OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 76

1948

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# JUDGE ADVOCATE GENERAL'S DEPARTMENT

## BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 76

including

CM 326882 - CM 328246

also

CM 315523

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

21 JUN 1948

JAGH CM 326882

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 24TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Kumamoto, Kyushu, Japan, 25 September 1947. Briley: Disapproved. Burke: Dishonorable discharge (suspended), total forfeitures and confinement for one (1) year. United States Disciplinary Barracks, Fort Leavenworth, Kansas. |
| Private PHILLIP E. BURKE, RA 11148551, Company L, 21st Infantry, and Private THOMAS F. BRILEY, RA 11161797, Headquarters Company, 1st Battalion, 21st Infantry. | ) | |

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 insufficient to support the findings of guilty and the sentence in part as to accused Burke. 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:

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

Specification 1: (Finding of not guilty as to each accused).

Specification 2: In that, Private Phillip E. Burke, Company "L", 21st Infantry and Private Thomas F. Briley, Headquarters Company, First Battalion, 21st Infantry, acting jointly and in pursuance of a common intent, did, on or about 2030 hours, 24 August 1947, in the vicinity of Kumamoto, Kyushu, Japan, commit an assault upon Kumaki Hatteri by wilfully and feloniously striking him on the head with a cider bottle.

(Note: As to accused Briley, finding of not guilty).

Specification 3: In that, Private Phillip E. Burke, Company "L", 21st Infantry, did, on or about 2140 hours, 24 August 1947, at Kumamoto, Japan, with intent to do bodily harm, commit an assault upon Otsuka Shigeru and Kasuka Nagamuma

by wilfully and feloniously striking the said Otsuka Shigeru and Kasuka Naganuma about the body with his fists.

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

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

Accused Burke pleaded, to Specification 1, Charge I, guilty except the words "and in pursuance of a common intent" and "with intent to commit a criminal offense, to wit, larceny, therein;" to Specification 2 of Charge I, guilty except the words "and in pursuance of a common intent;" to Specification 3 of Charge I, guilty except the words "with intent to do bodily harm," to Charge I, guilty, and to Charge II and the Specification thereunder, not guilty. During trial accused Burke changed his pleas to Specification 1 and Specification 2 of Charge I to not guilty (R 22). Evidence of two previous convictions was introduced as to accused Burke. Burke was found not guilty of Specification 1 of Charge I; guilty of Specification 2 of Charge I except the words "acting jointly and in pursuance of a common intent" and "wilfully and feloniously striking," substituting therefor "wrongfully striking," of the excepted words not guilty, of the substituted words, guilty; guilty of Specification 3 of Charge I; guilty of Charge I; and guilty of Charge II and its Specification.

Accused Briley pleaded not guilty to all Charges and Specifications. No evidence of previous convictions was introduced. He was found not guilty of Charge I and its Specifications and guilty of Charge II and its Specification. Accused Briley was sentenced to forfeit $45 of his pay per month for a period of three months. Accused Burke was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for one year. The reviewing authority approved only so much of the findings of guilty of Specification 3 of Charge I, as involved a finding against the accused Burke of guilty of assault and battery at the time and place alleged in the Specification, approved only so much of the findings of guilty of Charge I as involves a violation of Article of War 96, and disapproved the findings of guilty of the Specification of Charge II and Charge II as to both accused. The reviewing authority disapproved the sentence as to accused Briley, and approved the sentence as to accused Burke and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated The United States Disciplinary Barracks, Fort Leavenworth, Kansas, or such other place as the Secretary of the Army may direct as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 44, Headquarters 24th Infantry Division, APO #24, dated 14 October 1947.

3. Evidence for the prosecution.

The record of trial is legally sufficient to support the finding of guilty of Specification 3, Charge I, as approved by the reviewing authority. The only question necessary to be discussed in this case is the legal sufficiency of the record of trial to support the findings of guilty of Specification 2 of Charge I and the sentence with respect to accused Burke. The evidence relating to Specification 2 of Charge I is summarized as follows:

At about 1830 hours on the evening of 24 August 1947 both accused went to the house of Toshiki Hattori and requested some whiskey. Toshiki told the accused that he had no whiskey but gave them two bottles of beer. Sumiko Hattori, Toshiki's wife, obtained a bottle of whiskey and gave it to accused (R 9,19,14). Accused then left (R 12) and Toshiki and Sumiko went to the movies. Upon their return from the movies they found the house disturbed and Toshiki's father, Kumaki Hattori, with a towel around his head. Toshiki, knowing that his father had bad eyesight, thought perhaps that he had fallen. (R 9,10,11,13). Toshiki asked what had happened and Kumaki, who had been in the house when accused had asked for whiskey, told his son that the two men who had entered previously had returned and hit him over the head (R 11). Kumaki told Sumiko that he had been hit over the head by a member of the occupation forces (R 13).

Private First Class Raymond Danielezyk testified that he was present in the Military Police Station when Kumaki Hattori was present and that Kumaki Hattori at that time identified and pointed out both accused from a group of about five soldiers then in the room (R 8). (Note: The witness did not state when this event took place nor did he state with respect to what circumstances the identification was made).

Kumaki Hattori testified as to the first witness for the prosecution. After being asked his name and address, he testified as follows:

"Q. Do you know the accused?
A. I do.

Q. Point them out.
A. (The witness could not point out the accused.)

Q. Do you remember anything unusual that happened on the night of 24 August this year?
A. About 2050 I was listening to the radio. As I was half asleep I heard a small noise. I saw two members of the Occupation Forces standing in the doorway. I saw two GI's who entered the room and pulled out the bureau drawer. One went up and opened a case which contained a doll. The taller of the two went up and opened the case and gave the doll over to his smaller companion.

Q. Are those two men in this room? (To interpreter: Tell him not to be afraid.)
A. No answer.

Q. Are you afraid to identify these two men?
A. I have poor eyesight, and I am in doubt if I can identify these two men now.

Q. Were you at the MP station at any time after this night?
A. No, my elder son went to the MP station." (R 6,7).

After some discussion between counsel and the Law Member, the witness stated:

"Witness: I would like to look around the court room once more and see if I can identify the accused."

The record then stated: "permission being given by the President, the witness looked around the court room again and could not identify anyone," upon which the President stated "We are wasting our time; have him sit down." (R 6,7). Witness was excused but, following the testimony of Danielezyk, was recalled. Upon his again taking the stand the following occurred:

"Q. Point out the man or men who struck you on the head on the night of 24 August.

President: No testimony has been brought out that he was struck on the head.

Q. I will withdraw the question. Point out the accused.
A. (The witness walked around the court room and could not identify anyone.)"

The witness was then removed from the room and seven men, including both accused were lined up. Witness then reentered the court room.

"Q. Look at each one of these men in this line and tell me if you can identify the accused.
A. (The witness walked up and down the line and looked at each man in the line.) I am not sure." (R 8,9).

Following testimony of other witnesses, and after both prosecution and defense had rested, the court permitted Kumaki Hattori to be recalled. Upon this occasion eight men were linedup, including both accused, and the witness was examined as follows:

"Q. Before you is a line of men. See if you can identify anyone there who hit you that night.
A. (Witness pointed to Pvt. Thomas F. Briley).

Q. Is that the man who hit you?
A. Yes (The witness looked at the line of men again and amended his answer.) No, I was mistaken. This is the one who hit me. (Witness indicated Pvt. Phillip E. Burke)" (R 24).

Witness then testified that the one who hit him was the man who broke the doll case and removed the doll. The man hit him with a cider bottle and then left the room. He further testified that the men were the same men who entered the house on the first occasion earlier in the evening. Upon the occasion when witness was hit, the taller of the two men had entered the house. The other man remained in the yard (R 24-26). Asked why he could pick out the men this last time, but could not do so before, witness testified "Since I have very poor eyesight I was afraid I would make a mistake in pointing out the GI's. Therefore I did not point them out the first time." He also denied that he was at the "MP" station after the attack.

4. Evidence for the defense.

At the end of March or around the first of April 1947 Private First Class Joseph O'Neil was with the accused Burke in Kumamoto City. They were directed to the house occupied by Toshiki Hattori and Sumiko Hattori as a place where they could purchase whiskey. They went to this house and purchased some whiskey.

The accused were warned of their rights as witnesses and elected to remain silent.

5. Discussion. The record of trial shows that the finding of guilty of Specification 2 of Charge I rests solely on the judicial identification of the accused as the men who assaulted Kumaki Hattori as alleged. Upon four separate occasions in the courtroom this witness was unable to identify either of the two men who had entered the house and had hit him. He carefully attempted to identify accused and was permitted to walk around the room and to inspect those in the courtroom and on two occasions to inspect each person in lineups which included both accused. Finally, after the victim had completely failed to identify either of the accused on four separate occasions, notwithstanding the fact that he had been confronted by them in a lineup in court on one prior occasion, and he had positively indicated that he was unable to identify the accused because of his bad eyesight, the court, after the prosecution and defense had rested, and the court recessed, permitted the victim to be recalled for the purpose of making the desired identification. On this fifth attempt, he identified Burke as the man who hit him, but even on this occasion he first mistakenly pointed to Briley. Moreover, it is a fair inference from the record that it was made known to this material witness that he was expected to identify accused as his assailants. This inference is based upon the following colloquy between the trial judge advocate and the witness:

"Q. Are you afraid to identify these two men?
A. I have poor eyesight, and I am in doubt if I can identify these two men now." (Emphasis supplied)

The identification which the witness finally made is very uncertain and dubious not only as to both accused but as to which of the two accused had hit the witness. He did not testify, after pointing to Burke, that he was certain Burke was the man. He did testify that he did not point out the men the "first" time because he had very poor eyesight and was afraid he might be wrong. This uncertainty in his mind, arising from such a reason, must obviously cast some doubt on his final identification of the accused. It is also noted that he contradicted himself by first testifying that both men entered the house and then later testifying that only one did. He did not describe the two men whom he saw the night he was hit nor did he state that he recognized them by their features so that they could be thus identified, except to say that one was taller than the other. In a case where a witness referred only to one accused as taller than the other, the Board of Review stated: "'Two soldiers, one taller than the other', is, of course, no identification at all, especially since the record fails to show that either of the accused was in fact taller than the other." (CM 270871, Shirley et al; 45 BR 351). In the instant case the record is silent as to the comparative height of accused. In view of the four previous failures of Kumaki Hattori to identify accused after having carefully examined everyone in the courtroom, his admittedly poor eyesight, and the fact that when he first saw the men he was, as he testified, "half asleep," it cannot be considered that his identification of Burke, or of either accused, was reasonable or of any probative value.

Accused's identification was then, to say the least, of extremely doubtful character. We do not state that such doubtful identification in and of itself invalidates the finding of guilty of the offense under discussion, but do state that the irregular procedure adopted by the court in permitting this witness to be recalled for the express purpose of curing a record where one of the essential elements of proof is wanting after the witness had conclusively demonstrated his inability and incapacity to make a positive identification, reflects adversely with impunity upon the findings and raises serious doubt that the guilt of these accused was established beyond a reasonable doubt.

Thus in People v. O'Hara, 163 N.W. at p.815, it was held:

> "Whether the jury ought to have convicted on their (the witnesses) uncorroborated testimony, or would have done so, we do not undertake to determine, but in view of the fact that their incriminating testimony is of doubtful character it was very important for the defendants that no improper evidence should be introduced against them to give weight to the prosecution * * *."

In the instant case Kumaki Hattori in his original testimony was unable to identify the accused. He also stated that he had not been to the "MP" station after the night in question. He was then excused temporarily and Private First Class Raymond Danielezyk was sworn as a witness and testified that at a lineup held in the "MP" station at a time not specified Kumaki Hattori identified the two accused. Subsequently after he had ultimately identified accused Kumaki Hattori testified that after the attack he did not go to the "MP" station but that his elder son went to the "MP" station to report.

It is necessary to inquire if Danielezyk's testimony was competent. Suffice it to say that as a general rule a witness may only testify that another made a pre-trial identification of an accused if the other had previously identified accused in court (CM 279112, Smith, 10 BR (ETO) 367; CM 291957, Williams, 18 BR (ETO) 7). Such evidence is only admissible as corroboration of a prior consistent identification made by the principal identifying witness. The evidence of pre-trial identification by Kumaki Hattori, however, must have been received and considered by the court as substantive evidence since there was at the time of its admission no judicial identification to corroborate. The substantive nature of the pre-trial identification was not changed by reason of the ultimate judicial identification made by Kumaki Hattori especially in view of the latter's assertion that he did not go to the "MP" station after the attack. We are of the opinion that consideration of Danielezyk's testimony as substantive evidence was error, and in view of the unsatisfactory and doubtful character of the judicial identification of accused we are of the opinion that it was prejudicial error within the purview of Article of War 37.

Over objection by the defense Toshiki Hattori, a son of Kumaki Hattori, was allowed to testify that at 2045 when he returned home his father told him "the same men who came previously had kicked the door open and hit him in the head." The declaration was admitted by the president as "what his father said, and not as to the truth of what his father said." Under the circumstances of its admission the declaration may not be considered as tending to prove that accused struck the declarant, and in any case it is doubtful if the declaration identified accused exclusively as the assailants.

For the reasons stated we are of the opinion that the finding of guilty of Specification 2, Charge I, is not supported by the record of trial.

6. In Specification 3 of Charge I the accused was found guilty of assault and battery. This offense will support a sentence of confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months (Par 104c, MCM, 1928).

7. For the foregoing reasons the Board of Review is of the opinion that the record of trial is, as to accused Burke, legally insufficient to support the findings of guilty of Specification 2 of Charge I, legally sufficient to support the findings of guilty of Specification 3, Charge I, and Charge I, and legally sufficient to support only so much of the sentence as to accused Burke as provides

for confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period.

(On leave), Judge Advocate

G W Lynch, Judge Advocate

Joseph T Brack, Judge Advocate

JAGH CM 326882 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 6 JUL 1948

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 Phillip E. Burke, RA 11148551, Company L, 21st Infantry, and Private Thomas F. Briley, RA 11161797, Headquarters Company, 1st Battalion, 21st Infantry.

2. The Board of Review is of the opinion as to accused Burke that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge I, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period. I concur in the opinion of the Board of Review and recommend that in the case of Private Phillip E. Burke, the finding of guilty of Specification 2, Charge I, and so much of the sentence as is in excess of confinement at hard labor for six 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 findings and 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

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( GCMO 136 , July 13, 1948 ).

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

JAGN-CM 326883

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | UNITED STATES CONSTABULARY |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Bad Cannstatt, Germany, 29 May 1947. Dishonorable discharge and confinement for eighteen (18) months. Disciplinary Barracks. |
| | ) | |
| Private JAMES A. MEECE (35677688), Troop A, 72d Squadron, 10th Constabulary Regiment. | ) | |

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

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

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

CHARGE I: Violation of the 93rd Article of War.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

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

Specification: In that Private James A. Meece, Troop "A", 72nd Squadron, 10th Constabulary Regiment, APO 154, United States Army, did, at or near Stuttgart, Germany, on or about 4 April 1947, wrongfully and without lawful permission or authority use a two and one half ton (2½) ton) Cargo truck, property of the United States.

Accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due,

and to be confined at hard labor for eighteen months. The reviewing authority disapproved the findings of guilty of Charge I and its Specification, approved the sentence, designated the Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification. The only question requiring discussion here are the nature and extent of the offense alleged and the maximum punishment applicable thereto. In view of the nature of the discussion it is deemed unnecessary to summarize the evidence.

4. By the Specification it is alleged, in essence, that accused did "wrongfully and without lawful permission or authority use a two and one-half ton (2½ ton) Cargo truck, property of the United States." Thus accused was charged with, and found guilty of, the commission of a tortious act in such a manner and under such circumstances that his conduct constituted the criminal offense of a disorder to the prejudice of good order and military discipline, in violation of Article of War 96. As was said in CM 307097, Mellinger, 60 BR 214:

> "The presence of the word 'wrongful' in each Specification was sufficient to put * * * /the accused/ * * * on notice that his acts were alleged to have been effected under such improper circumstances as to be prejudicial to good order and military discipline or to constitute conduct of a nature to bring discredit upon the military service (Cf: CM 226512, Lubon; CM 303049, Penick, CM ETO 8458; CM 305617, Blacker, CM ETO 10418)."

It is within the province of the Board of Review to examine the evidence in the record of trial to determine whether it is legally sufficient to establish the wrongful nature of the act alleged. However, it cannot affirm a punishment inflicted for the commission of an offense which may have been proven but which is not alleged by, contained within, or reasonably to be implied from the original verbiage of the Specification. Sans "wrongfully" the allegations contained in this Specification do not state or imply misconduct, since the accused might well have committed such an act through mistake, and a will to do wrong may not be inferred where it is not inherent in the act. The physical act of accused might, depending upon all of the circumstances including the nature of accused's intent, constitute on the one hand the offense of a simple disorder and on the other hand any one of several felonies cognizable in military law. In such cases, when used alone as the charging word, "wrongfully" indicates only the slightest degree of criminality which might be applicable to the acts alleged. Thus here, in the absence of other or additional words by which an offense of greater gravity would be stated or might be reasonably implied, we are forced to the conclusion that the

offense of which accused has been found guilty is a simple disorder in violation of Article of War 96 (CM 318430, Turgeon, et al, 67 BR 295, VI Bull JAG 13).

5. The offense of using wrongfully and without authority is not specifically listed inthe table of maximum punishments (par. 104c, MCM, 1928). However, we do find there listed the offense described as "Disorderly under such circumstances as to bring discredit upon the military service" with an authorized punishment not to exceed confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. There can be little doubt but that the President, by his Executive Order reproduced in paragraph 104c, Manual for Courts-Martial, 1928, sought to insure that comparable offenses would not be punishable in military law to any greater extent than in civil jurisdictions of the United States (CM 322167, Jernigan, (1947)). When the listed offense above described is considered in the light of the other specific offenses listed in the table as within Article of War 96 it would seem that the "Disorderly" conduct thus referred to was intended to include all disorders unless they are of such a character as to bring them clearly within the meaning of some other offense listed in the table or unless they involve such a degree of moral turpitude as to make of them something more than a simple disorder. We conclude as to this case that the alleged offense of which accused has been found guilty is no more than a simple disorder and that it is a form of the offense listed in the table of maximum punishments as "Disorderly under such circumstances as to bring discredit upon the military service."

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and to support only so much of the sentence as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

Edward T. Johnson, Judge Advocate.

(SICK IN QUARTERS), Judge Advocate.

George B. Springston, Judge Advocate.

MAR 4 1948

JAGN-CM 326883 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, United States Constabulary, APO 46, c/o Postmaster, New York, N. Y.

1. In the case of Private James A. Meece (35677688), Troop A, 72d Squadron, 10th Constabulary Regiment, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. 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 326883).

624

1 Incl
Record of trial

THOMAS H. GREEN
Major General,
The Judge Advocate General

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

JAGN-CM 326903

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | UNITED STATES CONSTABULARY |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Fulda, Germany, 28 August 1947. Whitley: Dishonorable discharge and confinement for nine (9) months. Douglas: Dishonorable discharge and confinement for six (6) months. Both: Disciplinary Barracks. |
| Corporal JAMES B. WHITLEY (44014569), and Private ROBERT L. DOUGLAS (38769784), both of Headquarters & Headquarters Company, 559th Engineer Service Battalion. | ) | |

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

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

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

WHITLEY AND DOUGLAS

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

Specification: In that Private Robert L. Douglas and Corporal James B. Whitley, Headquarters and Headquarters Company, 559th Engineer Service Battalion, acting jointly and in pursuance of a common intent, did at Mainz-Kastel, Germany, on or about 11 May 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Keinz Schnack, a German Policeman, "a German Kennkarte," the property of Hildegard Rother, a German civilian.

WHITLEY

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

Specification: In that Corporal James B. Whitley, Headquarters and Headquarters Company, 559th Engineer Service Battalion, did, at Mainz-Kastel, Germany, on or about 11 May 1947 willfully and wrongfully discharge a pistol in a public place, to wit, Roonstrasse, Mainz-Kastel.

Each accused pleaded not guilty to all the Charges and Specifications upon which he was arraigned. Each accused was found guilty of the Specification of Charge I, "except the words 'by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Keinz Schnack, a German Policeman, "a German Kennkarte,"' substituting therefor, respectively, the words 'feloniously take, steal and carry away from the custody of Keinz Schnack, a German Policeman, a German Kennkarte of some value.'" Accused Whitley was also found guilty of Charge II and its Specification. Accused Whitley 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. Accused Douglas 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 nine months. The reviewing authority approved only so much of the sentence as to accused Whitley as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for nine months, and approved only so much of the sentence as to accused Douglas as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months. He designated as to place of confinement for each accused the Branch United States Disciplinary Barracks, Greenhaven, New York, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

About 2300 hours 11 May 1947 two German policemen named Kreuzer and Geissler were on bicycle patrol and had neared a colored soldiers' club in Mainz-Kastel, Germany. Kreuzer approached a German girl standing in the vicinity and asked her for her identification card. She handed it to him and as he was looking at it a group of colored soldiers came from the club and started stoning him. The girl moved away and he mounted his bicycle and rode to the police station. As he left the scene he heard a shot fired a short distance to his rear. He entered the police station, and seeing German policemen, Schnack and Heilscher, present, he laid the card on the table, stated briefly what it was, and then returned to the vicinity of the club to find Geissler (R. 6-12). The above facts, as testified to by Kreuzer, were corroborated by Geissler, who further testified that three colored soldiers followed Kreuzer to the station; that an unidentified one of the three was the man who fired

the shot; and that accused Whitley was one of the three (R. 12-16).

(To prove the allegations contained in the Specification of Charge I the prosecution called as witnesses two German policemen, Hubertus Hielscher and Heinz Schnack. Throughout their testimony these witnesses referred to the respective individual accused by pointing or by reference to their relative size. However, from the record of trial as a whole, including the testimony of the accused themselves, it is possible to ascertain which accused is being referred to in each such instance and appropriate substitutions in the summary of evidence are therefore indulged in).

At about 2300 hours 11 May 1947 Schnack and Hielscher were together in the police station at Mainz-Kastel. Kreuzer entered, laid a pass on the table, stated he must return to "his comrade, Geissler," and hurried out. Shortly afterward three colored soldiers, including the two accused, entered the room (R. 21). As he came into the room accused Whitley worked the slide of his pistol and pointed it at Hielscher (R. 27, 29). Accused Douglas approached Hielscher and asked, "'Have you pass for the girl?'" Hielscher replied "'What's up'" and at some later time added "'That is not possible'" (R. 27-28). By his advance accused Douglas had come within the view of Schnack, theretofore hidden from view of the entrance by an intervening wall locker, and he turned from Hielscher to Schnack and asked the latter for the pass. Schnack testified that although he did not see a pistol in the possession of accused Douglas he assumed he held one as his hand was in his pocket and "because I thought he had one pistol in his hand I saw myself forced under these circumstances to give him the pass and he took the pass that was laying on the table" (R. 21). No threats were voiced by either accused, but from the manner of their entrance the policemen thought they were being threatened (R. 23, 24, 28). After accused Douglas picked up the pass he put it in his pocket. Then, according to the witness Schnack, "shortly before he left he took my hand and shook it and said whether it was OK. He offered my comrade Hielscher and me a cigarette. We bowed and refused the cigarettes" (R. 21). Thereupon all of the colored soldiers left (R. 29). Later that evening, acting upon a complaint by German police accused Whitley was apprehended by Sergeant Mihalowes who testified he examined accused Whitley's pistol and by smell determined it had been fired within the preceeding two hours (R. 17).

During the period in question accused Whitley was on duty as a special police corporal of the guard, and as such was authorized to carry a loaded pistol (R. 18).

The "kinnkarte" in question, referred to by various witnesses as the "pass," the "card" and the "passport" was an identification document required to be kept in the possession of every German civilian. Its usage varied with the locality of domicile. The police were

authorized to check the document of any German civilian and to hold it pending completion of such check, but "the person is always present during that check of the card" (R. 22).

4. Evidence for the defense:

Accused Whitley, having been duly advised of his rights in the premises, elected to testify under oath, substantially as follows. On the night of 11 May 1947 he was on duty as a special police corporal of the guard and was armed with a pistol (R. 31). He checked the colored soldiers' club in Mainz-Kastel at its closing time and as he came out he noticed several groups of colored soldiers under the influence of liquor, and several German girls, including one he had known about nine months named Hildegard Rother. He ordered the soldiers and the girls to go home (R. 32, 35, 36). About ten minutes later Hildegard Rother came to him and stated the police had taken her pass. Just then he heard noise coming from a group of colored soldiers and, moving in that direction, saw a German policeman being pursued by a group of colored soldiers. He called "Stop" and drew and fired his pistol once into the air as a signal for help. The pursuit stopped, he ordered all soldiers back to camp, and he then proceeded to the police station (R. 32-33). As he entered the station he cleared his pistol, picked up the unexpended cartridge from the floor, replaced it in the "clip," replaced the "clip" in the pistol, and put the pistol back in his holster. Concerning his subsequent conduct in the station he testified:

> "Douglas and two policemen were going behind the wardrobe. I come back and looked and see this little man behind the wardrobe and I didn't know whether he had the pass or not. I asked him and he said 'Nix.' I said it was the pass of a fraulein. He looked at the tall police and he looked at me. He was standing behind the wardrobe and started on out and he gave me the pass and I looked at it and Douglas was offering cigarettes. I got out " (R. 33).

And, again:

> "When I come in the door a tall police and another police was over there standing with Douglas. I just turned and unloaded my gun. * * * I finished and turned around and put it in my holster. They were going around this little table. I saw a little policeman, Schnack, behind the wardrobe. I told him I wanted to talk to them to tell them about a pass they took from the girl. I didn't go there to ask for no pass (R. 34). * * * I went to tell the police about taking the kennkarte and leaving the girl without a pass. They are supposed to take the girl with them (R. 35). * * * Before I could tell him he gave it to

me. * * * I looked at it and saw the girl's picture and started out. I went on out" (R. 34).

He later saw the girl on the street and gave her pass to her (R. 34, 38). As he was unloading his pistol he heard Douglas say "Was ist los?" Douglas said nothing more while witness was present. Douglas had nothing in his hands during that period and was still in the station when witness departed (R. 34). Hildegard Rother lived in Gelnhausen, was supposed to return there the next day, and witness sought to aid her in recovering her pass so she would be able to make the trip (R. 36, 38).

Accused Douglas, having been duly advised of his rights in the premises, elected to testify under oath, substantially as follows. On the night of 11 May he was on pass. As he came out of the club in Mainz-Kastel he saw some soldiers, about a half a block away, stoning a policeman, and heard a gun discharged. "So I ran down to the station. I seen a small policeman go into the station. Then I goes into the police station and ask a tall policeman what is wrong and he says the soldiers are shooting at him and throwing rocks at him" (R. 40). During the events in question witness carried a small Kodak camera slung about his neck but had no gun of any kind (R. 40). Witness corroborated in detail the testimony of accused Whitley concerning the latter's actions in the station (R. 40-42). Witness does not know Hildegard Rother (R. 42). When asked "Why were you in the police station?", witness replied: "Because I heard a shot and went down - maybe someone got hurt" (R. 42). While accused Whitley was being handed the card witness started to smoke and then offered a cigarette to each of the others present as a customary gesture and the policemen took one each (R. 41-42). The Germans did not appear to be afraid while he was in the station (R. 41).

5. Schnack and Hielscher were recalled by the court but no new evidence was elicited except the testimony of each that he had not seen any camera in the possession of accused Douglas (R. 43, 45).

6. By the Specification of Charge I accused Whitley and Douglas were charged with the joint commission of a robbery. By exceptions and substitutions the court, in essence, found them guilty of a joint commission of the offense of larceny, from the custody of Schnack, of "'a German Kennkarte; of some value,' the property of Hildegard Rother."

Larceny is a specific intent crime. It has been defined as "the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein (Clark)" (par. 149g, MCM, 1928). "The taking and carrying away must be felonious; that is, done animo furandi; or, as the civil law expresses it, lucri causa" (4 Blackstone's Commentaries, 232). "Undoubtedly the 'taint of selfish greed' in the taker distinguishes larceny from a mere trespass and is actually present in every larceny" (Groover v. State (Fla.) 90 So. 473, 26 ALR 373).

In this case the prosecution proposed to demonstrate that accused took the Kennkarte from the presence of Schnack by force and violence and by putting him in fear. The court, by its findings, determined that accused were not guilty of accomplishing the taking "by force and violence and by putting him [Schnack] in fear." Presuming, without holding, that the resultant finding is legally sufficient to properly find accused jointly guilty of larceny, we must turn to the record of trial to determine whether there is sufficient legal evidence therein contained to support such finding.

The most cursory examination of the evidence in the record relating to this matter discloses a violent conflict between the testimony of accused Whitley and Douglas on the one hand, and the testimony of Schnack and Hielscher on the other. This conflict is no doubt in large part a result of the interpretation by the witnesses of the surrounding circumstances, and of language difficulties and racial custom. The rule of interpretation applicable in such cases has been well stated as follows:

> "Such conflicts [in evidence] are to be resolved, in the first instance at least by the court and in so doing it is not required to accept as true the testimony of any witnesses, whether advanced by the prosecution or by the defense, but may give such weight as it deems fit to any evidence properly brought to its attention (Wharton's Criminal Evidence, 11th Ed., s. 881; CM 267476, Wilson, 44 BR 1, 9; CM 318085, Chance; par. 78a, MCM, 1928). The only requirement is that, as an end result, the court's findings of guilty be based upon such evidence, apparently selected from the whole as worthy of belief, as would, standing alone and unencumbered by any unexplained contradictions within itself, be of the prescribed quantum and consistent with no other rational hypothesis than that of accused's guilt" (CM 325457, McKinster).

Applying the rule above stated, and in view of the finding of the court, we are forced to conclude that the court chose to believe a portion of the testimony of the accused respecting the issues of force and fear, and that portion of the testimony of the German policemen respecting the joint nature of the act and the circumstances (other than by force and fear) of the taking. Even if we accept, as reasonable, such obvious conclusions by the court as to which testimony shall be accepted, we are still faced with the necessity of determining whether, viewed in such a light, the testimony so selected, or any of the testimony in the record is legally sufficient to establish the larceny found.

Assuming, for purposes of argument, that the card was properly in the custody of the police, to the exclusion of the owner's rights

to immediate possession; that the two accused were acting jointly; that they entered the station and Douglas demanded the card; that he then saw the card on a table, picked it up, and put it in his pocket; we are then met by the uncontradicted testimony of Schnack, in essence, as follows: Schnack did not object to the taking of the card because he felt himself threatened (R. 21, 25-26). After the card was taken from the table by Douglas, "shortly before he /Douglas/ left he took my hand and shook it and said whether it was OK. He offered my comrade Hielscher and me a cigarette. We bowed and refused the cigarettes" (R. 21).

Keeping in mind the language difficulties involved it seems quite obvious that the accused left the station under the impression their actions were beyond reproach since the only intent imputable to them which can reasonably be inferred was that of returning the card to its rightful owner, and since no objections had been interposed thereto by the German police. It may well be that the latter pair, having been advised of the recent attack upon their fellow officer by colored soldiers, were apprehensive with the intrusion of three such soldiers into the station, and acted accordingly, but even when all of the evidence is construed most strongly against the accused we fail to find any sufficient to prove, directly or by reasonable inference, that accused are chargeable with any animus furandi in their taking of the card.

7. In the Specification of Charge II it is alleged, in essence, that accused Whitley did "* * * willfully and wrongfully discharge a pistol in a public place * * *," in violation of Article of War 96. The Specification was obviously intended to allege such act as a disorder or as discrediting conduct. Since the act of a soldier in discharging a pistol in a public place is not per se an offense the record of trial, in order that the findings of guilty may be sustained, must contain legal proof that (1) accused committed the act alleged, and (2) that he did so "willfully and wrongfully."

Although there is some evidence in the record of trial, other than accused Whitley's admissions, from which it might be suspected that he fired the pistol shot in question, such fact can only be legally established by those admissions. It is well settled that where, as in this case, the only evidence legally sufficient to establish the fact that accused committed the act alleged as an offense is the admission of the accused, then the prosecution and the court are bound by the accused's statements considered in their whole effect, and the court is not at liberty to reject or disbelieve the self-serving portions of the statements while accepting the disserving portions thereof, unless there is other evidence in the case tending to render the self-serving statements questionable, doubtful, or inconsistent (CM 319168, Poe (1947); 26 ALR 541). Accused Whitley, in admitting he fired the shot in question, explained that he did so for the

purpose of summoning aid. He admitted three spaced shots would have constituted a more appropriate signal but stated he was excited at the time and thought one would accomplish his purpose. There is nothing in his own statement, or in the remaining evidence, to contravene such explanation, which certainly may not be said to be unreasonable. We are thus forced to conclude that the evidence fails to establish that the act of accused in firing his pistol constituted a criminal offense.

8. For the reasons stated the Board of Review holds the record of trial, as to each accused, legally insufficient to support the findings or the sentence.

Edward L. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

_____, Judge Advocate.

JAGN CM 326903 1st Ind

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

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

1. In the case of Corporal James B. Whitley (44014509), and Private Robert L. Douglas (38769784), both of Headquarters & Headquarters Company, 559th Engineer Service Battalion, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence as to each accused be vacated.

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

(CM 326903).

1 Incl
Record of trial

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

881

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

(25)

JAGK - CM 326950

19 DEC 1947

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| UNITED STATES<br><br>v.<br><br>Captain CARL M. KAYSER (O-1844445), Medical Administrative Corps | HEADQUARTERS COMMAND<br>EUROPEAN COMMAND<br><br>Trial by G.C.M., convened at Frankfurt-am-Main, 23 September 1947. Dismissal and total forfeitures. |

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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 61st Article of War.

Specification: In that Captain Carl M. Kayser, 2nd Medical General Dispensary, European Command, then a member of the 63rd Medical Depot, did, without proper leave absent himself from his place of duty at Liege, Belgium, from about 27 November 1946 to about 11 August 1947.

He pleaded guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three months. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action under Article of War 48.

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

4. Records of the Department of the Army show the accused to be 31 years of age and married. He enlisted on 7 March 1940 and was commissioned an officer on 9 December 1942. He departed the United States for duty in the European Theater in 1943. He has sufficient ASR points for return to the Zone of Interior and discharge. His efficiency reports

for 1945 are superior and excellent.

5. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 61.

Ahrstn E. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Gilbert Pickhoyd, Judge Advocate

JAGK - CM 326950 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 5 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Captain Carl M. Kayser (O-1844445), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from 27 November 1946 to 11 August 1947, in violation of Article of War 61. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three months. The reviewing authority approved the sentence but remitted the confinement adjudged 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 that the record of trial is legally sufficient to support the findings of guilty and the sentence.

The accused pleaded guilty. He testified that he absented himself without leave in Europe on 27 November 1946, when ordered to return to the United States, and remained absent until 11 August 1947. From the testimony of accused it appears that he was seeking a divorce from his wife and that he desired to remain in Belgium in order to marry a Belgian woman and to engage in business. He was employed in Belgium during his absence.

4. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures adjudged be remitted and that 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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( GCMO 16 (DA) 20 Jan 1948).

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

(29)

NOV 26 1947

JAGQ - CM 327041

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| UNITED STATES | ) | CARIBBEAN AIR COMMAND |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Howard Field, Canal Zone, 4 November 1947. Dismissal and total forfeitures. |
| | ) | |
| First Lieutenant DAVID W. POHL (0-2099245), Air Corps | ) | |

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OPINION of the BOARD OF REVIEW
LIPSCOMB, SCHENKEN and KANE, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that, First Lieutenant David W. Pohl, 91st Reconnaissance Squadron (Long Range Photo), did, at Fort Clayton, Canal Zone, on or about 2 October 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Pfc Oscar J. Gwynn, 516th Transportation Car Company.

Specification 2: In that First Lieutenant David W. Pohl, 91st Reconnaissance Squadron (Long Range Photo), did, at Fort Clayton, Canal Zone, on or about 2 October 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Pfc Alvin L. Senne, Jr., 516th Transportation Car Company.

Specification 3: In that First Lieutenant David W. Pohl, 91st Reconnaissance Squadron (Long Range Photo), did, at Fort Clayton, Canal Zone, on or about 2 October 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Pfc Warren C. Crandall, 516th Transportation Car Company.

The accused declined to plead to the Charge and Specifications thereunder and the court stated that it entered a plea of not guilty for him. The trial proceeded as if the accused had pleaded not guilty. He was found guilty of the Charge and Specifications thereunder. 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.

Private First Class Oscar J. Gwynn testified that on the night of 2 October 1947, he accompanied the accused to the latter's quarters where they had a "couple of drinks." They then left the accused's quarters and entered his automobile where the accused engaged in an act of carnal intercourse with him per os. Private Gwynn's testimony describes all of the elements of the completed act of sexual connection by mouth with the accused. When the carnal act was completed, the accused drove to Private Gwynn's quarters. Private Gwynn then awakened Privates Senne and Crandall and asked them, in effect, if they wished to engage in a sexual act with the accused. According to the witness, both Senne and Crandall responded in the affirmative and each committed such an act with the accused (R 7-8).

Privates First Class Alvin L. Senne, Jr., and Warren C. Crandall each testified that on the night of 2 October 1947, he was awakened by Private Gwynn and asked the question above stated. Each of these witnesses further testified that they joined the accused in his car and that the accused engaged in a sexual act with them by mouth. Each witness also identified the accused as the same person who committed the act each described (R 8-10).

4. Evidence for the Accused.

The only evidence for the accused consists of the testimony of Major George T. Hicks, 91st Reconnaissance Squadron, who described the accused as an officer with "an excellent record." He testified that the accused's Form 66-2 shows that he has a minimum rating of 4.8 and maximum rating of 5.0. He also testified that the accused had participated in the "Doolittle Raid over Tokyo" and that he had been awarded the Distinguished Flying Cross, Chinese Breast Order of Pao Ting with ribbon, and "the other defense medals of World War II" (R 11-12).

5. Sufficiency of Proof.

Each of the three specifications alleged that the accused, did, at Fort Clayton, Canal Zone, on or about 2 October 1947, commit the crime of sodomy by having carnal connection per os with the person therein named. The Manual for Courts-Martial defines sodomy as follows:

> "Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals." (MCM, 1928, par 149k)

The evidence clearly shows, beyond a reasonable doubt, that the accused committed each offense alleged. The testimony of each accomplice tends

to corroborate the testimony of the other. It follows, therefore, that the record of trial is legally sufficient to sustain the findings of guilty.

6. The records of the Department of the Army show that the accused is 26 years of age. He was born at Boston, Massachusetts on 31 December 1921. He was graduated from high school in 1935, and inducted into the service on 3 January 1940. In 1942, while serving as a corporal with the Air Forces, he volunteered for the "Doolittle Raid" over Tokyo. For his participation in that raid he was awarded the Distinguished Flying Cross and the Breast Order of Pao Ting with ribbon and diploma by the Chinese Government. He was commissioned a second lieutenant, Army of the United States, on 4 August 1945 and promoted to the rank of first lieutenant, Air Corps, on 27 June 1947. His efficiency ratings have been "excellent."

7. The court was legally constituted and had jurisdiction of the person of the accused and of the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the finding of guilty and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon a conviction of a violation of Article of War 93.

Abner E. Lipscomb, Judge Advocate

C. F. Schenken, Judge Advocate

A. D. Kane, Judge Advocate

JAGQ - CM 327041 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. DEC 5 1949

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 David W. Pohl (0-2099245), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of feloniously committing the act of sodomy per os with three enlisted men, 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 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.

4. The record shows that on the night of 2 October 1947, the accused after drinking with an enlisted man engaged in the act of sodomy with him. Thereafter the accused and the enlisted man drove to the latter's barracks where the enlisted man awakened two other enlisted men and presented them to the accused. The accused then engaged in the act of sodomy with each of them.

5. The records of the Department of the Army show that the accused is 26 years of age. He was born at Boston, Massachusetts on 31 December 1921. He was graduated from high school in 1935, and inducted into the service on 3 January 1940. In 1942, while serving as a corporal with the Air Forces, he volunteered for the "Doolittle Raid" over Tokyo. For his participation in that raid he was awarded the Distinguished Flying Cross and the Breast Order of Pao Ting with ribbon and diploma by the Chinese Government. He was commissioned a second lieutenant, Army of the United States, on 4 August 1945 and promoted to the rank of first lieutenant, Air Corps, on 27 June 1947. His efficiency ratings have been "excellent." He has submitted his resignation for the good of the service. Action on the resignation has been withheld by the Army Personnel Board pending action by the confirming authority.

6. Although the accused distinguished himself by his voluntary participation in the "Doolittle Raid" over Tokyo his commission of three separate acts of sodomy with enlisted men show that he is unworthy of being retained in the service. In view of the gravity of these offenses, I recommend that the sentence be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls.
1. R/T
2. Form of action

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( GCMO 89, Dec 18, 1947).

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

JAGK - CM 327060

27 JAN 1948

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| UNITED STATES<br><br>v.<br><br>Private ANGEL M. GRAULAU (RA 30405112), Battery "A", 504th Field Artillery Battalion, Losey Field, Puerto Rico. | HEADQUARTERS ANTILLES DEPARTMENT<br><br>Trial by G.C.M., convened at Losey Field, Puerto Rico, 23 October 1947. Dishonorable discharge (suspended), total forfeitures and confinement for eighteen (18) months. Rehabilitation Center, Fort Buchanan, Puerto Rico. |

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

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

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

CHARGE: Violation of the 84th Article of War.

Specification 1: In that Private Angel M. Graulau, Battery "A", 504th Field Artillery Battalion, Losey Field, Puerto Rico, did, at or near Potala Colony, Juana Diaz, Puerto Rico, on or about 17 April 1947, unlawfully sell to Angel Diaz, one (1) khaki shirt, of the value of $2.41, issued for use in the military service of the United States.

Specification 2: In that Private Angel M. Graulau, Battery "A", 504th Field Artillery Battalion, Losey Field, Puerto Rico, did, at or near Potala Colony, Juana Diaz, Puerto Rico, on or about 20 May 1947, unlawfully sell to Juan Ortiz, two (2) shirts, value $4.82, two (2) pairs of trousers, value $5.62, one (1) raincoat, value $4.55, and one (1) blanket, value $8.11, of a total value of $23.10, issued for use in the military service of the United States.

He pleaded not guilty to and was found guilty of the charge and both 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 eighteen months. The reviewing authority approved the sentence and ordered it executed, but suspended that portion thereof relating

to dishonorable discharge until the soldier's release from confinement, and designated the Detention and Rehabilitation Center, Fort Buchanan, Puerto Rico, 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. 27, Headquarters Antilles Department, dated 7 November 1947.

3. The evidence shows that sometime during the month of April 1947 accused sold to Angel Diaz a khaki shirt, which accused, in his pre-trial statement admitting the sale, described as "a new Army khaki shirt" (R 7, Pros Ex 8), and that sometime "about three months" before the trial he had sold to Juan Ortiz Rodriguez two khaki shirts, two khaki trousers, one raincoat and one blanket (R 9). The defense refused to stipulate that the articles of clothing contained in Prosecution Exhibits 1 to 6 inclusive, which were identified as the articles of clothing sold by accused, were similar to the type clothing issued in the military service and asserted that similar items were sold by commercial stores (R 21). Captain Paul A. McVay, S-4, 504th Field Artillery Battalion, testified that all the articles in Prosecution Exhibits 1 to 6 were of the type issued for use in the military service and described the blanket as being "apparently a Model 1934, wool, blanket, heavy issued for use of troops" (R 21-22). The court took judicial notice of Catalogues QM 5-1-A and 5-1-E, which list the prices of shirts, cotton, khaki, at $2.41, trousers, cotton, khaki, at $2.81; raincoats rbzd., dismtd., $4.55; and blanket, wool, OD $8.11 (R 21).

4. The Manual for Courts-Martial 1928, paragraph 150i, in discussing the proof required to establish the offense of unlawfully selling, etc., military property of the United States in violation of Article of War 94, provides that:

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

The Board of Review in CM 319591, Pogue, stated:

> "Proof that accused had applied to his own use or to another apparently unauthorized purpose certain property of a type and kind generally furnished and intended for the military service, even though such property might bear manufacturer's markings indicating that it had been made under Government contract for ultimate use in the military service, is insufficient to support

a conviction of misappropriation in violation of the 94th Article of War unless such proof is accompanied by further evidence that the property in question had been unlawfully obtained from military custody or that items similar to such property were not sold on a legitimate open market in the locality where the offense was alleged to have been committed or by other showing, by fair inference or accused's own admission, that such property was in fact military property. (CM 318062, Guevara; CM 250426, Hecht, 32 BR 361, 368; CM 210763, Pelletier, 9 BR 351, 353; CM 203511, Wedmore, 1st Ind., 7 BR 221, 225; par. 150i, MCM, 1928)." (See also CM 192952, Scoles, 2 BR 51.)

It was also pointed out in the Pogue case that the rule heretofore set forth "is of peculiar validity today when large stocks of items formerly exclusively used by the military service are sold to the general public in an effort to dispose of surplus war supplies."

Despite the rather general language found in paragraph 144a of the Manual for Courts-Martial, 1928, concerning proof of the offense of unlawfully selling, etc., property "issued for use in the military service" in violation of Article of War 84, we believe the foregoing principles apply with equal force whether the unlawful sale be denounced as a violation of Article of War 94 or Article of War 84, for in either case the plain intendment of Congress was to protect military property owned by the United States from illegal use or disposition (CM 310965, Griffin, 27 BR (ETO) 381; see as to title in United States of clothing and equipment issues, Sec. III, AR 615-40, 1 February 1945, and changes thereto, compare Winthrop's Mil. Law and Prec., 2nd Ed., p. 561). Although accused, in his pre-trial statement, described the shirt which was made the subject of Specification 1 of the Charge as "a new Army khaki shirt" the record contains no indication that the adjective "Army" was used to convey any meaning other than that the shirt in question was of the type and kind customarily worn by members of the military service. As has been heretofore pointed out, such evidence, standing alone, is insufficient to show that the property in question was property furnished or intended for, or issued for use in, the military service in the sense that the United States had title thereto at the time it was allegedly unlawfully sold (CM 312273, Mascarello, 62 BR 55, 58 - unlawful sale in violation of AW 94; see CM 265294, Rindfleich, 1 BR (ETO) 153, 159 - misapplication in violation of AW 94) or, in respect to a prosecution under Article of War 84 and having in mind the historical background of that Article (Winthrop, supra, p. 560), that the property in question was at such time, if not generally, at least specially owned by the United States by reason of being on issue for use in the military service.

5. For the foregoing reasons the Board of Review is of the opinion

that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Calvin B. Gilbert, Judge Advocate

Gilbert S. Hagaman, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 327060 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. FEB 2 1948

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 Angel M. Graulau (RA 30305112), Battery "A", 504th Field Artillery Battalion, Losey Field, Puerto Rico.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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( GCMO 38 (DA) 5 Feb 1948).

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

JAGH - CM 327134

DEC 1947

| | | |
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| UNITED STATES | ) | 2D INFANTRY DIVISION |
| v. | ) | Trial by G.C.M., convened at Fort Lewis, Washington, 19 and 26 August and 2 September 1947. Dismissal, total forfeitures, and confinement for one (1) year. |
| First Lieutenant WILLIAM W. FUNK (0-1647029), 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 1: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon, did, at Portland, Oregon, on or about 7 June 1947, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Portland, Oregon 5 June 19 47

First National Bank
Alexandria La. (name of Bank)
~~Portland, Oregon~~

Pay to William W Funk Or Order $ 235 00

two hundred and thirty five Dollars---------- Dollars

Robert R. Ames

which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: Same as Specification 1, except the date of the offense was 16 June 1947, the date on the check was 13 June 1947, and the amount of the check was $125.00.

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

Specification 1: Same as Specification 1, Charge I.

Specification 2: Same as Specification 2, Charge I.

Specification 3: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon, did, at Portland, Oregon, on or about 9 June 1947, with intent to defraud, wrongfully and unlawfully make and utter to American Legion Portland Post No. 1, Portland, Oregon, a certain check, in words and figures as follows, to wit:

No. 8

MAIN BRANCH
THE FIRST NATIONAL BANK OF PORTLAND 24-4
S.W. Fifth, Sixth and Stark Streets 1230

Portland, Oregon 9 June 19 47

Pay to the Order Of American Legion Portland Post No. 1 $ 20 00

twenty Dollars & no----------Dollars

William W Funk

in payment of value received by him, the said First Lieutenant William W. Funk, he the said First Lieutenant William W. Funk then well knowing he did not have and not intending that he should have sufficient funds in the said Main Branch, The First National Bank of Portland, Portland, Oregon, for the payment of said check.

Specification 4: Same as Specification 3, except that 10 June 1947 was the date of the offense and the date on the check.

Specification 5: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon, did, at Portland, Oregon, on or about 13 June 1947, with intent to defraud, wrongfully and unlawfully make and utter to Jack Bowne, Portland, Oregon, a certain check, in words and figures as follows, to wit:

MAIN BRANCH
THE FIRST NATIONAL BANK OF PORTLAND
S.W. Fifth, Sixth, and Stark Streets

No. _____

24-4
1230

Portland, Oregon 13 June 19 47

Pay to the Order of Jack Bowne $20 00

twenty Dollars & no----------Dollars

William W Funk

in payment of value received by him, the said First Lieutenant William W. Funk, he the said First Lieutenant William W. Funk then well knowing he did not have and not intending that he should have sufficient funds in the said Main Branch, The First National Bank of Portland, Portland, Oregon, for the payment of said check.

Specification 6: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon, did, at Vancouver, Washington, on or about 19 June 1947, with intent to defraud, wrongfully and unlawfully make and utter to The Log Cabin, Vancouver, Washington, a certain check in words and figures as follows, to wit:

Vancouver, Wash. 19 June 19 47 No. ____

First
~~CLARK COUNTY~~ NATIONAL BANK
~~Vancouver, Washington~~ 98-217
Portland Ore.

Pay to the Order of
Vancouver, Branch
The National Bank of Commerce of Seattle $20 00

Pay To the Order of The Log Cabin

twenty Dollars & no---------- Dollars

William W Funk

in payment of value received by him, the said First Lieutenant William W. Funk, he, the said First Lieutenant William W. Funk, then well knowing that he did not have and not intending that he should have sufficient funds in the said The First National Bank of Portland, Portland, Oregon, for the payment of said check.

Specification 7: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon, did, at Vancouver, Washington, on or about 18 June 1947, with intent to defraud, wrongfully and unlawfully make and utter to The Log Cabin, Vancouver, Washington, a certain check in words and figures as follows, to wit:

MAIN BRANCH No. _____
THE FIRST NATIONAL BANK OF PORTLAND
S.W. Fifth, Sixth and Stark Streets 24-4
Portland, Oregon 18 June 19 47 1230

Pay to the Order of
Vancouver, Branch
The National Bank of Commerce of Seattle
Pay To the Order of Vancouver, Washington $ 20 00
The Log Cabin

twenty Dollars & no---------- Dollars

William W Funk

in payment of value received by him, the said First Lieutenant William W. Funk, he, the said First Lieutenant William W. Funk, then well knowing that he did not have and not intending that he should have sufficient funds in the said Main Branch, The First National Bank of Portland, Portland, Oregon, for the payment of said check.

Specification 8: Same as Specification 6 (Additional check).

Specifications 9, 10, and 11: Same as Specification 7, except as follows:

| Spec | Amount |
|---|---|
| 9 | $25.00 |
| 10 | 10.00 |
| 11 | 15.00 |

Specification 12: Same as Specification 6, except the amount of the check was $15.00.

Specification 13: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, being indebted to the 525 Restaurant, Portland, Oregon, in the sum of seventy-one dollars and fifty cents ($71.50) for meals furnished enlisted personnel of the Railway Terminal Military Police at Portland, Oregon, at the request of and while the said First Lieutenant William W. Funk was on temporary duty with said Railway Terminal Police, which amount became due and payable on or about 23 June 1947, did, at Portland, Oregon, and Fort Lewis, Washington, from 4 July 1947 to 22 July 1947, dishonorably fail and neglect to pay said debt.

Specification 14: Disapproved by the reviewing authority.

Specification 15: Nolle Prosequi.

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

Specification 1: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon, did, at Portland, Oregon, on or about 7 June 1947, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain bank check in words and figures as follows:

Portland, Oregon 5 June 19 47

First National Bank
Alexandria, La. (Name of Bank)
~~Portland, Oregon~~

Pay to William W Funk Or Order $ 235 00

two hundred and thirty five Dollars----------Dollars

Robert R Ames

a writing of a private nature, which might operate to the prejudice of another, which said check was, as he, the said First Lieutenant William W Funk then well knew falsely made and forged.

Specification 2: Same as Specification 1, except the date of the offense was 16 June 1947, the date of the check was 13 June 1947, and the amount of the check was $125.00.

Specification 3: In that First Lieutenant William W. Funk, Corps of Engineers, 2d Engineer Battalion, 2d Infantry Division, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon, did, at Portland, Oregon, on or about 1 May 1947, wrongfully borrow the sum of twenty dollars ($20.00) from an enlisted man, to wit, Private First Class Prentis D. Letney, Company B, 656th Engineer Battalion, Fort Lewis, Washington, then on temporary duty with the Railway Terminal Military Police, Portland, Oregon.

Specifications 4, 5, 10, and 11: The same as Specification 3, except as follows:

| Spec | Date of Offense | Enlisted man involved | Amount borrowed |
|---|---|---|---|
| 4 | 10 May 1947 | No difference | No difference |
| 5 | No difference | T/5 William K. Jernigan | No difference |
| 10 | 7 June 1947 | Pfc George Stenchfield | $30.00 |
| 11 | 7 June 1947 | Pfc Marland Stryker | $45.00 |

Specifications 6, 7, 8, and 9: Nolle prosequi.

Specification 12: Disapproved by the reviewing authority.

He pleaded not guilty to, and was found guilty of, all Specifications and Charges and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority disapproved the findings of guilty of Specification 14, Charge II, and Specification 12, Charge III, approved the sentence, but reduced the period of confinement to one year, and forwarded the record of trial pursuant to Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the 2d Infantry Division Judge Advocate, dated 20 October 1947.

4. Records of the Army show that accused is 31 years of age, married and the father of three children, with the expectancy of a fourth child in the near future. He was graduated from high school in 1934 and then served three years in the Civilian Conservation Corps. He was subsequently employed as a laborer and lineman. He had National Guard enlisted service from June 1937 until he enlisted in the Regular Army on 14 September 1939. He was commissioned a second lieutenant on 20 May 1943 and was promoted to first lieutenant on 16 May 1945. He was released from active duty on 3

December 1945, re-enlisted in the Regular Army in the grade of master sergeant on 12 December 1945, and was recalled to active duty as a first lieutenant on 22 July 1946. His efficiency ratings of record are uniformly "excellent."

5. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of the 95th Article of War, and a sentence of dismissal, total forfeitures, and confinement at hard labor for one year is authorized upon conviction of violations of Articles of War 93 and 96.

R. Hottenstein, Judge Advocate

John T. O'Brien, Judge Advocate

W. Lynch, Judge Advocate

JAGH - CM 327134 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 6 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant William W. Funk (0-1647029), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of forging and uttering two checks (Chg I, Specs 1, 2; Chg II, Specs 1, 2; Chg III, Specs 1, 2), in violation of Articles of War 93, 95, and 96; of making and uttering ten checks upon a bank not having and not intending to have sufficient funds in that bank for payment of the checks (Chg II, Specs 3-12 Incl), and of failing dishonorably to pay debts in two instances (Chg II, Specs 13, 14), in violation of Article of War 95; and of dishonorably failing to pay a debt and borrowing money from enlisted men on five occasions (Chg III, Specs 3, 4, 5, 10, 11, 12), 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 three years. The reviewing authority disapproved the findings of guilty of Specification 14, Charge II, and Specification 12, Charge III (dishonorable failure to pay debts in two instances), approved the sentence but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the 2d Infantry Division Judge Advocate which has been adopted by the Board of Review as a statement of the evidence and the law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

In April 1947 accused and a detachment of enlisted men were sent from Fort Lewis, Washington, to Portland, Oregon, to perform military police duty. Most of the men were without funds and accused made a credit arrangement with the proprietor of the "525 Restaurant" whereby the men would be fed. Accused paid one bill amounting to $175.00. Subsequently a debt of $71.50 accrued and on 23 June 1947 accused gave a check in payment of the latter bill with the request that it not be presented for payment until 4 July 1947. On or about that date the check was presented and was returned because of insufficient funds.

During the period accused was in Portland he borrowed a total of $135.00 from enlisted men who were members of his detachment. Of this amount $56.00 were repaid.

On 2 June 1947 accused opened a checking account in the First National Bank of Portland, Portland, Oregon, with a cash deposit of $95.00. Subsequently on 7 and 16 June 1947 he deposited to his account two checks amounting to $360.00 payable to himself drawn on a non-existent bank by a fictitious drawer. During the pre-trial investigation and at the trial accused admitted his authorship of the two checks. On 30 June he gave the bank a promissory note to cover the overdraft resulting upon discovery of the two forged checks.

During June 1947 accused cashed three checks totalling $60.00 at American Legion Portland Post No. 1. These checks were later returned to the Legion Post because of insufficient funds.

On 18 and 19 June six checks of accused amounting to $165.00 were cashed at the Log Cabin in Portland, and later returned because of insufficient funds. Seventy dollars of the amount obtained on these checks have been repaid to the payee. It appears that these checks were given to an employee at the "L Club," a gambling place which was under the same ownership as the Log Cabin. The employee then cashed the checks at the Log Cabin and gave the cash so obtained to accused.

In his testimony accused substantially admitted his offenses, but as to the checks which were cashed at the Log Cabin stated that the checks were in payment of chips already received and that it was understood that the checks were not good but would be made good. He also claimed that he lost between $250.00 and $300.00 at the "L Club" playing poker and that subsequently he found that the games going on there were crooked. He admitted borrowing money from enlisted men but stated that he had lent money to other enlisted men. As to his loans to enlisted men most of the money lent had been repaid to accused.

4. The accused is 31 years of age, married and the father of three children, with the expectancy of a fourth child in the near future. He was graduated from high school in 1934 and then served three years in the Civilian Conservation Corps. He was subsequently employed as a laborer and lineman. He had National Guard enlisted service from June 1937 until he enlisted in the Regular Army on 14 September 1939. He was commissioned a second lieutenant on 20 May 1943 and was promoted to first lieutenant on 16 May 1945. He was released from active duty on 3 December 1945, re-enlisted in the Regular Army in the grade of master sergeant on 12 December 1945, and was recalled to active duty as a first lieutenant on 22 July 1946. His efficiency ratings of record are uniformly "excellent."

5. The psychiatrist who examined accused prior to trial, while finding no psychiatric disease, stated in his report:

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

JAGH CM 327149

4 February 1948

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|---|---|
| UNITED STATES<br><br>v.<br><br>Sergeant VIRGIL ENDICOTT, RA 35652138, Company C, 388th Military Police Battalion | BREMERHAVEN PORT OF EMBARKATION<br><br>Trial by G.C.M., convened at Bremerhaven, Germany, 17-18 October 1947. Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks, Fort Knox, Kentucky. |

HOLDING of the BOARD OF REVIEW
HOTTENSTEIN, LYNCH and BRACK, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Sergeant Virgil Endicott, Company C, 388th Military Police Service Battalion, did, at or near Brake, Germany, on or about 7 September 1947, wrongfully and unlawfully and through culpable negligence, kill Kurt Scobel, by striking him with a motor vehicle.

He pleaded not guilty to and was found guilty of the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved "only so much of the findings of guilty of the Specification of the Charge and the Charge as involves findings that the accused did, at the time and place alleged, wrongfully and unlawfully and through negligence, kill Kurt Scobel, by striking him with a motor vehicle, in violation of the 96th Article of War," approved and ordered executed only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, but suspended the execution of that portion adjudging

dishonorable discharge until the soldier's release from confinement, and designated 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. 70, Headquarters, Bremerhaven Port of Embarkation, dated 8 November 1947.

3. Evidence for the prosecution.

At about 1800, 7 September 1947, while it was still daylight, Mr. Kurt Scobel (deceased) was standing on the sidewalk in front of his home at 22 Harrierstrasse, Brake, Germany (R 10,16,18,24). A 3/4 ton weapons carrier, assigned to the 388th Military Police Battalion (R 47) and driven by the accused (R 37,53; Pros Ex 2) ran up over the curb on the left side of the road and on to the sidewalk in front of 21 Harrierstrasse (R 20,25). The sidewalk level is eight inches higher than the road surface (R 32). The truck struck two buildings in its course, one at 21 Harrierstrasse and the other next to it at 22 Harrierstrasse. Then it spun around and struck Mr. Kurt Scobel, throwing him against the wall of his house (R 17,30). After the collision, the vehicle came to a stop on the sidewalk about six feet past the corner of Mr. Scobel's house (R 13). Immediately after the incident, Mr. Scobel was found lying on the left side of the front entrance to his house. He had lacerations on his left shoulder and forehead and "his left leg was hanging lifeless" (R 9-13). Mr. Scobel was carried into his home where he was given first aid by a doctor and about twenty minutes thereafter he was removed to a hospital in an ambulance where he died the following morning as a result of the injuries he sustained in this incident (R 10-13, 23). Accused did not offer or render any assistance to Mr. Scobel after the collision and immediately drove off leaving the scene (R 17,21,25,31).

Private Edward H. Watson, who was riding with the accused at the time of the accident, testified that on Sunday, 7 September 1947, he met the accused in the billets of the Marine Compound at Bremerhaven. They went to Brake in a 3/4 ton truck of which witness was the regular driver. When they reached Dedesdorf Ferry, accused relieved witness as driver because the latter was drunk and accused drove the rest of the way into Brake. In Brake, they stopped at accused's billets at the CIC and from there they went to a German beer house where each of them drank one glass of beer. Next they drove down to the house of a German girl where they stayed about five or ten minutes and then they proceeded on toward accused's girl's house. Enroute to the latter house and while accused was still driving, the vehicle struck a German civilian. After the vehicle struck the German it stopped and the foot accelerator stuck. Neither the witness nor the accused got out of the vehicle to see about the man who was struck. Accused then drove the vehicle as far as the road that goes to Dedesdorf Ferry and the witness drove from there (R 35-40).

Warrant Officer Junior Grade John T. Hadder testified that shortly before 1800 hours on 7 September 1947, he was on "C.Q. duty" in the office at Brake when the accused came in from Bremerhaven with his driver. They stayed only a few minutes and then left. At approximately 1900 hours, accused returned to the office and, in a conversation between them, witness told accused that he had received a report that a drunken driver in a jeep ran over two Germans. Accused asked witness, "if it was definitely a jeep." Accused then stated that he was quite sure his driver returned to Bremen "the other way," that "his driver never drank, so he knew it was definitely safe for his driver, if it was a drunken driver who ran over this man." He also told witness that "later this afternoon he (accused) had been to a birthday party in Bremerhaven and had been drunk or close to drunk, or fairly drunk, * * * and when he left he took a bottle of whiskey along and when he got to the Dedesdorf Ferry it was gone. His driver didn't drink and could be trusted." (R 6-8).

A plot of the area in which the incident in question occurred was received in evidence without objection (R 8-9; Pros Ex 1).

Pauline Bohlmann, a civilian eyewitness to the incident, testified in pertinent part, that at the time of the incident she was looking out of the second floor window of her house at 21 Harrierstrasse and saw a car traveling at a "very high rate of speed" approaching. Mr. Scobel, his son, witness' daughters and another girl were on the sidewalk. When witness saw the car come up on the sidewalk she left the window, went down to the street and saw Mr. Scobel being carried into the house (R 18-21).

Volkea Schewe testified that just before the incident she was standing at the point marked numeral "2" on the plot of the area (Pros Ex 1). The car (vehicle driven by accused) came from Langerstrasse and stopped in the middle of the street at 9 Harrierstrasse (point marked numeral "6", Pros Ex 1). The car then drove on "in a rate - a high rate of speed in a zig-zag course and went up on the sidewalk at numeral "5" (Pros Ex 1). Witness heard "yelling" and saw the car stopped at numeral "4" (Pros Ex 1). When she reached the scene, Mr. Scobel was being taken into the house. When asked, "How fast was this vehicle going do you know?", she replied, "It was rather fast. I was attracted by the high speed of the car and, therefore, I looked at it." (R 24-25).

Elizabeth Heuscher testified that at the time of the incident she was walking on the sidewalk at point marked numeral "8" (Pros Ex 1) when a vehicle (vehicle driven by accused) passed her at a "very high rate of speed in a zig-zag course" (R 26-27).

Friedrich Behrens testified that just prior to the incident he was sitting at the window in his house (indicated as numeral "39", Pros Ex 1)

when he heard the noise of "a fast moving car." He saw the car go to the left and "touch" the house across the street at 21 Harrierstrasse and then saw it strike the corner of Mr. Scobel's house (R 28-30).

Accused's written pretrial statement was admitted in evidence as Prosecution Exhibit 2, over objection by the defense (R 45). Accused's statement is substantially as follows: On 7 September he and Private Watson left Bremerhaven to return to Brake. At the Dedesdorf Ferry accused noticed that the driver, Private Watson, was getting drunk and so he started to drive the vehicle from there to Brake. When they reached Brake, they went to a beer house, drank one glass of beer and then on to the CIC billet where he (accused) was billeted. From there they went to see a German girl that lives in Brake. They turned down Harrierstrasse and some German people were walking down the street. Accused slowed down and the "foot feed" on the truck broke. He was looking down and before he knew it, he hit the curb, bounced up and hit a German man. He stopped and the man got up and walked away. Some people came rushing down the street so he said to Watson "we better go to the billets." He started the truck and went to the CIC billets and Watson went to Bremerhaven. When he saw the people coming down the street, he was afraid of being mobbed by them and therefore did not stay there.

4. Evidence for the defense.

First Lieutenant Gilbert C. Oliver, Motor Transportation Officer for the 382nd Military Police Battalion, inspected the vehicle that was driven by the accused on 7 September 1947. The vehicle was in his impounding lot and had been in there about ten days to two weeks prior to his inspection of it. He examined the vehicle about a month ago (date of trial, 18 October 1947) but could not recall the exact date. He did not know anything about the vehicle before he examined it. The vehicle did not belong to his outfit at that time but was assigned to the 388th Military Police Battalion. Witness knew it was the same vehicle that accused was driving on 7 September because he saw the trip ticket and the vehicle never left the motor park. The following deficiencies were found on the vehicle at the time of the witness' inspection; right ring of the shock absorber missing, five leaves of the right front spring broken, two "U" bolts of the right front spring out of center and bent, Pittman arm of the steering wheel loose, rear propeller shaft disconnected, left windshield wrecked, left side of body and fenders scraped, pin for the fly-wheel loose, starter switch and starter loose, fan tips bent towards the radiator, horn knob missing, knob for the gear shift missing, dimmer switch and windshield wiper did not work. On direct examination by the defense, witness was asked whether the damaged condition of the vehicle he described would in any way impair the steering of the vehicle. He answered, "Yes, sir. Several things there would hurt the steering; the Pittman arm loose and the

leaves missing out of the right front spring, and the 'U' bolts; that would cause it to jump to the right." When asked, "Was anything wrong with the accelerator?" he answered, "That wasn't included in my report, sir. I had occasion several times to move that vehicle while in my impounding lot, during one time the accelerator did stick on me." (R. 46-49).

The accused was advised of his rights as a witness and he elected to make a sworn statement. His testimony is substantially the same as contained in his pre-trial statement, which was admitted in evidence as prosecution's exhibit 2, but it was further amplified in the following particulars: he was driving at a rate of approximately twenty-five miles per hour. He did not report the accident to anyone because he did not believe the man was hurt. No damage was done to the vehicle (R 54). He left the Marine Compound to go to Brake on that day at a little after one o'clock. Watson drove to Dedesdorf Ferry and accused did not see him drink anything on the way. Watson was alright when they started out but he told accused he had been drinking in the billets before he left. Watson seemed to drive alright with the exception of speeding. Accused was driving down to see the girl who does his laundry in Brake. "She lives off of Harrierstrasse, just on the right." After he struck the German, he stopped his vehicle on the sidewalk approximately ten feet past the man (R 54-56). After the accident accused returned to the CIC and talked to Mr. Hadder. Mr. Hadder told him there had been an accident, that a three-quarter ton truck had hit a man and injured him. Accused denied Mr. Hadder's testimony that he (accused) stated it could not have been accused's driver because his driver never drank anything. He further denied that he told Mr. Hadder it could not have been him (accused) because he had been to a party in Bremerhaven and that he drank so much he could not drive, but admitted that he told Mr. Hadder he had been to a party the night before. Accused never told Mr. Hadder or anyone else that he hit this man even though Mr. Hadder had called his attention to this accident (R 57).

5. The specification alleges that the accused did:

> "* * * wrongfully and unlawfully and through culpable negligence, kill Kurt Scobel, by striking him, with a motor vehicle." (Underscoring supplied)

in violation of Article of War 93. The reviewing authority approved only so much of the findings of guilty of the specification of the Charge, as involves findings that the accused did, at the time and place alleged,

> "wrongfully and unlawfully and through negligence, kill Kurt Scobel, by striking him with a motor vehicle." (Underscoring supplied)

in violation of the 96th Article of War. Thus the reviewing authority, by omitting the word "culpable" from the allegation of negligence, and by designating the alleged offense as a violation of the 96th Article of War instead of the 93rd Article of War, did, in effect, disapprove the findings of guilty of involuntary manslaughter, as charged, and approved only so much of the findings as support the allegations that the accused wrongfully and unlawfully and through negligence committed a homicide which constituted an offense of "conduct of a nature to bring discredit upon the military service."

The only question presented is whether the evidence is legally sufficient to support the findings as approved.

The evidence shows conclusively that on 7 September 1947, the accused was driving a 3/4 ton truck down Harrierstrasse in Brake, Germany, and that the truck ran over the curb and upon the sidewalk on the left side of the street where it struck two buildings and finally struck the alleged victim, Kurt Scobel, who died as a result of injuries sustained in this collision. While the record is silent as to the specific or estimated speed at which the accused's vehicle was traveling just prior to the incident, four eyewitnesses testified that the truck that struck Mr. Scobel was driven at a "very high rate of speed" and in a "zig-zag" course. The witness, Volkea Schewe, stated that her attention was attracted to the car because of its high speed, while the witness, Behrens, stated that he looked out of the window of his house because of "the noise of a fast moving car." It is pertinent to note that at the time witnesses Schewe and Heuscher saw accused's truck pass them at a "very high rate of speed," they were standing between Langenstrasse and Kirchnerstrasse at reference points "2" and "8", respectively, (Pros Ex 1) a point fairly distant to reference point "13" where Mr. Scobel was struck, and reference point "14" where the truck ran over the curb and upon the sidewalk. Thus these witnesses were in an advantageous position to view the operational characteristics of the vehicle in proximate relationship to the point of collision. Strong circumstantial evidence in regard to the speed and force of the truck is presented by the fact that the curb where accused left the road was about eight inches high and that after striking it, the truck proceeded over the sidewalk, struck two buildings and finally came to rest about twenty meters past the point at which it crossed the curb (R 32). It was further shown that substantial damage was done to the front end of the vehicle which was inspected by Lieutenant Oliver in his impounding lot, about ten days after the incident. The extent of this damage may well support an inference of immoderate speed of the vehicle when considered together with the surrounding circumstances. Lieutenant Oliver was called as a defense witness and while defense counsel made an effort to show through his testimony that substantial defects existed in the steering mechanism of the truck which contributed to the cause

of the accident, we feel that the evidence and the testimony of Lieutenant Oliver, inconclusive as it is, does not establish this contention. Indeed, such contention is not reasonably consistent with the known Army standards of automotive maintenance and to speculate that the described defects existed so patently upon accused's vehicle prior to dispatch appears fantastic.

The accused testified that at the time in question he was driving at a rate of 25 miles per hour and that he lost control of the vehicle when the foot accelerator stuck and while he was looking down at it in an attempt to free it. This testimony is directly rebutted by the testimony of Private Watson who was riding with accused. Watson stated that the foot accelerator did stick but that this happened after the German civilian was struck. Considering the various obstacles and hurdles encountered by the vehicle in its course as it hit the curb and in view of the nature of damages to the vehicle, the court was justified in disbelieving the accused's testimony in this regard.

It is the opinion of the Board of Review that the testimony of the above named witnesses with respect to the speed and weaving course of the vehicle, in the light of all the attendant circumstances, constitutes sufficient evidence of reckless driving to support the finding that the alleged homicide was the proximate result of accused's negligence.

The record contains some evidence of conflicting and dubious character pertaining to accused's sobriety but, in view of the foregoing opinion, it is deemed unnecessary to give attention thereto.

As has been stated, the reviewing authority, by omitting the word "culpable" in his action, approved only so much of the findings of guilty as charge that the accused did wrongfully and unlawfully and through negligence commit the alleged homicide. Such negligence is of a lesser degree than that charged. It is simple negligence. Obviously, the reviewing authority was of the opinion that accused was not guilty of the greater degree of negligence necessary to sustain a finding of involuntary manslaughter. It is apparent, however, that he was of the opinion that the lesser degree of negligence exhibited by accused did cause the homicide and he approved a finding of guilty to this effect.

The negligent operation of a motor vehicle resulting in a homicide, where such negligence was not criminal, gross or culpable, is a "lesser included offense" necessarily included in that charged. (CM 293509, Coats et al., 8 ETO 39,46; CM 319823, Rhimes (1947); CM 252521, Groat, 34 BR 67).

6. It remains to be determined whether the offense of which accused was convicted will support the sentence as approved by the reviewing authority.

The offense, the findings of guilty of which were approved by the reviewing authority, is not listed in the Table of Maximum Punishments nor is it included in or closely related to any offense listed therein. There is no Federal statute of general application denouncing the offense, but an offense, similar in all respects, is denounced by the law of the District of Columbia and is applicable hereto as a guide to the maximum measure of punishment. It is provided in Section 40-606 (6:246a), District of Columbia Code that:

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

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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

(59)

JAGK - CM 327221

9 March 1948

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|---|---|---|
| UNITED STATES | ) | ZONE COMMAND AUSTRIA |
| v. | ) | Trial by G.C.M., convened at Salzburg, Austria, 7-23 July 1947. Dismissal, total forfeitures and confinement for two (2) years. |
| Captain JAMES H. McGUIRE (0-920436), Transportation Corps | ) | |

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

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

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

CHARGE I and Specifications 1 and 2: (Finding of not guilty).

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

Specification: In that Captain James H. McGuire, Judge Advocate General's Department, Headquarters, Zone Command Austria, did, at Salzburg, Austria, on or about September-October 1946, feloniously embezzle by fraudulently converting to his own use certain jewelry and other valuables, to wit: 4 silver candle stick-holders of a value of about $137.50, 1 silver cigarette case of the value of about $2.00, 1 ring with 4 sapphires and 12 diamonds of a value of about $450.00, 1 wedding ring with 4 diamonds of a value of about $70.00, 1 diamond dinner ring of a value of about $550.00, 1 diamond bracelet of a value of about $2,000.00, 1 diamond and sapphire ring of a value of about $800.00, 1 set of table silver of a value of about $576.50, 1 silver snuff box of a value of about $1.30, 1 set of 12 silver spoons of a value of about $40.00, all of a total value of about $4,627.30, the property of First Lieutenant Rene S. Davis, then Company A, 63rd Signal Operations Battalion, now 7831 Station Complement Unit, entrusted to Captain James H. McGuire by First Lieutenant Rene S. Davis.

ADDITIONAL CHARGE I and Specification: (Nolle Prosequi).

ADDITIONAL CHARGE II and Specification: (Stricken on Motion of Defense).

The accused refused to plead and the court directed that a plea of not guilty be entered for him. He was found guilty of Charge II and its specification except the words and figures "4 silver candle stick holders of a value of about $137.50", "$2.00", "$450.00", "$70.00", "$550.00", "2000.00", "1 diamond and sapphire ring of the value of about $800.00", "1 set of table silver of a value of about $576.50", "1 silver snuff box of a value of about $1.30", "1 set of 12 silver spoons of a value of about $40.00", "$4627.30", and substituting therefor the figures "$1.00" for the excepted figures "$2.00"; the figures "$200.00" for the excepted figures "$450.00"; the figures "$50.00" for the excepted figures "$70.00"; the figures "$300.00" for the excepted figures "$550.00"; the figures "$750.00" for the excepted figures "$2000.00"; and the figures "$1301.00" for the excepted figures "$4627.30"; of the excepted words and figures not guilty, of the substituted words and figures guilty. 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 a period of two years. The reviewing authority approved only so much of the findings of guilty as involved an "embezzlement by fraudulent conversion, at the time and place and from the person alleged, of one silver cigarette case value of about $1.00, one ring with 4 sapphires and 12 diamonds value of about $200.00, and one wedding ring with 4 diamonds of a value of about $50.00." He approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

In September of 1946 an investigation was being conducted relative to certain alleged "black market" transactions of First Lieutenant Rene S. Davis. On 7 October 1946 Lieutenant Davis addressed a communication to the Judge Advocate of the Zone Command, Austria, requesting that the accused be appointed his defense counsel "if and when I come to court-martial" (R 68,70; Pros Ex 1). Lieutenant Davis testified that he discussed the accusations pending against him with the accused who made the following statement:

> "Captain McGuire told me that if the CID found any valuables that I might have, their usual method was to pick them up and I would never see them again, and that I should turn them over to him and he would keep them for me." (R 83)

The accused thereupon delivered certain items of his jewelry to the accused, among which was a silver cigarette case (R 199, Pros Ex 14), a ring with 4 sapphires and 12 diamonds (R 200, Pros Ex 8), and a wedding ring with 4 diamonds (R 201, Pros Ex 11) (R 73-92). Concerning the delivery of the items of jewelry to the accused, Lieutenant Davis testified:

"Q. What was your understanding of the nature of the transaction?

"A. That the things would be returned.

* * *

"Q. Why did you expect to have them returned?

"A. Captain McGuire said he would return them.

"Q. Did Captain McGuire say when he would return them?

"A. No, sir, he didn't.

"Q. Did Captain McGuire return them?

"A. No, sir. He didn't, no, sir." (R 83-84)

"Q. When you turned these items over to Captain McGuire, did he say anything more than that the CID might pick them up?

"A. Answering your question, when I turned the items over to Captain McGuire, he did not say anything more than that the CID might pick them up at that time.

"Q. Did Captain McGuire say anything with reference to this transfer at any other time?

"A. Yes, sir.

"Q. What did he say?

"A. I don't know. In an off-hand manner, he said he might have to use some of them. I said I didn't care what he did with them. He could throw them in the river for all I cared.

"Q. Why, then, did you make a demand upon Captain McGuire, to get these things back?

"A. Because after that, he said I would get them back.

"Q. Did Captain McGuire say anything to you to indicate why the property should be turned over to him rather than to anyone else?

"A. Just that he said he knew the CID and in his official position, they couldn't touch him." (R 85)

"Q. For what purpose did you give these items to Captain McGuire, Lieutenant Davis?

"A. Colonel, I already said I turned the items over because Captain McGuire said if the CID picked them up, there was a good chance I would never see them again.

"Q. After turning them over to Captain McGuire, did you expect to see them again?

"A. Yes, sir. I did, for the first two weeks or ten days.

"Q. Did you still consider these items your property?

"A. Yes, sir, I did up until 10 days or two weeks.

"Q. After that?

"A. After that, Captain McGuire said he would get them back, and definitely I figured they were mine, yes.

"Q. I mean, after you gave them to Captain McGuire, for the first ten days, did you consider these items your property?

"A. Yes, sir." (R 87)

"Q. When was your first demand for the jewelry to be given back?

"A. I believe - I am not sure - within a month after I first gave the jewelry to him.

"Q. Did you demand it all back?

"A. Well, sir, my question to Captain McGuire was: 'When do I get the stuff back?' As I didn't know what disposition of it was or anything else, I didn't know how much there was there. I just referred to it as a whole.

"Q. Did Captain McGuire report to you he had to use any of it?

"A. Yes, sir.

"Q. What items did he say he had to use?

* * *

"A. Specifically, I can only remember a diamond ring and a bracelet.

"Q. What did he say with reference to these two items?

"A. He just said he had had to use them.

"Q. Did he mention anything further as to why, or in what way, he used them?

"A. No. He said it was to help me, but he didn't explain actually, and to the point, actually what happened to them.

"Q. Did he say whether he had given them to anybody or that they had passed out of his possession?

"A. I believe he said they had passed out of his possession, yes, sir. To whom was never disclosed to me. I don't know. It was never discussed.

"Q. Did you consent to the use of these two items?

"A. Insofar as I didn't object, yes, sir.

"Q. Why did you consent to their use?

"A. Because one thing, I said, I thought that the man was acting on my behalf.

"Q. What do you mean when you say, 'acting on my behalf?'

"A. As I have already said, that if I had come to court martial that first time, I expected he would be my defense counsel, and, also, I knew he was a lawyer or something and he was helping me." (R 89)

"Q. You have testified, Lieutenant Davis, of the transfer to Captain McGuire of various items. Was this one or several transactions?

"A. To the best of my knowledge it was, in my estimation, one transfer; however, it did not take place at the exact second. I believe it was in a period of, well, say about six or seven hours.

"Q. You mean within six or seven hours on the same day?

"A. Within a twenty-four hour period, yes, sir.

"Q. Why did you transfer these items to Captain McGuire?

* * *

"A. For the reason that I stated before, that Captain McGuire told me that if the CID found this stuff that I was liable not to get it back, and that it was safer in his possession.

"Q. Were any of these items evidence in the case then pending against you?

"A. No, sir.

"Q. Were these items ever returned to you?

"A. No, sir.

"Q. Did you demand their return?

"A. I asked for their return, yes, sir.

"Q. Whom did you ask?

"A. Captain McGuire, sir.

* * *

"Q. When did you ask Captain McGuire for the return of these items?

"A. To the best of my knowledge, approximately a month or a little less after I gave them to him, and then in late November or early December 1946, sir.

"Q. What did Captain McGuire say on the first occasion?

"A. He said that the situation was still the same and that he had better keep them, but that I would get them back.

"Q. What did he say on the second occasion?

"A. That I would get them back; that he was on the way to Vienna and to Italy, and that when he came back I would get them.

"Q. Why did you ask Captain McGuire for these items back?

"A. Because the main thing is that I wanted them, sir.

"Q. Why did you want them back?

"A. Because I got them in the first place for my wife, sir." (R 202-203)

Sometime in late October or early November 1946 the accused gave the silver cigarette case (Pros Ex 14) and the ring with 4 sapphires and 12 diamonds (Pros Ex 8) to Mrs. Clifton D. Blackford, wife of Lieutenant Colonel Clifton D. Blackford (R 109,115).

In October 1946 the accused gave as a gift the wedding ring with 4 diamonds to Mrs. Anneliese Rausch, at which time "he said I should keep it for my little daughter". Mrs. Rausch could not remember that he said anything else about the ring (R 221,222). The silver cigarette case (Pros Ex 14) was valued at 105 Austrian schillings, the ring with 4 sapphires and 12 diamonds (Pros Ex 8) at 4500 schillings, and the wedding ring with 4 diamonds (Pros Ex 11) at 700 schillings (R 332,333).

4. For the Defense

The defense offered no evidence pertaining to the offense charged in Charge II and its specification. The accused was warned of his rights as a witness and elected to remain silent (R 355).

5. Miscellaneous Matters

Defense motion for an inquiry into the sanity of accused

The court convened on 7 July 1947, at which time the defense counsel moved the court to inquire into the sanity of the accused. The law member suggested that the defense make some showing as to why such a request had been made. The defense offered no evidence concerning the mental condition of the accused, and the law member denied the motion without prejudice. Although paragraph 63, Manual for Courts-Martial, 1928, provides for an inquiry into the mental condition of the accused "whenever at any time while the case is before the court it appears to the court for any reason such inquiry ought to be made in the interest of justice," yet it does not require the court to make such an inquiry without some evidence which indicates that the accused might be mentally irresponsible. The ruling by the law member left the defense free to introduce evidence relating to the accused's mental condition. This the defense failed to do and the accused actively participated in his trial as an attorney for the defense.

Until the contrary is shown, a person is presumed to be sane, and a mere assertion that a person is insane is not necessarily enough to impose any burden of inquiry on the court (par 63, MCM, 1928). We conclude that under the circumstances no prejudicial error resulted in the court's failure to inquire into the accused's mental condition.

Defense counsel as a witness for the prosecution

During the trial of the case the prosecution called as a witness Lieutenant Colonel Clifton D. Blackford the regularly appointed defense counsel who was actively participating with other counsel in the defense of the case. Colonel Blackford testified, over objection, that he became counsel for the accused on December 24, 1946. Prior to this appointment, and during October or early November 1946 the accused had given to Mrs. Blackford, the wife of the witness, the silver cigarette case and the ring set with 4 sapphires and 12 diamonds introduced in evidence as Prosecution Exhibits 14 and 8, respectively.

The record of trial discloses that the order appointing the court was dated 27 June 1947. On this order Lieutenant Colonel Clifton D. Blackford was the regularly appointed defense counsel and Captain Leving Y. McCarty, Captain William M. Rooney, Jr. and First Lieutenant Mercer F. Davis were the regularly appointed assistant defense counsel. When asked whom he desired to introduce as defense counsel the accused stated:

> "At this time the accused desires to introduce Mr. Benjamin Reich, civilian lawyer, Captain Baker, Colonel Blackford, Captain McCarty, Captain Rooney, Lieutenant Davis, and the accused, Captain James H. McGuire" (R 3, 38).

The accused objected to proceeding with the case without all of the above

named defense counsel being present. One instance of his objection appears on page 60 of the record.

"President: Captain McGuire, may we proceed without Lieutenant Davis?

"Accused: Sir, I would like to have my counsel here. ***"

Thereupon the court delayed the proceeding until Lieutenant Davis was present.

Article of War 17 provides in part:

"*** Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel."

In CM 320233, Fleming (69 BR 271,273), the Board of Review said:

"Where an accused insists upon retaining the services of a regularly appointed defense counsel ***, we can only assume that for reasons acceptable to him, even though undisclosed, accused has elected to stand or fall on the merits of his case as presented by counsel of his own selection." (Underscoring supplied.)

In Milan v. State, 24 Arkansas 346, the defense called as a witness one Dandridge McRae who announced that he was counsel for the prosecution and for that reason refused to testify. The defense stated that it did not desire to examine the witness on matters of professional confidence and moved the court to require the witness to testify. This motion was denied. In holding this to be error the appellate court said:

"Although an attorney is bound to withhold, and will never be compelled to disclose any information which he knows only through professional relations to his client, it does not follow that he is incompetent as a witness, or may not testify against the client as to other matters." (p. 355)

The Board of Review is of the opinion that in the present case no error resulted in calling Lieutenant Colonel Blackford as a witness for the prosecution. His testimony related to events which occurred prior to his being engaged as defense counsel, and his knowledge of the events to which he testified was not based upon information received by him in his capacity as defense counsel. The courts generally discourage the practice of calling, as witnesses, attorneys participating in the case, yet to hold them incompetent to testify to facts not privileged would permit an accused to select as his defense counsel a witness against him and thereby circumvent justice

by preventing incriminating evidence from being presented to the court.

Double Arraignment

The first indorsement to the charge sheet referred the case for trial to "Lt Col. John F De V Patrick, TJA, Hq, ZCA general court-martial appointed by paragraph 15, Special Orders No. 29, Headquarters Zone Command Austria 17 March 1947."

The court which tried the case was appointed by paragraph 6, Special Orders No. 68, Headquarters Zone Command Austria, 27 June 1947. The original order appointing this court did not contain the usual paragraph withdrawing unarraigned cases from a previously appointed court and referring them to the court therein appointed (R 1).

The court convened on 7 July, at which time the court was organized, the rights as to challenges exercised, the court sworn, and the accused arraigned. He refused to plead and the court directed that a plea of not guilty be entered. A continuance was then granted at the request of the accused (R 1-33).

The court reconvened on 14 July 1947, at which time a corrected copy of paragraph 6, Special Orders No. 68, Headquarters Zone Command Austria, 27 June 1947 was produced by the Trial Judge Advocate. The only material change in this corrected copy was to withdraw all unarraigned cases from the court appointed by paragraph 15, Special Orders No. 29, Headquarters Zone Command Austria, 17 March 1947, and refer them for trial to the court therein appointed. Thereupon the court was organized, the rights as to challenge given, and the accused was again arraigned and asked to plead. He again refused to plead and the court directed that a plea of not guilty be entered. At the second arraignment the defense objected to the proceedings and stated that on 7 July 1947 a court was duly constituted and the accused arraigned and for any other court to attempt to try the accused after that arraignment would constitute double jeopardy. The court overruled this objection (R 54).

It is apparent from the foregoing that the accused was tried by the court which originally convened on 7 July 1947. However, when the court convened in the first instance the special order appointing the court did not specifically show that this case had been referred to it for trial. The second arraignment of the accused was harmless, being merely a repetitious procedure caused, no doubt, by an excess of caution on the part of the court. It did not amount to double jeopardy (CM 324725, Blakeley; Lovato v. New Mexico, 242 U.S. 199). Neither was the jurisdiction of the court-martial impaired by the issuance of the corrected order supplying the missing reference to trial, for if there had been no formal reference at all the action of the reviewing authority approving the sentence would work a ratification of the actual reference of this case to

the legally constituted court which tried it (CM 314939, Greene, 64 BR 293, 298; CM 271153, Karsonoff, 46 BR 61,68; CM 232790, Brandon, 19 BR 193).

6. Charge II and its Specification

The evidence establishes that in September 1946 First Lieutenant Rene Davis was being investigated relative to certain "black market" activities. During this investigation he consulted the accused with a view to having the accused represent him in any court-martial case which might result from the investigation. Lieutenant Davis was at this time in the possession of certain items of jewelry. He entrusted this jewelry to the accused in order to prevent the Criminal Investigation Department agents from finding it in his possession and confiscating it. It was agreed that this jewelry was to be held by the accused and returned to Lieutenant Davis. Thereafter the accused requested permission to use a portion of the jewelry for the benefit of Lieutenant Davis. Lieutenant Davis agreed to this use of the property, apparently on the assumption that the accused intended to employ it in an attempt to influence persons connected with the prosecution of charges against Davis. The statement, "He could throw them in the river for all I cared," when considered in the light of the other testimony, cannot be construed as a relinquishment by Lieutenant Davis of the title to his property. Immediately following the quoted expression, the Lieutenant stated that he made demand upon the accused for return of the articles "Because after all, he said I would get them back." Even if it were to be inferred that the transaction was intended to achieve an illegal purpose, no title to the property ever passed to the accused. There was, at most, a gratuitous bailment with a right in the bailee to use the property for the bailor's benefit. We have no reason to suppose that accused had given the cigarette case and ring to Mrs. Blackford for the purpose of aiding the defense of Lieutenant Davis, and it affirmatively appears that no such purpose attended the gift of the wedding ring to Mrs. Rausch. Accused's act of giving away the jewelry in question was, therefore, a wrongful and fraudulent exercise of dominion over the property inconsistent with the terms of his trust, which act, under the circumstances here shown to exist, constituted the crime of embezzlement. It is no defense to a charge of embezzlement that the accused appropriated the property to the use of a third person, not the owner, rather than to his own use, nor is it a defense that the bailment under which accused had care and control of the property may have been made for an illegal purpose (CM 237265, Fowler, 23 BR 341, 349; Wharton's Crim. Law (12th Ed), sec 1274).

7. On 19 February 1948 the accused submitted a detailed brief in his behalf. The Board of Review has considered all questions raised therein.

8. Records of the Department of the Army show the accused to be 46 years of age and married. He attended Austin, Texas, Military and

Mechanical Institute and prior to his entry into the service he was employed by the U.S. Department of Labor at Milwaukee, Wisconsin. He was appointed and commissioned a temporary first lieutenant, Army of the United States (limited service only), Transportation Corps, and entered upon active duty on 4 December 1942. He was promoted to captain on 9 June 1943. On 11 February 1944 he departed the United States for duty in the European Theater and has been overseas since that time. In 1946 he was working in the Judge Advocate's Section of the Zone Command, Austria, but there are no orders detailing him to the Judge Advocate General's Department.

9. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Robert D. Silvers, Judge Advocate

Gilbert E. Hoyt, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 327221 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAR 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 James H. McGuire (0-920436), Transportation Corps.

2. As approved by the reviewing authority, this officer was found guilty of embezzling three items of jewelry, the property of First Lieutenant Rene S. Davis, of a total value of $251.00 in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

In September 1946 First Lieutenant Rene S. Davis, who was then being investigated for alleged illegal transactions, entrusted several items of jewelry to the accused in order to prevent them from being found in his possession and confiscated by CID agents. The accused, who was then on duty in the Judge Advocate Section, Zone Command Austria, represented to Davis that the CID could not "touch him" and offered to hold the jewelry for Davis and return it at a later date. Davis thereupon entrusted certain items of the jewelry to the accused. Thereafter he authorized the accused to use a portion of the jewelry in his behalf. Three of the items entrusted to the accused, namely, a silver cigarette case, a ring with 4 sapphires and 12 diamonds, and wedding ring with 4 diamonds, were never used by accused on behalf of Lieutenant Davis, and although demanded of the accused they were not returned to Davis. The wedding ring with 4 diamonds was given to one Mrs. Rausch, a German national, and the other two items were given to the wife of an American Army officer. The total value of these items of jewelry was found to be $251.00.

4. The accused is 46 years of age and married. He attended the Austin Military and Mechanical Institute. Prior to his entry into the service he was employed by the United States Department of Labor. He was appointed a temporary first lieutenant (limited service) and entered upon active duty on 4 December 1942, being assigned to the Transportation Corps. He was promoted to captain on 9 June 1943.

The accused submitted a brief in his behalf which has been considered.

In view of all the circumstances of the case, I recommend that the sentence be confirmed but that the period of confinement be reduced to one year, that the unexecuted portion of the confinement adjudged be remitted, and as thus modified that the sentence be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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(GCMO 74, March 24, 1948).

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

JAGH CM 327247 | 13 August 1948

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| U N I T E D S T A T E S<br><br>v.<br><br>Technician Fourth Grade HAROLD C. SMITH, 31047403, 7819 Station Complement Unit. | UNITED STATES CONSTABULARY<br><br>Trial by G.C.M., convened at Heidelberg, Germany, 24 July 1947. Dishonorable discharge (suspended), and confinement for six (6) months. United States Disciplinary Barracks, Fort Knox, Kentucky. |

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

1. The record of trial in the case of the soldier named above has been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, and 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 96th Article of War.

Specification: In that Technician Fourth Grade Harold C. Smith, 7819 Station Complement Unit, being duly summoned and sworn as a witness before the General Court-Martial appointed by paragraph 20, Special Orders No. 103, Headquarters United States Constabulary, dated 5 May 1947, did at Heidelberg, Germany, on or about 9 May 1947, willfully and wrongfully refuse to testify before said court-martial.

CHARGE II: Violation of the 64th Article of War.

Specification: In that Technician Fourth Grade Harold C. Smith, 7819 Station Complement Unit, having been duly summoned and sworn as a witness before the General Court-Martial appointed by paragraph 20 Special Orders No. 103 Headquarters United States Constabulary, dated 5 May 1947, and having received a lawful command from Colonel Harry E. McKinny, his superior officer who was then in the execution of his office as President of said court, to testify and respond to the questions propounded by the Trial Judge Advocate, did at Heidelberg, Germany, on or about 9 May 1947, willfully and wrongfully disobey the same.

He pleaded not guilty to and was found guilty of both Charges and of the Specification under each. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence but reduced the period of confinement at hard labor to six months, suspended the execution of the dishonorable discharge until the soldier's release from confinement, ordered execution of the sentence as thus modified, 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 results of trial were published in General Court-Martial Orders No. 487, Headquarters United States Constabulary, APO 46, dated 10 November 1947.

3. The Board of Review holds the record of trial legally sufficient to support the finding of guilty of the Specification of Charge I and Charge I and for that reason the evidence relating thereto will not be set forth and discussed except insofar as is necessary in discussing the evidence in relation to the other Charge and Specification.

4. Evidence relating to Charge II and its Specification:

On 9 May 1947 the accused was called as a witness for the prosecution in a case against First Lieutenant Sidney Hartman. The court which tried Lieutenant Hartman was appointed by paragraph 20, Special Orders No. 103, Headquarters United States Constabulary, APO 46, dated 5 May 1947. Colonel Harry E. McKinney was the senior member of that court and was present and acted as president at the trial of the case (R 26). The accused was asked several questions which he refused to answer on the grounds that his answers might be self-incriminating. These questions and his refusal to answer them are the basis of the Specification of Charge I and Charge I, which Charge and Specification the Board holds legally sustained by the evidence (R 28,29; Pros Exs 3,4). In the instant case Colonel McKinney testified:

"Q. Will you state whether or not anything unusual developed as a result of his appearing as a witness?

A. Yes. After answering one or two preliminary questions, the question was asked to the effect, 'did you see Lieutenant Hartman on that date at the motor pool?' or words to that effect, and the answer was given, 'I can't answer,' or words to that effect. He was thereupon instructed by the law member and by the President of the court - myself - that there was nothing prejudicial to his rights in the question or in the answer to the question and he was given a direct order to answer the question. It was explained to him carefully what that meant. He agreed that he understood and he continued to refuse to answer the questions.

Q. What was the basis of the ruling of the court at that time?
A. The basis of the ruling, the witness has been asked questions, it was the opinion of the law member and the president of the court that the question was not prejudicial to the rights of the accused, therefore he was ordered to answer the question.

* * *

Q. And the ruling of the court was that. . . .
A. There was nothing prejudicial to the rights of the accused in the questions and answers.

Q. Was the accused in this case who was a witness in that case so instructed?
A. He was.

Q. By whom?
A. By myself and by the law member. I went overboard - I leaned over backwards - to try to explain to the accused what his refusal to answer meant and asked him, if I remember correctly, did he understand what I was saying, he could, after having been directed to do so by the court, be held for contempt of court, and that was explained to the witness.

Q. Will you state whether or not anything further in the course of this trial was received by the court which would bear on the witness, that is Sergeant Smith, who is the accused in this case, on his privilege against self-incrimination?
A. Well, various questions were asked throughout the proceedings at a later time. It grew to be rather absurd, some questions were asked and after each question, I informed the accused that he was directed to answer the question and he still failed to answer." (R. 27).

The prosecution offered in evidence the record of trial in the case of First Lieutenant Sidney Hartman (R 18,19). This record was accepted as Prosecution Exhibit 4. The testimony of the accused in that case was read to the court and the portion read in court was appended to the record as Prosecution Exhibit 4. This exhibit shows the following testimony by accused at the Hartman trial:

"Q. Sergeant, I direct your attention to the 9th day of October 1946 at about 1400 hours, and ask you if you had occasion to see Lt Hartman in the motor pool on that day.
A. I cannot answer that question.

Q. On what grounds?
A. I would like to stand on my rights under the 24th Article of War.

* * *

LAW MEMBER: The witness will be required to answer that question.

WITNESS: I would like to stand on my rights under the 24th Article Article of War.

LAW MEMBER: You are under court direction to answer the question.

WITNESS: Sorry.

* * *

Technician Fourth Grade HAROLD C SMITH, recalled by the prosecution, was reminded that he was still under oath.

PROSECUTION: Does the court desire to question the witness or instruct him in any manner, or does the court wish the prosecution to proceed?

LAW MEMBER (to witness): You are informed that there has been received into evidence a true copy of the letter of immunity signed by order of General Burress. Legally, that constitutes a full and complete defense should you on any later occasion be tried for any incident arising out of this transaction. It is my duty to inform you further that failure to answer any questions directed to you will be construed as a direct disobedience of orders, punishable under the 96th Article of War. Do you understand that?

WITNESS: Yes, sir.

LAW MEMBER: I am informing you at this time that this letter in your possession does constitute a full and complete defense to any charges which may be brought against you as a result of this transaction. Is that understood?

WITNESS: Yes, sir." (R 22).

* * *

"PRESIDENT: I have gone to great lengths, as president of this court, to stress throughout your rights, and I have satisfied myself, as a lay member of this court, that this document - the original of which is in your admitted possession - promises you full immunity from <u>any</u> offenses revealed in the course of your testimony before the general court-martial pertaining to the United States vs. Lieutenant Sidney Hartman. This is a full and complete defense, as explained to you by the law member. If you persist in your refusal to answer the question that was read previously as to your whereabouts and where you saw the defendant, Lt Hartman, this court will have no other recourse than to see that charges are preferred against you under the 96th Article of War, the penalty for which offense is six months and forfeiture of two-thirds of your pay for a like period. Do you understand that?

* * *

Q. Sergeant Smith, I will repeat my original question and ask

you again if on the 9th of October you had occasion to see Lieutenant Hartman in the motor pool at Fulda.

A. Sorry, sir. I would like to stand on the 24th Article of War, and cannot answer.

* * *

PRESIDENT: It is the desire of the president of the court to go on the record with the fact that the court is attempting in every way to protect the rights of the witness, Sergeant Smith, in this case. This court will go to any lengths to see that the man understands the intent of the court in this case, and I again direct Sergeant Smith to answer the question.

WITNESS: I am sorry. I want to stand under the 24th Article of War." (R 23,24)

* * *

"Q. Sergeant Smith, I direct your attention to the 18th of October 1946, and ask you if you saw Lt Hartman in his office.

A. Sorry, sir. I can't answer your question.

PRESIDENT: You refuse to answer the question?

WITNESS: I would like to stand on my rights under the 24th Article of War. I can't answer the question.

PRESIDENT: The prosecution will continue. I would like to warn the witness that if he refuses to answer the questions each and every refusal to answer is a separate offense. I now direct that you answer the question. You now have the possibility of one year. Continue, Mr. Prosecutor.

Q. Sergeant Smith, I direct your attention to the 4th of November 1946, particularly to the motor pool of the 8th Provisional Truck Company, and ask if you saw Lt Hartman at that time and at that place.

PRESIDENT: The witness will answer.

A. Sorry, sir. I would like to stand on my rights under the 24th Article of War." (R 25).

5. <u>Discussion as to Specification, Charge II</u>:

The evidence amply establishes that when the accused was called as a witness in the case of First Lieutenant Sidney Hartman he refused to answer any questions on the grounds that his answers might be self-incriminating. The president of the court and the law member both advised the accused that the answers to some of the questions could in no manner

be incriminating and Colonel McKinney, the president of the court, ordered the accused to answer the questions. The accused refused to answer claiming his rights under the 24th Article of War.

The Specification of Charge II alleges that the accused willfully and unlawfully disobeyed the lawful command of Colonel McKinney, his superior officer, who was then in the execution of his office as president of a general court-martial, to testify and respond to the questions propounded by the Trial Judge Advocate. The orders and ruling of the president of the court-martial made in open court are the orders and ruling of the court rather than the orders of the individual issuing the order. Consequently, when the accused refused to answer the question as ordered he disobeyed the orders of the court. His offense is not the willful disobedience of a superior officer in the sense that it is denounced by Article of War 64. It is at most a violation of Article of War 96.

Consequently a fatal variance appears between the allegations of the Specification and the proof. It was alleged that the accused willfully violated the order given by Colonel McKinney. The evidence shows that the order violated was in fact the order of the court rather than the order of Colonel McKinney.

It is also noted that the accused had already refused to answer the questions propounded, that the disobedience of this order was only another refusal to answer the questions and was, therefore, but a different aspect of the original refusal of the accused to answer the question propounded to him.

6. Punishment:

Neither the offense of refusing to testify as a witness before a court-martial nor any closely related offense is listed in the Table of Maximum Punishments contained in paragraph 104c, Manual for Courts-Martial. Neither is this offense specifically denounced by the Criminal Code of the United States or by the Code of the District of Columbia.

Paragraph 104c, of the Manual for Courts-Martial, provides that offenses, the punishment of which is not otherwise herein prescribed "remain punishable as authorized by statute or by the custom of the service."

Article of War 23 provides in part:

> "Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, * * * refuses to * * * testify, * * * shall be deemed guilty of

misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, * * * and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: * * *." (Underscoring supplied)

The purpose of Article of War 45 authorizing the President to fix maximum limits of punishment was no doubt that of inducing "uniformity in the penalties adjudged by courts-martial in similar cases." (Winthrop's Military Law and Precedents, reprint, p.395). The limitations by reference to statutes enacted by the Congress accomplish such a purpose. It is but reasonable to assume that in broadening and in making uniform his limitations of punishments through reference to statutes, the President intended to include all statutes of the Congress, at least those applicable within the Continental United States, containing congressional expressions as to suitable punishments (CM 212505, Tipton, 10 BR 246).

"It is the custom of the service, where no limit of punishment for an offense is specifically prescribed in the Executive Order, to follow Congressional expression of what constitutes appropriate punishment" (CM 199369, Davis).

From the foregoing, the Board of Review is of the opinion that the punishment provided in Article of War 23 for the refusal of a civilian witness to testify before a military court should, by way of analogy, be applied to military witnesses who refuse to testify before courts-martial.

Consequently the maximum punishment authorized for the offense of which accused was convicted under the specification of Charge I, is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. Dishonorable discharge is not authorized (CM 325620, Paul, 74 BR 365).

7. For the foregoing reasons 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 Charge II and its specification and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for six months.

K. Rottenstein, Judge Advocate

C. O. Wolfe, Judge Advocate

(Dissent), Judge Advocate

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

JACH CM 327247 — 13 August 1948

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| UNITED STATES<br><br>v.<br><br>Technician Fourth Grade HAROLD C. SMITH, 31047403, 7819 Station Complement Unit. | UNITED STATES CONSTABULARY<br><br>Trial by G.C.M., convened at Heidelberg, Germany, 24 July 1947. Dishonorable discharge (suspended), and confinement for six (6) months. United States Disciplinary Barracks, Fort Knox, Kentucky. |

DISSENTING OPINION BY
LYNCH, Judge Advocate

I am of the opinion that the sentence in this case is supported by the legal findings of guilty. I believe that the punishment set forth for refusal to testify by persons not subject to military law by its very terms may not be applicable to persons subject to military law (AW 23). It is considered that to determine the proper maximum punishment which may be adjudged resort must be had to a statute not restricted to a particular class.

A refusal to testify before a court is a criminal contempt committed before the court (Ex Parte Hudgings, 249 US 378, 632 Ed 656, 39 Sup Ct Rep 337). Such a contempt is punishable by 28 USC 385 by fine or imprisonment at the discretion of the court. Both fine and imprisonment are not imposable but as to the punishment adjudged either by way of fine or imprisonment there is no maximum limitation prescribed by the statute. It has been held, however, that a sentence to six months imprisonment is an appropriate sentence under the cited statute by analogy to 28 USC 387 providing for punishment for contempts not committed before a court (Ryals v. US, 69 Fed 946). In deciding, however, that a sentence to six months confinement is appropriate under section 385, supra, the court undoubtedly had in mind the additional power of a federal court to coerce a recalcitrant witness. Thus it is within the power of a federal court to order a recalcitrant witness into confinement until he is amenable to the orders of the court and then after the witness has purged himself of his contempt adjudge punishment against him for his refusal to testify (Wilson v. US, 65 Fed 621). I know of no law vesting such coercive power in a court-martial. I, therefore, conclude that there is no maximum limitation of punishment applicable for a refusal to testify by a person subject to military law, and, in view of the circumstance that coercive power is not vested in a court-martial, that a sentence in excess of the approved sentence in this case would be appropriate.

Even if it be admitted that by analogy to Article of War 23 the maximum term of confinement which may be imposed in this case is six months, I fail to see any prohibition against the imposition of a dishonorable discharge. The punishment which may be given for a violation of Article of War 96 is at the discretion of the court in the absence of a limitation of punishment prescribed by the Table of Maximum Punishments or by statute or the customs of the service (par 104c, MCM 1928). Punishment prescribed by statute is without reference to a possible military status of the offender, yet where the term of confinement authorized by statute is in excess of six months it is conceded that the sentence of a court-martial may include dishonorable discharge. On the other hand as pointed out in the majority opinion it has usually been held that if an offense is punishable by imprisonment for not more than six months the court may not impose dishonorable discharge. An implication that an authorized confinement for not more than six months will not allow the imposition of a dishonorable discharge has evidently been drawn from the following rules set forth in paragraphs 104b and 104c, Section B, Manual for Courts-Martial 1928:

> "A court shall not, by a single sentence which does not include dishonorable discharge, adjudge against an accused:
>
> * * *
>
> "Confinement at hard labor for a period greater than six months."
>
> "If an accused be found guilty by the court of two or more offenses for none of which dishonorable discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more, will authorize dishonorable discharge and total forfeitures."

I do not believe that the implication is supported by the language of the Manual. The rule set forth in the majority opinion is not without exception. Thus where the legal finding of guilty was of the offense of unlawful entry punishable under the District of Columbia Code by imprisonment for not more than six months, a dishonorable discharge was held to be authorized (CM 235296, Herndon). I do not attempt to reconcile existing cases but do suggest a line of demarcation to which adherence should be made. Many of the offenses for which resort is had to statute to determine the maximum punishment are comparatively minor in nature, not as in this case a defiance of constituted authority. It is not a custom of the service to separate a soldier from the service for the commission of minor offenses, but such separation may be merited for more serious offenses, as unlawful entry or refusal to testify before a court-martial.

P. W. Lynch, Judge Advocate

JAGF CM 327247 1st Ind

JAGO, Department of the Army, Washington 25, D. C. 19 [illegible]

TO: The Secretary of the Army

1. Pursuant to the provisions of Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) there is transmitted herewith for your action the record of trial and accompanying papers in the case of Technician Fourth Grade Harold C. Smith (31047403), 7819 Station Complement Unit.

2. Upon trial by general court-martial accused was found guilty of a specification alleging that the accused, having been duly summoned and sworn as a witness before a general court-martial at Heidelberg, Germany, did willfully and wrongfully refuse to testify before said court, in violation of Article of War 96 (Chg. I and Spec.). He was also found guilty of a specification alleging that, having been duly summoned and sworn as a witness before said general court-martial and having received a lawful command from Colonel Harry E. McKinny, his superior officer, who was then in the execution of his office as president of said court, to testify and respond to the questions propounded by the trial judge advocate, he willfully and wrongfully disobeyed the command, in violation of Article of War 64 (Chg. II and Spec.). 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 but reduced the period of confinement to six months, suspended the execution of the dishonorable discharge until the soldier's release from confinement, ordered execution of the sentence as thus modified 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. 487, Headquarters United States Constabulary, APO 46, dated 10 November 1947.

The record of trial has been considered by the Board of Review under Article of War 50½. The Board of Review, with one member dissenting, is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, legally insufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for

six months and forfeiture of two-thirds of accused's pay per month for six months. I do not concur in the opinion of the majority members of the Board of Review and, for the reasons hereinafter stated, am of the opinion that the record of trial is legally sufficient to support all the findings of guilty (with exception as to Charge II hereinafter indicated) and the sentence.

3. There is substantial evidence that the accused was sworn as a witness in the general court-martial trial of a First Lieutenant Sidney Hartman but refused to answer any questions on the ground that his answers might be self-incriminating and persisted in refusing to answer material questions when ordered to do so by Colonel Harry E. McKinny, president of the general court-martial. It appears that answers to the questions asked of the accused would not have been self-incriminating, but in any event the accused was properly offered immunity, by the appointing authority, from prosecution for any offenses disclosed by his testimony.

4. The Specification of Charge II alleges that the accused "having been duly summoned and sworn as a witness before the General Court-Martial ***, and having received a lawful command from Colonel Harry E. McKinny, his superior officer who was then in the execution of his office as President of said court, to testify and respond to the questions propounded by the Trial Judge Advocate, did *** willfully and wrongfully disobey the same", in violation of Article of War 64. The majority members of the Board of Review are of the view that the offense alleged is not willful disobedience of a superior officer in the sense that it is denounced by Article of War 64; that, "<u>It is at most a violation of Article of War 96</u>" (Underscoring supplied); and that a fatal variance appears between the allegations and the proof in that it is alleged that the order was given by Colonel McKinny whereas the evidence shows it was the order of the court. I am in accord with the view that the Specification should have been laid under Article of War 96, instead of Article of War 64, since the order was in fact that of the court-martial rather than of an individual superior officer. Paragraph 28 of the Manual for Courts-Martial provides, however, that neither the designation of a wrong article, nor the failure to designate any article, is ordinarily material, provided the specification alleges an offense of which courts-martial have jurisdiction. It follows that the designation of a wrong Article of War is not material in this case. Further, I do not perceive any variance between the allegation and the proof as to this Specification. The Specification alleges that the order was given by Colonel McKinny <u>in the execution of his office as president of the court</u>. It is explicit as to

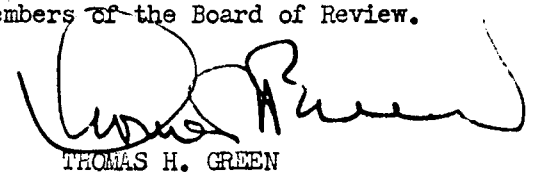
the origin of the order and the capacity of the officer giving it. There is no suggestion that the accused was misled by the pleading. It is, therefore, my opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge II in violation of Article of War 96.

5. The majority of the Board of Review is of the opinion that the maximum sentence for the offense involved in Charge I and its Specification (the findings of guilty of which are found legally supported) may not exceed confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months. This view is based upon Article of War 23 which provides, in pertinent part, that every person not subject to military law who refuses to testify before any military court shall be punished, on information and conviction in an appropriate Federal court, by a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court. The majority members believe that the limitation of punishment thus prescribed applies, by analogy, to military witnesses who wrongfully refuse to testify before a military court. It is my view, however, that the exclusion of military witnesses from the provisions of the Article reasonably precludes such analogy and implies that a different maximum punishment is appropriate in the case of military witnesses.

6. The willful and wrongful refusal of a military witness to testify before a court-martial is, I believe, closely related, within the meaning of paragraph 104c of the Manual, supra, to the offense of willfully disobeying the lawful command of a superior officer, in violation of Article of War 64. Each offense is marked by an act of disobedience to and defiance of constituted authority and the former is, in time of peace, no less a subversion of the discipline of the Army than the latter. The maximum authorized sentence for willful disobedience of a superior officer, in violation of Article of War 64 (dishonorable discharge, total forfeitures and confinement at hard labor for five years), should be considered as the maximum sentence for the offense here in question, whether in the form alleged in the Specification, Charge I, or in the form alleged in the Specification, Charge II.

7. In my opinion the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support so much of the findings of guilty of Charge II and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence.

8. Inclosed herewith are two forms of action prepared for your signature. Draft A will accomplish action including confirmation of the sentence in accordance with my views. Draft B will accomplish vacation of the findings and sentence in part in accordance with the opinion of the majority members of the Board of Review.



3 Incls
1. Record of trial
2. Form of action "A"
3. Form of action "B"

THOMAS H. GREEN
Major General
The Judge Advocate General

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( GCMO 158, 26 Aug. 1948).

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

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| U N I T E D S T A T E S | ) | FIRST U. S. INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Munich, Germany, 26 and 29 September 1947. Dishonorable discharge and confinement for one (1) year and twenty-one (21) days. United States Disciplinary Barracks. |
| Private WASHINGTON P. DURNELL (43007056), 3974th Transportation Corps Truck Company. | ) | |

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 61st Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: In that Private Washington P. Durnell, 437th Quartermaster Gas Supply Company, did, without proper leave, absent himself from the 385th Station Hospital at Nurnberg, Germany, from about 2000 hours 3 April 1947 to about 0900 hours 7 April 1947.

Specification 3: (Disapproved by the Reviewing Authority).

Specification 4: In that Private Washington P. Durnell, 437th Quartermaster Gas Supply Company, did, without proper leave, absent himself from the 385th Station Hospital at Nurnberg, Germany, from about 0500 hours 21 April 1947, to about 0940 hours 24 April 1947.

Specification 5: (Finding of Not Guilty).

Specification 6: (Disapproved by the Reviewing Authority).

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

Specification 1: In that Private Washington P. Durnell, 437th Quartermaster Gas Supply Company, having been duly placed in confinement in the 385th Station Hospital on or about 3 April 1947, did, at Nurnberg, Germany, on or about 3 April 1947, escape from said confinement before he was set at liberty by proper authority.

Specification 2: (Disapproved by the Reviewing Authority).

Specification 3: (Disapproved by the Reviewing Authority).

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 1 and 5 of Charge I, guilty of Specification 3 of Charge II, except the words and figures "on or about 24 April 1947" substituting therefor the words and figures "on or about 21 April 1947." Of the excepted words and figures, Not Guilty, and of the substituted words and figures, guilty and guilty of all remaining Charges and Specifications. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority disapproved the findings of guilty of Specifications 3 and 6 of Charge I and Specifications 2 and 3 of Charge II and approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for one year and twenty-one days, designated 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. The only question presented by the record is whether the findings of guilty support the sentence as approved by the reviewing authority. The initial absence of accused in connection with Specification 2 of Charge I was also the escape from confinement of which accused was found guilty under Specification 1 of Charge II. Thus the absence without leave and the escape from confinement were but different aspects of the same act and the punishment imposed should be limited to the maximum authorized for the offense deemed most important arising from the single act or circumstance upon which the separate offenses were based. In the instant case the escape from confinement, authorized the more severe punishment of dishonorable discharge, total forfeitures and confinement at hard labor for one year. Imposition of additional confinement at hard labor predicated upon the offense of absence without leave from 3 April 1947 to 7 April 1947 was illegal (CM 313544, Carson, 63 BR 137; 5 Bull. JAG 202 and cases there cited). The additional offense of absence without leave from 0500 hours 21 April 1947 to 0940 hours 24 April 1947 having been proved by competent evidence will support additional confinement for twelve days.

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and twelve days.

W H Johnson Jr, Judge Advocate

On Leave, Judge Advocate

A T Kane, Judge Advocate

JAGQ - CM 327345 1st Ind

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

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

1. In the case of Private Washington P. Durnell (43007056), 3974th Transportation Corps Truck Company, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and twelve days. 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:

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.



DEC 4 1947

JAGQ - CM 327361

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| UNITED STATES | ) | EIGHTH ARMY |
| v. | ) | Trial by G.C.M., convened at APO 343, 3 and 6 October 1947. To be hanged by the neck until dead. |
| Private ALBERT WILLIAMS (33633891), Headquarters and Headquarters Detachment, 14th Replacement Battalion, 4th Replacement Depot, APO 703. | ) | |

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

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Albert Williams and Private Willie L. Middleton, both of Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703, acting jointly and in pursuance of a common intent, did, at or in the vicinity of Number 80, 4-chome Tori-cho, Minami-ku, Yokohama, Honshu, Japan, on or about 24 June 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Shinichi Ishikawa, a human being, by striking him on the head with a pistol.

After arraignment accused Middleton moved for and the court granted a severance and proceeded with the trial of accused Williams. By direction of the court the specification was amended by deleting the words "and Private Willie L. Middleton, both of" and "acting jointly and in pursuance of a common intent" (R. 7). Accused pleaded not guilty to and was found guilty of the Charge and Specification as amended. Evidence of two previous convictions for absence without leave was introduced. He was sentenced to be hanged by the neck until dead, all members

of the court present concurring therein. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

On the morning of 25 June 1947 at 0500 the body of deceased (Shinichi Ishikawa) was discovered by one Ino Kojima, who reported the fact to the police (R. 12, 13). When Kojima saw deceased's body it was attired in clothing of an O.D. color and was "wearing" a hat similar to prosecution's exhibit 2 (R. 36, 37). Dr. Yasuo Fujii testified that he examined deceased on 25 June 1947, that deceased's skull was "cracked" between the eyes, there were lacerations on the back of the head, and that the cause of death as developed by an autopsy was a large flow of blood on the base of the brain and contusion of the small brain. In the opinion of the doctor death was caused by a hard blunt instrument and that death was caused by blows, and could not have been the result of a fall (R. 13-15). He also testified that deceased was wearing work clothes of O.D. color and a panama hat (R. 38). Tadashige Watanabe testified that he was with deceased on 24 June 1947 at about 2330 and that deceased was wearing work clothes a lighter shade than O.D., a white panama hat and was carrying a brief case (R. 10, 32, 33).

On 24 June 1947 about 2330 accused, Privates Middleton and Price left a Chinese restaurant near 3 Chome, Tori, Yokohama (R. 16, 21, 41, 44). Accused had a pistol in his hand (R. 22). A Japanese who appeared to be drunk approached the group and accused said "There's a man looks like he have some money" and Middleton said "Yeah". Accused accosted the Japanese who ran away. Private Middleton "chased" the Japanese who was finally caught by accused who struck the Japanese twice with his gun. Thereafter a shot was heard which came from the gun accused held. The Japanese fell and accused started to search him (R. 16, 17, 22-25). Private Price testified that the Japanese was carrying a grip or bag and was wearing a "round" hat. Private Middleton testified that the Japanese was carrying a brief case and wearing what seemed to be a gray hat with a black band (R. 44, 57). By means of a map (Pros. Ex. 4; R. 65), it was established that the deceased was found in the approximate place where Middleton and Price testified they saw accused strike the Japanese with his gun.

After his rights were explained to him accused elected to remain silent (R. 65).

4. The competent evidence clearly proved that accused and Private Middleton conspired to rob the deceased, that in the commission of this felonious act accused struck deceased twice with his pistol and that as a result of the blows the victim died. The deceased was identified

by Ino Kojima, a neighbor (R. 12-13), by Tadashige Watanabe, a friend who had been with him on the night of the murder (R. 10-11, 32-34) and by the coroner who examined the body and performed the autopsy (R. 13-14, 38). No question of insanity or intoxication was raised at the trial. "Intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out that purpose" (1 Wharton's Criminal Law, sec. 420, p. 632). The instant case is governed by the law enunciated in CM 306769, Leatherberry, 5 BR (ETO) 103, p. 113, in which the Board of Review stated:

> "Robbery inherently involves the element of violence upon the person and it is a probable, natural and reasonable consequence of an attempt to commit 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).

The evidence clearly shows that Shinichi Ishikawa met his death as a result of an unprovoked beating by the accused which was administered in furtherance of a design to commit a felony, viz., to rob the deceased. Every element of the offense of murder as denounced by Article of War 92 was proved by competent evidence beyond a reasonable doubt.

5. The charge sheet shows accused to be 23-3/12 years of age. He was inducted at Richmond, Virginia, on 14 April 1943.

6. The Board of Review has considered a letter addressed to the "Military Affairs Committee", United States Senate and a telegram to the Chief of Staff from Mrs. Claude V. Cline, President, United Service Club of Aitkin, Minnesota, protesting the death sentence imposed on accused in view of the sentence imposed on Lieutenant K. Koike found guilty of contributing to killing nine American airmen in Formosa and expressing disapproval of a death penalty for American soldiers in peace or in war.

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. For the reasons stated above, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

W H Johnson Jr, Judge Advocate

C E Lohmann, Judge Advocate

A. D. Kane, Judge Advocate

JAGQ - CM 327361 1st Ind

JAGO, Dept of the Army, Washington 25, D. C. JAN 5

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial and the Opinion of the Board of Review in the case of Private Albert Williams (33633891), Headquarters and Headquarters Detachment, 14th Replacement Battalion, 4th Replacement Depot, APO 703.

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

3. The charge sheet shows accused to be 23-3/12 years of age. He was inducted at Richmond, Virginia, on 14 April 1943. He has two previous convictions by Special Court-Martial, the first for absence without leave for two months and the last for an absence without leave of twenty-six days.

4. A telegram to the President, a telegram to the Chief of Staff, Department of the Army and a letter to the Military Affairs Committee, United States Senate, all signed by Mrs. Claude V. Cline, President, United Service Club, Aitkin, Minnesota, have been considered. Mrs. Cline on behalf of the United Service Club condemns the death sentence imposed on accused, compares it unfavorably with the penalty imposed on Lieutenant Kaneichi Koike whom she alleges was found guilty of contributing to the death of nine American airmen shot down in Formosa and further expresses disapproval of the death penalty for any member of the American Armed Forces at any time, "in wartime or peace".

5. I recommend that the sentence be confirmed but in view of all the circumstances of the case including the fact that much of the evidence is circumstantial, recommend that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of accused, and that the sentence as thus commuted be carried into execution. I further recommend that a United States Penitentiary be designated as the place of confinement.

(94)

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

CM 327361

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls.
1. Record of trial
2. Draft ltr for sig Sec of the Army
3. Form of Exec. action

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( GCMO 30 (DA) 23 Jan 1948).

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

JAGK - CM 327368

2 [illegible] 1948

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| UNITED STATES | ) | 1ST AIR DIVISION |
| v. | ) | Trial by G.C.M., convened at Headquarters 1st Air Division, 26 and 30 September 1947. Dishonorable discharge (suspended), total forfeitures and confinement for ten (10) years. Disciplinary Barracks. |
| Private ELI SEWELL, JR. (RA 18245099), 899th Engineer Aviation Company. | ) | |

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Eli Sewell, Jr., 899th Engineer Aviation Company, did, at 301st Fighter Wing, APO 239 Unit 2, on or about 19 August 1947, with intent to commit rape, commit an assault upon Tamoyoshi Uto, Itoman, Okinawa, by striking her on the face and head with his fist.

He pleaded not guilty to and was found guilty of the specification and 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 ten years. The reviewing authority disapproved "the words 'with his fist,' of the findings on the specification to the charge," approved the sentence and ordered it executed. He 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, Camp McQuaide, California, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 32, Headquarters, 1st Air Division, 4 November 1947.

3. Evidence for the Prosecution

Sergeant James J. Berra, accompanied by two other military policemen, saw the accused while patrolling Highway #3 in a jeep shortly after "5:30" a.m. on 19 August 1947. Upon questioning, the accused said he was trying to catch a ride to the 899th Engineer Aviation Company. As curfew ended at 5:30 a.m., the military policeman drove on (R 6,7).

Tamayoshi Uto, an Okinawan female civilian, was walking along Highway #3 at about "6:00" a.m. the same morning when the accused approached her. Concerning this meeting she testified as follows:

"Q. Did anything unusual happen to you after you left the M.P. check point and were proceeding north on this road?
"A. Yes, there was an incident.
"Q. What?
"A. A person came out and got hold of my hand and when I said 'No', he struck me.
"Q. He got hold of your hand, what do you mean?
"A. He got hold of my hand and tried to pull me in the grass.
"Q. You say he struck you - how many times?
"A. I remember five or six times.
"Q. Did he hurt you?
"A. Yes, he hurt me. (R 9)

* * *

"Q. What were you wearing?
"A. I was wearing a blouse and skirt.
"Q. Did anything happen to your blouse and skirt?
"A. My blouse was torn.
"Q. You say when he struck you five or six times he hurt you. How badly did he hurt you?
"A. I was on the point of fainting.
"Q. Did any of these blows break your skin?
"A. On the forehead I was wounded.
"Q. Were you bleeding?
"A. Yes.
"Q. How long did this attack last.
"A. About five minutes.
"Q. What happened?
"A. This one American came up to me.
"Q. Along the road?
"A. Yes, he did.
"Q. Then what happened?
"A. The person who attacked me ran away.

"Q. Who was this person who was attacking you?
"A. This person here. (indicating Sewell).
"Q. After Sewell ran away what did you do?
"A. I was sitting on the side of the road.
"Q. You mean you just sat down?
"A. Because I was bleeding and I had a pain in my head I sat down." (R. 10)

"Q. On 30th August did you not make a statement 'As I was walking along .....'
PROSECUTION: Objection - to whom?
"Q. To Captain Harold E. Zettle, investigating officer at this time - 'As I was walking along the road a soldier came up to me and said he would give me some tobacco and to come up on the mountain. I said no, and called to the M.P.'s for help'?
"A. He was saying something about cigarettes.

* * *

"Q. Do you understand, or rather did you understand anything that this person said to you - the person who assaulted you?
"A. I remember only the word 'cigaretto'.
"Q. Did this person who assaulted you show you anything?
"A. He did not show me any goods.

* * *

"Q. What did you do when you were first attacked?
"A. He got hold of my hand and said 'cigaretto'.
"Q. What did you do?
"A. I tried to run away." (R 13)

Sergeant Elmer L. Hannah, assistant mess officer at the officers' club, saw "this Okinawan girl in the street" while on his way to the club from his quarters on the morning of 19 August 1947. He had left his quarters at about 5:55 a.m. At the same time he saw a colored soldier dressed in one piece fatigues running away. He did not recognize the soldier but he was about the same size as accused. The girl had blood on her face, mud in her hair and her blouse was "pretty well torn up" (R 14-16). Accused was not present at reveille which was stipulated to have been held at the accused's organization at 5:30 a.m. that morning. Later in the morning at about 6:30 a.m. and again at about 8:00 a.m. Staff Sergeant Robert J. Carter, acting first sergeant, saw the accused in bed, sound asleep and dressed in a suit of "coveralls" (R 17,18,28).

For the Defense

The accused, according to Sergeant Johnny Chalmers, came to the "NCO club Naha" at about 10:30 p.m. on the night of 19 August 1947 (obviously intended to be 18 August). He asked for a drink but as "he was pretty well lit" he was given a drink of water. He slept on a settee at the club

all night and left the following morning at about 5:30 a.m., "pretty well sober" and dressed in fatigues (R 21,22).

Technician Fifth Grade James L. Stewart testified that he saw the accused lying in his own bed at "5:55" a.m. on 19 August 1947. He established the time by a certain radio program which usually came on at 6:00 a.m. This particular morning he had to wait awhile for the program to come on after turning on his radio (R 22-24).

The accused after having his rights explained to him was sworn as a witness and testified in his own behalf that he went to the "NCO club" of his organization at about 10:30 p.m. on 18 August 1947 where he stayed all night. The following morning he left the club "pretty late" and was hurrying to make reveille, which he thought was at 6:00 a.m., when he met the "MP's" at about 5:30 a.m. When he arrived at his organization he saw the men coming from chow with "their pans." It was then he realized he had left his at the guardhouse from which he had just recently been released.

He was confronted with a written pre-trial statement which was voluntarily made and signed by him. He was cross-examined upon it without any objection by the defense. In that statement he said he left the "NCO club" at about 5:20 a.m., that he met the MP's about a block away from the club and that when he reached his organization he went to the latrine where he discovered he had a "discharge" so he lay down on his bed to wait for sick call.

4. Discussion

The accused was found guilty of an assault with intent to commit rape.

Assault with intent to commit rape is defined as:

> "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice." (par. 149l, MCM 1928.)

It has also been said that intent is a mental process which can be inferred only from all of the facts and circumstances existent at the time of the assault, such as the time, place, character and degree of violence applied, language, threats, demonstrations and the entire conduct of the accused (Winthrop Mil. Law & Prec., 2d Ed., p. 688).

It was stated by the Board of Review in CM 320352, Jones, 69 BR 333:

"*** that the question of intent is one of fact rather than law except in a case where the facts proved afford no reasonable ground for the inference drawn."

In the instant case, therefore, we must look to the record of trial to see whether it contains evidence legally sufficient to support the conclusion of the court and reviewing authority that the accused intended at the time of his assault upon the Okinawan woman to overcome by force any resistance she might have offered to a carnal penetration of her person. The judicial answer to the question as to what prompted the accused's unjustified attack upon the woman must be predicated upon a rational hypothesis drawn from the proof and not from mere conjecture or surmise. Furthermore, if the accused's conduct, as reflected in the record, is as consistent with an inference of guilt of only a lesser included offense as it is with an inference of guilt of the greater offense of which he stands convicted, then he must be given the benefit of the doubt and the findings must accordingly be tailored to fit the lesser crime (CM 234998, McKenzie, 1 BR (ETO) 69,81). We think that the accused's act of beating his victim after she had refused his offer of a cigarette, even if it be assumed that the offer was made with illicit copulation in mind, lends no greater support to the theory that the beating was administered for the purpose of gratifying his sexual desires over her protest than to the equally tenable theory that he simply became infuriated at her refusal to assume the role of a prostitute. Being unable to discover the workings of the benighted mind of this accused by any method other than a consideration of what the proof shows he has done, and since his assault upon the woman does not appear to have been committed in such a manner as to exclude the reasonable probability that it was a simple assault and battery, and nothing more, we are of the opinion that so much of the findings of guilty as denounce his intent to rape should be set aside. (See CM 199369, Davis, 4 BR 37; CM 239839, Harrison, 25 BR 273; CM 286982, Green, 12 BR (ETO) 333; CM 287892, Henderson, 5 BR (NATO-MTO) 253).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the charge and its specification as includes a finding that the accused did at the time and place alleged wrongfully commit an assault upon the person alleged by striking her on the face and head in violation of Article of War 96 and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for a like period.

Robert D. Silvers, Judge Advocate

Gilbert E. Schroyer, Judge Advocate

Harley A. Lanning, Judge Advocate

(100)

MAR 30 [illegible]

JAGK - CM 327368 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Eli Sewell, Jr. (RA 18245099), 899th Engineer Aviation Company.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of the specification and the charge be approved as involves a finding that accused did, at the time and place alleged, wrongfully commit an assault upon the person alleged by striking her on the face and head in violation of Article of War 96; that so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for a like period be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of those portions 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

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( GCMO 92, 21 April 1948).

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

(101)

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NAVY DEPARTMENT 14 MAR 1948

JAGK - 327409

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| UNITED STATES<br><br>v.<br><br>Major DeWitt C. Armstrong, III (0-25441), Cavalry | UNITED STATES FORCES IN AUSTRIA<br><br>Trial by G.C.M., convened at Vienna, Austria, 23 and 24 October 1947. To be reduced on the promotion list fifty files and to forfeit fifty dollars per month for three months. |

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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 in the Office of The Judge Advocate General and there found legally insufficient to support the findings and the sentence. The record has now been examined by the Board of Review and the Board submits this its opinion to The Judge Advocate General.

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

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

Specification: In that Major DeWitt C. Armstrong, III, G-2 Section, Headquarters United States Forces in Austria, did, at Vienna, Austria, on or about 28 July 1947, willfully, feloniously and unlawfully kill Johann Mersics by shooting him with a pistol.

CHARGE II: (Nolle prosequi entered by direction of appointing authority.)

Specification: (Nolle prosequi entered by direction of appointing authority.)

Accused was tried together with John B. Nielsen, an Army civilian employee, who was charged under a separate specification with assault with intent to do bodily harm with a dangerous weapon upon Johann Mersics. Nielsen was acquitted. The accused Armstrong pleaded not guilty to the charge and its specification. He was found guilty of the specification except the words "willfully, feloniously and," of the excepted words not guilty, and guilty of the charge. Accused was sentenced to be reduced on the promotion list fifty files and to forfeit fifty dollars per month for three months.

The reviewing authority approved the sentence and ordered it duly executed. The result of trial was published in General Court-Martial Orders No. 56, Headquarters, United States Forces in Austria, APO 777, dated 14 November 1947.

3. For the Prosecution

At about 0225 hours on 28 July 1947 Mr. John B. Nielsen reported to the Military Police at a police station in Vienna, Austria, that an American major had shot an Austrian civilian. Corporal Misaras accompanied Nielsen about 7/10 of a mile to 68 Hohewartegasse, the scene of the reported incident. The victim of the shooting was found lying in the street wounded but still alive. Major Armstrong was standing nearby unloading his pistol. He stated that he shot the man, who had tried to escape from his custody. He first "hollered" at the man "a couple of times" and fired a shot in the air, then aimed at him and fired another shot. Armstrong surrendered his weapon to Agent Cavaney of the Criminal Investigation Division who had also arrived at the scene. Cavaney noticed that the civilian had what appeared to be a bullet hole in the back of his coat and he died while his body was being examined (R 10-16).

It was stipulated by the prosecution and defense that the name of the deceased was Johann Mersics and that he was pronounced dead by competent medical authority on the morning of 28 July 1947 (R 13).

An autopsy performed on the deceased showed that he died from a gunshot wound which pierced the heart and lungs. Another wound was found on the outer side of the right hip, but this was merely a flesh wound and had caused no serious injury (R 28,29, Pros Ex 7-A). Two bullets were extracted from the body and a ballistics examination revealed that the bullet which caused the death of Johann Mersics was fired from the pistol used by accused Armstrong. Nielsen had also been armed with a pistol which he turned over to the Criminal Investigation Division. The ballistics tests further showed that the bullet extracted from the deceased's hip was fired from Nielsen's pistol. This bullet had probably ricocheted before striking deceased (R 25, 33-39).

There was received in evidence a copy of a directive from Headquarters United States Forces in Austria, 29 November 1946 (AG 470-GCT) addressed to the various subordinate commands and entitled "Restrictions on the use of Firearms." Paragraph 1 thereof states that -

> "The following regulations govern the use of firearms in the U.S. Occupied Zone of Austria by Military Police, constabulary, sentries on duty and other law enforcement agencies."

There follow regulations prohibiting unnecessary force or violence in effecting arrest or preventing the escape of a prisoner and stating that

wounding or killing is justified only where necessary in order to effect the arrest or to prevent the escape of a person "if there are reasonable grounds to believe" that such person had committed one of the "serious offenses covered by the Articles of War or listed as felonies under civil law," such as "Murder, Rape, Forgery, Robbery, Arson, Burglary, Housebreaking, Manslaughter, Mayhem, Kidnapping and in cases of serious assault" (R 42, Pros Ex 9).

4. For the Defense

It was stipulated by the parties that if Oscar Mattausch were present he would testify that the deceased, whom he identified by a photograph, had entered a restaurant at No. 63 Grinzingerstrasse about 2300 hours on 27 July and left shortly before 2400 hours. Deceased mentioned that he had to be at the Westbahnhof at 2400 hours and needed a taxi. He appeared to be "a little tipsy" but not drunk. Witness offered to share with deceased the taxi used to take the restaurant personnel home, but deceased refused to pay his part of the fare and went off saying he would take his own car. At about 0130 hours Mattausch saw a gray car, a "Volkswagen," coming down Grinzingerstrasse with "turned off motor" and the deceased was in the driver's seat. About ten minutes later an American approached and asked if he had seen a gray Volkswagen and witness reported what he had seen (R 72,84).

Each accused elected to take the stand and testify under oath. Major Armstrong testified that he arrived at his quarters at #62 Grinzingerstrasse shortly before midnight on 27 July 1948. He left his personal car, a Volkswagen, at the curb and removed the key. He then entered the house and went to bed. Sometime later he was awakened by Mr. Nielsen who resided in the same quarters and who stated someone was tampering with his (Armstrong's) car. Armstrong was only half awake and thought Nielsen was unnecessarily concerned. Shortly thereafter Nielsen reported the car missing. Armstrong then got up and dressed, took his 25 caliber "Duo" pistol and went downstairs with Nielsen to get Nielsen's car out of the garage. While Nielsen was getting the car, Armstrong looked up and down the street and saw that his car was gone. He saw some Austrian civilians in front of the St. Augustin Cafe and went over to them. He asked one of the men, whom he recognized as a waiter at the cafe, if he had seen a Volkswagen. Armstrong "understood enough of his German and gestures to be sure he had seen my Volkswagen, which had been parked in front of my house, move down the hill, with the engine off, and move around the corner to the right at the next intersection." Armstrong then returned to Nielsen and got into the car with him. They drove down the hill and around the corner where they came upon Armstrong's car parked in a diagonal position near a wall on the right side of Hohe Wartegasse. Armstrong took his pistol from its holster and placed an extra clip in his pocket, leaving the holster in the car. He got out of Nielsen's car and went over to his own car. There was sufficient light from a street light at the intersection to see inside the car. No one was in the car. Suddenly Nielsen said, "There

he is, that's the man," or words to that effect. Nielsen identified a man approaching as the person he had seen around Armstrong's car. Armstrong walked over to the man and told him to put his hands up. The man moved his hands up and down several times but acted "surly or bold," or "brazen" and began protesting. Armstrong spoke in English and Nielsen translated into German, saying that they were taking him to the military police. The man continued protesting. He pushed Nielsen and made motions toward Armstrong who signalled for the man to get into the car. As they started around the left rear of Nielsen's car, the man broke and ran. Armstrong was not positive whether he shouted at the man but he started to run after him. Due to a sprained foot he was unable to run effectively and he stopped, placed a round in the chamber of his pistol and fired over the man's head. The man continued to run at full speed and Armstrong aimed at him and fired again. When he fired the second time the man was 20 to 25 yards away and was disappearing in the darkness. Almost immediately the man disappeared from sight. Major Armstrong and Mr. Nielsen then got into Nielsen's car and continued the pursuit. After going 75 or 80 yards the same man suddenly appeared staggering from an alley and slumped prone in the center of the street. Nielsen went for the military police while Major Armstrong remained to guard the victim (R 44-56).

Mr. Nielsen testified that shortly after midnight on 27 July 1947 he saw a man tampering with Major Armstrong's car which was parked on the street in front of his room. The man disappeared, then returned to the car and began turning the lights on and off. Nielsen aroused Major Armstrong and notified him of what he had seen but Armstrong did nothing at the time. Nielsen went back to his window, looked out, and saw that the car had disappeared. He made further report to Major Armstrong who then got up and dressed. The men then planned to investigate the incident using Nielsen's car. While Nielsen got his car, Armstrong went to a nearby cafe to make inquiry. Armstrong returned, got in the car and told Nielsen to "take the next right." Nielsen drove down the street and turned right into Hohe Wartegasse, where they found Armstrong's Volkswagen. Both jumped out and examined the car. Suddenly Nielsen saw the man he had previously seen walking toward the car. Nielsen shouted and the man turned to the right, across Grinzingerstrasse, but Major Armstrong cut off his escape. At the street intersection Armstrong told the man to raise his hands, but the civilian only raised his arms to about shoulder height and dropped them again. Thinking the man did not understand Major Armstrong, Nielsen told him in German several times that they were going to take him to the military police, and if he was not guilty he had nothing to fear. The man acted like he was going with them, so Nielsen went to his car followed by Armstrong. As Nielsen started to open the left rear door he heard a shout and saw the civilian dash up the street. He heard a shot and took out his own pistol and tried to fire it, but it would not fire. He pulled back the slide and tried again, but still it did not fire. He intended to fire over the man's head. Nielsen heard two shots fired but did not think that he fired any shots. He and Major Armstrong then ran to Nielsen's car, got in and drove up the hill about 75 or 80 yards.

They then saw the civilian come from the right hand side of the street staggering and "deliberately" lie down in the center of the street. They dismounted and ran to the man. Armstrong told Nielsen to go get the military police,which he did. Nielsen was positive the man was the same person he had previously seen in Major Armstrong's car (R 59-70).

The court recalled both accused and questioned each as to his authority to carry firearms. Major Armstrong testified that he did not have any specific authorization to carry a pistol, although he testified that he considered it necessary in the proper performance of his duties. His weapon was not registered (R 80-81). Nielsen testified that his duties did not require that he carry firearms and he had no permit (R 83,84). Both prosecution and defense objected to this testimony, but it was admitted over objection ( R 85).

When the court opened to hear evidence of previous convictions, the defense was allowed to present documentary proof showing that the deceased, Johann Mersics, had a criminal record of six convictions by military and civil courts for offenses including larceny, embezzlement, seduction, and assault with a dangerous weapon (R 95, Def. Ex. B).

5. Comment

The accused was originally charged with voluntary manslaughter and with wrongful possession of a pistol in violation of Circular 10, Headquarters USFA, dated 12 February 1946. The latter offense was nolleprossed by direction of the appointing authority. By appropriate exceptions the accused was found guilty of involuntary manslaughter.

That portion of the sentence providing that accused be reduced fifty files on the promotion list is inoperative as being inconsistent with the Officer Personnel Act of 1947 (act of 7 Aug 1947, PL 381, 80th Congress). In this regard see opinion of The Judge Advocate General in JAGA 1947/10181, 6 Bull JAG 280.

The evidence conclusively establishes that on the night in question the deceased, Mersics, feloniously took, stole and carried away the private automobile of Major Armstrong. Mr. Nielsen observed Mersics in the act. Shortly thereafter he and Major Armstrong left their quarters in pursuit of the culprit, recovered the car, and apprehended Mersics whom Armstrong took in custody at the point of his revolver. They fully explained to Mersics that he was in custody to be delivered to the police authorities. As they attempted to place Mersics in the car he fled. Major Armstrong fired a shot into the air in an attempt to stop him. He may have also shouted to the culprit to halt but it is certain that Mersics, in total disregard, continued his flight and was about to vanish in the dark when Armstrong took aim and fired the bullet which caused his death. Although persons and "agencies" other than the accused were specifically charged with the responsibility of enforcing the peace and apprehending

criminals, and although a military police station was located about 7/10 of a mile away, yet we are of the opinion that when the emergency herein arose the accused had full right to pursue and apprehend Mersics.

The rule prevailed under the common law that a private citizen could arrest without a warrant one who had in fact committed a felony and this is the general rule now prevailing in our system of jurisprudence (Kurtz v. Moffett, 115 U.S. 487, 504; Brady v. U.S., 300 Fed 540, 543). And some of the jurisdictions have held that under the common law any person present when a felony is committed is bound under pain of fine or imprisonment to arrest the felon (Crawford v. Comm., 241 Ky 391; 44 S W 2d 286, 288; Kennedy v. State, 107 Ind 144, 6 N E 305; 13 R C L 874). Paragraph 4(a), AR 600-355, provides as follows:

> "All members of the military establishment have the ordinary right and duty of civilians to assist in the maintenance of peace. Where therefore a felony or a misdemeanor amounting to a breach of the peace is being committed, it is the right and duty of every member of the military service, as of every civilian, to arrest the perpetrator no matter what his status ***" (underscoring supplied).

Although it might be contended that the last mentioned authorities have particular applicability to the relation of military personnel to each other and to civilians in the United States and its territories, the record of trial does not show, nor can we conceive, that the commanding general of the occupying forces in Austria intended to or did limit the authority of his subordinates, not detailed to police functions, to something less than that enjoyed by or imposed upon the ordinary citizen of the United States under similar circumstances. We conclude therefore that Major Armstrong had both the legal right and the duty to apprehend and take Mersics into custody. Having undertaken to exercise that authority, he is entitled to the protection the law affords one who is duly executing its mandates. In this respect, accused stands in the position of a law enforcement officer. He was, in short, "a law enforcement agency" within the terms of the directive introduced in evidence as Prosecution Exhibit 9 and his case is to be considered precisely as though he were a member of the constabulary when he fired the fatal shot. Here it may be pointed out that although the mentioned circular does not specifically list the crime of larceny as one of the "serious offenses covered by the Articles of War or listed as felonies under civil law," larceny certainly is such an offense, clearly as "serious" as forgery, which is listed, and we therefore are of the opinion that the omission of larceny from the list of felonies is an immaterial matter.

It is a general rule that -

> "Homicide committed by a public officer or private citizen while attempting in a lawful manner and by the necessary use of

> force to arrest or prevent the escape of a felon, whether in fleeing from arrest or in attempting to escape after he has been taken, is justifiable where the felon's life is taken in the course of using such force in effecting his arrest and in overcoming his resistance, or in preventing his escape, as is necessary, or as appears to the arresting officer or citizen, in the exercise of a reasonable discretion, to be necessary." (40 C.J.S., pp 963-964)

But it is only when there is no other reasonably apparent method of effecting the arrest or preventing the escape of the felon that an officer may, if he has performed his duty in other respects, take the life of the offender (4 Am Jur 57). The issue narrows then to a determination of whether the accused, acting in good faith had reasonable grounds to believe and did so believe that the seriously wounding or killing of Mersics was necessary to prevent his escape. It appears that both Nielsen who was acquitted, and the accused Armstrong believed that the shooting was necessary to prevent the escape. In the state and Federal courts the question as to what degree of force was apparently necessary under the circumstances is generally one of fact for the jury, under proper instructions. In Stinnett v. Commonwealth of Virginia (21 Fed (2d) 542), the court stated the problem as follows:

> "The rule is that the officer has the right to use such force as under the circumstances appears reasonably necessary to effect the arrest or prevent the escape of the felon, and that, if the reasonable use of such force results in death of the felon, the officer is not to be held criminally accountable therefor. Of course, the jury and not the officer is to be the judge of the force reasonably necessary under the circumstances, and this final supervision should serve as a salutary restraint upon the use of undue violence on the part of the officers of the law; but it should be remembered that the jury is to judge of the necessity, in the light of the circumstances as they reasonably appear to the officer at the time." (Underscoring supplied.)

In military tribunals the same principle is applied, but the court-martial sits as the jury, and in the ordinary case the weighing of the evidence and determination of its sufficiency, the judging of the credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts are functions committed primarily to the members as the fact finding agency. But when the facts are undisputed as they appear to be in this case, and the only logical inference therefrom is that reasonable grounds existed for accused's belief that it was necessary to seriously wound or kill the thief to prevent his escape, and the proof is clear and uncontradicted that accused acted

in good faith on such belief, it becomes at once apparent that, as a matter of law, no unlawful homicide has been shown and that the court's findings of guilty in this respect must have been based on an erroneous legal conclusion (CM 303045, Ross, 13 BR (ETO) 79, 96-98; Metropolitan Railroad v. Moore, 121 U S 558).

We find no evidence in the record tending to show, or from which a reasonable inference might be drawn, that the accused, in firing at Mersics as he was about to vanish into the darkness, used unnecessary or unreasonable force to prevent his escape. To assume that under the circumstances herein the recapture could have been effected by other and less violent means appears to overlook the realities of the situation and delve into the realm of conjecture. Moreover, the accused was entitled to have this question determined in the light of the circumstances as they reasonably appeared to him at the time. The felon elected to flee after being fully informed of his status and well knowing that the arresting officer held a drawn pistol to enforce obedience to his command (see Wright v. Comm, 85 Ky 123, 2 S W 904; Robinson's Ky Crim Law and Proc, p 379). Experience has clearly shown that even in modern organized society it frequently occurs that human life must be taken to vindicate the supremacy of the law. This appears to have been one of those cases.

The circumstance that the pistol used by the accused was unregistered and that he did not have a permit to possess the weapon, although possibly amounting to a violation of some directive, is too remote to have any bearing on the ultimate question as to whether the killing of Mersics was or was not criminal. With respect to the homicide, such circumstance was merely a condition and not a cause (par 149a, 8th subpar, MCM 1928).

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

Christy D. Silvers, Judge Advocate

Gilbert G. Schwarz, Judge Advocate

On Leave
_____, Judge Advocate

JAGK - CM 327409 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAY 19 1948

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 Major DeWitt C. Armstrong, III (O-25441), Cavalry.

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

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( GCMO 117, 2 June 1948).

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

JAGN-CM 327432

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| UNITED STATES<br><br>v.<br><br>Private First Class WILLIE E. RECTOR (18229309), Company A, 97th Engineer General Service Battalion. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | PHILIPPINES-RYUKYUS COMMAND<br><br>Trial by G.C.M., convened at Camp Angeles, APO 74, 23 October 1947. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks. |

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

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

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

CHARGE: Violation of the 84th Article of War.

Specification: In that Private First Class Willie E. Rector, Company A, 97th Engineer General Service Battalion, Camp Angeles, APO 74, did, at Angeles, Pampanga, Philippine Islands, on or about 6 September 1947, unlawfully sell to Troadio Torres, one (1) pistol Cal. .45, of the value of about $38.00, issued for use in the military service of the United States.

Accused pleaded not guilty to, and was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

On or about 3 September 1947 a .45 caliber pistol, serial 1807790, issued for use in the military service of the United States, was found missing from the lawful custody of Captain Pennington, Provost Marshal, Camp Angeles (R. 7). Accused was then assisting the supply sergeant of the Military Police Detachment, Camp Angeles, and could have unofficially entered the room where the pistol was kept (R. 8).

On 6 September 1947 accused sold an otherwise unidentified "gun calibre. 45" to a civilian, Troadio Torres who, in turn, sold the gun so purchased to Technical Sergeant Thomas A. Scott (R. 9-10). Technical Sergeant Scott delivered the gun he so purchased, "a .45 calibre pistol," to a civilian, Henry Doyle, for safekeeping (R. 11-12). Doyle pawned the gun he received from Scott, "a new looking .45" to another civilian, Walter Cook (R. 13). On some unspecified date Sergeant William K. McCoy "received a .45 calibre pistol #1807790 from Mr. Walter Cook * * * [and] delivered the pistol to Captain Pennington * * *." (Stipulated testimony, R. 13). Captain Pennington identified in court the pistol received by him from Sergeant McCoy and it was admitted in evidence without objection as prosecution's exhibit 1 (R. 7).

4. Evidence for the defense:

The accused, having been duly advised of his rights in the premises elected to testify under oath and stated that he had never sold any pistol to Torres (R. 14).

5. By the Specification of the Charge it is alleged, in essence, that accused did "unlawfully sell to Troadio Torres, one (1) pistol Cal. .45, * * * issued for use in the military service of the United States." The sale of a .45 caliber pistol to Torres by the accused was clearly proven by direct testimony, although it is denied by accused. In order to show the identity of the pistol so sold the prosecution sought to establish the continuity of its possession from the time of sale until the time of the trial. Thus it was shown that the particular pistol sold by accused to Torres was resold to Scott, by Scott delivered to Doyle, and by Doyle pawned to Cook. There, however, the path of evidence stops since there is not one iota of evidence in the record of trial to establish that the pistol taken from Cook by Sergeant McCoy was in fact the same pistol that was acquired by Cook from Doyle. It follows that there is no legal evidence in the record of trial to support the finding of the court that the pistol sold by accused to Torres was "issued for use in the military service of the United States," an essential element of the offense alleged.

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

Edward D. Kimmons, Judge Advocate.

Frank C. Alfred, Judge Advocate.

(ON LEAVE), Judge Advocate.

DEC 31 1947

JAGN CM 327432 1st Ind

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

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

1. In the case of Private First Class Willie E. Rector (18229309), Company A, 97th Engineer General Service Battalion, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated.

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

(CM 327432)

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 327459

2 JAN 1948

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| UNITED STATES<br><br>v.<br><br>First Lieutenant HAROLD R. SHIPLEY (0-1946166), Transportation Corps. | SAN FRANCISCO PORT OF EMBARKATION<br><br>Trial by G.C.M., convened at Fort Mason, California, 14 and 22 October 1947. Dismissal, total forfeitures and confinement for three years. |

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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: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Harold R. Shipley, Transportation Corps, 9206 Technical Service Unit, Ship's Complement, San Francisco Port of Embarkation, did, while aboard the United States Army Transport "General D. E. Aultman", on or about 14 June, 1947, feloniously embezzle by fraudulently converting to his own use about eight hundred five dollars and twenty cents ($805.20), the property of the Port Transport Exchange of San Francisco Port of Embarkation, entrusted to him in his capacity as Troop Transport Exchange Officer of the Branch Transport Exchange, United States Army Transport "General D. E. Aultman".

NOTE: Amended on motion of defense counsel so as to allege wrongful conversion of the property at the time and place alleged.

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

Specification 1: In that First Lieutenant Harold R. Shipley, ***, did, while serving as Troop Transport Exchange Officer, and while aboard the United States Army Transport "General D. E. Aultman" at Shanghai, China, on or about 7 June, 1947, wrongfully sell to George Hall Wise, in one transaction,

one case containing 50 cartons of cigarettes, in violation of the provisions of Standard Operating Procedure for Transport Exchange Officers, San Francisco Port of Embarkation, 12 March 1947, prohibiting the sale by personnel of Troop Transport Exchanges of cigarettes in quantities in excess of the number which could be reasonably consumed by the purchaser.

Specification 2: In that First Lieutenant Harold R. Shipley, ***, did, while serving as Troop Transport Exchange Officer, and while aboard the United States Army Transport "General D. E. Aultman" at Shanghai, China, on or about 7 June 1947, wrongfully sell to E. E. Brooks, in one transaction, one case containing 50 cartons of cigarettes, in violation of the provisions of Standard Operating Procedure for Transport Exchange Officers, San Francisco Port of Embarkation, 12 March 1947, prohibiting the sale by personnel of Troop Transport Exchanges of cigarettes in quantities in excess of the number which could be reasonably consumed by the purchaser.

Specification 3: In that First Lieutenant Harold R. Shipley, ***, did, while serving as Troop Transport Exchange Officer, and while aboard the United States Army Transport "General D. E. Aultman" at Shanghai, China, on or about 7 June 1947, wrongfully sell to Francis Brodzik, in one transaction, one case containing 50 cartons of cigarettes, in violation of the provisions of Standard Operating Procedure for Transport Exchange Officers, San Francisco Port of Embarkation, 12 March 1947, prohibiting the sale by personnel of Troop Transport Exchanges of cigarettes in quantities in excess of the number which could be reasonably consumed by the purchaser.

He pleaded not guilty to all charges and specifications. He was found guilty of the Specification, Charge I, except the words "feloniously embezzle by fraudulently converting", substituting therefor the words "wrongfully convert" in violation of the 96th Article of War, and not guilty of a violation of the 93rd Article of War. He was found guilty of Charge II and its specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, designated the U.S. Disciplinary Barracks, Camp Cooke, California, as the place of confinement and forwarded the record for action under Article of War 48.

3. Evidence for the Prosecution

The accused was the Transport Exchange officer on Voyage No. 7 of the

USA Transport "General D. E. Aultman" which left the San Francisco Port of Embarkation on or about 22 May 1947 and returned to the same port on or about 1 July 1947 (R 9,34). Prior to the date of the ship's departure and again upon its return to port an inventory and audit was made of the property and funds of the transport exchange. On the latter occasion, a "Voyage Sales Accountability Report" was duly executed and signed by the accused as Transport Exchange officer and by Major Edward W. Malone, TC, as Warehouse Exchange officer. The audit revealed a shortage in either funds or merchandise in the amount of $805.20. This constituted 8.4 percent of the gross sales. The foregoing accountability report was identified by the chief auditor of Port Transport exchanges and received in evidence without objection as Prosecution Exhibit 1 (R 26).

Miss Bernice Lorraine Norton, the chief auditor of port transport exchanges, identified Prosecution's Exhibits 2 to 12 inclusive as being certified true copies of the various inventories of supplies, requisitions, adjustment vouchers, and the certificate of deposit which form the basis for the computations contained in Prosecution Exhibit No. 1 establishing the aforementioned shortage. All of these documents were shown to have been duly signed by the accused at the time of their execution and the originals thereof were exhibited by the chief auditor in court and shown to have been retained by her in the Exchange Warehouse files. The defense objected to the introduction of these exhibits, except Pros. Exs. 2,3, and 8 (deposit slip), on the ground that the chief auditor had not personally made all the computations and entries thereon (R 30-33).

On 17 July 1947 the accused, after being duly advised of his rights, made a voluntary written statement to Special Agents Mangini and Knight wherein he "acknowledged responsibility for the loss of seven hundred nine dollars and thirty five cents ($709.35) of the Post Exchange funds, during the voyage of the USAT 'General D. E. Aultman', ending 1 July 1947." He also stated that he desired to make restitution of the loss (R 133, Pros Ex 17).

Mr. Jack Walker, San Francisco, California, Special Agent, Criminal Investigation Division, assigned to the Port Intelligence Office, made an investigation of an alleged shortage of post exchange funds on the "Transport Aultman" and on 11 August 1947, after he had advised the accused of his rights under Article of War 24 the accused orally stated to Walker that he used part of the transport exchange funds to pay a private debt of about $2100.00. At the request of Agent Walker the accused subsequently made a written statement and signed his name thereto as follows:

> "I have been advised of my rights under the 24th A.W. and make the following statement.
>
> 'I borrowed $720.00 from the Transport Exchange Funds of the U.S.A.T. "Gen. D.E. Aultman" on or about 14 June 1947 to pay a personal debt.'
>
> 11 Aug 47 H. R. Shipley
> 1st Lt., TC.

Witnessed
Jack Walker
Special Agent CID" (R 43-45, Pros Ex 13).

Agent Walker testified further that on the following morning, 12 August 1947, the accused stated to him that on 1 March 1947 a friend of his in Manila, P.I., had given him $2100.00 in cash to make certain purchases in the United States, and that on Saturday, 14 June 1947, while the USAT General Aultman was in port at Manila he reported to his friend that the merchandise was not available and returned the $2100 to him in cash; $720.00 of this money "was money which I took from the Transport Exchange Funds of the USAT General D. E. Aultman" (R 46). On cross-examination the witness stated that the accused had been interrogated on prior occasions and, upon being informed that he had made certain conflicting statements, checked the Manual for Courts-Martial for the "penalty for perjury" (R 50).

Captain Wesley Portwood, TC, Transport Commander of the USAT General D. E. Aultman, testified that on or about 18 June 1947, aboard ship, the accused reported to him that he had discovered a shortage of "around one thousand dollars" in the ship's post exchange funds. He instructed the accused to take another inventory and appointed as inventory officer from the ship's crew. This inventory was accomplished and also revealed the shortage (R 80-82).

By stipulation, there was received in evidence Prosecution Exhibit 16 as being a true copy of the "Standard Operating Procedures" with regard to the sale of merchandise by transport exchange officers (R 83). Paragraph 3c.(4) of Prosecution Exhibit 16 provided as follows:

> "Sales will be restricted to amounts which can be reasonably consumed by the purchaser. Requests for large amounts of any item will be carefully considered, and will be cut down where amounts are unreasonable." (Pros Ex 16).

On 7 June 1947, while the Transport "General Aultman" was in the port of Shanghai, China, the accused sold to each of the following persons: Mr. George H. Wise, the ship's master at arms; Mr. Elton E. Brooks, the chief storekeeper; and Mr. Francis Brodzik, the second butcher, a case of cigarettes. Each case contained 50 cartons. The purchasers paid the regular price of forty dollars per case (R 84-102).

4. <u>For the Defense</u>

The accused, after being duly advised of his rights as a witness, elected to testify under oath in his own behalf. He did not remember talking to either Wise, Brooks or Brodzik with reference to cigarettes (R 119). On or about 14 June 1947, while the ship was in Manila, P.I.,

Captain Popovich came aboard and he repaid the captain two thousand dollars which Popovich had entrusted to him on a prior voyage. Payment was made by giving Popovich about $1700.00 in cash and the rest in merchandise. When the ship returned to San Francisco he had been questioned every day concerning the shortage for about two weeks, "eighty or seventy times" and once at night. He made the statement (Pros Ex 13) after Walker had suggested, "Lt, why don't you admit you stole the money or borrowed it for your own use and make a statement to that effect. Then we can make arrangements with the Transport Exchange Branch and you can make up the shortage, make it good to the PX." Walker called Captain Prater and the accused assumed that he authorized repayment and that no further action would be taken. After he had made the oral statement to Agent Walker on the night of 11 August 1947 and at about the time he made the written statement he was advised by Major Jenks that "any promises made by anyone of this office or any reward I expected to receive from signing any statement or any statement I would make could not be granted." The accused did not know why his offer to make restitution had never been accepted (R 125-126).

On cross-examination the accused stated that the total amount of the shortage as ascertained by inventory aboard ship was about "twelve hundred some odd dollars" (R 127). He voluntarily signed the statement (Pros Ex 13) knowing the "top portion" was untrue and did not realize the consequence of the statement at the time of signing (R 129-130). As the responsible officer he was willing to make good the loss, and in a written statement dated 17 July 1947 he made such offer. He fixed the amount of the shortage at $709.35 (R 132-135, Pros Ex 17).

The defense called Captain John Prater who stated that he received a telephone call from Agent Walker on the night of 11 August 1947 relative to a statement about to be given by the accused, but that he did not authorize Walker to make any promise or offer to the accused conditioned upon his making a confession (R 57).

Lieutenant Colonel Erwin Perkins, TC, and Captain Leo B. Santeere, TC, testified that they had known the accused for a considerable length of time and that his general reputation for character, honesty and integrity was excellent (R 141-145).

It was stipulated that if Captain Albert J. Lioi, Ships Complement, were present he would testify that the accused's manner of performance of duty aboard the USAT General D. E. Aultman "was characterized by efficiency and attention to detail the equal of the best operations he has seen in his previous service" (R 147, Def. Ex. A).

The defense offered and there was received in evidence without objection the deposition of Peter E. Germaine, 201 14th Street, Hoboken, New Jersey. The deponent stated that he was the assistant Transport Exchange officer of the USAT General D. E. Aultman in June 1947; that "the merchant seamen came to me and asked if they could have cigarettes." He replied

that it was against regulations. They asserted that the accused had authorized the sales. He asked "Lt Shipley and he told me OK to sell the cigarettes to these seamen. I don't know their names. I delivered three cases to them." One of these men was George Wise. "One was third baker, and the other was a butcher." Germaine gave the money he received from the sale to the accused (R 148, Def Ex B).

The accused also elected to make a written unsworn statement. He stated that on 22 June 1947, after taking the usual weekly inventory he discovered the shortage, reported it and offered to make restitution inasmuch as he was responsible and accountable for the shortage. Captain Costello told him that he would draw up a contract and take care of it without any trouble. The Criminal Investigation Division continued to investigate the matter and he signed a statement on 17 July asserting that he wished to make restitution. He had declined to resign for the good of the service and held a permanent appointment as master sergeant. He had applied for separation from the service for the purpose of reenlisting as a master sergeant (R 149-150). No further material evidence was presented.

5. Discussion

Charge I and its Specification

The court correctly overruled the objections of the defense counsel to the introduction into evidence of Prosecution Exhibits 4 to 7 and 9 to 12 inclusive. The shortage was sufficiently shown by Prosecution Exhibit 1 which was received without objection. The documents objected to and which were explanatory of Prosecution Exhibit 1 were shown to have been admissible as records made in the regular course of business (28 USC 695).

The evidence shows conclusively that on or about 1 July 1947 there was a shortage of about $805.00 in the funds of which the accused was the responsible and accountable officer. He had reported a shortage in excess of this amount. At a later date the accused admitted that he had used funds of the Transport Exchange to pay a private debt and that he had requested permission to repay the "shortage" in monthly installments. He was found guilty of having wrongfully converted the amount of the shortage entrusted to him in his capacity as troop transport exchange officer. The circumstances are such as to negative any right on his part to use the funds of the exchange for his own personal benefit and the findings of guilty of wrongful conversion are amply supported by the evidence. A willingness to repay at some future date the funds wrongfully converted is not a defense (CM 244795, Milbrook, 29 BR 19, 25; CM 271265, Weed, 46 BR 79, 86). Wrongful conversion of property entrusted to an accused in violation of Article of War 96 is an offense lesser than and necessarily

included in embezzlement (CM 243947, Sheriff, 28 BR 149; CM 271265, Weed, supra; CM 324930, Henry). The court was justified in concluding upon the evidence that the accused's statement, made to Agent Walker, was of a voluntary nature, not obtained under promise of reward as accused contended.

Charge II and its Specifications

The specifications under the above charge allege the wrongful sale on or about 7 June 1947 to each of the parties named of a case of cigarettes (50 cartons) "in violation of Standard Operating Procedure, *** prohibiting the sale by personnel of Troop Transport Exchanges of cigarettes in quantities in excess of the number which could be reasonably consumed by the purchaser."

It is a matter of common knowledge that American cigarettes are a favored domestic commodity with which to bargain in the foreign black market. Many and varying directives and regulations have been promulgated to prevent such barter. The directive in question prohibits sale beyond that which "could be reasonably be consumed by the purchaser." Of course the period of consumption would necessarily have to be controlled by the circumstances of each particular case arising under it, for otherwise the directive would be practically meaningless. The directive has a rationale. It relates to general and specific matters having to do with the voyage of the Army transport. The voyage in question was No. 7. We construe the meaning of the words "reasonably consumed by the purchaser" to be limited to the voyage in question. The transport was at sea about forty days during the voyage in question. We conclude, as did the court, that 50 cartons were more than one person could reasonably consume during the 40-day period. Mr. Germaine, who was the assistant exchange officer, stated that he told the seamen that the sales were unlawful and he required the express approval of the accused before making delivery. The circumstances are such that it may reasonably be inferred that the accused had knowledge of the wrongful character of the sales when he authorized the same to be made. Even if it be said that the actual delivery was made by Germaine and that the accused simply authorized or gave his "OK" the accused was an aider and abettor and therefore a principal in law (18 USC 550; Winthrop's Mil. Law & Prec., Reprint, p. 108).

6. War Department records show that the accused is 29 years of age and married. He is a high school graduate and was employed as a clerk for the Pennsylvania Department of Highways prior to 19 January 1940 when he was inducted into the service. He was discharged on 3 August 1943 as a master sergeant to accept a commission as second lieutenant, TC, AUS. His efficiency ratings 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 authorized upon conviction of a violation of Article of War 93 or 96.

Chester D. Silvers, Judge Advocate

Elbert E. Hebroyd, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 327459 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 Harold R. Shipley (O-1946166), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully converting to his own use about eight hundred and five dollars and twenty cents ($805.20), property of the Port Transport Exchange of San Francisco Port of Embarkation, entrusted to him as Troop Transport Exchange officer, and of wrongfully, in violation of regulations, selling a case (50 cartons) of cigarettes each to three merchant seamen aboard the U. S. Army Transport General D. E. Aultman while in port at Shanghai, China, all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused was the transport exchange officer on Voyage No. 7 of the USAT General D. E. Aultman which left San Francisco Port of Embarkation on about 22 May 1947 and returned to the same port on or about 1 July 1947. During the voyage and after the transport had made a call at Manila, Philippine Islands, a shortage of about $1200.00 was discovered in the funds of the transport exchange. The accused reported the shortage to the transport commander who directed that a supplemental inventory be taken. The latter inventory confirmed the shortage. While the transport was docked in Shanghai, China, on or about 7 June 1947 the accused directed Peter E. Germain, then his assistant, to sell to each of three merchant seamen a case of cigarettes. The sales were consummated, each seaman paying the regular exchange price of $40 per case and the money was turned over to the accused. When the transport returned to San Francisco a complete audit of the exchange revealed a shortage of $805.20. The accused signed the "Voyage Sales Accountability Report" showing the foregoing shortage. After being advised of his rights by an agent of the CID accused prepared and signed a statement asserting that "I borrowed $720 from the Transport Exchange Funds of the USAT Gen. D. E. Altman on or about 14 June 1947 to pay a personal debt".

The accused contended at the trial that the statement he signed was made under an implied if not express promise that he would be allowed to repay the shortage by deductions from his pay over a six-month period and that he would not be prosecuted. The record does not support this contention.

Testifying in his behalf, the accused stated that on a previous voyage one Captain Popovich at Manila, Philippine Islands, had entrusted him with $2,000 to purchase merchandise for subsequent delivery. He was unable to procure the merchandise. When the General D. E. Aultman docked at Manila the captain came aboard the transport and he repaid the captain about $1700 in money and the balance in merchandise from the transport exchange. He "borrowed" $720.00 from the exchange funds to apply on the payment. Accused made an unsworn statement at the trial in which he admitted responsibility for the shortage but felt innocent of the "charge". He had declined to resign for the good of the service and held a permanent appointment as master sergeant. He had applied for separation for the purpose of reenlisting as a master sergeant. Character evidence introduced at the trial tended to show that the accused was considered an efficient exchange officer and had a prior acceptable record.

4. I recommend that the sentence be confirmed but that the period of confinement be reduced to one year, and that the sentence as thus modified 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 327459

2 Incls
1 record of trial
2 Form of Action

THOMAS H. GREEN
Major General
The Judge Advocate General

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( GCMO 49 (DA) 9 Feb 1948).

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

JAGH - CM 327480

947

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| UNITED STATES<br><br>v.<br><br>First Lieutenant EDGAR W. JORDAN (O-1115936), Corps of Engineers | ) | FLYING DIVISION, AIR TRAINING COMMAND<br><br>Trial by G.C.M., convened at Randolph Field, Texas, 6 and 10 November 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 sumbits 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 First Lieutenant Edgar W. Jordan, Corps of Engineers, did at Randolph Field Sub-Base, San Marcos, Texas, on or about 11 September 1947, feloniously take, steal, and carry away one Zeiss Ikon Super Ikonta B Camera, Serial No. 6721 with Tessar F 2.8 Lens, Serial No. 2572843, of a value of over $50.00, the property of First Lieutenant George R. Otto.

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 only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of evidence and law contained in the review of the Staff Judge Advocate, Flying Division, Air Training Command, Randolph Field, Texas, dated 20 November 1947, with the following additional comments.

The defense offered evidence, through the testimony of a civilian police officer, as to a polygraph or lie detector examination conducted on the accused. The witness related his qualifications as a polygraph operator and was describing the nature and theory of the machine when the prosecution objected to the admission of any evidence relating to the tests. The law member sustained the objection.

The results of lie detection tests generally have been held to be inadmissible in evidence (Frye v. United States, 293 Fed 1013; CM 317327, Durant, 66 BR 277; 20 Am Jur, p 633). It should be observed, however, that, in the authorities cited, the reason advanced for rejecting evidence of the results of such tests is that it was not shown that they have received general scientific recognition. It is conceivable a different determination would result if a proper foundation is laid for the introduction of the evidence (People v. Becker, 300 Mich 562, 2 NW (2nd) 503; 139 ALR 1174). It follows in this case that the ruling of the law member in restricting the defense in its effort to lay a foundation for the introduction of evidence as to the results of the test may well be regarded as technically erroneous. It appears, however, from what preliminary evidence that was introduced, that the results of the tests concerning which the defense desired to introduce evidence were based on the well-known Polygraph or Keller procedures. Evidence of the results of such tests have not as yet been recognized as admissible by the courts (20 Am Jur, p 633) and there is no reason to believe that a different conclusion could properly have been reached in this case. Therefore, the law member's ruling, albeit premature, may not be considered to have affected the accused's substantial rights.

4. Records of the Army disclose that the accused was born at Walters, Oklahoma, on 23 May 1918. He attended high school at Wichita, Kansas, but was not graduated. He was employed as a drug and grocery store clerk and in oil field work. He enlisted in the Army on 30 October 1939 and was appointed a second lieutenant, Army of the United States, on 4 August 1943. He was promoted to first lieutenant on 7 September 1944 and to captain on 31 December 1945. He had one year and eight months service in Europe. He was relieved from active duty on 28 January 1946 and was recalled in the rank of first lieutenant effective 19 September 1946. His efficiency reports show three adjectival ratings of excellent and one of superior. He is divorced or was recently in the process of being divorced by his wife.

5. 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 of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon a conviction of an offense of a violation of Article of War 93.

A. H. Hottenstein, Judge Advocate

John G. O'Brien, Judge Advocate

John W. Lynch, Judge Advocate

JAGH - CM 327480 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. JAN 5 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Edgar W. Jordan (O-1115936), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of larceny of the camera of another officer, in violation of Article of War 93. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Staff Judge Advocate, Flying Division, Air Training Command, Randolph Field, Texas, dated 20 November 1947, which was adopted, with certain additional comments, in the accompanying opinion of the Board of Review as a statement of the evidence and law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

On 11 September 1947 the owner of the camera discovered that it was missing. A warning was sent to local police authorities and, on 23 September 1947, the camera was discovered in accused's possession when he attempted to sell it or have it appraised at a camera shop. The accused and the owner of the camera lived in the same barracks and accused had been told of the theft of the camera. The accused first explained his possession of the camera by saying that he had obtained it in Europe and that it had not been out of his possession except when he loaned it to another officer who was taking a trip to Mexico. Later, he said he recently obtained it from a technical sergeant whom he knew very well, and still later he said he purchased it at an inn from a Technical Sergeant Ramstead whom he had never seen before or since. The accused reiterated the latter account at his trial. Search was made for a man answering accused's description of Ramstead but he could not be located. A witness for the defense testified that at the inn in question he had observed a noncommissioned officer in possession of a camera while in the company of accused.

4. Records of the Army disclose that the accused was born at Walters, Oklahoma, on 23 May 1918. He attended high school at Wichita, Kansas, but was not graduated. He was employed as a drug and grocery

store clerk and in oil field work. He enlisted in the Army on 30 October 1939 and was appointed a second lieutenant, Army of the United States, on 4 August 1943. He was promoted to first lieutenant on 7 September 1944 and to captain on 31 December 1945. He had one year and eight months service in Europe. He was relieved from active duty on 28 January 1946 and was recalled in the rank of first lieutenant effective 19 September 1946. His efficiency reports show three adjectival ratings of excellent and one of superior. He is divorced or was recently in the process of being divorced by his wife.

5. No mitigating circumstances appear in this case. I, therefore, recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

CM 327480

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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( GCMO 24 (DA) 21 Jan 1948).

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

JAGK - CM 327522

17 FEB 1948

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| UNITED STATES | PORT OF LEGHORN |
| v. | Trial by G.C.M., convened at Leghorn, Italy, 4 November 1947. RIPPEY: Dismissal, total forfeitures and confinement for five (5) years. SIMPSON: Dismissal and total forfeitures. |
| Major MELVIN RAY RIPPEY (0-2042731) and First Lieutenant JOHN C. SIMPSON (0-2017603), both Corps of Military Police | |

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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 officers named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused were tried upon the following charges and specifications:

As to accused Rippey

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

Specification 1: In that Major Melvin R. Rippey, Transportation Section, Headquarters MTOUSA, did, at or near Leghorn, Italy, on or about 23 October 1947, with intent to do him bodily harm, commit an assault upon Sergeant Rayford T. Dunn by striking him in and about the head, face and arms with a dangerous weapon, to wit, a pistol.

Specification 2: In that Major Melvin R. Rippey, ***, at or near Leghorn, Italy, on or about 23 October 1947, did wrongfully assault Sergeant Rayford T. Dunn and Corporal William A. Worthington, two military policemen who were then and there in the execution of their offices by causing a guard to point a pistol at the said Sergeant Rayford T. Dunn and Corporal William A. Worthington.

Specification 3: In that Major Melvin R. Rippey, Transportation Section, Headquarters MTOUSA, with intent to do bodily harm, did, at or near Leghorn, Italy, on or about 23 October 1947, commit an assault upon Corporal William A. Worthington by striking him in the face with a dangerous weapon, to wit, a flash light.

Specification 4: In that Major Melvin R. Rippey, ***, did, with intent to do bodily harm, at or near Leghorn, Italy, on or about 23 October 1947, commit an assault upon Corporal William A. Worthington by striking him in and about the face, head, and arms, with a dangerous weapon, to wit, a pistol.

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

Specification 1: In that Major Melvin R. Rippey, ***, did, at or near Leghorn, Italy, on or about 23 October 1947 wrongfully and knowingly use profane, insulting, and abusive language toward military police enlisted men, members of the United States Army, to wit, Sergeant Rayford T. Dunn and Corporal William A. Worthington, who were then and there in the performance of their offices as military policemen, by stating to them "You are sons of bitches and you know you are sons of bitches" or words to that effect.

Specification 2: In that Major Melvin R. Rippey, ***, did, at or near Leghorn, Italy, on or about 23 October 1947, wrongfully coerce Sergeant Rayford T. Dunn and Corporal William A. Worthington to falsely report to their officer of the day that certain personal injuries received by them had been caused by them falling down stairs and the said Major Rippey did then and there know the same to be false and untrue, and he did then and there threaten the said Sergeant Rayford T. Dunn and Corporal William A. Worthington with bodily harm if said order was not obeyed.

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

Specification 1: In that Major Melvin R. Rippey, ***, and First Lieutenant John C. Simpson, 115th Military Police Company, acting jointly and in pursuance of a common intent, did, at or near Leghorn, Italy, on or about 23 October 1947, wrongfully strike Sergeant Rayford T. Dunn, a military policeman who was then and there in the execution of his office, in and about the face, head, and body, with their fists.

Specifications 2,3, and 4: (Finding of not Guilty).

<u>As to accused Simpson</u>

CHARGE III: (Set forth above).

Specification 1: (Set forth above).

Accused pleaded not guilty to the charges and specifications upon which they were respectively arraigned. Accused Rippey was found guilty of Charges I and II and their specifications and of Charge III and Specification 1 thereunder. He was found not guilty of Specifications 2,3 and 4 of Charge III. Accused Simpson was found guilty of the charge and specification upon which he was arraigned. No evidence of any previous conviction was introduced against either accused. Accused Rippey 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 ten years. Accused Simpson was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. As to accused Rippey, the reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge I as involved a finding of guilty "of assault in violation of Article of War 96" and only so much of the finding of guilty of Specification 4 of Charge I as involved a finding of guilty "of committing an assault with intent to do bodily harm upon Corporal Worthington by striking the said Corporal Worthington in and about the face and head with a dangerous weapon, to-wit, a pistol." The reviewing authority approved the sentence as to each accused, remitted five years of the confinement adjudged in the case of accused Rippey and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

About 3:10 a.m. on 23 October 1947, Sergeant Rayford T. Dunn and Corporal William A. Worthington, both members of Company B, 503rd Military Police Battalion, were observed leaving the Leghorn Central Police Station. This station was operated by the 503rd Military Police Battalion and the two enlisted men were members of a police jeep patrol on duty from midnight to 6:00 a.m. . At this time, both were dressed as military policemen and their appearance "was very good, nothing wrong with them at all." They were wearing military police arm bands and white helmets and each was armed with a .45 caliber pistol. The police jeep had no top (R 11,12,15-17,19, 38).

Shortly after the two military policemen had left the police station and while they were patrolling "Route 1" in the City of Leghorn, they noticed a jeep approaching from the opposite direction travelling at what they considered was an excessive rate of speed. The speed limit on Route 1 was 20 miles per hour in the night time. This jeep was driven by an officer wearing a raincoat with no insignia of rank thereon and in the vehicle were two passengers, a "blond headed girl" in front and a lieutenant in the back. "Recreation vehicles," that is, military vehicles used solely for purposes of recreation, were required to be returned to their respective motor pools prior to 2:00 a.m. Sergeant Dunn, who was driving the police vehicle, decided to "check" the jeep, turned about and gave chase thereto. Travelling at a speed of about 50 miles per hour, the

police vehicle pulled alongside the jeep driven by the officer, which was travelling at a rate of about 40 miles per hour, and Corporal Worthington said, "Lieutenant, pull over." The officer laughed at this request and kept on going. The policemen dropped back for a time, Sergeant Dunn blowing the horn on his jeep in an attempt to get the preceding vehicle to stop. Upon overtaking the officer's vehicle again, Corporal Worthington made the same request as before and achieved the same negative result. Corporal Worthington, at this time, "figured he either stole it or something." Once more falling to the rear of the jeep they were pursuing, Corporal Worthington, acting pursuant to the orders of Sergeant Dunn, fired two rounds into the air and another at a tire of the fleeing vehicle. This latter shot "missed" the tire and went through the "left hand side" of the jeep driven by the officer. The jeep still continued on, followed by the military policemen, until it arrived in the "10th Port area" where it was brought to a halt by its driver, who proved to be accused Major Rippey. Sergeant Dunn requested the Major to accompany him to the police station but the Major refused, saying, "I'm not going nowhere with you son of a bitches, you shot one of my men." The lieutenant sitting in the back of the jeep was accused Lieutenant Simpson and the female occupant of the front seat was an Italian civilian by the name of Santuzza Zucchelli. At this time, accused Simpson complained of having been hit by "one of the stray bullets" and expressed a desire to go to the hospital. Accused Rippey, although he stated that accused Simpson and Miss Zucchelli had been hit, said nothing to the policemen about having been shot himself. When the policemen offered to take accused Simpson to the hospital, accused Rippey refused to allow them to do so. After the policemen had come to a halt, Corporal Worthington cleared his pistol. He had three rounds in the clip and one in the chamber. The round in the chamber fell to the ground when he cleared his pistol (R 9,15,17,18,29,36-39,65,104; Staff Memo. No. 49, Hq. MTOUSA, 18 June 1947).

While conversing with the two policemen, accused Rippey, who was the Port Provost Marshal, called to one of the cable guards under his command, a Private Sousa. When Private Sousa approached the scene, accused Rippey ordered him to put a round in the chamber of his pistol and the two policemen were informed by accused Rippey that if they did not surrender their pistols, which were holstered at the time, to the guard, he would give the guard an order to shoot them. The policemen thereupon gave up their arms to the guard who turned them over to accused Rippey. Accused Rippey placed a clip which Sergeant Dunn had given him when he surrendered his pistol into one of the pistols and threw a round into the chamber. Accused Rippey then ordered the military police to get in the front seat of their vehicle and precede him to his office in the Port Area and gave the guard instructions to get in the back of the police car to "keep them covered and if they moved to fire at them." According to the guard, the appearance of the two policemen was normal at this time. As the policemen were proceeding towards the office of the Port Provost Marshal, followed

by accused Rippey in his jeep, a shot was fired from behind and "whizzed by" the police jeep. The party was observed going through the Port gate by the gate guard, accused Rippey's vehicle following the police car by about 10 feet, and at this time accused Rippey was pointing a .45 caliber pistol towards the police (R 19,20,39,40,66,68,69,75,76,112,113).

Arriving at accused's office, the two policemen were shepherded in by the guard who had disarmed them. Accused Rippey entered the office at the same time and complained that he had been shot in the thumb. There was blood "all over his thumb." The two policemen were lined up against the office wall and, for approximately an hour were required by accused Rippey to stand at attention. Accused Rippey had ordered the guard to keep the policemen covered and during this period he abused the two men verbally and physically. He said to them, "You two sons of a bitches is a bunch of killers, aren't youse" and required them to reply in the affirmative. He called them "dirty rotten sons of bitches" and "no good bastards" and declared that "if he had an automatic carbine he would shoot a pattern around the wall, tell them to take a step forward and fall dead." Accused Rippey twice struck Sergeant Dunn on the jaw with a pistol which he was holding in his hand and struck the sergeant on the arm with the pistol when the sergeant raised his arm to ward off another blow. He then struck Corporal Worthington over the right eye with the pistol, stepped back and threw the pistol at Sergeant Dunn, missing his mark. Again walking over to where Corporal Worthington was standing, he hit the Corporal on the jaw with a flashlight, knocking the Corporal down. The Italian girl came into the office and said,"'Don't, don't,' or something," or "Stop, before somebody gets hurt," but accused Rippey "shoved her across the room and told her to get out of there" (R 21-23, 41-44, 68,69,72,74).

While the two military policemen were in the Port Provost Marshal's Office, accused Simpson was observed going in and out of the room, apparently endeavoring to get through a telephone call to the sergeant of the guard of the Port Area and to the duty officer of the organization to which the two military policemen belonged. According to Corporal Worthington, accused Simpson was in the office about ten or fifteen minutes "at the time" the Corporal and Sergeant Dunn "were being beaten" but the Corporal "didn't pay much attention" to the comings and goings of accused Simpson, for "I was looking at Sergeant Dunn over there in the corner." At one time, when Sergeant Dunn had gone into a clinch with accused Rippey to keep the latter from striking him, Corporal Worthington saw accused Simpson "smack" Sergeant Dunn on the back of the neck with his "fist." The Sergeant then "went down." The room was "kind of dark" but vision was "pretty good" because of "lights from the outside." Sergeant Dunn did not know whether accused Simpson stayed in the room "all the time." He saw him only once and that was when he was "hit" by accused Simpson on the back of the neck; not on his "person" but on his clothing. At this time he was holding accused Rippey and although the "blows" delivered by accused Simpson "didn't hurt" and did not knock the Sergeant off accused Rippey, he released his hold

on accused Rippey "anyway." At this time, the Sergeant was "more or less knelt." These "blows" "weren't hard blows" and felt like a series of "rabbit punches." The Sergeant did not know whether accused Simpson was merely trying to pull him away from accused Rippey. According to Private Sousa, "it looked like" accused Simpson "reached down and grabbed them and tried to pull them apart." About 4:00 a.m. the desk sergeant at the Central Police Station received a telephone call from accused Simpson informing him that the Lieutenant had been shot in the leg by "two MPs of the 503d" and requesting that the duty officer, Lieutenant William J. Gomes, come to the Port Area (R 13,23,29-33,43,45,54,58,59,68,70,71,107).

Sometime after Corporal Worthington had been struck with the flashlight, the corporal of the guard of the Port Area entered the office and, together with Private Sousa, was successful in restraining accused Rippey from making further physical attacks upon the two policemen. Accused Rippey then ordered the policemen to stand at attention and embrace each other, "like you love each other." Later, accused Simpson informed accused Rippey that "the O.D." was coming, whereupon accused Rippey ordered the guard to march the two policemen out to the porch of the office building. Here they were again lined up against the wall and made to stand at attention. He ordered Sergeant Dunn to explain the injuries to the two policemen upon the arrival of "the O.D." by stating that they had fallen down the stairs. Both men agreed to comply with this order through fear that if they did not they would again be beaten (R 21,22,45-47,70,71,86).

About 4:20 or 4:30 a.m., Lieutenant Gomes, accompanied by Corporal Mattingly, arrived in the Port Area. He first talked to accused Simpson, who was standing near a jeep, and then saw accused Rippey "in the area." Accused Rippey insisted that he turn his weapon over to the Port Area sergeant of the guard and the Lieutenant did so because "the impression that I got, when I was requested to turn my weapon over was that the shooting might occur in that area, the Major didn't want it." Corporal Mattingly also surrendered his weapon to the sergeant of the guard. Lieutenant Gomes noticed Sergeant Dunn and Corporal Worthington standing at attention on either side of the doorway of accused Rippey's office, on the porch. They were under guard and the guard was armed. As Sergeant Dunn's hands were bleeding, the Lieutenant asked him the cause. Sergeant Dunn did not reply until "Major Rippey told me that the men had fallen down and he told the sergeant to tell me that they had fallen down, the sergeant agreed." The Sergeant said, "Yes sir." Lieutenant Gomes recovered the guns of the policemen from accused Rippey and three rounds of ammunition. Seven rounds had been issued to each man. One of the guns, the one which had been issued to Corporal Worthington, had been fired and the other had not. According to Corporal Worthington, he turned the clip from his pistol over to Lieutenant Gomes "the 23rd when I came back from the hospital" (R 29,48,77-82).

At about 5:05 a.m. the two policemen returned to the Central Police

Station. Sergeant Dunn had blood on his hand, a cut on one eye, which had turned black, and complained of a fractured jaw. Corporal Worthington had "a large lump" on his right eye and it was blackened. Upon examination at the 61st Station Hospital in the early morning hours of 23 October, it was discovered that Sergeant Dunn had a compound fracture of the right maxilla (just below the right eye), a compound fracture of the right side of the mandible, a compound fracture of the left wrist, and a laceration of the scalp about an inch and one-half long in the posterior parietal region. Accused Rippey was examined at the hospital at the same time as Sergeant Dunn. He had a small, superficial laceration of the thumb which did not appear to be a gunshot wound, although it was impossible to tell definitely whether it was or not. Sergeant Dunn told the doctor treating him that he had been "beat up by that major over there," pointing to accused Rippey. Lieutenant Gomes being also present at the time, accused Rippey called the Lieutenant's attention to what Sergeant Dunn had said but did not deny the accusation "at that time." A blood sample was taken from accused Rippey's body and a blood alcohol test was performed. The result of this test showed an alcoholic content of five-tenths of a milligram per cubic centimeter. This amount of alcohol in the blood is not considered to be intoxicating by the medical profession (R 12,13,60-64,79).

Accused Simpson had a superficial laceration on one knee, a deeper wound than that of accused Rippey. An X-Ray showed that accused Simpson's wound contained no foreign body, although it appeared to be a gunshot wound (R 61,62).

The pre-trial statements of both accused were received in evidence without objection by the defense after a showing of their voluntary nature; accused Rippey's statement as Prosecution Exhibit 9 and accused Simpson's statement as Prosecution Exhibit 8 (R 89,92).

Accused Rippey, in his statement, said that about 3:00 or 3:30 a.m. on the morning of 23 October, as he was driving back to his organization from a party, a jeep pulled up alongside his vehicle. The horn on this jeep had sounded several times while following him. He glanced back, but being somewhat blinded by the glare of the jeep's headlights and being able to observe only that the jeep had no top, he thought the vehicle belonged to a friend of his, one Major Voyer, who customarily drove a topless jeep. He waved to the pursuing vehicle and continued on his way. Thereafter, three shots were fired behind him and he came to a stop. The jeep which had been following him pulled up in front of him and he then realized it was a military police vehicle. The passengers in accused Rippey's vehicle, Miss Zucchelli and accused Simpson, both complained that they had been hit and accused Rippey noticed blood flowing from his right thumb. The policemen got out of their jeep, and, in a "very belligerent" manner asked, "Why in the hell didn't you stop?" Both "still had their guns out." Accused Rippey replied that he did not know they wanted

him to stop and told the policemen that they "shouldn't shoot at people unless they are criminals." He then summoned one of the cable guards stationed nearby and, placing the two policemen under arrest, gave the guard instructions to take them to the office. Arriving at his office, he found that the lights were out due to a power failure so he had the military policemen stand at attention outside the office where there was a street light shining. He instructed the cable guard, "I want you to have these two men stand against this wall here, and they don't move." When Lieutenant Gomes came to the Port Area, accused Rippey told him to check the ammunition in the policemen's guns. The Lieutenant found two shells in one clip and one shell in another clip. Accused Rippey smelled both guns and came to the conclusion that each had been fired recently. He was afraid of the two policemen, for they were apparently "very angry," their clothes were disarranged and they were very belligerent. They looked "as if they had been in a fight with someone." "Their clothes were dirty and filthy, and their belts were over to one side and one of them had blood on his mouth." The cable guard disarmed the two policemen and the only time accused Rippey touched their weapons was when he inspected them to see if they had been fired. Accused Rippey did not strike either of the policemen. He did not hit "anyone" with a pistol, with his hand, or with any other object. He did not tell the policemen how to explain their injuries. Miss Zucchelli did not come into the office at any time. Accused Rippey did not see anyone strike the policemen while they were in the office. Both accused Rippey and accused Simpson had some drinks at the party they had attended that night but both were "certainly far from being drunk." There had been a "little feud" between the 503rd and accused Rippey's unit. Accused Rippey had tried to break up the feud but "would rather the 503rd wouldn't even catch" him with an expired trip ticket. The trip ticket for the jeep he was driving when the incident in question occurred had expired at midnight and he was going to his organization to get it renewed before taking Miss Zucchelli home (Pros Ex 9).

Accused Simpson, in his pre-trial statement, stated that while riding towards the Port Area in the back seat of a jeep driven by accused Rippey at a speed of 27 or 28 miles per hour, the horn was sounded on a jeep following them. This jeep drew up alongside them and then dropped back. Thereafter three shots were fired and accused Simpson was hit in the knee. Miss Zucchelli, who was riding in the front seat with accused Rippey, was also hit in the knee. After the shots were fired, accused Rippey stopped and the jeep behind them, containing two military policemen, also came to a stop. The policemen were "acting a little belligerent and hostile." They were wearing their helmets on the back of their heads "in cowboy fashion" their jackets were rumpled, their harness was not on straight, and "when they got out of the jeep they acted certainly as if they were guilty of doing something wrong, they acted like Italian people, waving and holding the pistols in their hands and waving them around like toys." Since "they were rather recalcitrant to answer the major's questions," accused Rippey called a guard who was stationed in the vicinity and placed the policemen under arrest. The guard got in the police vehicle with the policemen and the two jeeps proceeded towards accused Rippey's office, the police car being in the lead. Accused Simpson "wouldn't be

sure" that any shots were fired on the way to the office. When the party arrived at the office, accused Simpson entered first to make telephone calls to his own organization and the 503rd Military Police Battalion Central Police Station. The office was in darkness and "only a minimum amount of light" was reflected from outside; just enough so that people's outlines could be distinguished. He "lit a cigarette lighter, but it stayed lighted for only a few minutes and then went out." Shortly thereafter, accused Rippey, Miss Zucchelli, the two policemen and the guard entered. Accused Simpson "could tell who was in the office by the voices." He remained in the office about ten or fifteen minutes and during this time "there was some noise that could have been caused by someone bumping into the furniture, stumbling over something." He heard sounds "like someone dropped something." Leaving the office, accused Simpson bumped into someone, "walked into several people, including the door and a wall, and stumbled over a chair and a table, and almost knocked a typewriter on the floor." He tripped once and fell down. The only thing he heard accused Rippey say while in the office was, "What you men have done is a direct reflection on your former commanding officer which shows lack of proper training." After accused Simpson left the office, he went to a nearby dispensary to have his wound attended to. He did not see the "faces" of the military policemen when they came out of the office.

Evidence for the Defense

Lieutenant Colonel Fred A. Dunham, Major Harold Vinick, Major C. J. Addison and Captain Charles Monyak each testified that accused Rippey's reputation for truth and veracity was good and that he was generally an excellent officer. He was not pugnacious nor had he ever by his actions indicated that he had an ungovernable temper (R 95-96; 97-98,99,100-101). Captain Patrick J. St. John and First Lieutenant William J. Gomes each testified that accused Simpson's reputation for truth and veracity was good and that he was an excellent soldier. Accused Simpson had never been seen to "fly off the handle" (R 92-94; 102-103).

The Officers' Clasification Card of accused Rippey was received in evidence as Defense Exhibit B and that of accused Simpson as Defense Exhibit A (R 101). It appeared from these exhibits that the efficiency ratings of both accused were excellent.

Each accused, having been informed of his rights as a witness in his own behalf, elected to remain silent (R 102,103).

Evidence for the Court

The court called as its witness Miss Santuzza Zucchelli. She testified that early in the morning of 23 October, while she was riding in a jeep in the company of both accused, the following events occurred:

"After we had left Leghorn on the Via Fiortina, we heard a vehicle blowing its horn. The Major thought it was a friend of his and he answered with his horn. We proceeded, we in front and the other vehicle in back. The other vehicle couldn't pass us at once because there was a truck on the other side on the left. The vehicle pulled up to us on the bridge going to Tirrenia. The Major said his name and proceeded. When he arrived at the railroad crossing the major stopped and the vehicle pulled up with us. At the same time the major said that he was an officer of the 115, and then he proceeded. After a little while, I don't remember if it was before the first or the second bridge, the police caught up with us and said 'Halt' and shot three times." (R 104-105)

The first time the police vehicle caught up with accused Rippey's jeep "it didn't say anything" but the second time "the police said to stop and the major said his rank and his name."

"When they shot the jeep stopped and the Major stopped. The jeep had its wheels alongside with ours. The Major got off and so did the lieutenant. I got off but I didn't go near them. I heard they were talking and I heard the major call the sentinel of the 115. Then the major said -- I don't know because I don't understand English very well, and I saw the soldiers from behind because I was staying near the jeep. Then I saw two of the policemen get in the vehicle again, then those of the 115 behind those of the police." (R 105)

The witness did not "think" there was any further shooting after the guard got in the vehicle with the two military policemen. No one in accused Rippey's vehicle had "a pistol out at that time."

"They arrived inside the camp in front of the office and everybody got off. I was the last one because I was looking for the bullet in the jeep. First of all I searched for it in the dark, then I remembered there was a flashlight inside the jeep, then I got the flashlight and I found this bullet. I climbed -- I got it, I climbed up the stairs, I met the lieutenant and I gave it to him. At that time somebody took the flashlight from me. I arrived at the door to see the major." (R 105)

Miss Zucchelli did not know who took the flashlight from her, it being so dark she could not see "where her hands were." She took a step inside the office, which was very dark "because coming from the light" and saw accused Rippey "right there next to the door." She said, "Stop enough," meaning that she was tired and wanted him to take her home, but he told her "to go away because this wasn't a place for me." When she first arrived, she saw accused Simpson "in the entrance hall." She saw him

"very much outside" but was not sure "if he came in or went out of the office." She neither heard nor saw "anything unusual" in the office, for when she entered the door it was too dark to see anything and when she went outside she could not hear sounds emanating from the office because of the double doors. She was in the office only about three or four minutes. When accused Rippey spoke to her in the office "it wasn't exactly as if he was mad but as if I was troubling him, was bothering him." She did not notice the appearance of the military policemen either before they entered the office or after they came out (R 104-111).

4. Discussion

As to accused Rippey

Charge I and its Specifications

Under Specification 1 of Charge I, accused Rippey was found guilty of having committed an assault with intent to do bodily harm upon Sergeant Dunn by striking him in and about the head, face and arms with a dangerous weapon, to wit, a pistol. Under the finding of guilty of Specification 4 of Charge I, as approved by the reviewing authority, he was convicted of having committed the same type assault upon Corporal Worthington by striking him in and about the face and head with a pistol and, under Specification 3 of that charge, he was found guilty of having assaulted the Corporal with intent to do him bodily harm by striking him in the face with a dangerous weapon, to wit, a flashlight. These specifications were laid under the 93rd Article of War. No recapitulation of the evidence set forth above concerning the activities of accused Rippey in and about his office in the early morning hours of 23 October would appear to be necessary to demonstrate the correctness of the court's findings, as approved by the reviewing authority, with respect to these specifications and the charge under which they were laid. It has been held that a pistol used as a club is a dangerous weapon (CM 293871, Harris, 30 BR (ETO) 111, 114) and we are of the opinion that a flashlight used as a bludgeon may be likewise described (CM 324519, Davis). That the assaults here under consideration were accompanied by an intent to do bodily harm may fairly be inferred not only from the nature of the weapons used but also from the extent of the injuries inflicted on the two policemen and from the vicious manner in which such assaults were consummated by a battery while the victims were held defenseless at gun point by a guard under accused Rippey's command (CM 236547, Killian, 23 BR 51,53; CM 321915, McCarson). The malignant attitude exhibited by accused Rippey's words and acts with respect to the two policemen both before and after the episode in his office also serves to indicate his intention to do them bodily harm.

Under the finding of guilty of Specification 2 of Charge I, as approved by the reviewing authority, accused Rippey was convicted of having committed the assault therein described in violation of the 96th Article

of War. Although the act of a policeman in shooting at the vehicle or person of a speeding motorist in an effort to apprehend him may be as fraught with danger, in its legal aspects, to the policeman as it is in the prospect of physical harm being done to the fleeing driver or the occupants of his motor car (see People v. Klein, 305 Ill 141, 137 N E 145), we believe that the court and the reviewing authority were warranted in concluding that accused Rippey was not justified in causing the two military policemen to surrender their arms at gun point after the chase had come to an end. In view of the showing by competent evidence that the policemen were not, in their attempt to complete their arrest, so wildly excited or unduly belligerent as both accused, in their pre-trial statements, would have us believe, we see no reason to disturb these findings. Furthermore, although the policemen may have been, under the circumstances, somewhat overzealous in employing the means they did in attempting to apprehend accused Rippey, it certainly cannot be contended that their conduct in any way excused the brutal assaults upon their persons which followed and which were made the subject of Specifications 1, 3 and 4 of Charge I.

Charge II and its Specifications

In Specification 1 of this charge it was alleged that accused Rippey wrongfully and knowingly used profane, insulting and abusive language toward the two military policemen while they were in the performance of their military duties, by stating to them, "'You are sons of bitches and you know you are sons of bitches' or words to that effect." The evidence clearly meets the allegations by a showing that accused used obscene and opprobrious language, to the same effect as the specific language alleged, toward the military policemen while they were in the performance of duty. Moreover, we are of the opinion that the voicing by accused Rippey of such contemptible language under the grossly despicable circumstances here shown to exist constitutes a violation of Article of War 95, as alleged (see CM 252075, McPherson, 33 BR 325 328). Accused Rippey's guilt of Specification 2 of Charge II (wrongfully coercing the two policemen to make a false report to their officer of the day as to the cause of their injuries) was also clearly proved at the trial. Although accused Rippey's coercive command in this respect was apparently directed principally to Sergeant Dunn and Sergeant Dunn actually made the false report to Lieutenant Gomes, the coercion in question took place under such circumstances as to be equally applicable to Corporal Worthington and to effectively prevent the Corporal from uttering a denial of the falsehood. The threat of bodily harm to the two policemen should accused Rippey's order be disobeyed was plainly inherent in the situation in which the order was given. We believe this procuring of a false report by accused Rippey was, in view of the background against which it took place, a violation of Article of War 95 (see CM 301840, Clarke, 24 BR (ETO) 203,211; CM 321309, Tisdall).

As to accused Rippey and Simpson

Charge III and Specification 1 thereof

Under this charge and specification accused Rippey and accused Simpson were jointly found guilty of having wrongfully struck Sergeant Dunn in and about the face, head and body with their fists, the Sergeant being a military policeman in the execution of his office at the time. The only touching of the person of Sergeant Dunn by the "fists" of either accused in which it might be said that both accused jointly participated, appears to have been done by accused Simpson during the incident in the office when Sergeant Dunn went into a clinch with accused Rippey. We must, then, assume that the specification was intended to be addressed to this event and that the court and the accused must have understood it to have been so addressed.

Corporal Worthington testified that he saw accused Simpson "smack" Sergeant Dunn on the back of the neck with his "fist" and that the Sergeant then "went down." The room was "kind of dark" but vision was "pretty good" because of "lights from the outside." Sergeant Dunn, however, testified that the "blows" delivered by accused Simpson failed to knock him off Major Rippey, that they "didn't hurt" and felt like a series of "rabbit punches" and that he did not know whether accused Simpson was merely trying to pull him away from the Major. According to the guard, Private Sousa, it "looked like" accused Simpson "reached down and grabbed them and tried to pull them apart." Accused Simpson, in his pre-trial statement, attempts to explain the incident by stating that he bumped into someone in the darkness of the unlighted office and that he tripped once and fell down. The evidence in the record of trial relating to the length of time accused Simpson was in the office, his activities while there, and the degree of lighting in the room is inconclusive, confusing and contradictory. All that clearly appears with respect to accused Simpson merely tends to show that he was in and out of the office, that he was trying to telephone his own organization and the unit to which the two policemen belonged, that he was, from the first, concerned about medical attention for the wound in his knee, and that at one time while accused Rippey and Sergeant Dunn were grappling with each other, accused Simpson's hand came in contact with the back of the Sergeant's neck. Having in mind the confusion which must have attended the nightmarish scene in accused Rippey's office, we find the evidence insufficient to establish, to a moral certainty, that accused Simpson's act of touching the person of Sergeant Dunn was wrongful, in the sense that it was a battery, rather than a justifiable laying on of the hands in an attempt to separate the struggling men.

It is obvious, from the approved findings of guilty of the charge and specification in question, that the court and reviewing authority found themselves satisfied beyond a reasonable doubt that accused Simpson had committed a wrongful battery upon the person of Sergeant Dunn. Nevertheless, it is axiomatic that in a close case the minds of men, though they be trained in the law, may differ considerably as to the conclusions to be drawn from the proof. In CM 320681, Watcke, we had occasion to say:

"In cases examined by us before confirmation pursuant to the second paragraph of Article of War 50½, as is the case here, it is our right and duty to weigh the evidence as well as to pass upon the formal legal sufficiency of the record of trial. In weighing the evidence, we may arrive at a different conclusion than did the court and the reviewing authority, even though their conclusions are, strictly speaking, legally justified by the evidence appearing in the record. Briefly stated, we are allowed in such cases a difference of opinion. We, too, must be convinced of accused's guilt beyond a reasonable doubt."

As we have already intimated, upon the state of this record of trial we are not so convinced. Being of the opinion that the proof herein is not such as to exclude every fair and reasonable hypothesis except that of accused Simpson's guilt of the charge and specification in question and that all the logical inferences to be drawn from the evidence adduced in respect thereto are as consistent with his innocence as with his guilt, we believe that the findings of guilty as to this accused should be set aside.

Since accused Rippey's guilt of Charge III and Specification 1 thereof must perforce be based upon the theory that he was particeps criminis in the unlawful battery supposedly committed by accused Simpson and since we do not find in the record of trial sufficient evidence to establish the occurrence of such a battery, we are of the opinion that the findings of guilty as to accused Rippey of this charge and specification should also be set aside.

5. Records of the Department of the Army show that accused Rippey is 32 years of age. He attended high school for four years. He is married and has one child. In civilian life he worked as a roustabout in the Texas oil fields. He enlisted in the Army on 8 May 1934 and served as an enlisted man until 13 February 1943, rising to the rank of master sergeant. On the latter date, while serving overseas in the South Pacific Area, he was appointed and commissioned a temporary first lieutenant in the Army of the United States. He was promoted to the temporary grade of captain on 11 September 1943 and to the temporary grade of major on 26 September 1944, while still serving in the Pacific. On 23 August 1945 he entered upon terminal leave to revert to inactive status on 15 November 1945. At this time he was appointed a Major, Corps of Military Police, in the Officers' Reserve Corps. Thereafter, he again entered the service as an enlisted man with the rank of master sergeant. On 13 August 1946 he was recalled to active duty as a temporary major in the Corps of Military Police and by War Department Orders dated 25 September 1946 was assigned to the Mediterranean Theater of Operations. While serving in that Theater in the grade of temporary major, he was, on 7 July 1947, promoted to the grade of lieutenant colonel, Corps of Military Police, in the Officers' Reserve Corps, without change in his active duty grade. The character of his service has been uniformly excellent. He participated in the North Solomons Campaign and the Southern Philippines Campaign.

Records of the Department of the Army reveal that accused Simpson is 23 years of age and is unmarried. He is a high school graduate. He entered the military service as an enlisted man on 3 March 1943 and departed for overseas service on 23 July 1944. He participated in the campaign of Northern France, the Ardennes Campaign and the Rhineland Campaign as a radio operator in a reconnaissance troop. On 5 May 1945, upon graduation from the Ground Force Officer Candidate School in the European Theater, he was commissioned and appointed a temporary second lieutenant in the Army of the United States and was assigned to the Infantry. He was promoted to the grade of temporary first lieutenant on 3 July 1946 and on 26 October of that year was detailed from the Infantry to the Corps of Military Police. On 24 June 1947 he was appointed a first lieutenant, Corps of Military Police, in the Officers' Reserve Corps. The character of his service has been excellent.

6. The court was legally constituted and had jurisdiction over each accused and of the offenses. Except as noted, no errors injuriously affecting the rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally insufficient to support the findings of guilty of Charge III and Specification 1 thereunder as to either accused, legally insufficient to support the sentence as to accused Simpson, legally sufficient to support the findings of guilty as approved by the reviewing authority of Charges I and II and their specifications and legally sufficient to support the sentence as approved by the reviewing authority as to accused Rippey and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of an officer of a violation of Article of War 96.

Robert D. Gilbert, Judge Advocate

Gilbert G. Dobyns, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 327522 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAR 10 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 Major Melvin Ray Rippey (0-2042731) and First Lieutenant John C. Simpson (0-2017603), both Corps of Military Police.

2. Upon trial by general court-martial accused Rippey was found guilty of having committed an assault upon Sergeant Rayford T. Dunn, with intent to do him bodily harm, by striking him in and about the head, face and arms with a dangerous weapon, to wit, a pistol (Specification 1, Charge I), of having wrongfully assaulted Sergeant Dunn and Corporal William A. Worthington, Military policemen then in the execution of their offices, by causing a guard to point a pistol at them (Specification 2, Charge II), of having committed an assault upon Corporal Worthington, with intent to do him bodily harm, by striking him in the face with a dangerous weapon, to wit, a flashlight (Specification 3, Charge I) and of having committed an assault upon Corporal Worthington, with intent to do him bodily harm, by striking him in and about the face, head and arms with a dangerous weapon, to wit, a pistol (Specification 4, Charge I), all in violation of the 93rd Article of War. Under Charge II and its specifications he was found guilty of having violated the 95th Article of War by having wrongfully and knowingly used profane, insulting and abusive language toward Sergeant Dunn and Corporal Worthington, then in the performance of their offices as military policemen, by stating to them, "You are sons of bitches and you know you are sons of bitches" or words to that effect (Specification 1, Charge II) and by having wrongfully coerced Sergeant Dunn and Corporal Worthington, under threat of bodily harm, to falsely report to their Officer of the Day that certain personal injuries received by them had been caused by their falling down stairs (Specification 2, Charge II). Accused Rippey and accused Simpson, tried jointly under Charge III and Specification 1 thereof, were each found guilty of having wrongfully struck Sergeant Dunn, a military policeman then in the execution of his office, in and about the face, head and body with their fists, in violation of Article of War 96. No evidence of any previous conviction was introduced against either accused. Accused Rippey 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. Accused Simpson was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. As to accused Rippey, the reviewing authority approved only so much of the finding of guilty of Specification 2 of Charge I as involved a finding of guilty "of assault in violation of Article of War 96" and only so much of the findings of

guilty of Specification 4 of Charge I as involved a finding of guilty "of committing an assault with intent to do bodily harm upon Corporal Worthington by striking the said Corporal Worthington in and about the face and head with a dangerous weapon, to wit, a pistol." The reviewing authority approved the sentence as to each accused, remitted five years of the confinement adjudged in the case of accused Rippey and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the findings of guilty of Charge III and Specification 1 thereunder as to either accused, legally insufficient to support the sentence as to accused Simpson, legally sufficient to support the findings of guilty, as approved by the reviewing authority, of Charges I and II and their specifications and legally sufficient to support the sentence as approved by the reviewing authority as to accused Rippey and to warrant confirmation thereof.

Sometime shortly after 3:00 a.m. on 23 October 1947, Sergeant Rayford T. Dunn and Corporal William A. Worthington, military policemen, were engaged in conducting a jeep patrol about the streets of Leghorn, Italy. They were wearing military police arm bands and white helmets and each was armed with a .45 caliber pistol. Their vehicle had no top. They noticed a speeding jeep approaching them from the opposite direction and gave chase thereto. As they pulled up alongside this vehicle, which was travelling at a speed of about 40 miles per hour, they remarked that it was driven by an officer wearing a raincoat with no insignia of rank thereon. In the back seat of the vehicle was a lieutenant and in the front seat, sitting beside the driver was a "blond headed girl." The speed limit at this particular place was 20 miles per hour and vehicles used for recreation purposes were not supposed to be on the road after 2:00 p.m. As the police vehicle came alongside the vehicle driven by the officer, Corporal Worthington asked its driver to pull over. The officer laughed at this request and kept on going. Dropping back, the horn on the police car was blown in order to get the preceding vehicle to stop, but to no avail. Overtaking the jeep again, Corporal Worthington made the same request as before and achieved the same results. Sergeant Dunn, who was driving the police car, then ordered Corporal Worthington to fire at the jeep. The Corporal fired two rounds into the air and a third at the tire of the fleeing vehicle. This latter shot missed its mark and went through the "left hand side" of the jeep driven by the officer. The jeep still continued on its way, however, until it arrived in the 10th Port Area, where it came to a stop. Dismounting, the policemen found that the driver of the speeding car was accused Rippey, the Port Provost Marshal, the occupant of the back seat was accused Simpson, and passenger in the front seat was an Italian girl named Santuzza Zucchelli.

Accused Simpson immediately complained of having been hit in the

knee "by one of the stray bullets" and expressed a desire to be taken to ths hospital. When the policemen offered to take him, accused Rippey refused to allow them to do so. Accused Rippey also refused to go to the police station with Sergeant Dunn, as requested, saying, "I'm not going nowhere with you son of a bitches, you shot one of my men." Accused Rippey then ordered a cable guard who was under his command and who was stationed nearby, one Private Sousa, to approach and place the military policemen under arrest. He told Private Sousa to put a round in the chamber of his pistol and informed the policemen that if they did not surrender their pistols, which were holstered at the time, to the guard, he would have the guard shoot them. The policemen thereupon gave up their arms to Private Sousa who turned them over to accused Rippey. The policemen were then instructed by accused Rippey to get in their patrol car and precede him to his office in the Port Area. He posted the guard in the back seat of the police vehicle with orders to "keep them covered and if they moved to fire at them." On the way to the office, followed by accused Rippey and his party, a shot was fired from behind and "whizzed by" the police jeep.

When the group arrived at the office, the two policemen were taken inside and lined up against the wall. Accused Rippey gave the guard instructions to keep them covered with his gun. He complained that he had been shot in the thumb and the thumb of one hand was bleeding. The office was unlighted, but there was a rather faint illumination from lights outside. For approximately an hour, the policemen were required to stand at attention in the office, always under guard, and during this time accused Rippey abused the two men verbally and physically. He said to them, "You two sons of a bitches is a bunch of killers, aren't youse" and required them to answer in the affirmative. He called them "dirty rotten sons of bitches" and "no good bastards" and declared that "if he had an automatic carbine he would shoot a pattern around the wall, tell them to take a step forward and fall dead." Accused Rippey twice struck Sergeant Dunn on the jaw with a pistol which he was holding in his hand and struck the Sergeant on the arm with the pistol when the Sergeant raised his arm to ward off another blow. He then struck Corporal Worthington over the right eye with the pistol, stepped back and threw the pistol at Sergeant Dunn but missed. Again walking over to where Corporal Worthington was standing, he hit the Corporal on the jaw with a flashlight, knocking the Corporal down.

While these events were taking place, accused Simpson was seen going in and out of the office, apparently trying to telephone his own organization, the unit to which the two policemen belonged and the sergeant of the guard of the Port Area. On one occasion when Sergeant Dunn had gone into a clinch with accused Rippey to prevent the latter from striking him, accused Simpson was seen to approach the struggling men. Accord-

ing to the testimony of Corporal Worthington, accused Simpson "smacked" Sergeant Dunn on the back of the neck with his "fist." The Sergeant then "went down." According to Sergeant Dunn, accused Simpson's "blows" were not "hard blows," felt like a series of "rabbit punches," "didn't hurt" and did not knock him off accused Rippey. They were delivered on the back of his neck; not on his "person" but on his clothing. The Sergeant did not know whether accused Simpson was merely trying to pull him away from accused Rippey. Private Sousa testified that "it looked like" accused Simpson "reached down and grabbed them and tried to pull them apart." In his pre-trial statement, accused Simpson stated that at one time while he was in the unlighted office he bumped into someone. He also tripped once and fell down.

After accused Rippey was informed by accused Simpson that "the O.D." from the policemen's unit was coming, he ordered the guard to march the two policemen to the porch of the office building. Here they were again lined up against the wall and made to stand at attention. He ordered Sergeant Dunn to explain his injuries and those of Corporal Worthington upon the arrival of the Officer of the Day by stating that they had fallen down the stairs. Both men agreed to comply with his order through fear that if they did not they would again be beaten. When, about 4:30 a.m., Lieutenant Gomes, the Officer of the Day of the unit to which the policemen belonged, arrived on the scene, accused Rippey insisted that he turn his weapon over to the Port Area Sergeant of the Guard and the Lieutenant did so because of the impression he had received that "shooting might occur in that area, the Major didn't want it." He saw Sergeant Dunn and Corporal Worthington standing at attention on the porch of accused Rippey's office. They were under guard and the guard was armed. As Sergeant Dunn's hands were bleeding, the Lieutenant asked him the cause of his injuries. Sergeant Dunn did not reply until "Major Rippey told me that the men had fallen down and he told the sergeant to tell me that they had fallen down, the sergeant agreed." The sergeant said, "Yes sir."

As a result of the beatings administered by accused Rippey, Sergeant Dunn received a compound fracture of the right maxilla, a compound fracture of the right side of the mandible, a compound fracture of the left wrist and a laceration of the scalp about an inch and one half long. Corporal Worthington had a "large bump" on his right eye and it was blackened. A blood alcohol test was performed upon accused Rippey shortly after this episode and it was discovered that the alcoholic content was five-tenths of a milligram per cubic centimeter, an amount not considered intoxicating by the medical profession. Accused Rippey had a small, superficial laceration of the thumb which did not appear to be a gunshot wound, although it was impossible to tell definitely whether it was or not. Accused Simpson had a superficial laceration on one knee, a deeper wound than that of accused Rippey. This wound appeared to be a gunshot wound.

Neither accused testified at the trial. Accused Rippey, in his pretrial statement, asserted that he had not assaulted or in any way abused

either of the military policemen but that he had merely placed them under arrest because of his fear of the belligerent attitude which they exhibited after he had brought his vehicle to a stop. At this time, they looked "as if they had been in a fight with someone," their clothes were disarranged, both "still had their guns out" and they appeared to be "very angry." There had been a "little feud" between accused Rippey's organization and the unit to which the policemen belonged, which accused Rippey had tried to break up. Accused Simpson, in his pre-trial statement, also asserted that the policemen were "acting a little belligerent and hostile" when the two vehicles came to a stop. Their uniforms were improperly arranged and "when they got out of the jeep they acted certainly as if they were guilty of doing something wrong, they acted like Italian people, waving and holding the pistols in their hands and waving them around like toys."

4. On 22 January 1948, Colonel Remington Orsinger, who had been the reviewing authority in this case, appeared before the Board of Review and stated that upon further consideration he thought the term of confinement adjudged as to accused Rippey should be reduced to three years. Colonel Orsinger no longer occupied the position of reviewing authority with respect to this case at the time he appeared before the Board of Review.

5. Accused Rippey is 32 years of age. He attended high school for four years. He is married and has one child. In civilian life he worked as a roustabout in the Texas oil fields. He enlisted in the Army on 8 May 1934 and served as an enlisted man until 13 February 1943, rising to the rank of master sergeant. On the latter date, while serving overseas in the South Pacific Area, he was appointed and commissioned a temporary first lieutenant in the Army of the United States. He was promoted to the temporary grade of captain on 11 September 1943 and to the temporary grade of major on 26 September 1944, while still serving in the Pacific. On 23 August 1945 he entered upon terminal leave to revert to inactive status on 15 November 1945. At this time he was appointed a Major, Corps of Military Police, in the Officers' Reserve Corps. Thereafter, he again entered the service as an enlisted man with the rank of master sergeant. On 13 August 1946 he was recalled to active duty as a temporary major in the Corps of Military Police and by War Department Orders dated 25 September 1946 was assigned to the Mediterranean Theater of Operations. While serving in that Theater in the grade of temporary major, he was, on 7 July 1947, promoted to the grade of lieutenant colonel, Corps of Military Police, in the Officers' Reserve Corps, without change in his active duty grade. The character of his service has been uniformly excellent. He participated in the North Solomons Campaign and the Southern Philippines Campaign.

Accused Simpson is 23 years of age and is unmarried. He is a high school graduate. He entered the military service as an enlisted man on 3 March 1943 and departed for overseas service on 23 July 1944. He participated in the campaign of Northern France, the Ardennes Campaign and the

Rhineland Campaign as a radio operator in a reconnaissance troop. On 5 May 1945, upon graduation from the Ground Force Officer Candidate School in the European Theater, he was commissioned and appointed a temporary second lieutenant in the Army of the United States and was assigned to the Infantry. He was promoted to the grade of temporary first lieutenant on 3 July 1946 and on 26 October of that year was detailed from the Infantry to the Corps of Military Police. On 24 June 1947 he was appointed a first lieutenant, Corps of Military Police, in the Officers' Reserve Corps. The character of his service was excellent.

6. The Board of Review, upon its examination of the record of trial, came to the conclusion that the allegations contained in Specification 1 of Charge III must be held to have been addressed to the act of accused Simpson in touching or striking Sergeant Dunn while the Sergeant was engaged in a struggle with accused Rippey in the latter's office. After weighing the evidence adduced with respect to this charge and specification, consistently with its duties under the second paragraph of Article of War 50½, the Board also concluded that the proof was not such as to exclude every fair and reasonable hypothesis except that of accused Simpson's guilt of having committed a wrongful battery, as alleged, as distinguished from a justifiable laying on of the hands in an attempt to separate the struggling men. I agree with both these conclusions. Since, as pointed out by the Board of Review, accused Rippey's guilt of this charge and specification must necessarily be based upon his being particeps criminis with accused Simpson in the commission by the latter of a wrongful battery and since the proof is not, in my opinion, sufficient to establish the wrongfulness of the battery in question, I accordingly recommend that the findings of guilty of Charge III and Specification 1 thereunder as to each accused, and the sentence as to accused Simpson, be disapproved. In view of accused Rippey's long and excellent military record prior to the commission of these offenses and the recommendations of Colonel Orsinger, I also recommend that the sentence as to accused Rippey, as approved by the reviewing authority, be confirmed but the period of confinement be reduced to three years and that the sentence as thus modified be carried into execution. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement.

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

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( GCMO 73, March 24, 1948 ).

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

5 JAN 1948

JACH - CM 327661

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| UNITED STATES<br><br>v.<br><br>First Lieutenant LEONARD H. TALMAN (0-2026802), Headquarters American Graves Registration Command, European Area | AMERICAN GRAVES REGISTRATION COMMAND EUROPEAN AREA<br><br>Trial by G.C.M., convened at Hq, American Graves Registration Command, EA, Paris, France, 17 and 21 November 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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Leonard H. Talman, Headquarters, American Graves Registration Command, European Area, Army of the United States, did, in conjunction with Private First Class Richard K. Ewing, 327th Refrigeration Truck Company, American Graves Registration Command, European Area, Army of the United States, at Paris, France, on or about 9 June 1947, feloniously take, steal and carry away four bottles of whiskey and one bottle of champagne, of some value less than twenty dollars ($20.00), property of the Societe des Hotels de l'Etoile, a societe anonyme.

He pleaded not guilty to the Charge and the Specifications thereunder. He was found not guilty of Specification 1, but guilty of Specification 2 and the Charge. 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, but recommended that the execution of the dismissal be suspended, 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 American Graves Registration Command (European Area) Judge Advocate, dated 28 November 1947.

4. Records of the Army show that accused is 33 years of age, married, and a high school graduate. In civilian life he was employed in sales work and store management. He had enlisted service from 27 May 1943 until 26 September 1945, when he was commissioned a second lieutenant, Army of the United States. On 3 March 1947, he was promoted to the rank of first lieutenant. He served in the European Theater of Operations from May 1944 to May 1946, and again from 25 July 1946 until the present time. Since 26 September 1945 he has received three "Superior" efficiency reports and one "Excellent."

5. All members of the court present recommended that, in view of accused's past excellent record, the execution of the dismissal be suspended.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal and total forfeitures is authorized upon conviction of a violation of the 93rd Article of War.

A. Hottenstein, Judge Advocate

John G. O'Brien, Judge Advocate

J. W. Lynch, Judge Advocate

JAGH CM 327661 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. 14 JAN 1949

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 Leonard H. Talman (O-2026802), Headquarters American Graves Registration Command, European Area.

2. Upon trial by general court-martial this officer was found guilty of larceny, in conjunction with an enlisted man, of whiskey and champagne of value less than twenty dollars, property of the "Societe des Hotels de l'Etoile," in violation of Article of War 93 (Spec 2 of the Chg). 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, but by separate communication recommended that the execution of the dismissal be suspended. He 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 American Graves Registration Command (European Area) Judge Advocate, dated 28 November 1947, 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 the night of 9-10 June 1947, accused was duty officer at the Hotel Astoria, Paris, France, Headquarters American Graves Registration Command. Private First Class Ewing was the guard on duty at the Hotel Astoria during accused's tour as duty officer. The second basement to the hotel was not occupied by the Command and was used as a liquor cellar by the Societe des Hotels de l'Etoile. The door to this basement was equipped with a special lock, the key to which was kept in the possession of the manager of the Societe.

During inspection of the rooms and offices in Headquarters, on the night in question, accused and Ewing while in the third basement to the hotel discovered a vent in the ceiling. Ewing entered the second basement through this vent and informed accused that there was liquor in the room. Accused told him to "hand it down," whereupon Ewing passed down to him several bottles of liquor and a bottle of champagne. Accused kept some of the liquor which he later appropriated to his own use and permitted Ewing to keep the rest. On 10 June 1947 a quantity of whiskey and some champagne was found missing from the wine cellar located in the second basement of the Hotel Astoria.

In a pre-trial statement made about 19 September 1947 and again at the trial, accused admitted that he was involved in the taking of the liquor but thought it was some that had been abandoned by an American organization. He stated that he made no report of the discovery of the liquor or the vent opening into the second basement because of stupidity on his part, although he reported that various doors were open in the hotel and that typewriters were without covers.

4. Records of the Army show that accused is 33 years of age, married, and a high school graduate. In civilian life he was employed in sales work and store management. He had enlisted service from 27 May 1943 until 26 September 1945, when he was commissioned a second lieutenant, Army of the United States. On 3 March 1947, he was promoted to the rank of first lieutenant. He served in the European Theater of Operations from May 1944 to May 1946, and again from 25 July 1946 until the present time. Since 26 September 1945 he has received three "Superior" efficiency reports and one "Excellent."

5. All members of the court present recommended that, in view of accused's past excellent record, the execution of the dismissal be suspended. Private Ewing was tried by general court-martial and convicted of complicity in the offense charged against accused and also of breaking and entering on 28 June 1947, and the theft on that date of another quantity of liquor. Ewing was sentenced to be confined at hard labor for five months and to forfeit fifty dollars ($50) pay per month for five months. The sentence was approved but the confinement was suspended.

6. In view of the recommendations of the reviewing authority and the members of the court, together with all the circumstances of the case, I recommend that the sentence be confirmed but commuted to dismissal, a reprimand and forfeiture of $100 pay per month for three months, and that the sentence as thus commuted be carried into execution but that execution of the dismissal be suspended during good behavior.

7. Inclosed is a form of action designed to carry into effect the foregoing 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

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( GCMO 17, Jan 20, 1948).

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

JAGK - CM 327731

17 MAR 1948

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| UNITED STATES | EIGHTH ARMY |
| v. | Trial by G.C.M., convened at APO 343, October 8, 9, 10, 1947. Sentence as to accused Shells: Acquitted. As to accused Adams: Dishonorable discharge (suspended), total forfeitures and confinement for five (5) years. Disciplinary Barracks. |
| Private First Class EUGENE ADAMS (RA 32711129) and Technician Fifth Grade ALFRED LEE SHELLS (RA 39445212), both of Headquarters and Headquarters Battery, 933d Antiaircraft Artillery Automatic Weapons Battalion. | |

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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 soldiers named above having been examined in the Office of The Judge Advocate General and there found legally insufficient, in part, to support the findings of guilty and the sentence as to accused Adams has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused were jointly tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Alfred Lee Shells and Private First Class Eugene H. Adams, both of Headquarters and Headquarters Battery, 933d Antiaircraft Artillery Automatic Weapons Battalion, APO 503, acting jointly and in pursuance of a common intent, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 30 June 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Hideo Yamagami, a human being, by striking him on the body with their hands and feet.

Each accused pleaded not guilty to the charge and its specification. Accused Shells was found not guilty of the charge and its specification. Accused Adams was found guilty of the specification "except the words, 'Technician Fifth Grade Alfred Lee Shells,' 'acting jointly and in pursuance of a common intent,' and 'with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Hideo Yamagami, a human being, by striking him on the body with their

hands and feet,' substituting therefor the words, 'willfully, feloniously and unlawfully kill one Hideo Yamagami, a human being, by striking him on the body,'" and not guilty of the charge but guilty of a violation of the 93rd Article of War. No evidence of any previous conviction was introduced as to accused Adams. Accused Adams 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 five years. The reviewing authority approved the sentence as to accused Adams and ordered it 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 the Army might direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 223, Headquarters Eighth Army, APO 343, 17 November 1947.

3. Evidence

About 10:00 p.m. on 30 June 1947, accused and their two female companions, Kiyoko Seki and Umeko Kimura, were walking along the street near the Tsurumi station, Yokohama, Japan, having a short while before attended a party at which both accused had become intoxicated. A Japanese man, carrying an umbrella and a package, passed them and as he did so he remarked, "Iyarashi," or "Chu," the first word meaning "hate to look at" and the other "disagreeable." Accused Adams asked Miss Kimura what the Japanese had said and she replied "No good." Adams then turned toward the Japanese and asked him what he had said, whereupon the Japanese fled. Both accused gave chase and the Japanese man ran into a nearby meat market. Accused Adams followed him into the market. Miss Seki approached the market and waved to accused Shells, telling him to "hurry up." As she did so she heard accused Adams, who was in the store, ask a Japanese, "Why did you say 'disagreeable'" and heard the Japanese answer, "I am sorry." She then returned to where Miss Kimura was standing near the station. In two or three minutes the "two accused" and about four Japanese came out of the store. Accused Shells assumed "a boxer's stance" and a fight seemed to be in the making. Neither Miss Seki nor Miss Kimura saw what happened thereafter, for the lighting in the vicinity was poor and they were "terrified." The two accused finally joined their girl companions, accused Adams pulling accused Shells by the arm, and the quartet continued on their way towards the home of one of the girls. The two soldiers did not seem to be in a hurry. Shells was "well drunk," could not walk by himself and had to be supported by Adams (R 8,10,12-14,16-19,21-25,67,96-99).

Mr. Tomatsu Yoshida was an employee of a meat market located near the Tsurumi station. On the evening of 30 June 1947, there was a gathering of the employees of the market for the purpose of celebrating the installation of a refrigerator. Hideo Yamagami, a refrigerator mechanic, was present at this party, accompanied by his father. Some sake had been served and all those present at the celebration were quite drunk. Hideo's father

had "passed out" as had the two owners of the shop. About 10:00 p.m. a man with a parasol and a package ran into the store followed by a colored soldier. The soldier clenched his fist, assumed a "pugilistic stance", and said something in English which Mr. Yoshida could not understand. Mr. Yoshida saw another soldier outside and heard a woman's voice requesting the soldier who was inside the store to come out. Being afraid that there might be some trouble, Mr. Yoshida let out through a back door the man who had been chased into his store. While he was doing this, he heard a Japanese say, "I am sorry," but heard no "angry voices" or any "sounds of a souffle." After he had let the man out, he walked back through his shop and looked out the door through which the soldier had come. Outside, he saw Hideo Yamagami lying on the ground about five feet from the wall of the building. Hideo was lying on his back, "in the mud." He was "swooning" and "we could not understand what he was saying" (R 45-55, 91-93).

Miss Tomiko Mori was one of the persons present in the meat market on the evening of 30 June. Around "10:30 p.m." a Japanese "came rushing" into the store followed by a negro soldier. Miss Mori heard the Japanese yelling, "It is a misunderstanding." Another negro soldier was standing outside the entrance to the store. After an "understanding" had been apparently reached, the "two negroes" went outside the store and Miss Mori went upstairs. She was told by someone not to look out the window but she did so and saw a negro soldier strike the Japanese refrigerator mechanic on the right cheek, whereupon the Japanese fell over on his back with his head towards the building. Miss Mori "could not state" whether the blow was "hard or not violent" and she could not recall whether any other blows were struck. Her view was partially obstructed by an awning so that after the Japanese fell as a result of the blow she could only see his body from the waist down. Thereafter, the soldier kicked the mechanic "two or three times" on the leg. Miss Mori did not see any other soldier at the time she looked out the window. There were four or five people standing about "dumfounded and looking on" at the time the mechanic was beaten and after the mechanic fell he "appeared to be groaning" (R 25-31, 70-80).

Mr. Yoshida, after he saw Hideo Yamagami lying injured on the ground outside the meat market, summoned the military police (R 49). When they arrived, they found Hideo on his back in the mud "in the entrance of a little alley, right next to the curb." They took him to the Namamugi Hospital and on the way "he was breathing awfully heavy. He didn't say a word" (R 63-66). At the hospital, it was found that Hideo was suffering from a "hemorrhage of the brain." "From the outside," there was a small abrasion "about the size of a nickel" behind the head, an abrasion on the shoulder blade and another on the right elbow. His pulse was very weak and he had no reflexes. Blood was flowing from his right ear. He died at 5:12 a.m., 1 July 1947. There were no signs of his having been "violently beaten" and there was "no sharp instrument involved." Death had been caused by the brain injury, a concussion and tearing of the

capillary base resulting in internal bleeding. This injury could have been caused by a blow from a shoe or boot "if the shoe was not hard or there were no spikes or metal on the shoe." It could also have been caused "by a fall from a man's normal height." Hideo had "liquor in his stomach" and had probably been intoxicated. Either a drunk or sober person could sustain a brain injury like Hideo's from falling (R 32-39, 41-45).

Accused Adams, testifying under oath in his own behalf at the trial, stated that on the evening of 30 June 1947, while walking along the street by the Tsurumi station with accused Shells and their two girl companions, a passing Japanese made a remark to Miss Kimura. Accused Adams asked her what the Japanese had said and she replied that the remark was, "no good." Accused Adams then asked the Japanese what he had said but the Japanese turned and ran towards a butcher shop. Both accused chased him with the intention of bringing him back and making him apologize to Miss Kimura. Accused Adams entered the shop and the following occurred:

> "Well, as I entered the shop, I saw several Japanese in the shop and I saw this Japanese man that made the statement. He was standing behind a meat block. The meat block was in the center of the shop. He was standing behind the meat block, and I asked him, why did he make that remark; and he stood there and he looked at me, and he had his face all frowned up and everything, and I asked him, I said--I asked him again, 'What did you say?' and he wouldn't answer me.
>
> "So then a Japanese man walked over, one of the men that were in the shop walked over to me and he told me, asked me what was wrong, and I explained it to him to the best of my knowledge, speaking Japanese. So I asked him, 'Do you understand?' He said, 'Yes.' I told him I was sorry for entering his shop, you know. So he asked me would I leave, so I said, 'Yes.' I said, 'I will leave but I want you to understand that I had no intentions of disturbing this shop or anything like that.' So he said, 'Yes, I understand,' and he told me in Japanese, 'Gomen-nasai.' He said, 'Gomen-nasai.' So I told him, 'No, I have nothing against you.' He said, no, he was apologizing for this Japanese man that I chased into the shop." (R 102)

At this time, accused Shells was standing just outside the market surrounded by three Japanese men. One of the Japanese seemed to be "coming at Shells with his arms raised up like this, as if he was going to grab him." Accused Adams rushed out of the shop and pushed accused Shells out of the way. The Japanese then advanced towards accused Adams. Adams hit the Japanese who fell to his knees. Another Japanese approached accused Adams "from the opposite side" and, when Adams threw up his hand as though to ward off a blow, this Japanese turned and ran up an alley. Accused Adams chased him a short distance but soon turned back. As he turned, he saw a third

Japanese man "trying to come into Shells." Shells was drunk, "he was staggering and he had his hands up like this, holding his hands out." On his way back to help accused Shells, Adams was confronted by the Japanese he had struck before, who in the meantime had gotten up from the ground. This man "threw a punch" at accused Adams, whereupon Adams hit him again, causing him to fall back against the wall of the market. Accused Adams then "grabbed" accused Shells by the arm, and the two soldiers walked back to where the girls were waiting for them. Accused Adams "didn't intend to kill anyone," "didn't use any unnecessary force" and did not kick the Japanese. After the Japanese man had been hit the second time and had fallen against the wall, he "grabbed" at accused Adams' leg. Accused Adams "yanked" his leg away from the Japanese man's grip and walked away. Accused Shells was in no condition to defend himself. Accused Adams was also "intoxicated" (R 100-106).

Accused Shells, in his testimony under oath at the trial, stated that:

> "First we met a Japanese and he said something that was bad, the girl said it was bad. We started to ask him what did he say, and he broke and ran towards the butcher shop and we chased him. We went to the butcher shop and Adams was talking to him and he asked him, why did he speak 'No good.'
>
> "After that, I turned and started out. I heard the girl call me. I turned and started out, and when I started out, Adams came up behind he and pushed me, and when I turned around I saw him hit a Japanese and there was some scuffling. I don't know exactly what happened after that." (R 112)

The two soldiers had followed the Japanese to the butcher shop to inquire why he had said, "No good," and to get him to apologize "if he would" (R 112).

4. Discussion

Accused Adams, having been charged with the crime of murder, was found guilty of the lesser included offense of voluntary manslaughter. The question here presented for our consideration is whether there is evidence of record affording a reasonable basis for an inference that accused Adams committed the offense of which he was found guilty rather than the even lesser included offense of involuntary manslaughter. We state the problem in this manner, for we believe the court was warranted in coming to the conclusion that Hideo Yamagami was the person accused Adams admitted having struck, that this assault was the efficient cause of Hideo's demise and that accused Adams' claim of self-defense or defense of others should be rejected, there being an adequate showing that Adams and Shells were the aggressors and had provoked the difficulty in which Hideo met his death. (26 Am. Jur. p. 267; CM 255162, Lucerno, 36 BR 47,52; CM 254535, Saunders, 2 BR (NATO-MTO) 255,263.) We are of the opinion, however,

that the proof herein does not exclude a fair and rational hypothesis that Hideo's fatal wound was caused by a fall upon the ground or against the wall of the meat market, which fall was, in turn, caused by a blow or blows of the fist delivered by accused Adams in such a manner and under such circumstances as would have given rise to no greater offense than simple assault and battery had death not occurred. We will take this hypothesis to be the established fact in view of the legal insufficiency of the proof to point with moral certainty towards a more vicious cause of death.

In paragraph 149a of the Manual for Courts-Martial, 1928, it is stated:

> "Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.
>
> "Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.
>
> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law."

Voluntary manslaughter has also been described as the intentional killing of another without malice, as, for example, in hot blood under the passion occasioned by adequate provocation or in mutual combat of sudden origin or by the use of excessive force in self-defense (Commonwealth v. Webster, 5 Cush (Mass) 295).

These definitions have often been misinterpreted and misapplied because of the mistaken notion that every killing in hot blood, in mutual combat or by use of excessive force in self-defense may be described as voluntary manslaughter without reference to the particular act which in fact was the efficient cause of death. This notion loses sight of the fact that voluntary manslaughter is intentional homicide whereas involuntary manslaughter is unintentional homicide. True it is that one is presumed to have intended the natural and probable consequences of his act, but if an accused has taken the life of another by an act of his which would not ordinarily be likely to result in death it certainly would be most unjust to allow his conviction of voluntary manslaughter to stand merely because such act occurred in a setting of aroused passions. Judges must separate the wheat from the chaff and, in a case falling within the class of the example last put, must exorcise from their minds the all too human tendency to consider matters brought out in the recountal of the res gestae of a homicide which are logically immaterial to a legal determination of the grade of criminality of the killing. Voluntary manslaughter has all the earmarks of murder except that the element of malice aforethought which would ordinarily be inferred from accused's conduct is held to be lacking because of the presence of circumstances "which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offense" (Commonwealth v. Webster, supra). To state the proposition

another way, voluntary manslaughter is homicide which would be murder were the venom of the killer not excusable (CM 244183, Grant, 2 BR (NATO-MTO) 45, 52): On the other hand, however, involuntary manslaughter could never be described as murder merely because of the absence of mitigating circumstances, for the very act of accused which set the stage for Death's appearance was one which would not ordinarily have had fatal consequences were it not for other contributing factors which were set in motion by accused's criminal negligence or other unlawfulness. Where an accused is held responsible, by way of a conviction for involuntary manslaughter, for the lethal result of the forces thus loosened, such responsibility is based not upon the theory that these forces naturally and probably flowed from his wrongful act but rather upon the basis that their existence and the chance of their operation were merely foreseeable in the light of human experience. Thus it cannot be said, even by construction of law, that he intended to kill (Commonwealth v. Pierce, 138 Mass 165, 178; 33 Harv Law Rev 633, 643; CM 287101, Davis, 10 BR (ETO) 79).

Tested by the foregoing principles, was the offense committed by accused Adams in the instant case involuntary manslaughter or voluntary manslaughter? Since death is not the natural or probable result of a simple assault and battery with the fists, no intent to kill will be presumed therefrom although death is in fact caused thereby (People v. Crenshaw, 298 Ill 412, 131 N E 576, 15 A L R 671; 24 A L R 666; see generally on this question, Rush v. Commonwealth, 296 Ky 724, 178 S W (2d) 408; Roark v. Commonwealth, 182 Va 244, 28 S E (2d) 693; State v. Wilson, 172 Or 373, 142 P (2d) 680; Commonwealth v. Gricus, 317 Mass 403, 58 N E (2d) 241; Commonwealth v. Kluska, 333 Pa 65, 3 A (2d) 391; State v. Frazier, 339 Mo. 966, 98 S W (2d) 707). It follows then, that since under the circumstances here disclosed it may not be presumed that accused Adams intended to kill Hideo Yamagami by reason of having assaulted the Japanese with his fist, the homicide resulting from such assault can be of no higher grade of criminality than involuntary manslaughter (CM Davis, supra).

5. 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 finding of guilty of the specification of the charge as to accused Adams as involves a finding that accused Adams did, at the time and place alleged, unlawfully kill one Hideo Yamagami, a human being, by striking him on the body, legally sufficient to support the finding of guilty with respect to the charge as to accused Adams and legally sufficient to support only so much of the sentence as to accused Adams as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years.

Lehuston D. Silvus, Judge Advocate

Gilbert E. Schmidt, Judge Advocate

Harley A. Lamming, Judge Advocate

JAGK - CM 327731 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAR 25 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 Private Eugene H. Adams (RA 32711129), Headquarters and Headquarters Battery, 933d Antiaircraft Artillery Automatic Weapons Battalion.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of the Specification of the Charge be approved as involves a finding that accused Adams did, at the time and place alleged, unlawfully kill one Hideo Yamagami, a human being, by striking him on the body, that so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years be vacated, and that all rights, privileges and property of which Private Adams 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 this recommendation should such action meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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( GCMO 80, March 26, 1948).

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



19 January 1948

JAGH CM 327732

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| UNITED STATES | ) | FIFTH ARMY |
| v. | ) | Trial by G.C.M., convened at Fort Leavenworth, Kansas, 28, 29,30 July 1947. Jackson: Acquitted. Osborn, Snow and Upshaw: Dishonorable discharge and confinement for life. Disciplinary Barracks. |
| General Prisoners ARCHIE E. JACKSON, FLOYD J. OSBORN, HERMAN L. SNOW and EDDIE O. UPSHAW. | ) | |

REVIEW by 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 soldiers named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that General Prisoner Archie E. Jackson, General Prisoner Floyd J. Osborn, General Prisoner Eddie O. Upshaw, and General Prisoner Herman L. Snow, acting jointly and in pursuance of a common intent, did, at United States Disciplinary Barracks, Fort Leavenworth, Kansas, on or about 2 May 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one General Prisoner Dewey Osborne, a human being by striking his head against the wall and or floor; by striking him with their fists, and with some type of club, the exact nature of which is unknown.

Each accused pleaded not guilty to the Charge and Specification. Each accused was found guilty of the Charge and of the Specification, except the words "General Prisoner Archie E. Jackson;" and of the excepted words not guilty. Evidence of one previous conviction was considered as to accused Snow. Each accused, except Jackson, 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 Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement as to each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the Fifth Army Judge Advocate, dated 4 December 1947, but herein supplements so much of the discussion contained in paragraph 3a thereof as relates to the petition for clemency signed by some members of the court.

4. This petition, attached to the record, is in the form of a letter prepared by the defense counsel, dated 5 August 1947, and is addressed to the convening authority, Commanding General, Fifth Army, Chicago 15, Illinois, "Subject: Recommendation for Clemency in the case of General Prisoners Floyd J. Osborn, Herman L. Snow and Eddie O. Upshaw." The letter sets forth the following reasons upon which clemency was therein recommended:

> "1a. A general riot was impending, if not actually in progress, at the time of the incident on which charges were based in this case. Several other assaults and similar incidents between colored and white inmates had occurred during at least twenty-four hours prior to this crime.
>
> "b. The evidence presented by the prosecution was purely circumstantial with the exception of one eye witness who was proven by the defense to be a drug addict and who himself was under suspicion as a participant when investigation of this matter was first started.
>
> "c. Conviction was based on evidence in the nature of testimony by witnesses who themselves were inmates of the Disciplinary Barracks and the testimony appeared to be highly prejudicial and there seemed to exist a condition of witnesses blaming each other in order to save themselves from punishment for being parties to this incident and riot.
>
> "d. Testimony throughout the trial was of such a conflicting nature that it was difficult for the court to judge proper credibility.
>
> "e. There is a strong possibility that others may have been equally as guilty as the accused."

The amount of clemency recommended is then stated as follows:

> "2. As to the amount of clemency to be shown the three accused in this case, it is recommended that the sentence of confinement at hard labor for the period of their natural lives be amended to read 'for a period of twenty years'."

Nine of the eleven members of the court joined in the recommendation for clemency by subscribing this letter. Four of these signed the letter without taking exception to any of the reasons for clemency stated therein. The other five members, however, noted their exceptions to all or some of the subparagraphs contained in paragraph 1.

Considering the deleterious nature of the reasons stated in the petition for clemency, we feel constrained to determine whether its adoption, without qualification, by more than one third of the members of the court is so inconsistent with the findings of guilt as to impeach the findings and sentence.

The pertinent query under this anomalous situation is, whether at the time of making its findings, the court was satisfied, beyond a reasonable doubt, that the accused were guilty of the offense of which they were convicted pursuant to the fundamental concept of criminal jurisprudence and as contemplated in the Manual for Courts-Martial, paragraph 78a.

5. The Manual for Courts-Martial provides, that after a court-martial has sentenced an accused, "the defense may submit in writing for attachment to the record any matters as to clemency which it desires to have considered by the members of the court or the reviewing authority. The rules of evidence are not applicable to such matters." (Para 81, MCM, 1928) It further provides,

> "One or more recommendations to clemency, each signed by the members joining therein, may be submitted to the trial judge advocate for forwarding with the record. Such recommendation may include a recommendation for suspension of all or part of the sentence, including a sentence of dishonorable discharge. It should be specific as to amount and character of clemency recommended and as to the reasons for the recommendation." (Para 81, MCM, 1928)

An illuminating discussion of recommendations for clemency is contained in Winthrop's Military Law and Precedents, Sections 677-678, pp 443-444, and the footnotes thereto. Among his comments with respect to recommendations for clemency, Winthrop sets out the generally accepted rule as follows:

> "This statement is not a proceeding of the court, and no part of the record of the trial. It is therefore not properly incorporated with or added to the sentence, but, in practice, is usually appended to the record as a separate paper."

In the state and Federal courts it is generally held that, in the absence of a statute, the court will not receive the affidavits or testimony of jurors for the purpose of impeaching their verdict with respect to any matter essentially inherent in their verdict (Hendrix v. U.S., 219 U.S. 99; Mattox v. U.S., 146 U.S. 140; 23 Corpus Juris Secundum, pages 1310-1314).

In view of the Staff Judge Advocate's treatment of this subject it is reasonable to assume that the reviewing authority construed the letter

in question as being just what it purported to be, a plea for clemency, and obviously took the view that the language therein was not to be construed as evidence in derogation of the findings and sentence. We have reached the same conclusion, for unless it is shown by competent legal evidence and under authority of law in such cases provided, that the subsequent extra-judicial statements of the individual members of the court are manifestly repugnant or inconsistent with matters inherent in the court's findings and sentence, they are not to be received, ipso facto, as evidence impeaching the validity of the judicial proceeding.

In scrutinizing the petition for clemency, here under consideration, it is the opinion of the Board of Review that none of the reasons therein stated affords any reasonable or substantial basis to support a conclusion that the facts as recited are repugnant to the findings, nor are these reasons sufficient to show that the minds of at least two-thirds of the members of the court failed to consider the evidence sufficient to support conviction beyond a reasonable doubt.

6. The court was legally constituted and had jurisdiction of the persons and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused. A sentence to death or imprisonment for life is mandatory upon conviction of violation of Article of War 92.

A. Hottenstein, Judge Advocate

J. W. Lynch, Judge Advocate

Joseph L. Brank, Judge Advocate

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

9 APR 1948

JAGH CM 327733

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| UNITED STATES | ) | EIGHTH ARMY |
| v. | ) | Trial by G.C.M., convened at APO 343, 11 September 1947. Dishonorable discharge (suspended), and confinement for two (2) years. United States Disciplinary Barracks, Fort Leavenworth, Kansas. |
| Private First Class EDWARD R. KREMZIER (RA 12246211), 3053rd Ordnance Service Company, APO 503. | ) | |

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, LYNCH and BRACK, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Edward R. Kremzier, 3053 Ordnance Service Company, did, at Yokohama, on or about 8 June 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Technician Fourth Grade Raymond D. Doolittle, 3053 Ordnance Service Company.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two years. No previous conviction was considered. The reviewing authority approved the sentence and ordered it executed, suspended the execution of the dishonorable discharge until the soldier was released from confinement and designated the United States 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. 228, Headquarters Eighth Army, APO 343, 30 October 1947.

3. Private First Class Lenus L. E. Smith testified that on 8 June 1947 at about 1730 hours he and a Private First Class Henry L. Sapp were on military police motor patrol duty in Yokohama, Japan. In the course of their tour of duty the witness and his partner were directed to check a Japanese shrine which was located in an "off limits" area. Upon arriving at the shrine, witness observed two soldiers performing an act of sodomy per os within the shrine while a third soldier, who was identified as the accused, was standing about ten feet away watching this performance. One Technician Fourth Grade Edward Terwilliger was identified as the soldier who was observed with his pants "half ways down," the recipient of the act, and one Technician Fourth Grade Raymond D. Doolittle was identified as the soldier who was observed performing the act of sodomy per os. Witness and his partner "immediately" placed T/4 Doolittle, T/4 Terwilliger and the accused under arrest and ordered them to enter the military police jeep. All three asked for "a break" implying that they wanted the military police to let them go. Witness stated that when the three soldiers asked for "a break," which was refused, T/4 Terwilliger told him, in accused's presence, that the accused was "blowed first." Witness further testified "* * * so I went over and asked Kremzier, /accused/ checked if he was 'blowed' first; and he stated that he was." "He /accused/ said he was 'blowed' first and then watching at the corner." Accused was standing approximately ten feet away when Terwilliger made the statement with reference to the accused, but witness could not state an opinion whether accused could have heard it. When asked, "Did the accused sound an alarm when he recognized you and Sapp coming up?", witness replied, "I cannot recall any sound, sir." (R 7-11).

Mr. (formerly Private First Class) Henry L. Sapp identified the accused and testified substantially as follows: on 8 June 1947, he was on patrol duty with Private Smith when they checked a shrine off Route 11 in an "off limits" area. When they entered the shrine the accused was standing in the corner of the shrine, about 12 to 15 feet away from the other two. Witness walked past accused and saw Terwilliger sitting on the edge of the shrine with his pants down and Doolittle was standing. Terwilliger was getting a "blow job." Witness did not say anything when he passed accused. "* * * Pfc Kremzier /accused/ hollered--I don't remember what. He hollered at the soldier that was standing up /Doolittle/ and I would say he /accused/ called them by name--the one was sitting on the edge of the shrine with his pants down. He /Doolittle/ looked around, seen it was an MP. Then he /Doolittle/ pushed the T/4 back /Terwilliger/ and the T/4 he raised up sort of, raised his head up, turned around and sat on the cut-off about eight inches wide. He /Doolittle/ turned around and sat on the edge of the shrine there. Then the soldier with his pants down sat on the shrine and put his pants up and asked for a break." At the time witness and his partner Smith walked up to Doolittle and

Terwilliger and asked them what they were doing, Terwilliger stated that "he [Doolittle] was giving us a blow job." (Underscoring supplied) The accused did not have much to say except that "he wanted a break" (R 12-14).

Mr. Hiroshi Kunimina of the 20th Criminal Investigation Department, Yokohama, identified a pre-trial statement, voluntarily made by the accused in compliance with Article of War 24, which was admitted in evidence, over objection by the defense, as Prosecution's Exhibit 1 (R 15-16). The defense laid its objection under paragraph 114, Manual for Courts-Martial, on the theory that the introduction of the pre-trial statement was premature in that the record contained no evidence, either direct or circumstantial, of the corpus delicti. Prosecution's Exhibit 1 recites:

> "I met him outside of the beerhall. We were drinking beer for about an hour. We were talking to each other and Doolittle started to bragg how he would blow us for 50 yen if we used a rubber and 150 if we didn't.. He also said that it would be an additional 25 yen if the other guy watched. I only had 50 yen so Terwilliger asked him if American money would be all right. He took 50 yen and 50¢ for my blow job. He didn't finish it and gave me my yen back. Then he started on Terwilliger. When the MP's came I was standing in a corner and Terwilliger was being blowed by Doolittle.
>
> /s/ Edward R. Kremzier"

At the beginning of the case the Trial Judge Advocate made the following remarks in his opening statement:

> "Prosecution will present witnesses who will testify that the accused admitted to them that he had committed sodomy with Sergeant Doolittle as alleged in the specification concerning both the accused and Doolittle. This testimony will be evidence of the corpus delicti after which a signed confession of Kremzier will be introduced which implicates others." (R 6)

4. The accused was warned of his rights and elected to make an unsworn statement concerning the events which occurred at the Police Station after his arrest and at the time Prosecution's Exhibit 1 was secured from him (R 20).

5. Accused was charged and convicted of feloniously committing an act of sodomy, by having carnal connection per os, with one Technician Fourth Grade Raymond D. Doolittle. His extra-judicial statement (Pros Ex 1) which is tantamount to a confession, was executed by him on the

date of the alleged offense and shows that he admittedly committed the alleged offense for a stipulated consideration pursuant to a prior agreement.

Paragraph 114a, Manual for Courts-Martial, 1928, prescribes the following rule of evidence limiting the use of an accused's confession, oral or written, made out of court:

> "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. Usually such evidence is introduced before evidence of the confession; but a court may, in its discretion, admit the confession in evidence upon condition that it will be stricken out and disregarded in the event that the above requirement as to evidence of the corpus delicti is not met later. This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense."

The principal question presented is whether the record of trial contains evidence, either direct or circumstantial, other than the accused's confession, that the offense charged (an act of sodomy per os between accused and Doolittle) has probably been committed, thus authorizing consideration of accused's confession to support the findings of guilty under the foregoing rule.

The undisputed evidence shows that at the time and place alleged, two military policemen discovered Doolittle and Terwilliger committing an act of sodomy per os inside of a Japanese shrine which was located in an "off limits" area. Accused was in the room with the perpetrators of the criminal act watching them. It appears that when the military policemen entered the shrine, accused "hollered" at Doolittle and Terwilliger and "called them by name." It also appears that as a result of accused's warning, Doolittle looked around and seeing that it was the military police, he pushed Terwilliger away thus terminating his act of sodomy upon him. The evidence also shows that while only Doolittle and Terwilliger were "caught in the act" of committing sodomy and while accused, apparently, was only standing by watching the act, nevertheless, the accused as well as Doolittle and Terwilliger begged the military police for "a break," indicating that they wanted the military police to let them go. Under these circumstances, accused's

acts and declarations reasonably support the inference that he was acting in consort or collusion with Doolittle and Terwilliger and that his presence in the shrine with them, in such a remote "off limits" area, was not that of a mere bystander but rather as that of a participant, accomplice or co-conspirator. Although the evidence to this extent does not, of itself, establish the corpus delicti of the specific offense charged, such a showing becomes materially relevant thereto when it appears that the acts and declarations of a conspirator or accomplice, made during the commission of a crime, reveal the nature and scope of the common design and incriminate the accused (Par 114c, MCM, 1928). There being a showing made that accused was connected with the commission of an unlawful act of sodomy with Doolittle and Terwilliger, it remains to be determined whether the acts and declarations of Terwilliger, observed at the time the crime was interrupted by the military policemen, were admissible against the accused to show in what manner accused was involved in the unlawful combination. Since the declarations in question appear in the record of trial as the statements of a person, not the accused, who is not present at the trial, their admissibility and competency is entirely dependent upon, and must be found in, one of the recognized exceptions to the hearsay rule. In this regard, all the circumstances attendant to and surrounding the declarations and acts of a third person must be closely scrutinized to determine their relevancy and admissibility.

According to the testimony of military policeman Sapp, it appears that when he interrupted the act of sodomy being committed between Doolittle and Terwilliger he asked them what they were doing "up there" [Japanese shrine], and Terwilliger replied, "he [Doolittle] was giving us a blow job." Obviously, Terwilliger's statement, if admissible, bears particular significance, upon the corpus delicti insofar as his use of the plural pronoun "us," as used in his statement, could only have reference to accused and himself, and further, it carries the implication that accused, as well as himself, was at the shrine to be "blowed" by Doolittle, thus explaining accused's presence at the shrine and the scope of their common design.

According to the testimony of military policeman Smith, it was shown that when Smith placed Doolittle and Terwilliger under arrest and proceeded to get their names immediately after he entered the shrine, Terwilliger stated that "Pfc Kremzier [accused] was 'blowed first'." Smith thereupon walked over to where accused was standing to get accused's name and asked if he was "blowed" first to which question accused replied that he was. Witness referred to accused's admission, as follows: "He [accused] said he was 'blowed' first and then watching at the corner."

As a general rule, testimony of a witness with reference to acts and declarations of a participant to a crime are admissible in evidence

under one of the following recognized exceptions to the hearsay rule. The criterion for admissibility of such testimony in courts-martial cases, under one of these, is established in paragraph 114c, Manual for Courts-Martial, which provides:

> "In cases where several persons join with a common design in committing an offense, all acts and statements of each made in furtherance of the common design are admissible against all of them. It is immaterial whether such acts or statements were done or made in the presence or hearing of the other parties. The acts and statements of a conspirator, however, done or made after the common design is accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape."

Therefore, if the declarations of Terwilliger can be said to have been made in the furtherance of a common design which was formulated between himself, Doolittle and accused and if they were made before the common design was accomplished or terminated, then clearly, testimony with reference to the declarations would be admissible against the accused and such testimony would unquestionably constitute substantial evidence of the corpus delicti. However, under the circumstances surrounding Terwilliger's declarations, the admissibility of testimony relevant thereto, is not necessarily limited by the criterion established in the foregoing exception to the hearsay rule if it is shown that the declarations made were substantially contemporaneous with and so closely connected with the accomplishment of the unlawful common design as to be considered a part of the offense or offenses involved therein. Declarations made under such circumstances are admissible in evidence as exceptions to the hearsay rule as a part of the res gestae (CM 285325, Parrott, et al, 16 BR (ETO) 166,167). Concerning this exception, paragraph 115b, Manual for Courts-Martial, 1928, provides:

> "Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected with the main fact as to throw light upon its character, are termed res gestae. Evidence of anything constituting a part of the res gestae is always admissible."

A careful analysis of the events, acts and declarations encountered by the military policemen Sapp and Smith when they discovered accused, Doolittle and Terwilliger engaged in an act of sodomy, leads the Board to the conclusion that Terwilliger's declarations were made so spontaneously and contemporaneously with the commission and accomplishment of the common design in which all three men were participants that they

were clearly admissible as a part of the res gestae, i.e., on the issue of accused's connection in the offense or offenses being committed at the shrine. Res gestae are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes a part of the transaction, because it is then the transaction that speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is res gestae as part of the transaction itself. (Smith v. United States (C.C.A. 9th) 47 F.(2d) 518; Busch v. United States (C.C.A. 8th) 52 F.(2d) 79). The fact that a statement was made in response to questions will not alone exclude such statements from the operation of the res gestae rule. Statements, though in answer to a question, are nevertheless spontaneous and instinctive where the surrounding facts and circumstances negative the thought that they might have been made with design or premeditation. (Lucchesi v. Reynolds, 125 Wash. 352, 216 P. 12; Wharton's Criminal Evidence, 7th Ed., Sec 492 at pages 741 and 746). If a statement is actually involved in, andpart of, the res gestae, it is admissible even though it incriminates or tends to incriminate the accused (Green v. United States (C.C.A. 8th) 289 F. 236). This is true even though the acts or declarations are made after the termination of the conspiracy or unlawful design (White v. People, 79 Colo. 261, 245 P. 349; Fletcher v. Comm., 239 Ky 506, 39 S.W. (2d) 972; State v. Robey, 106 W.Va. 427, 145 S.E. 743). Thus, where a statement made to a witness immediately after a shooting, and while leaving the scene of the crime, by one jointly charged with homicide with his father, to the effect that they had killed the deceased, it was held to be admissible as part of the res gestae of the crime. (Henderson v. State, 89 Tex Crim Rep 21, 229 S.W. 535). See also (Hagood v. Com, 157 Va. 918, 162 S.E. 10, 601; Cox v. State, 109 Tex Crim Rep 437, 5 S.W. (2d) 147). Such evidence is admissible because it is deemed to be part of the transaction immediately surrounding the crime and upon the theory that the event is speaking through the instinctive words and acts of the participant, rather than the participant speaking of the event. The distinction to be drawn under the res gestae rule being that the acts or statements which are sought to be introduced may actually occur after the purpose of the conspiracy is achieved, and need not be in furtherance of the common design (Alexander v. Com. 216 Ky 376, 287 S.W. 933). It is also the rule that evidence of another and distinct offense is admissible if that offense was committed as part of the same transaction and formed part of the res gestae, or where it is so clearly connected with the one for which the accused is being tried as to be inseparable from it (Jordan v. Com, 240 Ky 391, 42 S.W. (2d) 509; Wharton's Criminal Evidence, sec. 720, page 1211). This rule is a rule determining the relevancy, and not the character or probative force of the evidence, and if the

statement in question was made under the spur of the criminal transaction, it is immaterial whether it was an opinion, a statement of fact, or a mere exclamation. The distinctive feature of res gestae evidence from all of the other foregoing fields of evidence is to be found in the fact that the act, conduct or declaration, or object which is sought to be admitted as res gestae is not offered for the truth or inherent probative force of the evidence, but rather from the fact that it occurs, or is to be found, within the criminal transaction itself, and tends to explain and elucidate the surrounding circumstances of the crime charged (Wharton's Criminal Evidence, Sec. 494, at pages 752,755).

In Green et al. v. United States, 289 F. 236, the record shows that the lower court admitted evidence of the conversation between the government officers and the defendants in regard to the alleged attempt of bribery, on the ground that it constituted a part of the res gestae, and that the attitude of the defendants at the time, upon being informed that they were government officers, would therefore be a deduction as bearing upon intent and good faith. The court held: "The evidence of the arrest of the accused, the attending circumstances, the persons in his company, the acts and conduct of the accused, his declarations, etc., are all proper as part of the res gestae, when, as here, the statements in question were made while the minds of the defendants were still acting under the excitement and influence of the immediate circumstances of the arrest." (See also, 16 Corpus Juris, 553).

As the rule is commonly stated and understood, the corpus delicti need not be proved independently of the confession beyond a reasonable doubt or by a preponderance of the evidence. The simple requirement being that to authorize consideration of accused's confession of a crime with which he is charged there must be adduced some evidence, outside the confession, tending to establish that that offense was <u>probably</u> committed.

In the opinion of the Board of Review the admissible evidence supporting accused's confessions is affirmatively established by Terwilliger's declarations "he [Doolittle] was giving <u>us</u> [meaning Terwilliger and accused] a blow job" and by his declaration "Pfc Kremzier [accused] was blowed first." Additional supporting evidence is found in the fact that accused and Doolittle were present together under such incriminating circumstances from which it could reasonably be inferred that they were present and consorting together at the locus delicti for the purpose of committing the alleged crime (CM 236937, <u>Kent</u>, 23 BR 179). The evidence thus adduced is legally sufficient to sustain accused's confession and to support the findings of guilty of the Charge and its Specification.

For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

_____, Judge Advocate

_____(Concurred)_____, Judge Advocate

_____, Judge Advocate

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

9 APR 1948

JAGH CM 327733

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| U N I T E D S T A T E S | ) | EIGHTH ARMY |
| v. | ) | Trial by G.C.M., convened at APO 343, 11 September 1947. Dishonorable discharge (suspended), and confinement for two (2) years. United States Disciplinary Barracks, Fort Leavenworth, Kansas. |
| Private First Class EDWARD R. KREMZIER (RA 12246211), 3053rd Ordnance Service Company, APO 503. | ) | |

CONCURRING OPINION BY
LYNCH, Judge Advocate

1. I concur in the statement of facts set forth in the majority opinion, but disagree as to the law applied to those facts, and concur in the result.

2. The evidence shows that a party of military police surprised Terwilliger and Doolittle during the commission of an act of sodomy in a room of a Japanese shrine. When the military police arrived accused was present and shouted something to Doolittle and Terwilliger. The three were placed under arrest and taken to the military police jeep at which time all three asked for "a break." When this was refused Terwilliger declared that accused was "blowed" first. There was other evidence that when Terwilliger and Doolittle were first confronted by the military police Terwilliger declared that Doolittle was "giving us a 'blow job'." The majority opinion holds that the Terwilliger statements establish the corpus delicti of an offense of sodomy committed by accused at a time prior to the appearance of the military police.

3. Admitting that there was established a conspiracy for the purpose of committing unnatural acts between accused, Terwilliger and Doolittle, and admitting that the narrative statements of Terwilliger were made in connection with the res gestae of the conspiracy, the statements related to a past event.

The res gestae rule as set forth in Par 115b, Manual for Courts-Martial, 1928, is as follows:

"Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected

> with the main fact as to throw light upon its character, are termed res gestae. Evidence of anything constituting a part of the res gestae is always admissible."

The main fact under consideration in this case, in the majority view of the case, is accused's commission of an act of sodomy with Doolittle. It is not shown that Terwilliger's statement was substantially contemporaneous with that alleged act, but was contemporaneous with the overall common design. The Terwilliger statements are not, therefore, admissible within the rule enunciated in the Manual.

An examination of the cases cited in the majority opinion, to my mind, lends no support for the proposition that a narrative statement of a past event made substantially contemporaneously with a conspiracy will establish the corpus delicti of a prior substantive offense committed during the course of the conspiracy. I find, therefore, that other than his confession there is no evidence that accused committed an act of sodomy with Doolittle.

4. The record is, however, legally sufficient to support the findings of guilty and the sentence. The competent evidence of record shows that accused, as to the act of sodomy committed by Terwilliger and Doolittle, was an aider and abettor, and as such was properly charged and found guilty as a principal in the commission of an act of sodomy with Doolittle (CM 260781, Menschner, 50 BR 237,244).

Jas Lynch, Judge Advocate

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



JAGK.- CM 327842

23 MAR 1948

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| UNITED STATES | ) | THIRTEENTH AIR FORCE |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Clark Field AAB, APO 74, Philippine Islands, 2,3,4, 6,7,11 and 12, June 1947. Dismissal, total forfeitures and confinement for three (3) years. Reformatory. |
| | ) | |
| Captain DONALD G. COLEMAN (O-577170), Air Corps | ) | |

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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. Accused was tried upon the following charges and specifications:

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

Specification: In that Captain Donald G. Coleman, 24th Bombardment Squadron, 6th Bombardment Group (VH), did, at Clark Field Army Air Base, APO 74, on or about 25 November 1946 knowingly and willfully misappropriate one truck, 2½ ton, 6x6 cargo, Army serial number 414270, of the value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Captain Donald G. Coleman, ***, did, at San Fernando, Pampanga, Philippine Islands on or about 4 December 1946 wrongfully and without proper authority certify to the Registration Clerk, Office of the District Engineer, Province of Pampanga, Philippine Islands as follows: I certify Jeep, motor No. GPW-254386 was assembled by parts taken from Mabalacat Ordnance Dump, that the motor number is not on the wanted vehicle list and furthermore that I have personal knowledge of its being assembled by Juanito Mariano, resident of Sapang Bato, Angeles, P.I., with the intent to defraud the United States.

He pleaded not guilty to and was found guilty of all specifications and charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances

due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for a period of three years. The reviewing authority approved the sentence and designated the "United States Federal Reformatory" at El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action "pursuant to Article of War 50½."

3. Evidence for the Prosecution

Concerning Charge I and its Specification

Blas Gonzales testified that he was the owner of a furniture shop on the base at Clark Field and that he became acquainted with the accused and a Captain Bray sometime before November 1946. Aurelio Guzman was a mechanic who made repairs on Gonzales' personal truck (R 115,116). Gonzales had introduced Guzman to the accused and had told accused that Guzman was a good mechanic.

Mr. Aurelio Guzman, Gonzales' mechanic, testified that he first met accused about December 1946 when accused took him to the "PW" camp, showed him a truck and asked him to repair it, but he said he was "afraid to repair that truck." Accused told him, "Don't be afraid, it's not making trouble." Accused towed the truck in question, which Guzman steered, to Modesto's Garage (Angeles Motor Works) where Guzman was employed. There the accused again told Guzman to put the truck in running condition and that he would pay for the repairs and parts. Guzman identified the truck referred to above, which was admitted in evidence as Prosecution Exhibit 11 and viewed by the court. The court granted the prosecution's request to withdraw the truck at the conclusion of the trial and to substitute photograph's thereof. The third day after the truck had been brought to the garage the accused instructed Guzman that if anyone inquired about the truck to tell them that it was his (Guzman's). At this same time the accused requested Guzman to paint the truck. He said he was "Afraid" to, but when accused told him not to be afraid he painted it. Before he painted the truck, it was "The Army Color" and there was a star on top of the hood, a "U.S. Army mark" on the side and rear, and a "PW" on the bumper. Guzman painted the truck blue. The accused expressed his approval and paid him ₱10.00 for the paint used. The truck needed a new muffler and the accused told Guzman that he would get it (R 174,175,182-190).

Upon cross-examination Guzman stated that he went to Manila where he purchased a motor for the truck. Gonzales accompanied him but did not know he intended to buy the motor nor did Gonzales furnish any of the purchase price. Guzman had obtained the money from his mother-in-law. The sales slip for the motor was received in evidence as "Defense Exhibit A," which showed a sale of a motor to Guzman for ₱100. This motor was installed in the truck but the truck was still not in running condition as many more

parts were needed. The witness denied having received any instructions from Gonzales with reference to the truck (R 190-205).

The accused and Captain Bray told Gonzales that they had a truck in Modesto's Garage (Angeles Motor Works). Captain Bray asked Gonzales, in the presence of accused, to have this vehicle registered in Gonzales' name but, inasmuch as Captain Bray had "no papers," Gonzales said he could not do this. He saw the truck referred to in the garage at Angeles in December 1946 (R 217-224). Gonzales further testified that his bookkeeper, Veneracion, delivered a letter to him from the accused which he destroyed. Veneracion corroborated Gonzales' testimony in this respect and stated further that accused waited for Gonzales several hours before leaving the letter. The torn pieces of this letter, assembled in intelligible form, were received into evidence as Prosecution Exhibit 13 (R 234,235). It was read to the court by Gonzales as follows:

> "Blas: In Connection with the truck, the man who went with me the day we took the truck to Angeles had already told the investigators that we got it from the Motor Pool at the P.W. Camp. Therefore it will be wise for you to tell them that you got the truck in Manila and towed it here to repair it and that you towed it to the PW Camp to have me help with the repair. After my mechanic looked it over, I advised you that you should get a new engine for it, and that I would be unable to work on it in my Motor Pool. You can also tell them that I pulled your truck into Modesto's garage. Tell them that the papers for it are in Manila and the next time you go there be sure to get papers. It would also be wise to take the truck to Manila, at least for two or three weeks.
>
> "Asang knows what to say about the other things. Don't worry about it. The important thing is to keep your story straight. You can reach me during duty hours at Clark 437. After reading this note destroy it.
>
> S/ Capt. Coleman" (R 235).

A genuine sample of the accused's signature was received in evidence for purposes of comparison as Prosecution Exhibit 10 without objection by the defense (R 156).

The accused was examined orally prior to trial by the investigating officer, Lieutenant Henry C. Mass. Lieutenant Colonel Fisher and Major Berry were also present. Each of the officers examined "Prosecution Exhibit J" for identification only and testified it was a true and complete record of the questions asked and the answers given by the accused (R 157,245). "Prosecution Exhibit J" was not offered in evidence. Major Berry, over the objection of the defense, was permitted to testify concerning the pretrial examination by using the said "Prosecution Exhibit J" as

Juanito Mariano, residing at Sapanbato, Angeles, Pampanga, was employed by Blas Gonzales as a driver and chair maker (R 41). He testified that he first met the accused at Gonzales' furniture shop and later at the shop of Modesto Bernadino (Angeles Motor Works) before "December" (R 42, 43). The accused brought a jeep to Modesto Bernadino's shop and requested Mariano to register it in his name. Mariano agreed because the accused told him there would be "no trouble" (R 43-45). Accused suggested they go to an attorney and that Mariano make an affidavit that the jeep had been assembled from parts taken from the camp. Accordingly when they arrived at the attorney's office, Mariano told the attorney that the jeep was to be put in his name and that it was assembled. He swore to the affidavit before the attorney and Captain Coleman paid the fee. Mariano identified the affidavit (Pros Ex 7) and his signature thereto (R 45-47). After they had left the attorney's office they went to the "100th MP's" where the accused got "a paper about that size (indicating 5x8)" (R 47-49). The following day Captain Coleman took Mariano to San Fernando in a light green colored jeep with "US Army" markings just below the windshield, but he did not notice any numbers. At the Capitol Building in San Fernando Captain Coleman gave the affidavit and three other papers to "the man who issues licenses." While they were there "Captain Coleman made a letter, a note" which he gave to the clerk who then went outside to inspect the numbers on the jeep. Mariano signed an application for a license for the jeep (Pros Ex 1) and the jeep was registered in his name (R 47-53). Captain Coleman took possession of the papers after the jeep was registered (R 89).

Mariano testified further that he considered the jeep as a gift to him from Captain Coleman because it was licensed in his (Mariano's) name. Although he did not have papers for the jeep he offered to sell it to Gonzales for ₱1400, who promised to pay him ₱1300 but never did. He signed the certificate of registration (Pros Ex 9), once when the jeep was registered and again at the request of Gonzales (R 52-56). Mariano stated that he did not assemble the jeep in question (R 71).

Mr. Conrado Del Rosario testified that he was an attorney and lived at Angeles, Pampanga, where he kept an office in his house. The accused, Captain Bray, and Juanito Mariano, came to his office on 3 December 1946, at which time Mariano told him that he had assembled a jeep from parts obtained from dumps and shops and that he wanted an affidavit prepared to that effect. The affidavit was prepared and executed by Mariano before him as notary. He did not charge any fee and even sustained the cost of the stamps. He gave the original affidavit to Mariano and a copy to Captain Coleman. Captain Coleman did not give him any of the information or data that was put into the affidavit. They had a casual conversation on general matters (R 108-114).

Mr. Elicio Miranda testified that he was the registration clerk

in the Office of the District Engineer, San Fernando, Pampanga, P.I. Juanito Mariano and the accused came to his office on 4 December 1946. Mariano presented to him his affidavit and a clearnce certificate from the "100th MP's" for the purpose of registering a jeep. These papers were not sufficient and he said it would be necessary to have a statement from a third party concerning the jeep before he could register it. Captain Coleman prepared such a statement in his own handwriting in the following form:

"Certificate

4 December 1946

I hereby certify that jeep, Motor No. GPW - 254386, was assembled by parts taken from the Mabalacat Ordnance dump, that the Motor No. is not on the wanted vehicle list, and furthermore that I have personal knowledge of it being assembled by Juanito Mariano, resident of Sapangbato, Angeles, Pampanga, P.I.

Donald G. Coleman
Capt. AC
Provost Marshal Section
Clark Field AAB U.S. Army" (Pros Ex 6)

The application for registration (Pros Ex 1) was signed by Mariano and the inspection slip (Pros Ex 3) was prepared by Miranda after he had obtained motor and chassis numbers from the jeep. The originals of all papers used for registration of the jeep (Pros Exs 1-7) were identified by both the custodian of the records (R 9,10) and the witness. Miranda examined a jeep, admitted in evidence as Prosecution Exhibit 8 (R 15) and testified it was the same vehicle he had registered in the name of Juanito Mariano who paid the registration fee of ₱10.75 (R 11-18).

Blas Gonzales testified that Juanito Mariano worked for him as a driver and made minor repairs on the truck which he drove. However, Aurelio Guzman, from whom he had purchased the truck, made all the major repairs (R 115-116). When he first saw the jeep in question it was being driven by Captain Bray in the area of his shop and it was painted green. Later, however, it was blue. Captain Bray, in the company of the accused, offered to sell it to him for ₱1400.00 on or about 16 or 17 January 1947. They said the jeep had been assembled at the "POW camp" and that it had been registered in the name of his driver, Juanito Mariano. Gonzales finally agreed to pay them ₱1300 for it. Two or three days later Gonzales paid ₱1000.00 to Captain Bray outside the shop and in return he received the registration certificate for the jeep which he had Mariano sign the next day. Although he promised to pay the balance of ₱300 on the following Wednesday, he did not have the money that day, so he paid Captain Coleman on Friday because in the meantime Captain Bray had gone

home. At that time he told Captain Coleman he was sorry to be late, but Captain Coleman said, "Blas, never mind, I gave Capt. Bray his share already" (R 117-123). He could not produce any receipts for payment of the money (R 124).

Gonzales testified on cross-examination that in his pre-trial statement to Major Sam L. Huey, the Investigating Officer, he had stated that he purchased a jeep from Mariano. By way of explanation of this statement, he testified, "I bought it from him because the registration says his name, but I know the jeep is owned by Capt. Coleman and Capt. Bray, but the registration is in the name of Juanito" (R 137). He knew Mariano did not own a jeep because it was understood that "Captain Coleman and Captain Bray are the ones who owned the jeep" (R 142).

Justino Pangilian testified that about four months before the trial two captains came to his service station ("Dijon's") in San Fernando and asked him to paint a jeep ivory color, which he did. Prior to that date it was green in color but he could not remember the markings. He did not know whether he could recognize the jeep now because he heard it had been painted blue. He was not requested to examine Prosecution Exhibit 8 (R 231-233).

Esperanza Manasang was the secretary for Mr. Gonzales. Her nickname was "Asang," by which name Captain Coleman knew her. During the early part of February 1947, Captain Coleman came to the shop and she told him "Juanito and Delio were brought to the Provost Marshal's Office." He asked what they had said but she said she did not know. He then told her that if anybody came to the shop asking about the jeep she should tell them "that it was given to Juanito, that Juanito assembled it" (R 143-145).

Captain Milton Johnson, Finance Officer at Clark Field, found from his records that Captain Coleman had purchased a Military Payment Order on 24 January 1947 for $600.00 and that no other such order had been purchased by the accused since Captain Johnson had come on duty as finance officer in August 1946. The accused had been on duty at the Base since March 1946 and had been paid only his regular pay or allowances which amounted to about $226 per month after deductions were made for allotments. According to accused's pay voucher, he did not claim any dependents (R 150-156).

Lieutenant Henry C. Mass, the investigating officer, identified Prosecution Exhibit 8 as the vehicle he saw in the parking lot at the Provost Marshal's Office, Clark Field, on about 25 February 1947, at the time he received orders to investigate the activities of Captain Coleman. He had scratched the hood "to bring out the numbers underneath when it was still an Army jeep." He also found layers of paint, first bare metal; then "OD"; ivory, yellow or cream; followed by blue (R 172,173).

Lieutenant Mass interrogated the accused on 25 February 1947, at which time Major Cooley C. Berry and Lieutenant Colonel John L. Fisher were present (R 157,170,177). Article of War 24 was read and explained to accused (R 158,161,168).

Major Berry identified "Prosecution Exhibit J" as a true and correct record of the questions asked and of the answers given by Captain Coleman on 25 February 1947. Over the objection by defense he used "Prosecution Exhibit J" to refresh his recollection as to certain of the testimony given by the accused on 25 February 1947, and read certain portions directly from it, but it was never introduced into evidence (R 158,161).

According to Major Berry at the interrogation 25 February 1947 Captain Coleman related the following concerning the jeep in question:

> "That he did not know that Blas Gonzales was the owner of the jeep but thought, that as far as he knew, the jeep belonged to Juanito Mariano; he knew the jeep that was then painted blue was at one time painted yellow; he knew that the jeep was painted blue in Angeles. Later on Captain Coleman stated he had no knowledge of the jeep being painted blue from its color of yellow; that Captain Bray had driven this jeep on several occasions while it was painted yellow but that he had never driven the jeep. Later on in the questioning with regard to signing the certificate in San Fernando Captain Coleman stated that his remuneration for signing the certificate was the use of the jeep several times; Captain Coleman further stated that he was present in Blas Gonzales' furniture factory when he was approached by Juanito Mariano who asked him if he would go to San Fernando and help him get this jeep registered, and that two or three days later he did go to San Fernando with Juanito Mariano for the purpose of registering this jeep that, to the best of his knowledge he went in the jeep that was legally assigned to him in his duties here and that Captain Bray was present with him but that Captain Bray took no active part in the registration of the jeep. Captain Coleman further stated that he knew that Juanito Mariano had been assembling a jeep but he didn't know other than that. Juanito Mariano told him where the spare parts came from which went into the assembly of the jeep, that all that he knew was what Mariano told him; that he did not have personal knowledge where the spare parts came from. He further stated that he signed the certificate in San Fernando at the request of the registrar and that he signed it upon his own authority. Captain Coleman was questioned as to his method of signing this certificate in San Fernando and Captain Coleman stated that he signed it 'Donald G. Coleman, Captain, Air Corps.' Upon being shown the certificate which shows Captain Coleman as having signed this certificate

'Captain, Air Corps, Provost Marshal Section, Clark Field Army Air Base', he stated that the registrar knew him to be from that office and asked him to sign it that way. Captain Coleman had previously stated that as Commandant of the Prisoner of War Camp he signed his name as 'Donald G Coleman, Captain, Air Corps, Commandant Prison of War Camp #8.' Captain Coleman further stated that he knew salvage property remained in the title of the United States Government and title could not be vested in other individuals. He stated that he knew that at the time he signed this certificate in San Fernando, but did not give it much thought because the risk involved was of little importance. He stated that he signed the certificate and that it included the Mabalacat Ordnance Dump and the San Fernando Ordnance Dump from where Juanito Mariano had obtained spare parts to assemble this jeep. He further stated that it was probable that these spare parts did come from these two dumps, which he enumerated and that he knew that the dumps in question were handled loosely. By 'loosely' he meant, so he stated, that security was poor at these dumps and that Filipinos could go into these dumps and obtain spare parts from friends of theirs on guard there; that to his knowledge such procedure had not been reported to the office in which he was connected; that he went to San Fernando to register this jeep in the name of Juanito Mariano as a friendly gesture; that he at no time had knowledge of its sale; that he did not receive any remuneration for this sale; that he did not receive ₱300.00 from Blas Gonzales for the sale of this jeep; that to his knowledge Captain Bray did not receive ₱1000.00 for the sale of this jeep." (R 163-164)

In addition to the above, Captain Coleman said concerning the certificate (Pros Ex 6) that he had not given much thought to either the legality or illegality of it. Although he knew some risk was involved it was not of enough importance to give any further thought (R 164).

Captain Coleman was asked the following question at the interrogation:

"You have stated before that you knew it was illegal and that title to the property remained in the government of all salvaged property and yet you state that at the time you signed this affidavit you did not know you were violating any Article of War?"

and his answer was: "It did not occur to me at the time I was violating an Article of War." (R 164-165)

Concerning personal expenditures Captain Coleman said he paid to Blas

Gonzales ₱900 for furniture, but did not know the exact date. He had purchased a Military Payment Order in the sum of $600.00 sometime in December or January (R 165). With respect to the letter he left for Blas Gonzales (Pros Ex 13), the accused stated that he had observed that anything left on Gonzales' desk would be picked up and read by other people, so he had always stated in his letters that they be destroyed after Gonzales had read them. That is why he put "that" statement in "Prosecution Exhibit 12" (R 166,172).

When Captain Coleman was asked during the course of the investigation if he had stated in his letter to Gonzales, "keep your story straight," he replied, "on the surface of that it appears to be self-incriminating" (R 168).

Second Lieutenant Lynn Hunter, the predecessor of Captain Baumgart as Motor Pool Officer for the 77th Air Service Group, testified that in February 1946 Lieutenant McGoff drove a jeep with registration number ending in "3093." He had not seen the vehicle since September 1946. It differed from other vehicles in that it was painted green and had diagonal stripes on the fenders. It also had a large star on the hood, a small star in the center of the rear of the body, and a small star on the front bumper. Other markings were in yellow paint and consisted of the serial number on each side of hood and body. The last four digits of the serial number, and the abbreviation for "13th Air Force" were on the back and on the left hand rear bumper. When Lieutenant McGoff was transferred from one organization to another he had taken the jeep with him and the organization markings were changed in succession to "7th Airdrome Squadron," "301st Squadron" and lastly to "77th Air Service Group." Lieutenant Hunter, being motor pool officer for the latter organization, serviced the vehicle. Lieutenant McGoff never represented the vehicle as his own but treated it as being government property, although at one time he did say that he assembled it. Lieutenant Hunter examined the jeep introduced in evidence as Prosecution Exhibit 8 and "would say it was the same vehicle as it was unlikely that another vehicle would be so much like it or have the same last four numbers" (R 19-25). Several photographs of the jeep, which were substituted for the original exhibit at the conclusion of the trial show the figures "20483093" painted thereon (Pros Ex 8).

Corporal James C. Welsh of the 1129th MP Company at Clark Field, upon instructions of Second Lieutenant Paul Boehm, Security Officer for the 77th Air Service Group, impounded on 4 October 1946 a "light off-colored green jeep" with serial number 20483093, which was being driven by Technical Sergeant Fred Hamil, who said he had lost the trip ticket (R 25,26).

Lieutenant Boehm described the impounded jeep as being an "off shade green" with yellow numbers "20483093" on the hood. Unit markings of the 77th Air Service Group were also painted on the jeep in yellow. Also the "TA sticker" on the windshield was torn in half which were the halves

of two different stickers. The right half had the last four numbers but they appeared to have been typed over. The vehicle was not on the property books of the 77th Air Service Group, nor was it on the "wanted list" of vehicles. Lieutenant Boehm said further that to his knowledge no one ever came to claim the jeep nor was the vehicle ever properly released (R 26,27).

Captain Vernon Baumgart, 358th Air Service Group, was the motor pool officer for the 77th Air Service Group when it was deactivated. He recalled a "grass green" jeep with yellow numbers had been impounded in his motor pool between 1 September and 1 November 1946 and that Lieutenant Boehm had requested that he hold it. He had it placed with the "dead lined" jeeps adjacent to his office where it remained for about two weeks. It disappeared but neither he nor his dispatcher ever gave permission for its release. The records of that organization were transferred along with him to his present office and they did not show the jeep on property books. There were 30 to 50 other vehicles in the organization which had been brought from Tinian that were not on the property books, as there was much confusion in moving and many records had been lost. During October 1946 Captain Baumgart allowed the accused, then Commandant of the prisoner of war camp, to have some vehicles on an "M/R" but the jeep in question was not among them (R 27-30).

Captain Maurice Bradshaw, Air Base Ordnance Officer at Clark Field, did not find a record of a jeep with serial number 20483093, however, there were a great many vehicles on the post which were not on any property books due to loss of records. He testified that when vehicles are found on the Base with Army markings it is assumed that they belong to the Government and a "turn-in slip" should be prepared and turned in to the Base Ordnance Supply (R 90-97). He testified further that property which is once U.S. Government property continues so to be except where it is sold or abandoned. Salvage ordnance property remains Government property. Captain Bradshaw said he never heard of the "Mabalacat Ordnance Dump" except in connection with this case. Although there are not supposed to be any serviceable parts in an ordnance salvage dump it is still possible to assemble a vehicle from such a dump. It is difficult to determine whether or not a jeep has been assembled, as the parts of a "Willys" or a "Ford" jeep are interchangeable and often are interchanged. Any assembled jeep is U.S. property even though registered in the Province of Pampanga's District Engineer Office (R 92-99).

The court took judicial notice of "AR 35-620, par 10b" (misquoted, should be AR 35-6520, par 10b), which provides in substance that when public property, unaccounted for, is discovered by either Army or civilian personnel, it will be protected and reported to the responsible accountable officer (R 93).

The Angeles Ordnance Depot of which Major Samuel G. Smith was the commander received surplus vehicles and other ordnance items from organizations in the territory north of Manila and south of Base "M" including Pampanga Province, Luzon, P.I. Major Smith testified that he had checked his records and found no record of jeep No. 20483093 in the depot. He had never heard of "Mabalacat Ordnance dump," although he was familiar with all ordnance dumps in his territory. The San Fernando Ordnance dump is located about two miles north of San Fernando or south of Clark Field, whereas Mabalacat is about three miles north of Clark Field. The San Fernando Ordnance dump was sold to Thomas M. Gonzales and Constancio D. Sangaton who took possession 5 September 1946. There were many serviceable parts in that dump, but no vehicles that could run under their own power. Many vehicles have been turned over to the Philippine Government, to transportation companies and individuals since 1945. When vehicles are sold by the Army the serial numbers are required to be painted out, but Major Smith was not sure this had been done in all cases (R 100-107).

4. Evidence for the Defense

The accused's rights as a witness were explained to him and he elected to testify under oath in his own behalf. He stated that he was Police and Prison Officer at Clark Field until 8 September 1946 and Commandant of the Prisoner of War Camp, Branch No. 8, also at Clark Field, from 8 September 1946 to 4 January 1947. About May 1946, while he was "P&P" officer, he met Gonzales and at the direction of his superior officer, Colonel Fisher, loaned him two U.S. carbines for security of his furniture manufacturing shop which was located upon the Base. Accused met Mariano about 1 November 1946 and Guzman about 25 November 1946 (R 247-248). On or about 21 November 1946 Gonzales had mentioned to the accused that he was buying a truck in Manila and requested that accused repair it. He had declined the request, but on or about 21 November 1946 the truck was brought to the prisoner of war camp motor pool where it remained for about four days. After telling Gonzales on two occasions that he would have to move the truck the accused, on or about 25 November 1946 towed the truck to Modesto Bernadino's Garage in Angeles while Guzman steered it. Accused denied that he ever gave any instructions to Guzman concerning the making of repairs to the truck. His suspicions were not aroused concerning the truck because the only markings on it consisted of the serial number (R 255-261). Many parts were needed for the truck. Some spare parts were on it when it was brought to the motor pool, but they did not come from the motor pool of the accused (R 259). Vehicles at the prisoner of war camp were marked "13th AF" and "313th Bomb Wing" on the same side of the bumper and on the other side they were marked "PW Camp #8." On the front bumper "PW Camp Number 8" was written out completely and on the back it was "PW #8" (R 298).

The accused denied that he had anything to do with painting the truck, making repairs upon it, obtaining a new motor for it, or of inducing anyone to claim ownership of the truck for purposes of registration (R 260-261). He admitted after examining the truck (Pros. Ex 11) that it was the one he towed into the garage at Angeles (R 269).

On 12 February 1947, accused went to Gonzales' shop where he saw "Asang" (Gonzales' secretary) who told him that Mariano and Guzman had been called up for investigation, at which time Mariano had reported that he had assembled the jeep. Guzman had stated that the truck came from accused's motor pool. He waited several hours for Gonzales and upon his failure to return he wrote a letter concerning the information he had obtained from "Asang" (Pros Ex 13) and gave it to Veneracion to give to Gonzales. The reason he wanted to see Gonzales was to check with him as to the truth of what he had heard, and since he was a friend of Gonzales, he wanted to tell him there was nothing to worry about (R 262,263). He told Gonzales to destroy the letter because the office help read everything that was left laying around (R 264).

The accused stated further that Gonzales informed him that Mariano was assembling a jeep which he first saw on 2 December 1946 in front of Gonzales' shop. All of the insignia on the jeep had been painted out with a darker "OD" paint except the serial number. It was at this time that Gonzales requested Captain Bray and accused to assist Mariano in getting the jeep registered. Accordingly, on the following day, 3 December 1946, as a special favor to Gonzales, accused and Captain Bray picked up Mariano at the garage in Angeles and took him in accused's jeep to Attorney Del Rosario as had been suggested by Gonzales. There Mariano conversed with the attorney in the Pampangan dialect. The attorney prepared an affidavit stating the jeep was assembled. It was read and explained to Mariano in Pampangan dialect, and when Mariano had signed it the attorney gave it to Mariano. No fee was charged or paid (R 249-253). They then went to the military police where Mariano obtained a certificate that the jeep was not on the "wanted list." The next day Captain Bray and accused again met Mariano at Gonzales' shop from whence they proceeded to the registrar's office in San Fernando. The registrar, Elicio Miranda, took the motor and chassis numbers from the jeep in question and asked accused if he would make a certificate that the jeep was assembled, because such a certificate was required from a disinterested person before it could be registered. The accused admitted that he had made the certificate (Pros Ex 6) but that in doing so he relied upon information given him by Gonzales and Mariano (R 249-253, 267).

Upon cross-examination the accused testified that at the time he signed the certificate (Pros Ex 6) he understood that most of the parts came from salvage dumps. He knew that salvage property was property of the United States, but he also knew salvage yards were being handled loosely and that parts could be obtained from Ordnance dumps by Filipino

civilians merely picking up what they wanted. Therefore, he did not feel the parts would be considered government property. He knew also that although a risk was involved it was of a minor nature and of no consequence. He also said he knew of the "technical illegality," meaning "that salvage property in Government dumps is still property of the U.S. Government" but that it was an accepted practice for Filipinos to assemble jeeps from spare parts. No question was ever made of it (R 289-294).

He was present at a meeting at the Provost Marshal's Office of AFWESPAC, at which time he and others were advised not to confiscate vehicles of Filipinos if they had any reasonable explanation or could show legal ownership (R 259).

Accused denied that he told Mariano to claim ownership of the jeep. He also denied he had anything to do with painting it or with selling it to Gonzales. He asserted that he did not receive any money from Gonzales nor did he tell "Asang" that if anyone queried her about the jeep to tell them that it had been given to Mariano who had assembled it (R 254,255, 268).

Accused identified the jeep (Pros Ex 8) as being the one he first saw on 2 December 1946 at Gonzales' shop (R 268). He said he had heard of the Mabalacat Ordnance Dump, but had never visited it, and that he knew of the San Fernando Ordnance Dump (R 262) and knew it had been sold to civilians about September 1946, but he did not know of the transaction until the middle of December 1946 (R 294).

Immediately after the jeep was registered, the accused and Captain Bray left the jeep at "Dijon's" service station, San Fernando, to be painted yellow as requested by Gonzales, but denied he ever paid "Dijon" ₱25.00 to paint the jeep, or that he knew Justino Pangilian (R 272). He never expected any remuneration for helping Mariano register the jeep, but he had borrowed it from Gonzales on two occasions. The jeep had been painted blue between Christmas and New Years (R 282).

Accused stated that he purchased a Military Payment Order on 24 January 1947 because during the past ten months he had saved over $2000 from his pay which amounted to between $226.00 and $230.00 each month (R 267-268). He made payments to Gonzales on 25 January 1947 of ₱300 and on 8 February 1947 of ₱600 which was for furniture Gonzales had made for him (R 264-265).

The accused asserted that he was questioned on 25 February 1947 by Lieutenant Mass in the presence of Colonel Fisher and Major Berry who joined in putting questions to him after he had been informed of his rights under Article of War 24. He did not feel he could talk freely due to Colonel Fisher's animosity toward him, however, he stated that Colonel Fisher had been a character witness for him on 11 December 1946 (R 265,266).

Accused stated that Gonzales had testified against him because he was trying to protect himself, and that Mariano and Guzman were merely following Gonzales' instructions (R 267-268).

A deposition by Harry A. Del Soldato was introduced in evidence as "Defense Exhibit E," in which it appears that he was motor pool sergeant at Clark Field during November and December 1946; that he saw a 6x6, 2-1/2 ton Army type vehicle towed into the prisoner of war camp motor pool during the latter part of November 1946 by three Filipino civilians who said the accused knew all about it; that about four days later the accused towed it to a civilian garage; that the only markings on the truck were Army serial numbers; that he did not know who it belonged to; that he knew nothing about a jeep except that he saw Captain Bray driving a yellow civilian jeep.

A deposition of Captain John T. Bray was accepted as "Defense Exhibit F." The deponent stated that he knew about a truck, 6x6, 2-1/2 ton, which Gonzales said was his and that he saw it at the Angeles General Auto Repair Shop where one "Modesto" did work on the truck as ordered by Gonzales. Bray further stated that he drove a jeep which belonged to Gonzales' driver, Mariano, but he did not know where Gonzales got the jeep. At the request of Gonzales, the accused and Bray had gone with Mariano to get the jeep registered. Neither he nor the accused tried to sell the jeep, nor did he receive any money from Gonzales.

Several character witnesses testified that the accused's reputation for truth and veracity was good and that he was a good officer. It was also shown by three depositions from members of his home community that he had a reputation as being a person of good moral character.

5. Rebuttal

Modesto Bernardino testified that accused came to his garage in Angeles frequently and that he saw accused tow the truck in question.

Three officers testified as to the accused's reputation for truth and veracity. One witness said it was "good unless he was in trouble" and the other two said that his reputation was bad.

6. Discussion

Charge I and its Specification

The accused was found guilty under this charge and specification of knowingly and willfully misappropriating a truck of a value of over $50.00, property of the United States furnished and intended for the military service thereof. Proof adduced by the prosecution clearly establishes

that the truck was government property and that its removal to the civilian garage was unauthorized and for an unlawful purpose. The accused admitted the removal of the truck but contended that it was private property and that he was merely accommodating the owner. It is clear that the court had before it evidence which was in direct conflict. Accordingly, it was necessary for it to exercise its primary function of weighing the evidence, accepting that which it considered worthy of belief and discarding that not worthy of belief. The Board of Review in CM 325457, McKinster, said:

> "*** Such conflicts are to be resolved, in the first instance at least, by the court and in so doing it is not required to accept as true the testimony of any witness, whether advanced by the prosecution or by the defense, but may give such weight as it deems fit to any evidence properly brought to its attention (Wharton's Criminal Evidence, 11th Ed., s. 881; CM 267476, Wilson, 44 BR 1, 9; CM 318085, Chance; par 78a, MCM, 1928). The only requirement is that, as an end result, the court's findings of guilty be based upon such evidence, apparently selected from the whole as worthy of belief, as would, standing alone and unencumbered by any unexplained contradictions within itself, be of the prescribed quantum and consistent with no other rational hypothesis than that of accused's guilt (par 78a, MCM, 1928; see CM 319322, Spencer - unexplained contradiction in evidence necessarily relied upon by court; CM 324396, Redmon - insufficient quantum in perjury case; CM 312356, Preater - proof consistent with reasonable hypothesis of innocence).* * *"

In the instant case, the conclusion of the court that the truck was property of the United States and that the accused devoted it to an unauthorized purpose was based upon sound reasoning and ample evidence. The explanation of the accused that his conduct concerning the truck was purely altruistic appears most weak and unconvincing in the face of the evidence. The accused said the truck belonged to Gonzales and was brought to the motor pool by him, but there is not one scintilla of evidence to support this self-serving declaration. On the other hand it was shown by the prosecution through the testimony of disinterested witnesses that the truck had Army markings on it; that it was at one time on the records of the 77th Air Service Group, an organization from which the accused as commandant of the prisoner of war camp at Clark Field had obtained some vehicles on an "M/R"; that the truck had never been turned in either as salvage or surplus; that the truck had been painted and repairs made thereto at the direction of the accused subsequent to its having been towed to the private garage; that the accused, together with his friend, Captain Bray, requested Gonzales to register the truck in his name. It follows therefore that when all of this evidence is considered together with the contents of the letter the accused admitted writing to Gonzales after an investigation into the activities of the accused had gotten underway the only logical conclusion that may be reached is that he

willfully and knowingly misappropriated the truck and that it was property of the United States furnished and intended for the military service thereof.

The defense contention that Gonzales falsified his testimony and induced Guzman to do likewise to protect himself is not supported by the record of trial.

The only remaining question concerns the finding of the court as to the value of the truck. No proof was offered as to monetary value of the truck except that the court was requested by the prosecution to take judicial notice of an Ordnance price list. The truck was before the court as an exhibit in the case, for which photographs were substituted, thus the members of the court were afforded an opportunity of viewing it and so were we. The evidence disclosed that at the time of the offense charged it was not in running condition, however, it was in the prisoner of war camp motor pool and it had not been officially declared either as salvage or surplus property. Furthermore, there was competent evidence from which the court could infer that it was capable of being fully repaired. We are of the opinion that under the circumstances presented in this case the court was warranted in finding that the value of the truck was over $50.00.

The Board of Review said in CM 317327, Durant, 66 BR 277, 307-308:

"*** Although as a general rule the court may not infer, from a mere description or even an actual inspection, that certain property the value of which is in issue at the trial is worth a specific sum of money or is worth over $50 (CM 208481, Ragsdale, 9 BR 13), the law is not so rigid or whimsical as to forbid the members of a court-martial, in an exceptional case, from drawing upon common experience in determining that the value of specific property, or a mass of property, of obviously great value exceeds the statutory limit of $50.00. This exception to the general rule has been applied in the case of automobiles (CM 262735, Kaslow, 41 BR 113,126; CM 228274, Small, 16 BR 111,115) and in the case of 'a horse, two mules and a wagon' (CM 193003, Simkins, 2 BR 67, 72). ***"

Charge II and its Specification

The accused was found guilty under this charge and specification of wrongfully and without proper authority certifying to the Registration Clerk at the Office of the District Engineer, Province of Pampanga, Philippine Islands, that a certain jeep was assembled by parts taken from the "Mabalacat Ordnance Dump," that it was not on the wanted list,

and that he had personal knowledge of its being assembled by Juanito Mariano, with intent to defraud the United States.

There is no issue here presented concerning the making of the certificate in question by the accused inasmuch as he admitted preparing it in his own handwriting. The evidence adduced by the prosecution establishes beyond a reasonable doubt that this certification was wrongful and unauthorized. Its effectiveness as a means of working a fraud against the United States is obvious and the conclusion that it was made with this fraudulent purpose in mind rests upon sound and reasonable inference.

Here as in the case of the truck (see above) the accused claims his conduct was motivated by a charitable feeling toward Gonzales and here again his explanation must fall before the avalanche of damaging evidence brought forth by the prosecution. The jeep in question had been on the Base at Clark Field since February 1946 operated by a U.S. Army officer until September or October of that year. During October it turned up as an impounded vehicle in the motor pool of the 77th Air Service Group referred to above as having furnished some vehicles to the prisoner of war camp on an "M/R." The jeep some time thereafter disappeared from the 77th Air Service Group without having been officially released. At the time of registration of the jeep there were Army markings on it sufficient to put one on notice as to its ownership. There was no record that the jeep had been turned in as either salvage or surplus. On the contrary there were records that it had been used by the 77th Air Service Group. The accused instructed Mariano to say that the jeep was assembled. It was shown that the Mabalacat Ordnance Dump did not exist. "Asang," Gonzales' secretary, was instructed by accused to say the jeep was assembled and belonged to Mariano. Mariano never had the registration certificate for the jeep in his possession. Accused and Captain Bray sold the jeep to Gonzales and received the money therefor. Shortly after the sale of the jeep it was shown that the accused had a large amount of money in his possession with which he purchased a military payment order for $600.00 and paid Gonzales ₱900.00 for furniture.

Assuming, for the sake of argument only, that the jeep was assembled, the accused admitted that most of the parts were taken from Ordnance dumps and further admitted such parts remained government property. Possessed with this knowledge the accused nevertheless proceeded to make the certificate, admitting that he was taking a risk and that there was a "technical illegality" but that "it was of a minor nature and of no importance."

The offense in the instant case is similar to or closely related to such offenses as making false official statements or making a false statement with intent to deceive, which offenses have long been held to be violations of Article of War 95 (CM 275353, Garris, 48 BR 39; CM 294913, Draper, 58 BR 23; CM 315736, Risoli, 65 BR 91). We are of the opinion, therefore, that this offense is likewise a violation of Article of War 95.

Evidence Question

The defense objected to the action of the court in allowing Major Berry to refer to a written record of a pre-trial examination of the accused (Pros Ex J) for the purpose of refreshing his memory concerning certain statements made by the accused. The defense likewise objected to the reception in evidence of oral testimony as to the substance of these statements because of the secondary nature of such testimony. A writing is generally held to be the best evidence of its contents and, under the best evidence rule, must be introduced to prove its contents upon a timely refusal to accept a substitute by the party against whom such proof is offered. However, where a writing has been lost or destroyed, or it is otherwise satisfactorily shown that the writing cannot be produced, then the contents may be proven by a copy or by oral testimony (par 116a, MCM, 1928; CM 216397, Fleming, 11 BR 139,141; CM 314746, Garfinkle, 64 BR 215). Here, there was no showing that the record of the pre-trial examination of the accused was lost or destroyed or was otherwise unavailable. On the contrary the record of trial indicates that the original was in the hands of the witness, Major Berry, while he was on the stand.

In military practice, it appears to be settled law that when an accused has made an oral out of court confession of guilt and this confession has been reduced to writing, either in question and answer form or as a summary of what the accused has said and whether or not signed by him, so much of the conversation in the course of which he has confessed as has been so reduced may not, over his objection, be shown by parole testimony of those who have heard his words, unless, of course, the writing has been lost or destroyed or is otherwise unavailable. On the other hand, however, it has also been held that this rule does not apply where an accused's oral pre-trial assertions amount only to admissions against interest falling short of a confession of guilt and in such a case there is no prohibition against proof of these admissions by the parole testimony of those who heard the accused make them even though the inculpatory statements have been reduced to written form and the accused insists upon the production of the writing (CM 210985, Banner, 9 BR 383, 387; CM 293448, Yancy, 15 BR (ETO) 207, 225). In the instant case, the statements of accused contained in the record of the pre-trial examination, as related to the court by Major Berry, touched upon the allegations found in Charge I and its specification only by way of admitting certain conduct, which conduct, although it was material to the proof of these allegations, did not per se constitute the offense charged. Consequently, it was not error to allow Major Berry to give parole evidence as to those pre-trial statements of accused contained in the document in question which referred to Charge I and its specification. As to those statements in the document which referred to Charge II and its specification, there might be ground for argument as to whether they amounted to a confession of guilt or were merely admissions against interest. This

question we need not decide, however, for even if we were to come to the conclusion that the court improperly allowed Major Berry to give parole testimony as to these statements, the error thus found would not have injuriously affected the substantial rights of accused. Not only was there abundant and convincing evidence of his guilt of Charge II and its specification aliunde his pre-trial statements but in his own testimony given under oath at the trial he substantially reiterated his pre-trial assertions. (CM 295757, Blackshear, 25 BR (ETO) 89, 91; CM 295519, Austin, 24 BR (ETO) 325, 330). This is not a case in which we are called upon to decide whether the erroneous reception in evidence of a confession, improperly admitted because procured in violation of Article of War 24 (see CM 329162, Sliger), is alone effective to taint with illegality the whole or any part of the findings of guilty and the sentence (CM Garfinkle, supra).

Place of Confinement

Confinement in a penitentiary is not authorized by Article of War 42 for the offense of misappropriation in violation of Article of War 94. It was so held in CM 319499, Smith, where the Board had occasion to say:

> "It is to be noted that although misappropriation is denounced by Article of War 94 it is not one of the offenses denounced by 18 USC 87 or any other section of the United States Criminal Code. Although the evidence shows that the accused was guilty of misapplication, which is denounced by 18 USC 87, he was not so charged, and he can not be punished as though he were convicted of misapplication.
>
> "Misappropriation, as such, is not denounced by the law of the District of Columbia.
>
> "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 (CM 223054, Langanki, 13 BR 347)." (See also CM 323136, Ligon; CM 326406, Sells.)

7. Careful consideration has been given by the Board of Review to the brief submitted by the regularly appointed defense counsel and Alberto R. DeJoya and M. H. DeJoya, attorneys at law, Manila, P.I., special defense counsel for the accused. Consideration has also been given to the oral argument made by Mr. William L. Coleman, attorney at law, Marysville, Ohio, the brother of accused, and to a letter written by the accused to The Judge Advocate General.

8. Records of the Department of the Army show that the accused is 30 years of age and unmarried. He is a high school graduate and was co-owner and co-operator of a specialized dairy farm at Marysville, Ohio,

prior to 27 March 1941, on which date he was inducted into the service. He was discharged on 15 April 1943 to accept a commission as a second lieutenant, AC, AUS. He was promoted to first lieutenant on 17 February 1944 and to captain on 31 October 1945. He was assigned to overseas duty and arrived at Clark Field, Luzon, P.I., in March 1946. His efficiency ratings have been "excellent" or "superior" except for two short periods when they were "very satisfactory."

9. 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 a conviction of a violation of Article of War 95 and is authorized upon a conviction of an officer of a violation of Article of War 94.

Chester D. Gibson, Judge Advocate

Gilbert R. Schmidt, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 327842 1st Ind MAR 27 1948

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Donald G. Coleman (O-577170), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of misappropriation on or about 25 November 1946 of one truck, 2-1/2 ton, 6x6 cargo, Army Serial No. 414270, of the value of over $50, property of the United States furnished and intended for the military service thereof in violation of Article of War 94 (Charge I and its Spec.), and of wrongfully and without proper authority on or about 4 December 1946 certifying to the registration clerk, Office of the District Engineer, Province of Pampanga, Philippine Islands, that a certain jeep was assembled from parts taken from the Mabalacat Ordnance Dump, that the jeep was not on the wanted list, and that he had personal knowledge of its being assembled by Juanito Mariano, with intent to defraud the United States, in violation of Article of War 95 (Charge II and its Spec.). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, designated the "United States Federal Reformatory" at El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action "pursaunt to Article of War 50½."

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.

4. During 1946 the accused was successively police and prison officer at Clark Field, P.I., and commandant of Prisoner of War Camp No. 8, also located at Clark Field. In the motor pool at the prisoner of war camp there were a number of U.S. government owned vehicles which for one reason or another were not carried on the property books. On 25 November 1946 the accused, without authority, towed one of these vehicles, a 2-1/2 ton, 6x6, cargo truck, to a civilian garage located in the town of Angeles, P.I. He instructed a mechanic named Aurelio Guzman to paint it and make certain repairs on it and stated that he would pay the costs of the labor and material. The accused and another officer tried to induce one Blas Gonzales, a Philippine civilian who operated a furniture manufacturing establishment at Clark Field, to have the truck registered with the civil

authorities in his (Gonzales') name, but he refused. During an investigation concerning these transactions the accused wrote and caused to be delivered to Gonzales a letter suggesting that he make certain false statements respecting the identity and ownership of the truck and to destroy the letter. Gonzales read and discarded the letter, but the torn portions were found, pieced together, and received in evidence at this trial.

In his sworn testimony the accused admitted towing the truck to the private garage and writing the letter to Gonzales. He contended that he did both as an accommodation to Gonzales who was his friend and who owned the truck. Gonzales denied that he had ever owned or claimed ownership of the truck.

With respect to Charge II and its specification the evidence shows that on 4 December 1946 the accused induced one Juanito Mariano, an employee of Gonzales, to go with him to the office of the District Engineer at Angeles for the purpose of registering a government owned jeep in his (Mariano's) name. In order to effect the registration, the accused, wrongfully and without authority, executed a certificate intended to show that the jeep was the personal property of Mariano. Mariano was reluctant to enter into the transaction but was assured by the accused that it would involve "no trouble." The jeep was registered in Mariano's name, subsequently sold to Blas Gonzales for ₱1300 and the accused and another officer divided the proceeds.

5. The accused is 30 years of age and single. He graduated from high school at Marysville, Ohio. He was a co-owner and co-operator of a specialized dairy farm at Marysville, Ohio, for about two years prior to induction into the military service on 27 March 1941. He was an enlisted man until 15 April 1943 when he was discharged to accept a commission as a second lieutenant, AC, AUS. He was promoted to first lieutenant on 17 February 1944, and to captain on 31 October 1945. He arrived at Clark Field, P.I., in March 1946. His efficiency ratings have been "excellent" or "superior" except for two short periods when they were "very satisfactory."

6. On 5 January 1948 William L. Coleman, civilian counsel and brother of the accused, appeared before the Board of Review and made an oral argument in accused's behalf. Careful consideration has been given to the argument and to a written brief submitted by accused's regularly appointed defense counsel and his special civilian counsel at the trial, Alberto R. DeJoya and M. H. DeJoya, members of the bar of the Republic of the Philippines. Consideration has also been given to a letter submitted to The Judge Advocate General by the accused, to three depositions and one notarized letter from members of the civilian community of the accused attached to the record of trial as exhibits, to two letters from Colonel M. Ray Allison, Veterans Administration Hospital, Lexington, Kentucky, dated 20 March 1947 and 18 September 1947, respectively, and to a letter

from Martin L. Shaner, Major, Chaplain Corps, USA, dated 10 December 1947, reciting particulars as to the accused's good character.

7. I recommend that the sentence be confirmed, but in view of the previous good record of the accused and all the circumstances of the case that the period of confinement be reduced to two years and that the sentence as thus modified be carried into execution. I further recommend that a United States disciplinary barracks be designated as the place of confinement.

8. 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

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( GCMO 88, 19 April 1948)

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

31 MAR 1948

JAGH CM 327866

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| UNITED STATES | ) | HEADQUARTERS COMMAND<br>EUROPEAN COMMAND |
| v. | ) | |
| First Lieutenant ROY N. HILL (0-2014952), Infantry. | ) | Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 4-5, 8-9 September 1947. Dismissal. |

HOLDING of the BOARD OF REVIEW
HOTTENSTEIN, LYNCH and BRACK, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Roy N. Hill, 7703 Transportation Battalion, at Frankfurt am Main, Germany, did, on or about 30 November 1946, wrongfully issue a set of vehicle license plates, number P-41519, to Technician 5th Grade Phillip O. Bouvier, 7702 Service Battalion, for a vehicle not properly carried on property records of Headquarters Command.

Specification 2: In that First Lieutenant Roy N. Hill, 7703 Transportation Battalion, at Frankfurt am Main, Germany, did, on or about 2 December 1946 wrongfully and corruptly issue to Technician 5th Grade Phillip O. Bouvier, 42107395, 7702 Service Battalion, Headquarters Command, USFET, a "Certificate of Loss" covering loss of certificate of license, for license number 41519, having full knowledge that the facts as stated in the Certificate were untrue.

Specification 3: In that First Lieutenant Roy N. Hill, 7703 Transportation Battalion, did, at Frankfurt am Main, Germany, on or about 13 December 1946, in the course of an official investigation being conducted by Major Milton E. Jones, A.C., Headquarters Command, USFET, make under oath a statement in substance as follows: "Corporal Bouvier has never procured for me any merchandise of any nature whatsoever", which statement he did not then believe to be true.

Specification 4: (Finding of not guilty)

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

Specification: In that First Lieutenant Roy N. Hill, 7703 Transportation Battalion, did at Frankfurt am Main, Germany, on or about 30 December 1946, wrongfully and unlawfully instruct Fraulein Gitta Muller to give false and untrue testimony at an official investigation conducted by an Inspector General.

He pleaded not guilty to the Charges and Specifications and was found not guilty of Specification 4 of the Charge, guilty of Specification 2 of the Charge except the words "and corruptly," guilty of the Specification of the Additional Charge except the words "conducted by an Inspector General," and guilty of the other Specifications and the Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due and to become due. The reviewing authority approved only so much of the sentence as provides for dismissal from the service and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution.

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

On or about 6 July 1946 accused, a member of the 7703 Transportation Battalion, Headquarters Command, Frankfurt, Germany, was placed in charge of his organization's motor pool which was otherwise known as the "Easy Area Motor Pool." Second Lieutenant Harry G. Marshall, 7703 Transportation Battalion, however, testified that he was the responsible officer for the vehicles in the pool and that he kept the records for the pool (R 22,23,24).

On 13 December 1946, Captain John P. Dring and First Lieutenant Loyd R. Cain, both of the 7702nd Headquarters and Service Battalion, were inspecting the Battalion Motor Pool in the "Bolster Area." In the course of their inspection they found a jeep which did not bear their battalion bumper markings and which was being tended by one Corporal Bouvier. Bouvier was a member of the 7702nd. The jeep had white sidewall tires, chromium wheels, a tow bar on the front, double mirrors, and a radio. The bumper markings were "HC 1006," the license tag number was "P-41519," and the War Department Number was "WD 20380208" (R 12,13,21). Lieutenant Marshall testified that the records of the "Easy Area Motor Pool" failed to show that any of these numbers

were assigned to the "Easy Area Motor Pool." Captain Dring had seen Bouvier driving the vehicle on previous occasions (R 13) and Lieutenant Cain had first seen Bouvier with the jeep either the latter part of August or the first part of October 1946 (R 22). On the afternoon of 13 December Captain Dring decided to investigate the status of the jeep. Accompanied by Lieutenant Cain he returned to the "Bolster Area Motor Pool" and found both the jeep and Bouvier gone. They found the jeep in the "Easy Area Motor Pool" with the "WD" number painted over and the license tags and radio missing (R 14,15,21). Prosecution Exhibit 1 for identification was a picture of a jeep which bore "WD number" "S 549," and license tag "P-01918" (R 17,22). Captain Dring and Lieutenant Cain identified the pictured jeep as the jeep they had seen in Bouvier's possession on 13 December 1946 (R 17,22,23). Prosecution Exhibit 1 for identification was admitted in evidence over objection by the defense although the origin of the exhibit was not shown (R 17). The defense later stipulated "that the picture, prosecution's exhibit Number 1, is with certain changes, the jeep that Bouvier was driving around some indeterminate time in 1946." (R 35). Samuel Hilinger testified that he examined the vehicle pictured in Prosecution's Exhibit Number 1, and found that it had Chassis Number 18669 (R 74). According to Lieutenant Marshall that number was not assigned to the "Easy Area Motor Pool" (R 37).

Lieutenant Marshall testified that license tag number "P-01918" and vehicle serial number "S-549" which appeared on the jeep pictured in Prosecution's Exhibit 1, were assigned to a vehicle which had been "deadlined" in the "Easy Area Motor Pool" and that Bouvier had obtained the said license tags and the vehicle serial number in the latter part of July or the first part of August 1946. The "deadlined" vehicle was turned in to Ordnance early in December 1946, at which time Lieutenant Marshall had Bouvier return the license tags which were likewise turned in to Ordnance (R 36,37). Lieutenant Marshall did not know what "number" the Bouvier jeep had carried or should carry (R 38).

Miss Mable Miller, Assistant Chief, Vehicle Registration Section, Office of the Chief of Ordnance, Frankfurt am Main, Germany, testified that she was the official custodian of the ordnance records for Headquarters European Command relating to the issuance of license plates. These records showed that license plate number P-41519 was issued in 1946. She identified Prosecution Exhibit 2 as a receipt signed by First Lieutenant Curtenius Gillette acknowledging receipt, as representative for the Commanding General, Western Base Section, of a block of license plates which included the one bearing number P-41519. Prosecution Exhibit 2 was admitted in evidence without objection by the defense (R 29). When license tags were assigned to a vehicle a certificate of license, in triplicate, was accomplished, the original being retained

by the military district concerned, the duplicate remaining in the files of the Chief of Ordnance, and the triplicate copy being issued to the driver of the vehicle to which the plates were assigned. Miss Miller identified Prosecution Exhibit 3 as a certificate of license retained by her office and it was admitted in evidence without objection (R 29). The certificate indicated that license tag "P-41519" was assigned to the "202 QM Bn." for a Willys Model MB, Chassis Number 358240, US Registration Number 20380208.

In the course of an official investigation by an assistant Inspector General, Major Milton E. Jones, accused admitted loaning Corporal Bouvier, license tags numbered "P-41519" (R 110, Pros Ex 8).

Gitta Muller, a German civilian, clerk typist at the "Easy Area Motor Pool" testified she had known Corporal Bouvier for about two months prior to 2 December 1946, and during that time Bouvier presumably brought whiskey and food to accused's office (R 44,46). Some of it was taken from the office by accused and some by Sergeant Weber (R 47). With respect to the nature of Bouvier's visits to accused's office she stated:

"Q Did Corporal Bouvier ever bring any merchandise of any nature to Lieutenant Hill's office?
A Yes.

Q Can you tell the court what Corporal Bouvier brought to Lieutenant Hill's office?
A Whiskey and food.

Q How many different times, if you remember?
A About every week.

Q Every week for how long, for how many months?
A One and a half, two months.

Q Can you tell the court a little more about what Corporal Bouvier brought to your office? Name it.
A I don't see it really. It was bread, meat, sugar.

Q And who got the bread and meat and sugar that was brought to your office by Corporal Bouvier?
A Sometimes he gave it to Lieutenant Hill and sometimes he put it in the office.

Q And whenever he put it in the office did you see anybody carry it out of the office?
A Lieutenant Hill or Sergeant Weber.

Q Lieutenant Hill and Sergeant Weber. Now, how about alcoholic beverages?
A Pardon?

Q Whiskey, cognac, or things of that nature, did Corporal Bouvier ever bring any of those to your office?
A Whiskey.

Q And how much whiskey did Corporal Bouvier bring to your office?
A One time three bottles, next time maybe seven; it was not the same; it was always different.

Q And who got that whiskey?
A Lieutenant Hill and Sergeant Weber." (R 46-47) (underscoring supplied)

On 2 December 1946 accused had Miss Muller type out a certificate of loss, to cover the loss of a certificate of license (Pros Ex 4). The information data on the certificate of loss was furnished to Miss Muller by Corporal Bouvier and Miss Muller typed the original certificate and three copies. After it was typed Miss Muller handed it to accused who put it in a basket on Miss Muller's desk (R 44). Miss Muller placed the carbon copies of the certificate in the files but has been unable to locate them since (R 45). She identified Prosecution Exhibit 4, marked for identification, as the certificate of loss which she prepared on 2 December 1946 (R 44). The certificate of loss is in substance as follows:

"SUBJECT: Loss of License Plate or License Certificate

TO : Commanding General, US Forces, European Theater, APO 757, US Army
Attention: Theater Provost Marshall
Thru : Command Channels

1. I certify that on 2 December 1946 the Certificate of License (X), License Plate ( ) issued to "E" Area Pool (unit) for use on 1/4 ton 4x4 (vehicle) USA Registration Number 20380208 License Number P-41519 was lost(X)stolen ( ) from said vehicle located Frankfurt.

/s/ Roy N. Hill
ROY N. HILL 1st Lt.
MTR.OFF.7703 TRANS.BN.
"E" AREA POOL
Commander"

(Pros Ex 4)

After being qualified as a handwriting expert, Captain George R. Bird testified that based on comparisons with known specimens of accused's handwriting (Pros Ex 9,10; R 81) it was his opinion that the signature on the certificate of loss was in accused's handwriting (R 103). The certificate of loss was received in evidence (R 108; Pros Ex 4). Major Milton E. Jones testified that he received the certificate of loss from Corporal Bouvier (R 82).

Miss Muller further testified as follows concerning a conversation accused had with her about the certificate of loss:

"Q Now, did you have any conversation with Lieutenant Hill about this certificate of loss after you had drawn it up?
A I don't understand.

Q Strike that question. Did you later have any conversation with Lieutenant Hill about this certificate of loss?
A Yes, he said to me if somebody come around and asks me about it I shall say that I did not type it.

Q That you what?
A That I did not type it." (R 45)

As to the time when the foregoing instruction was given to her by accused, she stated:

"Q Now, how long was that before you made a statement to Major Jones?
A It was in January.

Q Huh?
A January.

Q Well, did Lieutenant Hill tell you that before you made a statement to Major Jones?
A Yes." (R 48)

On cross-examination she stated that she had made prior statements to Major Jones, a Lieutenant Argo, and one to an Attorney Carroll (R 46,51, 52). She identified Defense Exhibit B as a statement she made to Carroll, and Defense Exhibit C, as a statement she made to Lieutenant Argo. The Carroll statement was written in German and was translated to the court. In pertinent part the statement recited: "shortly before Major Jones was supposed to come to our office Lt. Hill told me that somebody from the I.G. would come and question me about the 'certificate of the lost license plates.' Lieutenant Hill told me that I should tell this person that he did not issue the certificate. I never saw the copy of this certificate again after Lt. Hill put it in his basket on his desk."

With reference to her statement to Lieutenant Argo concerning the instructions given her by accused she testified as follows:

"Q Now, directing your attention to question number 8 in Defense's Exhibit C for identification, were you not asked the following question: 'Did you understand the second conversation with Lt. Hill?' And did you not reply thereto: 'I cannot swear to it under oath that I understood him to say that, if somebody should come from the CID or MP's, I was to say that I had not typed up the certificate.' Did you say that?
A Yes." (R 53-54)

The complete statement was admitted in evidence over objection by the defense (R 111, Pros Ex 5).

With reference to the person to whom she was to make the statement concerning the certificate of loss, she testified:

"Q Now, do you remember if Lieutenant Hill told you if the CID or MP investigator was coming?
A He say somebody comes around." (R 54)

On 13 December 1946, Major Milton E. Jones, Assistant Inspector General, was ordered by the Chief of Staff to make an investigation of the ownership and assignment of a certain jeep. In that capacity he interrogated accused on 13 December 1946, 17 December 1946, and 3 January 1947 (R 56,57,65,77,78,79). Prior to the first interrogation an explanation was made to accused of his rights under Article of War 24, and prior to each subsequent investigation he was reminded of the provisions of the 24th Article of War. In addition accused was sworn by Major Jones before each interrogation (R 57,64,76,77,78). The questions propounded by Major Jones and the answers made by accused were taken down in shorthand by Samuel Hilinger and transcribed by him. Hilinger identified Prosecution Exhibits 6, 7 and 8 as transcripts of questions and answers transcribed by him in the course of accused's interrogation by Major Jones on the respective dates shown therein (R 71,72). All the questions and answers which passed between Major Jones and accused appear in the exhibits but some matters in clarification and explanation of the questions were not transcribed (R 75,79). Major Jones testified that when explanations were made by him of the questions asked, he would tell the stenographer to omit these matters (R 79). Certain portions of the testimony transcribed in Prosecution Exhibits 6, 7 and 8 were deleted by stipulation between the prosecution and defense and the three transcripts of testimony were admitted in evidence over objection by the defense (R 110).

At the interrogation of 13 December (Pros Ex 6) accused in reply to the question: "Has Corporal Bouvier ever procured for you merchandise of any nature whatsoever?", stated "No, sir."

At the interrogation conducted on 3 January 1947 accused with reference to food and liquor obtained by him from Bouvier stated:

"Q How much food did Bouvier obtain for you through his connections with the 7702d Service Battalion ration breakdown unit?
A Just like I told you the other night. We used to go fishing and hunting once in a while, but the food was probably a can of luncheon meat or a can of this pork, getting a loaf of bread, maybe a half a dozen eggs, that's all there was to it.

Q Did Cpl Bouvier ever sell or give to you any quantity of liquor?
A Quantity? One time I got three (3) bottles of brandy from him, not for free. I paid him for it.

Q Did Cpl Bouvier ever bring any other liquor into your office?
A For the men, yes, sir; he brought once in a while, not very often, he would bring in, it wouldn't be a bottle, maybe it would be half a bottle, maybe half a dozen bottles of beer, something like that. The enlisted men at that time before they were redeployed I had eight (8) enlisted men at that time.

* * *

Q But you state categorically that he never obtained for your own use more than three (3) bottles of liquor?
A Approximately three (3) bottles. I remember one night we went to a wedding and he didn't bring it up to the place until I went back up there after supper. He didn't bring it up there during working hours. But it was not given to me; I paid for it. About three (3) bottles of brandy." (Pros Ex 8; pages 6 and 7)

4. Evidence for the defense.

Theodore Sobejak, a German civilian, testified that from December 1945 until 20 September 1946 he was employed as civilian labor supervisor in the Easy Area Motor Pool. His duties were supervision of mechanics, maintenance and dispatching of vehicles. In May 1946 Corporal Bouvier brought a jeep to the motor pool for service. The bumper marking on the jeep was SVB-5 and the "War Department Number" was 20103186 (R 130,131,132). Subsequently this jeep was turned in to Ordnance with bumper marking 2862, and "body part number" 20520514 (R 133). The "Body Part number" 20103186 was changed to "20520514" in order to make it appear to be a vehicle belonging to Easy Area Motor Pool because Ordnance would not accept a vehicle from an organization unless the vehicle belonged to that organization (R 134). In exchange for his "broken down" jeep Bouvier was given a jeep belonging to Easy Area Motor Pool bearing markings "Service Battalion 5, Body Part Number 20103186" which was ordered painted on the jeep by witness (R 134). Originally the latter jeep had bumper marking "2862," and body part number "20520514" (R 134,136), and Bouvier was given license plates "P-01918" which were taken from a vehicle with bumper marking 2851 (R 134,142).

Accused after being apprised of his rights elected to testify as to Specification 1 of the Charge, and the Specification of the Additional Charge.

In substance accused testified that he came into the Army as a Private in May 1942 and went overseas during the first part of 1944 with the 399th Infantry, 100th Division. He was commissioned in April 1945. In July 1946 he was placed in charge of maintenance at the Easy Area Motor Pool. He saw Bouvier a few days later with a vehicle numbered 5549 and bumper markings 2851. He made inquiries concerning the vehicle and secured records concerning the vehicle which he obtained from the 7702 Transportation Battalion (R 150,151,152). Accused had never belonged to the 7702 Battalion and was not custodian of its records. On objection by the prosecution he was not allowed to testify as to the information he secured from these records.

Accused also denied that he ever instructed Miss Muller to give false and untrue testimony to anybody. He did admit that on 1 or 2 December 1946 he did tell Miss Muller to say, if anybody should ask, that he did not type up the certificate of loss (R 153,154,156).

5. a. Specification 1 of the Charge. Accused was found guilty of wrongfully issuing a set of license plates, number P-41519, to Technician Fifth Grade Bouvier, for a vehicle not properly carried on property records of Headquarters Command. The evidence shows and accused admitted that on or about 1 December 1946 at Frankfurt-am-Main, Germany, he lent a set of license plates numbered P-41519 to Bouvier. Accused at the time was a member of the 7703 Transportation Battalion and was the officer in charge of the Easy Area Motor Pool. The vehicle on which these license plates were later found was a vehicle of which Bouvier had possession over a period of time and which was not carried on the property records of Easy Area Motor Pool and apparently was not assigned to the 7702nd Headquarters and Service Battalion of which Bouvier was a member. It was further shown that the license plates in question never had been assigned to accused's organization for use on one of its vehicles but that it was assigned to the "202 Trans Bn," a unit under command of Western Base Section for use on a Willis Model MB, Chassis Number 358240, US Registration Number 20380208. This latter number was on the Bouvier jeep when it was seen on 13 December 1946, but had apparently been recently placed thereon. The prosecution's evidence likewise showed that the chassis number of the Bouvier jeep was 188669. It is clear that the Bouvier jeep was not the "202 Trans Bn" jeep. Accused, in a pre-trial statement, admitted that license tags number P-41519 were turned in to him as having been found and that it was wrongful for him to have given them to Bouvier for use on his vehicle.

It was alleged that accused issued license plates "for a vehicle not properly carried on the property records of Headquarters Command."

(Underscoring supplied). While it was shown that accused gave Bouvier the license plates in question for use on his vehicle, and that the vehicle in question was not carried on the property records of Easy Area Motor Pool and apparently not on the property records of the 7702nd Headquarters and Service Battalion, no evidence was adduced to show that the vehicle was not carried on the property records of "Headquarters Command." Since it was not shown that the vehicle, for which accused gave the license plates to Bouvier, was not carried on the property records of Headquarters Command, the finding of guilty of Specification 1 of the Charge is not supported by the evidence.

b. Specification 2 of the Charge. Accused was found guilty of wrongfully issuing to Technician Fifth Grade Phillip Bouvier "a Certificate of Loss covering loss of certificate of license, for license number 41519 having full knowledge that the facts as stated in the Certificate were untrue." (Underscoring supplied). It is noted in passing that there is a patent ambiguity in the Specification as it is not clear which certificate, the "Certificate of Loss" or the "certificate of license," is alleged to contain the untrue statement of facts. For the purposes of this discussion it will be assumed that the untrue statement was contained in the "Certificate of Loss." The only intrinsic aid to this interpretation is the capitalization of "Certificate of Loss" and the capitalization of "Certificate" in the phrase "as stated in the certificate."

The evidence shows that on 2 December 1946 Corporal Bouvier dictated a certificate of loss to accused's stenographer, Miss Gitta Muller. The certificate was addressed to the Theatre Commander and contained the remarks that on 2 December 1946 the certificate of license issued to "'E' Area Pool" for use on 1/4 ton 4x4 USA Registration Number 20380208, license number P-41519, was lost from the vehicle. After typing the certificate, Miss Muller handed the certificate to accused who laid it in a basket on Miss Muller's desk. The only evidence tending to indicate that accused issued the certificate of loss to Bouvier must be found, by remote inference, from the fact that the certificate of loss was in Bouvier's possession when recovered by Major Jones, the Assistant Inspector General. The certificate bore the signature, "Roy N. Hill," over the same name typewritten, with the designation "1st Lt MRT OFF 7703 Trans Bn 'E' Area POOL." A handwriting expert testified that the signature was in accused's handwriting and known specimens of accused's handwriting were in evidence.

Without consideration of whether the facts shown by the evidence constitute an offense and without consideration of the variations of meaning which attach to the word "issue" in law, the evidence does not support the allegations in the Specification.

Assuming that the word "issue" means "to give" and assuming that the certificate of loss was signed by accused, there is no evidence

that accused gave or caused to be given the certificate of loss to Bouvier. After Miss Muller gave the typed certificate to accused he laid it in a basket on his clerk's desk. It is not shown whether the certificate was signed at that time, and it may be assumed that he signed it later and returned it to the basket. The fact that Bouvier was found in possession of it at some later time is not inconsistent with the probability that he acquired possession of it without accused's consent or authority. The certificate was addressed to the Theatre Commander and in the absence of a contrary showing it is only reasonable to presume that accused intended it to reach the person to whom it was addressed. For the reasons stated, it is the opinion of the Board of Review that the finding of guilty of Specification 2 of the Charge cannot be sustained.

c. Specification 3 of the Charge. Accused was found guilty of stating under oath, in the course of an official investigation being conducted by Major Milton E. Jones, Air Corps: "Corporal Bouvier has never procured for me any merchandise of any nature whatsoever," which statement he did not then believe to be true (Chg, Spec 3).

The evidence shows that Major Milton E. Jones, the then Assistant Inspector General, Headquarters Command, conducted an official investigation pursuant to orders of the Chief of Staff and in the course of the said investigation, interrogated the accused under oath. One of the interrogatories propounded to accused by Major Jones in the investigation on 13 December 1946 was "Has Corporal Bouvier ever procured for you merchandise of any nature whatsoever?" The accused's answer to this question was "No, sir." His negative answer, it is contended, was false in that, as it is alleged, the accused did not then believe his statement to be true (Underscoring supplied). It appears that the only evidence offered in proof of the falsity of the alleged statement is as follows: In a subsequent investigation of the same subject by Major Jones held on 3 January 1947, accused was asked, "How much food did Bouvier obtain for you" and he stated at this time, "the food was probably a can of luncheon meat or a can of this pork, getting a loaf of bread, maybe a half a dozen eggs, that's all there was to it." He also admitted purchasing 3 bottles of brandy from Bouvier. At the trial Miss Muller testified that although she did not "see it really" Bouvier brought bread, meat, and sugar to accused's office, and that sometimes Bouvier brought whiskey. Sometimes what was brought by Bouvier would be taken from the office by accused and sometimes by Sergeant Weber.

Before we consider the truth or falsity of accused's alleged false answer to Major Jones, we must, by virtue of the language used in the question "Has Corporal Bouvier ever procured for you merchandise of any nature whatsoever?", determine the general import of the word "procure" in order to arrive at an interpretation of the question as it might be

commonly understood. The record is silent as to whether any explanation of this question was made to accused.

According to Webster's New International Dictionary, Second Edition, the word "procure" is generically derived from the Latin word "procurare," which is interpreted as (pro) for, and (curare) to take care. Its simple definition is, "To bring into possession; to obtain by any means," According to the same authority, the prefix pro, is interpreted as meaning for, but in the English language it is also interpreted to denote the meaning for, before, in behalf of, in place of, etc., depending in greater part, upon the principal word to which it is attached and the manner in which it is used, "as in procure, to gain, literally, to care for." Thus the foregoing interpretation carries the general implication or presupposes that the object of the procurement was gained, obtained or reduced to possession by the procurer for or on behalf of another (at his request, suggestion or direction.)

In Black's Law Dictionary, Third Edition, the word "procure" is defined as follows:

> "In criminal law, and in analomous uses elsewhere, to 'procure' is to initiate a proceeding to cause a thing to be done; to instigate; to contrive, bring out, effect or cause.
>
> "To persuade, induce, prevail upon, or cause.
>
> "To obtain, as intoxicating liquor, for another.
>
> "To 'procure' an act to be done is not synonymous with to 'suffer' it to be done. (See cases cited)
>
> "To find or introduce;- said of a broker who obtains a customer.
>
> "To bring the seller and the buyer together so that the seller has an opportunity to sell."

In the light of the foregoing definitions and the implied connotation contained therein, the Board of Review believes that the fair and reasonable interpretation of the word "procure" as used in the question in issue, "Has Corporal Bouvier ever procured for you merchandise of any nature whatsoever," must be construed to inquire whether Corporal Bouvier ever obtained for him any merchandise in the sense that the words "procured for you" means on accused's behalf, request or direction. Accordingly, under this interpretation of the alleged statement, it was incumbent upon the prosecution, in order to prove the offense alleged, to show (a) that Corporal Bouvier had in fact obtained merchandise of some nature for accused, (b) that the merchandise was obtained by Corporal Bouvier for accused on accused's behalf or at his request or direction,

and (c) the circumstances from which it might be inferred that at the time accused answered the interrogatory in question, under oath in an official investigation, he knew or should have known that his negative answer was in fact untrue.

The record of trial contains no evidence to show that Corporal Bouvier obtained any merchandise for accused on accused's behalf or at his behest. Consequently it cannot be said that accused's negative answer to the alleged interrogatory was untrue nor that the alleged question and answer taken together constitutes a false statement. The mere fact that it was shown and admitted that accused obtained certain foodstuffs and brandy from Bouvier does not prove nor establish the presumption that merchandise was obtained by Bouvier for accused on his behalf, or request, or direction within the purported meaning of the question in issue.

The Board's opinion in this respect is buttressed by the circumstances surrounding accused's alleged false answer to the interrogatory in question. This interrogatory is utterly out of context with the interrogatories which preceded and succeeded it. It would appear that the other interrogatories were answered freely and a number of inculpatory answers made by accused. In that it does not appear that accused was seeking to exculpate himself during the interview it would appear that he did not understand the questions as propounded to him. In a later interview when asked specifically accused admitted receiving food and liquor from Bouvier and described the circumstances under which he received the food and liquor, and these admissions have not been proven false. Under the circumstances it does not appear that accused knowingly made a false statement under oath with an intent to deceive. From the foregoing, it is our opinion that the findings of guilty of Specification 3 of the Charge cannot be sustained.

d. Specification of Additional Charge. Accused was also found guilty of wrongfully and unlawfully instructing Gitta Muller to give false and untrue testimony at an official investigation. The Specification charged that accused instructed Gitta Muller to give false and untrue testimony at an official investigation conducted by an Inspector General. In its findings the court excepted the words "conducted by an Inspector General." The offense of which accused was found guilty, in effect, constitutes the offense of solicitation of perjury (CM 231309, Tisdall). The testimony of Gitta Muller shows that after she had typed the certificate of loss, accused told her to tell anyone who might come around that she did not type the certificate. In her testimony Miss Muller was positive that accused did not specify to whom she would make this statement. Accused in his testimony stated that on 1 or 2 December 1946 he instructed Miss Muller to say that he did not type the certificate. The date shown on the certificate is 2 December 1946. Miss Muller's testimony as to the time of conversation

is inconclusive. Accused's testimony as to the time of the conversation in question is uncontradicted and the Board concludes that the conversation took place on 2 December 1946. Prior to trial, Miss Muller made two statements pertaining to a conversation she had with accused concerning the certificate of loss. One of the two statements made to Mr. Carroll, an Attorney, was introduced in evidence by the defense to impeach her testimony. The statement which was written in German was translated to the court. In this statement Miss Muller stated that accused told her that somebody from the "I.G." would come and question her about the "certificate of the lost license plates" and she should say that accused did not issue the certificate. Miss Muller also admitted a purported inconsistency in her statement to a Lieutenant Argo as shown in the following colloquy:

"Q Now, directing your attention to question number 8 in Defense's Exhibit C for identification, were you not asked the following question: 'Did you understand the second conversation with Lt. Hill?' And did you not reply thereto: 'I cannot swear to it under oath that I understood him to say that, if somebody should come from the CID or MP's, I was to say that I had not typed up the certificate.' Did you say that?

A Yes." (R 53,54)

Subsequently Miss Muller's entire statement to Lieutenant Argo was admitted in evidence over objection by the defense. The statement, although it was not adopted by Miss Muller as a true and correct statement of the facts contained therein, was consistent with her testimony in court and was admissible in evidence to explain the purported inconsistency noted by the defense (70 C.J. 1145). Neither of the pretrial statements, however, are evidence of the facts recited therein, but may be considered solely on the question of Miss Muller's credibility (CM 373083, Davis). In the Argo statement introduced by the prosecution Miss Muller asserted that accused told her she should tell the "CID" or the "MP's" that she did not type out the certificate, and in the Carroll statement that she should tell a similar story to the IG. The court could not consider these two statements as evidence that accused told Miss Muller to tell the story to any of the agencies of the Army named in the two pre-trial statements of Miss Muller. The competent evidence thus shows that accused, on 2 December 1946, instructed Miss Muller that if somebody should come around and ask about the certificate of loss she should say that she did not type it; and that the statement so solicited is false.

The evidence fails to show, however, that an investigation pertaining to accused was in progress or pending at the time accused solicited Miss Muller to give a false statement. As previously related accused's conduct in relation to his transactions with Bouvier did not become the subject of investigation until 13 December 1946. His solicitation of

Miss Muller took place prior to 13 December 1946. The evidence, therefore, does not support the finding of the court, in that it is not shown that Miss Muller was to make the statement in an official investigation, and there are no circumstances which indicate that the statement was to be made under oath (CM 227545, Folk, 15 BR 307,311). Accordingly, the findings of guilty of the Specification of the Additional Charge and the Additional Charge cannot be sustained.

6. Records of the Army show that accused is 41 years of age and married. He completed the tenth grade of school and later attended a motor maintenance school for 16 weeks. In civilian life he was a maintenance superintendent. He had enlisted service from 4 June 1942 until he was commissioned a second lieutenant 2 May 1945. He was subsequently promoted to first lieutenant. He has been awarded the Bronze Star Medal and an Oak Leaf Cluster for heroism in combat. His efficiency reports of record show five ratings of "Excellent" and one of "Very Satisfactory."

7. Consideration has been given to a brief filed on behalf of accused by Mr. Joseph S. Robinson, New York, New York, attorney for the accused, and oral argument by Mr. Robinson was heard by the Board of Review.

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

(On leave), Judge Advocate

H. W. Lynch, Judge Advocate

Joseph J. Brack, Judge Advocate

JAGH CM 327866 1st Ind

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

TO: Commanding General, Headquarters Command, European Command, APO 757, c/o Postmaster, New York, New York

1. In the case of First Lieutenant Roy N. Hill (0-2014952), Infantry, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the findings of guilty and the sentence be disapproved.

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

(CM 327866).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

JAGK - CM 327874

21 [illegible] 1948

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| UNITED STATES | ) | PHILIPPINES-RYUKYUS COMMAND |
| | ) | |
| v. | ) | Trial by G.C.M., convened at PHILRYCOM, 23-24 September 1947. Dishonorable discharge and confinement for eighteen (18) years. Penitentiary. |
| Private ANGELO A. MAZZARO (12190944), unassigned, formerly of 432nd Fighter Squadron, 475th Fighter Group. | ) | |

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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 only question requiring consideration herein is whether the record of trial is legally sufficient to support the findings of guilty, as approved by the reviewing authority, of Specification 1 of Charge I and Charge I. Under this charge and specification accused was found guilty of having deserted the service of the United States on or about 14 March 1945 while stationed on the Island of Luzon in the Philippine Islands and having remained in desertion until he was apprehended at Manila on or about 21 February 1946. Accused was arraigned on 23 September 1947 and had pleaded not guilty to the charge and specification in question. The reviewing authority approved only so much of these findings of guilty as involved a finding of guilty of absence without leave from about 14 March 1945 to about 21 February 1946 in violation of Article of War 61.

3. The fact that the initial absence of accused occurred while he was stationed overseas in the Philippine Islands is not absence "from the jurisdiction of the United States" provided for in Article of War 39 (CM 313057, Siwy, 63 BR 5).

In the case of CM 217172, Rosenbaum (11 BR 225) the accused was found guilty of desertion in violation of Article of War 58, but the reviewing authority approved only so much of the findings as involved a finding of guilty of absence without leave in violation of Article of War 61. The initial absence pleaded and proved had occurred more than two years prior to the arraignment of accused. The Board of Review, citing paragraph 87b of the Manual for Courts-Martial, 1928, said that the reviewing authority was "without power to consider such absence as a basis of punishment because punishment for such absence was barred by Article of War 39."

4. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1 of Charge I and Charge I as approved by the reviewing authority but legally sufficient to support the findings of guilty of Specification 1 of Charge II and Charge II, Specifications 1 and 2 of Charge III and Charge III, Specifications 1 and 2 of Additional Charge I and Additional Charge I, the specification of Additional Charge II and Additional Charge II and the specification of Additional Charge III and Additional Charge III and legally sufficient to support the sentence as approved by the reviewing authority.

Christy D. Silvers, Judge Advocate

Gilbert E. Schroyer, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 327874 1st Ind

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

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

1. In the case of Private Angelo A. Mazzaro (12190944), unassigned, formerly of 432nd Fighter Squadron, 475th Fighter Group, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon disapproval of the findings of guilty of Specification 1 of Charge I and Charge I you will have authority to order the execution of the sentence.

2. In view of all the circumstances of the case it is recommended that the period of confinement be reduced to twelve 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 327874).

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 327988 10 February 1948

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| UNITED STATES | ) | FLYING DIVISION, AIR TRAINING COMMAND |
| v. | ) | Trial by G.C.M., convened at Barksdale Field, Louisiana, 28-30 July 1947. Dismissal and confinement for five (5) years. |
| First Lieutenant ROBERT P. HOGG (O-798635), United States Air Force. | ) | |

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 Charges and Specifications:

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

Specification: In that First Lieutenant Robert P. Hogg, Air Corps, did, at Barksdale Field, Louisiana, on or about 25 February 1947, with intent to deceive the Base Commandant, Barksdale Field, Louisiana, and the Barksdale Field Exchange Council, officially report to the said Base Commandant, Barksdale Field, Louisiana and the Barksdale Field Exchange Council, that the Consolidated Summary of Inventory of the Barksdale Field Exchange for the period 25 January 1947 to 25 February 1947 was accurate and correct, which report was known by the said First Lieutenant Hogg to be untrue.

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

Specification 1: In that First Lieutenant Robert P. Hogg, Air Corps, did, at Barksdale Field, Louisiana, on or about 11 December 1946, feloniously embezzle by fraudulently converting to his own use, one 21-inch Ladies' Traveling Bag, the value of about $19.50; one 18-inch Ladies' Traveling Bag, the value of about $19.50; one Ladies' Wardrobe Bag, the value of about $30.50; one Man's Wardrobe Bag, the value of about $30.50; and one Ladies' 26-inch Pullman Bag, the value of about $24.25; of a total value of about $124.25, the property of the Barksdale Field Post Exchange, entrusted to him by virtue of his office as Exchange Officer of the Barksdale Field Exchange.

Specification 2: (Nolle Prosequi)

Specification 3: In that First Lieutenant Robert P. Hogg, Air Corps, did, at Barksdale Field, Louisiana, on or about 25 January 1947, feloniously embezzle by fraudulently converting to his own use, the sum of about $1,750.00, the property of the Barksdale Field Exchange Fund, entrusted to him by virtue of his office as Exchange Officer, Barksdale Field Exchange.

Specification 4: Same as Specification 3 except the date, "7 March 1947," and the sum "$90.00."

Specification 5: Same as Specification 3 except the date, "3 March 1947," and the sum "$240.75."

Specification 6: (Nolle Prosequi)

Specification 7: (Finding of Not Guilty)

Specifications 8, 9, 10, 11, 12: (Nolle Prosequi)

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

Specification 1: In that First Lieutenant Robert P. Hogg, Air Corps, did, at Barksdale Field, Louisiana, on or about 22 October 1946, wrongfully and unlawfully cause to be made a claim against the Barksdale Field Exchange Fund, and did approve, allow, and cause to be paid, said claim against the Barksdale Field Exchange Fund, in the amount of about $104.03, for purported official traveling expenses alleged to have been incurred by John E. Miller, which claim was false and fraudulent in that the claim was prepared for traveling expenses over a period of ten (10) days, when, in fact, John E. Miller only performed five (5) days of travel, and which claim was then known by the said First Lieutenant Robert P. Hogg, to be false and fraudulent.

Specification 2: (Nolle Prosequi)

Specification 3: In that First Lieutenant Robert P. Hogg, Air Corps, did, at Barksdale Field, Louisiana, on or about 17 January 1947, wrongfully and unlawfully cause to be made a claim against the Barksdale Field Exchange Fund, and did approve, allow, and cause to be paid, said claim against the Barksdale Field Exchange Fund, in the amount of about $58.86, for purported official traveling expenses alleged to have been incurred by J. M. Lofley, which claim was false

and fraudulent in that the claim was prepared for traveling expenses for travel that was not made by J. M. Lofley, and which claim was then known by the said First Lieutenant Robert P. Hogg, to be false and fraudulent.

Specifications 4, 5: (Nolle Prosequi)

Specification 6: In that First Lieutenant Robert P. Hogg, Air Corps, did, at Barksdale Field, Louisiana, on or about 3 March 1947, wrongfully and unlawfully, and with intent to defraud, cause a Check No. 19790 to be drawn against the Barksdale Field Exchange, payable to Sergeant Bert J. Leahy, in the amount of about $240.75, which check was false and fraudulent in that there was no such person as Sergeant Bert J. Leahy, and was then known by the said First Lieutenant Robert P. Hogg to be false and fraudulent.

Specification 7: In that First Lieutenant Robert P. Hogg, Air Corps, did, at Barksdale Field, Louisiana, on or about 7 March 1947, wrongfully and unlawfully cause to be made a claim against the Barksdale Field Exchange Fund, and did approve and allow said claim against the Barksdale Field Exchange Fund, in the amount of about $36.77, payable to J. M. Lofley for alleged traveling expenses, the said First Lieutenant Robert P. Hogg well knowing that the claim was false and fraudulent in that the travel had not been performed by J. M. Lofley.

Specifications 8, 9, 10, 11, 12: (Nolle Prosequi)

Specification 13: (Finding of Not Guilty)

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 7, Charge II, and Specification 13, Charge III, and guilty of all other Specifications and Charges upon which trial was had. 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 the United States Government a fine of $2500.00 and to be confined at hard labor for ten years. The reviewing authority approved only so much of the sentence as provided for dismissal and confinement at hard labor for five years and forwarded the record of trial for action under Article of War 48.

3. The evidence pertaining to the findings of guilty is substantially as follows:

During the period from May 1946 to the latter part of March 1947, the accused was detailed as post exchange officer of the Barksdale Field Exchange under the command of Colonel Victor H. Strahm, station commander (R 49, Pros Ex 2). The Post Exchange, Camp Polk, Louisiana, was a branch

exchange of the Barksdale Field Exchange, and as such, came under the accused's jurisdiction.

a. Charge I, Specification 1: (False official report)

On or about 25 January 1947, accused picked up some damaged watches, belonging to the Camp Polk Branch Exchange, from Homer A. Self, Manager of the Branch Exchange, stating that he would have them repaired. These watches were never returned to the Camp Polk Exchange and on or about 20 February 1947, accused instructed Mr. Self to carry them on the Camp Polk Exchange inventory for that month (R 87,88). The original copy of inventory of the Camp Polk Branch Exchange, dated 25 February 1947, was submitted to accused at the Barksdale Field Post Exchange and the four watches, which had been picked up by the accused from Mr. Self for repair, were listed in the inventory on a separate sheet as property titled, "Department 'E', Jewelry," of a value of $109.40 (R 92-93, 118, 139). Accused told Mr. Albert E. Brown, office manager of the Exchange, that he wanted to buy these watches. Mr. Brown suggested to accused that this could be accomplished by removing the inventory sheet (Department "E", Jewelry Account) which was attached to the Camp Polk Exchange inventory, dated 25 February, and then raising the inventory figures shown in the Department "A", Tobacco account, and Department "F", Stationery account, in an equivalent amount to absorb the difference in the inventoried value of the watches. Accused approved this suggestion and directed Mr. Brown to make the necessary alterations in the Camp Polk Exchange inventory records which Mr. Brown did (R 118-119). On 5 March 1947, accused paid Mr. Self $109.40 for the watches (R 87).

A Consolidated Summary of Inventory of the Barksdale Field Exchange, dated 25 February 1947, certified as correct by accused, was admitted in evidence (R 58, Pros Ex 3). The certificate thereon reads as follows:

> "I certify that I have tested the accuracy of the inventories and have counted the cash and coupons on hand and that, in my opinion, the amounts shown above are substantially correct." (R 58, Pros Ex 3)

By deposition admitted in evidence as Prosecution Exhibit 2, Colonel Strahm testified that accused submitted to him the Consolidated Summary of Inventory for the period 25 January to 25 February 1947, and the report was accepted by Colonel Strahm as being accurate and correct in accordance with the certificate on the report (R 49). The Consolidated Summary of Inventory consists of two pages with two sheets identified as Inventory Summaries, attached as supporting papers. The supporting papers reflect the selling price and cost of merchandise on hand at the Barksdale Field Exchange and the Camp Polk Branch Exchange.

As to the alterations made in the Camp Polk inventory, Brown testified that:

"A sheet showing $109.40 worth of watches was taken out and the retail value of $109.40 was substituted for by adding $108.00 worth of tobacco in one place and $1.40 worth of greeting cards in another.

* * *

"There is no amount shown for Department E, Jewelry, representing the inventory sheet which was removed. The value for Department A, Tobacco, is $108.00 more than the inventory as originally prepared. The value of Department F, Stationery, is $1.40 more than the inventory originally prepared.

* * *

"The substitutions for Department A, Tobacco, appears on Page W 22735, where there appears on line 16, 'Camels, each, 900, at 12 cents, $108.00', and on Sheet W 22726, where there appears on line 8, 'Christmas Cards, each, 140, at one cent, $1.40'." (R 92,93)

The sheet containing the "computation" of watches was destroyed. Brown also testified that as a result of the alterations there was an error of $8.44 in the cost value of the retail department inventory of the Camp Polk Exchange which is entered on page 2 of the summary.

Harold V. Purnell, an auditor, testified that he had audited the Consolidated Summary of Inventory of the Barksdale Field Post Exchange for the period 25 January to 25 February 1947 and found that there was a discrepancy in the cost value of merchandise as listed on line 2, page 1, of the inventory in the amount of $8.44. Mr. Purnell explained that cost value was determined by taking a percentage of the retail price, that the percentage used varied with the particular type of merchandise, and that different types of merchandise with the same retail price would have a different cost price (R 62,63,65). On cross-examination Purnell admitted that the arithmetic of the Summary of Inventory based on the substituted entries was correct, that the items of tobacco and greeting cards were entered in their proper departments and if the tobacco and greeting cards were physically present the summary of inventory was correct (R 65,66).

b. Charge II, Specification 1, (Embezzlement of post exchange property of a value of $124.25).

During December 1946 accused accompanied by J. M. Lofley, civilian exchange manager, went to the luggage department in the exchange warehouse. Accused inspected five pieces of luggage and told Daniel Stone, Junior, warehouse manager, to mark the pieces of luggage "down to $1.00 on a price change voucher," and directed the luggage to be shipped to his wife in Florida. The luggage was subsequently shipped to accused's wife. At accused's direction a requisition was made on the warehouse

from the main store for the five pieces of luggage, and accused gave Lofley, five dollars in payment (R 124,125,149,150). A price change voucher on the luggage was made 18 January 1947 bearing accused's signature (R 124,125). According to the voucher the old selling prices of the luggage aggregated $124.25. The voucher also recited that the luggage had been damaged by water (R 125, Pros Ex 25). In Lofley's opinion the luggage was in saleable condition, and appeared identical to the other luggage there. Stone testified that from outward appearances the luggage looked all right (R 124,150). Neither witness inspected the inside of the luggage (R 130,150).

c. Charge II, Specification 3, (Embezzlement of $1750.00).

Upon consolidation of the Perrin Field Exchange with the Barksdale Field Exchange the latter exchange acquired among other assets a bowling alley and dry box (R 97). On 8 January 1947 Robert R. Parmley, of Loganspot, Louisiana, a bowling alley operator, offered accused $3,000.00 for the bowling alley. In a conversation with Brown on 9 January 1947 accused asked a great many questions about the method of pricing bowling alleys and indicated that he was going to get a side present, on the sale of the Perrin Field Alleys, from a veteran (R 121,122). On 13 January, Parmley received a call from accused from the Baker Hotel of Dallas and was informed he could have the alleys and equipment for $3200.00 (R 70). Parmley testified that on 15 January 1947 he and accused went to Perrin Field and inspected the alley. Parmley purchased the alley and a dry box paying $3200 for the alley and $150.00 for the dry box (R 70,71). In payment Parmley gave accused three one-thousand-dollar bills, three one-hundred-dollar bills, two twenty-dollar bills, and a ten dollar bill. Parmley wrote out a receipt which recited "Received full payment for one (1) Bowling Alley four 4 lanes and equipment located at Perrin Field Tex, also one (1) Dry Box & unit from Robert R. Parmley." This receipt was signed by accused. Accused returned to Barksdale Field on 16 January 1947, and two days later on 18 January showed Brown two one-thousand-dollar bills and stated that he wished "to apply $1600.00 to the sale of the bowling alley and dry box from Perrin Field." Brown testified that he objected to accepting currency of such large denomination and some days later accused turned in $1600 in "one-hundreds and a few fifties" (R 98,111). Brown admitted that in a prior statement he said that accused gave him sixteen $100 bills but subsequent to that time he had refreshed his memory by referring to "the officer's cash account" (R 111). At the time accused handed Brown a copy of the receipt he executed for Parmley (R 98, Pros Ex 18). Original and duplicate receipts running to Parmley in the amounts of $1500.00 for the bowling alley and $100.00 for the dry box were prepared, and the copies were signed by accused (R 98, Pros Ex 19,20). Accused received a receipt in the amount of $1614.85, dated 25 January 1947 which, among other things, according

to Brown, represented the $1500 turned in for the bowling alley and $100 for the dry box (R 98, Pros Ex 98). Sometime after his purchase of the bowling alley and dry box Parmley was contacted by the Provost Marshal who suggested that Parmley see accused and get a receipt showing the actual amount he had paid (R 72). On 20 March, Parmley saw accused at Barksdale Field and asked for a receipt showing the actual amount he had paid. Accused told Parmley that he could give him a receipt for $1500 for the bowling alley and $100.00 for the dry box, but could not give him a receipt for the full amount as he (accused) had used the balance to make up shortages in other accounts. Parmley did receive from accused a letter which stated that the bowling alley had a cost value of $6,125.42 (R 70, Pros Ex 8). Although Parmley made no mention of anyone else being present during his conversation with accused on 20 March, Brown testified that he was present and heard Parmley ask accused for a receipt in the amount of $3350.00 (R 120).

d. Charge II, Specification 4, (Embezzlement of $90.00, property of the Barksdale Field Exchange Fund).

As previously related in paragraph 3a, supra, accused on or about 25 January 1947 picked up some damaged watches at the Camp Polk Branch, Barksdale Field Exchange, stating that he would have the watches repaired, indicated to Brown his purpose of purchasing the watches and subsequently on 5 March 1947 paid the sum of $109.40 for the watches. On cross-examination Self, the manager of the Camp Polk Branch testified as follows with reference to the watches carried on the 25 February inventory:

> "Mr. Self, I will question you about Prosecution's Exhibit '12'. Watches, each, one, $14.40; Watches, Waltham, each, one, $18.00; Watches, Benrus, each, two, $38.50. That's your February 25, 1947 inventory, is that correct?
> "Yes, sir." (Underscoring supplied) (R 139)

Sometime during the first ten days of February accused showed Lofley, the civilian exchange manager, four or five watches which he (accused) stated he had purchased from the Camp Polk Exchange. Accused gave two of the watches to Lofley with instructions to put them on sale and have the money realized upon sale turned in to the office. Lofley gave the watches to Miss Grace Dyson who was in charge of the jewelry counter (R 126,152). Miss Dyson testified that on or about 1 February 1947 she received the following watches in her department: A Benrus selling for $240.75, a Walton selling for $112.00, and two other Waltons, one selling for $90.00, and the other for $112.00. She received the latter two from Lofley with instructions to bring the money for these two to the office rather than "ring it up." She subsequently sold the $90.00 Walton watch and gave the money to Brown who put it in an envelope (R 152). Brown testified that on the afternoon of 4 March 1947 Miss Dyson gave him

$90.00. At the time, accused was away and ascertaining upon his return that Brown had some money for him, instructed Brown to credit it to his (accused's) account in the Bossier State Bank. Brown made the deposit on 20 March 1947 (R 94, Pros Ex 13, R 95).

e. Charge II, Specification 5, (Embezzlement of $240.75, property of Barksdale Field Exchange Fund); Charge III, Specification 6, (Issuing a check to a fictitious person with intent to defraud).

As stated in paragraphs 4a and d, supra, accused had picked up some damaged watches at the Camp Polk Branch of the Barksdale Exchange and these watches were carried on the 25 February inventory of the Branch Exchange. Subsequently on or about 5 March 1947 accused paid $109.40, for these watches.

Self, the manager of the Branch, testified that two of the watches carried on the 25 February inventory were "Ladies' Benrus Watches" which had sold for $192.50 (R 139). On the 25 February inventory the selling price of the Benrus Ladies' Watch was listed as $38.50 (R 139).

On or about 3 March 1947 Bert J. Leahy, Shreveport, Louisiana, received a call from accused to come out to Barksdale Field to discuss the purchase of surplus property. Leahy, accompanied by G. C. Harper, also of Shreveport went out to Barksdale Field and after inspecting surplus equipment in the warehouse went to the Exchange (R 74).

Leahy testified with respect to accused's action after their arrival in his office as follows:

> "* * * he asked me for my full name, which I printed and handed to him. A few minutes later a gentleman came in and he gave him several notation and told him to fix them up. He came back sometime later with a green piece of paper that looked to be about 4'x9'. Mr. Harper and I were sitting beside his desk discussing various prices on surplus which were listed. He said, 'give me your signature' and before realizing what was happening I had written my signature on this piece of paper. I later realized it was a check. I asked him what it was for and he said it was just a formality. I said, 'What are you trying to do? Get me in trouble?' That was just about all there was to it. I did not realize what it was until it was all over. He said it was army routine or a formality. I said, 'I do not want to get in trouble' and he said, 'don't worry'." (R 74)

Leahy identified his signature on a piece of paper, the reverse side of which was a check payable to "Sgt Bert J. Leahy" in the amount of $240.75, drawn on the Barksdale Field Exchange Fund at the Bossier State Bank,

bearing the signature "R. P. Hogg" as drawer, acting for the "Barksdale Field Exchange" (R 74, Pros Ex 75). At the time Leahy signed the paper he did not see the face of the paper. Leahy also recalled that at the time he signed there was another piece of paper attached to it. The two pieces of paper were of the same length and width and were folded together (R 75). Leahy testified that he had been in the armed forces but had never attained the rank of Sergeant (R 75). On cross-examination he identified Brown as a person who had been in and out of the office during his conversation with accused. He could not state that Lofley had appeared in the office, but stated that some other employee talked to accused once or twice (R 77). During the conversation accused took a ladies' watch out of his drawer and gave it to an employee (R 77). Leahy had been a member of the Shreveport Police Department and an insurance adjuster for five years (R 78). He designated the sheet which was attached to the check as "a letter of advice," and admitted that a letter of advice was a check attachment but stated he did not realize he had signed a check until later (R 75,78,79). On redirect examination Leahy testified with relation to signing the check that:

"Q. What precisely had transpired and how long a period of time between the time Lieutenant Hogg received this piece of paper and the time the witness realized he had signed a check?

A. The three of us were talking. Suddenly Lieutenant Hogg passed me this piece of paper and said, 'give me your signature'. I did not realize until it had happened what was going on and what it was all about. I was in no position to question his intentions and I did not assume that he would be having something out for me to sign that was not all right.

Q. Did Lieutenant Hogg indicate where on the piece of paper he wished you to sign?

DEFENSE: Objection.

LAW MEMBER: Overruled.

A. As I recall it, he did.

Q. When, precisely, did you realize that you had signed a check?

A. A minute or so afterwards. He took the check and folded it. I asked him what he was trying to do." (R 79,80)

On examination by the court Leahy stated that accused told him it was "routine or army procedure" (R 80). On re-cross-examination Leahy admitted that although a moment after signing the check he realized what

he had done he made no report of the matter until he was questioned by officers of the law (R 80). With reference to Leahy signing a paper Harper, Leahy's companion, testified:

> "* * * Lieutenant Hogg asked Mr. Leahy what his full name was. He gave it to him - wrote it on a piece of paper and he called for someone to come in and he gave him that and a package and told him to fix it up for him. From there we went out and looked at some equipment to be sold. When we got back Lieutenant Hogg had something there for Mr. Leahy to sign.
>
> * * *
>
> "Lieutenant Hogg just handed him the piece of paper, shoved it out on the desk and told him to sign it. Bert said, 'what do you want me to put on it'. He told him exactly like he gave it to him. As he went to sign it, I said, 'Are you going to sign it without reading it?' Lieutenant Hogg informed Leahy that it was a matter of form. * * *" (R 83)

On cross-examination Harper stated that he did not hear accused call Leahy "Sergeant" and he did not see accused leave the room (R 84). Harper identified Lofley as the man that came in and received the piece of paper with Leahy's name on it and who later came back with the paper to which Leahy signed his name (R 84,85). He also stated that he had seen Brown (R 85). At the time Lofley received the piece of paper he was also handed a package the size of a little jewelry box by accused (R 85).

Brown testified concerning the transaction as follows:

> "Q. Can you explain to the court the circumstances surrounding the drawing and cashing of that check?
>
> A. Yes, sir. On the 3rd of March, 1947, Lieutenant Hogg explained to me that he wished to return to the Exchange a watch he had acquired at a reduced price at Camp Polk through a refund made out to a veteran friend of his who would be out that afternoon. On the afternoon of 3 March 1947, Lieutenant Hogg handed me the watch in a box and a slip of paper with the name 'Bert J. Leahy' written on it. This occurred in Lieutenant Hogg's office and two gentlemen were sitting in the settee at the one side of his desk at that time. I inquired of Lieutenant Hogg the rank of Bert J. Leahy and he advised me that he was a Sergeant. He also instructed me to have Mr. Lofley prepare the necessary receiving report. I took the watch and slip of paper to Mr. Lofley and transmitted the Lieutenant's wishes.* * *
>
> * * *
>
> A short time later, Mr. Lofley handed me a receiving report from the main store, or, I should say, the necessary paper work, and I had prepared Barksdale Field Exchange check in

the amount of approximately $190.00. I took that check with the attached voucher receiving report and placed it in Lieutenant Hogg's 'In' basket. A short time thereafter, Mr. Lofley appeared with the first check and attachments and a new receiving report in the amount of $240.75. I voided the first check and prepared Barksdale Field Check No. 19790, payable to Sergeant Bert J. Leahy, in the amount of $240.75, and placed that check and voucher in Lieutenant Hogg's 'In' basket and left his office. A short time later, Lieutenant Hogg called me into the office and handed me the $240.75 check, which was indorsed on the back 'Bert J. Leahy' and instructed me to cash the same for him. I cashed the check at the Exchange Office and turned the $240.75 over to Lieutenant Hogg that evening." (R 90,91)

Brown identified the signature on the face of the check, the reverse side of which Leahy had signed, as being that of accused (R 74, Pros Ex 9, R 90). The voucher which had been attached to the check had the following wording thereon "3 March 1947. Refund on 1 only Benrus Watch, Ladies', $240.75." Brown identified a carbon copy of the check and voucher as being identical to the original and the carbon was admitted in evidence (R 91, Pros Ex 10). On cross-examination Brown testified that when accused gave him the watch to give to Lofley he asked accused Leahy's rank and was told "Sergeant" (R 104). Although Leahy and Harper were present they did not indicate they had heard the conversation between Brown and accused which was carried on in a low tone of voice. Brown also stated that at the time Leahy and Harper were conversing among themselves, Brown admitted drawing up both the $192.50 check and the $240.75 check. He drew up the first check on the basis of a receiving report "okayed" by the Exchange manager, and explained the receiving report in the following terms:

"* * * when merchandise is offered for return, the department to which it is returned prepares a receiving report describing the merchandise and who it was received from, and its value, and we are authorized to make the refund on the okay of certain officials." (R 106)

Accused had not told Brown what amount to use for the refund but merely told Brown to have Lofley do the necessary paper work. The $240.75 check was likewise drawn by Brown, the amount of the check being determined from a receiving report given to Brown by Lofley (R 106). Although Brown did not see the inside of the box which accused handed him, he concluded that the box contained one of the watches obtained from the Camp Polk Branch Exchange (R 108). On redirect examination Brown testified that after the transaction was completed he reported it to Colonel Kunish (R 119).

As to his part in the transaction Lofley testified:

"I received the watch from Mr. Brown. Made out a refund slip payable to Sergeant Bert J. Leahy, delivered the refund slip to Mr. Brown. The refund slip was made out in the amount of $192.50. A few minutes later, I was called to Lieutenant Hogg's office. He handed me the refund slip with the check attached and said, 'How did you arrive at this price of $192.50?' I explained to him that was the amount of the price tag attached to the watch. He explained to me that we had similar watches in stock marked at $240.75. He further instructed me to void the refund slip and prepare a new one in the amount of $240.75, which I did." (R 127)

After preparing the refund voucher in the amount of $240.75 Lofley turned it over to Brown. The watch itself was given to Miss Dyson who put it in stock.

f. Charge III, Specification 1, (False claim).

On or about 6 October 1946 John E. Miller, the post tailor, accompanied accused on a trip to New York. It was believed that clothing would be carried in the Post Exchange and the trip was made for the purpose of procuring clothing. Miller arrived in New York on Tuesday and was back in Shreveport Friday night (R 147). Lofley who also made the trip testified that he and accused were gone about ten days and that Miller returned three or four days earlier. On the last occasion Lofley saw Miller in New York the latter told Lofley and accused that he was leaving the next morning by commercial plane (R 129). On his return from New York Miller was given a copy of travel orders by Brown. The copy was signed. Miller identified a signature on the reverse side of a check as being his. (R 100, Pros Ex 23, R 147). With reference to the circumstances under which his signature was affixed thereon Miller testified:

"I was called to the Post Exchange by Mr. Brown, who handed me this check. It was handed to me, to the best of my knowledge, face down with instructions to indorse same, which I did. * * *" (R 148)

Miller claimed that he never received the proceeds of the check (R 148). Miller also testified that he never made a claim for the expenses incurred by him on the New York trip, and that he was on the trip for only five business days (R 148). On cross-examination he testified that he did not know the amount of the check at the time he endorsed it (R 148). With reference to Prosecution's Exhibit 23 which contained the original of the check indorsed by Miller, Brown testified:

"This is the original and the exact duplicate carbon of Barksdale Field Exchange Check No. 18225, dated 22 October 1946, payable to John E. Miller, in the amount of $104.03, covering the reimbursement for expenses of a trip to New York, the 6th to 16th of October, 1946." (R 100)

The carbon copy had a voucher attached by perforations itemizing expenses for a ten day trip to New York. The original voucher was not in evidence. The original check bore the following legend in perforated letters and numerals on its face: "PAID" "10 25 46" "84.398". On the reverse side under Miller's endorsement was stamped the words: "Bossier State Bank TO THE CREDIT OF" followed by two lines on the first of which was written "Barksdale PX" and on the next line the signature of a person who designated herself as "teller."

Brown also testified that Miller did not receive any money on the check (R 117).

g. Charge III, Specification 3, (False claim).

On or about 17 January 1947 Lofley was called to accused's office and was told by accused that he (accused) had been arrested for speeding in Hallsville, Texas, and that it would be necessary to put Lofley on orders to go to Perrin Field. At the time accused had a check lying on his desk face down. Accused told Lofley to endorse the check which Lofley did (R 128). The following day Lofley endorsed another check for accused. Lofley testified:

"The first check was signed on or about January 16, 1947, the following day Lieutenant Hogg called me to his office and said Mr. Brown had indorsed the check payable to the account of Lieutenant R. P. Hogg. He stated further that he did not want the check to go through that way. He said he had voided the other check and told me to indorse this check which was laying face down on his desk." (R 129)

Lofley identified his signature on the reverse side of a check payable to him in the amount of $58.86, drawn by accused on the exchange account at the Bossier State Bank. Lofley stated that a travel directive dated 10 January 1947 directing him to travel to Perrin Field on or about 11 January 1947 and signed by accused had not been seen by him until after "the investigation" had started. Further, Lofley denied that he had ever made a trip to Perrin Field and had never instigated a claim for travel expenses to Perrin Field (R 128). The checks and travel order were prepared by Brown at accused's direction. Brown testified that:

"On the 16th of January, 1947, Lieutenant Hogg instructed me to prepare orders for Mr. Lofley to accompany him to Perrin Field and Dallas, Texas, the trip from which he, Lieutenant Hogg, had just returned, in order that he, Lieutenant Hogg, might be reimbursed for some of the expenses of the trip. He presented gasoline tickets and approximate figures on meals and I had the travel order, which I have a short time ago identified, prepared. I also had prepared the Barksdale Field Check, the remainder of which I have recently identified. I delivered the check and the voucher attachments to Lieutenant Hogg and a short time later, he reappeared with the check indorsed by Mr. Lofley and instructed me to send it to his home town bank for deposit to his credit. I prepared a typed indorsement on the check appropriate for safeguarding the funds in the mails which would permit the check to be deposited only to his credit at Val Prazo State Bank, Val Prazo, Florida. It occurred to me that this might not be agreeable to his wishes.

* * *

"And, I exhibited the check to him, bearing the indorsement I have just described. He instructed me to reprepare the check, and I did, so preparing the check dated 17 January 1947, which I have recently identified. I mutulated the first check, tearing out a portion of the signature element, and the portion showing the indorsement, and had the gasoline tickets attached to the exact duplicate voucher of the new check." (R 96,97).

With relation to Prosecution's Exhibit 15 Brown testified on direct examination:

"Q. Mr. Brown, I hand you another document for purposes of identification.
A. This is Barksdale Field Exchange Check No. 19294, dated 17 January 1947, payable to J. M. Lofley in the amount of $58.86, and the carbon copy of that check.

Q. Is that the duplicate original?
A. Yes, sir. The carbon copy duplicate original of that check.

Q. Is there any attachment to the duplicate original of that check?
A. Yes, sir, It is a description of expenses of the trip to Perrin Field and Dallas, Texas on the 11th to 15th of January, 1947.

Q. And, is the attachment to Check No. 19295, the duplicate original, the same as the original, would previously have been attached to the original check?
A. Yes, sir.

Q. Whose signature appears on the original of that check?
A. Lieutenant R. P. Hogg, Exchange Officer.

Q. Can you positively identify that as his signature?
A. Yes, sir." (R 95)

On cross-examination Brown testified:

"Q. You knew at the time that you gave Lieutenant Hogg this money that, if the facts you stated were correct, they constituted a theft or embezzlement, didn't you?
A. By the Exchange Officer, yes.

Q. You knew that he was committing a theft and a felony, didn't you?
A. I am not familiar with the exact specifications.

Q. Did you ask Lieutenant Hogg to give you a receipt for this money?
A. It didn't appear necessary, inasmuch as the money was forwarded to the Val Prazo Bank, and there would be a record.

Q. This money wasn't sent to the bank, was it?
A. As I recall, it was.

Q. Do you have any proof that it was? Who sent it?
A. I went over to the bank and purchased the bank draft.

Q. Do you have a copy of anything from the bank to prove that?
A. No, I haven't.

Q. Did you pay this money to Lieutenant Hogg in the presence of anyone?
A. No. I bought a bank draft payable to his bank.

Q. Is it a fact that you kept this money?
A. It is not." (R 110)

h. Charge III, Specification 7, (Allowance of false claim against the Barksdale Field Exchange).

A travel directive dated 3 March 1947 directing Lofley to proceed to Camp Polk, Louisiana, on or about 4 March 1947 was introduced in evidence (R 99, Pros Ex 22). Brown identified the signature on the directive as being that of accused (R 99). A carbon copy of Post Exchange Check No. 19798 payable to Lofley in the amount of $36.77, and attached carbon copy of voucher itemizing expenses of a trip to Camp Polk, Louisiana, 4-6 March 1947 were admitted into evidence (R 100, 138, Pros Ex 29). Brown testified that the carbon copy was an exact duplicate of the original and that the original check was signed by accused. A photostatic copy of the original was admitted in evidence and except that the photostatic copy bore the signature "R. P. Hogg" was identical

in content to the carbon copy (R 138, Pros Ex 29). Brown turned the original check over to Major Thomas P. Carter, the Provost Marshal (R 100,115). When accused presented the check to Brown it did not bear Lofley's indorsement and as of the June 1947 bank statement the check had not been cashed (R 115). Lofley denied that he had made a trip to Camp Polk, Louisiana, on or about 4 March 1947. He further stated that he did not see the check which was issued for the trip (R 134).

4. Evidence for the defense.

After having been apprised of his rights accused elected to remain silent as to the merits of the case, but did testify on an interlocutory matter. Since the matter then in issue was resolved in favor of the defense it is not necessary to set forth accused's testimony pertaining thereto.

Mr. Grady V. Durrett testified that he was general manager of the Post Exchange at Hobbs, New Mexico, and that he had formerly been warehouse manager and office manager of the Post Exchange at Perrin Field. On 10 January 1947 he, accompanied by accused, looked over the bowling alley at Perrin Field. In Durrett's opinion the alley was in poor condition and $1500.00 was a reasonable price for the alley (R 163,164, 165). While he was at the Post Exchange at Alamogordo, New Mexico, that Exchange purchased a four lane alley from the Fort Bliss Exchange and the cost of picking it up, transporting it, and installing it was between $2400 and $2500 (R 165,166). On cross-examination Durrett testified that he never had any experience in the operation of a bowling alley (R 167).

Major Evan L. Roberts, the officer in charge of the Dallas Regional Office, Army Exchange Service, testified that the sale of the Perrin Field bowling alley was reported to his office and that there were no suspicions of fraud entertained by his office in connection with the sale (R 167,168).

Lieutenant Colonel Deak K. Givens testified that he had known accused since May 1946 and had never heard any derogatory remarks concerning accused's character and reputation for honesty (R 175). On cross-examination Colonel Givens testified that he had been stationed at the same post with accused and had not heard his honesty discussed (R 176). On redirect examination Colonel Givens stated that he was not an intimate friend of accused.

Major John R. Pennington testified that he had been on the Post Exchange Council for thirteen months and had known accused during that time; that he had never heard any derogatory remarks concerning accused's honesty (R 177).

Other testimony adduced by the defense pertained to a Specification upon which a finding of not guilty was made and will not be set forth.

5. For the prosecution in rebuttal.

Robert R. Parmley recalled as a witness for the prosecution testified that it cost him $1800 to pick up, transport, and install the alleys he had purchased at Perrin Field (R 181).

6. Accused stands convicted of making a false official report in violation of Article of War 95, of three offenses of embezzlement from the Barksdale Field Post Exchange in violation of Article of War 93, of three offenses involving false claims against the Barksdale Field Post Exchange, and of causing a check to be drawn to the order of a fictitious payee in violation of Article of War 96. With the exceptions of Specification 5, Charge II, and Specification 6, Charge III, which will be discussed jointly, the other offenses will be discussed separately in the order in which they appeared on arraignment.

a. Charge I, Specification; (False official report).

The uncontradicted evidence of record shows that on or about 25 January 1947 accused, the Post Exchange Officer of the Barksdale Field Post Exchange, picked up four watches from the Camp Polk Branch of the Exchange, evincing the intention of having the watches repaired. On 20 February accused instructed the manager of the Camp Polk Branch to carry the four watches on the inventory of the branch for that monthly period, and the four watches were carried on the inventory of the branch dated 25 February 1947. At the time the Camp Polk inventory came to the Main Exchange at Barksdale Field accused told Brown, the office manager of the Exchange, that he intended to buy the four watches. Brown suggested that the sheet containing the watches be taken out of the Camp Polk inventory and that there be substituted in the inventory items which could be computed to the same retail value as the watches. Accused directed that this be done. Brown removed the sheet listing the watches and on the sheet representing the tobacco department added a quantity of cigarettes and to the sheet representing the stationery department a quantity of greeting cards. The total retail value of the inventory was not effected by the deletion and additions made. The cost value of the inventory, however, was affected. Cost value of the articles inventoried was determined by taking a percentage of the retail value. The percentages used in the tobacco and stationery departments differed from the percentage in the jewelry department under which the watches were inventoried. As a result the cost value total was in error in the amount of $8.44. The Camp Polk inventory was incorporated into the 25 February 1947 consolidated report of inventory of the Barksdale Field Exchange and resulted

in the cost value total of that report being in error to the same extent as the comparable entry in the Camp Polk inventory. Accused certified the accuracy of the inventory and the same was submitted to Colonel Strahm, the Commandant of Barksdale Field, who accepted the report as correct. It is clear that the report submitted by accused to Colonel Strahm was false, and known to accused to be false in that erroneous resulting cost value total in the report was attained by the deletion and substitutions directed in the Branch inventory by accused for the purpose of concealing questionable conduct on his part as Exchange Officer. The making of a false official report is a violation of the 95th Article of War (CM 247981, Cobb, 50 BR 11,17). The court was warranted in finding that accused made a false official report as alleged.

b. Charge II, Specification 1, (Embezzlement of Post Exchange property of a value of $124.25).

During December 1946 accused inspected five pieces of luggage in the luggage department of the Exchange warehouse and ordered the prices of the individual pieces of luggage marked down to $1.00 on a price change voucher. There was no evidence that the luggage had been damaged, or was in any different condition from the other luggage stored in the warehouse, and there was no showing that the other luggage was similarly marked down in price. Accused paid $5.00 for the luggage and had it shipped to his wife. Subsequently he executed a price change voucher which showed the aggregate selling price of the luggage prior to the markdown as $124.25.

It is clear that had accused, the Post Exchange Officer, taken the luggage in question and shipped it to his wife he would be guilty of embezzlement. It cannot be contended that the device to which accused resorted in this case renders ineffectual his conviction of embezzlement. The authority of an exchange officer with respect to contracts at the time in question is set forth in par 201 AR 210-65, 12 June 1945 as follows: "He is, within the specific authority vested in him by these regulations, empowered to execute contracts in the name of the exchange." Likewise pertinent to the instant case is par 38 of the above cited Army Regulation: "Price lists will be posted conspicuously in all activities of exchange, including those of concessionaires, and articles stocked for sale will be conspicuously priced."

It may be presumed from the contractual authority vested in the exchange officer that he had authority to fix prices of articles to be sold in the Exchange. It may not be presumed from this authority that an exchange officer could fix prices on specific items of a general class and then purchase the specific items himself. It is clear from the circumstances shown by the record that the articles ostensibly purchased by accused were not conspicuously priced as required by the

above cited Army Regulation, and at the reduced price were not offered for sale to authorized patrons of the Exchange. These circumstances attendant upon the purported sale are indicative of the fraudulent intent of accused. The other facts shown by the record are susceptible to but one inference, that the whole transaction was tainted by fraud. The aggregate selling price of the five pieces of luggage, $124.25, was reduced to $5.00. Although the notation appearing on the price change voucher (Pros Ex 25) executed by accused, recited that the luggage was damaged by water, no evidence was offered by the defense to substantiate the entry. Lofley and Stone, exchange employees, testified that there was no apparent damage to the luggage and that it appeared identical to the other luggage. It would thus appear that accused's notation on the price change voucher was self serving and sheds additional light upon the fraudulent intent of accused to embezzle the luggage by means of the purchase device. No other pieces of luggage were similarly reduced in price. The payment by accused of $5.00 for the luggage did not constitute a good faith purchase, but rather was a device by which, when confronted with his fraudulent conversion he might make some claim of a color of right. The taking of the luggage under the circumstances recited above constituted embezzlement.

The value of the luggage was alleged to be about $124.25. The only evidence introduced as to the value of the luggage was the price change voucher executed by accused showing the aggregate selling price of the luggage to be $124.25. This evidence was sufficient to show the value of the luggage to be $124.25 in the absence of any showing of damage or other facts which justify an inference that the value of the luggage was less.

c. Charge II, Specification 3, (Embezzlement of $1750.00).

The uncontradicted evidence shows that on 13 January 1947 accused sold a bowling alley and dry box belonging to the Barksdale Field Exchange and located at Perrin Field, Texas, to Robert R. Parmley. Parmley testified that he paid accused $3350.00 for the items of property purchased. Parmley's testimony as to the purchase price was uncorroborated. At the time of sale Parmley wrote out a receipt which accused signed. The receipt recited in effect that full payment had been made for the bowling alley and dry box, but did not state the purchase price. Accused subsequently paid in to the Post Exchange $1600 as the amount he received for the property sold. The evidence thus shows that accused embezzled $1750.00, the difference between what he received as the purchase price and that which he turned in. It is not material on the issue of legal sufficiency that Parmley's testimony as to the purchase price paid for the property was uncorroborated. The rule is:

> "* * * The uncorroborated evidence of one witness is ordinarily sufficient to sustain a conviction of crime. It follows from this, then, that where a fact has been proved by one witness, it is not error to exclude merely cumulative evidence of the same fact, although the use of more than one witness is advisable. The fact that a witness was employed

to procure evidence of a violation of the law does not necessitate corroboration of his testimony to sustain a conviction. Nor need the complaining witness be corroborated, even though he had previously been convicted of a crime." (Wharton's Criminal Evidence, VOL 3, p 2281)

The finding of the court was warranted by the evidence.

d. Charge II, Specification 4; (Embezzlement of $90.00).

On 25 January 1947 accused picked up four watches from the Camp Polk Branch stating that he would have them repaired. Two were Benrus watches, one, a Waltham, and one was undescribed. Around the first of February accused told Lofley he had purchased four watches at Camp Polk and gave Lofley two of the watches to put on sale. The watches were given to Miss Dyson, the clerk at the jewelry counter, to sell. Miss Dyson testified that the two watches she received from Lofley were Walton watches. She sold one of these for $90.00 and gave the money to Brown. Brown testified he received the money 4 March 1947 and subsequently deposited the money to accused's account in the Bossier State Bank at accused's direction. On 5 March 1947 accused paid for the watches which he had picked up at Camp Polk in January.

The alleged embezzlement in this instance rests on the theory that the watch sold at Barksdale Field on 4 March 1947 was one of the four watches picked up by accused at Camp Polk in January and paid for on 5 March 1947. The evidence, however, negatives this theory. Two of the watches picked up at Camp Polk by accused were of Benrus manufacture, one was of Waltham manufacture, and one was undescribed. The two watches which were put on sale at Barksdale Field were "Waltons". There is no evidence that these two watches were property of the Exchange and hence accused could not be guilty of embezzlement of the purchase money received upon sale of these watches. The finding of guilty of this Specification is not supported by the evidence.

e. Charge II, Specification 5, (Embezzlement of $240.75, property of Barksdale Field Exchange Fund); Charge III, Specification 6, (Issuing a check to a fictitious person with intent to defraud).

As previously related two of the watches picked up by accused at Camp Polk were Ladies' Benrus watches, which had formerly sold for $192.50 each, but were subsequently marked down to $38.50 each. These watches were carried on the 25 February inventory of the Camp Polk Branch, and accused had told Brown that he intended to buy these watches. On 5 March 1947 accused paid for the watches. On 3 March 1947 Bert J. Leahy, accompanied by G. C. Harper, came to Barksdale Field to discuss

the surplus property situation with accused. While they were conversing in accused's office the latter had Leahy write his name on a piece of paper. Brown came to the office and was given the piece of paper and a watch by accused, whereupon he asked accused Leahy's rank. Accused replied "Sergeant." Leahy and Harper did not hear this conversation. Brown gave the watch and piece of paper to Lofley who made up a receiving report which showed the return of a Ladies' Benrus watch with a selling price of $192.50. From the receiving report Brown made up a check payable to Sergeant Bert J. Leahy in the amount of $192.50, which he gave to accused. Accused called Lofley in and told him the amount should be $240.75. Lofley then drew up another receiving report reflecting this latter sum and from this receiving report another check was drawn by Brown. Attached to the check was a voucher with the entry "Refund on 1 only Benrus Ladies watch $240.75." The date of the entry was 3 March 1947. Brown gave the check to accused. Accused laid the check on the desk face down. The check and voucher were folded along the perforated line. Accused had Leahy sign his name on the back of the check. Moments after signing the check Leahy realized what he had done but made no report of the matter until questioned by "officers of the law." Later accused gave the endorsed check which bore his signature as drawer to Brown who cashed it and gave the proceeds to accused.

As to the embezzlement charged, the evidence shows that accused disposed of a watch which was the property of a branch of the Barksdale Field Exchange and received therefor $240.75. The day following his disposition of the watch he paid for it and also three other watches which he had taken from the Camp Polk Branch Exchange. The price accused paid for the watch was $38.50, and the watch had formerly sold for $192.50. Thus accused, without advancing any money, secured a watch from a branch of the Exchange, turned it in to the Exchange and by means of the return device received $240.75. This conduct of accused constituted embezzlement as alleged.

To accomplish the embezzlement accused had the check by which the refund was to be accomplished made payable to a Bert J. Leahy. As has been shown Leahy was tricked into signing the reverse side of a check which had been made payable to him. Prior to his drawing of the check Brown had asked accused Leahy's rank and had been told, "Sergeant," and the check was drawn payable to "Sergeant Bert J. Leahy." It was shown that Leahy was not in the service, and that although he had served in the Army he had never attained the rank of Sergeant. It was alleged that the check was false and fraudulent in that the payee, "Sergeant Bert J. Leahy," was non-existent. While it is true that Leahy was not a Sergeant and had never been one, the circumstances show that the Bert J. Leahy present in accused's office was the person designated as payee on the check, otherwise there would have been no need to have Leahy endorse the check. For the reasons stated the finding of guilty of Specification 6, Charge III, is not supported by the evidence.

f. Charge III, Specification 1, (False claim).

During October 1946 accused, together with Lofley and Miller, went to New York on Exchange business. Miller returned earlier than accused and Lofley and in all was gone but five days on the trip. Subsequently a check was drawn payable to Miller in the amount of $104.03. The carbon copy of the original check to Miller and the attached voucher showed that reimbursement was being made for a ten day trip to New York. Accused had Miller sign the original check face down, and the check was subsequently deposited to the Exchange account in the bank upon which the check was drawn. Miller had never made claim for any reimbursement and did not receive any compensation. The evidence does not otherwise show that the check was cashed.

It may be seen that the claim was false in its entirety in that no claim had been made by the rightful claimant. Had the claim been made by Miller who had a right to reimbursement, it would have been false as to the amount, since the expenditures claimed covered a ten-day period where in fact expenditures were made for a five-day period. In that accused accompanied Miller on the trip and knew of the latter's early return, he knew that the expenditures listed for a ten-day period were misrepresented. Notwithstanding his knowledge of the false basis for the sum involved and his knowledge that the rightful claimant had not in fact made any claim, accused had a voucher executed ostensibly showing payment of a claim to Miller, and also had a check drawn, which he signed, to effect payment of the false claim. It is clear that accused caused to be made, allowed and approved a false claim as alleged. The question remains whether the claim was paid. There is no evidence of record that the check in question was ever cashed. Lofley endorsed the check but received nothing for the check. It is not shown that accused cashed the check. The second endorsement on the check by the cashier of the Bossier State Bank, the bank upon which the check was drawn, shows that the check was deposited to the credit of the Post Exchange. Under the circumstances, that part of the findings of guilty pertaining to the payment of the claim is not supported by the evidence.

g. Charge III, Specification 3, (False claim).

During January 1947 accused caused a voucher to be drawn showing reimbursement to Lofley for travel payments, and a check was drawn payable to Lofley in the amount of $58.86. In fact Lofley had not performed the travel described in the voucher. Accused laid the check in front of Lofley face down and had Lofley endorse it. Accused gave the check to Brown who purchased a bank draft and sent it to accused's bank. The finding that accused caused to be made, approved, allowed, and caused to be paid a false claim as alleged is supported by the evidence.

h. Charge III, Specification 7, (False claim).

During March 1947 accused caused a voucher to be drawn showing reimbursement to Lofley for travel performed and drew a check payable to Lofley in the amount of $36.77. This check was never endorsed by Lofley who in fact had not performed the travel described in the voucher. The check was given by accused to Brown who turned it over to the Provost Marshal. The court was justified in finding that accused caused to be made, allowed and approved a false claim as alleged.

7. Counsel for the accused in his brief and on oral argument before the Board has made two assignments of error. In the first assignment of error counsel attacks the constitutionality of Articles of War 95 and 96 in that these two articles do not set forth "definitely ascertainable standards of guilt."

In Dynes v. Hoover, 20 Howard 65, the Supreme Court considered a similar question. The then 32nd Article of the rules for the government of the Navy provided that: "All crimes committed by persons belonging to the Navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." In commenting upon this Article Mr. Justice Wayne stated:

> "Courts martial derive their jurisdiction and are regulated with us by an act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted are expressed in terms; or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the Legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognised to be such by the practice of courts martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts martial. And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance.* * *."

It may be seen, therefore, that a general enactment such as the 95th and 96th Articles of War has been recognized as appropriate to the military and naval establishments. The first "assignment of error" is, therefore, without merit.

The second assignment of error is that the verdict is against the weight of the law and the evidence. It is stated that the actions and testimony of the civilian employees at the Post Exchange are "so unusual, so incredulous, so lacking in good faith and candor, so violative of their positions of trust, as to raise a reasonable doubt as to the guilt of accused." It must be remembered that the testimony of none of these witnesses was contradicted. It may be conceded that Brown who was the principal witness against accused as to all the offenses of which accused was found guilty, was an accomplice, and his testimony should be considered with great caution (Par 124a, MCM 1928). The Board is of the opinion that Brown's testimony as well as the other testimony adduced, was evaluated with prescribed care by the court, and viewing the testimony as a whole finds no reason to disbelieve the uncontradicted evidence introduced by the prosecution.

8. The records of the Department of the Army show that accused is 31 years of age and married. He was graduated from high school in 1937 and was subsequently employed as a store clerk, machinist and subcontractor. He entered the service on 3 January 1942 as an Air Cadet, was commissioned a second lieutenant in February 1943, and was subsequently promoted to first lieutenant. He served in the Pacific Theatre for eight months, flew five combat missions and was awarded the Air Medal. Prior to being commissioned he was court-martialed for cheating during an examination and was sentenced to forfeit $50.00 pay per month for three months. As an officer he has been twice punished under Article of War 104. His efficiency ratings of record are as follows: Superior (2); Excellent (7); Very Satisfactory (2); and Satisfactory (1).

The following communications pertaining to accused have been considered by the Board: Letter to The Judge Advocate General, dated 3 November 1947, from the Honorable Bob Sikes, House of Representatives; and letter to The Judge Advocate General, dated 21 September 1947, from the Honorable Stephen Pace, House of Representatives.

The Board has also considered a brief submitted by Whitfield Jack, Esquire, Shreveport, Louisiana, and heard oral argument by Mr. Jack on 12 January 1948.

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial except as hereinbefore

stated. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 4, Charge II, and Specification 6, Charge III, legally sufficient to support only so much of the finding of guilty of Specification 1, Charge III, as finds the accused guilty of that Specification except the words "and cause to be paid," legally sufficient to support the other findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon a conviction of a violation of Article of War 95, and a sentence to dismissal and confinement at hard labor for five years is authorized upon conviction of violations of Articles of War 93 and 96.

A Hottenstein, Judge Advocate

J W Lynch, Judge Advocate

Joseph L. Brock, Judge Advocate

JAGH CM 327988 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAR 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 P. Hogg (0-798635), Air Force of the United States.

2. Upon trial by general court-martial this officer was found guilty of making a false official report in violation of Article of War 95 (Chg I, Spec); of embezzlement in four instances of money and property of the Barksdale Field Post Exchange in violation of Article of War 93 (Chg II, Specs 1, 3, 4 and 5); of three transactions involving approval, allowance and causing to be paid false claims against the Barksdale Field Post Exchange (Chg III, Specs 1, 3 and 7) and issuing a check drawn on the Barksdale Field Exchange Fund to a fictitious payee (Chg III, Spec 6) in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay the United States Government a fine of $2500.00 and to be confined at hard labor for ten years. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and confinement at hard labor for five years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 4, Charge II (Embezzlement of $90.00) and Specification 6, Charge III (Issuing a check to a fictitious person), legally sufficient to support only so much of the finding of guilty of Specification 1, Charge III (False claim) as involves a finding of guilty of the Specification except the words "and cause to be paid," legally sufficient to support all other findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

Accused was Post Exchange Officer at Barksdale Field, Louisiana, from May 1946 until the latter part of March 1947. The Barksdale Field Exchange had a Branch Exchange at Camp Polk, Louisiana. In January 1947 while inspecting the Branch Exchange at Camp Polk accused picked up four damaged watches for the purpose of having them repaired. On 20 February 1947 he instructed the manager of the Camp Polk Branch to carry the watches on inventory which was done. Two of the watches listed on the inventory were Ladies' Benrus watches which had formerly been priced at $192.50 each, one Waltham watch, and one watch which was

undescribed. When the branch inventory for that monthly period arrived at the Main Exchange accused told the office manager, A. E. Brown, that he intended to purchase the four watches. Brown suggested that the sheet showing the watches be removed from the inventory and that the value of other items on the inventory be increased. Accused directed that this be done and the sheet listing the watches was withdrawn and the retail values shown in the tobacco and stationery departments were increased so that the total retail value of the inventory was unchanged. There was, however, a discrepancy of $8.44 in the cost value total of the inventory inasmuch as the mark-up of tobacco and stationery was not the same as for jewelry. The Camp Polk inventory was consolidated in the Consolidated Summary of Inventory with the result that the error in the total cost value in the branch inventory was carried into the Consolidated Summary of Inventory. Accused certified that the Consolidated Summary of Inventory was correct and submitted it to the Commandant, Barksdale Field, who accepted the report as correct in accordance with accused's certificate.

Early in February 1947 accused gave J. M. Lofley, civilian exchange manager, two Walton watches which he claimed to have purchased at the Camp Polk Exchange, and told Lofley to put them on sale and give the proceeds to accused. One of the watches was sold on 4 March 1947 and the $90.00 realized on the sale was turned over to accused. On 5 March 1947, accused paid for the four watches which he picked up at the Branch Exchange in January. The evidence fails to show that the Walton watch which was sold for accused was one of the watches which he had picked up at Camp Polk in January to have repaired, and there is no evidence showing that the watch was the property of the Exchange. For the reasons stated the finding of guilty of embezzlement of $90.00 the property of the Barksdale Field Post Exchange is not supported by the evidence (Charge II, Specification 4).

On 3 March 1947 a Bert J. Leahy was discussing the purchase of surplus Post Exchange property with accused. Accused had Leahy write his name on a piece of paper and then gave the piece of paper and a Ladies' Benrus watch to Brown. Brown asked accused Leahy's rank and was told "Sergeant." Leahy was, in fact, a civilian, and although he had served in the Army had never attained the rank of Sergeant. A receiving report was prepared showing the return by Leahy of a Ladies' Benrus watch, selling for $240.75 and a check was drawn to the order of Sergeant Bert J. Leahy in the amount of $240.75. The check was brought to accused who laid it face down on his desk. He told Leahy that as a matter of form he wanted Leahy's signature and had Leahy sign the back of the check. Accused gave the check to Brown who cashed it and gave the proceeds to accused. The check, which was in evidence, had been signed by accused as drawer for the Post Exchange. The evidence shows that the watch in question was one which accused had taken from the Camp Polk Exchange to have repaired and which he did not purchase until

after the transaction here described. The price which he paid for the four watches, including the watch on which he realized $240.75, was $109.40. The finding of guilty of embezzlement of $240.75, property of the Exchange (Charge II, Spec 5) is supported by the evidence. The payee on the check which was used to effect the embezzlement was not a fictitious person and for that reason the finding of guilty of Charge III, Spec 6, is not warranted.

During December 1946 accused went to the Exchange warehouse, picked out five pieces of luggage, the aggregate selling price of which was $124.25, marked down the aggregate selling price to $5.00, paid for the luggage at the greatly reduced price, and had it shipped to his wife.

During January 1947 he sold a bowling alley and dry box acquired by the Barksdale Field Exchange from the Perrin Field Exchange for $3350.00 and turned in $1600.00, keeping $1750.00 for himself.

During October 1946 John E. Miller, an exchange employee performed travel to New York on Exchange business. Miller's trip was completed in five days and he made no claim for reimbursement. Accused executed a voucher showing reimbursement to Miller for a ten day trip, and drew a check payable to Miller in the amount of $104.03 and had Miller endorse the check. Miller did not receive any money from the check and the check was deposited to the credit of the Exchange at the bank on which the check was drawn. There is no evidence that the check was ever cashed. The words "and caused to be paid" should be excepted from the finding of guilty based upon the transaction described (Charge III, Spec 1).

In two other instances accused caused vouchers to be executed for travel expenses by an exchange employee where in fact the employee had not performed travel. In each instance accused drew checks payable to the order of the employee and in one instance received the proceeds of the check. In the other instance the check was turned over to the Provost Marshal and was never endorsed or paid.

4. The accused is 31 years of age and married. He was graduated from high school in 1937 and was subsequently employed as a store clerk, machinist and sub-contractor. He entered the service on 3 January 1942 as an Air Cadet, was commissioned a second lieutenant in February 1943, and was subsequently promoted to first lieutenant. He served in the Pacific Theatre for eight months, flew five combat missions and was awarded the Air Medal. Prior to being commissioned he was court-martialed for cheating during an examination and was sentenced to forfeit $50.00 pay per month for three months. As an officer he has been twice punished under Article of War 104. His efficiency ratings of record are as follows: Superior (2); Excellent (7); Very Satisfactory (2); and Satisfactory (1).

The following communications pertaining to clemency on behalf of accused have been considered: letter to The Judge Advocate General, dated 3 November 1947, from the Honorable Bob Sikes, House of Representatives; a letter to The Judge Advocate General, dated 21 September 1947, from the Honorable Stephen Pace, House of Representatives. In addition to the foregoing a brief submitted by Whitfield Jack, Esquire, Shreveport, Louisiana, who also presented oral argument on behalf of accused before the Board of Review on 12 January 1948, has been given careful consideration.

5. I recommend that the finding of guilty of Specification 4, Charge II, and Specification 6, Charge III, be disapproved, that so much of the finding of guilty of Specification 1, Charge III, be disapproved as involves a finding of guilty of the words "and cause to be paid." I further recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that a United States penitentiary be designated as the place of confinement.

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

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( GCMO 77, March 26, 1948).

DEPARTMENT OF THE ARMY
I he Office of The Judge Advocat eneral
Washington 25, D. C.

255

DEC 30 1947

JAGQ - CM 328009

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| U N I T E D S T A T E S<br><br>v.<br><br>Privates HIRM BOLDON (RA 18229916), ROBERT L. MAY (RA 44138381), Company B, JOHN W. HAYES (RA 13235996), BROG MCCRAY, JR. (34962243) and JAMES E. SNEED, JR. (RA 17194011), Company C, all of 97th Engineer General Service Battalion. | ) | PHILIPPINES-RYUKYUS COMMAND<br><br>Trial by G.C.M., convened at HEADQUARTERS CAMP ANGELES, PHILRYCOM, APO 74, 18 September 1947. Boldon, May, McCray and Sneed: Dishonorable discharge and confinement for one (1) year. Hayes: Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks. |

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

1. The record of trial in the case of the soldiers named above has been examined and is held by the Board of Review to be legally sufficient to support the sentences as to accused Boldon, May, McCray and Sneed.

2. The only question presented by the record is whether the findings of guilty of Additional Charge IV and its Specification as to accused Hayes is supported by the evidence. This accused was tried upon the following Charges and Specifications:

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

Specification: In that Private John W. Hayes, Company "C", 97th Engineer General Service Battalion, having been duly placed in confinement in the 97th Engineer General Service Battalion Stockade on or about 23 May 1947, did at the 97th Engineer General Service Battalion Stockade (APO 74), on or about 29 May 1947, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 93rd Article of War.
(Nolle Prosequi)

Specification: (Nolle Prosequi).

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

Specification: (Finding of Not Guilty).

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

Specification: In that Private John W. Hayes, Company "C", 97th Engineer General Service Battalion, did, at Camp Angeles, Pampanga, Philippine Islands (APO 74), on or about 29 May 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private Alexander Pierre, one carbine, value about $37.50, the property of the United States.

Accused Hayes pleaded not guilty to all Charges and Specifications. A nolle prosequi was entered by the prosecution as to Charge II and the Specification thereof. Accused was found not guilty of Charge III and the Specification thereof and guilty of all remaining Charges and Specifications. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence, 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. The competent evidence clearly establishes the guilt of accused as to Charge I and the Specification thereof (escape from confinement). The only question remaining for the Board of Review is the legality of the finding of guilty of Additional Charge IV and its Specification (robbery). The evidence shows that on the night of 29 May 1947, Private Alexander Pierre was on guard duty and that he took accused Hayes and two other prisoners to the latrine. Returning from the latrine Private Pierre had his carbine in his left hand and the keys to the stockade gate in his right hand. As he was opening the stockade gate accused Hayes "snatched" the weapon from him, "threw" a round into the chamber and told him not to move. Someone hit him and when he awakened five prisoners including accused had escaped and his carbine was missing (R. 19-20). In relating how his weapon was taken from him Pierre said "Just ordinary snatch" (R. 20).

4. The factual basis for the charge that accused by force and violence and by putting him in fear feloniously took and carried away from the person of Private Pierre one carbine, value about $37.50, the property of the United States is the "snatching" the weapon from his hand

by accused. 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 snatched out of another's hand * * * and no other force is used and the owner is not put in fear, the offense is not robbery." (underscoring supplied).

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 in the taking and that accused was not put in fear until the taking was accomplished. 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". In CM 324119, Pipkin (26 Sept. 1947), the case cited by the staff judge advocate to support the findings of guilty of the offense of robbery, the facts are clearly distinguishable from the instant case. In the Pipkin case, supra, accused was found guilty of three separate specifications of robbery and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The competent evidence in the record of trial clearly established that in two of the robbery specifications the property was taken at the point of a loaded weapon by force and violence. Consequently, the record of trial was legally sufficient to support the sentence without reference to the specification which charged accused with robbery by "grabbing" a carbine from another guard.

The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of the Additional Charge IV and the Specification thereof as involves a finding of guilty of the lesser included offense of larceny (CM 209074, McCausland, 9 BR 63; CM 222598, O'Day, 13 BR 301, 303). In the case of Routt v. State,

61 Arkansas 594, 34 S.W. 262, 263, the exact factual situation and identical proposition of law was passed upon by the court with the following comment:

> "* * * 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; Shinn 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 maximum sentence to confinement authorized by paragraph 104c of the Manual for Courts-Martial for the offense involved in Charge I and the Specification thereof, escape from confinement, is one year, and for the offense of larceny of property of a value of $37.50 is one year.

5. For the reasons stated, the Board of Review holds the record of trial as to accused Hayes legally sufficient to support the findings of guilty of Charge I and the Specification thereof, legally sufficient to support only so much of the findings of guilty of Additional Charge IV and its Specification as involves a finding that accused did, at the time and place alleged, feloniously take, steal and carry away from the person of Private Alexander Pierre, one carbine, value about $37.50, the property of the United States, and legally sufficient to support only so much of the sentence as to accused Hayes as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years.

W. A. Simon, Judge Advocate

On Leave, Judge Advocate

R. Kane, Judge Advocate

DEC 31 1947

JAGQ - CM 328009 1st Ind

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

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

1. In the case of Privates Hirm Boldon (RA 18229916), Robert L. May (RA 44138381), Company B, John W. Hayes (RA 13235996), Brog McCray, Jr. (34962243) and James E. Sneed, Jr. (RA 17194011), Company C, all of the 97th General Service Battalion, I concur in the foregoing holding by the Board of Review and recommend that only so much of the finding of guilty as to accused Hayes of the Specification, Additional Charge IV, be approved as involves a finding that accused did, at the time and place alleged, feloniously take, steal and carry away from the person of Private Alexander Pierre, one carbine, value about $37.50, the property of the United States, and that only so much of the sentence as to accused Hayes be approved as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. 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 328009).

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.

20 February 1948

JAGH-CM 328048

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| UNITED STATES | ) | New York Port of Embarkation |
| v. | ) | Trial by G.C.M., convened at New York Port of Embarkation, Brooklyn, New York, 6-15 October 1947. Dismissal and total forfeitures. |
| Major JOSEPH V. MISELI (0-346789), Ordnance. | ) | |

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OPINION of the BOARD OF REVIEW
HOTTENSTEIN, LYNCH and BRACK, 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 94th Article of War.

Specification: In that Major Joseph V. Miseli, Ordnance, 9201 Technical Service Unit-Transportation Corps, Headquarters Detachment 1, Camp Kilmer, New Jersey, then of 605th Ordnance Battalion, Peninsular Base Section, Naples, Italy, did, at Naples, Italy, at Leghorn, Italy, and at Brooklyn Army Base New York Port of Embarkation, Brooklyn, New York, between on or about October 1945, and on or about 2 May 1947, knowingly and willfully apply to his own use and benefit:

Watch Repair Kit, Waltham Wrist
Watch, Model 10609 Ordnance.....Value about $450.00
Watch Repair Kit, Hamilton &
Elgin Model SNL F 187 Ordnance....Value about $450.00

Watch Repair Kit, Waltham Wrist
Watch Ordnance Number 10609.....Value about $450.00
One 45 Caliber United States Army
Pistol Model 1911, A1, Serial
Number 1021753 with magazine,
manufactured by Remington Rand,
Inc.....Value about 35.00
One Shoulder Holster, leather,
45 caliber.....Value about 1.75
One 22 Caliber high standard United
States Army Model H-d Automatic
Pistol silencer equipped,
Serial Number 116771.....Value about 41.00
One Gauge, depth, one inch,
Army stock Number 41-G-142.....Value about 11.24
One Carbine United States Caliber
30, Serial Number 228, Inland
Manufacturing Company, General
Motors Corp.....Value about 36.50
One Remington shotgun, Serial
Number 700447, Marked U.S. .....Value about 38.50
One soldering iron marked U.S. .....Value about 2.46
One pair binoculars, Bausch &
Lomb, 8x56 marked U.S. Army
A-68818.....Value about 135.00
One Message Center clock,M1.....Value about 41.00
One Finder, Range, 80 cent-
meter, Base Model 1914,
Nunber 127.....Value about 617.00
One aircraft inspectors kit,
marked Air Force, U.S. Army .....Value about 25.00
Two mattresses, pneumatic,
Type A2, Air Corps speci-
fication Number 94-3079-
80-B, value of each $9.50.....Value about 19.00
One mattress, pneumatic,
Type A3, Air Corps speci-
fication number 3137A.....Value about 17.30
One life raft AN 6520-1,
Purchase Order Number (535),
specification number
43-23470-AF.....Value about. 90.00
One electric drill, marked
Property Air Force, U.S.
Army, Serial Number AC
41-235547.....Value about 42.00
One set earphones, marked
ANB-H-1.....Value about 7.50

One life raft pneumatic, Type A3, specification number 944042 with accessories and parts.....Value about 200.00
One United States Army Air Force Gun Camera.....Value about 79.60
One typewriter, portable, Remington Rand with carrying case, stock number P1145609.....Value about 40.00
One Stove, cooking, gasoline, two burner, Stock Number 65H2882.....Value about 7.07
One telephone TP-6-A, Grapevine 29.....Value about 10.69
One Hallicrafter SX-28, Radio PM 23 Serial Number 338418.....Value about 233.84
One Bell & Howell 16 milimeter Sound Projector and speaker.....Value about 337.50
One Amplifier Unit for Bell & Howell Projector, Serial Number 104081.....Value about 49.75
One Kit spare parts for Bell & Howell Projector.....Value about 10.00
One Speaker, Signal Corps LS-2, Ser.No. 338418.....Value about 5.00
One Delta Power light lantern, marked U.S. property.....Value about 2.50
Two sets earphones, Signal Corps B-2-A.....Value about 13.00

of the total value of about three thousand four hundred ninety-nine dollars ($3,499.20) and twenty cents, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to the Charge and Specification and was found guilty of the Charge, and of the Specification guilty, except the words and figures "605th Ordnance Battalion, and at Brooklyn Army Base, New York Port of Embarkation, Brooklyn, New York; October; 2 May; repair; repair; repair-Ordnance Number; $135.00; Aircraft inspectors, $25.00; one set, earphones, marked ANB-H-1, value about $7.50; stock; 338418-$233.81; $337.50; kit... for Bell & Howell projector; one speaker, Signal Corps, LS-2, Serial Number 338418, value about $5.00; $2.50; $13.00; three thousand four hundred and ninety-nine dollars and twenty cents

($3,499.20);" and substituting therefor respectively the words and figures "and; 26 December; 20 March; spare parts; spare parts... watches; spare parts....model...Ordnance; $91.00; $18.10; about; incomplete; serial; H-175092-$210.00; serial number 386996-$334.95; box, spare parts; $2.30; $12.86; three thousand four hundred and nine dollars and seven cents ($3,409.07);" of the excepted words, Not Guilty, of the substituted words, Guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but "recommended that the sentence as approved be confirmed but that the dismissal be remitted and the forfeiture be commuted to a reprimand and forfeiture of Five Hundred ($500) Dollars of accused's pay and allowances per month for two (2) months," and forwarded the record of trial pursuant to Article of War 48.

3. The Board of Review adopts the review of the New York Port of Embarkation Judge Advocate dated 18 December 1947 as the statement of the facts and of the law in the case.

4. Records of the Department of the Army show that accused is 39 years of age, married, and the father of two minor children. He completed two years of high school and was thereafter employed as a garage foreman, general repair foreman, and mechanical engineer. He had enlisted service in the National Guard from 1929 until he was appointed Second Lieutenant, Field Artillery, National Guard of the United States in the Army of the United States. He was promoted to First Lieutenant and ordered to active service on 16 September 1940. He was promoted to Captain on 20 June 1942, and to Major on 24 February 1943. He served in the European Theater of Operations from 28 August 1944 to 9 October 1945 and in Italy from 20 December 1945 to 20 March 1947. On 23 April 1947 he was placed on terminal leave and was to revert to inactive status on 21 June 1947. Prior to the expiration of his terminal leave he was recalled to active duty. He is entitled to wear four battle participation stars on his EAME ribbon. His efficiency index is 40.0, the adjectival equivalent of which is "Excellent."

Lieutenant Colonel Abraham J. Rosenblum, special military defense counsel at the trial, presented oral argument in behalf of accused before the Board of Review.

5. The court was legally constituted and had jurisdiction of the person and the offense. No errors adversely affecting the substantial rights of accused were committed during trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal

and total forfeitures is authorized upon conviction of a violation of Article of War 94.

_____, Judge Advocate.

_____, Judge Advocate.

_____ Judge Advocate.

JAGH CM 328048 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAR 4 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 Major Joseph V. Miseli (0-346789) Ordnance.

2. Upon trial by general court-martial this officer was found guilty of the misapplication of Government property of a value of $3,409.07. 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 pursuant to Article of War 48, with the recommendation that the dismissal be remitted and the total forfeitures be commuted to a reprimand and forfeiture of $500 pay per month for two months.

3. A summary of the evidence may be found in the review of the New York Port of Embarkation Judge Advocate which has been adopted by the Board of Review as a statement of the evidence and the law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

Accused while serving in Italy was in charge of six ordnance depots. On his return to the United States from Italy in March 1947 it was discovered that in the 34 pieces of luggage which he shipped, addressed to his home, there was a considerable quantity of Government property. The property in question had a value of about $3,400.

Accused claimed that most of the property in question which included watch repair kits, arms, moving picture projection and sound equipment, a radio, a typewriter, mattresses, and technical equipment, were used by him overseas for the entertainment of his family, and the watch repair kits were used to repair watches for friends. When he was ordered to Leghorn from Naples he took the property with him in order to turn it in there, but on arriving at Leghorn learned that he was to be shipped to the States for reassignment. He testified that he intended to turn the property in upon arrival at his permanent station in the States, and that when he was ordered to be separated from active duty instead of being reassigned, he intended to return the property

to the Government upon receipt of his luggage at his home. He also testified that he told a civilian employee at the New York Port of Embarkation, one Hagen, that he had Government property in his luggage. Hagen denied this, but stated that accused had asked him to say that accused had informed him of his possession of Government property.

4. Accused is 39 years of age, married, and the father of two minor children. He completed two years of high school and was thereafter employed as a garage foreman, general repair foreman, and mechanical engineer. He had enlisted service in the National Guard from 1929 until he was appointed Second Lieutenant, Field Artillery, National Guard of the United States in the Army of the United States. He was promoted to First Lieutenant and ordered to active service on 16 September 1940. He was promoted to Captain on 20 June 1942, and to Major on 24 February 1943. He served in the European Theater of Operations from 28 August 1944 to 9 October 1945 and in Italy from 20 December 1945 to 20 March 1947. On 23 April 1947 he was placed on terminal leave and was to revert to inactive status on 21 June 1947. Prior to the expiration of his terminal leave he was recalled to active duty. He is entitled to wear four battle participation stars on his EAME ribbon. His efficiency index is 40.0, the adjectival equivalent of which is "Excellent."

Lieutenant Colonel Abraham J. Rosenblum, special military defense counsel at the trial, presented oral argument in behalf of accused before the Board of Review, on 18 February 1948.

5. I recommend that the sentence be confirmed but, in view of ~~all the circumstances and~~ the recommendation of the reviewing authority, recommend that it be commuted to a reprimand and forfeiture of $500 pay per month for two months, and that the sentence as thus commuted be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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( GCMO 68, 23 March 1948).

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



DEC 31 1947

JAGQ - CM 328054

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| UNITED STATES<br><br>v.<br><br>Private PHILLIP A. McDONALD (RA 34599253), Detachment "A", 10th Air Supply Squadron, Oberwiessenfeld Signal Depot, Munich, Germany, APO 407-A. | UNITED STATES AIR FORCES IN EUROPE<br><br>Trial by G.C.M., convened at Neubiberg, Germany, 4-5 November 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Phillip A. McDonald, Detachment "A", 10th Air Supply Squadron was, at Munich, Germany, on or about 5 September 1947, drunk and disorderly in uniform in a public place, to wit, the intersection at Akeleistrasse and Rosenstrasse, Munich, Germany & Military Police Headquarters, Munich, Germany.

Specification 2: In that Private Phillip A. McDonald, Detachment "A", 10th Air Supply Squadron, did, at Munich, Germany, on or about 5 September 1947, wrongfully and unlawfully permit Private Thomas E. Neal to operate a certain motor vehicle, to wit, a seven (7) ton truck tractor with twenty-five (25) foot trailer, duly dispatched to the said Private Phillip A. McDonald as driver.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specifications. 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 one year. The reviewing authority approved the sentence, designated Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Inasmuch as the Board holds that there was prejudicial error committed during the trial, the evidence need not be summarized.

4. When accused was asked if he desired to challenge any members of the court for cause the defense counsel announced that a Private Neal was to be called as a witness for the defense and asked the court if any member felt that the appearance of Private Neal would affect that member's decision in the case (R. 12). At this point the following took place (R. 13-16):

"Lt. Snow: (a member) Yes. I do not feel that I could take wholly the testimony of Private Neal as the truth.

* * * *

LM: Do you wish to challenge yourself on that ground?

Lt. Snow: No, I just want to make the statement that I dont believe in my own mind I could take all statements of Private McNeal — Private Neal, the witness, as wholly truthful.

Lt. Snow was sworn as to his competency to act as a member of the court.

* * * *

DC: I would like to challenge Lt. Snow for cause at this time in that I feel he is biased or prejudiced by or for or against the accused according to paragraph 58e, Manual for Courts Martial, 1928.

* * * *

Questions by DC:

Q. Lt. Snow, you made the statement you did not feel you could weigh the evidence correctly in this case. Is that correct?

A. Only on the testimony of Private Neal.

Q. And if the testimony of Private Neal was very relevant to this case, do you feel that you could justly render a decision as to guilt or innocence of the accused in this case. Mind you, if the testimony of Private Neal is of such importance, would you render a just decision in your mind as to guilt or innocence of the accused?

A. No, I don't believe it would.

LM: Is the answer to your question clear?

DC: Yes, sir. He stated he could not render a just decision, sir.

LM to Lt. Snow: Is that what you intended to state?

Lt. Snow: No, I believe that although it may tend to sway me I am still capable of making a just opinion on the two specifications and charges - or two specifications of the charge.

DC: Isn't it true, Lt. Snow, that even though you haven't heard the testimony of Private Neal in this case, you would not tend to believe him, hearing his testimony? Is that correct?

A. Yes. Thats right.

DC: On those grounds, sir, I challenge Lt. Snow.

* * * *

DC: Lt. Snow, isnt it true that if the testimony of the witness Neal were relevant in this case it would tend to affect your rendering of justice? You have answered that once. It is a question to which I would like you to repeat the answer.

A. The only thing I can say is that I don't believe everything that the witness stated under oath.

* * * *

Question by Court Members:

Q. I would like to ask just one question. Do you feel that you would consider any testimony given by Private Neal untrue simply because Private Neal gave the testimony — simply because he gave that testimony himself, would you consider it untrue?

A. Well, I wouldn't consider it entirely untrue, yet, there are certain points of his statement which if came to affect my decision I would probably lean towards the idea that they were not true.

* * * *

The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot, and, upon being opened, the president announced that the challenge was not sustained, and the challenged member thereupon resumed his seat."

The testimony of Private Neal which was adduced at the trial (R. 54-58) was vital to the defense presented by accused on both specifications of the Charge. It thus appears that a member of the court was openly and frankly biased with respect to an important witness for the defense and regardless of his denial of any prior knowledge of the facts surrounding the offenses of which accused was charged, he could not by his own admission impartially judge the issues involved. Lieutenant Snow was clearly incompetent to serve under the ninth proviso of Paragraph 58g, Manual for Courts-Martial, 1928, which states as a ground for challenge for cause:

"Any other fact indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness and impartiality" (Underscoring supplied).

It will be noted that the "doubt" as to fairness or impartiality need not be overwhelming but simply a "substantial" one. While it is within the province of the court to determine the relevancy and validity of a challenge for cause (Paragraph 58a, Manual for Courts-Martial, 1928), it is further provided in Paragraph 58(f), Manual for Courts-Martial that:

"Courts should be liberal in passing upon challenges, *** A failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused."

It is the opinion of the Board of Review that Lieutenant Snow should have been excused from the court upon the challenge of defense counsel notwithstanding his contention that he had formed no opinion.

His mind, on the issue of guilt or innocence, could not help but be prejudiced against accused feeling as he did about the veracity of the most important witness for the defense and even if it was not the facts are such as to create a substantial doubt to that effect. It follows that the trial was not free from substantial doubt as to impartiality (CM 261181, Payne, et al., 40 BR 157, 159). Under the facts and circumstances of the instant case the Board of Review holds that the challenge for cause of Lieutenant Snow should have been sustained by the court and that its failure so to do injuriously affected the substantial rights of the accused. The statement of defense counsel after the ruling of the court on the challenge of Lieutenant Snow and after the defense had used its peremptory challenge as to another member who had previously been unsuccessfully challenged for cause that:

> "The accused has no objection to being tried by any member of the court now present" (R. 16).

was merely the orderly acquiescence of personnel of the defense in the ruling of the court and can in no way be considered a waiver of accused's objection to Lieutenant Snow which was previously argued vigorously to the court by counsel for the defense.

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

W.H. Johnson Jr., Judge Advocate.

On Leave, Judge Advocate.

R. Kane, Judge Advocate.

(274)

JAN 5 1953

JAGQ - CM 328054 1st Ind

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

TO: Commanding General, United States Air Forces in Europe,
APO 633, c/o Postmaster, New York, New York

1. In the case of Private Phillip A. McDonald (RA 34599253), Detachment "A", 10th Air Supply Squadron, Oberwiesenfeld Signal Depot, Munich, Germany, APO 407-A, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

2. When copies of the published order in this case are forwarded to this office, 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 328054).

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.

(275)

JAGK - CM 328081

6 FEB 1948

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|---|---|---|
| UNITED STATES | ) | MARIANAS-BONINS COMMAND |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Guam, Marianas Islands, 9 December 1947. Dismissal. |
| | ) | |
| First Lieutenant MELVIN M. HATCHER (O-2035637), Transportation Corps. | ) | |

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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 charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Melvin M Hatcher, 55th Transportation Truck Company, APO 246, Guam, Marianas Island did, at Guam, Marianas Island on or about 6 November 1947 wrongfully strike Corporal Wallace Cayson on the face with his fist.

Specification 2: In that First Lieutenant Melvin M Hatcher, 55th Transportation Truck Company, APO 246, Guam, Marianas Island, was at Guam, Marianas Island, on or about 6 November 1947, drunk and disorderly in his quarters.

He pleaded not guilty to and was found guilty of the charge and specifications. No evidence of any previous conviction was introduced. He was sentenced to be 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

At about 1630 hours on 6 November 1947, the accused was observed to be sitting in front of his quarters on Guam, Marianas Islands, drinking from a bottle with a friend. At the evening mess he made his way to a table, upset a glass of water, had difficulty using the tableware and finally, with uneven cadence interrupted by abrupt contacts with various physical objects in the mess hall and the adjoining club room, made his way to his quarters. In the opinion of accused's commanding officer he

was drunk (R 13). Shortly after 1800 hours on the date in question Technician Fifth Grade Cayson and his friend, Corporal Winfield, both members of the 55th Transportation Truck Company, went to accused's quarters with a Kodachrome projector for the purpose of viewing some of the accused's films. Winfield knocked on the door, identified himself and requested entrance. He received no answer, however, "at that point we heard a sort of crash and somebody stumbled so we went in and saw Lieutenant Hatcher slumped on the floor and in a doubled up position." The enlisted men "propped" the accused in his bed and after observing that blood was flowing from a cut on his nose, Winfield requested Cayson to stay in the room with the accused while he went to the dispensary for first aid materials. Before Winfield returned the accused arose from the bed and ordered Cayson three times to "get out." After attempting to persuade the accused to lie down and rest, Cayson left the building and started towards the dispensary. Shortly thereafter he met Captain Herman J. Schwartz who inquired as to the cause of the commotion. While Cayson was attempting to explain what had occurred, the accused came forward and struck Cayson a blow on the left side of his face breaking his glasses. Captain Wakefield arrived on the scene and with Captain Schwartz "quieted down Lieutenant Hatcher and was leading him to his quarters." Later Cayson and Winfield returned to the area near accused's quarters to observe the climax of what had taken place and the accused suddenly came out of his quarters dressed in khaki shirt and underdrawers, approached Cayson and said, "Are you the enlisted man that hit me?" to which Cayson replied, "No Sir." The accused thereupon "drove off and swung at me and I side-stepped and he kind of tumbled on the ground." Cayson asserted that he did nothing to provoke the assault. He thought that the accused "was a little drunk" (R 7,9,15,16).

For the Defense

Captain Edwin J. Kamons, MC, Chief of the Neuro-Psychiatric Section, APO 246, testified that on 7 November 1947 he examined the accused, that at the time of his examination the accused had the odor of liquor on his breath but that he was not clinically intoxicated. From his study of the accused's condition Captain Kamons was of the opinion that "Firstly, that the patient had been under a tension state for a considerable length of time during his tour of duty in the Marianas-Bonins Command. In order to find relief from this tension state the patient had engaged in the excessive use of alcohol over a period of several months at least. The alcoholism, however, was a symptom of his tension state. The questioning of the patient revealed that he had been in the armed service for approximately 7 years. He had entered the service as an enlisted man and he had induced excellent service" (R 19-20). Captain Kamons was of the opinion that the accused was not a confirmed alcoholic but that he was suffering from frustration arising out of dissatisfaction with his present assignment (R 21-22). The accused's rights were explained to him by the law member and he elected to remain silent.

4. Discussion

There is no conflict in the evidence. It shows to the exclusion of any reasonable doubt that the accused was drunk and disorderly in his quarters on the date alleged and that he wrongfully struck Corporal Cayson on the face with his fist even though it be conceded that the striking was done under an erroneous belief that the corporal had assaulted him. And although the corporal appears to have been an uninvited guest in accused's quarters, his conduct and motives appear to have been in no wise provocative of violence. Both of the alleged offenses are clearly a violation of Article of War 96.

5. The accused is 25 years of age and unmarried. He graduated from high school in 1938 and enlisted in the Army as a private in December 1940. After attending Officers Candidate School he was appointed a second lieutenant, Quartermaster Corps, on 28 September 1943. He was promoted to first lieutenant, AUS, on 20 August 1947. His efficiency reports average "Excellent."

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 a violation of Article of War 96.

Chester D. Silver, Judge Advocate

Gilbert E. Jeffrey, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 328081 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. FEB 17 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 Melvin M. Hatcher (O-2035637), Transportation Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully striking Corporal Wallace Cayson on the face with his fist and of being drunk and disorderly in his quarters at Guam, Marianas Islands, on 6 November 1947. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

During the afternoon of 6 November 1947 the accused was observed to be sitting in front of his quarters on Guam drinking out of a bottle. He appeared at the evening mess where it was noticed that he had difficulty in walking and this together with his unusual manner at the table indicated that he was drunk. He returned to his quarters after the evening mess and shortly thereafter two enlisted men, Corporals Cayson and Winfield, went to his room to borrow some Kodachrome film for use in their projector. They knocked on the door and identified themselves. There was no response from within, but suddenly they heard a crash and upon opening the door observed the accused to be lying in a slumped position on the floor. He had a gash on his face from which blood was flowing. The enlisted men lifted the accused to his bed and Winfield went to the dispensary for first aid materials while Cayson remained with the accused. Before Winfield returned from the dispensary the accused arose from the bed, ordered Cayson out of the room, and as Cayson proceeded to leave the accused followed him. Captain Schwartz approached the parties and inquired as to the cause of the trouble. While Cayson was attempting to make an explanation the accused struck him in the face breaking his glasses.

In his testimony, Corporal Cayson exhibited no feeling of ill will toward the accused. He asserted that the accused appeared to be "a little drunk." The Chief of the Neuro-Psychiatric Section testified that his examination of accused revealed that the patient was suffering from frustration brought on by continual dissatisfaction with his assignment on Guam, that he was not a chronic alcoholic, although he had been drinking

heavily for several months. Both the accused and Corporal Cayson are colored. The accused enlisted as a private and has had seven years of continuous active duty. He has a fairly creditable record in the Quartermaster and Transportation Corps. On 6 August 1947 he was tried by general court-martial appointed by the Commanding General, Marianas-Bonins Command, on a charge of disorderly conduct in violation of Article of War 96 by forcing entry into the quarters of the officer of the day and smashing a bottle of gin being used by the officer of the day. He was acquitted of this alleged offense.

4. Considering all the circumstances, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of one hundred dollars ($100.00) per month for two 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.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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(GCMO 55, 4 March 1948).

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



JAGH CM 328104

18 February 1948

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| U N I T E D S T A T E S | ) | HEADQUARTERS EIGHTH ARMY |
| v. | ) | Trial by G.C.M., convened at APO 343, 20 November 1947. Dishonorable discharge (suspended) and confinement for three (3) months. Eighth Army Stockade, APO 343. |
| Private LOUIS C. BEST, RA 12225293, Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703. | ) | |

OPINION OF THE BOARD OF REVIEW
HOTTENSTEIN, LYNCH and BRACK, Judge Advocates

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

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

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

Specification: In that Private Louis C. Best, Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703, did, without proper leave, absent himself from his company at the Fourth Replacement Depot, APO 703, from about 28 September 1947 to about 3 October 1947.

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

Specification: In that Private Louis C. Best, Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703, having been restricted to the limits of Room number 3, Building S-7, Fourth Replacement Depot, APO 703, did, at the Fourth Replacement Depot, APO 703, on or about 28 September 1947, break said restriction by going beyond the limits thereof.

He pleaded not guilty to and was found guilty of the Charges and the Specification under each. Evidence of five previous convictions was

considered. 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 three months. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Eighth Army Stockade, APO 343, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 235, Headquarters Eighth Army, APO 343, dated 11 December 1947.

3. The evidence showed that accused was duly placed in restriction in the "VD room" at the 4th Replacement Depot, APO 703, which was Room 3 in Building S-7, on 16 September 1947 and that he left the room without authority on or about 28 September and was absent without leave from that date until 3 October 1947.

After the court had closed to determine its findings, it reopened for the purpose of hearing evidence of previous convictions and personal data as to accused. At this time the Trial Judge Advocate offered evidence of four previous convictions. When asked if there was any objection to the record of previous convictions as read, the Defense Counsel stated that he "would like to bring out one point," namely that the defense understood the prosecution intended to submit evidence of five previous convictions. Defense Counsel added that without five previous convictions the charges did not warrant trial by general court-martial. He moved that "the trial be disregarded" and that the case be "referred to an inferior court." There followed an unrecorded discussion, following which the court directed the Trial Judge Advocate to amend the certificate of previous convictions to include a fifth conviction which, apparently for some unstated reason, had been deleted by the Trial Judge Advocate. A new certificate with five previous convictions was then introduced, as Prosecution's Exhibit 4.

4. The evidence shows that the breach of restriction and the absence without leave were but different aspects of the same act of accused. As the period of absence was only five days for which the maximum punishment is confinement at hard labor for 15 days and forfeiture of 10 days' pay, it is apparent that the most serious aspect of accused's offense consisted in the breach of restriction, for which the maximum punishment authorized is confinement for one month and forfeiture of two-thirds of one month's pay. (CM 326457, Borrero, 15 Jan 48; 5 Bull JAG 203, CM 313544, 1946).

5. As a result of the introduction of evidence of five previous convictions, the court was authorized to adjudge, and did adjudge, a sentence to dishonorable discharge, total forfeitures and confinement

at hard labor for three months. (Table of Maximum Punishments, Sec B, MCM, 1928, page 101). The introduction in evidence of the fifth previous conviction by the prosecution was obviously prompted by the action of the defense counsel in raising the question relative to the propriety of trying the accused by a general court-martial for such petty offenses as alleged when only four previous convictions were introduced against him. Thus, insofar as the consequences of his bona fide, albeit ill-advised action resulted in a more severe sentence than might otherwise have been authorized, it becomes apparent that his well intentioned act was, nevertheless, incompatible with his duty to protect the accused from any greater incrimination than was offered by the prosecution. Therefore, it is concluded that in consequence of defense counsel's action he, in effect although inadvertently, assisted the prosecution in curing an oversight and aided in the introduction of additional derogatory evidence contrary to the best interests of accused's defense.

In CM 320618, Gardner, 3 April 1947, defense counsel found the Trial Judge Advocate had not introduced evidence of apprehension in a case of desertion allegedly terminated by apprehension. The defense counsel thereupon offered to stipulate, and did stipulate that a certain person would testify as appeared in a certain document, not in itself admissible, and thus placed in the record evidence of apprehension. This evidence was material and important on the issues of the case in favor of the prosecution. It was held that because of the action of the defense counsel accused was deprived of the effective assistance of counsel to which he was entitled and that the record of trial was legally insufficient to support the findings of guilty and the sentence.

In applying the principle, namely, that accused be protected in his right to effective assistance of counsel to which he is entitled, as laid down in the Gardner case to the instant case, the Board deems it necessary to apply the principle to the measure of the prejudicial irregularities revealed in the record of trial consistent with Article of War 37. Accordingly, the Board finds that the impropriety of defense counsel's action in the instant case must be distinguished from that of the defense counsel in the Gardner case. It must be noted that in the latter case the consequences of defense counsel's action went directly to the merits of the prosecution's case and thus was material to the findings of guilty, whereas, in the instant case, the consequences of defense counsel's action merely affected the legality of the sentence and in nowise touched upon the findings. In view thereof, it is the opinion of the Board of Review that the action of the defense counsel, insofar as the sentence is concerned, deprived accused of effective assistance of counsel to the prejudice of his substantial right and that so much of the sentence as exceeds the punishment authorized for the alleged offenses, without reference to five previous convictions, cannot be sustained.

6. 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 one month and forfeiture of two-thirds of accused's pay for one month.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH CM 328104 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAR 6 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and Executive Order No. 9556, dated 26 May 1945, is the record of trial in the case of Private Louis C. Best (RA 12225293), Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703.

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 provides for confinement at hard labor for one month and forfeiture of $50 for one month. I concur in the opinion of the Board, and recommend that so much of the sentence as is in excess of confinement at hard labor for one month and forfeiture of $50 pay be vacated and that all rights, privileges and property of which the accused 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

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( GCMO 76, 26 March 1948)

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



JAGH CM 328121

26 MAR 1948

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| UNITED STATES | ) | EIGHTH ARMY |
| | ) | |
| v. | ) | Trial by G.C.M., convened at APO 343, 12 November 1947. Dismissal and total forfeitures. |
| | ) | |
| Major ERNEST P. WILSON (01080335), Adjutant General's Department. | ) | |

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, LYNCH and BRACK, Judge Advocates

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

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

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

Specification 1: In that Major Ernest P. Wilson, Central Records Depot Number Four, Eighth Army, APO 343, at or in the vicinity of Yokohama, Honshu, Japan, between on or about 20 March 1947 and on or about 19 June 1947, did, wrongfully convert to his own use and benefit about fourteen (14) Eighth Army Ration Cards, instruments to be used in accordance with the provisions of Eighth Army Circular 293, dated 25 October 1946, entrusted to him by or through the Adjutant General, Eighth Army, for distribution by virtue of his assignment as unit commander, Central Records Depot Number Four, Eighth Army, to the prejudice of good order and military discipline.

Specification 2: (Finding of not guilty)

Specification 3: In that Major Ernest P. Wilson, Central Records Depot Number Four, Eighth Army, APO 343, at or in the vicinity of Yokohama, Honshu, Japan, between on or about 23 May 1947 and on or about 15 June 1947, did, wrongfully cause Katherine F. Cherven to present and make use of about four (4) Eighth Army Ration Cards, instruments to be used in accordance with the provisions of Eighth Army Circular 293, dated 25 October 1946, to wrongfully obtain Army Exchange Service merchandise to the prejudice of good order and military discipline.

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

Specification 1: (Same as Specification 1, Charge I, except the number of ration cards involved is "about sixteen (16)" instead of "about fourteen (14)").

Specification 2: (Finding of not guilty)

Specification 3: (Same as Specification 3, Charge I)

Specification 4: (Finding of not guilty)

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 1 and 3 of Charges I and II, guilty of Charges I and II, and not guilty of all other Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution pertinent to the findings of guilty.

On or about 20 March 1947 the accused, Unit Commander of the Central Records Depot Number Four, Eighth Army, received (and receipted for) in accordance with Paragraph 1, Section II, Circular No. 293, Headquarters Eighth Army, dated 25 October 1946, a block of one hundred (numbers 179901 - 180000) Eighth Army Post Exchange ration cards to be used during the second quarter of 1947 (R 8-9, Pros Ex 1 and 2). It was the responsibility of the accused, as Unit Commander, to distribute one ration card (plus one "women's clothing" ration card for each female) to each person in his command, including himself (Pros Ex 1). Accused initially, about 1 April 1947, issued 30 ration cards, numbers 179901 to 179930, inclusive, to members of his unit. Among these he issued number 179922 to himself and number 179925 to Miss Cherven, a civilian employee on duty with his unit (Pros Ex 3). Two enlisted men who later joined his unit were issued cards number 179999 and 180000 (R 61, Pros Ex 3). Rationed items (cigarettes, candies, and toilet articles) could be purchased only once a week, by an individual. When rationed items were purchased, the individual's card was punched according to the item and week the purchase was made. If rationed items were not purchased during any one ration week (Monday through Saturday), the right to purchase them for that week was automatically forfeited (Pros Ex 1; R 24).

Between the period of 20 March and 15 June 1947, Corporal Boskovich, manager of the Customs Building (location of Headquarters, Eighth Army) sub-branch of Post Exchange Branch Number 16, and Miss Takemura, a Japanese clerk employed there, observed the accused making purchases of rationed items ("mostly cigarettes" (R 31)) two or three times within a single ration week (R 24,25,26,32). On at least four separate occasions the ration cards presented by the accused were checked and recorded (R 30).

The pertinent portions of Corporal Boskovich's testimony relative to these purchases by accused and the checking of the ration cards presented by him are as follows:

"Q During the period, let us put it that way, between the dates of 20 March 1947 and 15 June 1947, on or about those dates did you have occasion to notice Major Wilson in any particular manner?
A Yes, I did.

Q And in what manner?
A I noticed he was coming into the PX and buying more than one ration in a given ration period.

* * * *

Q Did you ever see Major Wilson present more than one card in a week?
A Yes, sir.

Q Did you personally see this yourself?
A Yes, sir.

Q How do you know he presented more than one card?
A I saw him.

* * * *

Q Do you have any means of knowing definitely that the same card was not used, that they were different cards?
A No, sir.

* * * *

Q Did you at any time observe Major Wilson presenting ration cards carrying different serial numbers?
A No, sir.

* * * *

Q Did you ever at any time observe the number on those cards?
A At least in one instance.

Q Did you make any record of the numbers?
A That I saw myself?

Q Yes.
A Yes, sir.

Q Can you state what those numbers were or do you have any memorandum made at that time that you observed.
A Yes, sir.

Q Do you have such memorandum with you?
A Yes, sir.

Q Will you refer to that memorandum and state to the court what ration cards you recorded as being used by Major Wilson. You may refer to the memorandum and state to the court what ration card you observed, what numbers you recorded from those cards presented by the accused.

A I don't know which one of these numbers I got myself because I got some of the numbers from the cigarette girl.

LM All right.

DEF I object to the use of the . . .

LM Is he the manager in charge?

DEF Yes, sir.

LM Then this is a record in the form of a memorandum that he caused to be made.

DEF Not committed by himself, however.

LM Well, we will evaluate that. Is the other Post Exchange employee available?

PROS Yes, sir.

LM I will permit that list of numbers to come into evidence for our evaluation. He may state that as a result of direct order that he caused to be made in the agency that these are the results, among them is a number or there are numbers that he himself took and by the same token you may have the privilege of introducing further evidence. We will evaluate it.

* * * *

Q Very well, will you state what numbers are recorded as being the numbers of ration cards presented by Major Wilson.

A Recorded the following numbers that were given to me 179938, 179976, 179982 and 179951.

* * * *

Q Now when you saw that one card was that Major Wilson behind the card or was Major Wilson's name on that card?

A Major Wilson was behind the card.

Q All right. On the other card that was reported to you was it reported that there was a Major Wilson behind the card or that it was Major Wilson's name on the card?

A It was reported to me, it was reported to me that Major Wilson had the card.

* * * *

Q And you have further stated that Major Wilson's name appeared on four different ration cards that were used in the PX during a three week period.

A Yes, sir." (R 24-30)

Miss Takemura, the Japanese clerk who sold cigarettes at the sub-branch Exchange, testified relative to accused's purchases and use of ration cards in pertinent part as follows:

"Q How many times in one week or one ration period did you observe Major Wilson purchasing rationed items?
A More than once.

* * *

Q Did Major Wilson present a ration card at each time he made a purchase?
A Yes, sir, he gave me the card.

Q Was it the same card each time?
A The number wasn't the same, the card was the same.

Q Can you at this time state the numbers of the cards presented by Major Wilson?
A No, I can't tell the numbers, I can't remember the numbers.

Q Do you have any record of the numbers?
A No, sir.

Q Did you make a temporary record of the numbers at the time?
A Roughly I did.

Q And what did you do with those numbers?
A I gave it to the store manager.

Q And who was that?
A I call him Boris.

Q Boris Boskovich?
A Yes.

* * *

Q Did the cards presented by Major Wilson have his name on them?
A The card had his name on, sir." (R 32,33,34)

Corporal Boskovich testified that for a period of about three weeks, during the latter part of May and the first half of June 1947, he observed Miss Cherven purchasing rationed items at the sub-branch Exchange more than once during a ration week. He stated that he saw the ration cards presented by her but when asked whether her name was on them, stated "I didn't get that close a look at it" (R 27). He further stated, however, that he did see them "close enough" to record the serial numbers "on one or two occasions," and that "The cards I recorded as having Katherine Cherven's name on them are 044724, 178892, 179991, 179947" (R 28).

Miss Takemura testified that between the dates of 23 May and 15 June 1947, Miss Cherven purchased rationed items more than once a week, with ration cards bearing her name and different serial numbers. She

stated that she did not remember the numbers on the cards but recorded the numbers and gave them to the store manager (R 33-34).

Miss Cherven was called as a witness by the prosecution and testified that she worked under the accused's supervision from November 1946 until September 1947. She stated that she possessed only the ration card legitimately issued to her (R 44). She made purchases at the Post Exchange for accused, with a ration card she "assumed" was his. These purchases made by her "may have been sometime" more than once a week. She testified, however, that at no time did she purchase more than one authorized ration for accused during any one week. When asked, "Did you make a statement to the CID last June in substance as follows: 'I purchased cigarettes at the Post Exchange about four times weekly with ration cards given to me by Major Wilson. The cigarettes were given to him and I don't know how they were disposed of. Major Wilson also gave me the money to pay for them. I did not receive any payment for them either by gifts or money. I do not know where he got the ration cards.'", she replied: "I made it, it is not true." (R 45-46)

On the afternoon of 17 June 1947, Captain Acton, 44th Criminal Investigation Detachment, went to accused's office and examined the contents of an envelope containing ration cards and a record of cards which had been issued to members of accused's unit. The record showed that 32 cards had been issued, bearing numbers as hereinbefore stated. Twenty-six unissued cards (later three more were added to this number) were in the envelope. When Miss Cherven, who was present in the office, was asked by Captain Acton to show her ration card she produced card number 179948 (Pros Ex 5; R 16-17). Accused was questioned as to the remainder of the one hundred cards which had been entrusted to him for his unit. He told Captain Acton "that when he received the block of one hundred cards they had been 25 cards short, that he had explained this to an unidentified Sergeant in the Adjutant General's Office and had been requested to sign the receipt for the full 100 and they would make up the 25 to them later." Accused had no explanation for the remaining cards which were still unaccounted for, and requested time "to check into the matter." (R 17).

4. Pertinent evidence for the defense.

Accused at his own request was sworn and testified in part as follows:

> "Sometime in the latter part of March the distribution of the ration cards was made to Central Records Depot. When I came in one afternoon the ration cards were lying on my desk with this sheet under them. The cards had a rubber band around them.

I checked the first number and the last number appearing on the ration cards, I signed the receipt and sent it back to 8th Army placing the ration cards in my safe. * * * There were several cards that were destroyed in the process of the first issue. Those were replaced in a like manner; then on the first of May there was a report made to the Post Exchange Officer as required by Circular No. 13, paragraph 8 of Headquarters 8th Army. The number of cards that were destroyed during the month of April was reflected in that report. That number is six. A little before this report was made I was cleaning out my safe and upon the re-issue of another card I discovered that there were some numbers missing. I counted the cards, card by card, and found there were about 25 short. This I reported to the Distribution Section in the AG Section of Headquarters 8th Army. I was told at that time upon my question to continue the report to the 8th Army Exchange as if the 100 were received. On the initial issue of ration cards there were 32. * * * On the initial issue of the ration cards numbers up through 179930 were issued which are 30 cards with the six being destroyed, On the 17th of April Sgt. Crowder reported to me that Cpl. John Corral had lost his ration card. I re-issued him a card that number being 179944. This I recorded on my calender pad on the date of April 17. On April 26th Cpl. Eugene H. Bacchi reported to me that he had lost his ration card and I issued him ration card 179945 recorded on my calender pad on the 26th of April. As previously stated Mrs. Hopkins lost a ration card. She asked for another one and I issued her card No. 179950 on the 28th of April. When her card was returned to her, the original that was issued which was card No. 179928, she returned to me card No. 179950 and I destroyed it. On the 30th of April there was a civilian employee by the name of Miss Betty Chancey who was working at that time in the Adjutant General's Office of 8th Army who reported to me that she had lost her ration card of which she was till on my payroll and was charged with her administration. I issued to her card No. 179952. On the first day of May I submitted the report to the 8th Army Exchange Service showing the number of cards issued by the unit as 34, the original 30 that were issued and the four cards that I have just named, the number of cards lost or destroyed which were destroyed through the process of issuing the cards, 6. On the first day of May Miss Katherine Cherven reported to me that she had lost a card. I issued to her card No. 179948. The original card that was issued to Miss Cherven was 179925. Card No. 179948 is the card that the CID removed from Miss Cherven's handbag at the time they interviewed her."

"* * * On the 30th, or thereabouts, of May a Private Rowland and Private Roper were assigned to my unit. Rowland was issued card 179999, Roper was issued card No. 180000. On the third of June

Rowland reported to me that his card had been lost and I issued him card No. 179997. On the 13th of June the First Sergeant reported to me that Corporal Ifuku had lost his card and I issued him card 179953. * * * When Captain Acton interviewed me at the Depot on the 17th of June, he only asked me questions involving 25 ration cards. Those 25 ration cards I told him that I had reported as being not received. * * *". (R 60-61)

When asked on cross-examination whether he "at any time purchased or induced anyone else to purchase for you rationed items over and above that which you are authorized," accused answered, "No, sir." (R 64).

5. a. Specification 1, Charges I and II. Accused was found guilty under Articles of War 95 and 96 of "wrongfully converting to his own use and benefit about fourteen (Chg I) sixteen (Chg II) Eighth Army Ration Cards, instruments to be used in accordance with the provisions of Eighth Army Circular 293, dated 25 October 1946, entrusted to him by or through the Adjutant General, Eighth Army, for distribution by virtue of his assignment as unit commander, Central Records Depot Number Four, Eighth Army, to the prejudice of good order and military discipline."

Corporal Boskovich, manager of the sub-branch Exchange, testified that during the period alleged (20 March to 19 June 1947) he noticed accused purchasing rationed items on more than one occasion during a ration week. He further testified that he saw accused present more than one ration card but did not know whether the "same card" was used each time or whether "they were different cards." He stated that he did not observe accused presenting ration cards bearing different serial numbers, but on at least one occasion he recorded "the numbers" on "those cards." When questioned by the prosecution whether he had with him a memorandum made at the time the numbers were observed, he answered that he did. He also stated that "I don't know which one of these numbers I got myself because I got some of the numbers from the cigarette girl (Miss Takemura)." Boskovich was permitted to testify, over objection by the defense, by referring to the memorandum, that he "Recorded the following numbers that were given to me 179938, 179976, 179982 and 179951" (Underscoring supplied) as the numbers on cards presented by accused for purchasing rationed items.

Miss Takemura testified that accused purchased rationed items (cigarettes) more than once during a ration week and that each time he made purchases he presented a ration card to her. She stated that the "card" was the same but the "number" was different. When asked whether she could state the numbers on the cards presented by the accused, she replied, "No, I can't tell the numbers, I can't remember the numbers." Miss Takemura further testified that she "roughly" made a temporary record of the numbers on the cards and gave it to the store manager.

Competent evidence introduced by the prosecution proves beyond a reasonable doubt that accused purchased rationed items more than once during a single ration week and that he presented several ration cards with different serial numbers in making these purchases. Whether accused's name appeared on these cards as the person to whom the cards had been issued for use, or as that of issuing officer, or both, or whether his name did not appear at all on the cards, is not clear from the evidence. Assuming that his name did appear on the cards as the person to whom they had been issued for use, then accused's purchases of rationed items by means of these cards would have been clearly in violation of Eighth Army Circular 293, which prohibited the issuing of more than one ratión card to an individual. The Specification, however, of which accused was found guilty, alleges an offense other than a mere violation of Circular 293. It alleges that accused wrongfully converted to his own use a certain number of Eighth Army Ration Cards entrusted to him by the Adjutant General, Eighth Army, for distribution by virtue of his assignment as unit commander. Therefore, even with the assumptions made above, the accused could not, in the absence of other incriminating evidence, be found guilty of the offense as charged. If his name did not appear on the cards presented by him, it cannot be said, without further evidence, that accused's purchases constituted an offense, since there was no prohibition against an individual purchasing rationed items for another person who possessed a ration card, if the latter's card was presented at the time of making such purchase.

If, on the other hand, it has been shown by competent evidence that the ration cards presented by accused were cards which had been entrusted to him as alleged, and none of the cards presented had ever been issued legitimately either to himself or other members of his unit, his wrongful use of such ration cards constituted the offense charged. Corporal Boskovich testified over objection by the defense, that the numbers recorded from the cards presented by accused were 179938, 179976, 179982 and 179951. Each of these numbers fall within those identifying cards which had been entrusted to accused, and there was no record that any of the four cards bearing these numbers had ever been issued for use. Although the testimony of Boskovich relative to the obtaining of the numbers of these four cards is somewhat confusing, he did state unequivocally that the four numbers he recorded on the memorandum were given to him. Miss Takemura testified that she made a temporary record of cards presented by accused, that she could not remember the numbers but gave them to Corporal Boskovich.

It is apparent from the foregoing that the testimony of Boskovich with respect to the serial number of the ration cards presented by accused was hearsay and the admission of this testimony was erroneous. Also, the memorandum from which he testified or read, was not admissible

in evidence either as an official statement in writing (par 117, MCM, 1928; 395 (21 Dig Op JAG 1912-1940) or as a writing or record made in regular course of business (28 USC 695; Palmer v. Hoffman, 318 US 109, affirming 129 F (2d) 976). Nor can it be said that Boskovich used the memorandum to refresh his memory as to the serial numbers of the ration cards used by accused, since the numbers on these cards were never a matter within his personal knowledge.

There remains for consideration, however, in addition to the evidence that accused used more than one card for purchasing rationed items during a ration week, the fact that he could not, when questioned by Captain Acton on 17 June 1947, account for some seventeen of the ration cards which had been entrusted to him. Also, it is to be noted that when accused, in his sworn testimony at the trial, attempted to account for these cards, he stated that six of them were rendered unsuitable for issue and destroyed by him during the process of issuing the first 30 cards to members of his unit. A record of this initial issue, which was introduced in evidence, shows that cards bearing numbers 179901 to 179930, inclusive, were issued with no interruption of their numerical sequence. It is difficult to believe that the 30 cards could have been issued in regular sequence, when six cards were "spoiled" and destroyed under the circumstances related by accused. With so questionable an explanation as that advanced by accused, the court had grounds for believing that at least six of the ration cards entrusted to him were not accounted for. This, together with the fact that he presented more than one ration card for the purchase of rationed items, might give rise to an inference that he did wrongfully convert, as alleged, at least one of the ration cards entrusted to him. Under the circumstances of this case, however, it is not necessary to decide whether the evidence introduced was legally sufficient to sustain a finding of guilty. Since the evidence tending to prove accused's guilt is not compelling and since, in our opinion, it was prejudicial error to admit in evidence the hearsay testimony of Corporal Boskovich that he "Recorded the following numbers that were given to me 179938, 179976, 179982 and 179951" as the cards presented by accused, the findings of guilty of Specification 1, Charges I and II, cannot be sustained (CM 238696, White, 24 BR 330).

b. Specification 3, Charges I and II. Accused was found guilty under Articles of War 95 and 96, of "between on or about 23 May 1947 and on or about 15 June 1947 did, wrongfully cause Katherine F. Cherven to present and make use of about four (4) Eighth Army Ration Cards, instruments to be used in accordance with the provisions of Eighth Army Circular 293, dated 25 October 1946, to wrongfully obtain Army Exchange Service merchandise to the prejudice of good order and military discipline."

Corporal Boskovich testified that he saw Miss Cherven purchasing rationed items at the sub-branch Exchange, on several occasions during

ration weeks of the period alleged. He was not able to see the name on the cards presented by her but did get "close enough" to record the serial numbers "on one or two occasions." He further testified that "The cards I recorded as having Katherine Cherven's name on them are 044724, 178892, 179991, 179947" (Underscoring supplied).

Miss Takemura testified that she observed Miss Cherven purchasing rationed items more than once a week with cards bearing her name and different serial numbers. She did not remember the numbers on the cards but recorded them and gave them to the store manager.

Miss Cherven, as a witness for the prosecution, testified that she made purchases at the Post Exchange for accused with a ration card she "assumed" was his, but at no time did she purchase more than one authorized rationed item during a ration week. She admitted that prior to the trial she made a statement to the "CID" that she had purchased cigarettes about four times a week for accused, using cards and money furnished by him for making such purchases but denied that the statement was true.

On the afternoon of 17 June 1947, when asked by Captain Acton for her ration card, Miss Cherven produced card number 179948, on which her name appeared as the person to whom it had been issued for use, by accused.

It is to be noted that two of the four cards (044724 and 178892) reported as having been presented by Miss Cherven, bore numbers not included among those cards entrusted to accused for issue to members of his unit. There is no evidence which shows that accused had any control over, or had anything to do with the issuing of these two cards. The numbers on the other two cards (179991 and 179947), recorded as having been presented by Miss Cherven, however, identified them as being among those entrusted to accused. Considering the testimony of Corporal Boskovich and Miss Takemura relative to the obtaining and recording of these numbers, it must be concluded that the former's testimony, that "The cards I recorded as having Katherine Cherven's name on them are 044724, 178892, 179991, 179947" (Underscoring supplied), was hearsay and inadmissible in evidence for the same reason stated under Specification 1, Charges I and II, supra. In view of Boskovich's testimony, that he did not get "that close a look" at the cards presented by Miss Cherven to see whether her name was on them, the only logical inference deductable is that the four numbers were recorded by Miss Takemura and given to him as numbers taken from cards bearing Miss Cherven's name. Miss Cherven was issued ration card number 179925 on or about 1 April 1947. On 17 June 1947 she produced card number 179948 when asked by Captain Acton to show her ration card. Her name appeared on this latter card and its date of issue by accused was 1 May 1947. Accused testified that card number 179948 was issued to Miss Cherven when she reported that

the card initially issued to her had been lost. His testimony was not refuted.

Miss Cherven's pre-trial statement to the "CID," although she admitted making the statement, was not such evidence as could be considered by the court in its conviction of the accused. Prior statements made out of court by a witness may be used to impeach the witness, subject to the provisions of Paragraph 124b, MCM, 1928, but it has been generally held that such prior statements of a witness not the accused, when introduced for impeachment purposes, are not to be considered as substantive evidence against the accused (CM 297312, Westfield, 18 BR (ETO) 269, 281 and authorities cited therein), unless such out of court statements are adopted by the witness as his true statements (Perry v. Byrd, 280 Mich 580, 274 N.W. 335; Breeden v. Martens, 21 S.D. 357, 112 N.W. 960). From the foregoing it is our opinion that there was insufficient competent evidence adduced at the trial to support the court's findings of guilty of Specification 3, Charges I and II, and that the findings must be set aside.

6. The accused, a high school graduate, is 34 years of age, married and the father of three children. He served as an enlisted man in the Coast Artillery, Regular Army, from 2 November 1933 to 29 June 1942, attaining the grade of master sergeant. From 29 June 1942 to 18 September 1942 he attended the Coast Artillery Officer's Candidate School and was commissioned a second lieutenant, Army of the United States, on the latter date. He was promoted through the successive ranks to the grade of major and on 28 June 1947 was appointed a Lieutenant Colonel, Adjutant General Reserve. On 24 August 1946 he left the continental United States for service in Japan, arriving there on 6 September 1946. His efficiency reports of record show six ratings of "Superior" and one of "Excellent." He was awarded the Army Commendation Ribbon as Officer-in-Charge of the Purple Heart Section of the Decorations and Award Sub-Branch of the Adjutant General's Office, New York, New York, during the period 23 August 1944 to 28 February 1946.

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

R. Hottenstein, Judge Advocate

J. W. Lynch, Judge Advocate

Joseph T. Brack, Judge Advocate

JAGH CM 328121 1st Ind

APR 13 1948

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

TO: Commanding General, Eighth Army, APO 343, c/o Postmaster, San Francisco, California.

1. In the case of Major Ernest P. Wilson, O-1080335, Adjutant General's Department, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the findings of guilty and the sentence be disapproved.

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

(CM 328121).

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.



13 APR 1948

JAGH CM 328128

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| UNITED STATES<br><br>v.<br><br>Technician Fifth Grade WILLIAM H. VINES (38660779), Technician Fourth Grade DEWEY E. PRICE, JR. (35998846), and Private First Class JAMES E. CAUSEY (44094529), all of 7809th Station Complement Unit. | ) | UNITED STATES CONSTABULARY<br><br>Trial by G.C.M., convened at Heidelberg, Germany, 26 September 1947. Vines: Confinement for three (3) months (suspended) and to forfeit fifty dollars ($50.00) of his pay per month for a like period. Price: Confinement for three (3) months and to forfeit fifty dollars ($50.00) of his pay per month for a like period; The Heidelberg Post Guardhouse. Causey: Confinement for three (3) months (suspended) and to forfeit thirty-five dollars ($35.00) of his pay per month for a like period. |

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 insufficient to support the findings of guilty and the sentence as to each accused. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Each accused was tried in a common trial upon the following respective Charge and Specification:

As to accused Vines:

CHARGE: Violation of the 93d Article of War.

Specification: In that Technician Fifth Grade William H. Vines, 7809th Station Complement Unit, did, at Karlsruhe, Germany, between 1 February 1947 and 14 February 1947, feloniously embezzle by fraudulently converting to his own use the sum of approximately $7.92, property of the United States, entrusted to him by the United States.

As to accused Price:

CHARGE: Violation of the 93d Article of War.

Specification: In that Technician Fourth Grade Dewey E. Price, Jr., 334th Finance Disbursement Section, Swiss Leave Center, did, at Karlsruhe, Germany, between 1 February 1947 and 14

February 1947, feloniously embezzle by fraudulently converting to his own use the sum of approximately $6.68, property of the United States, entrusted to him by the United States.

As to accused Causey:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class James E. Causey, 7809th Station Complement Unit, did, at Karlsruhe, Germany, between 1 February 1947 and 14 February 1947, feloniously embezzle by fraudulently converting to his own use the sum of approximately $7.04, property of the United States, entrusted to him by the United States.

Each accused pleaded not guilty to and was found guilty of the Specification and the Charge against him. Each was sentenced to be confined at hard labor at such place as the reviewing authority may direct for three months, and to forfeit fifty dollars of his pay per month for a like period. No evidence of previous convictions was considered as to any accused. As to accused Vines the reviewing authority approved the sentence and ordered it executed but suspended execution of so much of the sentence as relates to confinement. As to accused Price, the reviewing authority approved the sentence and ordered it executed, and designated the Heidelberg Post Guardhouse, Neckargemund, Germany, as the place of confinement. As to accused Causey, the reviewing authority approved and ordered executed only so much of the sentence as imposed confinement at hard labor for three months and forfeiture of thirty-five dollars per month for a like period, but suspended the execution thereof insofar as it related to confinement. The results of trial were published as to Vines in General Court-Martial Orders No. 517, as to Price in General Court-Martial Orders No. 518, and as to Causey in General Court-Martial Orders No. 519, all by Headquarters United States Constabulary, APO 46, 10 December 1947.

3. Evidence for the prosecution.

During the period from 1 February 1947 to 14 February 1947, the accused were cashiers at the 334th Finance Disbursing Section, Swiss Leave Center in Karlsruhe, Germany, The general nature of their official duties was to convert American currency, Military Payment Certificates or Traveller's Checks into Swiss francs for American personnel who were taking Swiss tours. Each tourist was limited to a maximum purchase of 100 Swiss francs. During the period alleged in the Specifications, the rate of exchange for 100 Swiss francs was $23.36. Because the lowest denomination in which American script and Military

Payment Certificates were issued was five cents, the fractional sum of $23.36 could not be collected in Military Payment Certificates. Consequently, the accused were required by the Finance Office to collect $23.40 in Military Payment Certificates for each transaction involving 100 Swiss francs. Under these circumstances, the fractional difference, amounting to four cents on each 100 Swiss franc transaction, was not remitted to the tourist in any monetary form but resulted in a gain to the Finance Office as an "overage." Each accused turned in a daily cashier's report to the Finance Officer of "the number of people that he had handled going through on a particular day" /presumably the number of tourists for whom each accused had exchanged Military Payment Certificates for Swiss francs/ (R 7-9).

Second Lieutenant Richard L. Page, Class B Agent Officer, 334th Finance Disbursing Section, 7736th Leave Center, Switzerland, testified substantially as follows: All three accused were under his jurisdiction as cashiers. According to his instructions as Finance Officer, all "overages" as well as all "shortages" in cashier accounts should have been reported to the control cashier who was one Technical Sergeant Iovino. It was Sergeant Iovino's duty to check each cashier's daily account and it was his responsibility to report any "overages" or "shortages" to the witness. While the witness knew that, prior to his arrival at the Swiss Leave Center, it was the practice for the Swiss Leave Center cashiers to apply overages to make up their shortages incurred in the exchange of currency, he did not know whether such a practice was followed in this case because no overages or shortages were ever brought to his attention (R 8,12-13,20,21). When asked the following questions, the witness replied:

"Q Well, was it the practice after you arrived there?
A Well, I had never given my complete sanction to the men. I had never told the men as individuals or collectively that they must use their overages to cover their shortages.

Q Well, you never told them that they couldn't, did you?
A No, I didn't. But I requested that all overages be turned in to me personally.

Q All right. Now, how would a man report overages?
A Well, the way they came to my attention was through the control cashier.

* * *

Q Now, I will ask you to state whether * * * whether you knew a cashier, the accused, carried his overages to the next day's disbursements on his balance sheet?

* * *

A No, I didn't.

Q Did you examine the daily reports that a man made?
A I examined the daily reports as far as ascertaining the number of people that had gone through to see if they checked with the receipts I got from the processing center. (Underscoring supplied)

Q But you never calculated whether a man had overages from his daily sheet, did you?
A No, I never did.

Q * * * If he reported it on his daily sheet you would have had no knowledge because you didn't examine the daily sheet as to disbursements, did you?
A No, I didn't.

Q So if he had overages and actually reported it you would have no knowledge of it unless it was reported directly to you, isn't that correct?
A That's right." (R 13-14)

Witness further testified that "Off hand I would say about ninety-nine and eight-tenths percent" of the people taking the Swiss-Rome tour converted a full allowance of Swiss francs for their trip (R 8). This percentage, however, only represents witness' opinion based on his experience and witness could only state that to the best of his knowledge the number of tourists who did not purchase the maximum of 100 Swiss francs authorized was in the "extreme minority." (R 15,16). He had a complete set of records showing the number of people that had gone through daily during the period from 1 to 14 February 1947 and the number of people that each accused had handled on a particular day. He stated that he made a "compilation," from those records, of the number of people that each accused processed for the Swiss-Rome tour between 1 to 14 February 1947, and after consulting his notes he testified that during this period T/4 Price processed 167 people, T/5 Vines processed 198 people and Pfc Causey processed 176 people. With reference to the amount of overages alleged to have been embezzled by each accused, witness testified as follows:

"Q Then what should have been the total amount of overages that accrued to the account of T/4 Price for the sale of Swiss francs, that is, to persons going on the Swiss-Rome tour described by you during the period 1 to 14 February 1947?
A It should have been approximately $6.68.

Defense: We object to the answer of the witness as to what it should have been. He can state what it was or what he actually figured it out to be. We are not concerned with prophecies.

Law Member: Objection sustained.

Prosecution: Well, if it please the court, we have put this witness on the stand to give some mathematical computations. We have shown that for each transaction involving one hundred Swiss francs.....

Law Member: The witness's answer was not responsive to the question. The witness stated what it should have been and not what it was.

Prosecution: Well, that's all I can ask him, what it should have been.

Defense: That's all your case is predicated on.....

Prosecution: Prosecution objects to the remark made by the defense counsel and requests that the defense counsel be instructed not to make such remarks in the future.

Law Member: The defense counsel is so instructed.

Defense: My apologies to the court

Prosecution: If Imay explain the line of my questioning, sir, on what I base my question to the court, then I will ask you to reconsider the ruling. We have proven - or this witness has testified that in an exchange involving one hundred Swiss francs there was a gain of four cents. This witness has testified that ninety-nine and eight-tenths percent of the people who took the Swiss-Rome tour converted for the full amount of one hundred Swiss francs. This witness made a computation of the number of persons who took the Swiss-Rome tour, that is, who were processed for the Swiss-Rome tour by the individual. From a matter of computation we believe this witness is qualified to testify as to what the total overages accruing to the account of the accused in question should have been as a matter of computation and that is the purport of our question.

Law Member: The witness can testify as to what the computation would show.

Prosecution: All right, I will word the question in that way.

Q According to your figures that you have made, your computations, what would the overages accruing to the account of T/4 Price have been?

Defense: No, we object to that question, what would it have been. What was it?

Prosecution: All right.

Q What was it?
A My figures show that for one hundred sixty-seven people processed by T/5 Price the overage was $6.68.

Q How many people were processed by T/5 Vines during that period for the Swiss-Rome tour?
A T/5 Vines processed one hundred ninety-eight people for a gain of $7.93.

Q And how many people were processed by Pfc. Causey during that period?
A Pfc. Causey processed one hundred seventy-six people for a gain of $7.04." (R 9-11)

Witness stated that the procedure that should have been followed by each cashier was "The cashier should rightfully have included the amount of the overages on the daily turn in slip or informed me personally that there was an overage," but he did not receive any overages from any of the accused that accrued during the period 1 to 14 February 1947. (R 11-12,19,20). He did not know whether any one of the accused embezzled, took or stole any money, and further stated, "As a matter of record there are no such records that we can point to absolutely and say that." (R 14). With reference to the actual amount of overages purported accumulated by each accused he testified:

"Q Well, when you knew that there was a four cent profit on every individual you didn't take any action to find out where the overage was, did you?

* * *

Witness: I can only state that in answer to that question, did I or did I not know that there was an overage, yes, I did know that there was an overage and at the time I didn't exactly know what to do with overages. I admit that I was acting as a finance officer and probably I should have known but I still maintain that my basic branch was Infantry and I never requested finance.

Q Well, you state now that you knew there was an overage.
A Well, it was obvious that there had to be an overage simply because the cost of the tour was one price and it necessitated the collection of a higher amount making a four cent gain.

Q Well, if you knew there was an overage, what did you do about it?

A I really can't answer that one except possibly to say that I never did investigate - I never did make inquiries into the matter of the whereabouts of the four cent overage.

Q But in knowing about that overage you never saw that either of the accused had pocketed the money, did you?
A Would you repeat that, sir?

Q In knowing that there was an overage you didn't ascertain that either of the accused had pocketed the money, did you?
A Well, can you clarify ascertain?

Q Well, did you determine or find out?
A No, I didn't.

Q They served pretty faithfully for you, didn't they, the accused?
A Yes, they did." (R 17,18)

Examination by witness of the daily cashier reports for the period alleged did not reflect a turn-in of overages commensurate with the overages which he stated should have accrued. He did not check the amount of cash or Military Payment Certificates which he should have had during the period in question and consequently he did not know "whether or not there was physically present in the finance office there an amount of $6.68 in one case, $7.92 in the other and $7.04 in the third case, to take care of these overages which would have accrued." (R 21). When the witness examined accused's records of account and daily cashier reports he merely computed them for the purpose of ascertaining the number of people processed by each accused and not to determine the amounts of money involved (R 25).

The court took judicial notice of paragraphs 17a and b; paragraph 18 and paragraphs 19a and b, AR 35-120, dated 21 March 1946 and so much of AR 35-120, dated 27 March 1947 as supercedes the foregoing provisions (R 29; Pros Ex 5).

A pre-trial statement of each accused was admitted in evidence.

The statement of Price (Pros Ex 2) shows he was a cashier from 21 September 1946 to 30 April 1947. He exchanged dollars or dollar instruments including Military Payment Certificates for Swiss francs for "the Swiss Tour and Swiss-Rome Tour." He admitted that "when I had an overage I put it in the box for overages and when I had a shortage I took it from the box. The largest overage I ever had was $2.00 or $3.00."

The statement of Vines (Pros Ex 3) shows he was a cashier from March 1946, and from September 1946 to April 1947 processed about 25 to 50 people a day. He states:

"These overages according to the AR's were to be turned in to the Finance Officer. However, being a poor cashier and constantly making errors and balancing out at the end of the day with large shortages I had to use some of the overages to cover my shortages. Nothing was said to the Finance Officer because he would have taken it out of the kitty anyway. The kitty was made up of the overages that was turned in on previous days. As far as I know all cashiers turned in their overages to the Finance Officer. I did turn in some overages to the Finance Officer as far as the other cashiers, I know nothing of their activities and did not attempt to find out about them as I had enough troubles of my own. As far as making money off the overages goes I don't believe I made a cent as I did not attempt to."

The statement of Causey (Pros Ex 4) is similar to the others. He acted as cashier from September 21, 1946 to 30 April 1947. He stated:

"An overage of from 45 to 60 cents would be collected (i.e. each day on exchanges) which was turned over to the Finance Officer with a slip containing person, date and amount on reverse side. As to what record was made by F.O. is unknown by undersigned. Shortages were covered from the overages accumulated. I was instructed by the Finance Officer to turn in overages and report to him any shortages which might have occurred. No A.R. were ever shown or explained to me concerning the procedure of turning in of overages."

4. Evidence for the defense:

Each accused, having been advised of his rights as a witness, elected to remain silent.

5. Each accused is charged with embezzlement of a sum of money amounting to less than $10.00, property of the United States entrusted to him by the United States, by fraudulently converting it to his own use. The record of trial contains no direct evidence to show that any of the accused fraudulently converted money to his own use. The circumstances surrounding the alleged offenses are such that prosecution's case must rest entirely upon proof that there was a shortage of funds shown in each accused's financial records and accounts in the amount alleged, which, if not satisfactorily explained, would legally support the inference that the accused fraudulently converted or appropriated such shortages to his own use and benefit.

Under paragraph 149h (Proof) MCM, 1928, the offense of embezzlement is established upon proof of the following essential elements:

"(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged;

(b) that he fraudulently converted or appropriated such money or property; and

(c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent."

The only matter requiring consideration concerns the competency and legal sufficiency of the evidence adduced to prove the fraudulent conversion or appropriation of money in the sums alleged. Under the circumstances of this case, the ultimate fact which had to be proven to establish the existence of a shortage is, that the total amount of cash receipts (Military Payment Certificates) turned in to the Finance Office during the period of 1 February to 14 February 1947, by each accused, was less than the total amount of cash receipts (Military Payment Certificates) actually collected during the same period. Therefore, it must be determined whether the record of trial contains sufficient competent evidence of the actual cash receipts turned in to the Finance Office by each accused and of the actual cash receipts collected during the period alleged from which the court could legally find that a shortage in each accused's account did in fact exist and from which fact, unless satisfactorily explained, a fraudulent conversion or appropriation could be presumed.

It appears that the gist of the alleged offenses is based on the hypothesis that accused collected and appropriated numerous overages, amounting in each instance to four cents, which were derived from the exchange of each 100 Swiss francs for Military Payment Certificates. The official rate of exchange for 100 Swiss francs was $23.36, but because the smallest denomination in which Military Payment Certificates were issued was five cents, the accused were required to collect $23.40 in Military Payment Certificates to effect such exchange. The prosecution contends that this four cent differential, collected by accused on numerous occasions, and referred to as an "overage," was not remitted by them to the Finance Office and thus constitutes the gravamen of the offense with which each is charged.

According to the testimony of Lieutenant Page, neither accused's cashier accounts nor any other records contained individual entries indicating the number of separate 100 Swiss transactions handled by the accused or the amount of overages collected by each. For this reason, the prosecution apparently considered it useless to introduce accused's daily cashier reports in evidence to show the total receipts or specific overages collected by them. To accomplish such proof, however, the prosecution expressly declared that it proposed to establish the amount of overages collected by each through the testimony of Lieutenant Page by showing that each accused processed a certain number of tourists during the alleged period; that practically all tourists who purchased

Swiss francs bought the maximum limit of 100 Swiss francs, and, that assuming all tourists processed by each accused purchased 100 Swiss francs, the amount of overages collected by each accused would be determined by multiplying the number of persons processed by four cents, that being the overage which was to accrue on each 100 Swiss transaction. Assuming, but not deciding, that such proof was established, not a scintilla of evidence was adduced to show the amount of cash receipts collected or turned in to the Finance Officer by accused during the alleged period. Consequently, there was no competent evidence before the court from which it could find that a shortage was reflected in the accuseds' accounts. Obviously, the fact that each accused collected a specific amount of overages does not, in and of itself, constitute proof that he fraudulently converted it. Unless the record contains competent evidence of the cash receipts which accused collected or should have collected showing that such receipts exceeded the amount of cash receipts turned in to the Finance Officer it can not be said that the overages which were collected were not included in the cash receipts turned in. Lieutenant Page testified that when he examined each accused's record he did not do so to determine whether accuseds' accounts contained the amount of overages which were collected or whether their cash turn-in was less than the amount of cash which was collected, and the prosecution made no offer of proof whatever to show that a shortage in the accounts of each accused existed. The only other evidence adduced by the prosecution may be found in the pre-trial statement of each accused (Pros Ex 2,3,4). These statements, however, contain no probative evidence on the issue of fraudulent conversion and consequently cannot serve to supply the lack of proof. In view of this material deficiency in evidence, there was before the court no legal or competent evidence of the status of the accused's cashier accounts from which a computation of the sums alleged in the Specifications could have been determined. Failure to introduce in evidence relevant records or other competent testimony from which the actual balance of accuseds' accounts could have been legally established is, therefore, fatal to the findings of the Charge and its Specification as to each accused (CM 318706, Cuthbert, (1947) and cases cited therein).

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

A Hottenstein, Judge Advocate

J W Lynch, Judge Advocate

Joseph T Brack, Judge Advocate

JAGH CM 328128 1st Ind APR 20 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 Technician Fifth Grade William H. Vines (38660779), Technician Fourth Grade Dewey E. Price, Jr. (35998846), and Private First Class James E. Causey (44094529), all of 7809th Station Complement Unit, APO 403.

2. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentences be vacated, and that all rights, privileges, and property of which accused have been deprived by virtue of said sentences be restored.

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

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

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( GCMO 101, 6 May 1948 (Vines).

( GCMO 102, 6 May 1948 ( Price).

( GCMO 103 , 6 May 1948 (Causey).

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

JAGH CM 328133 | 18 February 1948

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| UNITED STATES<br><br>v.<br><br>Second Lieutenant CLIFFORD T. KONNO (0-2031836), Corps of Engineers. | )<br>)<br>)<br>)<br>)<br>)<br>) | HEADQUARTERS<br>1ST CAVALRY DIVISION<br><br>Trial by G.C.M., convened at Tokyo, Japan, 25 Aug - 5 Sept 1947. Dismissal, total forfeitures and confinement for one (1) year. |

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

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

Specification 1: In that Second Lieutenant Clifford T. Konno, General Headquarters, Supreme Commander for the Allied Powers, APO 500, being then and there assigned to duty with the Motion Picture and Theatrical Unit, Civil Information and Education Section, General Headquarters, Supreme Commander for the Allied Powers, and as such required in the course of his duties to engage in official liaison activities with the Ofuna or Shochiku Studio, the Toho Studio, and the Daiei Studio, the same being Japanese concerns engaged in the production of motion pictures, did, at and in the vicinity of Tokyo, Japan, from about October 1945 to about April 1947, wrongfully, unlawfully and dishonorably accept as a gift or emolument from Japanese nationals who were then and there officials of the said Ofuna or Shochiku Studio, the said Toho Studio, and the said Daiei Studio, food, drink, and other entertainment of a value aggregating many thousands of yen, to the scandal and disgrace of the military service and the prejudice of the objectives of the occupation of Japan.

Specification 2: In that Second Lieutenant Clifford T. Konno, General Headquarters, Supreme Commander for the Allied

Powers, APO 500, being then and there assigned to duty with the Motion Picture and Theatrical Unit, Civil Information and Education Section, General Headquarters, Supreme Commander for the Allied Powers, and as such required in the course of his duties to engage in official liaison activities with the Ofuna Movie Production Shochiku Stock Company, Limited, a Japanese corporation, did, at and in the vicinity of Tokyo, Japan, from about November 1946 to about March 1947, wrongfully, unlawfully, and dishonorably demand and receive for his own use and benefit from Kiyoshi Takamura, Hiroshi Otani, Sennosuke Tsukimori, Hideo Komatsu, and Isamu Kosugi, they being Japanese nationals who were then and there officials and employees of the said Ofuna Movie Production Shochiku Stock Company, Limited, sums of lawful Japanese money, or negotiable instruments of the like value, of the aggregate value of about ¥ 126,000, to wit, about ¥ 20,000 received on or about 28 November 1946, about ¥ 100,000 received on or about 28 December 1946, and about ¥ 6,000 received on or about 17 March 1947, to the scandal and disgrace of the military service and the prejudice of the objectives of the occupation of Japan.

Specification 3: In that Second Lieutenant Clifford T. Konno, General Headquarters, Supreme Commander for the Allied Powers, APO 500, being then and there a married man, did, at and in the vicinity of Tokyo, Japan, and at other places unknown on the islands of Honshu and Hokkaido, Japan, from about 22 February 1946 to about June 1947, wrongfully, unlawfully, dishonorably, and openly cohabit with, keep and maintain one Emiko Kudo, otherwise known as Emiko Aoyama and as Michiko Aoyama, a Japanese national, a woman not his wife.

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

Specification 1: In that Second Lieutenant Clifford T. Konno, General Headquarters, Supreme Commander for the Allied Powers, APO 500, being then and there assigned to duty with the Motion Picture and Theatrical Unit, Civil Information and Education Section, General Headquarters, Supreme Commander for the Allied Powers, and as such required in the course of his duties to engage in official liaison activities with the Ofuna or Shochiku Studio, the Toho Studio, and the Daiei Studio, the same being Japanese concerns engaged in the production of motion pictures, did, at and in the vicinity of Tokyo, Japan, from about October 1945 to about April 1947, feloniously, wrongfully, and unlawfully accept as a gift or emolument from Japanese

nationals who were then and there officials of the said Ofuna or Shochiku Studio, the said Toho Studio, and the said Daiei Studio, food, drink, and other entertainment of a value aggregating many thousands of yen, to the discredit of the military service and the prejudice of the objectives of the occupation of Japan.

Specification 2: In that Second Lieutenant Clifford T. Konno, General Headquarters, Supreme Commander for the Allied Powers, APO 500, being then and there assigned to duty with the Motion Picture and Theatrical Unit, Civil Information and Education Section, General Headquarters, Supreme Commander for the Allied Powers, and as such required in the course of his duties to engage in official liaison activities with the Ofuna Movie Production Shochiku Stock Company, Limited, a Japanese corporation, did, at and in the vicinity of Tokyo, Japan, from about November 1946 to about March 1947, feloniously, wrongfully, and unlawfully demand and receive for his own use and benefit from Kiyoshi Takamura, Hiroshi Otani, Sennosuke Tsukimori, Hideo Komatsu, and Isamu Kosugi, they being Japanese nationals who were then and there officials and employees of the said Ofuna Movie Production Shochiku Stock Company, Limited, sums of lawful Japanese money, or negotiable instruments of the like value, of the aggregate value of about ¥ 126,000, to wit, about ¥ 20,000 received on or about 28 November 1946, about ¥ 100,000 received on or about 28 December 1946, and about ¥ 6,000 received on or about 17 March 1947, to the discredit of the military service and the prejudice of the objectives of the occupation of Japan.

Specification 3: In that Second Lieutenant Clifford T. Konno, General Headquarters, Supreme Commander for the Allied Powers, APO 500, being then and there assigned to duty with the Motion Picture and Theatrical Unit, Civil Information and Education Section, General Headquarters, Supreme Commander for the Allied Powers, and as such required in the course of his duties to engage in official liaison activities with one Masaichi Nagata, a Japanese national who was then and there an official and employee of a Japanese concern engaged in the production of motion pictures, did, at and in the vicinity of Tokyo, Japan, between about October 1945 and about April 1947, feloniously, wrongfully, and unlawfully demand and receive for his own use and benefit from the said Masaichi Nagata sums of lawful Japanese money, or negotiable instruments of the like value, of the aggregate value of about ¥ 9,000, to wit, about ¥ 3,000 on each of three unknown dates within the period above-mentioned, to the discredit of the military service and the prejudice of the objectives of the occupation of Japan.

Specification 4: In that Second Lieutenant Clifford T. Konno, General Headquarters, Supreme Commander for the Allied Powers, APO 500, being then and there a married man, did, at and in the vicinity of Tokyo, Japan, and at other places unknown on the islands of Honshu and Hokkaido, Japan, from about 22 February 1946 to about June 1947, wrongfully, unlawfully, and openly cohabit with, keep and maintain one Emiko Kudo, otherwise known as Emiko Aoyama and as Michiko Aoyama, a Japanese national, a woman not his wife.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications but, as to Specification 3, Charge II, the words "¥ 9,000" and "three unknown dates" were excepted therefrom and the words "¥ 6,000" and "two unknown dates" were substituted, respectively, therefor. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

a. Specification 1 of Charge I and II. The accused was a member of the Civil Information and Education Section (hereinafter referred to as the CI&E), Motion Picture and Theatrical Unit, General Headquarters, Supreme Commander for the Allied Powers. His principal duty was that of an interpreter-translator. When Japan was occupied by the American forces, all Japanese motion pictures became subject to censorship. It was the function of accused's organization to supervise, advise and instruct the Japanese motion picture production companies with reference to approved subject matter for civilian motion pictures and to translate Japanese script and scenarios submitted to it into the English language before they were forwarded for censorship to the Civil Censorship Detachment of the G-2 office for final approval. In his capacity as an interpreter-translator, accused translated the proposed motion picture scenarios, submitted by the Japanese motion picture studios to the CI&E, and also exercised limited authority over the editing of the Japanese motion picture script (R 17,19-20,87,93,95,96,205-207,216).

In October 1945, the Ofuna Studio of the Shochiku Motion Picture Company submitted a proposed motion picture scenario to the CI&E and it was censored. Changes in the script were required. Accused translated the script and made many suggestions to effect the changes desired by the Censorship Detachment (R 7-10). During the month of December 1945, the accused, as a result of his own suggestion, was dined and entertained by the officials of the Shochiku Company on two occasions and the expenses of each party were paid by a Mr. Sato of the Tokyo Theater, a subsidiary of the Shochiku Motion Picture Company. The approximate cost of each party was 2,000 yen (R 7-16). The two "get-togethers" were arranged

because the officials of the Ofuna Motion Picture Studio desired some information pertaining to the censorship restrictions issued by the occupation forces. Because the officials of the Japanese studio did not come to a conclusion with the accused at the first party the second party was arranged at the suggestion of a Mr. Kosugi of the Ofuna Studio (R 16).

During the months of January and March 1947, the accused was also dined and entertained by the officials of the Shochiku Company and on each occasion, a Mr. Komatsu of that company paid the expenses of the parties (R 17-18,72,73).

Mr. Hidea Komatsu, liaison representative of the Shochiku Company, testified that on 26 September 1946 and in the months of November and December 1946, the accused was dined and entertained at the Masano Restaurant by the officials of the Shochiku Motion Picture Company. The purpose of the party on 26 September 1946 was to acquaint several officials of the Kyoto Movie Studio with the officials of the CI&E. Present at this party were the witness, two officials from the Kyoto Studio, the accused and his assistant interpreter, Mr. Ishikawa. The cost of the food and entertainment for the September party amounted to 5,000 yen and was paid by the witness. Witness also paid the expenses of the November party but did not recall the amount paid. The December 1946 party was attended by eight persons and the only Americans present were the accused and his assistant, Mr. Ishikawa. This was a "bonen kai party" which the Japanese hold at the end of the year and cost 8,000 yen, which was paid by the Shochiku, Daiei and Toho Motion Picture Companies.

On 11 January 1947 and in the month of February and March 1947, the accused attended parties sponsored by the Shochiku Company at the Yukimura Restaurant. The only Americans present at the 11 January party were a Mr. Gercke, chief of the Motion Picture and Theatrical Unit, his wife, accused's assistant and the accused. The Shochiku Company paid the expenses of each party amounting to about 5 or 6,000 yen for the February party and about 5,000 yen for the March party.

Around December 1946, witness also entertained and bought drinks for the accused at the "bar Machi of Ginza" on about ten occasions at a total expense of approximately 15 or 16,000 yen (R 109-116).

Mr. Masaichi Nagata, President of the Daiei Movie Studio, testified that during the period of October 1945 to February 1946, the accused invited him to the Hayakawa Restaurant and geisha house on two or three occasions where they were dined and entertained at the expense of the Daiei Studio. Mr. Nagata generally visited the CI&E office and the accused's office about once a week for business transactions and at times for his private affairs. He explained his private affairs as follows:

"There is a Mr. Condi above Lt. Konno and he is in charge of Motion Picture and all that, the present aims of the motion picture and such, I want to learn from Lt. Konno, so when I mean private affair, I go and ask about things like that." (R 36-40,52,55,103,109).

Mr. Hidehisa Suga, liaison representative of the Toho Movie Studio, testified that during the period of January to March 1947, the Toho Studio dined and entertained the accused at the Masano [restaurant and geisha house] about two or three times. The approximate cost of the food and entertainment on each occasion amounted to 6,000 or 10,000 yen and was paid by the Toho Studio (R 61). On 31 January 1947, the accused, Mr. and Mrs. Gercke, and accused's assistant, Mr. Ishikawa, were entertained and dined by the Toho Studio at a reception given at the Yukimura Restaurant and Geisha House in honor of Mr. and Mrs. Gercke, who had just arrived in Japan to head the CI&E motion picture section, and also as a wedding celebration for Mr. and Mrs. Gercke. The expense of this party amounted to 23,160 yen and was paid by the Toho Studio. Twenty-four persons were present at the reception, four of whom, including accused, his assistant and Mr. and Mrs. Gercke, were American personnel. Witness claims that he suggested and arranged for the reception personally without the suggestion from accused but stated that the Toho Studio did not maintain any special allowance fund for such entertainment. He further stated that the parties sponsored by the Toho Studio for accused and the reception for Mr. and Mrs. Gercke were held as a celebration upon the completion of a motion picture (R 50,60-63,71,74,75).

On or about 27 December 1946 and 15 January 1947, the accused was dined and entertained at the Masano Restaurant and Geisha House by the joint sponsorship of the Daiei, Toho and Shochiku Motion Picture Studios. The total cost of these parties was shared by the three studios. The Daiei share of the 27 December party expense was 5,000 yen and the 15 January party expense was about 3,000 yen. About ten persons attended the 27 December party and about six or seven persons attended the 15 January party. On 24 January 1947, the accused attended a party sponsored by the Daiei Company at the Sinkiraku Restaurant, the cost of which was paid by the Daiei Company (R 82-85).

Some of the parties or dinners attended by the accused were held in an "off limits" area (R 42,163).

b. Specification 2, Charge I and II. During the month of November 1946, accused asked Mr. Kamatsu of the Shochiku Company for a loan. Since Mr. Kamatsu had no personal money to loan he told accused to speak to the higher officials of his company. About a week later accused and Komatsu talked to Mr. Tsukimori about a loan. Tsukimori told Mr. Takemura, head of the Ofuna Studio, that accused wanted to

borrow 20,000 yen and Takamura at first refused the loan. Mr. Tsukimori again asked Takamura if he could do something about the loan for accused and Takamura testified, because "he seemed to be in a tough situation * * * I gave it to him to save him." (R 112,87-88,12). Takamura refused Tsukimori's request the first time because "The movie studio never lends money to outsiders up to that time." (R 89). Takamura stated that he agreed to loan the money to accused after the second request because, "I did not wish to break up the friendship between Mr. Konno and Mr. Tsukimori." (R 91) On 28 November 1946, Tsukimori received a check for 20,000 yen from Mr. Takamura and on the same date handed it to Mr. Kamatsu. Because the Ofuna Studio could not lend money to outsiders, Takamura instructed Tsukimori to charge the 20,000 yen loan to four motion pictures as miscellaneous expense (R 13). Kamatsu cashed the check at the Tokyo Theater and gave the 20,000 yen in cash to accused. Accused never repaid any part of this loan to the Ofuna Studio (R 113).

In December 1946, accused telephoned Mr. Hiroshi Otani, President of the Shochiku Motion Picture Company, and asked Otani to meet him at the Radio Tokyo. When they met, accused asked Otani for a loan of 150,000 yen but Otani refused to make the loan. Subsequently, Mr. Kosugi, an outstanding actor of the Shochiku Company, accompanied by accused, came to Otani and again asked for a loan of 100,000 yen and Mr. Otani loaned the money to Kosugi (R 107). Kosugi signed a receipt for the 100,000 yen loan and gave the check to Mr. Komatsu to exchange the check for cash for accused. On 25 or 26 December 1946, accused told Kosugi he [accused] would be fully responsible for the repayment of the loan (R 32-35). Komatsu cashed the check for 100,000 yen given to him by Kosugi and gave the cash to accused on or about 26 December 1946. This loan was never repaid by accused (R 113-114).

About the middle of February 1947, accused asked Mr. Tsukimori, Managing Director of the Ofuna Motion Picture Company, for a loan of 6,000 yen and thereafter repeated this request on two occasions. On 17 March 1947, Tsukimori went to accused's home to deliver the 6,000 yen to him. The loan was not evidenced by a written agreement nor was any agreement made for the payment of interest, repayment of the loan or for collateral security (R 13-14).

In a pre-trial statement made on 21 May 1947 in conformity with requirements of Article of War 24, and admitted in evidence, accused stated:

> "It is true that I borrowed approximately one hundred thousand yen (¥ 100,000) from Mr. KOSUGI, an actor friend of mine, with the intention of returning the loan during an indefinite period of time. I also borrowed twenty thousand yen (¥ 20,000) from Mr. TSUKIMORI, producer of Ofuna Studio, with the intention of returning the loan as soon as possible. I gave Mr. KOMATSU, liaison man

of Shochiku Motion Picture Company, one old OD shirt, that was too large for me and told him to repair it and make use of it, but that he didn't do. I also gave him an old pair of shoes, which he had repaired and was wearing them.* * *." (R 165,167; Pros Ex 7A).

Specification 3, Charge II. Between October 1945 and February 1946, accused asked Mr. Nagata, President of the Daiei Studio, for a loan. Mr. Nagata loaned 3,000 yen to accused on each of two separate occasions at accused's request. Accused never repaid the loans, gave no security, made no agreement for payment of interest on the loans and never set a definite date for repayment of the money (R 37-38). Accused had owed this money for about a year and seven months but Mr. Nagata did not demand repayment because "* * * I myself figure he /accused/ could not pay it back so I just give it to him, more or less give it to him." (R 40)

c. Specification 3, Charge I; Specification 4, Charge II. Emiko Kudo, a singer, also known on the theater stage as Emiko Aoyama, testified that she met accused on 22 February 1946 and thereafter they saw each other weekly until about August 1947, the month prior to the instant trial. In March 1946, accused asked Miss Kudo to marry him but he did not tell her he was then married until August 1946. In September 1946, after accused's wife came to Japan from Hawaii, witness and accused went by train to Hokkaido to visit her parents. The train trip to Hokkaido took four days and altogether they remained away from Tokyo about half a month. During their stay in Hokkaido they stayed at the home of Emiko's parents (R 123-126,144,145,154). Accused introduced his wife to Emiko in September 1946. In a conversation between the three of them at that time they discussed accused's marital troubles and the best ways to resolve the situation. Explaining what she meant by "the situation," witness stated, "Mrs. Konno knew that their marriage was a failure and also Lt. Konno won't be able to continue his marriage, so they came to an understanding that they would separate soon. * * * Mrs. Konno and Lt. Konno, they had different ideas of things, and just won't be able to click." She further explained her presence at this meeting as follows: "Since marriage or separation is the most important thing in your life, so Lt. Konno asked me to go along with him, sir." (R 128) In January 1947, Emiko purchased a house for 130,000 yen and accused loaned her 80,000 yen to apply on the purchase price. Emiko never repaid any of this loan to accused (R 126-127). Accused gave Emiko food, candy and lace and about once a month, he brought "candy and such," and "things to eat." (R 140-141,169). Articles of accused's clothing and his toilet articles were found in Emiko's house (R 143,149, 151,159,168). Emiko admitted that accused stayed at her house after 2300 hours once when he was apprehended by the "CID" but denied that he ever stayed with her overnight (R 128,156). She admitted accused was her

lover and added, "I would not suffer in this manner if he wasn't my lover; in fact, he is my present lover." When asked, "When did he first become your lover?", she replied, "I do not want to answer such questions." (R 147). Asked whether accused ever kissed her, she answered, "I cannot answer." * * * "As a Japanese custom I cannot say such things. Especially an educated woman will not say such things." * * * "That a woman should go through all of this suffering is enough and you should understand by that." (R 148). In explaining what she meant when she said accused was her lover, Emiko stated, "Japanese women cannot change her man because there is something wrong with him or because of inconveniences that arise." (R 148).

About the third week of January 1947, accused's wife complained about accused's relationship with another woman to accused's commanding officer, Lieutenant Colonel Donald R. Nugent. Lieutenant Colonel Nugent called accused to his office to answer this complaint and accused promised him that his conduct in the future would be exemplary; that there would be no further cause for complaint as to his alleged neglect of his family. On the following morning accused again reported to Colonel Nugent stating that he had taken certain measures which would lead to a better relationship with his family; that he had broken off relations with certain of his former friends and a woman whose name was not revealed; and that he had returned to his own home, certain of his possessions which had been at the house of friends (R 189-192).

It was stipulated that accused is married and that he has been married since about July 1939, to Mrs. Ellen K. Konno (R 192).

At about 0230, 21 May 1947, First Lieutenant Walter T. Deppe, Provost Marshal's Office, Tokyo, and Vice Squad Commander, Military Police Investigation Section, investigated the home of Emiko Kudo and found the accused asleep in a bed on the first floor of the house. Accused was dressed in a T-shirt and "OD" trunks and Emiko Kudo was dressed in a thin kimona when she answered the door. Emiko's maid was on the second floor of the house and Emiko and accused were in the room on the first floor. Only two beds were in the house, one of which, occupied by the maid, was on the second floor and the other, occupied by accused, was on the first floor. Accused appeared and acted perfectly sober and when he was asked by witness whether he had authority to remain in a Japanese house, he replied, "The only authority I have is from my wife." (R 157). Witness did not place accused under arrest but took accused to the Provost Marshal's Office in Tokyo (R 138-139,157-161). When accused arrived at the Provost Marshal's Office he made the following voluntary statement in conformity with the 24th Article of War, which statement was admitted in evidence as Prosecution Exhibit 13 (R 193-195):

"I met Miss Enuko Kudo on the night of 22 February 1946, attending a small party given by friends. After that we were seeing each other off and on. Then after couple of months of corresponding we found out that we were in love. At first I knew I couldn't marry her but I thought that some day there might be a chance to officially get married. I knew I must first get a divorce from my wife. Before I realized what I was doing I had called my wife and told her to come to Japan. She arrived 3 September, 1946. We had been apart for quite some time, in that our meeting wasn't exactly what I expected. My children were very happy to see me. We stayed at Palace Heights, but I didn't tell Miss Kudo that my wife was here, but she found out. At that time I was going over to see Miss Kudo two or three times a week, then, after two months we moved to Lincoln Center. My wife was furious of what I was doing so she went to see Col. Nugent, my commanding officer. He called me into his office and asked me of my present attitude toward my home and wife. I frankly told him that I was not doing the right thing but that I just couldn't help it. He told me to stop seeing her immediately, that I did. Somehow I couldn't forget her so after four days I went back to see her. Later my wife knew that I really loved her so together with my wife and Miss Kudo we made an understanding that Imay be with her whenever I asked. Also, at that time, my wife and I discussed about having a divorce. She wants to go back to Hawaie as soon as possible, before her contract expires in September, 1947. Thru this understanding I was meeting Miss Judo almost every day. I had a purpose of staying with her until I was taken in by military authorities on the morning of 21 May, 1947."

During his inspection of Emiko Kudo's house on 21 May 1947, Lieutenant Deppe and Private First Class Stefancic, found items of American food and wearing apparel which were confiscated and impounded (R 158,159,161). In his pre-trial statement dated 21 May 1947 accused stated in pertinent part: "* * * I gave Miss EMITSO KUDO some canned goods and there were lots of other things that actually belonged to me. I hope to have those things belonging to me returned." (Pros Ex 7A). Several weeks later Lieutenant Deppe checked Emiko's house at about 0030 and found accused in the house again. Emiko was also present. On both occasions that Lieutenant Deppe investigated Emiko's house, a quarter ton 4x4 vehicle, owned by accused,was parked by the house in the driveway (R 158,159,186-189; Pros Ex 12).

Colonel Pope S. Atkinson, Provost Marshal of General Headquarters, Tokyo, testified that around 1 May 1947 he had been riding to work past Emiko Kudo's house. On about six or seven occasions he had seen a jeep, No. 896, parked in a driveway of this house around 0600 to 0630. He made a note of the vehicle number in a book he carried and made a report of the matter because he thought it might be a violation of the regulations against staying in a Japanese house after 2300 hours (R 172,183,185).

Following accused's apprehension at Emiko Kudo's house on 21 May 1947, Lieutenant Colonel Theodore S. Hatzfeld, executive officer of the CI&E, was informed by the Provost Marshal's office that accused was in arrest and he was requested to sign a receipt for his release. Upon accused's release, accused reported to Colonel Hatzfeld, and after being warned that any statement he might make may be used against him in a courts-martial, accused told Colonel Hatzfeld that "All I have to say is that I am ashamed. I admit I am guilty of all charges." (R 23,26; Pros Ex 3).

The court was requested to take judicial notice of paragraph 2e, AR 600-10, dated 8 July 1944 as amended by Change 4, 17 September 1946, and SCAP Circular No. 1, 7 January 1947.

Prosecution's Exhibit 1A, containing various memoranda issued by the CI&E to CI&E personnel, with specific reference to "Subject: SOP re Contacts and Relations with Japanese," dated 25 October 1946, as well as Prosecution's Exhibit 1B, a receipt for the Memoranda represented by Prosecution's Exhibit 1A was received in evidence over objection by the defense (R 20-27).

Prosecution's Exhibit 3, being General Orders No. 27, GHQ, SCAP, dated 3 June 1946, with specific reference to page 8 and 9 thereof, "Limitation of Activities" (substantially a limited restatement of paragraph 2e, AR 600-10), was admitted in evidence over objection by the defense (R 20,99).

4. Evidence for the defense.

The defense moved for a finding of not guilty (R 196) which motion was denied (R 199).

Mr. J. Woodall Greene, formerly known as Colonel Greene, Chief of Analysis and Research Division, Civil Information and Education, testified, in substance, that he was the accused's Commanding Officer from about April 1945 to September 22, 1946, and was responsible in a measure for the accused's promotion to 2d Lieutenant as the accused was formerly a staff sergeant; that the witness went with the accused to Toho Studio in June 1946, partly out of curiosity, and partly on official business; that the accused made the arrangements at the witness' request; that the witness and the accused along with others stayed for dinner but has no idea who paid the bill (R 199-203).

Mr. J. Gercke testified, in substance, that he supervised the accused's work and that it was necessary for the accused to contact Japanese daily; that in the furtherance of maintaining liaison the witness and the accused attended receptions in January and February 1947, when they ate and met with Japanese officials; that due to the language

difficulty the accused made social contacts with the Japanese as a part of his duties; that the accused's performance of duty was entirely acceptable; that the witness had no funds for the creation of good will and had no direct authority to accept Japanese hospitality (R 203-223).

Mr. Edward M. Kaneshima testified, in substance, that he and the accused had soldiered together since 1944 and that the accused enjoyed a good reputation as a soldier. A stipulation was received to the effect that the accused had earned four battle stars; three for the Asiatic-Pacific Campaign and one for the Philippine Campaign; and that he has earned the following ribbons; American Defense, American Theater, Good Conduct, Occupation Ribbon, Distinguished Unit Citation--three palms; and that he has three and a half years' service (R 225).

5. a. Specification 1, Charge I and II. Under Specification 1, Charge I, it is alleged that the accused did, at and in the vicinity of Tokyo, Japan, from about October 1945 to about April 1947, wrongfully, unlawfully and dishonorably accept, as a gift or emolument, food, drink and other entertainment, of a value aggregating many thousand yen, from Japanese nationals who were officials of the Ofuna or Shochiku Studio, Toho Studio and Daiei Studio, to the scandal and disgrace of the military service and the prejudice of the objectives of the occupation of Japan in violation of Article of War 95.

The offense charged as a violation of the 95th Article of War is also charged as a violation of the 96th Article of War (Spec 1, Chg II) except that in the latter offense, the word "feloniously" is substituted for the word "dishonorably" and except that the latter offense is denounced as being "to the discredit of the military service" instead of "to the scandal and disgrace of the military service."

The prosecution contended that the accused's alleged conduct contravenes the standards of service enjoined upon military personnel under paragraph 2e, Army Regulations 600-10, 8 July 1944, and by memoranda and directives published under authority of the Supreme Commander For the Allied Powers. Paragraph 2e, subparagraph (2), AR 600-10 provides:

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

(a) It is impossible to enumerate all the various outside activities and interests to which these regulations

refer. The following examples may be regarded as typical:

1. Acceptance by an officer of a substantial loan or gift or any emolument from a person or firm with whom it is the officer's duty as an agent of the Government to carry on negotiations."

Paragraph 2, page 8, of General Orders No. 27, GHQ, SCAP, 3 June 1946, titled "Limitation of Activities:" is substantially a restatement of paragraph 2e, AR 600-10, except that the limitations of activities prescribed in General Order No. 27, GHQ, SCAP, is expressly made applicable to activities performed within the Japanese zone of occupation (Pros Ex 2).

Paragraph 7 of unnumbered memorandum of GHQ, SCAP, dated 25 October 1946, "Subject: re Contacts and Relations with Japanese," provides:

> "7. Exchange of gifts is an old Japanese custom. It should be noticed that the word 'exchange' is used rather than the word 'giving'. In the Japanese mind, the acceptance of a gift obligates the receiver to return a gift or favor in exchange. It is therefore highly inappropriate for members of CI&E to accept gifts from Japanese whom they contact in an official or semi-official capacity. Offers of gifts should be refused with a courteous statement to the effect that it is against Section policy for any member of CI&E to receive gifts. Persons offering gifts 'in exchange for past favors' should be told that this Section extends no individual or official 'favors'. If all personnel adhere to this principle, Japanese donors whose motives are sincere cannot take offense, while those with ulterior motives will be unsuccessful in their attempts to place CI&E personnel under obligation." (Pros Ex 1)

It was clearly shown by the evidence that on numerous occasions during the alleged period from about October 1945 to about April 1947, the accused was the recipient of food, drink and entertainment furnished by Japanese nationals, officials of the alleged motion picture studios. It was further shown that the Japanese motion picture industry was subject to regulations imposed by the Allied Occupation Forces and in this connection, various Japanese nationals, official representatives of the Japanese motion picture studios, necessarily maintained liaison with the responsible officers of the CI&E. Accused, a Nisei, was principally employed as an interpreter in the CI&E and as a translator of the Japanese motion picture scripts submitted by the Japanese for censorship prior to their approval for civilian production. In this capacity, accused's position with the CI&E was simply ministerial in character although he was permitted to assist the Japanese nationals in editing the script in order to effect compliance with established censorship regulations. It appears that as a result of language difficulties between the Japanese nationals and the responsible military officials, the

Japanese nationals became somewhat dependent upon accused for communication with the military officials and for an interpretation and understanding of the censorship regulations and instructions imposed by them. Apparently, as a result of the close business relationship between accused and the Japanese liaison officials, they became intimately associated, socially, to an extent where the Japanese nationals wined, dined and entertained the accused with geisha girls, not at their personal or reciprocal expense, but at the expense of the various Japanese motion picture studios. The cost of these so-called dinners, parties and "get-togethers" ranged from 2,000 yen to 23,000 yen and aggregated many thousands of yen. Sometimes the expense of these affairs was divided among the several motion picture companies and because none of the companies had any special allowance account for the promotion of such activities, the Japanese motion picture studios charged these expenses off to the production costs of their approved motion pictures. In most instances these purported parties were held as a celebration upon the successful completion of a motion picture and except for one or two instances, the accused and his Nisei assistant were the only allied personnel present. There is evidence in the record that on several occasions a meal, dinner or party between an executive of the Japanese motion picture studio and the accused was suggested by the accused but the expense was paid by the Japanese motion picture studio.

While it is not affirmatively shown what consideration, if any, was rendered by the accused to warrant the lavish treatment and benevolence shown by the Japanese, it is the opinion of the Board of Review that from all the direct and circumstantial evidence presented, the court was reasonably justified in inferring that the gratuities thus offered or furnished were accepted by accused as an emolument of his official position with the CI&E for favors connected with the performance of his official duties. Under the circumstances shown by the evidence, it is considered that by accepting such numerous and lavish gratuities, while occupying a position necessitating the exercise of undivided trust and fidelity to the honor of the Allied Occupation, the accused subordinated and compromised the dignity of the Allied cause. His indiscreet conduct in this respect certainly can be said to attract suspicion to his activities connected with the discharge of his military duties and is incompatible with the general principle underlying the limitations enjoined by paragraph 2e, Army Regulations 600-10, and the memoranda published by the Supreme Commander for the Allied Powers, supra.

In CM 235011, Goodman, 21 BR 243, the accused was charged with having accepted a gift in the amount of $20 from a partnership with which it was the accused's duty to carry on negotiations. In speaking of this offense, the Board of Review said:

> "The real question is whether the acceptance of the money by accused, even if judged in its most favorable light as an unsolicited gift predicated upon no past or future consideration

or favor, is an offense in violation of Article of War 96. It is the essence of naivete to believe that such a gift can be accepted without kindling forbidden hopes in the heart of the giver or stultifying the recipient's sense of singleminded obligation to the Government. The public regards the acceptance of gratuities by public servants with grave suspicion. The acceptance of this money by accused was a suspicious circumstance. It tended to belittle accused, and to bring discredit and disrepute not only to him but to the service which he represented. Army officers transacting public business are, like Ceasor's wife, required to be beyond suspicion."

In CM 304586, MacDowell, 32 BR (ETO) 1, the accused was found guilty only of soliciting and receiving from a Frenchman about 10,000 French francs of the exchange value of about $200. The Board of Review discusses the evidence and the law as follows:

"The evidence clearly showed the payment to and acceptance by accused of ten thousand francs, as alleged in the Specification, and the sole question for solution is whether this conduct constituted a violation of Article of War 96.

"The Specification alleged and the proof established that the payment was made to accused in connection with the performance of his official duties and with the performance of work by other personnel of the army. Imbert, by reason of authorization given him by the French government, had an interest in the expeditious and careful removal of the wrecked vehicles, and the evidence abundantly supported the inference that the payment to accused was made for the purpose of obtaining his cooperation.

"Although accused contended that the acceptance of the money did not influence him in the execution of his official duties, the payment was made under suspicious circumstances, in the presence of two French civilians, and under conditions which would be conducive to corruption and disloyalty to the army and service. A discrediting conduct is clearly shown (CM 235011, Goodman, 21 BR 243 (1943); CM 234644, Cayouette, 21 BR 97 (1943))."

While it was shown by positive evidence that in October 1946 accused had knowledge of the limitation on activities and relations with Japanese nationals, as exhibited by Prosecution's Exhibit 1B, he nevertheless persisted and continued, thereafter, to accept gratuities from Japanese nationals contrary to the prescriptions set out in Memorandum 176, GHQ, SCAP (Pros Ex 1A). Regardless of whether accused had personal knowledge of the limitations of activities enjoined upon military personnel by order of the Supreme Commander for the Allied Forces prior to October 1946, he was nevertheless bound by the limitations enjoined in paragraph 2e, AR 600-10, and lack of knowledge thereof would be no defense.

In CM 267639, Tressler, 44 BR 27 at 32, the Board of Review stated:

> "The Army Regulations are public military regulations and all military personnel are presumed to have knowledge thereof just as is the case with public civil law. Accused's ignorance of the regulations under consideration, assuming that to be the fact, constitutes no defense to the offense charged, * * ."

It is the opinion of the Board of Review that if the accused had not been in a position, as an officer of the CI&E, to benefit or favor the Japanese motion picture companies in connection with the performance of his duties, such an amount of food, drink and entertainment would not have been advanced to the accused by the Japanese nationals. Under the circumstances surrounding the instant case the acceptance of gratuities by accused was not merely improper but was dishonorable and constituted a violation of the 95th Article of War (CM 234644, Cayouette, 21 BR 97).

The acceptance of gifts or gratuities by an Army officer from persons with whom he transacts business has, on numerous occasions, been held to be a violation of Article of War 96 (CM 325040, Kotches, (1947); CM 235011, Goodman, supra; CM 234644, Cayouette, supra; CM 267639, Tressler, supra; CM 307417, Ruf, 30 BR (ETO) 13; CM 304586, MacDowell, supra.

b. Specification 2, Charge I and II. In support of these Specifications and Charges it was shown that from about November 1946 to about March 1947, the accused requested and received, for his own use and benefit, from the Japanese nationals alleged, sums of Japanese money aggregating 126,000 yen. At the time of the alleged transactions he was engaged in official liaison activities with these persons who were representatives of the alleged Japanese motion picture studios. The money received by him was purportedly borrowed, on each occasion, from one of the motion picture studios. Despite the initial refusal of the Japanese motion picture studios to grant a loan to accused and despite the fact that the alleged studios were not authorized to make loans to "outsiders," the accused, nevertheless, succeeded in obtaining the money from them and the loans were accomplished by the studios by charging them off to the censored and approved motion pictures as miscellaneous expense. In this connection, none of the loans were evidenced by a written instrument nor was any agreement made for the payment of interest, repayment of the loans or for collateral security. None of the monies thus obtained by accused was repaid. There was no evidence that accused used any sort of persuasion to obtain these purported loans, but the Board of Review in commenting upon the legal sufficiency of the evidence to support findings of guilty in a similar situation stated:

"The soliciting by accused of a personal loan from Emtman and his soliciting and procuring personal loans from Braman and Norcross, Government contractors, as charged in Specifications 1-4, inclusive, Charge II, were amply proved. Suggestions of business or financial favors to the contractors or threats of possible injury to them by accused in his official capacities, were implicit in the circumstances. His conduct in this connection was plainly of a nature to bring discredit upon the military service and was violative of Article of War 96, as charged." (CM 213993, Casseday, 10 BR at 322).

In his pre-trial statement, accused admitted that he received the money in question but maintained that it was received as a loan and not as a gift. This was the contention of the defense upon trial. In CM 234644, Cayouette, supra, the accused, an officer, being assigned to duty in the Office of the Chief of Ordnance, was similarly charged in several Specifications with accepting gifts from a Government contractor who was engaged in performance of existing contracts and business transactions with the United States. The accused was not a contracting officer; it was not part of his duties to act for the Government in negotiating for contracts; and he was not at any time in a position to secure awards for contractors, but the evidence disclosed that he had made certain recommendations favorable to a certain American manufacturing company, of which one W. J. Gourley was the president, and that he had accepted from Gourley money and entertainment. That transaction which was charged as a violation of the 95th Article of War alleged the receipt of a check of the value of $3,000. The defense as to this Specification was that the check in question was a loan from Mr. Gourley to the accused and both Gourley and the accused testified that it was a loan and not a gift. In disposing of this contention the Board of Review said:

"* * * The transaction was a loan from Mr. Gourley to accused, according to their testimony, but the attendant circumstances were not those of an ordinary loan. No security for repayment was given and accused did not execute any note or other evidence of indebtedness. There was no agreement as to what rate of interest would be charged and no understanding as to when the loan would fall due. In his statement under oath to Colonel McCoy accused unequivocally asserted that he had asked Mr. Gourley for the loan, but after the latter had testified that he 'volunteered' to lend the money accused testified that his statement to Colonel McCoy was not true and that 'the money had been made available' to him. He stated that he borrowed the money to make a down payment on a house which he desired to purchase but instead of depositing it in his own bank account he arranged to have it deposited in a separate bank account of his wife.

* * * *

"It is the opinion of the Board of Review that the $3,000 check under consideration was not a bona fide loan and that such an amount would not have been advanced to the accused by Mr. Gourley if the accused had not been in a position, as an officer of the Ordnance Department, to benefit the American Manufacturing Company in connection with the performance of its contracts with the United States. Under the circumstances the acceptance of the check by accused was not merely indiscreet or improper but was dishonorable and constituted a violation of the 95th Article of War."

Under all the circumstances shown by the record of trial in the instant case, it is the opinion of the Board of Review that the evidence pertaining to Specification 2 of Charge I constitutes an offense under paragraph 2e, AR 600-10, in violation of the 96th Article of War and that the acceptance of said monies was illegal and constitutes dishonorable conduct violative of the 95th Article of War.

c. Specification 3, Charge I and Specification 4, Charge II. Accused being a married man, is charged with wrongfully, unlawfully and openly cohabiting, keeping and maintaining one Emiko Kudo, a Japanese national, a woman not his wife, in the vicinity of Tokyo, Japan, from about 22 February 1946 to about June 1947. This offense, as charged under the 96th Article of War, is also charged as a violation of the 95th Article of War with the added allegation that such conduct was dishonorable. The gravamen of the offense charged is unlawful cohabitation.

The term "cohabitation" is simply defined as "To live together in the same house." (Bouvier's Law Dictionary, Rawle's Third Revision). Legal aspects of the term generally, in a criminal sense, are many and varied, depending in large part upon the construction and interpretation of statutory enactments which denounce a particular course of conduct within a classification of cohabitation. Thus, in order to constitute an offense of unlawful cohabitation in some State jurisdictions the idea of habitual sexual intercourse must be involved, or living together in such a way as to hold out the appearance of being husband and wife, and it is the scandal resulting therefrom which constitutes the mischief against which the statutes are directed; Luster v. State, 23 Fla 339, 2 South 690; Jones v. Com., 80 Va. 20; Kinaid v. State, 57 Miss. 132; Sullivan v. State, 32 Ark. 187. However, in the absence of a statutory enactment the offense of unlawful cohabitation is judicially defined as:

"The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife." (Bouvier's Law Dictionary, Rawle's Third Revision at page 1868).

In its primary sense, cohabitation has been defined as meaning the act or state of dwelling together, or in the same place with another, living

together; and in its secondary sense, as meaning a living together as husband and wife, or as man and wife. In particular connections it has been said that the term does not simply mean the gratification of the sexual passion, but to live or dwell together, to have the same habitation, to live in the same house, and while as commonly understood, the term implies sexual intercourse, sexual intercourse is not necessarily implied as the word does not even include necessarily the occupying of the same bed (14 C.J.S. p 1312 and cases cited therein).

Since accused is simply charged with "wrongfully, unlawfully and openly cohabiting" we conclude that, in view of the foregoing discussion, and in the absence of any applicable statute governing the offense charged as violative of the 95th and 96th Articles of War, the alleged offense of unlawful cohabitation is to be construed in its primary sense, namely, living together in the same house with a woman not his legal wife. In this respect, we follow the view expressed in Barksdale v. United States et al., 4 F. Supp 208.

The evidence in the instant case is primarily circumstantial. It was shown that from 22 February 1946 to about August 1947, accused, a married man, was intimately associated with Emiko Kudo, a Japanese national, not his wife. Emiko regarded accused as her lover and while she refused to comment upon any intimate relations which may have occurred between them, because, as a Japanese custom and as an educated woman, she could not say such things, nevertheless, her naive statement "That a woman should go through all this suffering is enough and you should understand by that," bears significant substance to be weighed by the court in reference to the nature of the relationship existing between accused and Emiko. As evidence of the close, continuing and intimate relationship of these parties it was shown that as early as May 1946, accused asked Emiko to marry him without disclosing that he was married and had two children at the time. They admittedly saw each other several times a week over a period of about eighteen months and on one occasion went on a trip to Hokkaido, Japan, shortly after accused's wife arrived in Japan from Hawaii to live with him, where they stayed at the home of Emiko's parents for several weeks. In January 1947, subsequent to his wife's arrival in Japan, accused gave Emiko 80,000 yen for the purchase of a house which Emiko claimed was a loan. However, under the circumstances of their intimate relationship and in the absence of any written agreement characterizing the terms of an ostensible loan, the evidence justifies the inference that the 80,000 yen advanced by accused to Emiko was to furnish a dwelling for their intimate association. At about 0230, 21 May 1947, accused and Emiko were apprehended in Emiko's house under circumstances indicating that they were living as man and wife. Accused was found sleeping in Emiko's bed dressed in a T shirt and OD trunks while Emiko was dressed in a thin kimona. On about six different occasions, accused's personal vehicle was seen while parked in the driveway next to

Emiko's house in early morning hours giving rise to a reasonable assumption that he was present in her house throughout the entire night. Upon accused's release from arrest he told the Executive Officer of the CI&E that he was ashamed of his conduct and admitted guilt of the charge on which he was arrested. Several weeks later accused was again apprehended in Emiko's house with Emiko in early morning hours. At the time of his first arrest some articles of accused's clothing, toilet articles and American foodstuffs were taken from Emiko's house and confiscated. Accused admitted that he furnished Emiko with American food and canned goods and requested that his personal property, which was found at Emiko's house be returned to him. The evidence thus adduced supports the allegations that accused kept and maintained Emiko Kudo. When accused's wife learned of accused's intimate relationship with Emiko, she reported the matter to accused's commanding officer, Colonel Nugent, and solicited his cooperation to straighten out the marital and domestic difficulties existing between accused and herself. In January 1947, Colonel Nugent spoke to accused about his wife's complaint and accused admitted that he neglected his family but promised that he would take steps to straighten things out. The following day, accused told Colonel Nugent that he had broken off relations with his friends and a certain unnamed woman and that he had taken all his personal possessions from their house and returned them to his own home and promised that thereafter his conduct would be exemplary. Notwithstanding this promise accused continued to live with Emiko as evidenced by his arrest in her house on 21 May 1947 and on an occasion several weeks thereafter. While accused did not disclose the name of the woman with whom he asserted that he had broken off relations the conclusion wrought by all the evidence is inescapable that he referred to Emiko. Considering the fact that throughout accused's association with Emiko he was a married man, as stipulated in the record of trial, it is the opinion of the Board of Review that the direct and circumstantial evidence adduced is legally sufficient to constitute the alleged offense of wrongful, unlawful and open cohabitation with Emiko Kudo, a Japanese national, a woman not his wife, and of keeping and maintaining her in violation of the 95th and 96th Articles of War.

In Specifications 1, 2 and 3 of Charge II, accused is charged with "feloniously" committing the acts therein charged. Except as the term "feloniously" has reference to the word felony as defined in the Manual for Courts-Martial, it does not have any fixed definition in American jurisprudence but, a general connotation of the term as expressed in various state and Federal courts is compiled in Black's Law Dictionary, 3d Ed, as follows:

> "Of, pertaining to, or having, the quality of felony. * * * Without color of right or excuse. * * * Malignantly; maliciously. * * * Wickedly and against the admonition of law. * * * with the intention of committing a crime."

The word "felony," as construed in American law, is condensed in Black's Law Dictionary, as follows:

"The term has no very definite or precise meaning, except in some cases where it is defined by statute. For the most part, the state laws, in describing any particular offense, declare whether or not it shall be considered a felony. Apart from this, the word seems merely to imply a crime of graver or more atrocious nature than those designated as 'misdemeanors.' US v. Coppersmith (C.C.) 4 Fed 205; Bannon v. U.S., 156 U.S. 464, 15 Sup Ct 467, 39 L Ed 494."

"A crime is not a felony unless so declared by statute, or it was such at the common law; State v. Murphy, 17 R I 698, 24 Atl 473, 16 LRA 550."

The word "felony" is a generic term, going to distinguish certain crimes, as murder, robbery, and larceny, from other minor offenses and generally, an offense is a felony, if it may be punished by imprisonment in the penitentiary, regardless of what penalty actually is imposed. (State v. Celestin, 138 La 407, 70 So 342,343; Seitz v. Ohio State Medical Board, 24 Ohio App 154,157 NE 304,305).

According to the definition provided in the Manual for Courts-Martial and the laws of the United States the following crimes are felonies; those declared expressly or impliedly by statute to be such, those punished under their common law name and which are felonies at common law, and those made a felony by a state law which is adopted by Congress (CM 202359, Turner, 6 BR 91; Par 149d, MCM; U.S. v. Coppersmith, supra). Felonies are defined as follows by Federal statute:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies." (Sec. 335, Federal Penal Code; USC 18:541).

The offenses charged in Specifications 1, 2 and 3 of Charge II, of which accused was convicted, are not denounced as a felony by any law of the United States or under the common law. Although it might be said that the gist of the offenses alleged are analagous to the offenses denounced by Section 113 of the United States Criminal Code (18 USC 203), which are punishable by a maximum fine of $10,000 and imprisonment for a period not exceeding two years, thus constituting the statutory offense a felony, the instant offense, by virtue of the language used in the Specifications fail to come within the scope of the offenses denounced by said statute and consequently cannot properly be construed as a felony nor may said statute be used as a basis for penitentiary confinement under authority of Article of War 42 (CM 322047, Porter, 6 Bull JAG 175; CM 321542, McCullough (1947). While the use of the term "feloniously" in the said specifications was unnecessary and irregular inasmuch as the crimes alleged are nowhere denounced as felonies, use of the word "feloniously" cannot be said to be harmful. In CM233182, Blue, 19 BR 345, it was held:

"The meaning of the word [feloniously] is no longer restricted to its ancient and traditional use and it may connote a wrongful, malicious and wicked act contrary to the admonition of the law regardless of whether the act which it describes is, in fact, a felony. Its use in charging a felony was indispensable at common law and is so in many jurisdictions today, but when applied to a crime of lesser grade it can have no harmful significance."

6. The accused is a Nisei who formerly lived in Hawaii. The records of the Department of the Army show that he is 29 years of age, married and the father of two children. He had one year of business college education and his principal civilian occupations were those of carpenter and chauffeur. Accused was inducted into the military service on 3 January 1944 and served as an enlisted man for 20 months as a translator and interpreter. His highest enlisted grade was Staff Sergeant. On 1 September 1945, he was commissioned a second lieutenant. He served overseas in the Pacific Theater from 5 February 1945 to date of trial and is authorized to wear the Pacific Theater Ribbon with two battle stars; the Philippine Liberation Ribbon with battle star; the World War II Victory Medal, and the Army of Occupation Medal with clasp "Japan." His manner of performance ratings, as set forth in his WD AGO Form 66-1, from 1 September 1945 to 30 June 1946 are as follows: 4.3, 4.3, 3.6, and 5.4, each of which is equivalent to a rating of "Excellent."

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. 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 violation of Article of War 95, and a sentence to dismissal, total forfeitures and confinement at hard labor for one year is authorized upon conviction of a violation of Article of War 96.

A. Horowitz, Judge Advocate

F. W. Lynch, Judge Advocate

Joseph T. Brock, Judge Advocate

JAGH CM 328133

JAGO, Dept. of the Army, Washington 25, D.C. MAR 27 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clifford T. Konno (0-2031836), Corps of Engineers.

2. This officer was found guilty of accepting, as a gift or emolument, food, drink and entertainment from Japanese nationals with whom he was officially associated from October 1945 to April 1947, in violation of Articles of War 95 and 96 (Chg I, Spec 1; Chg II, Spec 1), of wrongfully borrowing 126,000 yen for his own use and benefit from Japanese nationals with whom he was officially associated to the scandal and disgrace of the military service and prejudice of the objectives of the occupation in violation of the 95th and 96th Articles of War (Chg I, Spec 2; Chg II, Spec 2), of wrongfully and unlawfully cohabiting, keeping and maintaining a Japanese woman, not his wife, from 22 February 1946 to June 1947, in violation of the 95th and 96th Articles of War (Chg I, Spec 3; Chg II, Spec 4), and of wrongfully borrowing 6000 yen from a Japanese national, with whom he associated officially in violation of Article of War 96 (Chg II, Spec 3). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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.

The accused was an interpreter and translator for the Motion Picture and Theatrical Unit of the Information Division, Civil Information and Education Section in the General Headquarters of the Supreme Commander for the Allied Powers. He was assigned to transcribe the proposed motion picture scenarios, submitted by Japanese Motion Picture Studios to the Civil Information and Education Section. In this capacity, accused exercised some power of supervision over the editing of the script which, when approved by the Civil Information and Education Section, was forwarded to the Civil Censorship Division of the G-2 office for final approval of form and substance prior to civilian production of the proposed scenario into civilian motion pictures. By virtue of his assignment, accused became acquainted with certain Japanese Nationals, officials of various Japanese motion picture studios. From October

1945 through March 1947, he was lavishly dined and entertained by these officials on numerous occasions, and the food, drinks and geisha girls were furnished at the expense of the Japanese motion picture studios. The expenses of these dinner parties amounted to many thousand yen and on some occasions the expenses of a dinner party were apportioned among the several studios who were joined in the social function. In some instances the party was arranged by the Japanese studio officials at accused's suggestion and the benefactions thereof were accepted by him without remuneration of pecuniary expenses.

Accused requested and received from a Japanese motion picture studio the sum of 20,000 yen in November 1946, 100,000 yen in December 1946 and 6,000 yen in March 1947. None of these purported loans was evidenced by a written instrument nor was any agreement made for the payment of interest, repayment of the loans or for collateral security. The monies thus obtained by accused was never repaid and it was charged off as miscellaneous expense by the Japanese motion picture studios.

The accused requested and obtained a loan of 3,000 yen from Mr. Masaichi Nagata, President of "Daiei Movie Studio," on two occasions since October 1945. He requested these sums as a loan but the lender did not consider that the accused could pay it back and just gave it to him. A demand for repayment was therefore never made and the loan was not repaid by the accused.

On 22 February 1946, accused met Emiko Kudo, a singer, also known on the stage as Emiko Aoyama. Although accused knew that he could not legally marry Emiko, because he was already married and had two children, nevertheless, in March 1946, he asked her to marry him without disclosing the fact of his marital status. They admittedly saw each other several times weekly and in September 1946, they visited Emiko's parents in Hokkaido, Japan, where they stayed for a week. In January 1947, Emiko purchased a house for 130,000 yen and accused purportedly loaned her 80,000 yen for the purchase of the house. He also furnished food, candy and lace for Emiko and he admittedly kept his toilet articles, articles of clothing and bathing trunks at her house. After accused's wife arrived in Japan on 3 September 1946, he continued to see Emiko and his wife complained to accused's commanding officer. Accused promised his commanding officer that he had broken off relations with Emiko, that he had taken his personal possessions from Emiko's house and returned them to his own house and that in the future his conduct would be exemplary. Four days later, accused returned to Emiko. He entered into an agreement with his wife, wherein for some undisclosed consideration, his wife consented to his seeing Emiko almost every day. Accused's jeep was observed on about six different days to be at Emiko's house in early morning hours by the Provost Marshal. As a result of these observations the military police vice squad made a raid of Emiko's

house at about 0230 hours, 21 May 1947. Accused was found asleep in bed downstairs dressed in his underclothes and Emiko was dressed in a thin kimono. The same house was searched several weeks later at about midnight and the accused was present. Emiko testified that accused tried to get her to quit work but that she limited her work only in the summertime. She admitted that accused made love to her, that he is her present lover and that Japanese women cannot change their man because there is something wrong with him or because inconveniences arise.

4. The accused is a Nisei who formerly lived in Hawaii. He is 29 years of age, married and the father of two children. He had attended a business college for one year and his principal civilian occupations were those of carpenter and chauffeur. Accused was inducted into the military service on 3 January 1944 and served as an enlisted man for 20 months as a translator and interpreter. His highest enlisted grade was Staff Sergeant. On 1 September 1945, he was commissioned a second lieutenant. He served overseas in the Pacific Theater from 5 February 1945 to date of trial and is authorized to wear the Pacific Theater Ribbon with two battle stars; the Philippine Liberation Ribbon with battle star; the World War II Victory Medal, and the Army of Occupation Medal with clasp "Japan." His manner of performance ratings, as set forth in his WD AGO Form 66-1, from 1 September 1945 to 30 June 1946, are as follow: 4.3, 4.3, 3.6 and 5.4, each of which is equivalent to a rating of "Excellent."

5. 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.

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

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( GCMO 87, 19 April 1948).

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

(339)

9 MAR 1948

JAGH CM 328217

UNITED STATES

v.

Private First Class JOSEPH KULCSAR, RA 32924144, Troop A, 7th Cavalry Regiment, APO 201, Unit 2.

HEADQUARTERS 1ST CAVALRY DIVISION

Trial by G.C.M., convened at Tokyo, Japan, 15 August and 10 October 1947. Dishonorable discharge (suspended) and confinement for three (3) years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Joseph Kulcsar, Troop A, 7th Cavalry Regiment, did, at 37th Station Hospital, Luzon, Philippine Islands, on or about 16 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Nakano, Honshu, Japan, on or about 10 October 1946.

He pleaded not guilty to the Charge and the Specification thereunder. He was found guilty of the Specification and the Charge. 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 five years. The reviewing authority approved only so much of the findings of guilty as involved a finding of guilty of absence without leave from about 1 August 1945 to about 10 October 1946, in violation of Article of War 61, and reduced the period of confinement to three years. As thus modified the reviewing authority ordered the sentence executed but suspended the execution of the dishonorable discharge until the soldier's

release from confinement. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, or such other place as the Secretary of the Army may direct, was designated as the place of confinement. The results of trial were published in General Court-Martial Orders No. 111, Headquarters 1st Cavalry Division, Camp Drake, Japan, dated 5 December 1947.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority. Accused was arraigned on 15 August 1947 and pleaded not guilty to the Specification and the Charge. More than two years had elapsed between the date of the initial absence and the date accused was arraigned. There is no doubt that the accused was absent without leave for the period specified in the approved findings.

Article of War 39 provides in part that:

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

Paragraph 87b, MCM 1928, provides in part as follows:

> "* * * Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A.W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense."

In CM 217172, Rosenbaum, 11 BR 225, accused was charged with and found guilty of desertion in violation of Article of War 58. The reviewing authority approved only so much of the findings of guilty as involved a finding of guilty of absence without leave for the period alleged in violation of Article of War 61. The Board of Review, quoting the above-mentioned paragraph in the Manual for Courts-Martial held the record of trial legally insufficient to support the sentence. See also CM 231504, 3 Bull JAG 56-58; CM 313593, Sawyer, 63 BR 185.

In the instant case the reviewing authority reduced the offense to absence without leave. This action was taken after the trial had been completed, in the absence of accused, and in a situation where he could not assert his rights.

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

, Judge Advocate

, Judge Advocate

Judge Advocate

(342)

JAGH CM 328217 1st Ind

JAGO, Department of the Army, Washington 25, D.C. MAR 15 1948

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 Joseph Kulcsar (RA 32924144), Troop A, 7th Cavalry Regiment, APO 201, Unit 2.

2. 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 accused has been deprived by virtue of said sentence be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

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( GCMO 70, 24 March 1948).

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



JAGH CM 328231

28 January 1948

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| U N I T E D S T A T E S | ) | NEW ORLEANS PORT OF EMBARKATION |
| v. | ) | Trial by G.C.M., convened at New Orleans Port of Embarkation, New Orleans, Louisiana, 29 December 1947. Dismissal, total forfeitures and confinement for six (6) months. |
| First Lieutenant ARTHUR R. RUDNICKI (O-1946846), Transportation Corps. | ) | |

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

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

Specification 1: In that, First Lieutenant Arthur R. Rudnicki, 46th Transportation Corps Truck Company, New Orleans Port of Embarkation, New Orleans, Louisiana, did, at the New Orleans Port of Embarkation, Louisiana, on or about 31 October 1947, gamble with Private Carolina Washington, Private First Class Ralph Thomas, Technician Fourth Grade James H. Watt, Technician Fifth Grade Eddie Parker, and Private William B. Franklin.

Specification 2: In that First Lieutenant Arthur R. Rudnicki, 46th Transportation Corps Truck Company, New Orleans Port of Embarkation, New Orleans, Louisiana, did, at New Orleans, Louisiana, on or about 31 October 1947, gamble in camp, in violation of company Orders Number 11, 46th Transportation Truck Company, New Orleans Personnel Center, New Orleans Port of Embarkation, New Orleans, Louisiana, dated 19 April 1947.

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

Specification 1: In that First Lieutenant Arthur R. Rudnicki, 46th Transportation Corps Truck Company, New Orleans Port

of Embarkation, New Orleans, Louisiana, did, at New Orleans Port of Embarkation, Louisiana, on or about 2 October 1947, loan to Technician Fifth Grade James E. Neal, $15.00 under an agreement whereby he, the said Lieutenant Arthur R. Rudnicki, was to receive for the use of said money for one month interest at the rate of 50 per cent per month, thereby demanding and receiving an usurious rate of interest for said loan.

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

Specification 4: In that First Lieutenant Arthur R. Rudnicki, 46th Transportation Corps Truck Company, New Orleans Port of Embarkation, New Orleans, Louisiana, did, at New Orleans Port of Embarkation, Louisiana, on or about 15 August 1947, loan to Technician Fifth Grade L. C. M. Dukes, $10.00 under an agreement whereby he, the said Lieutenant Arthur R. Rudnicki, was to receive for the use of said money for one month interest at the rate of 50 per cent per month, thereby demanding and receiving an usurious rate of interest for said loan.

Specification 5: In that First Lieutenant Arthur R. Rudnicki, 46th Transportation Corps Truck Company, New Orleans Port of Embarkation, New Orleans Louisiana, did, at New Orleans Port of Embarkation, Louisiana, on or about 15 August 1947, loan to Private First Class Ralph Thomas, $5.00 under an agreement whereby he, the said Lieutenant Arthur R. Rudnicki, was to receive for the use of said money for one month interest at the rate of 50 per cent per month, thereby demanding and receiving an usurious rate of interest for said loan.

He pleaded guilty to all Charges and Specifications, and was found guilty of Charge I and its Specifications, not guilty of Specifications 2 and 3 of Charge II, guilty of Charge II and Specifications 1, 4 and 5 thereof. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. 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 New Orleans Port of Embarkation Judge Advocate, dated 31 December 1947.

4. The accused is 33 years of age, married and the father of one child. Records of the Army show that he was graduated from New York

University in 1933. Prior to entering the service he was employed as a bond clerk and statistician. He served as an enlisted man in the New York National Guard from 23 October 1939 to 6 November 1940 and as an enlisted man in the Army from 7 January 1941 until he was commissioned a second lieutenant, Army of the United States, on 1 December 1943. On 1 September 1945, he was promoted to the rank of first lieutenant. He served overseas in the European Theater from 10 May 1944 to 10 September 1945 and is authorized to wear two campaign stars on his European-African-Middle Eastern Theatre Ribbon. His performance ratings as set forth in WD AGO Form 66-1 from 4 December 1943 to 30 June 1947 are as follows: 5 Excellent and 5 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 the accused were committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95, and a sentence to dismissal, total forfeitures and confinement at hard labor for six months is authorized upon conviction of a violation of Article of War 96.

A. Hottenstein, Judge Advocate

[illegible], Judge Advocate

Joseph T. Brack, Judge Advocate

JAGH CM 328231 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. FEB 6 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 Arthur R. Rudnicki (0-1946846), Transportation Corps.

2. Upon trial by general court-martial this officer pleaded guilty to all Charges and Specifications and was found guilty of gambling with enlisted men and of gambling in camp, contrary to company orders, in violation of Article of War 95 (Chg I, Specs 1 and 2), and of loaning money to enlisted men at usurious rates of interest on three occasions, in violation of Article of War 96 (Chg II, Specs 1, 4 and 5). 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 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 New Orleans Port of Embarkation Judge Advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On or about 31 October 1947, accused was found gambling (shooting dice) with enlisted men of his organization, in a government building at the New Orleans Personnel Center, in violation of company orders. On three occasions between 15 August 1947 and 2 October 1947, accused loaned certain sums of money to enlisted men of his organization at an interest rate of fifty per cent per month. This rate of interest was collected by accused in all three instances.

4. The accused is 33 years of age, married and the father of one child. Records of the Army show that he was graduated from New York University in 1933. Prior to entering the service he was employed as a bond clerk and statistician. He served as an enlisted man in the New York National Guard from 23 October 1939 to 6 November 1940 and as an enlisted man in the Army from 7 January 1941 until he was commissioned a second lieutenant, Army of the United States, on 1 December 1943. On 1 September 1945, he was promoted to the rank of first lieutenant. He served overseas in the European Theater from 10 May 1944 to 10 September 1945 and is authorized to wear two campaign stars on his European-African-Middle Eastern Theatre Ribbon. He was separated from the service on 3

November 1945 and recalled to active duty on 4 September 1946. His performance ratings as set forth in his WD AGO Form 66-1 from 4 December 1943 to 30 June 1947 show five ratings of excellent and five ratings of very satisfactory.

5. I recommend that the sentence be confirmed but the confinement be remitted, and as thus modified the sentence 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

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( GCMO 54, 2 March 1948).

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

20 February 1948

JAGH-CM 328246

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| UNITED STATES | ) | EUROPEAN AIR TRANSPORT SERVICE |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Wiesbaden, Germany, 21-22 October 1947. Dismissal, total forfeitures and confinement for five (5) years. |
| | ) | |
| Second Lieutenant WARREN J. COURAGE (0936408), Air Corps. | ) | |

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

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

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

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

Specification: In that Second Lieutenant Warren J. Courage, Air Corps, 134th Airways and Air Communications Squadron, 5th Airways and Air Communications Wing, did, at Wiesbaden, Germany, on or about 17 February 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at LeZoute, Belgium, on or about 16 August 1947.

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

Specification 1: In that Second Lieutenant Warren J. Courage, Air Corps, 134th Airways and Air Communications Squadron, 5th Airways and Air Communications Wing, did, at Frankfurt, Germany, on or about 11 April, 1947, present for approval and payment a

claim against the finance officer at Frankfurt, Germany, an officer of the United States duly authorized to approve and pay such claims, in the amount of $497.10 for monthly pay, including additional pay for flying, and allowances as a Second Lieutenant of the Army of the United States for the period of 1 February 1947 to 31 March 1947, which claim was false and fraudulent in that he, the said Warren J. Courage, was absent in desertion and was not entitled to such pay and allowances, and was then known by said Warren J. Courage to be false and fraudulent.

Specification 2: Same as Specification 1, Charge II, except the date, "1 May 1947," the amount claimed "$306.00" and the period for which pay and allowances were claimed, "1 to 30 April 1947."

Specification 3: Same as Specification 1, Charge II, except the date, "2 June 1947," the amount claimed "$315.65" and the period for which pay and allowances were claimed, "1 to 31 May 1947."

Specification 4: Same as Specification 1, Charge II, except the date, "2 July 1947," the amount claimed "$355.50," and the period for which pay and allowances were claimed, "1 to 30 June 1947."

Specification 5: Same as Specification 1, Charge II, except the date, "31 July 1947," the amount claimed "$356.90," and the period for which pay and allowances were claimed, "1 to 31 July 1947."

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

Specification: In that Second Lieutenant Warren J. Courage, Air Corps, 134th Airways and Air Communications Squadron, 5th Airways and Air Communications Wing, did, at LeZoute, Belgium, on or about 16 August 1947, with wrongful and fraudulent intent have in his possession a falsely made and forged military pass, to wit: military orders granting leave of absence to the said Warren J. Courage.

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

Specification 1: Same as Specification 1, Charge II.

Specification 2: Same as Specification 2, Charge II.

Specification 3: Same as Specification 3, Charge II.

Specification 4: Same as Specification 4, Charge II.

Specification 5: Same as Specification 5, Charge II.

Specification 6: Same as the Specification, Charge III.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification of Charge I, except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave" and "without leave"; of the excepted words not guilty, of the substituted words guilty; of Charge I not guilty, "but guilty of a violation of the 61st Article of War"; of all Specifications of Charge II, and of the first five Specifications of Charge IV guilty, except in each of the said Specifications the words "in desertion" substituting therefor the words "without leave," of the excepted words not guilty, of the substituted words guilty; guilty of the other Specifications and of Charges II, III, and IV. 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 five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3 a. Evidence for the prosecution.

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

An extract copy of morning report of the 89th AAF BU (Hq 5th AACS Wing) was admitted in evidence without objection and contained the following entry:

7 Mar 47

"CORRECTION 3 Mar 47
Courage, Warren J (AC) 0936408 2dLt --
Reld fr atchd & ret to 764th AAF BU 134th
AACS Sq par 8 SO 15 that Hq eff 21 Feb 47
SHOULD BE
Courage, Warren J (AC) 0936408 2d Lt --
Present status: Atchd fr 764th AAFBU
134th AACS Sq Ref M/R 14 Feb 47
TDY to AWOL 0815 hrs 17 Feb 47 Dropped
fr Strength Section to M/R of 764th AAFBU
134th AACS Sq s/George E Kunde
t/GEORGE E KUNDE
Capt Air Corps" (R 15; Pros Ex 1).

First Lieutenant Milton B. Pulch testified that he was the custodian of the morning report of Headquarters, 5th AACS Wing and that he had verified from the original morning report the entries appearing on the extract copy admitted in evidence against accused including the signature on the original morning report (R 14, 15).

Accused had attended the opening session of a Detachment Commanders School at 5th Wing Headquarters at Wiesbaden, Germany, on 10 February 1947. He was next seen at the school three or four days later. Lieutenant Willis Johnson, a student at the school, testified that after 14 February 1947 he did not see accused in attendance the remainder of the two week session at Wiesbaden (R 16, 17). On examination by the court Lieutenant Johnson stated that had accused been in attendance he would have noticed him as the class was small (R 18).

Alfons DeWulf, a Belgian police officer, testified that during the month of August 1947 he was employed as police judicaire in the City of Knokke, Belgium (R 26, 27). On the night of 13-14 August 1947 DeWulf was watching the Bar LaTortue and observed accused, wearing a white jacket, tending the bar there (R 27, 28). Subsequently DeWulf learned that accused was staying at the Hotel San Toney and on the morning of 16 August went to accused's room at that hotel to check on his papers. Accused showed DeWulf leave orders and an AGO card. His AGO card seemed to be in order but not his leave orders. DeWulf identified Prosecution's Exhibit 3 for identification as the leave orders which accused showed him, and the orders were admitted in evidence without objection as Prosecution's Exhibit 3 (R. 29, 30). DeWulf had accused accompany him to the police station, and after a telephone conversation with American military authorities held accused in custody (R 32, 36).

The orders which accused had in his possession were purportedly issued by "Headquarters, 133rd AACS SQ, 867th AAF BU, Army and Airways Communications Service, ATC Frankfurt, Germany." It was designated Special Order Number 318, and bore the date 30 July 1947. It granted leave to accused for eight days from on or about 1 August 1947 and gave him permission to visit Luxembourg and Belgium. It recited that it was issued "By order of Colonel Ledoux" and was published over the name "James T. McDermott, WOJG USA" as "Assistant Adjutant." The following was written on the face of the orders: "Leave extended till 23 Aug 47 per Cable. WJC."

Captain Norval A. Dahl testified that he was the Adjutant of the 763rd AAF Base Unit, Rhein/Main, Germany. With reference to the Headquarters which purportedly issued the leave orders found in accused's possession, Captain Dahl testified as follows:

"Q. What is the Headquarters of origin as indicated by that piece of paper?
A. It states, Headquarters, 133rd AACS Squadron, 867th AAF BU, Army and Air Communications Service, ATC, Frankfurt, Germany.

Q. Is that the organization for which you are now adjutant?
A. Part of it is, sir. Part of the designation is correct.

Q. In other words, the designation is incorrect?
A. That's right" (R 53).

Captain Dahl further testified that but one special order a day was issued by his organization, that the number of orders issued in a year would not exceed the number of days in a year and that on 20 July 1947 only 114 days of the year had elapsed. He further stated that he did not know a James T. McDermott, Warrant Officer Junior Grade, that such a person had never been assistant adjutant of the organization and that Colonel LeDoux had been Commanding Officer in 1945 (R 54).

Lieutenant Colonel J. M. Jones testified that he was the finance officer at Wurzburg, Germany, and that prior to that assignment he had been Finance Officer of the 60th Finance Disbursing Section, Frankfurt, Germany. Prior to departing from the latter assignment its designation was changed to "Finance Office, Frankfurt" (R 20). Colonel Jones identified Prosecution's Exhibits 4, 5, 6, 7 and 8 as certified true copies of duplicate retained vouchers (R 44, 45, 46, 47). He also testified that when officers presented vouchers for payment at the Frankfurt office the cashier would check the AGO card with the pay voucher to see if the signatures were correct and to see if the name listed on the pay voucher was the same as on the AGO card (R 47). Prior to Colonel Jones' testimony the defense offered the following stipulation which was agreed to by the prosecution and accused:

"Jones is or was at the time of the alleged presentation of the pay vouchers the Finance Officer at Frankfurt, Germany, to whom these pay vouchers would normally be presented."

Other stipulations, pertaining to the pay vouchers, which were agreed to by the prosecution, defense and accused are as follows:

"* * * the originals of these pay vouchers are on file in Retained Record Section, Finance Office, in St. Louis, for the Office of the Controlling General, Washington, D. C., and stipulate that it is agreeable to the defense

and to the prosecution that these true copies of the retained records be used * * *.

* * *

The defense orally stipulates that the true copies of the pay vouchers introduced through Lieutenant Colonel Jones are exact duplicates of the vouchers in his accounts, and further stipulates that they were signed by Lieutenant Courage" (R 45, 55).

The vouchers in question claim pay and allowances including foreign service, longevity and flight pay, together with increased allowance for a dependent mother for the period 1 February 1947 to 31 July 1947. The total amount claimed was $2,480.15, and entries on the vouchers show that a total of $1831.15 was disbursed, and the dates of payment as indicated by the brief blockings on the vouchers were 11 April, 1 May, 2 June, 2 July and 31 July 1947 (R 47).

Joseph J. Godek, an Army Investigator, on duty with "Deputy Command Provost Marshal, Paris, France," testified that on 22 August 1947, at Paris, France, he interrogated accused and that after informing him of his rights under the 24th Article of War accused made a statement which was taken down in long hand and then typewritten.

The defense objected to admission of the statement in evidence on the ground that promises were made to accused when the statement was taken.

As to the circumstances under which he made his statement accused testified that he had declined to make a statement unless he was promised that he would be court-martialed at Paris. After taking the matter up with the Staff Judge Advocate at Paris the Staff Judge Advocate, through Godek, promised that accused would be "court-martialed" in Paris (R 58). Without the promise accused would not have made the statement (R 59).

Mr. Godek testified on examination by the court that before making the statement accused asked if he would be tried in Paris. Godek checked with the Staff Judge Advocate and was informed that accused would probably be tried in Paris. Godek passed the information on to accused (R 62). Prior to getting the information from the Staff Judge Advocate accused had indicated to Godek that he would make a statement (R 63).

The statement was admitted in evidence over objection by the defense (R 64; Pros Ex 9).

In the statement accused related that during the first part of February 1947 he was on "TDY" at the 5th AACS Wing Headquarters at

Wiesbaden, Germany. He left Wiesbaden and went to Frankfurt and stayed there at the "Officers Billets" until 31 July 1947 when he went to Brussels, Belgium. While in Frankfurt he drew pay and allowances for three or four months at the Finance Office. He was taken into custody by the civil police at LeZoute, Belgium, on 16 August 1947 and was eventually taken into military control at Liege, Belgium, and was confined at the Paris Detention Barracks 21 August 1947.

b. Evidence for the defense.

After being apprised of his rights as a witness accused elected to testify only as to Charge I and its Specification. He testified that from February to 31 July he was billeted at the Officers Billets in Frankfurt; no orders being requested of him (R 72). Except when engaging in sports he always wore his uniform in public, and never resorted to an alias. While in Belgium he received a $300.00 money order from his mother which was addressed to him as Lieutenant Warren J. Courage, care of Hotel Atlanta, Brussels, Belgium (R 73). He never intended to desert (R 73). While staying at LeZoute, Belgium, however, dress was informal and while there he generally wore beach trunks and a sweater (R 74).

On cross-examination he stated that his absence started by missing a bus to Wiesbaden. He thought he might get transferred if he stayed away a few days, but at the end of that time he failed to report back and soon became scared to return (R 74, 75). He admitted that he took part in a bridge tournament at Frankfurt and with his partner, a War Department civilian worker, took second place in the tournament. The event was highly publicized in the Frankfurt Occupation Chronicle and accused's name and rank appeared in the paper (R 75). Accused explained that LeZoute, the place where he was apprehended was a section of the city of Knokke, Belgium.

On examination by the court he stated that at the time he was in the bar at LeZoute he was dressed in loafer-type mocassins, Army officer's pink trousers, and a white tennis sweater which had a red, white and blue stripe around the neck (R 76).

Lieutenant Colonel Jones, recalled as a witness for the defense, testified that accused and he were quarterd in the same building in Frankfurt. To the best of Colonel Jones' memory this was during June and July 1947 (R 50, 51). During the period Colonel Jones saw accused a few times and only at night. Accused was in uniform on these occasions (R 51).

4. The uncontradicted evidence together with the pre-trial statement and testimony of accused show that while on temporary duty

at Headquarters, 5th AACS Wing, Wiesbaden, accused absented himself without leave on or about 17 February 1947 and remained absent until he was apprehended at LeZoute, Belgium, on 16 August 1947. The finding of guilty of absence without leave from 17 February to 16 August 1947 was warranted by the evidence.

When apprehended accused was found in possession of leave orders purportedly issued by Headquarters, 133rd AACS Squadron, 867th AAF BU, and dated 30 July 1947. The orders recited that they were issued "By Order of Colonel LeDoux" over the typed name and designation: "JAMES T. McDERMOTT WOJG, USA Assistant Adjutant." The orders granted leave to accused for eight days from on or about 1 August 1947, and the following handwritten indorsement appeared on the face of the orders: "Leave extended till 23 Aug 47 Per Cable WJC." The initials are those of accused. Captain Norval A. Dahl, adjutant of the 763rd AAF BU, testified that he was adjutant for part of that organization which purportedly issued the orders, and that the designation of the organization was incorrect. The court was authorized to take judicial notice that the Organizational Directory, Army Airways and Communications Service, 1 December 1946, as amended, showed that the 133rd AACS Squadron was assigned to the 763rd AAF BU on 30 July 1947, and thus the organizational designation on the orders was false. In addition Captain Dahl testified that Colonel LeDoux had not been Commanding Officer of the organization since 1945, and that there never had been a James T. McDermott, WOJG, serving as Assistant Adjutant of the organization.

The execution of an instrument in a fictitious name constitutes forgery (CM 271591, Bailey, 46 BR 138). It is clear that the leave orders found in accused's possession were forged. A pass has been defined as a license to go or come (Black's Law Dictionary, 3rd Ed, p 1334). The forged leave orders found in accused's possession purportedly authorized accused's travel into Belgium and hence had the attributes of a pass.

The fact that he had been absent without leave for six months, and that he used the orders to account for his presence in Belgium when he was questioned by the Belgian police, was ample evidence that his possession of the orders was accompanied by a false and fraudulent intent. His possession of forged leave orders under the circumstances of this case constituted conduct to the prejudice of good order and military discipline and conduct unbecoming an officer and a gentleman, and was likewise conduct denounced in 18 USC 132. The findings of guilty of Charge III and its Specification and Specification 6, Charge IV, are supported by the evidence.

Accused also stands convicted of presenting five false

claims for pay and allowances (Specs 1,2,3,4 and 5, Charge II and IV). There were introduced in evidence without objection five certified true copies of duplicate retained copies of vouchers of the Frankfurt Finance Office. It was stipulated that the originals of these pay vouchers are on file in the Retained Record Section, Finance Office in Saint Louis, and that the pay vouchers had been signed by accused. It was not shown, however, whether accused had merely signed line 16 of the voucher certifying that the account was true and correct or whether in addition he had signed line 18, indicating receipt of payment. The certified true copies of the retained duplicate copies of vouchers otherwise show that for the period 1 February 1947 to 31 July 1947 accused claimed pay and allowances totaling $2,480.15 and received in cash payments the sum of $1831.15, and the payments were made in the period extending from 11 April 1947 to 31 July 1947. While it is true that the retained copies, or their certified true copies, of vouchers are mere secondary evidence of the facts recited in them, and that the best evidence of these facts would be the original vouchers, there was no objection to the introduction in evidence of the certified true copies of the retained copies and, therefore, they were properly considered by the court. It may be implied from the testimony of Colonel Jones that the retained copies were memoranda made in the regular course of business and in the absence of objection certified true copies of the retained vouchers were competent evidence of the facts recited therein. (CM 324725, Blakely).

The gist of the offenses charged is that accused presented false claims. Accordingly, proof that the accused presented the false claims is an indispensable element of the offenses charged. Payment of the vouchers is evidence of presentation of the claim by the payee or claimant named in the voucher. (Par 9, AR 35-120, 27 March 1947 provides:

> "Payment to be made only to person to whom due.--Except as otherwise prescribed by law or regulations, payments of public money may be made only to the persons to whom the money was originally due. Accountable disbursing officers, their deputies or agent officers, properly designated assistants who are specially authorized to make payments, or special disbursing agents, must personally supervise every voucher paid by them, adopt proper measures to insure that all checks reach the persons in whose favor they are drawn and make all cash payments directly to the persons to whom they are due."

Par 11a of the cited Regulation provides:

> "a. Officers and others who certify their own pay vouchers.--For payments to officers and others who certify their own pay vouchers, identification may be accomplished either by War Department Signature Card (WD Form 35), or upon presentation of proper Identification Card (WD AGO Form 65 series)."

and par 12a provides:

"a. Individual vouchers or pay rolls.--Cash payments made to military and civilian personel on individual pay vouchers and travel accounts need not be witnessed, provided that such personnel sign the voucher at the time payment is made and the disbursing officer is satisfied as to the identity of the payee. Cash payment of pay rolls covering more than one person will be witnessed."

In the absence of a contrary showing there is a presumption of compliance with the provisions of the cited Regulations, and it necessarily follows that accused presented the vouchers in question (1st Ind CM 216029, Brown, 11 BR 91,96). It may also be presumed that the date of payment would be the date of presentment.

The vouchers in question were presented as evidenced by the dates of payment in the period extending from 11 April 1947 to and including 31 July 1947, and accused was absent without leave from 17 February 1947 to 16 August 1947. Except as to the voucher presented 11 April 1947 which claimed pay and allowances for the period 1 February 1947 to 31 March 1947, the vouchers claimed pay and allowances for periods during which accused was absent without leave. During the period 16 February 1947 to 31 March 1947, part of the period for which pay and allowances were claimed in the 11 April 1947 voucher accused was absent without leave. In 10 USC 841 it is provided as to officers "When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable." The record shows that accused's absence during the period for which claims were made was due to his own willful misconduct and was not "unavoidable," and his claims for pay and allowances for periods in which he was absent without leave constitute false claims (CM 324725, Blakely). The findings of guilty in respect to the false claims alleged are warranted by the evidence. The presentation of false claims is a violation of both Article of War 95 and Article of War 96, and alleging such offenses under both Articles does not constitute a multiplication of charges (CM 325484, Dallmann).

5. Records of the Department of the Army show that accused is 27 years of age and single. He was graduated from high school and attended Columbia University and the University of Connecticut. In civilian life he was employed as a draftsman. He had enlisted service from 26 May 1942 to 3 August 1944 when he was appointed Flight Officer. He was commissioned Second Lieutenant Air Corps 18 April 1946 and was serving in the European Theater at the time he committed the offenses here charged. As an enlisted man he was sentenced to confinement at hard labor for 15 days by summary court-martial for absence without leave. His two efficiency ratings of record are "Excellent."

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the

substantial rights of accused were committed during trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of the 95th Article of War, and a sentence to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years is authorized upon conviction of violations of Articles of War 61, 94 and 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH CM 328246 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAR 6 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Warren J. Courage (0-936408), Air Force of the United States.

2. Upon trial by general court-martial this officer was found guilty of absence without leave for the period 17 February to 16 August 1947 in violation of Article of War 61 (Chg I, Spec); of possession of a forged pass in violation of Articles of War 95 and 96 (Chg III, Spec; Chg IV, Spec 6); and of presenting false claims in four instances in violation of Articles of War 94 and 95 (Chg II, Specs; Chg IV, Specs 1-5). 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 five years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

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

Accused absented himself without leave 17 February 1947 while he was on temporary duty at Headquarters, 5th AACS Wing, Wiesbaden, Germany. On the evening of 14 August 1947 accused was observed tending bar in a saloon in LeZoute, Belgium, by Alfons DeWulf, a Belgian police officer. On the morning of 16 August 1947 DeWulf went to accused's room in the Hotel San Toney in LeZoute to check accused's papers. Accused showed DeWulf leave orders with which DeWulf was not satisfied and he took accused into custody. Testimony at the trial concerning the leave orders which were in evidence showed that the orders were issued over the name of a non-existent person.

During his absence accused presented four pay vouchers claiming pay and allowances for the period of his absence without leave and the vouchers were paid. The total sum claimed was $2,480.15, and the cash disbursements amounted to $1831.15.

Accused testified in his own behalf and denied that he intended to desert the service.

4. Accused is 27 years of age and single. He was graduated from high school and attended Columbia University and the University of Connecticut. In civilian life he was employed as a draftsman. He had enlisted service from 26 May 1942 to 3 August 1944 when he was appointed Flight Officer. He was commissioned Second Lieutenant Air Corps on 18 April 1946 and was serving in the European Theater at the time he committed the offenses here charged. As an enlisted man he was sentenced to confinement at hard labor for 15 days by summary court-martial for absence without leave. His two efficiency ratings of record are "Excellent."

5. I recommend that the sentence be confirmed and carried into execution. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

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( GCMO 89, 19 April 1948).

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



JAGK - CM 315523

14 MAY 1948

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| UNITED STATES | 6TH INFANTRY DIVISION |
| v. | Trial by G.C.M., convened at APO 6, 8 and 9 December 1947. Dishonorable discharge and confinement for life. Penitentiary. |
| Sergeant CLARENCE A. HUNTINGTON (39936228), Medical Detachment, 1st Infantry | |

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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. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Clarence A. Huntington, Medical Detachment, First Infantry, APO #6, did, at Taegu, Korea, on or about the 27th April 1946, forcibly and feloniously, against her will, have carnal knowledge of An Kyung Buni.

Accused pleaded not guilty to and was found guilty of the charge and its specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the rest of his natural life. The reviewing authority approved the sentence, designated "The United States Penitentiary, McNeil, Washington," or elsewhere as the Secretary of the Army might direct, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. This is the second rehearing of this case. In the original hearing, held on 20-21 May 1946, and the first rehearing, held on 19 August 1947, accused had been sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life. The Board of Review held the record of trial of the original hearing legally insufficient to support the findings of guilty and the sentence because of error prejudicial to the substantial rights of accused occurring during the course of trial when the court, after closing for deliberation upon the findings, reopened and received testimony of an officer who had investigated the alleged offense to the effect that in his opinion accused was a participant. The Board held the record of trial of the first rehearing legally insufficient to support the findings of guilty and the sentence on

the ground that a member of the court who sat at that hearing had previously sat as a member of the court which first heard the case. Each of the holdings referred to above were concurred in by The Judge Advocate General and in each instance the reviewing authority disapproved the sentence and ordered a rehearing.

4. Evidence for the Prosecution

Without objection by the defense, the prosecution offered in evidence the testimony of Hong, Chun Kim, given under oath at the original trial of this case. The witness was, at this hearing, beyond the reach of process. Hong had testified that on 27 April 1946 he was living near Taegu, Korea. A girl, whose name he did not know, lived in the house next door to the one in which he was residing. About 7:30 p.m., at which time it was "very dark," a jeep stopped in front of his home. There were two soldiers in the jeep, one of whom got out and searched Hong's house. The search being completed, the soldiers went away but came back about three minutes later and "searched again." They then left only to return for the third time in about twenty minutes. This time, one soldier remained on guard in the jeep and the other, the taller of the two, went into the girl's house and "got her." She was "dragged" and "forced" to the jeep. The girl's father came out and tried to get in the jeep but was pushed away. There was no top on the jeep and it had three seats in front. The girl was put in the middle, between the two soldiers. The taller soldier shot into the air and the jeep, driven by the shorter soldier, drove about 100 feet away. The girl's father followed the vehicle, but since the lights had been turned out and "we were afraid to follow the car," Hong did not know where the jeep went. The soldier that fired had a "long" weapon. Both soldiers had guns. Hong at one time had been within ten feet of the jeep, with the lights "facing" him. He saw no markings on the vehicle, for it was dark. He could see "only in front" and saw the driver of the vehicle "clearly." "At that time" he "was not certain" of the identity of the driver. Later the American officials brought first two and then six American soldiers to the girl's house for identification purposes. On the second occasion, of the six soldiers "there were two soldiers standing here and two more soldiers standing here" and he was asked "to pick him out." They put glasses on a tall soldier to see "if it looked like him." Another soldier, "the small man," had "three stripes." Hong did not "know at first" but "I know by this mark on his uniform." He "didn't recognize the soldier by his face but by his uniform." The shorter soldier was "a small man with eyes standing in deep and his nose was long and sharp." Hong was "certain" that accused was the soldier driving the jeep at the time the girl was carried away (R 6-12).

An, Kyung Buni, a farm girl of Kum Tan Dong, Taegu, Korea, was sixteen years of age on 27 April 1946. After supper on that day, while feeding her dog, a "car" with its bright lights on stopped in front of the house next door. Her parents went next door and when they returned they informed

her that some American soldiers were searching the house. Since she was "afraid of American soldiers," Kyung Buni hid herself in her room. After she had been informed by her parents that the soldiers had gone, she came out of her room, but as she did so a tall soldier "appeared" and "grabbed" her arm. The tall soldier dragged her out of the house and put her in a car which was parked outside with the lights still burning. There was a smaller soldier in the driver's seat of the vehicle. Her father approached the car in an attempt to prevent her abduction but the tall soldier fired his rifle in the air and her father backed away. Kyung Buni "tried to holler" but one of the soldiers put his hand over her mouth. The vehicle was then driven to a spot about one hundred yards away from the house where a blanket was laid on the ground by the taller soldier while the shorter soldier held her. The following events then occurred:

> "After the tall soldier put the blanket on the ground the small soldier was standing behind us with his rifle and the tall soldier laid me on the blanket and start taking off my clothes. The tall soldier who took my clothes off, after he did, he took his clothes off too and he get on top of me -- top of me. But that time he couldn't take off my shorts what I had on that time, so I avoid to let him take off my shorts. Then he tear it off.
>
> "PRES: What article of clothing?
>
> "Witness: Shorts -- pants, and he started to have sex intercourse with me against my will, so I tried to holler. Then he put his hand on my mouth so I couldn't. When the tall soldier wished to have sexual intercourse with me the small soldier came to me and hold me while the tall soldier was putting his clothes on. Then the tall soldier went to the place where the small soldier was standing and the small soldier did the same as what the other tall soldier did with me. When the small soldier finished sexual intercourse with me I heard the people talking, so I tried getting to that company but I don't. I was fainted and I stepped about three steps -- after I stepped three steps.
>
> "Q. What is the next thing you remembered after you fainted?
> "A. I don't remember anything except the one thing I was taken back to my home by my brother." (R 14)
>
> "Q. You stated the tall soldier put you on the ground, tore your pants off, that you tried to call out and he put his hand over your mouth. Did you or did you not make any other attempt to keep him from having sexual intercourse with you?
> "A. Yes, I tried to turn over on my side. Then he pushed my shoulder and I tried to -- my legs together but couldn't. It was parted by the soldier." (R 15)

Each soldier put his sexual organ into her sexual organ "just a little bit." The "car" was a very small type and had three seats in front and "no covers."

She had never before had sexual intercourse with an American soldier. Kyung Buni thought she had seen the tall soldier pass by her house on a former occasion. At that time, three or four other soldiers were in the "car" with him. On the night in question, "when this happened," it was "very dark." She "looked good" at the tall soldier who grabbed her arm and was "very sure" she could identify him. She thought accused was the shorter soldier who drove the car but was "not sure." She did not "know exactly" but thought it was "approximately 7:00 p.m." when the soldiers came to her house (R 13-20).

The testimony of An, Sun Jo, father of Kyung Buni, given at the original hearing was read into the instant record without objection by the defense. The witness had died before this hearing. "A little over 7:00 p.m.," a "car" stopped in front of the house next door. Sun Jo did not "know" about the markings on the car. There were two soldiers in the car. At first one got out and then the other. They searched the house next door and finding "nothing" there, they came to his house and one of them, the taller of the two, seized his daughter. His daughter was put in the car, which had three seats in front. She was made to sit in the middle. Sun Jo followed the soldiers to the car in an attempt to protect his daughter. The taller soldier pointed a gun at him but he was able to "push it off," just before it was fired. If he had not "pushed it off," he would have been shot. He thought the gun was a "little bit" shorter than an M-1 but longer than a carbine. After the taller soldier had fired his gun, the car went away. Sun Jo "trailed" the car but "a little farther on" there was one soldier with his gun pointed in the air. Being "scared," Sun Jo remained where he was and, after the car went away, he "got" his daughter and brought her back. When the car first arrived at his house it was "a little dark." At the time his daughter was taken away it was "about" 7:30 p.m. and "not quite dark." It was "about half past eight or nine" when he picked up his daughter "after she had fainted." He had no watch and could not "tell the time." Sun Jo identified Private First Class Vaughn, who was brought into the court room upon the original hearing, as the soldier who had seized his daughter. Sun Jo had seen this soldier going past his house, in a car "just like" the one in which his daughter was carried away, on more than ten previous occasions. The soldier would "generally" take small children of the neighborhood for a ride in the jeep. Sometimes he would go "up that road" to the river where he would be heard shooting off a gun. On these journeys, he wore dark glasses, with "wool around the eyes." However, Sun Jo did not think the soldier was wearing the glasses on the night of 27 April. He had not seen any Army vehicle go past his house since the night of the crime. Sun Jo was "not certain" that accused was the shorter of the two soldiers who had mistreated his daughter. On 28 April, Sun Jo found an empty shell "exactly where the vehicle stood" on the preceding night. That day he was also shown a car which he was "sure" was the same one used on the night his daughter was carried away. The car had come from the direction of Taegu that night. When it left it had gone in the same direction. A Korean girl

who wore short skirts, "western style dresses," lived in the house next door but she moved away to Taegu" a little over one month ago." (R 20-31).

An, Jong Tae, brother of Kyung Buni, testified that as "it was getting dark," a car, with headlights burning, stopped by the house next door. There were two soldiers in the car and one of them got out and searched the house next door. The following events then transpired:

> "After they through with the house they come to my house through the onion plants on the ground, so my sister hid herself inside of her room at my house. Then the soldier took off after he looked around my house. That time we thought that the soldier was looking for thief or robber but he couldn't find it so he was going back. Then my sister came up from room of my house. I do not know how this soldier appeared there but the soldier was appeared again and grabbed by arm of my sister. Then the soldier took her by the next house where they park the car. My sister get in the car but they put her in the middle of front seat. So I tried to get on the car with my sister but they wouldn't let me get on it. Then my father tried to get her out from the car but at this time one soldier came up from the jeep and pointed his gun at my father. Then my father was very scared at the rifle and he grabbed the rifle. Then the soldier shot it into air. We were very scared at the firing of the rifle, so we stopped back away, so the soldier get on the car and they drove away. We followed the car when they started driving but we couldn't follow it very well because the car was running very fast and we couldn't run any faster than the car was going. They drive the car into Mang-dong so we followed the direction of car. Then we could the car was parked on the road and they switched off the light where bushes are alongside of road. By the car that time I see one soldier was standing in a bush with a rifle and turned to us and say 'Kara', Kara' in Korean, which means go away. About forty minutes later then I go that place where the car was parked. The soldiers come up from the bush and they get on the car and they started to drive away. Then I heard my sister was crying and saying Korean father and mother and brother and she started to run but she fainted after she stepped about three steps. So I carried my sister to my home on my back and I went to a police station and reported to policeman about mentioned story. Then some soldiers and a doctor came to my home and they investigated what happened." (R 33)

The taller of the two soldiers had taken Kyung Buni to the jeep and the shorter one drove the vehicle. The taller had fired the rifle. Jong Tae thought the shorter soldier was "that man should be over there," pointing to "someone" in the court room (R 32-34).

First Lieutenant Donald J. Arthur was Provost Marshal, 3rd Battalion, First Infantry Regiment, on and for sometime after 27 April 1946. On that day he received a report from the Taegu police that American soldiers had raped a Korean girl outside the city. Summoning a doctor from Company "A", 6th Medical Battalion, he went to the scene of the alleged rape. He did not question "the girl" that night but was shown the actual place on the ground where the rape was "supposed" to have taken place and obtained a description of the perpetrators. The next morning, he again visited the place where the rape allegedly occurred and found some wheel marks of a "1/4 ton Army vehicle" and the contents of an Army prophylactic kit. Also, "there was a bank running alongside of the road; up on the bank a field *** there was a foot print, definite foot print showing an Army shoe." The foot print was that of a size 8-D or 8½-D shoe and in the heel mark the letters "GOO" were clearly visible. Lieutenant Arthur was given a description of the vehicle "the men had come in" from various "witnesses to the scene." Returning to Taegu, the Lieutenant checked all the 1/4 ton vehicles in the motor pool at Taegu. In the motor pool at Headquarters, First Infantry, located at Taegu, he found a jeep answering to the description he had been given. As he was inspecting the vehicle, Private First Class Vaughn came up to him and asked him what he was doing there. Lieutenant Arthur sent Vaughn after "the man he had been with on the night of the 27th" and Vaughn came back with accused. Both men answered the description given Lieutenant Arthur of the perpetrators of the rape. The Lieutenant found a blanket on the front seat on the jeep and noticed certain stains on the blanket. He took the blanket to the National Crime Laboratory in Seoul and turned it over to Major Creyts, the officer in charge of the laboratory. Lieutenant Arthur visited Private Vaughn's quarters during the course of his investigation. "Inside the quarters of the Medical Detachment there was an M-1 rifle, field stripped, lying on the table in the center of the quarters. There was cleaning material on the table with the rifle. The rifle showed signs of having been fired within a day or two ***." No one knew how the rifle had come to be in the room. The rifle was on issue to a Corporal Garfield. The shoes Vaughn was wearing were "approximately the same size as the print on the ground" and the heel was identical with the "print on the ground." On 29 April, Lieutenant Arthur took Vaughn, accused and the jeep to the home of the girl who had been allegedly raped. The girl was "rather hesitant" in identifying either Vaughn or accused as having participated in the attack upon her on the evening of 27 April. "She said she was not sure." The girl's brother "identified Vaughn, but at that time he was not very sure of Sergeant Huntington." The father "said it was definitely Vaughn but he was not as definite in his identification of Sergeant Huntington." The father also said "that was the vehicle that they came in." "Another officer" and "another soldier" accompanied Lieutenant Arthur at the identification. On 28 April, the lieutenant had taken two men other than Vaughn and accused to the girl's home. "The Koreans" had said that these two men had not committed the crime. There were more than two people in the Lieutenant's "area" who answered the description given him of the girl's assailants. Accused admitted to the Lieutenant that he was with Vaughn on the evening of 27 April, but both Vaughn and accused

asserted that they had not been in the vicinity of the alleged rape. It was approximately 3-1/2 miles from accused's quarters to the place of the crime and, travelling over the shortest route at "a more than moderate rate of speed," it would take approximately 15 minutes to traverse the distance (R 34-39).

Second Lieutenant Travis M. Moursund, Camp Skipworth, Korea, had testified at the original hearing and thereafter had been returned to the United States. His testimony given at the original hearing was received in evidence without objection by the defense. Lieutenant Moursund had assisted Lieutenant Arthur in the latter's investigation of the alleged rape. Upon an examination of Private First Class Vaughn's quarters "after" 27 April 1946, he found three whole clips of M-1 ammunition, one empty clip, and seven rounds of M-1 ammunition. It would be normal for a soldier to empty his clip if he did not have a full clip load of M-1 ammunition. He examined "the number one Medical jeep" and in the glove compartment thereof found "an ordinary pair of driver's goggles." He and Lieutenant Arthur measured the footprints at the scene of the crime. They were made by a shoe approximately size 8½-D. In the heel print were "the letters E-F and a small G, and the letters G-O-O." Lieutenant Moursund examined the shoes worn by Vaughn and noticed that they were "approximately" size 8½-D. The heels on Vaughn's shoes were Goodrich heels with the letters E-F-G in the center. The Lieutenant did not "test the Sergeant's shoes to see if it would fit" (R 58-61).

The testimony of First Lieutenant Robert Moyce, Medical Corps, Company "B", 1st Infantry, given at the original hearing, was received in evidence without objection by the defense. Lieutenant Moyce had been returned to the United States. He had testified that he had examined a Korean girl, whose name he did not know, at about 11:00 p.m. on 27 April 1946. The girl was about 15 years of age and had been allegedly raped. The girl was lying on the floor of a room in a doctor's house. She was fully conscious and did not seem to be in any acute pain. There was a bruise on her left shoulder approximately one inch long. There were no signs of lacerations around her private parts. Her hymen was perforated and there was some evidence of swelling "and visibly red" around the vagina. There was no evidence of bleeding. The vagina contained some fluid but no examination of this fluid was made. The fluid could have been evidence of gonorrhea or it could have been normal moisture caused by recent sexual intercourse. He felt that the girl had intercourse that evening but was unable to state definitely that she did have intercourse at such time. There was nothing to indicate that the perforation of the girl's hymen was of recent date. He stated that "the hymen in some cases may be very thick and cause bleeding upon perforation. Others may be very thin in which case there would be very little bleeding. There should be some evidence of recent bleeding" (R 40-44). It appeared in this record of trial that at the original hearing, "the prosecution and the defense" had stipulated that the girl examined by Lieutenant Moyce was An, Kyung Buni (R 42).

The testimony at the original hearing of Major Harold G. Creyts, Crime Laboratory, Detective Bureau, Seoul, Korea, was received in evidence without objection by the defense. Major Creyts had been returned to the United States. On 1 May 1946, First Lieutenant Donald J. Arthur had submitted to him for chemical analysis a woolen Army blanket. Under ultraviolet light, it was discovered that there were several stained areas on the blanket. Some of the stains were white and some were purple. Upon further examination, it was found that the white stains were caused by human spermatazoa and the purple stains were "the same as Army prophylactic material." He could not say how recently the stains had been placed on the blanket, but "would say quite recently from the looks of the matter on the slide" (R 44-46).

Without objection by the defense, the testimony of Corporal George C. Garfield, Headquarters and Headquarters Company, Taegu, Korea, given at the original hearing, was introduced in evidence. Corporal Garfield had returned to the United States. The Corporal had been issued an M-1 rifle. He had loaned his rifle to Private First Class Vaughn sometime before the inspection held on Saturday morning, 27 April 1946. Vaughn had returned the rifle prior to the inspection, but after the inspection the Corporal noticed that it was missing. He "next" saw his rifle by Vaughn's bed, which was "in the room next to ours, right opposite ours." The rifle had been fired. It had been cleaned prior to the inspection. He did not know by whom or when the rifle had been fired (R 46-47).

The testimony at the original hearing of Private First Class Benjamin W. Agee, Medical Detachment, 1st Infantry, Taegu, Korea, was received in evidence without objection by the defense. Private Agee had returned to the United States. Agee knew accused who had also been assigned to the Medical Detachment, 1st Infantry. In the afternoon of 27 April 1946, Agee, Private First Class Twente, accused and Private First Class Vaughn had gone on a hunting trip. The men rode in a jeep which was marked "Medics 1" on the front. The jeep had no top and "we sometimes have a small seat that goes in the middle of the two front seats." He could not say for sure whether the third seat was used that day. There were two weapons in the jeep, an M-1 and a carbine. The carbine was fired that afternoon but the M-1 was not. The men arrived back at the barracks about 6:15 p.m., went to the mess hall to get something to eat, and brought the food they obtained there back to the quarters. Private Agee separated from the other men about 6:30 p.m. He next saw Vaughn, in the quarters, about 7:15 p.m. for about two minutes. He asked Vaughn where he was going and Vaughn replied, "nowhere, I will be right back." He did not see accused at this time. Between 8:15 and 8:30 p.m., Vaughn and accused came in the barracks and Agee and Sergeant Chesshire went with them in the jeep to the International Club to get some doughnuts. They stayed at the International Club for about 15 minutes and then went to the 3rd Battalion Red Cross Club. They remained at the latter club from half an hour to forty-five minutes and then returned to the quarters, arriving there about 9:45 p.m. To

Agee's "knowledge," there were no weapons in the jeep that evening. When they arrived back at the barracks after the hunting trip, Agee thought he saw Vaughn carry in the M-1. There might have been a blanket in the front of the jeep, but Agee "didn't notice it." He customarily got in the jeep by crawling in over the back (R 47-51).

Sergeant Ralph D. Marsden, Headquarters and Headquarters Company, 1st Infantry Regiment, had been returned to the United States after the original hearing in this case. His testimony given at the original hearing was introduced in evidence without objection by the defense. On the evening of 27 April 1946, Sergeant Marsden had been at the International Club playing ping pong. When he left, he met Private Vaughn who was "riding in a jeep" and who offered to bring him "back to the company." It was then about 7:00 p.m. When they arrived at "Headquarters Company," they met accused. They "secured the balls" and Sergeant Marsden, accused, Vaughn, Private First Class Twente and Technician Fifth Grade Bartley "started back to the International Club." The jeep in which they rode had no top. Sergeant Marsden did not notice whether there were two or three seats in the front of the jeep. He sat in the back. There was an M-1 rifle in the vehicle. The sergeant did not notice whether there was a blanket in the car. Accused had a "Class A" uniform on at the time but Sergeant Marsden did not recall "seeing the front of" accused and could not say what "insignias" he was wearing. The men stopped for about five minutes "down town" and let off Private Twente so that he might get some clothes. They then proceeded to the International Club, arriving there between 7:15 and 7:30 p.m. Vaughn was driving the jeep. The "last time" Sergeant Marsden saw accused and Vaughn together in the jeep was when he got out at the International Club. Sergeant Marsden was the first man out of the jeep. He did not notice whether accused and Vaughn got out or not (R 51-53).

Sergeant Howard W. Chesshire, Medical Detachment, 1st Infantry Regiment, had testified at the original hearing. Thereafter he had been returned to the United States. His testimony at the original hearing was received in evidence without objection by the defense. "Around" 7:00 or 7:15 p.m. on 27 April 1946, he saw accused and Vaughn "in their headquarters." At that time, "they said that they would be back to pick us up to go to the Red Cross." At approximately 8:15, accused and Vaughn returned and "picked up" Sergeant Chesshire and Private First Class Agee. The four men rode in "Medical number one jeep with no top" to "the Red Cross." Since there were no doughnuts there, they proceeded to the 3rd Battalion Red Cross Club where they talked to "Ruth" for a while and got some doughnuts. They arrived at the 3rd Battalion Red Cross Club at about 8:45 p.m. The four men then returned to "the quarters," arriving there "around 9:00 or 9:30." Accused and Vaughn "went right to bed." It was dark when they left "the Regimental CP" for the "International Club" and it was "fairly dark" when Sergeant Chesshire saw accused and Vaughn "go off in a jeep" at 7:15 p.m. When accused and Vaughn "got back" at about 8:15, they said that they "were over in the CP for a while." Sergeant Chesshire had no watch, and his statement

that accused and Vaughn "picked him up" at about 8:15 p.m. was intended to convey "just the approximate time." Sergeant Chesshire did not notice whether there were any weapons or a blanket in the jeep. He could not say whether there were three seats in the front, for he climbed over the back. Accused and Vaughn had not noticeably "been drinking." They had only one can of beer (R 54-57).

Private First Class John W. Twente had returned to the United States after the original hearing. His testimony therein was received in evidence without objection by the defense. On the afternoon of 27 April 1946, Twente, Private First Class Agee, Vaughn and accused had gone hunting on the road northeast of Taegu. There was a carbine and an M-1 rifle in the jeep. Private Twente did not know who brought the carbine. It was not his carbine. He believed Vaughn brought the M-1. The M-1 was on the floor in the back. The carbine was fired a few times but, to Private Twente's knowledge, the M-1 was not fired. He did not see a blanket in the jeep "that afternoon." Each man took turns driving the vehicle. The four men returned to their quarters from the hunting trip about 6:00 p.m. Private Twente immediately went to the mess hall and got something to eat. Since he was, he believed, the first person out of the jeep he did not see "who carried the weapons in out of the vehicle." About 7:00 p.m., he started walking to the "Red Cross." After he had walked about one quarter of the distance, he was "picked up" in a jeep by Vaughn, accused, Marsden and Bartley. They took him to the tailor shop and then drove to the Red Cross where everyone except Vaughn and accused got out. He thought he must have been in the back seat of the jeep and he did not see any weapons in the vehicle that evening. He could not recall having seen either accused or Vaughn later that evening (R 61-65).

The testimony of Private First Class Gilbert D. Vaughn, given at the original hearing, was admitted in evidence without objection by the defense. Private Vaughn had been returned to the United States "as a general prisoner." On the afternoon of 27 April 1946, Vaughn, accused, Agee and Twente drove out on the road towards Pohang. They shot some birds with a carbine they had brought with them and took some pictures. They were riding in a jeep which had no top. Each man drove the vehicle from time to time. There was a third seat "in the center of the two seats" and there was a blanket in the jeep. The blanket had been "drawn" from the supply room "about a week after Easter." Two "boys" live in the supply room and it is always open to anyone who goes in. Vaughn had simply "picked the blanket off the floor in the supply room" and had not signed for it. It was an old blanket "with holes in it and white spots on it." To Private Vaughn's knowledge, they had no weapon other than the carbine with them. The four men returned from their trip between 6:00 and 6:30 p.m. After getting something to eat and sitting around in the quarters for a while Vaughn, accused, Bartley and Marsden left for "the Red Cross." On their way they "picked up" Private Twente and, after waiting for Twente to transact some business at a tailor shop, drove to their destination. Private Vaughn and accused did not go

into "the International Club" at this time, but returned to "the Regimental CP" because Vaughn had "told the fellows what they wanted to do the jeep would do." When they arrived back at the Regimental CP, there was no one there. There were three men playing ball on the road, however. Private Vaughn talked to the three men, one of whom was Sergeant Krill, for about 15 minutes and it was "about 7:30 p.m." when he stopped talking to them. At this time, Vaughn saw a Korean girl "in shorts" come by. "Between 7:30 and twenty to eight," the two men started "back down town for the Red Cross." On the way, Vaughn reached for a cigarette and found that he did not have any. Accused had no cigarettes either. The two men "drove around the train station" and started back to the quarters for some cigarettes. They drove around the train station because "there was nothing else to do" and although Vaughn was aware that the Red Cross "gave away cigarettes" this had not entered his mind. They arrived "back in the Regimental Area" a little before 8:00 p.m. No other men were in the quarters at this time. Vaughn then went over to "the I & R Platoon" and borrowed a package of cigarettes from a soldier whose name he did not remember. About 8:15 p.m., Vaughn, accused, "Sergeant Marsden" and Private Agee left the quarters and went to the International Club. From there they drove out to the 3rd Battalion Red Cross area. Here, Vaughn talked to Miss McCubbin for about 15 minutes. The party left the 3rd Battalion Red Cross Club shortly before 9:30 p.m. and took some doughnuts with them. They returned directly to their quarters where they passed around the doughnuts and turned in their passes. Vaughn and accused then went to bed. It takes between five and ten minutes to drive from the International Club to the quarters occupied by Vaughn and accused. Vaughn and accused had been together throughout the afternoon and evening of 27 April with the exception of the period "shortly after 6:30 until a little before 7:00 p.m." Vaughn had not been issued an M-1 rifle but customarily borrowed one from Corporal Garfield. After inspection on 27 April, he "picked up Corporal Garfield's rifle *** but didn't take the weapon out to the jeep." The loose rounds of M-1 ammunition found in his possession had been obtained by him from the 3rd Battalion. In this connection Private Vaughn stated:

> "A lot of times when we get it for these trips we have some loose rounds left over and I would take them out of the clips. That is the only way I can get the ammunition and I save it. When I have enough loose rounds left over I make a full clip of them."

The carbine had been borrowed by Private Twente from the First Sergeant of Personnel. On "Sunday morning," some prophylactic material had been found in Vaughn's jeep, but it had been placed there without his knowledge. Private Vaughn had seen "the girl that was here this afternoon" once on the Monday following 27 April, when he and accused had been taken "out to see them," and once at the original hearing. These were the only times he had seen her. He had never been to the scene of the crime until he visited it in the company of Lieutenant Arthur. He arrived in Korea on 11 March

1946. He was assigned to "the Third Battalion" on 15 March. From 15 March to 25 March, on which later date he was assigned to the Medical Detachment, he performed no duties and did not drive a vehicle. He was first assigned a vehicle on 27 March. He had never driven past the house he visited with Lieutenant Arthur (R 65-77).

The court was asked to, and did, take judicial notice of the time of sunset and the approximate hour of twilight at Taegu, Korea, on 27 April 1946. For this purpose it was furnished with a map "giving the latitudes and longitudes" (R 13).

Evidence for the Defense

Accused, having been advised of his rights as a witness in his own behalf, elected to remain silent (R 77-78).

5. Discussion

The evidence adduced upon this, the second, rehearing of this case established beyond all reasonable doubt that An, Kyung Buni, was raped sometime during the evening or night of 27 April 1946 by two men who appeared to be American soldiers. The only question with which we are here confronted is whether the record of trial now before us is legally sufficient to support the conclusion that accused was one of the perpetrators of the rape.

Although there is much confusion in the evidence as to the precise time of day when the rape occurred, the victim's father and brother testified that it was becoming "a little dark" or "was getting dark" at the time the two soldiers drove up to the house next to the one in which the victim lived with her family. The father also testified that it was "not quite dark" at the time his daughter was seized and forcibly carried away. The rape, which immediately followed the abduction and which took place a short distance away from the girl's home, seems to have consumed a considerable amount of time, "about 40 minutes" according to Kyung Buni's brother, and even longer according to her father. In any event, it appears to have been completely dark when the rape was consummated and the soldiers drove away. The court took judicial notice of the hour of sunset and the duration of twilight at the time and place of the crime. The Board of Review, aided by information received from the Naval Observatory, Washington, D. C., takes judicial notice that in the vicinity of Taegu, Korea, on 27 April 1946, the sun set at 7:09 p.m. and that there was approximately 27 minutes of (civil) twilight. It follows that the hour of darkness, unaffected by any appreciable amount of twilight, fell at about 7:36 p.m. A strong and reasonable probability then, was raised by the evidence that the rapists first appeared upon the scene shortly before 7:36 p.m. - we say shortly before because when the vehicle in which they were riding was first observed its lights were burning - and that the rape took place sometime after that hour. Indeed, the witness Hong, Chun Kim, would have us believe that the crime was committed quite some time

after darkness had fallen.

On the evening of 27 April 1946, several enlisted men had ridden in a jeep with accused and Private First Class Vaughn to the International Club in Taegu, arriving there between 7:15 and 7:30 p.m. Accused and Vaughn apparently remained in the jeep after it had stopped at the club. It was "fairly dark" when the jeep had left the barracks area in which the occupants of the vehicle were quartered and it was a drive of about five or ten minutes to the club. Accused and Vaughn were seen together again, in their quarters, at about 8:15 p.m. or between 8:15 and 8:30 p.m. Thereafter, the movements of accused and Vaughn were under constant observation by various members of their organization until both went to bed somewhere between 9:30 and 9:45 p.m. It thus appears that on this state of the evidence the court's determination of guilt or innocence was to be most vitally influenced by the proof adduced with respect to the whereabouts of accused and Vaughn from the time they separated from their companions at the International Club between 7:15 and 7:30 p.m. to the time they were again seen together in their quarters between 8:15 and 8:30 p.m., for there was a reasonably clear indication that the rape was committed during this period of time. Also, Vaughn had been definitely identified as one of the rapists by the victim's father.

The defense of alibi was raised by the evidence. Private Vaughn testified that after he and accused had let off their passengers at the International Club, they returned to their quarters. No one was in the quarters when they got back but there were some men playing ball on the road, one of whom was a Sergeant Krill. Vaughn talked to these men for about 15 minutes and when the conversation was finished it was about 7:30 p.m. Between 7:30 and 7:40 p.m., Vaughn and accused started to drive down town "to the Red Cross." On their way, they discovered that they had no cigarettes with them so they "drove around the train station" and then returned to their quarters for cigarettes. They arrived at the quarters a little before 8:00 p.m., at which time no other men were present. Vaughn then went to the "I & R Platoon" where he borrowed a package of cigarettes from a soldier whose name he did not remember. About 8:15 p.m., Vaughn, accused and two other enlisted men left the quarters and drove to the International Club. Thereafter, Vaughn and accused were in the presence of these two men for the remainder of the evening.

The court, obviously, chose to disbelieve the testimony of Private Vaughn. This result is not particularly surprising in view of the entire lack of corroboration of his assertion that after depositing some of his fellow soldiers at the International Club he and accused had returned to their barracks area about 7:30 p.m. where they had been seen by Sergeant Krill, the conflict between Vaughn's testimony and that of other witnesses concerning the presence of an M-1 rifle in the jeep he had been using on the afternoon and evening of 27 April and the other evidence, direct and circumstantial, tending to implicate Vaughn in the commission of the crime

with which accused was charged. It cannot be gainsaid that once Vaughn's testimony was cast aside as unworthy of belief, the proof against accused was considerably damning.

We find ourselves most interested, however, in speculating upon what the court's decision might have been had Vaughn's claim that he and accused were in the barracks area between 7:30 and 7:40 p.m. been confirmed by Sergeant Krill. Had Vaughn's testimony in this respect been substantiated, the court, having before it evidence that it took some 15 minutes to travel the distance between the soldiers' quarters and the scene of the crime, that accused and Vaughn were seen in their quarters at about 8:15 p.m. or between 8:15 and 8:30 p.m. and that the actual commission of the rape covered a period of forty minutes or more, could most certainly have entertained a reasonable doubt as to the guilt of accused. As will hereinafter appear, this speculation on our part is not the result of idle curiosity.

In accordance with the provisions of paragraph 85b of the Manual for Courts-Martial, 1928, a record of the prior hearings in this case accompanies the instant record of trial. We note that in the original hearing, Technical Sergeant Ralph L. Krill, Medical Detachment, 1st Infantry Regiment, had testified as a witness for the prosecution. He there stated that on 27 April 1946 he saw accused, in the company of Vaughn, "a little after" 6:00 p.m. when "the men" came in from their hunting trip, again at approximately 7:00 p.m. when "they came back from the Red Cross to get a ping pong ball," a third time "around 7:30 p.m." when the Sergeant was playing catch on the road next to the quarters and at about 10:00 p.m. when accused and Vaughn turned in their passes. At 10:30 p.m. accused and Vaughn were both in bed. When Sergeant Krill saw accused and Vaughn "at 7:30 p.m." they "came and parked by the APO. They went into the quarters and in a few minutes they went back towards town." Asked if he remembered the light conditions at this time, the Sergeant replied:

> "Thompson left before they left. He went to the show and he went to catch the truck and PFC Meldon stayed and we played ball until about 8:00. It was getting fairly dark and we could hardly see the ball. They had just left." (Underscoring supplied.)

Neither accused nor Vaughn "had been drinking" at the time they turned in their passes. Vaughn was driving the "medical number one jeep" when the sergeant saw him at 7:30 p.m. (R 63-66 of original hearing). We also note that upon the first rehearing the testimony of Sergeant Krill given at the original hearing was introduced in evidence by the prosecution. The witness was described as being "now beyond the reach of process" (R 60-63 of 1st rehearing). The former testimony of Sergeant Krill was not put in evidence in the instant hearing. True, had the Sergeant's testimony been received in evidence, the court may have refused to give it credence or, believing it, may have nevertheless decided that other

witnesses were mistaken as to their estimates of time, or were untruthful, and thus may still have found accused guilty as charged. On the other hand, however, the court may well have chosen to accept such testimony as sufficient to establish the defense of alibi. In any event, the court should have been given the opportunity to consider this most important evidence.

There are numerous decisions to the effect that a verdict of guilty in a criminal case should not be permitted to stand where an accused is deprived of the benefit of important and material evidence which might reasonably have caused the triers of fact to return a different verdict (People v. Schulman, 299 Ill 125, 132 N.E. 530, 24 ALR 1022; People v. Nitti, 312 Ill 73, 143 N E 448; Sanchez v. State, 199 Ind 235, 157 N E 1, Cornwell v. State, 106 Ohio St 626, 140 N E 363; State v. Jones, 12 Mo App 93; State v. Gunter, 30 La Ann 536; 64 ALR 436). Since, as has been pointed out above, the court in the instant case may well have entertained a reasonable doubt of accused's guilt had his claim of alibi been fortified by the testimony of Sergeant Krill, it is obvious that the failure to place before the court such evidence of vital import to accused, under circumstances clearly indicating that Sergeant Krill's testimony was readily available in an admissible form, presents a juridical situation in which it would be impossible for those charged with the appellate review of this record under Article of War 50½ to conclude that accused was accorded a fair trial. Accordingly, we must hold that the findings of guilty and the sentence herein should be set aside.

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.

Charles F. Silvus, Judge Advocate

Gilbert E. Hemphill, Judge Advocate

Harley A. Lanning, Judge Advocate

(378)

JAGK - CM 315523 1st Ind

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

TO: Commanding General, 6th Infantry Division, APO 6, c/o Postmaster, San Francisco, California

1. In the case of Sergeant Clarence A. Huntington (39936228), Medical Detachment, 1st Infantry, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

2. When copies of the published order in this case are forwarded to this office, 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 315523)

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

vol 76 Army JAG Bd. Rev

vol 76 Army JAG Bd.Rev

TITLE

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