four diamonds of a value of $8,000 into the United States without paying duty thereon, in violation of Article of War 96 (Specs. 3 and 5, Charge II); and

d. Wrongfully executing on 3 February 1947 a United States customs declaration which he knew to be false in that he knew that he had failed to schedule in that declaration four diamonds of a value of $8,000, in violation of Article of War 96 (Spec. 4, Charge II).

The accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 10 years. The reviewing authority approved the sentence, but reduced the period of confinement to eight years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial pursuant to Article of War 48.

3. A summary of 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 legally sufficient to support the sentence and to warrant confirmation thereof.

The record shows that on 21 November 1945 the accused was appointed "officer in charge" of four vaults in the Bank of Japan which were then being used as depositories for certain seized enemy property, including a large quantity of diamonds. On 22 March 1946, the accused was relieved of his duties as custodian and returned to the United States on temporary duty. On this first return trip he admittedly brought over 500 diamonds with him. Later, he returned to Japan and resumed his former position there. On 17 January 1947, he was relieved of those duties and returned again to the United States.

Upon his arrival at San Francisco on 3 February 1947 he filed a false baggage declaration. During the search of his person and possession which followed, he surrendered to the customs officials four diamonds of a value of $8,000. He admitted that he had acquired those four diamonds and the 500 additional diamonds while in Japan. He also stated that if the diamonds in the vaults of the Bank of Japan were captured enemy property, then the diamonds introduced by him into the United States were also captured enemy property. He further admitted that he had never received any diamonds anywhere outside the building of the Bank of Japan. When asked in the course of a formal investigation why he had taken the diamonds, he made the following statement under oath:

> "Just a chance to make some quick money and the feeling that soldiers are entitled to a little loot. That's not a legitimate feeling, I know."

This professed desire for "quick money" is corroborated by the fact that on 9 May 1946 he sold four diamonds through his wife to a jeweler in San Francisco, for $13,000.

4. On 21 October 1947 Mr. Burr Tracy Ansell of the law firm of Ansell & Ansell presented a brief and oral argument to the Board of Review. In support of his brief and oral argument, Mr. Ansell presented two affidavits signed by Major Ralph S. Johnston, the defense counsel for the accused, and an affidavit by Mr. Frederick C. Taylor, a brother-in-law of the accused. Later, certain other affidavits signed by witnesses who testified during the trial were presented. These affidavits tended to impeach the fairness of the court and the fairness of the trial judge advocate in the presentation of evidence.

In view of the filing of the above-described affidavits, the Inspector General's Department was requested to conduct an investigation

in order to determine the merit of the matter in question. The report of this investigation shows that the allegations presented by the affidavits were unwarranted and without substance. Statements of many affiants, including every member of the court and all the witnesses who testified support the record of trial and the conclusion that the accused was given a fair and impartial trial.

Appropriate consideration has been given to a copy of a letter to United States Senator Sherman Downey from three citizens of Sacramento, California, transmitted by the Honorable Leroy Johnson, House of Representatives, and to a statement addressed to Senator Downey signed by a number of citizens of Sacramento, attesting Colonel Murray's previous good reputation and urging clemency in his behalf.

5. The accused is approximately 56 years of age. He is married and has one daughter. He completed two years of high school studies and five years of correspondence school work. After serving three years as an enlisted man in the National Guard, he was commissioned a 2nd Lieutenant of Infantry on 19 June 1916, and served thereafter on the Mexican border. He has had continuous National Guard service and was promoted to the rank of colonel on 9 November 1937. He was called to active duty on 3 March 1941. He has been awarded the Bronze Star Medal, the Silver Star Medal, and the Legion of Merit. Prior to his entry upon active military service, he was employed as a bridge engineer by the California State Highway Department.

6. The Special Defense Counsel in a plea for clemency recommended that the period of confinement imposed be remitted. He recites, in support of his plea, the facts that the accused has served his country honorably in two wars; that all of his ratings on Form 66-1 have been "Superior"; that dismissal alone involves severe punishment for the accused; that he has cooperated with the authorities and made restitution of all of the diamonds appropriated; that he is of the advanced age of fifty-seven and is contrite and penitent. Five of the nine members of the court concurred in this recommendation to the extent that they recommended that the period of confinement be reduced to five years.

7. The accused has been found guilty not only of the wrongful appropriation of a large quantity of valuable diamonds intrusted to his care as custodian of the vaults of the Bank of Japan, but of wrongfully introducing those diamonds into the United States in violation of customs regulations, and of making a false declaration concerning four of them. In committing these offenses, he has violated a solemn trust, has dishonored himself as an officer and a gentleman, and has brought grave discredit upon the Army of the United States. Accordingly, stern punishment is warranted. In view, however, of his previous long and apparently honorable service, and his conduct in returning 500 odd diamonds to the

custody of the United States, I believe that he is worthy of clemency. In view of these facts, the advanced age of the accused, and the recommendation of five of the nine members of the court that the sentence be reduced to five years, I recommend that the sentence be confirmed, but that the period of confinement be reduced to five years, that as thus modified the sentence be ordered into execution and that a United States Disciplinary Barracks be designated as the place of confinement.

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

CM 324272

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 85, 19 April 1948).

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

JAGK - CM 324701

6 MAY 1948

UNITED STATES v. Sergeant SAMUEL STEVENSON (RA 34853692), 510 Military Police Service Platoon	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Heidelberg, Germany, 25 November, 2,10,11 and 12 December 1947. To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Samuel Stevenson, 510th Military Police Service Platoon, did, at Mannheim, Germany, on or about 8 March 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one First Sergeant Burchard L. Buckner, a human being, by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

Preliminary Matters

The trial herein was upon rehearing. The sentence "to be hanged by the neck until dead" adjudged on 20 May 1947 was disapproved because of an error prejudicial to the substantial rights of the accused committed at the first trial.

When the court convened on 25 November 1947 the accused introduced as special defense counsel Lieutenant Colonel C. R. Piper and Captain Willis

R. Stark who had defended him upon the first hearing and who had been, at accused's request, recalled from the United States for this purpose. At the request of the defense the court granted a continuance to enable counsel to prepare for the trial. At the next session of the court on 2 December 1947 it appeared that Captain Stark had been hospitalized and was not able to take part in the defense of the accused. Accordingly, another continuance was granted at the request of the defense to 10 December 1947. At that time the accused introduced as special defense counsel Mr. Robert Conner, a civilian employee of the Government, who had been made available to the accused at his request, in addition to Lieutenant Colonel Piper and the regularly appointed assistant defense counsel, Captain Siegel. Accused consented to absence of regularly appointed defense counsel Lieutenant Colonel Wellen. Upon being asked by the president of the court if he was willing to proceed with the trial the accused replied he would like to have Captain Stark but that if it were the court's wish to proceed without Captain Stark he was willing to do so. The prosecution presented evidence establishing that Captain Stark had been declared unavailable by the appointing authority to take part in the trial due to his physical incapacity and the president ordered the trial to proceed. After the court and prosecution had been sworn the court closed and upon reopening declared through the president that the court was of the opinion that the trial would proceed without Captain Stark as sufficient counsel had been provided for the defense. After arraignment and plea of the accused had been received the defense made a "plea in abatement" to proceeding without Captain Stark. The law member overruled the plea but upon objection of one of the members the court closed and upon reopening the president announced that the ruling of the law member had been sustained.

The accused was asked if he realized that Lieutenant Colonel Piper had been the investigating officer and if he still wanted him to act as his special defense counsel, to which the accused replied in the affirmative (R 1-18).

For the Prosecution

On the evening of 8 March 1947 the 510th Military Police Service Platoon stationed at Gartenstadt near Mannheim, Germany, sponsored a party for the men and their dates. Sergeant Joseph J. Garrett, "duty NCO" for that evening, observed the accused, Sergeant Samuel Stevenson and First Sergeant Burchard L. Buckner, all members of the 510th Military Police Service Platoon, at the party. After leaving the party and at about 11:30 p.m. Sergeant Garrett went to his quarters to get his overcoat. While there he again saw accused in the hallway and upon leaving he met Sergeant Buckner and Sergeant Fortune who were checking the barracks for women. Sergeant Garrett went back to his billets with them. They met the accused with a girl just leaving the building. In response to Sergeant Fortune's query as to why the girl was there the accused said that she wanted to use the latrine. Sergeant Buckner, however, would not accept any explanation and he appeared quite angry. Sergeant Buckner ordered Sergeant Fortune to take the girl to the

orderly room first and then to the police station. The accused demanded an explanation and argued about the matter but Sergeant Buckner said nothing. They all went to the orderly room. Sergeant Garrett, upon instructions from Sergeant Buckner went after Lieutenant William King, the company commander, and the accused left. The accused returned shortly to the orderly room dressed in his OD uniform, Sam Browne belt, and pistol holster, prepared to go on patrol duty at 11:30 p.m. Accused again tried to explain to Sergeant Buckner why the girl was in the barracks but he would not pay any attention, which made the accused very angry (R 19-21,29,31, 37-40).

When Lieutenant King arrived at the orderly room he talked to Sergeant Buckner for about three minutes and then called the accused into his office. The lieutenant informed the accused that Sergeant Garrett would prepare court-martial charges against him and that he was in arrest of quarters. He then ordered accused to go to his room which was upstairs over the orderly room. At the same time Lieutenant King relieved the accused of his .45 caliber pistol and gave it to Private First Class Wade, the Charge of Quarters, to retum to the arms room. Accused then left the office (R 21, 22,40,41,53-56,74).

Private First Class Harold G. Meyers, the assistant armorer, testified that he issued a .45 caliber pistol to the accused at about "11 p.m." and about two or three minutes later issued another .45 caliber pistol to Sergeant Buckner, who left the arms room abruptly without signing for it as was required. About 15 or 20 minutes after accused had drawn his pistol he returned to the arms room and drew another .45 caliber pistol for one Williams, a member of his patrol. Within five to eight minutes the witness heard two or three shots (R 75-80).

Shortly after being ordered to go to his room the accused appeared in the doorway between the orderly room and Lieutenant King's office. Lieutenant King was sitting at his desk and Sergeant Buckner was standing in front of it, to one side facing Lieutenant King. The accused said, "Sgt Buckner, I have something for you." Sergeant Buckner turned to face the accused, who immediately fired a .45 caliber pistol at Sergeant Buckner from a distance of about five feet. Sergeant Buckner then staggered back and raised his arms, "elbows waist high hands extended upwards." The accused then walked toward Sergeant Buckner and fired four or five shots directly at him. Sergeant Buckner fell to the floor in front of Lieutenant King's desk and lay there in a pool of blood 1-1/2 to two feet square. Photographs of Sergeant Buckner lying in this position were admitted in evidence as Prosecution Exhibits 1 and 2 (R 28,29). Lieutenant King examined Sergeant Buckner and found that his pulse was not beating and he did not appear to be breathing.

Sergeants Garrett and Fortune were in the orderly room adjacent to Lieutenant King's office when the shooting occurred. They heard the

accused's voice as he said, "Sergeant Buckner, I have something for you." They looked up and saw no pistol in the accused's hand, but immediately following the accused's words saw him raise his .45 caliber pistol and heard the shots. They sought refuge behind and under Sergeant Garrett's desk, from which vantage point each of them attempted to fire Sergeant Garrett's pistol at the accused but it would not fire (R 23-29, 42-44,57-60). Directly after the accused fired the shots at Sergeant Buckner he turned to Lieutenant King and said, "I should kill you, but you are a good officer, I will let you live." The accused then left the orderly room (R 59,60). When at a distance of about forty yards Sergeant Garrett fired at him and accused returned the fire (R 26-27).

Sergeant Buckner was dressed in an OD uniform and a coat with a parka. None of the witnesses saw any pistol on him, although he was usually armed. When he was taken to the hospital a .45 caliber pistol was found in the belt of his trousers (R 41,52,53,57,63,64,91).

Lieutenant King accompanied Sergeant Buckner to the 130 Station Hospital about 25 or 30 minutes after the shooting occurred. Upon arrival at the hospital Major Larson, the medical duty officer, made an examination of Sergeant Buckner (R 61,62,70,81,83). Corporal Murl D. Ablee, medical technician, was present at the examination conducted by Major Larson. He opened up Sergeant Buckner's clothes and discovered five small piercing wounds, one each in his chest, abdomen, head, neck and elbow. They were about the size of a "little finger." Corporal Ablee felt of Sergeant Buckner's pulse and found that his heart was not beating. He examined Prosecution Exhibits 3 and 4 for identification and stated that Exhibit 3 was a report of a medical examination made by Major Larson of the body of Sergeant Buckner which was represented by the photograph, Prosecution Exhibit 4. Corporal Ablee also testified that he prepared all of the report except the diagnosis and that Major Larson signed it. Such a report was required on every patient entering the hospital. Prosecution Exhibits 3 and 4 were thereupon admitted in evidence (R 80-90). The report contained the letters "DOA", which meant "dead on arrival" (R 113,114).

Lieutenant King identified Prosecution Exhibits 4 and 5 as photographs of Sergeant Buckner (R 117,118). Miss Ursula Krutina, a medical technician, testified she was present at an autopsy of the body pictured in Prosecution Exhibits 4 and 5 performed by Captain Noe. She also identified Prosecution Exhibit 6 as the report of the autopsy she saw performed (R 96-99, 106-109). Private Richard J. Lombardi testified that he was present when Captain Noe performed an autopsy on the body shown in the photographs (Pros Exs 4 and 5) and he identified the signature on the autopsy report (Pros Ex 6) as that of Captain Noe (R 100-105,115-117). Staff Sergeant Paul A. Warner testified he was the noncommissioned officer in charge of the laboratory under Captain Roy A. Moore and that one of his duties was to file the laboratory records. He identified Prosecution Exhibit 6 as an autopsy

report which he had filed. He also testified that autopsy reports were required in case of death of any military personnel (R 93,94,109-111). Captain Roy A. Moore testified he was the officer in charge of the laboratory at the 130 Station Hospital and that he was custodian of the autopsy records. He identified Prosecution Exhibit 6 as an autopsy report filed in his office. He further stated that an autopsy was required by Army regulations upon death of any military personnel dying under unusual circumstances (R 92,93,111-114). Prosecution Exhibits 5 and 6 were admitted in evidence over objection of the defense (R 119).

The autopsy report (Pros Ex 6) contained the following:

"Autopsy findings show that Sergeant Buckner died of multiple GSW /gun shot wounds/ of the head, chest, abdomen, right arm and left leg."

The accused was an expert with the pistol and had made the highest score at the Military Police school. When Sergeant Buckner learned of accused's score he caused him to fire the course over again because of some doubt as to whether the score he turned in was correct (R 48,49). The accused had requested Sergeant Buckner to see Lieutenant King about a transfer but Sergeant Buckner would not give accused permission to see him. Sergeant Buckner and the accused had not been on friendly terms. Accused had missed a few formations (R 49).

Thomas B. Whitlock, Criminal Investigation Division agent, saw the accused on 11 March 1947, at which time he was taken in custody and warned of his rights under Article of War 24. He saw the accused again on 12 March 1947, informed him of his rights and without any threats or promises the accused made an oral statement. He asserted that on the night of the party he had taken a girl to his billets for the purpose of having intercourse. Sergeant Buckner saw the girl as she left the latrine and the accused and Buckner had an argument about the matter. He remembered being put in arrest and being told by Sergeant Buckner on two occasions to go to his room. The next thing he remembered was Lieutenant King saying, "don't shoot me." When he awoke the following evening at a girl's house he thought he dreamed about shooting his first sergeant. As the girl was cleaning his room "she brushed his jacket and one of the pistols fell off, and then he realized what he had done" (R 120-129).

For the Defense

The rights of the accused were explained to him and he elected to be sworn as a witness. He testified that he attended the organization party at the mess hall and left about 11:15 p.m. with his girl as he had to go on duty at 11:30 p.m. His girl wanted to use a latrine so they went in to one of the barracks for that purpose. While they were there Sergeants Buckner and Fortune came in and discovered the girl's presence.

Sergeant Buckner asked him if he did not know better than to bring a girl into the barracks and ordered Sergeant Fortune to "book her for a V.D. check." The accused wanted to know why she was being "booked" and Sergeant Buckner said to Sergeant Fortune, "Come on, don't talk to him. He's just in the right mood to be blown away." The accused explained that the term "blown away" meant "to shoot someone." All of them went to the orderly room. Upon arrival there the accused called out his patrol over the public address system, then went to his quarters over the orderly room to put on his "regalia" preparatory to going on duty. When he returned to the orderly room Lieutenant King talked to him about the incident of his being with the girl in the barracks. The accused tried to explain but to no avail. Lieutenant King ordered him in arrest of quarters and relieved him of his pistol. Sergeant Buckner on three separate occasions called accused to the orderly room to ask him why he was not in his quarters but would not listen to his explanation. Buckner told accused to get back to his quarters and stay there. On this last occasion instead of going to his quarters he went to the arms room where he drew a .45 caliber pistol on the pretext of getting it for one of his men. He put the pistol in his pocket and asked Sergeant Buckner who was in Lieutenant King's office if he could speak to him. He said he could, so accused started toward him. Sergeant Buckner reached for his pistol and the accused fired. He did not remember how many shots he fired. Accused believed Sergeant Buckner would have shot him because of his attitude and certain incidents that had taken place between them. Sergeant Buckner was jealous of accused's ability with a pistol and as a result subjected him to indignities consisting of "bawling him out" before the men and ordering him to perform duties tending to degrade him. The accused also had requested permission of Sergeant Buckner to see the company commander about a transfer, but permission was never granted because Sergeant Buckner said he was going to keep accused there and "bust him down." He had no intention of shooting Sergeant Buckner when he went to the office. If he had he could have killed him with one shot; he would not have needed to fire any more (R 130-138).

Upon cross-examination the accused said he could not remember making a statement to Sergeant Buckner, "Sgt, I have something for you," but would not deny he had made such a statement. Sergeant Buckner was always armed, though he did not see any pistol on the sergeant that night. When Sergeant Buckner raised his hands up accused "removed his pistol from his pocket, put a round in the chamber and fired" at Sergeant Buckner. The accused denied making any statement to Mr. Whitlock. He stated that Mr. Whitlock gave him a package of cigarettes and said, "If you make this as easy for me as you can, I will guarantee I will make it as easy for you as I possibly can." He told Mr. Whitlock that he did not remember anything and would make no statement until he had seen his defense counsel, so Mr. Whitlock made a statement which he (accused) neither admitted nor denied (R 138-147).

Sergeant Garrett was recalled as a witness for the defense and testified that when he saw Sergeant Buckner after the first shot was fired he

was directly in front of Lieutenant King's desk. His hands were slightly above his waist and with the palms against his chest (R 150,151).

Private First Class Thomas R. Johnson testified that he and Lieutenant King accompanied Sergeant Buckner to the station hospital and that he saw Sergeant Buckner undressed. He observed a .45 caliber pistol with a clip inserted in it stuck in his belt (R 152-154).

Sergeant Lawton C. Johnson testified that he was section sergeant and that Sergeant Buckner had been "riding the accused pretty hard" for about two weeks during the latter part of February 1947 and had stated that he was "going to get the accused stripes" (R 155-157).

Lieutenant King was recalled by the court and testified that when the accused entered his office he did not see him draw the pistol and load it prior to firing. He further testified that the phrase, "You are in the mood to be blown away" meant that one is "in the mood to be shot or killed" (R 157-158).

4. Discussion

Inasmuch as the accused, with full knowledge of the fact that Lieutenant Colonel Piper had been the investigating officer, stated that he desired to be defended by him, no prejudicial error resulted by reason of Lieutenant Colonel Piper's acting as his special defense counsel (CM 320233, Fleming, 69 BR 271).

In view of the extraordinary circumstances here existing, the substantial rights of the accused were not prejudiced by the ruling of the court that the trial would proceed in the absence of Captain Stark, one of the special defense counsel. It appeared that at the request of the accused Captain Stark had been brought back to the theater from the United States to act as special defense counsel, but that after his arrival in the theater he rendered himself incapable of defending the accused and was hospitalized as a "chronic alcoholic" on 27 November 1947. Because of the incapacity of Captain Stark to participate in the defense the court granted a continuance on 2 December 1947 in order that accused might obtain additional defense counsel. When the court met again on 10 December 1947 the accused introduced Mr. Robert Conner as one of his special defense counsel. The appointing authority in declaring Captain Stark unavailable to the accused was acting within his authority and there was no showing of an abuse of discretion on his part. (CM 319858, Correlle, 69 BR 183, 191).

The accused was found guilty of the murder of First Sergeant Burchard L. Buckner. On 8 March 1947 after a party in the company area Sergeant Buckner found the accused in the barracks with a girl. He caused the girl to be removed and admonished the accused, reminding him of the regulations. The accused became incensed when the first sergeant ordered the

girl "booked." At the instance of the deceased, Lieutenant King, the commanding officer, ordered the accused into arrest of quarters as a result of the incident. The accused did not comply with the order, and on three separate occasions Sergeant Buckner directed accused to go to his room and stay there. The accused became angry and instead of going to his room as directed went to the arms room where he obtained a .45 caliber pistol. He then returned to the orderly room and said to the First Sergeant, "Sgt Buckner, I have something for you," whereupon he immediately raised the pistol and fired several shots directly into Buckner's body, causing his death within a short period of time. Following the shooting the accused said to Lieutenant King, "I should kill you, but you are a good officer, I will let you live." He then left the orderly room.

The report of medical examination (Pros Ex 3) and the autopsy report (Pros Ex 6) were properly received in evidence over the objection of the defense. These exhibits were sufficiently identified and were clearly admissible either as official writings or as entries made in the regular course of business (28 USC 698; CM 323197, Abney, 72 BR 149).

Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse and the death must take place within a year and a day (MCM, 1928, par 148a). Malice aforethought has been generally 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" (CM 325492, Mosely; Turner v. Comm, 167 Ky 365, 180 S.W. 768). Malice may be either express or implied in law (U.S. v. Carr, 25 Fed cases, 306-309; CM 326604, Gusik). The court-martial determined upon the evidence, beyond any reasonable doubt, that the killing of Sergeant Buckner by the accused was without legal excuse and that the act was done with malice aforethought. We are in accord with the findings of the court. Any prior disagreements or personal animosity between the parties, if either or both did exist, were insufficient in law to excuse the ultimate act of the accused or to mitigate the offense to voluntary manslaughter (CM 247055, Mason, 30 BR 249,253; CM 323197, Abney, 72 BR 149,153).

The accused's assertion that at the time he accosted Sergeant Buckner the latter raised his hands as though making hostile motions toward the accused is not, in the light of the other irrefutable evidence, sufficient to show the slightest degree of probability that the accused fired in self-defense. Although Buckner appears to have been armed with a pistol concealed from view, it is unbelievable that in raising his hands as the accused advanced upon him he did more than attempt to shield himself from the deadly missiles which the accused, in expressed malice, then and there sent into his body.

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

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

Edwards E. Gibson, Judge Advocate

(Sick in Quarters), Judge Advocate

Harley H. Lanning, Judge Advocate

JAGK - CM 324701 1st Ind

WD, JAGO, Washington 25, D. C. MAY 14 1948

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Sergeant Samuel Stevenson (RA 34853692), 510 Military Police Service Platoon.

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 I recommend that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of the accused. I further recommend that a U.S. 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 hereinabove made, should such action meet with approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Drft ltr sig S/A
3. Form Ex action

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

JAGK - CM 325541

30 JAN 1948

UNITED STATES v. Master Sergeant CECIL C. MORGAN (14001134), 2010th Labor Supervision Company.	XII TACTICAL AIR COMMAND Trial by G.C.M., convened at Furstenfeldbruck, Germany, 2, 3 and 9 July 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
SILVERS, ACKROYD and LANNING, Judge Advocates

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

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

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

Specification: In that Master Sergeant Cecil C. Morgan, 2010th Labor Supervision Co., APO 178, US Army did between 1 June 1946 and 1 September 1946 at Lechfeld Air Base, Lechfeld, Germany feloniously take, steal and carry away one (1) Leica Camera, value about $54.00, the property of the Post Exchange.

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

Specification 1: In that Master Sergeant Cecil C. Morgan, *** did at Oberpfaffenhofen Air Depot, APO 61, US Army on or about 26 June 1946 transfer funds and U.S. Currency through a personal transfer account, without the proper deduction being entered in his Currency Control Record.

Specification 2: In that Master Sergeant Cecil C. Morgan, *** did at Oberpfaffenhofen Air Depot, APO 61, US Army on or about 5 July 1946 transfer funds and U.S. Currency through a personal transfer account, without the proper deduction being entered in his currency Controll Record.

Specification 3: In that Master Sergeant Cecil C. Morgan, *** did at Lechfeld Air Base, APO 178, US Army on or about 8 July 1946 wrongfully and illegally purchase a Postal Money Order without said purchase being recorded in his Currency Control Record.

Specification 4: In that Master Sergeant Cecil C. Morgan, *** did at Lechfeld Air Base, APO 178, US Army on or about 11 July 1946 wrongfully and illegally purchase a Postal Money Order without said purchase being recorded in his Currency Control Record.

Specification 5: In that Master Sergeant Cecil C. Morgan, *** did at Lechfeld Air Base, APO 178, US Army on or about 24 July 1946 wrongfully and illegally purchase a Postal Money Order without said purchase being recorded in his Currency Control Record.

Specification 6: In that Master Sergeant Cecil C. Morgan, *** did at Lechfeld Air Base, APO 178, US Army on or about 19 August 1946 wrongfully and illegally purchase a Postal Money Order without the proper deduction being recorded in his Currency Control Record.

Specifications 7, 8, 9: (Findings of not guilty).

Accused pleaded not guilty to and was found guilty of all the specifications and charges excepting Specifications 7, 8, and 9 of Charge II, of which he was found not guilty. 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 one year. The reviewing authority approved the sentence and designated the Branch United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War might direct, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence for the Prosecution

a. As to the Specification of Charge I

The accused was manager of the post exchange at Lechfeld, Germany, from the early part of 1946 until January 1947 (R 10,17,27,28). During this period he lived in a room in the post exchange building (R 19). The accused had in his room a Leica F3.5 camera which he kept under his bed a part of the time (R 29) and in his wall locker a part of the time (R 31,38). Sergeant Gordon W. Baker, who was employed at the post exchange and lived with the accused while accused was post exchange manager, saw the accused take a camera from the safe during a post exchange inventory. He could not swear it was the same camera he saw in accused's room but said it was a similar camera (R 29,30). Accused told Sergeant Baker at one time that he obtained the camera from the post exchange. On another occasion accused told the sergeant that he got the camera from some other place (R 29) and at still another time that the camera was one he had crossed off the post exchange inventory sheet (R 30).

About 20 or 21 January 1947, before the investigation of the Lechfeld post exchange, the accused turned the Leica F 3.5 camera over to the then post exchange officer, Major Don A. Smith (R 25,31) saying he had been accused of stealing the camera and that he did not want to be called a thief (R 19). Major Smith in turn gave the camera to Louis J. Lynch, a civilian who succeeded the accused as post exchange manager (R 10,12). The camera was put on the post exchange inventory for sale (R 23). The value of the Leica camera was $54.50 according to Major Smith (R 19). Mr. Lynch said the camera sold at the post exchange for $54.50 (R 12).

There was never any record of any camera missing from the post exchange (R 14,66).

Sometime during the period 29 May 1946 to 1 December 1946 when Captain William B. Boyd was post exchange officer the accused won a Kodak 35 camera on a lottery (R 62) which he did purchase. Captain Boyd never gave accused permission to hold any camera off lottery and later purchase it (R 63), however, a person could win two cameras on a lottery (R 66).

b. As to Specifications 1,2,3,4,5, and 6, Charge II

Major Claud E. Ford, one of the investigating officers, examined the records of the Oberpfaffenhofen Finance Office and testified, without any objection by the defense, that the accused's name appeared on the said records as having obtained Personal Transfer Accounts on 26 June 1946 for $125.00 and on 5 July 1946 for $200.00 (R 88,89,94,95).

Personal Transfer Accounts are a manner of transferring money from the theater to the Zone of Interior. The individual brings money to the cashier who counts it and prepares certain forms showing the amount received. The receipts for 26 June 1946 and 5 July 1946 were no longer in the finance office but had been transmitted to the Army Finance, St. Louis, Missouri (R 85,86). Staff Sergeant Joseph Cordell worked in the finance office for some time prior to 20 November 1946 (R 87).

Major Edmund B. Edwards, one of the special investigators of the post exchange at Lechfeld, 4 February 1947, wired the postmaster at New York City for information on money orders obtained by the accused and others from 1 March to 31 October 1946 (R 70,71,106). He received on or about 1 March 1947 in reply thereto a letter from the postmaster (Pros Ex 1, R 72), to which was attached five photostatic copies of applications for money orders (R 107, Pros Exs 4,5,6, 7 and 8), purporting to have been prepared either by or on behalf of the accused. The defense counsel made no objection to admission of the letter from the postmaster into evidence, but did strenuously object to the admission of the photostatic copies of the applications for money orders (R 71, 74-76, 105,107,108).

The usual procedure followed in obtaining a money order is to present

the application for money order in duplicate together with the money. The application is then "MOB'd", that is, the stamp is placed on the application showing the postoffice, the unit, the date, the fee, initials of the clerk, and the money order number (R 82,83). Corporal Henry C. Fitzner examined Prosecution Exhibits 4,5,6,7, and 8 and stated that they had been processed by an Army post office (R 84).

Major Claud E. Ford searched the records at the Adjutant General's Depot until he found a currency control book on or about 22 February 1947 (R 89) purporting to be that of the accused. He kept the currency control book until his report was written up when the currency control book was made a part of the report, which report was transmitted to XII Tactical Air Command (R 90). A currency control book was admitted in evidence as Prosecution Exhibit 2 (R 91). Major Ford was not positive it was the same book he obtained from the Adjutant General's Depot but it appeared to be the same one (R 91-94). The currency control book was never shown to the accused (R 89).

Sergeant Gordon K. Baker testified that the accused in referring to Personal Transfer Accounts told him that he "knew the technical sergeant at the Oberpfaffenhofen" finance office so he was able to send home more money than he had on his currency control book (R 31,32). The accused said he had $50 or $60 deducted when he purchased Personal Transfer Accounts (R 35). The accused admitted to Major Edwards that he had purchased some money orders from the Army post office at Lechfeld to pay his brother for shoes, also that he had purchased "money orders" from the Oberpfaffenhofen Finance Office, and mentioned Sergeant Cordell and a Captain Howell as connected with the latter transactions (R 79-80).

The prosecution in its opening statement said that Specifications 1, 2,3,4,5 and 6 of Charge II were all violations of USFET Circular 82, 3 June 1946, and read the pertinent extracts therefrom:

> "2. Policy. Funds presented to theater facilities for purchases, exchange, or transmission will be limited to those derived from cash pay or allowances, or money lawfully imported into the theater by persons authorized to use such facilities.
>
> * * *
>
> "5. Subsequent Entries in the Record.
>
> * * *
>
> d. Exports. (1) The purchase of any dollar instrument shall be considered as an export from the theater, regardless of the payee named thereon.
>
> (2) The exchange of marks, Austrian money, or currency of any other country within the theater, for the currency of any country outside of the theater shall be considered as an export.
>
> (3) All exports shall be deducted from the balance in columns 5 or 8 by appropriate entries in either column 4 or 7.

(4) Export currency exchanges (sub-paragraph (2) above) will not be made without presentation of proper travel orders and/or compliance with such other regulations as may be promulgated by the Theater Fiscal Director.

(5) All export entries will be made by the officer, cashier, or other authorized person who received the money for exchange or transmittal, who will authenticate the entry by signature and serial number (or AGO identification card register number in case such official is a civilian) in column 9.

* * *

"16. Violation. Any false or unauthorized entry in the Currency Control Record, any improper exchange or transmittal of currency, or any other violation or evasion of the terms of this circular will be dealt with by appropriate disciplinary action."

The prosecution requested that the court take judicial notice of USFET Circulars 82, 130 and 140. The latter two circulars are dated subsequent to the date of offenses alleged in Specifications 1,2,3,4,5 and 6 of Charge II and hence are not applicable.

4. Evidence for the Defense

The defense moved that the currency control book (Pros Ex 2) be withdrawn and that the court be instructed to disregard it on the ground that it is a personal record and that the book has never been connected with the accused. The motion was denied by the law member (R 113).

The defense also moved for a finding of not guilty as to the specification of Charge I and Charge I on the ground that there had been a failure of proof. This motion was denied by the law member (R 113).

A written stipulation containing a signature purporting to be that of the accused was offered by the defense and consented to by the prosecution and received in evidence as Defense Exhibit A (R 114) pertaining to testimony concerning Specification 8 of Charge II that would be given by Colonel Paul L. Barton if he were present.

The accused was sworn as a witness and testified only concerning the specification of Charge I and Specifications 8 and 9 of Charge II (as to the latter he was found not guilty). As to the specification of Charge I the accused stated that some friends, who had since returned home, won the camera on a lottery and told him he could have it. He bought the camera and kept it in his room until he was accused of stealing it, at which time he returned it to the post exchange. He however could not recall the names of the friends who won the camera on the lottery. He paid the cashier for the camera, but does not have a sales slip now as it was probably torn up (R 117). He discussed the camera with Captain Boyd but he

(Captain Boyd) did not remember it. The accused denied discussing the camera with Sergeant Baker (R 118). It was common practice for people not to pick up lottery items or to give their slips away. Major Smith knew he had the camera.

5. Discussion

a. As to the Specification of Charge I

The evidence produced by the prosecution to support the conviction of the accused consisted of showing that the accused had in his possession a Leica F 3.5 camera which he returned to the post exchange after he had heard that he had been accused of stealing the camera because he did not want to be accused of being a thief. Sergeant Gordon W. Baker, a fellow worker in the post exchange and roommate of the accused, stated he had seen the accused remove a camera from the safe at the post exchange during inventory but he could not say it was the same camera but only that it was a similar camera. The accused at different times made admissions to Sergeant Baker that he had obtained the camera from the post exchange and that he had crossed it off the post exchange inventory.

In order to establish the offense charged it was necessary to prove that the accused took and carried away by trespass the Leica F 3.5 camera (par. 149g, MCM 1928). The one circumstance tending to prove the taking and carrying away by trespass by the accused is the testimony of the accused's roommate that he saw the accused take a camera from the safe at the post exchange. As was brought out on cross-examination of the roommate, cameras were commonly kept in the safe and the accused may well have taken the camera from the safe for someone who had a right to purchase the camera or may have taken it for himself for the purpose of purchasing it. Sergeant Baker did not see the accused take the camera (which he saw the accused remove from the safe) to his room nor could he state the camera he saw in the room of the accused was the same camera he saw accused remove from the safe, but could only say that it was a similar camera.

It also was brought out that there were many Leica F 3.5 cameras in the theater which were not purchased or obtained from a post exchange.

Mr. Lynch, civilian post exchange manager after accused was relieved, and Captain Boyd, post exchange officer during the period the larceny is alleged to have occurred, each testified that there was no record of a Leica F 3.5 camera missing. Captain Boyd said that the cameras were checked and there was no shortage.

There is no competent proof in the record of trial that there was a taking and carrying away of the camera in question by trespass. A corpus delicti must be proven in every case to sustain a conviction of a criminal offense.

"It is a fundamental rule of criminal procedure that the corpus delicti, or the fact of the commission of a crime, must be proved beyond a reasonable doubt, and until that is done no conviction of any grade of crime can be had (United States v. Searcey (D.C.), 26 F. 435). It is also elementary that the corpus delicti must be proved and cannot be presumed (Wagner v. United States (C.C.A. 8th), 8 F. (2d) 581)." (CM 216425, Frye et al, 49 BR 99.)

The Leica camera in question was not introduced in evidence nor is it necessary to do so. It was said by the Board of Review in CM 325090, Hall et al:

"When 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 possession of the accused (CM 202976, Baker, 6 BR 389, 392)."

Even if it is assumed that the taking of the camera from the safe in the post exchange witnessed by Sergeant Baker was a taking and carrying away by trespass there is no competent evidence which identifies the camera so taken as being the same one which the accused had in his possession. Lacking this necessary evidence the conviction of the accused cannot be sustained (CM 325598, Deal).

The evidence that the accused was seen to take a camera from the post exchange safe, made certain admissions, and that he returned the camera only after he heard he had been accused of stealing it, is sufficient only to cast suspicion upon the accused. It has been held repeatedly that a person cannot be convicted upon mere conjecture or suspicion (CM 197408, McCrimon, 3 BR 111; CM 216522, Young, CM 207591, Nash et al, 8 BR 359; CM 322967, Huffman et al, CM 325598, Deal).

Accordingly the Board of Review holds that the record of trial is not legally sufficient to support the findings of guilty of the specification of Charge I and Charge I.

b. As to Specifications 1 and 2, Charge II

Under Specifications 1 and 2 of Charge II accused was found guilty of having transferred funds and United States currency through a personal transfer account, "without the proper deduction being entered in his currency Control Record," on two separate occasions in violation of Article of War 96. In CM 316886, Chaffin (66 BR 97,100), the Board of Review said,

"Where an act or acts alleged in the specification, as finally approved by the reviewing authority, is not per se an offense, words of criminality must be used and remain in the specification

to make the act or acts alleged an offense. Ordinarily, such words as 'wrongfully', 'unlawfully' or 'without authority' are therefor employed."

And in the later case of CM 319573, O'Brien, the Board of Review said:

"It is a fundamental principle of law that the Government's pleading in a criminal case, be it an indictment, complaint or a specification in court-martial proceedings, must charge a violation of law. If it does not do so a finding of guilty under such a defective pleading will be of no legal effect whatsoever no matter what crime or crimes the evidence may show accused has committed."

In the instant case it is noted that the two specifications in question do not describe accused's conduct in transferring funds and currency through a personal transfer account to be wrongful, unlawful or in violation of any law or regulation. Obviously, such conduct would not be unlawful per se, nor, in our opinion, are the pleadings buttressed in this respect by the insertion of the phrase "without the proper deductions being entered in his currency Control Record," for there exist many "improprieties" which are not wrongful or unlawful in the criminal sense. For example, by reading the specifications in question and applying to them the court's findings of guilty, it may be that accused has now recorded against him a conviction of having done nothing more than to transfer funds by way of a personal transfer account, which transfer was incorrectly entered upon or inadvertently omitted from his currency control record without any fault on his part. Of course, he may also, under these specifications, have been found guilty of an "impropriety" which would constitute a violation of some applicable law or regulation and therefore a violation of Article of War 96. However, it is not sufficient that a criminal pleading may or may not state an offense, according to whatever interpretation the beholder may choose to place upon it. It must, in order to legally support a conviction of crime, unfailingly and unequivocally set forth an offense, without regard to whatever proof may appear in the record, and cannot, in any manner, be open to an interpretation that it may decry acts which are not subject to a criminal penalty. In short, the Board of Review holds that Specifications 1 and 2 of Charge II fail to allege a violation of Article of War 96, as they purport to do, and that the findings of guilty thereof must accordingly be set aside.

c. As to Specifications 3,4,5, and 6, Charge II

Specifications 3,4,5 and 6 of Charge II allege that the accused wrongfully and illegally purchased a Postal Money Order without said purchase being recorded in his Currency Control Record.

The gist of the offenses alleged is that no entry was made in the

Currency Control Record or that the entry made was not a proper entry. It should be noted that it is not alleged that the accused failed to make the entry or proper entry but merely that the entry or the proper entry was not made.

The prosecution proceeded upon the theory that the alleged offenses were in violation of USFET Circular 82, 3 June 1946 (referred to hereafter as Circular 82) and requested that the court take judicial notice of the circular.

The only questions necessary to consider in connection with Circular 82 are

(1) Was Circular 82 a part of the military law?

(2) Did the specifications allege a violation of Circular 82?

In answer to the first question it has been held many times that publications such as circulars, memoranda or other directives of a theater headquarters containing prohibitions are directive in nature and become a part of the written military law upon their effective date and individuals in the theater are chargeable with knowledge thereof (CM 291176, Besdine, 18 BR (ETO) 181; CM 307465, Danker, 61 BR 119,126; CM 307097, Mellinger, 60 BR 199, 215-216; CM 317064, Johns, 66 BR 169, 194-195; CM 324352, Gaddis, 25 Sep 1947).

The answer to the second question involves an interpretation or construction of the language of Circular 82.

The prohibitions contained in Circular 82 are directive and penal in nature. In interpreting a circular of General Headquarters Far East Command the Board of Review in CM 324352, Gaddis, supra, said:

> "Since the directive is also penal in nature, it follows that the rules ordinarily applied in the construction of penal statutes are applicable to the construction of the directive in question."

Earl T. Crawford in his text "The Construction of Statutes" in section 240 said:

> "Criminal and penal statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted. Only those persons, offenses, and penalties, clearly included, beyond any reasonable doubt, will be considered within the statute's operation. They must come clearly within both the spirit and the letter of the statute,

and where there is any reasonable doubt, it must be resolved in favor of the person accused of violating the statute; that is, all questions in doubt will be resolved in favor of those from whom the penalty is sought. ***"

That part of Circular 82 which is pertinent to the offenses alleged provides:

"5. Subsequent Entries in the Record. * * *

d. Exports. (1) The purchase of any dollar instrument shall be considered as an export from the theater, regardless of the payee named thereon.

* * *

(3) All exports shall be deducted from the balance in columns 5 or 8 by appropriate entries in either column 4 or 7.

* * *

(5) All export entries will be made by the officer, cashier, or other authorized person who receives the money for exchange or transmittal, who will authenticate the entry by signature and serial number (or AGO identification card register number in case such official is a civilian) in column 9." (Underscoring supplied.)

Other provisions of Circular 82 pertaining to imports, exchanges and purchases are couched in similar language.

Circular 82 is very definite in authorizing only certain and specific individuals to make entries in the currency control record and directs that they will make such entries. Applying the general rules of construction applicable to penal statutes set out above it cannot be implied or read into Circular 82 that the individual holder had either a duty to make any entries in his currency control record or a responsibility to see that they were made.

Circular 82 was recently considered in CM 319858, Correlle. The specification in that case alleged that the accused knowingly and wrongfully failed to have deductions made from his currency control record for purchases made from a United States post exchange in violation of Article of War 96, which was quite similar to the specifications under consideration in the instant case. In that case, however, the accused was the post exchange officer of the post exchange from which the purchases were made and the Board of Review in sustaining the finding of guilty pointed that out, saying:

"Accused was thus the person receiving the payment as well as the person making it. He should have entered the purchase price of the camera in his currency control record as a deduction

from the balance available therein, such price being above the $5.00 limit."

The opinion of the Board of Review in the cited case might have been otherwise had the accused not have been the post exchange officer whose duty it was to make the entry in his Currency Control Record as required by the provisions of Circular 82.

The Board of Review is not unmindful of the fact that there may have been some other circular, regulation or directive which the accused may have violated in doing the acts alleged in the specifications in question. Such directive was neither brought to the attention of the court nor has the Board of Review been able to find any of which the court might have taken judicial notice.

Since the duty or responsibility for making the deductions on the Currency Control Record was not placed upon the accused by Circular 82 or any other directive it follows that the record of trial is legally insufficient to sustain findings of guilty of Specifications 3,4,5 and 6 of Charge II.

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.

Chester D. Silver, Judge Advocate

Gilbert S. Hoyt, Judge Advocate

Harley M. Lanning, Judge Advocate

JAGK - CM 325541 1st Ind

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

TO: Commanding General, XII Tactical Air Command, APO 62, c/o Postmaster, New York, New York.

1. In the case of Master Sergeant Cecil C. Morgan (14001134), 2010th Labor Supervision Company, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the findings of guilty and the sentence be disapproved.

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

(CM 325541).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General