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1948

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JUDGE ADVOCATE GENERAL'S DEPARTMENT

BOARD OF REVIEW

Holdings Opinions and Reviews

VOLUME 77

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CM 328248 - CM 329178

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WASHINGTON: 1948

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CONTENTS FOR VOLUME NO 47

CM No	ACCUSED	DATE	PAGE
328248	Richardson	19 Apr 1948	1
328250	Lunde	26 Feb 1948	29
328279	MacLeod	10 Mar 1948	43
328331	Garr	9 Feb 1948	53
328351	Johnson	13 Feb 1948	59
328401	Still	28 Jan 1948	65
328416	Pierce	16 Jul 1948	71
328447	Tulagan	23 Jan 1948	93
328451	Robinson	16 Feb 1948	97
328477	Moore	3 Feb 1948	103
328486	Hubbard	27 Feb 1948	113
328542	Jeffries	27 Feb 1948	123
328584	Yakavonis	12 Feb 1948	131
328590	Welch	10 Feb 1948	145
328608	Dooley	30 Apr 1948	151
328612	Westover	27 Feb 1948	161
328619	Horton	2 Mar 1948	167
328620	Manquen	8 Mar 1948	173
328628	Jones	10 Feb 1948	179
328643	Heaney	27 Feb 1948	183
328648	Brown	2 Mar 1948	189
328797	Mansfield	19 May 1948	195
328817	Stroup	27 Feb 1948	209
328855	Johnson	31 Mar 1948	213
328856	Hiller	10 Mar 1948	217

CONTENTS FOR VOLUME NO 77  
Continued

CM NO	ACCUSED	DATE	PAGE
328857	Cockerham	10 Jun 1948	221
328876	Mullarkey	7 Jun 1948	247
328877	Dixon	5 Apr 1948	263
328884	Hale, Jensen, Mullinnix	20 May 1948	269
328886	Worthy	4 Mar 1948	287
328889	Verner	31 Mar 1948	295
328910	Kelly	20 Apr 1948	299
328924	Floyd, Wood, Stone, Lawson	8 Mar 1948	315
328930	Williams	20 Apr 1948	323
328967	Franz	19 Mar 1948	329
329008	Jensen	19 Apr. 1948	333
329022	Mathews	26 Feb 1948	341
329082	Rees	21 May 1948	347
329089	Smith	2 Mar 1948	353
329093	Edwards	8 Mar 1948	357
329162	Sliger, Peterson, Horton	5 Mar 1948	361
329178	Evans, McMillan, Hayden, Smith, Horton	23 Mar 1948	371

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

(1)

JAGK - CM 328248

19 APR 1948

UNITED STATES )

TRIESTE UNITED STATES TROOPS

v. )

Major EDWARD H. RICHARDSON )  
(O-28977), Field Artillery )

) Trial by G.C.M., convened at Trieste,  
) Free Territory of Trieste, 12-20 November  
) 1947. Dismissal, total forfeitures,  
) confinement for five (5) years, and  
) to pay to United States a fine of \$3,000.

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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 95th Article of War.

Specification: In that Major Edward H. Richardson, 7108th Military Government Detachment (Overhead), 88th Infantry Division, did, at Trieste, Italy, between 1 December 1945 and 15 March 1946, agree and conspire with one Angelo Ricci to accept contributions of money and gifts of property from persons and firms with whom the said Major Richardson, as Chief Public Works Officer, Allied Military Government, Venezia-Giulia, personally and through his subordinate officers and employees, was to carry on negotiations as an agent of said Allied Military Government.

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

Specification 1: In that Major Edward H. Richardson, \*\*\*, did, at Trieste, Italy, on or about 14 March 1947, wrongfully accept through his agent, Angelo Ricci, bank checks in the sum of 2,000,000 lire from Luigi Brischi, representative of Angelo Farsura, the said Farsura being a construction firm with whom the said Major Richardson, as Chief Public Works Officer, Allied Military Government, Venezia-Giulia, had negotiated for said Allied Military Government.

Specification 2: In that Major Edward H. Richardson, \*\*\*, did, at Trieste, Italy, on or about 9 May 1947, wrongfully accept,

through his agent Angelo Ricci, bank checks in the sum of 1,500,000 lire from Luigi Brischi, representative of Angelo Farsura, the said Farsura being a construction firm with whom the said Major Richardson, as Chief Public Works Officer, Allied Military Government, Venezia-Giulia, had negotiated for said Allied Military Government.

Specification 3: In that Major Edward H. Richardson, \*\*\*, did, at Trieste, Italy, on or about 10 May 1947, wrongfully accept, through his agent Angelo Ricci, bank checks in the sum of 250,000 lire from Angelo Comelli, the said Angelo Comelli being a construction firm with whom the said Major Richardson, as Chief Public Works Officer, Allied Military Government, Venezia-Giulia, had negotiated for the said Allied Military Government.

Specification 4: In that Major Edward H. Richardson, \*\*\*, did, at Trieste, Italy, on or about 15 February 1947, wrongfully accept, through his agent Angelo Ricci, the sum of 750,000 lire from the firm Emilio Colombo, the said firm Emilio Colombo being a construction firm with whom the said Major Richardson, as Chief Public Works Officer, Allied Military Government, Venezia-Giulia, had negotiated for the said Allied Military Government.

Specification 5: In that Major Edward H. Richardson, \*\*\*, did, at Trieste, Italy, on or about 18 February 1947, wrongfully accept from Dino Giungi an 18-karat gold, 16-jewel, Vacheron and Constantin, Geneva, Swiss wrist watch of the value of about five hundred dollars (\$500.00), the said Giungi being a member of the firm of Pavan & Giungi, with whom the said Major Richardson, as Chief Public Works Officer, Allied Military Government, Venezia-Giulia, had negotiated for the said Allied Military Government.

Specification 6: In that Major Edward H. Richardson, \*\*\*, was, at Trieste, Italy, on or about 7 July 1947, wrongfully in possession of United States currency in the sum of about twenty-seven thousand two hundred fifty-nine dollars (\$27,259.00), in violation of War Department Circular No. 256, 1946, paragraph 8 e.

He pleaded not guilty to and was found guilty of all charges and specifications as follows:

"Of specification 1, Charge I	Guilty
"Of Charge I	Guilty
"Of specification 1, Charge II,	Guilty except the figures

2,000,000, substituting therefor the figures 1,000,000. Of the excepted words not guilty, of the substituted words guilty.

"Of specification 2, Charge II, Guilty except the words and figures 'bank checks in the sum of 1,500,000' and substituting therefore the words and figures 'a bank check in the sum of 500,000 lire.' Of the excepted words and figures not guilty, of the substituted words and figures, guilty.

"Of specification 3, Charge II, Guilty except the word 'checks' and substituting therefore the word 'check'; of the excepted word not guilty, of the substituted word, guilty.

"Of specification 4, Charge II, Guilty

"Of specification 5, Charge II, Guilty except the words and figures 'five hundred dollars (\$500.00)' and substituting therefore the words and figures 'three hundred and fifty dollars (\$350.00)'. Of the excepted words and figures not guilty, of the substituted words and figures, guilty.

"Of specification 6, Charge II, Guilty  
"Charge II 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, to be confined at hard labor at such place as the reviewing authority might direct for five (5) years and to pay to the United States a fine of three thousand (\$3,000.00) dollars. The reviewing authority approved the sentence, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 48.

### 3. Preliminary matters

In June 1945, the armed forces of the United States and Great Britain jointly occupied Venezia-Giulia, a province in Northeastern Italy, and the occupying forces established what was designated as the Allied Military Government over the area. The seaport city of Trieste, Italy, which later became the Free Territory of Trieste, was located within the geographical boundaries of Venezia-Giulia. Field Marshal Harold Alexander was the Supreme Allied Commander of the Mediterranean Theater of Operations, under which Theater the Allied Military Government, Venezia-Giulia, operated. The Military Government was staffed by both American and British military personnel and included many civilian employees.

During all the times mentioned herein the accused was Chief of the

Public Works Division, Allied Military Government, which division was charged with control over all public works including construction and repair of roads, bridges, docks, housing and utilities in the area. Pursuant to proper orders the accused had reported for duty with Headquarters Allied Military Government on 12 September 1945, and occupied offices in the Ministry of Public Works Building, Trieste.-

#### 4. Evidence for the prosecution

Angelo Ricci identified the accused as the Public Works officer of the Allied Military Government and stated that he had been employed by the accused as a driver and interpreter "around September 1945." The witness had previously worked for the accused in a similar capacity in Torino, Italy. Ricci stated that a young woman named Miraslava Bessi was also employed by the accused "doing some typewriting and permits." Sometime during the winter of 1945, Ricci had a conversation with the accused in his office in Trieste concerning money he had been receiving from contractors who had contracts "through the Public Works of AMG." At that time he had about 5,000,000 lire and Miraslava had been spending some of the money too freely. The accused suggested that a bank account be opened for her in Florence. This was accomplished and 500,000 lire was deposited to her credit. Further deposits were made until July 1947 when Ricci was arrested. At about the time the bank account was opened, Ricci commenced dividing the money collected from the contractors with the accused. This money was "supposed to be for the future of Miraslava," and was received from the contractors as gifts. Ricci could not remember the exact dates or the amounts collected. However, he stated that the accused "must have" known where the money came from. It was agreed between Ricci and the accused that the gifts would be divided "50-50" between Ricci and Miraslava, but the accused was to hold Miraslava's part. Ricci stated that "what he would have done with it later was none of my business." On various occasions Ricci purchased presents such as diamonds from the money and gave them to the accused. He always "supposed" that Major Richardson knew that the money was coming from gifts of the contractors for "I told him the source of this money" (R 86-97).

At the suggestion of the accused, Ricci had purchased a strong box for him. He identified Prosecution Exhibit 4 as being the box he had bought with keys thereto and had delivered to Major Richardson while they were at Trieste. He did not retain any key to the box but gave both to the accused when he delivered the box. The accused kept the box in a footlocker which was in the bathroom next to accused's office. The witness asserted that on various occasions he purchased American dollars with the lire he had received from the contractors. He did this at the request of the accused and used "six or eight million" for this purpose. With regard to these transactions the witness asserted:

"I mean sometimes I kept the money sometimes because we were going to Rome and I kept the money, instead of giving it to

Major Richardson, I mean the part that should have been say split between me and Slava that Major Richardson kept he said, 'Ricci, buy me some dollars when you go down to Rome'" (R 97-103).

The witness knew of the Italian construction firm "Angelo Farsura" and on several occasions he had received gifts from Luigi Brischi, an engineer for the firm. He estimated that he had received four or five million lire from the Farsura Company. Ricci had received checks which he identified as Prosecution Exhibits 6,7,10 and 11, but he did not know any person named "Bruno Carlucci" whose name appeared as payee on two of these checks (R 105).

The contractors would experience difficulties in performance of their contracts entered into with "Genio Civile" (Italian Public Works agency) and which contracts had been approved by "Public works AMG." They would visit accused's office and through Ricci as interpreter explain their difficulties. The accused would thereupon contact the labor or other divisions and "clarify the situation." Ricci knew one Angelo Comelli, the owner of a construction company whose contracts had been approved by "Public Works AMG." He had received from Angelo Comelli "maybe a million and a half, two million, but I couldn't say for sure the amounts." Ricci identified and there were received in evidence Prosecution Exhibits 6,7,8,9, 10 and 11, being checks from construction firms, which checks the witness had left at his home (R 107). Sometime in February 1947 Ricci received gifts from the Emilio Colombo Construction Company approximating one and one-half million lire. The transactions referred to took place in Trieste over a period of time from the winter of 1945 until July 1947 when the witness was taken into custody by police authorities (R 91-110).

Mr. Ricci identified two documents as being forms "FWV 1 and FWV 2" duly signed by the accused as Chief Public Works and Utilities officer, Allied Military Government. These documents dated 16 March 1946 were received in evidence over the objection of the defense as Prosecution Exhibits 18 and 19 and were translated by the court's interpreter. Briefly stated, these exhibits show that on 16 March the accused, in his official capacity, had approved the awarding of a contract by the Genio Civile to the firm Angelo Farsura involving 48,200,000 lire for the construction of a bridge, road, tunnel and power station located at "S Anna, Trieste" (R 112). The contract referred to was received in evidence, without objection, as Prosecution Exhibit 20 (R 113).

Mr. Ricci identified Prosecution Exhibits 21 and 22 as being "FWV" Forms 2 and 1, respectively, duly signed by the accused in his official capacity on 16 October 1945, approving a contract for public works between Genio Civile and the firm Angelo Comelli. The consideration involved amounted to 9,342,500 lire. Prosecution Exhibit 23 was identified as the contract referred to and was received in evidence over objection by the defense. Ricci testified that representatives of Angelo Comelli visited the public works "for difficulties like almost all the contractors

(6)

found for getting along with the work." The accused listened to them "thru me and did his best to help them through getting along with their work" (R 114). Ricci had his office in "the room right by him (accused)." The sign on the door said, "Major Richardson, Chief of Public Works; Ricci Angelo, Engineer." Ricci was not in fact an engineer. The witness stated that the Colombo firm had received contracts which were approved in the Office of Public Works. He could not remember if Mr. Colombo dealt with the accused directly or through him as interpreter (R 115-116).

On cross-examination Ricci stated that the contracts were originally entered into "on the civilian side." Many of the "difficulties" which were discussed in the Public Works Division related to trouble the contractors were having with the Labor Division, American Military Government. The witness never heard the accused demand money from the contractors. There were about 400 contractors listed in the "Albo." Ricci did not share "everything" he received with the accused. He got a Topolini car and some cameras. He had not given Major Richardson any part of the checks and he could not "split" the car. He had loaned the accused money on occasion and had also borrowed from him. The title "engineer" appeared in other offices where the occupants were not engineers. He did not name those offices. The accused had never neglected his work and was "very active," even working on Sundays. The witness listed other gifts that were received by the accused, himself and "Slava" not particularly material to the issues herein. Ricci stated that other officers in "AMG" received gifts and he saw no harm in this. Every few days he would report to the accused, "I have so much." No receipts were ever given. Ricci received "around 24000, 28000 lire" per month from the Allied Military Government as his pay (R 122-128).

It was stipulated by the parties that the official exchange rate of the Italian lire to the United States dollar fluctuated from 100 lire to the dollar in February 1946 to 519 lire to the dollar in October 1947 (R 85, Pros Ex 17).

Romano Coasini, a civilian engineer formerly in the office of the accused at Headquarters Allied Military Government, identified, and there was received in evidence by agreement of the parties as Prosecution Exhibit 1 a chart showing the various divisions of the Allied Military Government and the procedure followed in handling contracts for public works. The contracts were entered into between the civilian governmental agencies and the contractors. The Italian Government provided the money which was paid through the "Banca D'Italia." The Public Works Division approved or disapproved the project and had authority to reject the bids before the contract was finally executed (R 22-32).

Mr. Luigi Brischì testified that he was an engineer and the manager of the construction firm Angelo Farsura. He knew the accused as the chief Public Works officer and Angelo Ricci as his interpreter. His firm "had

the tunnel Montebello and S Anna," also the tunnel "out on Via Venute." Work had been commenced on the first contract in 1943, suspended in April 1945, and resumed in March 1946. At the request of the accused he had made several visits to his office. Mr. Ricci had also requested conferences with him at the Public Works office. In June 1946, he had given Mr. Angelo Ricci a million lire, in September or October 1946 another million, in December 1946 a third million. The witness stated that he gave Ricci one million lire in March 1947 and one million in May, both payments being by checks. He identified Prosecution Exhibit 10 as being one of the checks mentioned. Prosecution Exhibit 10 is a check drawn on the Bank of Italy in the amount of 500,000 lire payable to Brischi and indorsed in blank by him. It is dated 9 May 1947. Some of the checks had been made out in the name of the firm's cashier, Bruno Carlucci. Prosecution Exhibits 6 and 7 were identified by the witness as being two of the checks issued through the cashier. Prosecution Exhibits 6 and 7 are checks drawn on the Bank of Rome dated 14 March 1947, payable to Bruno Carlucci and indorsed in blank by him. Each is in the amount of 500,000 lire. He had given to Mr. Ricci a total of five and one-half million lire. Ricci had demanded seven million. The money was given to Ricci because "it is the power of the administration to suspend works and the uncensorable judgment and without the firm having power to claim any reimbursement." The witness identified Prosecution Exhibit 20 as being the contract referred to and read from page 4 thereof which contained the clause authorizing cancellation of the contract at any time by the Allied Military Government without any further obligation (R 129-132).

On cross-examination the witness was asked if the clause referred to was in accordance with Italian law. He replied that the Italian law had a somewhat similar clause but that it was not so "severe." "Under the Italian law if a contract was terminated for public works the firm suffering from this termination has the right to claim a certain percent for the work which is still to be completed." When the firm met with labor difficulties "Major Richardson interceded with the labor division in order to try and settle the matter." In response to a question by the court the witness stated that he expected "nothing" in return for the money he had given Ricci (R 133-136).

Mr. Angelo Comelli, an Italian industrialist residing at Trieste, testified that he was the owner of the Angelo Comelli construction firm. His firm had received a contract through Genio Civile. The accused was, at that time, "chief public works." The witness stated that Angelo Ricci "demanded a certain amount of money from me for work I had performed on behalf of the Genio Civile." He had given Ricci the checks which he identified as Prosecution Exhibits 8 and 9 in the office of Public Works Allied Military Government. Each of these checks are dated 10 May 1947, are drawn upon the Institute of Credit, and are in the sum of 250,000 lire. They are indorsed in blank by the payee "Aldo Antoni," an alias used by

Mr. Comelli. He gave these checks because he was "afraid that he could prejudice the performance of my work, or that some work could be taken away from me, work which I was performing." He identified Prosecution Exhibit 23 as the contract which he had entered into and which bore his signature. Specifically, the administration (AMG) had reserved the right to cancel the "document" at "his uncensorable judgment." That was the reason he gave Ricci the checks. Request was made upon him in February or March 1947, "whereas I delivered the money sometime in May." On cross-examination the witness admitted that he had been tried and convicted of "corruption" but he had appealed the conviction. His defense was based on the fact that he delivered the money after having received "the works and not in relation to any act of the others." He asserted positively that at his trial he had testified that Ricci made demands upon him for the money. He had received contracts in the amount of 400,000,000 lire but had never discussed the terms with the accused (R 136-141).

Enrico Colombo testified that he was "geometer" with the firm of Emilio Colombo. The Emilio Colombo Company had received a contract with Genio Civile which had been approved by the "Public Works Dept AMG" for construction of the "tunnel Sandrinella." This contract was entered into "towards the end of January 1946." In the latter part of February or early March 1947 he had given to Angelo Ricci "a million and a half lire." In response to a request from Ricci he had gone to his office where Ricci "asked me to take on more labor." He was then working three shifts and it was impossible to employ more labor. Before departing Ricci requested one and one-half million for the "gallery," or tunnel (R 141-143). On cross-examination Mr. Colombo stated that he never negotiated with the accused for the contract and that accused's name was not mentioned in his dealings with Mr. Ricci. His firm had procured 300 millions in contracts and the Sandrinella Tunnel called for payment of 25 million. The witness admitted that he had been convicted in connection with gifts to public officers and their employees (R 145).

On redirect examination the witness gave the following explanation of his gift to Ricci:

"Q. Why did you give Mr. Ricci this money? What did you expect in return?

"A. In the meeting I had with Angelo Ricci in which occasion he demanded this money from me, Angelo Ricci told me that he had favored me for the contract for the tunnel, so a conversation happened between myself and Ricci in which conversation I told Ricci that he could not have favored me first of all because I didn't know him and then because the contract I had stipulated with Genio Civile. I didn't know what Ricci could have done for me therefore I denied paying him the amount. About one or two weeks after this meeting Ricci called me on the telephone, asked me to go to his office because he had an urgent need to talk to

me. We spoke of various jobs and in particular about the works which were being performed on the Sandrinella tunnel and on this occasion he gave me the demand for a million and a half. Before I left the room Ricci made that inference in this conversation, 'You understand me, Mr. Colombo?' so I examined the contract and I found a clause in which the administration reserved the right to cancel the contract at any time without giving any reasons for it and without any compensation being given to me, nor was I entitled to the percent of the contract which is provided for by the Italian works rules, that is a payment for the works performed and the percent of the works still to be performed. Obsessed by this and for the benefit of the firm Emilio Colombo I delivered the amount to Angelo Ricci in order that the firm Colombo would not suffer major damages because the firm had kept its equipment on the spot before starting the job and kept maintenance on the work already performed in 1943." (R 146)

Lieutenant Colonel John L. Keefe, 7177 Allied Military Government Detachment, testified that on 10 July 1947 he succeeded the accused as Public Works officer. In the bathroom which was connected with the office he noticed a footlocker with the name "Duane D Freeze" stencilled thereon (R 34).

Mr. Leo J. Pagnotta testified that he was "Chief CIC in Italy, United States Army." On 5 July 1947 he had been directed to investigate "Public Works of AMG, Trieste." On 9 July he visited the accused in his office "on the American second floor" at the Public Works Building with a crew of police who had "frozen the office completely." He identified Prosecution Exhibit 3 as a photograph of a footlocker found in the bathroom. Inside of the footlocker he found various items of personal clothing and a metal box. In the presence of Captain Lang and Major Calahan he forced open the metal box and found therein <sup>about</sup> \$27,229.00 in U.S. currency and other items. The American notes were in denominations ranging from one to five hundred dollars. Inside the box there were also a Vacheron-Constantin watch, some traveler's checks "belonging to Mrs. Richardson" and a pay check of the accused. Major Calahan of the G-2 Section took control of the box after the photographs were made. Prosecution Exhibit 3, the photograph of the footlocker and metal box; Prosecution Exhibit 4, the metal box, and Prosecution Exhibit 5, the described watch, were received in evidence over the objection of the defense. The box and watch were withdrawn at the conclusion of the trial. Mr. Pagnotta identified Prosecution Exhibit 12 as a photograph of the box showing the initials "LP" which he had scratched on the box for future identification, and Prosecution Exhibits 13, 14 and 15 as being photographs of the opened box and its contents. The photographs had been taken in the witness' presence. These exhibits were likewise received in evidence over objection (R 37-43). The witness also identified Prosecution Exhibits 6, 7, 8, 9, 10 and 11 as

(10)

being checks he had found during a search of the home of Angelo Ricci (R 44).

Over the objection by defense counsel Mr. Pagnotta was permitted to testify that his examination of the records of the Public Works Division revealed that the Angelo Farsura Company had been awarded 23 contracts totaling 924,181,525 lire and the Angelo Comelli Company had been awarded 70 contracts totaling 338,998,455 lire. The Emilio Colombo Company had drawn 301,375,444 lire and August Pavan-Giungi Company had drawn 360,971,473 lire (R 45). Mr. Pagnotta was cross-examined at length concerning the manner in which he conducted the investigation, the information he had obtained from the files of the Public Works Division, Allied Military Government, including the number of firms whose contracts had been approved in that office, the relative number of contracts received by the various firms and the total amounts involved. He was also cross-examined concerning testimony given by him at certain civilian trials (R 47-63).

Major Robert Calahan, G-2, TRUST, testified that he visited the office of Major Richardson in the Public Works Building, Allied Military Government, on 9 July 1947. When he arrived the steel box (Pros Ex 4) was open on the accused's desk and inside there were found various items including a watch (Pros Ex 5), and about \$27,000.00 in U.S. currency. The money was counted by Mr. Pagnotta under the observation of the witness and Captain Leon. Subsequently Major Calahan counted it for verification. An inventory of the contents was made by Mr. Pagnotta in his presence. In addition to the money the box contained one pay check, several travelers checks, ear rings, a watch, several diamonds, a fountain pen, and an Italian medal. The travelers checks were "made out to Mrs. Richardson." There was a monthly pay check payable to the order of Major Richardson. Major Calahan identified Prosecution Exhibit 15 as a true photograph of the steel box (Pros Ex 4) and its contents (R 65-69).

Without objection, the court took judicial notice of "Part II War Dept Circular 256 dated 23 Aug 1946," Section 8(e) of this circular prohibits, with exceptions not here material, the use or possession of U.S. currency in certain foreign countries. These prohibitions were made applicable to the Mediterranean Theater and published to the command by MTOUSA Circular 146, 10 September 1946, the provisions of which were read into the record as follows:

"(Prosecution read as follows: 'E. Possession of U.S. currency or coin by authorized personnel [armed forces of the U.S.] is prohibited except: (1) Within the limits of a port of debarkation or an airport of debarkation within this Theater. (2) When in possession of competent travel orders to depart for the United States or a country where this type of currency is in use.')

(R 70)

Dolores Lenassi, 16 Via Mazzini, Trieste, testified that she was a clerk for the Pavan and Giungi Construction Company. On 18 February 1947 she attended a birthday party for the accused at his home. On this occasion she handed the accused a watch, on behalf of Mr. Giungi. It was rumored that the accused was about to leave and the present was meant to be a "souvenir." It was "likely" that the watch had been purchased at "Dobner," the only watch shop in Trieste. The watch was given for no reason other than friendship and the accused was reluctant to but did accept it (R 71-77).

Oscar Dobner, a jeweler at No. 70 Via Dante Alighieri, Trieste, identified Prosecution Exhibit 5 as a photograph of the Swiss watch he sold to Mr. Dino Giungi on 17 February 1947 for 135,000 lire (R 78-82).

Mr. Leo J. Pagnotta was recalled to the stand and testified that on 11 July 1947, at the Excelsior Hotel, Venice, Italy, he interrogated the accused using Sergeant Clark as stenographer. Prior to questioning the accused he had introduced himself as a member of the Counter Intelligence Corps, warned the accused that he was not obliged to answer any questions and if he did his answers could be used as evidence against him. No threats or promises of immunity were employed. He identified Prosecution Exhibit No. 24 as the transcribed report of questions asked and the answers given by the accused on the occasion in question. Mr. Pagnotta also identified Prosecution Exhibit 25 as the handwritten statement of accused executed on 12 July 1947 and Prosecution Exhibit 26 as a third statement made by the accused at the hotel on 31 July 1947. The defense objected to receipt in evidence of the proffered exhibits and the law member ruled that they would not be admitted until the defense had been heard on its objections (R 150).

On cross-examination, Mr. Pagnotta stated that he arrived at the Lido at Venice "at approximately 1:00 to 1:15." The accused was on the beach in company with another officer. At the request of Mr. Pagnotta the accused dressed and received him at his room in the hotel. The interrogation began at about 1330 hours and, with a break for supper, continued until about 0330 hours the following morning. During the questioning the accused stated that he had requested legal counsel. Mr. Pagnotta replied that "I have nothing to do with legal counsel." The accused was under orders to stay at the Excelsior Hotel, Lido, Venice, and a guard had been posted near the door of his hotel room. In the introductory part of the report of interrogation, Mr. Pagnotta had stated "that the accused being confined to quarters in his room" (R 150-154). The witness had not arrested the accused, in fact he did not have authority to arrest or to confine. A search of accused's quarters was made by the witness and other officers particularly to see if there were any material which could be used by the accused to commit suicide. Pagnotta talked to the accused's wife, gave her the travelers checks, and the accused's pay check which had been found in the strong box in accused's office. The accused's

family was living with him at the hotel. Mr. Pagnotta also questioned the accused on 24 July and again on 31 July. He was aware of the legal protection afforded one against self-incrimination and was positive that he had not violated "those procedures." The witness had made his investigation and interrogation of the accused pursuant to orders from MTOUSA. Mr. Pagnotta admitted that, referring to Question 78 of the statement taken on 11 July, he had said to the accused, "You will have to make some kind of answer for the purpose of the investigation as to the derivation of the contents and as to your possession of the contents of the box." In response thereto the accused had declined to make explanation (R 161).

The defense offered and there was received in evidence as Defense Exhibit C the deposition of Major Frederick D. Blanchard, Air Corps. This deposition reveals that from July to September 1947 Major Blanchard was in command of the area in which the Excelsior Hotel was located; that pursuant to orders the accused reported to him on 9 July and was placed in arrest of quarters at the hotel where he was permitted to be with his family; that he placed accused under 24-hour guard in compliance with orders; that later he attempted to get permission to remove the guard because he was short of personnel and did not think the accused would commit suicide; that during mealtime and while on the beach the accused was not directly under guard but was accompanied by an unarmed officer. The guard had no interest in the procuring of a statement from the accused. On 11 July the accused had addressed a communication to the Commanding General, 88th Infantry Division, requesting that Lieutenant Colonel Keefe be sent to Lido to render him legal assistance, but Major Blanchard had no knowledge of counsel being furnished the accused prior to 31 July 1947 (R 161, Def Ex C).

First Lieutenant Sherman J. Smith testified that he was military manager of the Excelsior Hotel. When the accused was placed in arrest at the hotel the witness had set aside the entire first floor for the accused and his family. Armed guards occupied a room near the accused and a guard was on duty at all times. Only authorized persons were allowed to communicate with the accused. He was not deprived of any meals, comforts, or necessities of life. Lieutenant Smith accompanied the accused to the hotel dining room where he had his meals with his family. He also escorted accused to the beach twice each day for exercise (R 162-167).

Mrs. Sybil H. Richardson, wife of the accused, testified that she had met Mr. Pagnotta in Trieste on 8 July and on the following day he told her that Public Works was being investigated. After interrogating her for a short time, he stated that "I would be able to join my husband in a few days." She joined her husband at the Lido of Venice on the following Saturday morning. On 24 July, as she and the children were coming from the beach she met Pagnotta, who stated that there were two things he desired to discuss with her. They went to her room. He asserted that although "very illegal" he wished to return "my travellers checks." She

thanked him. He then stated that he needed her help. He related that he had been interrogating her husband "all morning" but "its like hitting a stone; he goes so far and then he stops." He said, "he is a true American, he won't squeal, he won't tell this, I am begging him to do it." The witness then stated that Mr. Pagnotta told her that there were 52 people implicated "in this thing," including high ranking officers. Pagnotta begged her to try to "break" her husband, stating that he owed it to her and the children. She promised to cooperate and "I fairly hounded that man." She was sorry "today" that she had done this. She could only see him on the beach and the guard situation was getting "worse by the minute." All of these things added together made him "abnormal" (R 173-174).

On cross-examination the witness was asked if Mr. Pagnotta made any promise to her conditioned on her husband's confessing. She replied, "He said he would be benefitted and his family." Upon being examined by the court, the witness stated that she took her meals with her husband "when it was possible the officer would remember to bring him to the dining room" (R 174).

The law member read to the accused his rights to be heard as a witness and the defense counsel stated that the accused would testify "solely for the admissibility of the statements, not as to the merits or to anything else." He stated that on 8 July he reported to Colonel Carnes' office and was introduced to Mr. Leo Pagnotta, a special agent of the Counter Intelligence Corps. He was then told that an investigation was being made and that he would get his clothes and go with other agents to the Lido of Venice. He reported to Major Blanchard at the Lido on the "9th" and was assigned quarters at the Hotel Excelsior. On the "10th" Colonel Patterson came to the hotel and delivered to him the orders placing him in arrest and allowing his family to join him. On the "11th" Pagnotta arrived and after lunch he informed the accused that he was there to carry on the investigation. He stated that about 30 people were involved and that "it was something not initiated here but initiated over in Yugoslavia to our Embassy and there to the Combined Chiefs of Staff in Washington and then on down." The accused stated that -

"From what he told me he was a very powerful position. In fact he started off by saying that I had a good record, had been a good soldier, out of thousands that applied to Regular Army I was one of the few who received it and I would continue to be one everybody in the division knew, my record was clear and this was just a formality." (R 176-177)

Prosecution Exhibit 24 was only a "small pertion of what transpired." The interrogation began in the afternoon and ended at three or four in the morning. He had repeatedly requested counsel but none had been provided before 31 July. Conversations with Mr. Pagnotta and his wife alarmed him because he felt that "I was to be made the goat" (R 177). During the afternoon of

11 July, Mr. Pagnotta had asked him if he knew what "states evidence meant." He replied that he had heard about it. Pagnotta replied that,

"Well, sometimes when you want something, investigators go to a person who may know or who may be able to give them leads and for return for those leads or that information that person is either granted immunity or other favors. He not only repeated to me at the beginning but at the end of the two hour investigation" (R 178). The accused stated further in this regard:

"He admonished me because I wouldn't make a statement, because I, - that I sort of insist on my legal right on that. He said it would be a shame that I, an allied officer, would have to come and stand trial, have to use Italian civilians against me; why didn't I wise up like the British officers and just make a statement, plead guilty and have it all over with" (R 179).

On cross-examination the accused stated that on 11, 24 and 31 July Mr. Pagnotta had made "implied" promises to him that it would be better to turn state's evidence, "in fact he implied there would be no charges preferred against me. It wasn't a direct promise, no, but a hint is as good as a nod to a blind horse." On 24 July Mr. Pagnotta had stated that, "If you don't make a statement you will take the rap for everything that has been done in Venezia-Giulia zone from the top to the bottom." No threats were made on 11-12 July because "there was no need of threats". On being examined by the court, the accused asserted that he also showed his "stupidity" by making only one written request for counsel, "I should have made one every day." He understood his rights under Article of War 24 (R 180-181).

Mr. Leo Pagnotta was recalled in rebuttal and denied emphatically that during the investigation of accused he either expressly or impliedly promised the accused immunity if he would turn state's evidence. He had conversed with Mrs. Richardson but had not promised her that "it would go much easier on Major Richardson if she could induce him to tell the truth in this matter." The witness reasserted that Prosecution Exhibits 24, 25 and 26 were free and voluntary statements (R 182-184). On cross-examination, Mr. Pagnotta stated that he might have told the accused that "It took only seven hours for Miraslava to tell the truth" (R 184).

The defense renewed its objection to the introduction in evidence of Prosecution Exhibits 24, 25 and 26, contending that the statements were shown to have been involuntary. After extensive argument by counsel, the law member overruled the objections and they were received in evidence (R 188).

The prosecution offered in evidence the 27,259.00 dollars in American currency, which was identified as having been found in Prosecution Exhibit

No. 4, the metal box, and requested leave to withdraw it at the close of the trial. The defense objected, contending that the money was obtained as the result of an illegal search. The court overruled the objection, admitted the currency, and authorized withdrawal thereof for return to the custodian. At the suggestion of the prosecution the court took judicial notice of AR 600-10 and all changes thereto (R 189).

Prosecution Exhibit 24 consists of 27 pages in question and answer form taken on 11-12 July 1947. It is not necessary to reproduce this document here. It is sufficient to say that it states that Mr. Pagnotta had informed the accused of his rights and that the accused did not object to being interrogated, although he had asked for counsel. Among other statements, the accused asserted that he was drawing only \$200 per month of his pay. The admissions contained in this document fall short of being a confession to the offenses alleged. Prosecution Exhibit 25 is a handwritten statement by the accused made on 12 July 1947 wherein he states that he "now" realizes that he has been betrayed by those in whom he placed trust and confidence, but that "I never made any deal with any contractor to pay me either in money or valuable gifts." Prosecution Exhibit 26 is as follows:

"31 July 1947  
 Excelsior Hotel  
 Room 729  
 Lido di Venezia

Statement taken by Leo J. Pagnotta,  
 Counter-Intelligence Corps

"I certify that I have been warned that I am not obliged to say anything and that whatever I say may be used against me as evidence. I further certify that I understand my rights and am giving this statement willingly. I wish to add this statement to the statement made by me to Mr. Pagnotta on 12 July 1947.

/s/ Edward H. Richardson  
 EDWARD H. RICHARDSON  
 Major, F.A.

Signature witnessed by:

/s/ Leo J. Pagnotta  
 LEO J. PAGNOTTA  
 Special Agent, CIC

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DECLARATION

"On or about September 1945 I became aware that in my office

of the Public Works, AMG, Torino, Angelo Ricci was engaged in an irregular practice of receiving monies and gifts from contracting companies and that he was giving a share of these monies to Miraslava Bessi. I immediately called Ricci to task and reprimanded him, warning that I would not tolerate such practice.

"In September 1945 I was transferred to Trieste where I organized my office. Angelo Ricci and Miraslava Bessi followed me to Trieste where I again employed them in their former positions. In November 1945 or December 1945 I was made Chief of Public Works, AMG, Trieste. I was given two officers, Major John Squires and Captain R. Taylor. Major Squires continued under me as supplies officer and Captain Taylor as Public Works officer in Gorizia. Several civilians were also kept in their former positions to work under me.

"Since 1945 I have noticed irregularities and signs of corruption which I have reported to the respective and effected department heads for their investigation. I may have spoken of these conditions to my subordinates and I have made written and verbal reports, in some instances, to my superiors. I was aware that Major Squires, Captain Wilde, Captain Cockerham and other subordinate officers had been receiving minor gifts on holidays or festive occasions from contractors and friends in construction firms. I was not aware that these subordinate officers were engaged in corruptive practice. However, on several occasions, I became suspicious of corruptive practice but in each case the officer concerned satisfied me that no corruptive practice existed.

"In the late winter of 1945 and 1946 Angelo Ricci again came to me and informed me that he had received a sizeable amount of money from construction companies as gifts. He also informed me that he had been giving Miraslava Bessi her share of these gifts and that she had been spending money too freely. I again reprimanded Ricci and threatened to fire him. However, he played upon my sympathy and convinced me that the gifts were received for favors and services in expediting legal and normal procedures. Ricci also convinced me that this money was used in part to prepare and secure the future of Miraslava Bessi in order that she might not remain destitute once AMG control and work ceased. I then agreed to allow Ricci to continue accepting gifts of money but only as a gift for services rendered. Ricci and I came to an understanding that we would share equally all gifts received and that Ricci would deduct from my share any monies given to Miraslava Bessi. It was further understood that Ricci alone was to accept gifts of money, never in my name or for me, and that he would keep in his possession all of the money until I requested it of him or told him to pay something for me. Occasionally Ricci would tell me that he had amassed so much in quantity of money and would inquire what I wanted to do with it. At times he would mention from which companies the money came from,

as for example, he would say I have received money from Camelli, Farsura, Sicelp and possibly others, and would ask what to do with my share. I would estimate that I have received from twelve to fifteen million lire from Ricci in this manner since 1945. With these lire I have procured American dollars, in a major portion through Ricci and some by purchasing myself. I purchased my dollars in Rome. I do not know where Ricci purchased dollars for me. I have never directly received monies with the exception of an account in the United States in the Community National Bank in Knoxville, Iowa, which was opened for me by the American Engineering Co. However, I do not know whether any money has or has not been deposited in this account. The account was opened under the name of Edward Hardy, which are my two first names. This account was opened for me sometime in late 1946 for my help in advising them on establishment in Trieste and for orders we had given them and a friendship which existed between myself and Mr. Griffith.

"I kept all monies received from Ricci and converted into dollars by him and me in a light brown metal strong box which was kept secure in a trunk formerly belonging to Major Duane D. Freese which was in my private bathroom of my office. The strong box was bought for me by Ricci in Torino. There was only one key to the strong box which I kept in my possession. I have placed in this strong box a quantity of American dollars which I thought amounted to about twenty-four to twenty-five thousand dollars. I have also placed about five hundred dollars worth of Swiss Francs in the same box. Both monies were the converted lire which I had received from Ricci. In addition, the box held one Swiss watch, 18 karat gold case which was given to me on my birthday, 18 February 1947, by Mr. Guingi of the Pavan Guingi Construction Company. I also had three sets of cuff links in the box, one set from my office help on Christmas 1945, another from Ricci on Christmas 1946, and the third one for Christmas but I don't remember from whom. There was also one diamond ring with three extra diamonds which were purchased for me by Ricci out of the monies held by him for me. The silver cigarette case in the box was given to me by a friend named Meklea Ronsky. The cigarette lighter was a birthday gift from Vera Monselis, proprietor of the lodgings I used in Florence. There was also an Italian medal in the box which I received from the Italian government in 1946. There were also two fountain pens, a pay check, check book and travelers' checks in the box which are the property of myself and my wife.

"The last occasion of my receiving any money from Ricci was about the last of June 1947 when Ricci gave me about one hundred thousand lire which he always kept on hand for me. The last time I placed dollars in the box was in the Spring of 1947. These dollars came from lire converted into dollars by Ricci.

"I certify that I have dictated the above statement on pages 1, 2, and 3 to Mr. Leo J. Pagnotta, Counter Intelligence Corps and that the statement is true to the best of my knowledge and belief.

/s/ Edward H. Richardson  
EDWARD H. RICHARDSON  
Major, F. A.

Signature witnessed by:  
/s/ Leo J. Pagnotta  
LEO J. PAGNOTTA  
Special Agent, CIC"

5. For the Defense

The defense called various witnesses who testified at length concerning the organization of and the manner of operation of the Allied Military Government, the various civilian organizations which functioned under its control and supervision, the civilian contractors who had been employed, and the total amounts involved in the contracts which had been awarded to each contractor (R 195-228).

It was stipulated that if First Lieutenant Charles C. Walsh, former adjutant of the 7108 Military Government Detachment, were present he would testify that during 1945, 1946 and 1947 the provisions of AR 600-10, 8 July 1944, were not complied with in the area in question and that he could find no record of any action having ever been taken concerning the same (R 229).

It was also stipulated that if the Town Major of Trieste were present he would testify that he was the custodian of records and papers relating to requisitions, that he had examined his records but had been unable to find documents relating to requisitioning of the building known as the "Ministry of Public Works" (R 230). The chief finance officer, Allied Military Government, testified that no funds paid to the contractors were provided by the U.S. Government (R 246).

Both sides having rested, the defense moved for a finding of not guilty of all charges and specifications. Subject to objection by any member of the court, the law member overruled the motion as to all charges and to all specifications except Specification 4 of Charge II concerning which he sustained the motion. The President of the court objected to the ruling with reference to Specification 4 of Charge II, the court was closed and upon being opened the President announced that the law member's ruling with respect to Specification 4 of Charge II was not sustained. The prosecution was granted leave to withdraw its Exhibits 1,4,5,16,18, 19,20,22,23,27 and Defense Exhibit B, substituting for the record photostatic copies, photographs and descriptions (R 266). No further material evidence was presented.

6. Discussion

The Specification to Charge I alleges a conspiracy between the accused and Angelo Ricci to accept gifts from persons and firms with whom the accused was to carry on negotiations as agent of the Allied Military Government. It will be noted that no overt act in furtherance of such conspiracy is alleged. In CM 320681, Watoke, 70 BR 125,133, and again in CM 325762, Edwards, the Board of Review, in considering conspiracy specifications wherein no overt act was alleged, pointed out that although such pleading did not state the offense of conspiracy as denounced by Section 37 of the Federal Criminal Code (18 USC 88), the code provision had not changed the

nature of the common law offense of conspiracy but had merely added the requirement that, for a conviction under the code, it was necessary that the indictment allege and the proof show an overt act in furtherance of the unlawful agreement (Brady v. U.S., 24 Fed (2d) 405, 407; Marino v. U.S., 91 Fed (2d) 891). In the Watoke and Edwards cases (supra) it was held that the common law offense of conspiracy, viz, a combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means, is clearly conduct of a nature prejudicial to good order and military discipline and tending to bring discredit upon the military service in violation of Article of War 96 (CM 296630, Siedentop, 58 ER 191,197). And, in the case of an officer, if the object to be obtained be dishonorable, as well as unlawful, and it will hereinafter appear that it was, the conspiracy is properly chargeable under Article of War 95 (CM 320455, Gaillard, 69 ER 345, 377).

Specifications 1 to 4 inclusive of Charge II allege that the accused on or about the dates alleged did wrongfully accept through his agent, Angelo Ricci, money and checks therein described from certain construction firms with whom the accused as Chief Public Works Officer, Allied Military Government, Venezia-Giulia, had negotiated for the said Allied Military Government. Specification 5 alleges the acceptance of a watch under like circumstances.

AR 600-10, paragraph 2e (2) (a), 1, 8 July 1944, with certain minor changes not material to the issues herein, prohibits -

"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."

The evidence shows that the United States and British military authorities had occupied and set up a joint military governmental organization over the territory in question, that the accused was Chief of the Public Works Division of the military government as established, and that his official duties included the ultimate approval or disapproval of contracts for public improvements which were being carried on between civilian agencies and certain contractors. In order to gain favorable consideration with both the Allied Military Government and the subservient civilian organizations with whom they had contracted directly, the contracting firms mentioned in the specifications, acting through their respective agents, delivered to Angelo Ricci, the accused's chauffeur and interpreter, the checks and money as found by the court. Each contractor's account of the delivery of the property to Ricci, together with Ricci's testimony concerning these transactions, leaves no doubt that the gifts had a direct relation to accused's official duties. That the accused had knowledge of and tacitly approved Ricci's conduct in procuring the "gifts," and in fact induced the practice, can be reasonably inferred from the agreement to divide the proceeds, the accused taking half and Ricci half. Although a

bank account was set up for Miraslava, it is apparent that she received a minor proportion of the proceeds. The acceptance by Ricci of the money and checks under the circumstances alleged constituted acceptance in law by the accused. Although we are of the opinion that the accused's conduct was violative of the provisions of AR 600-10, it is not necessary, in order to sustain a conviction herein, to determine that the accused was directly or indirectly carrying on negotiations with the civilian contractors within the meaning of the quoted regulation. In the transaction of public business, Army officers are, like Caesar's wife, required to be above suspicion. The offenses charged are closely related to bribery in civil law (3 Wharton's Crim Law (12th Ed), pp 2522-2525; U S Criminal Code, Sec 117 (18 USC 207)). The gifts were received under conditions clearly conducive to corruption and disloyalty to the military service and in each instance amounted to a violation of Article of War 96 irrespective of whatever Army Regulations or Federal Statutes may have otherwise been violated (CM 304586, McDowell, 32 BR (ETO) 1,4; CM 307417, Ruf, 30 BR (ET<sup>U</sup>) 13,16; CM 235011, Goodman, 21 BR 243, 254).

The legality of the search of accused's office in the building known as the Ministry of Public Works is called in question. It appears that the Allied Military Government exercised control over the building as the occupying power. The fact that the Town Major could not find a requisition for the building is of no importance. The military power had control of the building and the formality of a written requisition was entirely unnecessary. We quote from CM 248379, Wilson, 31 BR 235-236:

"Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building in a place under military control, even though occupied as an office or as living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command. \*\*\* such a search is not unreasonable and therefore not unlawful" (citing authorities).

In Grewe v. France, 75 F. Supp. 433, a habeas corpus proceeding in the District Court of the United States for the Eastern District of Wisconsin, the petitioner contended that evidence against him had been illegally obtained by unlawful search of his quarters by military police in a military compound established by the United States Army Occupation Forces in Germany. The learned court held that the search of the military controlled quarters occupied by petitioner, and the seizure of articles found therein, was not unreasonable or in violation of the Fourth Amendment to the Constitution. We therefore conclude that the search of accused's office and the wash room appurtenant thereto was fully authorized in law

and the exhibits constituting the American currency and other articles were properly received in evidence (CM 209952, Berry, 9 BR 155, 167). The circumstances under which the currency was found, together with the reasonable inferences concerning its source, leave no doubt but that this U. S. money was in accused's possession within the meaning of the quoted circulars. That a violation of War Department directives and circulars is an offense cognizable in military law is beyond question (CM 325541, Morgan).

The defense objection to the introduction of the checks found in the home of Ricci (Pros Exs 6, 7, 8, 9, 10, 11, inclusive) on the ground that there was no showing that the accused had any connection with these documents is without merit. The prosecution adequately established accused's interest in all of these illegal transactions and even if it be admitted that the particular checks found were part of Ricci's "cut" from the gifts, they were, in law, received by the accused through his agent, and the accused cannot otherwise be heard to complain about the search of Ricci's home (Gibson v. U.S., 149 Fed (2d) 381; Hall v. U.S., 150 Fed (2d) 281).

We have set forth heretofore in considerable detail the testimony of the accused and his wife which formed the basis of the defense's contention that the statements procured from him by Mr. Pagnotta were involuntary as having been induced by threat or promise. The accused stated that he was advised of his rights regarding self-incrimination by Mr. Pagnotta and it would appear most improbable that a major in the Regular Army would not be cognizant of the provisions of Article of War 24. Under the circumstances shown, we attach no particular importance to the fact that the interrogation on 11 July lasted from about 1300 hours to about 0330 hours the following morning (Lisenba v. California, 314 U. S. 219, 239; CM 252036 Kissell, 33 BR 331-343). The defense counsel contended that the circumstances in this case are comparable to the facts shown in CM 320230, Huffman, 69 BR 261, 269, wherein a confession was held inadmissible upon a showing that it had been procured after the accused had been confined under guard for more than 24 hours in a very cold room while wearing only scant clothing; that he was deprived of food and rest and was not permitted to speak to anyone except the interrogators. As we view the facts, the instant case presents an entirely different situation, for here the accused and his entire family were provided luxurious hotel facilities beside the sea, accused was allowed to be with his family while on the beach and at meal times, and only a mild restraint was enforced, prompted, in part at least, to prevent self-destruction on his part. We find no substantial evidence tending to indicate that the statements given by accused were involuntary in the sense that they were procured by force, threat, or promise of favor or immunity.

It has been vigorously contended by civilian counsel for accused, in oral argument and in his brief, that accused's confession herein should be excluded because obtained while accused was under what was said to be an unlawful arrest or restraint. It will be noticed that accused was

placed under administrative restraint on 8 July 1947, that he was ordered into arrest in quarters at the Excelsior Hotel, Lido of Venice, on 10 July 1947, that his confession was taken on 31 July 1947 after several interrogations, and that the charges herein were preferred on 7 August 1947. We have hereinbefore determined that, aside from the issue raised by the allegedly unlawful restraint, accused's confession was voluntary in that it had not been procured by force or promise of favor or immunity. Without deciding whether accused was in fact unlawfully restrained, but assuming for the sake of argument only that he was, we will now inquire whether the law will raise an inference of coercion from the bare fact of unlawful arrest or restraint where in all other respects a confession taken while in such durance is shown to have been voluntary.

At common law, it was held that a confession which was shown to have been the free and voluntary act of a accused was not to be excluded because of what was considered the incidental circumstance that it was obtained while accused was in unlawful custody (Sylvester Thornton's Case, 168 Eng Rep 955, overruling Ackroyd's and Warburton's Case, 168 Eng Rep 954; CM 320230. Huffman, supra, should be distinguished on the ground that actual coercion was shown). On the other hand, the Supreme Court of the United States, in the exercise of its general supervisory powers over the procedure to be applied by the civil Federal courts in the administration of justice and without calling into operation the Constitutional guarantees of due process and the right against self-incrimination, has held inadmissible a confession taken while accused was in unlawful custody regardless of the otherwise voluntary nature of the confession (McNabb v. United States, 318 U.S. 332, 341; see also dissenting opinion, 347; Anderson v. United States, 318 U.S. 350, 355; United States v. Bayer, 331 U.S. 532). The somewhat novel rule of evidence announced in this line of authority is not applicable to courts-martial, however, since the formulation of their correct procedure is vested in the legislative and executive departments of the Government (Const. Art. 1, Sec 8; AW 38; CM 307533, Boston, 1 ER (POA) 287, 296). In Paragraph 114a of the Manual for Courts-Martial, 1928, where the tests to be applied to a particular confession in gauging its voluntary or involuntary nature are laid down in general terms, it is stated:

"\*\*\* No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. \*\*\*" (Under-scoring supplied).

It follows, then, that in military practice a confession is not to be held inadmissible merely because, although otherwise free from taint, it had been taken while accused was in unlawful restraint. In the instant case, without animadversion upon the character of the restraint of which accused complains and after a careful examination of all the circumstances attending the securing of accused's confession, we are of the opinion that such confession was in fact and law voluntary and that it was properly received in evidence.

The stipulated evidence of Lieutenant Walsh to the effect that AR 600-10 had not been observed or enforced in the area during 1945, 1946 and 1947, even if true, cannot be construed as creating more than a possibly mitigating circumstance. Laxity in the enforcement of the law has never been considered a defense (CM 319747, Watson, 69 ER 47, 62).

Over the objection of defense counsel the law member allowed Mr. Pagnotta to state certain findings from his examination of the records of the Allied Military Government which related to the identity of the contractors, the number of contracts approved for each and the amounts involved. Defense counsel appears to have abandoned his objection thereto because he introduced similar compilations made by others. The prosecution obviously intended by this evidence to show that the accused had favored certain large contractors, including those mentioned in the specifications. In both instances the evidence was of a secondary nature but the facts disclosed were unnecessary for a determination of the issues herein. The contractors involved in this case, or their agents, had testified concerning their gifts and it was immaterial whether or not they had actually been shown any preference or granted any favors by the accused. We consider the irregularity of no material importance.

In their brief counsel complain that the formal investigation as directed by Article of War 70 was required by the appointing authority to be completed within 48 hours. It will be noted that an investigation of the Public Works Division had been in progress for nearly a month and obviously the investigating officer appointed by the convening authority most certainly had for his consideration the results of that investigation. Although the accused made no request for further investigation before trial, and did not request a continuance when the case was called for trial, counsel argue that the investigation under Article of War 70 was a mere formality and that the accused was thereby deprived of due process under the Fifth Amendment, citing Digest JAG, 1912-1940, p. 292; Hicks v. Hiatt, 64 F Supp. 238; Reilly v. Pescor, 156 F (2d) 632, 635). We find no substantial evidence to support the contention that the investigation conducted by Major Pell was not in substantial compliance with Article of War 70, but if errors were committed in the administrative procedure as set forth in the Article, they would not be effective to divest the court of jurisdiction. Since 1924 this office has consistently held that the investigative provisions of Article of War 70 are essentially administrative and that even the absence of such investigation will not operate to vitiate the judicial proceedings otherwise legal. (CM 209477, Floyd, 17 ER 149,153; CM 287834, Hawkins, 13 ER (ETO) 57, 71-75; CM 280385, Warnock, 17 ER (ETO) 163,179; CM 323486, Ruckman; CM 319858, Correlle, 69 ER 183,196).

On page 43 of counsel's brief for accused it is stated that subsequent to the trial the accused received information leading to the belief that

(24)

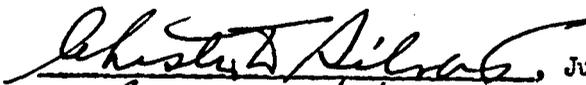
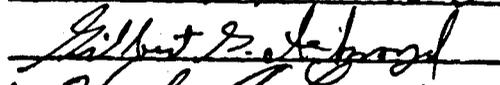
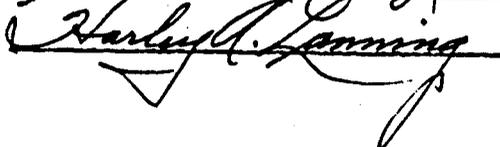
Lieutenant Colonel Vernon C. Rawls, JAGD, who sat as law member in the case, was also the officer who signed the pre-trial advice and recommendation to the Commanding General, Trieste United States Troops. The record discloses that on 25 August 1947, when the charges were originally referred for trial by the Commanding General, 88th Infantry Division (subsequently inactivated), and on 1 November 1947, about the time the charges were referred to the court which actually tried the case, the recommendation for disposition in each instance was signed by John W. Chapman, Colonel, JAGD, Judge Advocate. The record does not show that Colonel Rawls had any connection with the case other than the performance of his duties as law member.

The action of the reviewing authority in designating a penitentiary as the place of confinement is ineffective because confirmation of the sentence herein is required under Article of War 48. We note, however, that penitentiary confinement is not authorized for the offenses pleaded herein (AW 42; CM 319025, Fischer).

7. On 26 February 1948 Mr. Ralph S. Croskey and Mr. George J. Edwards of Philadelphia, Pennsylvania, appeared before the Board of Review in accused's behalf, made oral arguments and submitted brief which has been considered.

8. Records of the Department of the Army show that the accused is 45 years of age, married, and has two children. He graduated from Lehigh University with the Degree of B.S. in Civil Engineering in 1924 and was engaged in structural engineering. He was ordered to active duty on 13 January 1941 as a Captain, FA, National Guard, and promoted to Major, AUS, on 1 February 1942. The accused was appointed Major, FA, USA, on 5 July 1946 with rank from 18 February 1945. He has received 14 "Excellent" and five "Superior" efficiency ratings.

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 thereof. Dismissal is authorized for a conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

  
Chester D. Silver, Judge Advocate.  
  
Gilbert P. Johnson, Judge Advocate.  
  
Harley G. Lanning, Judge Advocate.

JAGK - CM 328248

1st Ind

MAY 28 1946

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Major Edward H. Richardson (O-28977), Field Artillery.

2. As approved by the reviewing authority, the accused was found guilty by general court-martial of entering into a conspiracy between 1 December 1945 and 15 March 1946 with one Angelo Ricci to accept contributions of money and gifts of property from persons and firms with whom the accused was negotiating as agent of the Allied Military Government, Venezia-Giulia (Trieste, Italy), in violation of Article of War 95 (Charge I and its specification); of wrongfully accepting through Ricci a bank check in the sum of 1,000,000 lire from the Angelo Farsura Company; of wrongfully accepting through Ricci a bank check in the sum of 500,000 lire from the Angelo Farsura Company; wrongfully accepting through Ricci a check in the sum of 250,000 lire from the Angelo Comelli Construction Company; of wrongfully accepting through Ricci 750,000 lire from the Emilio Colombo Construction Company (Specs. 1 to 4 inclusive of Charge II); of wrongfully accepting a Swiss watch of the value of \$350.00 from a member of the Pavan and Giungi Construction Company (Spec. 5, Charge II), all of said companies being construction firms with whom the accused had negotiated as Chief Public Works Officer, Allied Military Government; of wrongfully having in his possession on 7 July 1947 at Trieste, Italy, about twenty-seven thousand two hundred and fifty-nine dollars (\$27,259) United States currency, in violation of War Department Circular No. 256, 1946 (Spec. 6, Charge II). 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, to pay to the United States a fine of \$3,000.00, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

In September 1945 the accused became Chief, Public Works Division, Allied Military Government, Venezia-Giulia (Free Territory of Trieste, Italy). An Italian named Angelo Ricci was his chauffeur and interpreter.

One Miraslava Bessi, a young woman, was his stenographer. Accused's office was in the American Section of the Ministry of Public Works Building in Trieste. Extensive public works improvements in the territory, such as tunnels, highways, bridges, and housing projects were being authorized by the Allied Military Government. The Italian government was required to allocate funds for these improvements. A civilian governmental agency known as Genio-Civile contracted directly with construction firms for these improvements subject to the approval of the Allied Military Government. The accused, as Chief of the Public Works Division, was required on behalf of the Military Government to approve or disapprove the proposed projects and any contracts for the construction. Over the door of accused's office there was a sign reading, "Major Richardson, Chief of Public Works; Ricci Angelo, Engineer." Ricci was not in fact an engineer. Sometime during the winter of 1945 Ricci reported to the accused that he had about 5,000,000 lire which he had collected from the Italian contractors and that Miraslava was spending money too freely. It was then agreed that a bank account would be set up for Miraslava and 500,000 lire was deposited to her credit in a bank in Florence, Italy. The accused thereupon entered into an agreement with Ricci whereby Ricci would collect money from the contractors and that the accused was to share the money and that Miraslava's part would be deducted from the accused's share. Ricci agreed to pay to the accused the money when demanded of him. Ricci procured a strong box at a nearby Italian city and delivered the box and keys to the accused. In pursuance of this agreement Ricci demanded of and received gifts of money and checks from the civilian contractors as follows:

<u>Date</u>	<u>Amount</u>	<u>Source</u>
15 Feb 1947	750,000 lire	Emilio Colombo Const Co.
14 Mar 1947	1,000,000 lire	Angelo Farsura Const Co.
9 May 1947	500,000 lire (check)	Angelo Farsura Const Co.
10 May 1947	250,000 lire (check)	Angelo Comelli Const Co.

On 18 February 1947, at a party given at his home the accused accepted as a gift from Dino Giungi of the construction firm of Pavan and Giungi a Swiss watch valued at \$350.00. On about 7 July 1947 a search was made of accused's office in the Ministry of Public Works building and in the bathroom adjacent to his office a footlocker was found which contained a steel box. The box was forced open and among other items there was found U.S. currency totaling \$27,259.00.

In a pre-trial statement accused admitted entering into the alleged conspiracy with Ricci, admitted ownership of the U.S. currency found in his office and admitted that such money was collected from Italian contractors. He had received about twelve to fifteen million lire in this manner and converted it to American currency in Rome.

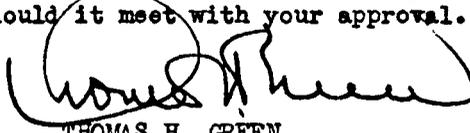
4. Records of the Department of the Army show that the accused is 45 years of age, married and has two children. He graduated from Lehigh University with the Degree of B.S. in Civil Engineering in 1924, and was

engaged in structural engineering. He was ordered to active duty on 13 January 1941 as a Captain, Field Artillery, National Guard, and promoted to Major, AUS, on 1 February 1942. The accused was appointed Major, Field Artillery, USA, on 5 July 1946 with rank from 18 February 1945. He has received 14 "Excellent" and five "Superior" efficiency ratings.

5. On 26 February 1948 Mr. Ralph S. Croskey and Mr. George J. Edwards, attorneys of Philadelphia, Pennsylvania, appeared before the Board of Review in accused's behalf, made oral arguments and filed a brief which has been considered.

6. I recommend that the sentence be confirmed and carried into execution. Penitentiary confinement is not authorized. I recommend that an appropriate United States disciplinary barracks be designated as the place of confinement.

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



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1. Form of action
2. Record of trial

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( GCMO 106, 12 May 1948 ).



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

(29)

JAGK - CM 328250

26 FEB 1948

UNITED STATES )

TRIESTE UNITED STATES TROOPS

v. )

Trial by G.C.M., convened at Trieste,  
Free Territory of Trieste, 5 December  
1947. Dismissal, total forfeitures  
and to pay to U.S. a fine of \$100.00.

First Lieutenant STANTON B.  
LUNDE (O-1320246), Company D,  
351st Infantry )

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review.
2. Accused was tried upon the following charges and specifications:

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

Specification 1: In that 1st Lieutenant Stanton B. Lunde, Company D, 351st Infantry, did, at or near Ellicott City, Maryland, on or about 1 July 1946, wrongfully marry Grace Elizabeth Robinson, of Baltimore, Maryland, without being legally divorced from Genevieve E. Lunde, of Wisconsin Rapids, Wisconsin, his lawful wife, then living.

Specification 2: (Finding of not guilty).

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

Specification 1: In that 1st Lieutenant Stanton B. Lunde, \*\*\*, with intent to defraud the United States Government, did, at or near Trieste, Italy, on or about 31 January 1947, unlawfully pretend to Lt. Colonel John I. Casterline, Finance Officer, 88th Infantry Division, that his lawful wife was Grace Elizabeth Lunde, of 3335 Edmondson Avenue, Baltimore, Maryland, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the United States Government the sum of \$348.40.

Specification 2: In that 1st Lieutenant Stanton B. Lunde, \*\*\*, with intent to defraud the United States Government, did, at or near Trieste, Italy, on or about 28 February 1947, unlawfully pretend to Lt. Colonel John I. Casterline, Finance Officer, 88th

Infantry Division, that his lawful wife was Grace Elizabeth Lunde of 3335 Edmondson Avenue, Baltimore, Maryland, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the United States Government the sum of \$344.20.

Added Specification Under the 95th Article of War.

Specification 3: (Finding of not guilty).

He pleaded not guilty to all the charges and specifications. He was found guilty of Specification 1 of Charge I, of Charge I, and of Charge II and its specifications and not guilty of Specification 2 of Charge I and of "Specification 3 of Charge I." 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 pay to the United States a fine of \$100. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

### 3. Evidence

Without objection by the defense, there was introduced in evidence as Prosecution Exhibit 2 a certified and authenticated photostatic copy of the record of the proceedings in a divorce action between Genevieve E. Lunde, Plaintiff, and Stanton B. Lunde, Defendant, had in the County Court of Wood County, Wisconsin (R 9). The record recited that the parties to the action were married on the 19th day of June, 1937, and that at the time of the hearing, on 28 February 1946, they were husband and wife. The defendant stipulated that he "will enter his personal appearance" in the action but he did not appear at the hearing. The decree entered by the court in this action, as it appeared in the record, ordered and adjudged:

"1. That the bonds of marriage subsisting between the said plaintiff, Genevieve E. Lunde, and the said defendant, Stanton B. Lunde, be and same are hereby wholly dissolved.

\* \* \*

"3. That this judgment so far as it affects the status of the parties hereto shall not be effective until the expiration of one year from the date hereof."

Paragraph 2 of the decree provided for a financial settlement in lieu of alimony pursuant to which the defendant was to assign certain insurance policies to the plaintiff and pay her the sum of \$500 cash, "payable to the Clerk of this Court in ten consecutive monthly installments of \$50.00 each, commencing with the entry of the decree herein." The decree was dated 28 February 1946. Counsel of record for the defendant, Stanton E. Lunde, was one M. S. King (Pros Ex 2). Again without objection by the defense, there was received in evidence, as Prosecution Exhibit 6, a certified and authenticated copy of a certificate of marriage taken from the files of the Clerk of the Circuit Court for Howard County, Maryland (R 10). From this certificate it appeared that Stanton Belvin Lunde, a resident of Baltimore, Maryland, was "united in marriage"

to Grace Elizabeth Robinson, also of Baltimore, on 1 July 1948 at Ellicott City, Maryland. The application for the marriage license, a copy of which appears in the certificate, is signed "G. Elizabeth Robinson" (Pros Ex 6).

A certified copy of accused's Officers' Qualification Card was received in evidence as Prosecution Exhibit 7 (R 10). On lines 19, 20 and 21 of this form appeared the following information:

"(19) - (L)	TWC
MARITAL STATUS AND DEPENDENTS: MARRIED <input checked="" type="checkbox"/>	DIVORCED <input type="checkbox"/>
(20) LEGAL RESIDENCE: ---- 45 Hein Ave --- Plymouth -- Wisconsin	
(21) Name <del>Mrs. G. Elizabeth Lund</del> Mrs. Harry Weinbaur	
Emergency Addressee	RELATIONSHIP <del>WIFE</del> MOTHER
Street Address	45 Hein Ave --- Plymouth -- Wisconsin"

Defense counsel stipulated that Prosecution Exhibit 7 was "a true copy of the original" but requested permission to introduce the original itself. The original was introduced as Prosecution Exhibit 8, "subject to withdrawal at conclusion of the trial" (R 10, 11). Chief Warrant Officer William R. Thorne testified that he was the official custodian of Prosecution Exhibit 8. Upon having his attention called to lines 19, 20 and 21 thereof, "where there appear to be erasures" and being asked to "explain why" by defense counsel, the witness replied:

"Lines -- Sections 20 and 21 are the legal residence and emergency addressee and permitted and required to be maintained in pencil due to changes of address. The changes made are made whenever an officer reports into the personnel section. It is erased and a new one put in" (R 14).

He did not know when the changes on the card in question were made, for the card was maintained by a noncommissioned officer. He testified in response to questions put to him by defense counsel as follows:

"Q. By holding the card at an angle, does there appear to be any figures under the pencilled notation as to the number and street?

"A. There is a vague street address which ends, apparently, apartment 37a.

"Q. Is there any number of the street?

"A. It looks like three -- I can't distinguish the second figure -- three, blank, three, five. The street name appears to begin with E.

"Q. In your opinion could that, from your examination of the card, have been 3335 Edmondson Avenue, Baltimore, Maryland?

"A. I think it could have in view of the fact that I can see a vague outline of Baltimore." (R 14)

Accused's formal application for permission to marry one Renata Comisso, an Italian civilian, was received in evidence, together with various accompanying papers, as Prosecution Exhibit 1. No objection was made by the defense to the admission of these documents. The application was dated 22 April 1947 and was apparently sworn to and subscribed by accused on 22 May 1947. In the application accused described himself as "previously married" and stated that the date of his "final divorce decree" was 28 February 1947. His "domicile and residence in the United States" was declared to be 45 Hein Ave., Plymouth, Wisconsin. Among the papers accompanying this application was a copy of the record of the divorce proceedings between accused and Genevieve E. Lunde, which copy was certified to be a true copy under accused's signature. It was identical with the copy of the record of the same divorce proceedings introduced in evidence as Prosecution Exhibit 2. The application was received in Headquarters, Trieste United States Troops, about 24 May 1947 where it was approved and forwarded to Headquarters, Mediterranean Theater of Operations. The latter headquarters disapproved the application (R 7,8, Pros Ex 1).

Without objection by the defense, there were received in evidence as Prosecution Exhibits 3, 4 and 5 certified copies of the pay and allowance accounts of accused for the months of January, February and March, 1947, respectively (R 9,10). Each voucher was signed by accused, apparently on the last day of the month for which the account was submitted, on lines 16 and 18 thereof, line 16 being a certificate that the statement of account in question was true and correct and line 18 being a receipt for payment in cash of the net balance stated. All vouchers were stamped "Paid by J. I. Casterline, Lt. Col. F. O. 88th Inf. Div." The statement "Lawful wife - Mrs. G. Elizabeth Lunde, 3335 Edmondson Ave., Baltimore, Md." appears on both the January and February vouchers. Accused was credited with a total of \$348.40 on the January voucher, \$43.40 of which was for subsistence allowance and \$75 of which was for rental allowance. On the February voucher, he was credited with a total of \$344.20, \$39.20 of which was for subsistence allowance, and \$75 of which was for rental allowance. The March voucher contained the notation "Lawful wife - Divorced 28 February 1947." On this voucher he was credited with a total of \$251.71, \$21.70 of which was for subsistence allowance. No rental allowance was claimed on this voucher. On all three of the above mentioned vouchers it is stated that accused was drawing pay based on his grade as a first lieutenant with "over 3 year's service; 2nd pay period, 4 years completed on 24 September 1946" (Pros Exs 3,4,5).

Accused testified that he had written to "an attorney in Wisconsin," asking for clarification "of the paragraph in the decree" and that he had received in reply the letter admitted in evidence, without objection by the prosecution, as Defense Exhibit A. The letter in question was dated 28 February 1946, was typewritten under the printed letter head -

"M. S. KING  
Attorney at Law  
Wisconsin Rapids, Wis."

and was purportedly signed by "M.S. King." In pertinent part, it reads as follows:

\*  
 \* "The judgment was taken today, however, and I am inclosing  
 a copy of it. \*\*\*  
 \*

\*  
 \* "The paragraph of my letter of December 18 that you wanted  
 an interpretation of is as follows:  
 \*

'The decree does not become final until one year  
 after its entry, and during that time any party who will  
 continue to be a resident of Wisconsin cannot marry in  
 this state or elsewhere.'

'That merely means that a Wisconsin resident who is divorced  
 in Wisconsin and who continues a Wisconsin resident cannot remarry  
 in the state or elsewhere legally for a period of one year.

"If, however, such a party becomes a bona fide resident of  
 another state it is only necessary that the law of such other  
 state be complied with so far as remarriage is concerned. I  
 trust that this gives you the information that you desire."

This letter was addressed to accused "c/o Mrs. Harry Weinbauer, 45  
 Hein Avenue, Plymouth Wisconsin." Accused stated that he had received  
 this letter while stationed at Camp Swift, Texas, and had given the lawyer  
 his mother's address for correspondence purposes because she was handling  
 his affairs and "would know where I was." His mother had forwarded the  
 letter to him in Texas. He thought he could remarry because of the letter  
 "and the fact that I had sought legal advice in Baltimore and was told it  
 only meant in Wisconsin."

When he returned from overseas in August 1945, he "returned to  
 Baltimore" and from that time maintained his "residence" in that city at  
 3335 Edmondson Avenue, at which place he "had a room." He had his ad-  
 dress card made out to show 3335 Edmondson Avenue as his home. 3335  
 Edmondson Avenue was "the same address as" Grace Elizabeth Lunde. He  
 had been stationed at Fort Meade, Maryland, prior to going overseas the  
 first time. Accused took the Edmondson Avenue address to be his "legal  
 residence" because he lived in Baltimore "Quite some period of time" had  
 his "legal address" changed to Maryland, and had established bank accounts  
 there. He did not have any other home "from August 1945 until the present  
 time." After returning from overseas in August 1945, he stayed at his  
 Baltimore address during his "period of thirty days recuperation" and  
 then reported to his unit at Camp Shelby, Mississippi. He returned to  
 Baltimore over the Christmas, 1945, holidays and spent two weeks leave  
 there. He next "got back" to Baltimore in June, 1946, where he remained  
 until he went overseas the second time in August of that year. On "1  
 July 1946" he considered his "legal address" to be Baltimore, Maryland.

"After" accused arrived overseas the second time there was "always a  
 question" in his mind concerning the legality of his second marriage. The  
 Edmondson Avenue address was on his Form 66-1 "before the last change."

The change was made in March, 1947. He did not intend to mislead "the Army authorities" when he used "the same initial on the second wife" as he did "on the first wife," for Grace Elizabeth Lunde preferred to be designated "G. Elizabeth." The last time he had heard from Genevieve E. Lunde was in July or August, 1945. He had sent the payments provided for in the divorce decree to the clerk of the court. His marriage to Genevieve had taken place on 19 June 1937. The initial "E" in her name stood for "Elizabeth" (R 15-23; Def Ex A).

#### 4. Discussion

##### Charge I and Specification 1 thereof

Under this charge and specification accused was found guilty of the crime of bigamy as that offense is known to military law. In military jurisprudence, it is a violation of Article of War 96, and of Article of War 95 in the case of an officer, for one wrongfully, that is intentionally and without color of right, to purport to marry another while a former marriage is still subsisting and this is so quite without reference to the statutory or other definition of the crime of bigamy, if there be such, in the particular jurisdiction in which the act of marriage decried took place (CM 272642, Bailey, 46 BR 343, 347, and cases there cited). We will, then, first inquire as to whether, at the time accused went through a marriage ceremony with Grace Elizabeth Robinson in Maryland on 1 July 1946, he was still married to Genevieve Elizabeth Lunde. The answer to this question quite obviously turns upon the interpretation to be given the Wisconsin divorce decree dated 28 February 1946 which "wholly dissolved" the bonds of matrimony between Genevieve and accused but, at the same time, provided that the judgment "so far as it affects the status of the parties" would not become effective until the expiration of one year from the date of the decree. Our determination of this question must, of course, be based on and, indeed, controlled by the applicable laws and judicial decisions of the State of Wisconsin, of which laws and decisions we will take judicial notice even though the court-martial which tried this case was not sitting in the State of Wisconsin (Wheelock v. Freiwald, 66 F (2d) 694, 700; par 111, MCM, 1928; Prudential Insurance Company v. Carlson, 126 F (2d) 607, 617; see par 125, MCM 1928; CM 289253, Lyons, 1 BR (A-P) 155, 158; compare CM 207264, Wilson, 8 BR 337, 338).

The Wisconsin statute pursuant to which the divorce decree here in issue was rendered reads as follows:

"(1) When a judgment or decree of divorce from the bonds of matrimony is granted so far as it affects the status of the parties it shall not be effective until the expiration of one year from the date of the granting of such judgment or decree; excepting that it shall immediately bar the parties from cohabitation together \*\*\*. But in case either party dies within said period, such judgment or decree, unless vacated or reversed,

shall be deemed to have entirely severed the marriage relation immediately before such death \*\*\*.

"(2) So far as said judgment or decree affects the status of the parties the court shall have power to vacate or modify the same for sufficient cause shown \*\*\* at any time within one year from the granting of such judgment or decree provided both parties are living. \*\*\* If the judgment or decree shall be vacated it shall restore the parties to the marital relation that existed before the granting of such judgment or decree.

\* \* \*

"(4) \*\*\* At the expiration of such year, such judgment or decree shall become final and conclusive without further proceedings, unless an appeal be pending, or the court, for sufficient cause shown, \*\*\* shall otherwise order before the expiration of such period." (Sec 247.37, Wisconsin Statutes, 1943).

Other pertinent Wisconsin statutes are:

Sec 245.03 (2). "It shall not be lawful for any person, who is a party to an action for divorce from the bonds of matrimony, in any court in this state, to marry again until one year after judgment of divorce is granted, and the marriage of any such person solemnized before the expiration of one year from the date of the granting of judgment of divorce shall be null and void."

Sec 245.04 (1). "If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

During the period between 28 February 1946 and 28 February 1947, was the decree of divorce upon which accused here relies an interlocutory or nisi decree or was it, from the date of its entry, an absolute decree, containing a mere prohibition against remarriage for a period of one year? If the former be the case, then his "marriage" to Grace on 31 July 1946 was clearly bigamous, for he was still married to Genevieve. In the latter event, however, even if the prohibition against marriage found in sections 245.03(2) and 245.04(1) were to be given extraterritorial effect (see Loughran v. Loughran, 292 U S 216; Fitzgerald v. Fitzgerald, 210 Wis 543, 246 N W 680, Illinois decree in issue here), his marriage to Grace, although it might be held invalid in some jurisdictions, would not be bigamous, regardless of the location of his domicile at the time of such

marriage, for there would have been no prior marriage in existence at the time. Parenthetically, it may be here stated that since Genevieve was the wife of accused and was alive, as of judicial record made in a cause to which accused was a party and in which he did not deny these facts, at the time of the entry of the Wisconsin decree, it may be assumed, in the absence of a showing to the contrary, that her marriage to accused was valid and that she was alive some four months later at the time accused went through a marriage ceremony with Grace (Gorman v. State, 23 Tex. 646; 34 A L R 489; 56 A L R 1273; Oliver v. State, 7 Ga App 695, 67 S E 886; Pontier v. State, 107 Md 384, 68 A 1059, 1061, 7 C J, p 1173). The Restatement, after discussing the general tendency not to give extraterritorial effect to prohibitions against remarriage contained in a divorce decree emanating from another jurisdiction, makes the following comment:

"Provisional decree distinguished. A distinction is to be noted between this case and a case where a divorce is, by the law governing it, provisional only until the lapse of a certain time, or the common case of a decree nisi, or the so-called interlocutory decree, which does not become absolute until further proceedings or after the lapse of a certain time. In such a case, neither party ceases to be married until the lapse of the given time, and neither can marry again in any state, since such marriage would be bigamous." (Rest., Conflict of Laws, sec 130; see also 32 A L R 1125).

On its face, the Wisconsin decree here under consideration, read in the light of the statute under which it was made, appears to have been a decree nisi in the first instance. Although a somewhat similar decree issued by a court of the State of Kansas was interpreted by the Supreme Court of that State to have effected an absolute divorce from the bonds of matrimony from the date of the entry of the decree with a mere prohibition against remarriage for a certain time (Durland v. Durland, 67 Kans 734, 74 P 274; Wheelock v. Freiwald, supra, Kansas construction of Kansas decree followed), the highest court of the State of Wisconsin has come to a different conclusion with respect to Wisconsin divorce decrees. In the case of White v. White, 167 Wis 615, 168 N W 704, a husband who had sued his wife for divorce in Wisconsin and had obtained a decree of the same type as the one in this case under a Wisconsin statute similar to the quoted section 247.37, moved out of the State of Wisconsin, went through a marriage ceremony with another woman in Chicago, Illinois, within the one year period, and thereafter lived, as husband and wife, with the second woman in Massachusetts. The Wisconsin court held that the second marriage was bigamous and that, within the one year period, the wife who had been the other party to the Wisconsin divorce proceedings might apply to have the decree entered therein set aside causa adultery. The court said:

"Until at least the year had gone by from the entry of the judgment \*\*\*, the parties hereto were still bound by the marital

tie. \*\*\* Until such year elapsed, there was in existence no absolute judgment of divorce and, consequently, no absolute severance of the marital relationship."

(See also, to the effect that a Wisconsin divorce under section 247.37, Wisconsin Statutes, does not become absolute until the year has run and that a remarriage within such period is bigamous, 26 Atty Gen (Wis) 161; Means v. Means, 40 Cal App (2d) 489, 104 P (2d) 1066; Ex parte Soucek, 101 F (2d) 405; Cummings v. United States, 34 F (2d) 284). It thus appears that in the instant case accused's marriage to Grace Elizabeth Robinson on 1 July 1946 was, in fact and law, bigamous. But was it criminally so, in other words, did accused marry Grace under color of right?

Under our decisions, a bigamous marriage entered into in good faith upon a reasonable and non-negligent belief that the prior marriage had ceased to exist is not an offense (CM Bailey, supra). Although it may be that good faith is not a defense to a prosecution for bigamy in Maryland (see Art 27, Sec 19-19A, Annotated Code of Maryland (1939 Ed), as amended by Ch 88, Sec 1, Laws of Maryland, 1945), where the bigamous marriage here in question took place, this accused is not charged with having violated Article of War 95 by reason of having contravened a law of that State and, as has been heretofore pointed out, we are not obliged to follow nor are we concerned with the definition there obtaining of what acts constitute the crime of bigamy (see CM 245510, Carusone, 29 BR 195, 198, which case is hereby distinguished). In the instant case, the prosecution, by failing to object to the introduction in evidence of Defense Exhibit A, the letter to accused from his counsel of record in the Wisconsin divorce proceedings, conceded the authenticity of that document (CM 325457, McKinster). By this letter, accused was advised that he could remarry in a State other than Wisconsin within the one year period, despite the language in the Wisconsin divorce decree, if he became a bona fide "resident" of such state. We think accused, who does not appear to be a lawyer, was entitled to rely upon this advice from his attorney even though we may not be in accord with that counsel's interpretation of the law of Wisconsin. Also, we find in this record of trial no reason to assume that accused was aware of the legal intricacies involved in establishing a new domicile and accordingly we must hold that if, at the time he went through a marriage ceremony with Grace Elizabeth Robinson in Maryland, he had a bona fide belief that he was a "resident," as that term is loosely used by laymen, of Maryland, then the findings of guilty of bigamy in violation of Article of War 95 must be set aside (CM 260611, Wilkinson, 39 BR 309, 329, belief, engendered by counsel, that interlocutory decree was absolute decree held a valid defense to bigamy prosecution).

Having "married" Grace, a resident of Baltimore, it is not illogical to accept his testimony that he lived with her in that city as husband and wife, even if only in "a room" and during periods of leave. In the Maryland

marriage certificate he is described as a resident of Baltimore. Apparently, at some time before the trial, his "legal residence" on his 66-1 Card was given as 3335 Edmondson Avenue, Baltimore, and this address appeared on his January and February, 1947, pay vouchers as that of his "lawful wife." Although it appeared that accused's March, 1947, pay voucher contained the remark "Divorced 28 February 1947," signifying that he claimed to be without a "lawful wife" at that time, that in April or May of that year he claimed to be "previously married" and a resident of Wisconsin in his application for permission to marry Renata Comisso and that at some time (in March, 1947, according to accused) his "legal residence" on his 66-1 Card was changed to show his mother's Wisconsin address and the entry thereon as to his marital status was changed from "Married" to "Divorced," this evidence has little bearing upon accused's state of mind with respect to residence on 1 July 1946, the date of his purported marriage to Grace. These later events serve only to show that sometime around March, 1947, after his divorce from Genevieve had become final, accused desired to renounce his Maryland marriage, and if we were to speculate upon the reason for his faithless conduct in this respect we would point out the very strong probability that his attachment to the Italian girl was the cause thereof. We conclude that as a matter of law, upon all the evidence, the proof herein is as consistent with an inference that accused believed in good faith that he was a "resident" of Maryland at the time of the marriage ceremony with Grace Elizabeth Robinson as it is with the contrary inference that, at such time, he considered himself a resident of Wisconsin. Accordingly, we must hold that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specification 1 thereof.

#### Charge II and its Specifications

Under this charge and its specifications accused was found guilty of having fraudulently obtained from the United States certain sums of money in January and February, 1947, by unlawfully pretending that his lawful wife was Grace Elizabeth Lunde, well knowing that said pretenses were false. It would appear that in January and February, 1947, accused was not lawfully married to Grace Elizabeth Lunde. No Maryland statute or decision has come to our attention which might be effective to validate accused's marriage to Grace by reason of the removal of the disability when his divorce from Genevieve became final on 28 February 1947 (see Bannister v. Bannister, 181 Md 177, 29 A (2d) 287; Abramson v. Abramson, 49 F (2d) 501; Ch 849, Sec 2, Laws of Maryland, 1947; see also, 23 Comp Gen 128; 22 Comp Gen 1145; FL 55 -80th Congress, 37 U S C 104, as amended). We are of the opinion that the court was warranted in assuming that the "Mrs. G. Elizabeth Lunde, 3335 Edmondson Ave., Baltimore, Md.", who was designated as accused's "lawful wife" on his pay vouchers for these months was, because of the address appearing after the name, Grace Elizabeth Lunde and not Genevieve Elizabeth Lunde.

Because of the view we take with regard to this charge and its specifications, it will be unnecessary to discuss the effect of the Wisconsin

decree of divorce nisi upon accused's right to allowances, during the months of January and February, 1947, as the husband of Genevieve Elizabeth Lunde, although under the circumstances of this case it would seem extremely doubtful that he would have been entitled to allowances on this basis (24 Comp Gen 88; 25 Comp Gen 821; see 37 USC 104; CM 242395, Adams, 27 ER 61,73), or to consider the ancillary question as to whether, if he was entitled to allowances as an officer having a dependent, his act in designating Grace as his lawful wife instead of Genevieve would constitute an offense cognizable within the allegations contained in the specifications here under consideration (see CM 325636, Devine). We will, then, treat this case as though accused's divorce from Genevieve had become final before January, 1947, but after the date of his marriage to Grace. We will also pass by without comment the fact that accused now stands convicted of having defrauded the Government of the whole sum credited to his account on the January and February vouchers, whereas the fraud charged could not possibly relate to anything more than the sums paid in excess of what he would have received had he been in an unmarried status.

It will be noticed that accused has been convicted under the charge and specifications here in question of having committed on two occasions the offense generally known to the common law, by virtue of ancient English statutes, as obtaining money or goods under false pretenses (Biddle v. United States, 156 Fed 759). In military law, the acts which constitute this offense, when committed either in this country or on foreign soil by persons subject to the Articles of War, have been held to be in violation of Article of War 96 (CM 328447, Talagan; par 1046, MCM, 1928; see also CM 320681, Wacke). One of the essential elements of the offense of obtaining money or other property by false pretenses is that accused must have had knowledge, either actual or constructive, that the representation was untrue. Thus it has been held that where accused had entertained in good faith a belief in the truth of the representation by means of which he obtained the property, the offense has not been committed, even though it should later appear that the pretense was in fact false (35 C J S, p 665, and cases there cited). In the instant case, the misrepresentation denounced in the allegations was the pretense of accused that his lawful wife was Grace Elizabeth Lunde. We must, then, examine the record with a view to determining whether it contains proof which would warrant the court in coming to a conclusion, based upon a moral certainty and not upon suspicion or even upon a mere preponderance of the evidence, that accused knew he was not married to Grace at the time he asserted that she was his lawful wife on the January and February, 1947, pay vouchers. It seems somewhat obvious to us that accused, a layman, could hardly have had actual knowledge of the falsity of these statements. Although accused's "marriage" to Grace appears to us to have been bigamous and we are aware of no law which may have later validated that purported union, our findings in this respect are based upon considerable legal research in a field in which there is much confusion. Indeed, accused received advice from his Wisconsin attorney which is quite contrary

(40)

to what we believe the law to be. Can it be said, however, that accused had constructive knowledge of the falsity of his pretenses made in January and February, 1947, that Grace was his wife on the ground that his later inconsistent statements on the March, 1947, pay voucher, on his application to marry Renata Comisso and on the changes made on his 66-1 Card indicated that in January and February accused did not in good faith believe that Grace was his wife? The record of trial contains no evidence to the effect that accused had been the recipient of a legal opinion with respect to his marital status at variance with the advice given him by his Wisconsin lawyer. Although, when on the witness stand, accused stated that "after" he had arrived overseas the second time there was "always a question" in his mind concerning the validity of his second marriage, it does not appear whether he harbored this doubt before or after he presented the January and February vouchers. The most that can be said concerning accused's change of heart with respect to his "marriage" to Grace is that his volte-face points with as much logic towards the occurrence of events, not clearly brought to light in the record, which effectively operated upon his mind and emotions only after the representations here under discussion were made as it does towards the existence of a guilty knowledge or suspicion of the falsity of such pretenses at the time they were made. Consequently, we are of the opinion that the evidence as to accused's guilt of Charge II and its specifications is so scanty that the court's findings relating thereto must be set aside.

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

Christy D. Silver, Judge Advocate

Albert G. Skrzyd, Judge Advocate

Harley Manning, Judge Advocate

JAGK - CM 328250

1st Ind

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

TO: Commanding General, Trieste United States Troops, APO 209, c/o  
Postmaster, New York, New York

1. In the case of First Lieutenant Stanton B. Lunde (O-1320246), Company D, 351st Infantry, I concur in the foregoing holding 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 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 328250).



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.

(43)

10 MAR 1948

JAGH CM 328279

UNITED STATES )

FIFTH ARMY )

v. )

Trial by G.C.M., convened at  
Fort Sheridan, Illinois, 1  
December 1947. Dismissal.

Major KENNETH J. MACLEOD )  
(O-1000619), Adjutant )  
General's Department. )

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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 Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major Kenneth J. MacLeod, Adjutant Generals Department, Illinois Recruiting District, did, at the Gladstone Hotel, Chicago, Illinois, on or about 30 July 1947, wrongfully enter a bed occupied by Corporal Kenneth Wayne Gordon and indecently fondle the person of the said Corporal Gordon, a male person.

Specification 2: (Finding of not guilty).

Specification 3: In that Major Kenneth J. MacLeod, Adjutant Generals Department, Illinois Recruiting District, did, at the Whitcomb Hotel, San Francisco, California, on or about 11 September 1947, wrongfully and in an immoral and disgraceful manner attempt to enter a bed occupied by Corporal Marvin D. Wadley, and did take hold of the penis of the said Corporal Wadley, a male person.

He pleaded not guilty to the Charge and Specifications. He was found not guilty of Specification 2; guilty of Specification 1, except the word "Corporal" substituting therefor the words "then Private," of the excepted words not guilty, of the substituted words, guilty; guilty of Specification 3; and guilty of the Charge. No evidence of previous

(14)

convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence contained in the review of the Fifth Army Judge Advocate dated 5 January 1948, with the following additions:

Corporal Gordon admitted that he had discussed the incident of the night of 30 July 1947 with Hays and Wadley and Wadley talked to him about going to the "CID." (R 26,27,193) Corporal Wadley testified that he had heard, from Gordon, of the incident involving Gordon and accused prior to making the California trip with accused (R 150). Despite the advances accused had made to him on the night of 10-11 September 1947 Wadley stayed with accused in the same hotel room the following evening because of financial reasons (R 173). Wadley, however, paid his share of the hotel expense. The first person he talked to concerning his encounter with accused was his brother in Washington (State) with whom he visited after leaving San Francisco (R 176). Wadley did not make an official report of accused's conduct until about two weeks after his return from the trip (R 177,188,189). Prior to making the report he had asked accused for a transfer to the Adjutant General's School and the request was refused (R 174,175). Accused had told Wadley at the time of the request that he could go if he had the qualifications (R 178). The following day accused informed Wadley that he did not have the requirements (R 179).

4. Accused was found guilty of indecently fondling the person of Corporal Kenneth Wayne Gordon (Chg, Spec 1). The evidence adduced by the prosecution shows that on the evening of 30 July 1947 Corporals Gordon and Hays visited accused at his apartment in Chicago. Accused was Gordon's section chief. During the course of the evening accused, who was attired in shorts only, furnished some mixed drinks as refreshments. After having consumed three drinks Gordon became ill and was put to bed in an adjoining room by accused and Hays. Hays remained at the apartment until about midnight and left. Subsequently Gordon was awakened by accused who was sponging him. Gordon claimed that accused tried to touch him under his shorts, but Gordon told him "That's enough." Gordon went to the latrine and then laid down on the couch in the other room. At accused's suggestion he returned to the bed. Accused entered the bed and moved up against Gordon and asked if he minded if accused slept close to him. Accused embraced Gordon with both arms and kissed him and told him that he wished he had a son like him. After 10 or 15 minutes Gordon told accused that he did not like him "fooling around" and rolled or pushed accused out of bed. Accused attempted to return to the bed several times thereafter for a period of three hours. When Gordon awoke the next morning he found accused in bed with him. At 7:00

a.m. accused's roommate who had been away from the apartment during the night entered the bedroom, at which time, according to Gordon, accused was in bed with him. It may be inferred from Gordon's testimony that he made no official report of the incident until sometime in September when Corporal Wadley suggested that he go to the CID.

Accused was also found guilty of indecent acts on the person of Corporal Wadley (Chg, Spec 3). The evidence shows that accused who was making a trip to California by military aircraft was asked by Wadley who worked in accused's section at Headquarters, Fifth Army, if he could get him, Wadley, a ride on the plane. Accused secured space for Wadley and on 10 September 1947, with other military passengers made the trip to San Francisco. Wadley was to continue on to Washington but a ride was not available until two days later. Accused went to the Whitcomb Hotel in San Francisco and was followed by Wadley. At the hotel an attempt was made to get separate rooms but only a double room was available and accused and Wadley were given the room. The record shows that accused in no way invited Wadley to accompany him to the hotel. Wadley had previously been informed by Gordon of the latter's difficulty with accused. Accused and Wadley had dinner together and visited some night clubs. In the course of the evening Wadley partially consumed two drinks. They returned to the hotel and retired. Wadley was subsequently awakened by accused. Accused sat on the edge of the bed, embraced Wadley with his left arm and told him that he loved him. Wadley pushed him away but accused pulled the covers off Wadley, embraced him and seized his penis but only held it momentarily as Wadley again pushed him away. Accused remained in his own bed the remainder of the night and there was no further incident. Wadley stayed with accused the following night without incident and when he left the hotel, paid his share of the expense. He testified that he stayed with accused the second night because of financial reasons. Wadley did not report the incident until approximately two weeks after his return to Fifth Army Headquarters. In the meantime he asked accused for a transfer to the Adjutant General School and was told by accused that he could go if he had the qualifications. Later accused told Wadley that he did not have the requisite qualifications.

The testimony of Gordon and Wadley supports the allegations contained in the Specifications wherein they are named as the objects of the indecent advances alleged, and the indecent conduct alleged constitutes a violation of Article of War 95 (CM 236725, Hyre, 23 BR 115; CM 244212, McFarlane, 28 BR 217; CM 243977, Brejman, 50 BR 1).

In cases before the Board of Review for examination pursuant to the second paragraph of Article of War 50 $\frac{1}{2}$ , as is the instant case, the Board is permitted to weigh the evidence in determining the legal sufficiency of the record of trial. In the instant case where the conviction on each of the two Specifications is based solely on the testimony of one witness, that testimony should be subjected to close

scrutiny and the Board "if it appears contradictory on material issues, incredible, as too unsubstantial to support the conviction, will reverse it" (CM 243927, Strong, 28 BR 129 at 146). In accordance with this rule the evidence unfavorable to the findings of guilty has been given careful consideration and as to each Specification will be briefly summarized and discussed.

(Specification 1, indecent advances toward Gordon). Gordon became suspicious of accused's intentions when accused in sponging him tried to insert the sponge, or wet rag used, under Gordon's shorts. Gordon then thought of leaving but did not, because he felt ill. After accused had made his initial indecent advances and had been repelled, Gordon remained in the bed, notwithstanding the fact that for a period of three hours accused returned to the bed repeatedly. Gordon finally fell asleep and awakened the following morning when accused's roommate entered the apartment at which time according to Gordon accused was in bed with him. Accused's roommate, on the other hand, testified that accused was asleep on the couch in the other room. Although Gordon discussed the incidents of that night with other enlisted men including Wadley, he did not report them until some time in September, more than a month later, and then only after such action had been suggested to him by Wadley. Gordon's conduct in the whole matter while irregular is susceptible to explanation. As to his remaining at the apartment it must be remembered that he was but 18 years of age and was somewhat intoxicated. It is not likely that he would have the judgment and experience which would lead him to take a course of action normally expected in the situation in which he found himself. The court was entitled to disbelieve the testimony of accused's roommate that accused was not in bed with Gordon but was sleeping on the couch in the other room. As to his long delay in making a report it is considered natural that a young immature enlisted man would be reluctant to bring such grave charges against an officer in the absence of corroboration, such as the corroboration of similar conduct by the officer offered by a third person, in this case, Wadley. In this connection it is to be noted that accused was acquitted of making indecent advances upon Haye who accompanied Gordon to accused's apartment and who allegedly was subjected to the indecent advances after Gordon was put to bed. The acquittal in this instance appears to have been motivated by the inconclusive nature of accused's conduct as described by Haye rather than to a disbelief of Haye's testimony. It might be asked why did not Haye and Gordon together report their respective incidents immediately. Again it may be answered that they were deterred by the natural reluctance of enlisted men to make charges against an officer. Viewing the evidence in support of the finding of guilty of Specification 1 of the Charge, in its aspects most favorable to accused, the Board finds no reason to declare that the court incorrectly weighed the evidence.

(Charge, Specification 3, indecent advances toward Wadley). Wadley, prior to leaving for California with accused, had heard of the incidents

involving Hays and Gordon. Nevertheless he forced himself upon accused and followed accused to the Hotel Whitcomb in San Francisco. He did, however, try to secure a separate room but assented to their assignment to the same hotel room. Despite the indecent advances made upon him the first night by accused, he stayed with accused the second night. His explanation for this was his financial condition. He did, however, pay his share of the hotel bill. On his return to the Fifth Army Headquarters where he was employed in accused's section, Wadley asked accused for a transfer to "AG" School. Accused informed Wadley that he could go to the school if he had the necessary qualifications. A day later accused told Wadley he could not have the transfer since he lacked the necessary qualifications. Later, approximately two weeks after his return from the West Coast, Wadley made a report to the CID concerning accused's indecent advances toward him in California.

Wadley's actions in following accused to the Whitcomb Hotel in San Francisco may be explained on the basis that he was a stranger in a large city and was following along with the idea of finding a place to stay. His acceptance of the same room with accused knowing of the Gordon and Hays incidents was probably motivated by the thought that if he refused it would be an affront to accused. His staying an additional night with accused is not susceptible to the explanation given by him, that is, finances. After all he did share in the expenses incurred. Again it might be said he hesitated to offer affront to accused. As against the inference that he concocted the incident because accused refused to accede to his request for a transfer, it may be inferred that he requested the transfer in order to remove himself from accused's proximity prior to making a report. As to the finding of guilty of Specification 3 of the Charge, it may not be said that the court incorrectly weighed the evidence.

5. Records of the Department of the Army show that accused is 34 years of age and single. He was graduated from the Western Washington College of Education in 1940 and taught school for approximately a year. He had enlisted service from November 1940 until October 1942 when he was commissioned Second Lieutenant. He was promoted to First Lieutenant on 7 June 1943, to Captain on 14 June 1944 and to Major on 24 September 1945. He had service in the Pacific Theatre from March 1944 to December 1945 and is entitled to wear two Bronze Stars on his Asiatic Pacific Ribbon. In addition, he is authorized to wear the Philippine Liberation Ribbon, The American Theatre Ribbon, and the Occupation Ribbon (Japan). His efficiency ratings of record are uniformly "Superior."

In its review of the case the Board has considered the following letters written by accused: letter to Lieutenant Colonel T. J. Marnane, Adjutant General, Fifth Army, dated 7 January 1948; and letter to

(48)

Brigadier General B. M. Fitch, Military Personnel Procurement Division,  
Department of the Army, dated 13 December 1947.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors adversely affecting the substantial rights of accused were committed during 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. A sentence to dismissal is mandatory upon conviction of violations of Article of War 95.

*R. H. Weinstein*, Judge Advocate  
*J. W. Lynch*, Judge Advocate  
*Joseph T. Brack*, Judge Advocate

JAGH-CM 328279

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 Major Kenneth J. MacLeod (O-1000619), Adjutant General's Department.

2. Upon trial by general court-martial this officer was found guilty of lewdly fondling the persons of enlisted men on two occasions in violation of Article of War 95 (Chg, Specs 1 and 3). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the review of the Fifth Army Judge Advocate, which with minor additions, has been adopted by the Board of Review as the statement of the evidence in the case. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On the evening of 30 July 1947 Corporals Gordon and Hays visited accused at his apartment in Chicago. Accused was Gordon's section chief. During the course of the evening accused, who was attired in shorts only, furnished some mixed drinks as refreshments. After having consumed three such drinks Gordon became ill and was put to bed in an adjoining room by accused and Hays. Hays remained at the apartment until midnight. Subsequently Gordon was awakened by accused who was sponging him. Gordon claimed that accused tried to touch him under his shorts but that he desisted when Gordon told him "That's enough." Gordon went to the latrine and then laid down on a couch in the other room. At accused's suggestion he returned to the bed. Accused then entered the bed and moved up against Gordon and asked if he minded if accused slept close to him. He embraced Gordon with both arms, kissed him, and told him he wished he had a son like him. After ten or fifteen minutes, Gordon told accused he did not like him "fooling around" and pushed or rolled him out of the bed. Accused attempted to return to the bed several times thereafter during a period of three hours. When Gordon awoke the next morning he found accused in bed with him. Gordon did not make an official report of the incidents until sometime in September

when Corporal Wadley, the enlisted man involved in the incident hereafter described, suggested that he go to the CID.

At some later time accused, who was making a trip to California by military aircraft, was asked by Corporal Wadley who worked in his section if he could get him a ride on the plane. Accused secured space on the plane for Wadley and on 10 September 1947, with other military passengers they made the trip to San Francisco. Wadley was to continue on to Washington but a ride was not available until two days later. Accused went to the Whitcomb Hotel in San Francisco and was followed by Wadley. At the hotel an attempt was made to secure separate rooms but only a double room was available and accused and Wadley were given the room. It is indicated that Wadley more or less forced his presence on accused, and Wadley admitted that he had been informed by Gordon of the latter's difficulty with accused. Accused and Wadley had dinner together and visited some night clubs. In the course of the evening Wadley partially consumed two drinks. On returning to the hotel they retired but subsequently Wadley was awakened by accused. Accused sat on the edge of the bed, embraced Wadley, and told him he loved him. Wadley pushed him away but accused pulled the covers off Wadley, embraced him, and grasped his penis momentarily. Wadley again pushed him away, and the remainder of the night passed without incident. Despite the incident Wadley remained with accused the following night. His explanation for this was his financial situation, although he paid his share of the hotel expense. Wadley did not report the incident until approximately two weeks after his return to Fifth Army Headquarters. Prior to reporting the incident he had asked accused for a transfer to "AG school" and had been refused.

Accused testified in his own behalf and denied both incidents. His roommate, a civilian, testified that he had been out of the apartment the night of the alleged incidents involving Gordon, but returned to the apartment early in the morning, and that at that time a soldier was sleeping in the bedroom, and accused was sleeping on the couch in the other room.

4. The accused is 34 years of age and single. He was graduated from the Western Washington College of Education in 1940 and taught school for approximately a year. He had enlisted service from November 1940 until October 1942 when he was commissioned a Second Lieutenant. He was promoted to First Lieutenant on 7 June 1943, to Captain on 14 June 1944 and to Major on 24 September 1945. He had service in the Pacific Theatre from March 1944 to December 1945 and is entitled to wear two Bronze Stars on his Asiatic Pacific Ribbon. In addition, he is authorized to wear the Philippine Liberation

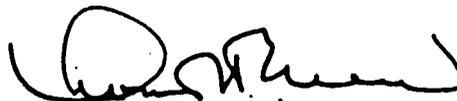
Ribbon, the American Theatre Ribbon, and the Occupation Ribbon (Japan). His efficiency ratings of record are uniformly "Superior."

The following letters written by accused have been considered: letter to Lieutenant Colonel T. J. Marnane, Adjutant General, Fifth Army, dated 7 January 1948; and letter to Brigadier General B. M. Fitch, Military Personnel Procurement Division, Department of the Army, dated 13 December 1947.

5. I recommend that the sentence be confirmed and carried into execution.

6. Inclosed is a form of action designed to carry the foregoing recommendations into effect, should such recommendations 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 86, 19 April 1948 ).



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

JAGN-CM 328331

UNITED STATES

v.

THEODORE CARR, JR. a civilian,  
formerly Private, Attached Un-  
assigned, Headquarters & Head-  
quarters Detachment, 14th  
Replacement Battalion, 4th  
Replacement Depot.

EIGHTH ARMY

Trial by G.C.M., convened at  
APO 343, 16 and 20 October  
1947. Total forfeitures and  
confinement for one (1) year  
and seven (7) months.  
Penitentiary.

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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 person named above has been examined by the Board of Review.

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Theodore Carr, Jr., a Civilian, then a Private, attached unassigned Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703, did, at the Fourth Replacement Depot, APO 703, on or about 12 March 1947, for the purpose of obtaining approval of a claim for pay and allowances of a higher enlisted rating than actually held by him, make and use a certain writing, to wit: An entry in his service record, WD AGO Form No. 24, wherein he represented himself to be a Staff Sergeant, which said record and statement was false and fraudulent, in that he had not been promoted to Staff Sergeant, and which statement was then known by the said Theodore Carr, Jr., then Private Theodore Carr, Jr., to be false and fraudulent.

(54)

Specification 2: (Finding of Not Guilty).

Accused pleaded not guilty to the Charge and Specifications and was found not guilty of Specification 2 and guilty of Specification 1 and the Charge. Evidence of one previous conviction was introduced. He was sentenced to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved only so much of the finding of guilty of Specification 1 of the Charge as involves a finding that the accused did, at the time and place alleged, for the purpose of obtaining approval of a claim for pay and allowances of a higher enlisted rating than actually held by him, use a certain writing, to wit, an entry in his service record wherein he represented himself to be a staff sergeant, which said record and statement were false and fraudulent, in that he had not been promoted to staff sergeant, and which statement was then known by the said Theodore Carr, Jr., then Private Theodore Carr, Jr., to be false and fraudulent, approved the sentence, but remitted five months of the confinement at hard labor, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. Inasmuch as the Board holds that there was prejudicial error committed during the trial, the evidence need not be summarized.

4. Lieutenant Colonel Martin M. Mendell, AGD, was appointed law member of the court which tried accused, by Special Orders 182, Headquarters Eighth Army, 6 August 1947. Subsequently he sat as such member during the trial of accused by that court, and participated in the hearing and determination of the case.

At page four of the record of trial the following appears:

"PROS: Does any other member of the court believe he has any facts which he considers ground for challenge by either side against any member?

LM: I believe the court should know that evidence to support the charges was obtained in my section. The charges were preferred at my direction by my assistant. I have prior knowledge of the case, although I do not feel I have formed a positive opinion. I believe that should be called to the attention of the court as to whether I should sit on the case.

PRES: Court will be closed and we will vote on it. Col. Mendell will withdraw.

The court was then closed until 0951, at which time the personnel of the court, prosecution and defense,

accused, and reporter resumed their seats.

PRES: Court will be open. The court, before it closed, questioned Col Mendell as to whether he personally investigated this matter, and as to whether he had formed a positive opinion of this case, and he stated he had not formed a positive opinion and did not personally investigate the case, so that his order that charges be preferred was purely an administrative matter as section head, and the court in closed session voted he would not be excused from sitting on this case. Any objection?

DEF: No objection.

PROS: Prosecution has no objection. Does any other member of the court have any knowledge, or is aware of any facts, which might be ground for challenge by either side against any member?

PRES: There appear to be none.

PROS: Prosecution has no challenge for cause. Prosecution does not desire to challenge peremptorily. Does the accused desire to challenge any member of the court for cause?

ACCUSED: No.

DEF: No."

It therefore appears that, although the law member stated that evidence to support the charges was obtained in his section, and that charges were preferred at his direction, the court in closed session voted that he would not be excused from sitting on the case.

Paragraph 57b, Manual for Courts-Martial, 1928, provides in part as follows: "If it appears \* \* \* that a member is subject to challenge on any ground stated in clauses first to fifth of 58e, and the fact is not disputed, such member will be excused forthwith." The third ground for challenge as stated in said paragraph 58e is, "That he (the challenged member) is the accuser as to any offense charged." It is true that the accuser of record, the officer who signed the charge sheet, was Captain Milo Igersheimer who identified himself on the witness stand as assistant administrative officer of the 4th Replacement Depot (R. 22). Nevertheless it must be noted that Lieutenant Colonel Mendell did not state merely that he directed

an investigation of the charges against accused, but that evidence to support the charges was obtained in his section, and that he directed that charges be preferred (R. 4), thus indicating that he was familiar with the evidence against accused, and that, in his opinion at the time charges were preferred, such evidence was sufficient to support the charges against accused. He was doubtless sincere in the statement he made at the trial that he did not feel he had formed a positive opinion. Nevertheless, since his statement identified him as an accuser, under the provisions of paragraphs 57b and 58e, Manual for Courts-Martial, 1928, quoted above, he should have been "excused forthwith," regardless of any opinion he may or may not have formed concerning either the guilt or innocence of the accused. This case may be distinguished from those in which it has been held that a commanding officer who has taken administrative action relative to preferring or forwarding court-martial charges does not necessarily become an accuser. The rule in such cases is stated in Winthrop's Military Law and Precedents, 2nd Ed., Reprint, p. 62, as follows:

"Whether a commander who has taken action in the case of an officer of his command proposed to be tried, — as by ordering his arrest, preferring or directing the preferring of charges, or approving charges as preferred, etc., — is to be considered as an accuser or prosecutor in the sense of this Article, so as to disqualify him from ordering the court and to make it necessary for the President to do so, is a question depending mainly upon the relation and animus of such commander toward the accused or the case. Where his action has been merely official, the capacity indicated cannot in general properly be ascribed to him. Thus, where, upon the facts of the supposed offence being reported to him, and appearing to call for investigation by court-martial, he has, as commander, directed some proper officer, as the commander of the regiment or company of the accused, or his own staff judge advocate, to prepare the charges, (indicating or not their form), or has approved or revised charges already prepared, he is not to be regarded as an 'accuser' in the sense of the Article, his action having been official and in the strict line of his duty."

In the instant case the law member was not in the position of a commander and had no official duty to initiate charges, as an administrative action. Evidence of the alleged guilt of accused came to his attention only because he was the officer in charge of the section in which certain information concerning accused became known. Under these circumstances it was proper for him either to refer the information to the commanding officer of accused or, as he elected to do in this case, to originate the charges as an accuser. Even in

the case of a commander, Winthrop states " \* \* \* where having personally originated or drafted the charges, he (a commander) has himself preferred them as his own, or caused them to be preferred nominally by another for him, with the purpose of having them brought to trial, he is properly the 'accuser,' even if he may occupy no hostile or adverse position toward the accused" (Winthrop's Military Law and Precedents, 2nd Ed., Reprint, pp. 62, 63).

Although the defense did not object to Lieutenant Colonel Mendell sitting on the court, it has been held that the language of paragraph 57b, Manual for Courts-Martial, 1928, is of the strongest protective quality and calls for full disclosure and prompt action by the court in excusing the disqualified member (CM 282160, Bennett, 15 BR(ETO) 69). The law member, therefore, should have been excused without the necessity of further challenge, and his presence as a member of the court was prejudicial to the substantial rights of the accused.

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

Edward J. Johnson Judge Advocate.

Frank C. Alfred Judge Advocate.

George S. Springston Judge Advocate.

(58)

FEB 24 1948

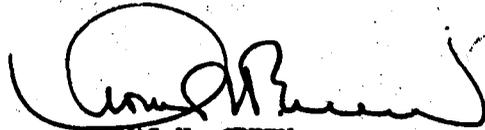
JAGN-CM 328331 1st Ind  
JAGO, Dept. of the Army, Washington 25, D. C.  
TO: Commanding General, Eighth Army, APO 343, c/o Postmaster,  
San Francisco, California.

1. In the case of Theodore Carr, Jr., a civilian, formerly private, Attached Unassigned, Headquarters & Headquarters Detachment, 14th Replacement Battalion, 4th Replacement Depot, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty and the sentence be vacated.

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

(CM 328331).

1 Incl  
Record of trial



THOMAS H. GREEN  
Major General  
The Judge Advocate General

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

JAGN-CM 328351

UNITED STATES )

NINTH AIR FORCE

v. )

Trial by G.C.M., convened at  
Sumter, South Carolina, 11  
December 1947. Dishonorable  
discharge and confinement for  
two (2) years. Disciplinary  
Barracks.

Private WESLEY F. JOHNSON  
(37602397), 55th Fighter  
Squadron, 20th Fighter Group,  
20th Fighter Wing, Army Air  
Forces. )

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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.

Specification: In that Private Wesley F. Johnson, 55th Fighter Squadron, 20th Fighter Group, Shaw Field, South Carolina, did, at Shaw Field, South Carolina, on or about 6 November 1947, feloniously take, steal and carry away one 1937 Buick automobile, value of more than \$50.00, the property of Sergeant Robert G. Storey, 79th Fighter Squadron, 20th Fighter Group, 20th Fighter Wing, Shaw Field, South Carolina.

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

Specification: In that Private Wesley F. Johnson, 55th Fighter Squadron, 20th Fighter Group, Shaw Field, South Carolina, having been restricted to the limits of Shaw Field, South Carolina, did, at Shaw Field,

(60)

South Carolina, on or about 0230 hours, 6 November 1947, break said restriction by going beyond the limits of Shaw Field, South Carolina.

The 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 two years. The reviewing authority approved the sentence, designated the Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$ .

3. At about 1900 hours, 5 November 1947, a Buick sedan, the property of Sergeant Robert A. Storey was parked, unlocked, behind barracks 57, Shaw Field, South Carolina. At about 0600 hours 6 November 1947 Sergeant Storey noted his car was missing although he had given no one permission to take it (R. 6-11). About two days later Sergeant Storey next saw his car in a field about 25 yards from the highway and about 5 miles from Shaw Field. At that time "a GI OD cap with the serial number K-5989 in" it was found lying in the front seat of the car (R. 11). This cap, properly identified, was introduced in evidence as prosecution's exhibit 1.

Private James E. Koen testified he was the owner of the cap (Pros. Ex. 1); that accused borrowed it from 1800 to 1830 on 5 November 1947, and on the same evening about 1900 asked to borrow it a second time; that witness consented to the second loan but did not know whether accused actually took the cap; that witness did not use the cap and was not aware that it was missing until he was advised of its whereabouts by CID agents several days later (R. 13-16).

About 1800 hours 7 November accused was brought to the CID office for interrogation relative to the offense in question. At that time, after being advised of the purpose of the interrogation and the identity of his questioners, but not of his rights under Article of War 24, accused denied any knowledge of the theft (R. 18, 20). During the following three hours accused was questioned at length by CID agents "Mr." McCallough, "Mr." Hissett, First Lieutenant Thomas W. Martin (R. 18-19) and a fourth agent, unnamed (R. 30). After discrepancies in accused's oral statements were pointed out to him, he finally said "All right, here it is fellows. I will tell you," and then made a full confession (R. 20). Accused was then asked if he was willing to make a written statement and after he assented he was advised of his rights under Article of War 24. Thereafter he dictated and signed a confession which was identified and admitted in evidence as prosecution's exhibit 2 (R. 20, 34).

All witnesses were agreed that no force or threat was

directed against accused during his interrogation. Witness for the defense testified that interrogators advised accused, in substance, it would be "easier" for him if he told the truth (R. 22) but such assertions were categorically denied by such interrogators when called as prosecution witnesses.

Respecting the Specification of Charge II the record contains stipulated testimony establishing that on 24 October 1947 accused was restricted to the limits of Shaw Field for a period of 55 days (R. 6).

4. The evidence contained in the record of trial, sans accused's confession, is not legally sufficient to support a finding of guilty. It follows that the only question requiring discussion here is whether the confession was properly admitted into evidence.

The voluntary character of a confession is the fundamental and ultimate test of its admissibility (par. 114a, MCM, 1928). From an examination of the Manual for Courts-Martial (Sec. 225b, MCM, 1921; par. 114a, MCM, 1928) and pertinent holdings by the Board of Review, we conceive the law in such cases to be properly stated as follows:

When a confession is obtained by questioning of the accused by his military superior its admissibility must be established by competent evidence in the record:

- (a) That it was of a spontaneous character (CM 255162, Lucero, 35 BR 47; CM 233611, Eckman, 20 BR 29; CM 224549, Sykes, 14 BR 159; CM 288872, Clark, 1 BR (POA) 89); or
- (b) That the accused, at all times throughout such questioning, substantially understood his rights as set out by AW 24 (CM 320252, Rodriguez (1947); CM 318851, Stacy (1947); CM 234561, Nelson, 21 BR 55; CM 237255, Chesson, 23 BR 317; CM 242082, Reid, 26 BR 391; CM 254423, Gonzalez, 35 BR 248).

5. In this case four CID agents, including at least one officer, questioned the accused for approximately three hours before they succeeded in obtaining his oral confession, despite his consistent earlier denials of guilt. There is nothing in the record of trial to indicate that during the whole, or any portion of that period accused was in any degree aware of his rights respecting self incrimination, and the record affirmatively shows that he was not advised, by his interrogators, of such rights until after his confession had been

(62)

obtained and he had agreed to its reduction to written form.

The applicable rule of law set out above forces a conclusion that the oral confession of accused was inadmissible because it was not voluntary, and it is quite obvious from the record that such inadmissibility equally attaches to the written confession (Wharton's Criminal Evidence, Vol. 2, Sec. 601, CM 316223, Evans (1946)).

6. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification and of Charge II and its Specification, and legally insufficient to support the sentence.

Edward J. Johnson Judge Advocate.

(SICK IN QUARTERS), Judge Advocate.

George S. Springer, Judge Advocate.

JAGN-CM 328351

1st Ind

MAR 3 1948

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

TO: Commanding General, Ninth Air Force, Greenville, South Carolina.

1. In the case of Private Wesley F. Johnson (37602397), 55th Fighter Squadron, 20th Fighter Group, 20th Fighter Wing, Army Air Forces, I concur in the foregoing holding by the Board of Review and for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated.

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

(CM 328351).

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.

(65)

JAGQ - CM 328401

28 JAN 1948

UNITED STATES )

UNITED STATES CONSTABULARY

v. )

Trial by G.C.M., convened at  
Wetzlar, Germany, 24 July  
1947. Dishonorable discharge  
and confinement for two (2)  
years. Disciplinary Barracks.

Private CLYDE M. STILL )  
(RA 33514188), Headquarters )  
and Headquarters Troop, 3d )  
Constabulary Regiment )

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HOLDING by the BOARD OF REVIEW  
JOHNSON, BAUGHN and KANE, Judge Advocates  
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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General.

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

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

Specification: In that, Private Clyde Still, Headquarters and Headquarters Troop, 3rd Constabulary Regiment, did, without proper leave, absent himself from his station at Wetzlar, Germany, from about 7 May 1947, to about 27 May 1947.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private Clyde Still, Headquarters and Headquarters Troop, 3rd Constabulary Regiment, having received a lawful order from S Sgt John Kalinowski, Headquarters Troop, a noncommissioned officer, who was then in the execution of his office, to remain in the barracks hall until he went into his room for his equipment, did, at Wetzlar, Germany, on or about 1000 hours, 7 May, 1947, willfully disobey the same.

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

Specification: In that Private Clyde Still, Headquarters and Headquarters Troop, 3rd Constabulary Regiment was, at Bremen Germany, on or about 27 May, 1947, drunk and disorderly while in uniform.

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

Specification: In that Private Clyde Still, Headquarters and Headquarters Troop, 3rd Constabulary Regiment did, at Bremen Germany, on or about 27 May 1947, with intent to do him bodily harm, commit an assault upon Private William Zlacki, a military policeman, in execution of his duty, by willfully and feloniously striking Private William Zlacki, in the groin with his feet.

CHARGE V: Violation of the 69th Article of War.  
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge V and its Specification and guilty of all remaining Charges and Specifications. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for two years. 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. Evidence for the Prosecution.

On the morning of 7 May 1947, Staff Sergeant Kalinowski was directed by his commanding officer to take accused to the dispensary (R. 6, 8). While he was in the process of carrying out this directive he ordered accused to remain in the orderly room while he obtained his pistol but when he returned approximately thirty seconds later accused had disappeared and remained in an absence without leave status until he was apprehended by military police on 27 May 1947 (R. 7-10; Pros Ex 1).

On 27 May 1947, while Privates Zlacki and Patrick were patrolling the city of Bremen they encountered accused in front of a Red Cross Club in an intoxicated condition (R. 10, 12). When they requested to see accused's pass he struck Zlacki in the face and before he was subdued, accused kicked Zlacki in the groin three or four times.

### 4. Evidence for the Defense.

After his rights as a witness had been explained to him accused elected to make an unsworn statement regarding Charge IV and its Specification only (R. 14). He testified that he showed the military police his pass when they requested it but refused to go with them to the station, whereupon Zlacki attempted to hold his arms and Patrick hit him on the back of the head with his pistol. After he was struck "things are not clear. I can't remember and was not wholly responsible for anything that happened" (R. 12).

5. The only questions presented in the record of trial is whether the willful disobedience of Sergeant Kalinowski's order "to remain in the orderly room" (Spec. of Chg. II) and the absence without leave (Spec. of Chg. I) were separate offenses and whether the assault on the military policeman in the execution of his duty (Spec. of Chg. IV) and the drunk and disorderly charge (Spec. of Chg. III) were separate offenses so as to allow the imposition of separate punishments for each of the four offenses charged.

It is clear from the evidence in the instant case that the same act of accused which gave rise to the offense of disobeying the order of the Sergeant to remain in the orderly room also constituted the offense of absence without leave, as accused immediately "took off" and when a search of the area failed to disclose his whereabouts he was promptly classed as "AWOL."

With reference to the assault on the military policeman in the execution of his duty and the offense of drunk and disorderly, the evidence shows that the acts of accused in committing the assault also constituted the disorderly conduct with which he was charged in the separate specification. It is apparent from all the circumstances in the case that the offense of being drunk and disorderly and the assault were not only contemporaneous in point of time but were in effect a single transaction.

Paragraph 80a, MCM, 1928 provides:

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

This provision has been held to be "a positive and mandatory rule of limitation" (CM 313544, Carson, 5 Bull. JAG 202) and therefore, the maximum punishment authorized for the offenses alleged in Specification of Charge I and Specification of Charge II as well as those alleged in Specification of Charge III and Specification of Charge IV must be limited to the maximum authorized punishment for the more important aspect of the two offenses in each instance, viz, willful disobedience of the lawful order of a non-commissioned officer and assault with intent to do bodily harm.

6. For the reasons stated above, the Board of Review holds that the record of trial is 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

(68)

due or to become due and confinement at hard labor for one year and six months.

W. H. Johnson Jr., Judge Advocate,  
Wilmot T. Baughn, Judge Advocate  
J. D. Kane, Judge Advocate

JAGQ - CM 328401

1st Ind

FEB 2 1948

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

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

1. In the case of Private Clyde M. Still (RA 33514188), Headquarters and Headquarters Troop, 3d Constabulary Regiment, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the sentence be approved as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 328401)

THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
Record of trial





DEPARTMENT OF THE ARMY

(71)

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

16 JUL 1948

JAGH CM 328416

U N I T E D S T A T E S	)	ARMY ADVISORY GROUP, CHINA
	)	
v.	)	Trial by G.C.M., convened at
	)	Shanghai, China, 15-22 October
Major RAYMOND C. PIERCE,	)	1947. Dismissal and confinement
O-442171, Air Division,	)	for one year.
Army Advisory Group.	)	

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 Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Major Raymond C. Pierce, Air Corps, Army Advisory Group, did, at or near Shanghai, China, on or about 1 August 1947, knowingly and willfully misappropriate about 540 drums of the value of about \$1620.00, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service 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.

Accused is in the military service and is a Major, Air Corps (R 12). It was stipulated that for more than six months prior to 12 August 1947, the accused was Director of Supply and Service at Kiangwan Airfield, Shanghai, China, for the 1580th AAF Base Unit (FTS), Western Pacific Wing, Pacific Division, Air Transport Command; and that on 12 August 1947 he was transferred to the Air Division, Army Advisory Group (R 106).

Petroleum products at Kiangwan Airfield were supplied under contract by the Texas Company otherwise referred to in the record as "Caltex."

The metal drums used as containers for the petroleum products were owned by the Army, and Caltex accounted for the drums in monthly "POL [Petroleum, oil, lubricant]" reports (R 53,55,67).

Nohom E. Soroka, a civilian employee of Caltex, was transferred by the company to Kiangwan Airfield on 1 June 1947 (R 199). Soroka testified that a few days after his transfer he was approached by accused and asked by the latter if he would release drums under the jurisdiction of Caltex without any "kind of paper." Accused also mentioned that he had a buyer for the drums. Soroka stated that he would refuse to release the drums. Some days later accused renewed the conversation and asked what Soroka's reaction to the matter would be if he were given a release order. Soroka again indicated that he would not release the drums. Subsequently accused gave Soroka a letter under the heading of accused's organization addressed to "The Texas (China) Ltd., Kiangwan," dated 9 June 1947, which Soroka sent to the head office. The letter stated:

"Effective immediately, I desire a complete inventory of Army stocks in possession of your Company every two (2) weeks showing bulk and drum stocks only.

"Empty drums in your possession are deteriorated and expendable. They are often used for transferring stocks, boundary marks and so forth. It will not be necessary for you to carry these on your records any further from this date, as our Stock Record Cards indicate a zero balance. These drums will be drawn on from time to time without any release from the undersigned." (Pros Ex 13)

The letter was signed "Raymond C. Pierce" over the typewritten designation, "Major, Air Corps, Director, Supply & Service" (R 50,200; Pros Ex 13,14). Sometime in June accused advised Major Hash, then the Base Accountable Officer at Kiangwan, that he was going to relieve the Texas Company of responsibility for empty drums (R 111). Upon receipt of the letter in the company, accountability for the empty drums was dropped and a letter was written to the company office at Kiangwan requesting them to drop the drums from their records (R 51,67). The drums were dropped from their records on 8 July 1947 at which time the inventory of drums stood at 5140-55 gallon drums and 416-40 gallon drums (R 50,76). Although company owned drums had formerly been held at Kiangwan all had been removed prior to 15 July 1947 (R 73) and after this date there were only Chinese Air Force and United States Army drums at the field. These drums were segregated as to ownership in different piles (R 126,128).

Soroka further testified that sometime in 1946 he had met Wong King Yung, a coolie contractor, who at that time was interested in purchasing drums. Soroka again met Wong in June or July of 1947 and

inquired of Wong if he was still interested in buying drums. Wong stated that he was still interested and Soroka arranged a meeting between Wong and accused at which Soroka was not present. About three weeks after the date which Soroka had set for the meeting, Wong went to Soroka's home and made inquiry as to the status of the sale. At Wong's request Soroka accompanied him to accused's residence where they saw accused. In the conversation which followed, Soroka acted as interpreter (R 202). Accused indicated that he was willing to sell the drums and a discussion as to the price followed. It was Soroka's impression that the price agreed upon was two dollars and fifty cents "CNC (Chinese National Currency) Equivalent." Accused refused, however, to give Wong a bill of sale but told Soroka that he would give Wong a tally-out sheet and that Soroka could come to accused's office and obtain it (R 201,202). The following day Soroka went to accused's office and asked his secretary if the accused had a letter for him. The secretary told Soroka to look on the desk. Soroka found a tally-out sheet designating a Chinese firm as consignee and in the main body of the sheet was written "POL empty drums" and the figure "1500" (R 202,211). Soroka took the tally-out sheet to accused who was in the mess hall and asked him to sign it. Accused said to Soroka, "Hell, I can't sign it." Soroka gave the unsigned tally-out sheet to Wong who returned with it to Soroka's residence the following day. Wong told Soroka that he had been to accused's residence the preceding night and accused had refused to sign the tally-out sheet, but had told Wong to ask Soroka to sign it. At this time Soroka observed that the number of drums to be released had been changed to 1800 (R203-4,207,208). Soroka questioned Wong as to the change in the figures and was told it had been done by accused (R 213). Soroka signed the tally-out sheet with the name of a fictitious person, "McLaughlin" (R 136,214). He identified Prosecution Exhibit 18 as a photostatic copy of the tally-out sheet which he obtained in accused's office and signed, and the exhibit was admitted in evidence (R 139).

On cross-examination Soroka stated that he was to receive a commission on the transaction from Wong (R 209,212). He admitted that in a pre-trial statement he had stated that accused had asked him to put some kind of signature on the bottom of the tally-out sheet (R 213).

Wong King Yung testified that he was introduced to accused at the latter's office by Soroka sometime during July 1947. At this meeting Soroka acted as interpreter (R 178). At this time Soroka stated "there was an American want to sold drums and at the same time asked me whether I want or not." Wong was informed that the price per drum was three dollars in "U. S. dollars" (R 178). Subsequently on 27 July 1947 Wong accompanied by Soroka went to accused's residence at Cathay Mansions. At this time it was agreed that the purchase price of \$3.00 per drum would be paid by Wong to Soroka and by the latter to accused (R 186). Wong was also told he would receive a pass the next day. By "pass" Wong meant "the paper which was written fifteen hundred drums." Wong received the paper from Soroka at the latter's residence (R 178). With reference to the paper Wong testified:

- Q. Was the paper signed when you first got it?  
A. It was not signed.
- Q. I hand you Prosecution Exhibit Number 18. Will you tell the court whether this is a picture of the sheet of paper which you refer to?  
A. It is the same as on the photo.
- Q. Can you read these figures (pointing on the exhibit)?  
A. It was written on the paper one thousand, five hundred and I saw, myself, personally, Major Pierce correct the one thousand, five hundred to one thousand, eight hundred.
- Q. What were you supposed to do with this paper?  
A. I used it as a certificate.
- Q. How many drums did you agree to buy?  
A. One thousand, five hundred drums.  
\* \* \*
- Q. Who was there when Major Pierce changed this figure?  
A. I was not there. Soroka took this paper to Major Pierce to sign it.  
\* \* \*
- Q. Did you see Major Pierce change the figure fifteen hundred on this Prosecution Exhibit Number 18?  
\* \* \*
- A. I did not see.
- Q. When you first received the pass, how many drums was it for?  
A. One thousand, five hundred drums.
- Q. What did you do with it then?  
A. After that he told me to load those drums.
- Q. Who told you?  
A. Major Pierce told Soroka. Soroka told me.  
\* \* \*
- Q. I hand you Prosecution Exhibit Number 18. Where and from whom did you get this piece of paper?  
A. This paper was given by Soroka at Soroka's home.
- Q. You said when you first got it, it wasn't signed. Is that correct?  
A. It wasn't signed.
- Q. Did you talk to anyone about getting it signed?  
A. I asked Soroka why this paper wasn't signed.

Q. What did Soroka say?

A. Soroka said Major Pierce refused to sign the paper so I told Soroka I don't want to buy this drums.

Q. Then what happened?

A. Soroka told me that Major Pierce told Soroka to sign the paper."  
(R 180,181,182)

Wong gave the unsigned paper back to Soroka and received it the following day at which time it was signed (R 183), and the number of drums was changed from "one thousand, five hundred," to "one thousand, eight hundred." Wong was informed by Soroka that the change in the number of drums was made by accused (R 184). Wong also stated that payment for the drums was not made (R 186).

On or about 15 July accused visited Major Chen Zang at the latter's office at Kiangwan Airfield (R 17). Major Chen was in charge of security at the field. As to their conversation, Major Chen testified:

"He came and told me that there were one thousand eight hundred drums will be sold to a Chinese civilian from his organization. He asked me at the time of transport to give a pass to that truck so I told him that if U.S. Army property there should be an official letter." (R 18).

Accused said that he would prepare such a letter (R 18). On 20 July Major Chen was visited by Wong King Yung who was seeking a pass. Major Chen informed Wong that he would have to have an official letter from the United States Army authority. At the time Wong had an unsigned paper with him and Major Chen told him it should be signed (R 16,22). On 28 July Wong returned with a signed "chit" and on it "there was written the amount of one thousand, eight hundred drums" (R 16,24). Major Chen instructed Sergeant Lin that if Wong King Yung came to the field with vehicles to "let them in" (R 24). On cross-examination Major Chen placed the time of accused's visit as the 4th or 5th of July but then stated he did not remember the date (R 26). He also stated that accused was accompanied by an interpreter whom witness did not know (R 25). Miss Bernardo, however, testified that she was with accused from 10 o'clock in the morning 4 July until three o'clock the following morning, and that during that time they did not go to the airfield (R 223,224).

In his testimony Wong denied knowing Major Chen, but claimed that Chen had been contacted by Soroka (R 185). On cross-examination he admitted, however, that he had been to see Major Chen before 1 August (R 191), and on redirect examination testified that Soroka had informed him that the figures had been changed from fifteen hundred to eighteen hundred because three hundred drums would be sent to Major Chen (R 194).

Wong testified that he made a resale of the drums to Lann Fak Kwei who furnished the trucks to transport the drums (R 184). Wong accompanied the trucks to Kiangwan Airfield and was admitted to the field. The trucks were taken to the back of the Caltex Company where Wong met a Russian named Alex. Wong showed Alex the paper which he had and Alex pointed to a pile of drums. Some drums were loaded on the trucks and the trucks were driven to the gate where Wong and the trucks and drums were detained by the Chinese guards (R 184,185,186).

Alexander Surinoff testified that he was employed to "look" after the tank farms of aviation gasoline at Kiangwan. At the place he was working there were stored about eight thousand empty drums belonging to "CAF" and the "U.S. Army." These drums were segregated as to ownership (R 124,125). At approximately the end of July some civilian trucks accompanied by Chinese civilians came to take Army drums. Surinoff stated that the civilians had accused's permission to take Army drums and he pointed out to them the location of the Army drums. The following day Surinoff noted that there were approximately 500 drums missing from the Army pile but that none were missing from the "CAF" pile (R 126). On cross-examination Surinoff testified as follows with reference to the identity of the empty drums:

"Q. Do you know the difference between a CAF empty drum --"

A. The difference is in locality.

Q. Difference in physical location. Is there any difference between the two drums, one that belongs to CAF and one that belongs to the U. S. Army?

A. Well, the difference not in every one. About three thousand of the CAF drums are different from Army drums because they were brought by the Japanese, formerly Japanese. The rest are painted Standard Vacuum Oil Company. Then there were painted Texas Company, also CAF drums, but there were a few which were not painted but still they were present because they were taken over from U.S. Army.

Q. They were? How do you know it?

A. Because when they brought the drums I was there.

Q. Were there any CAF drums marked 'U.S.A.'?

A. Yes, there were, without being painted or stencilled. Those drums were bought from Standard Vacuum or Texas Company. They are painted Texas Company or Standard but are drums bought from the U.S. Army so they weren't painted." (R 126,127)

Surinoff also stated that he did not report the taking of the drums because of instructions from the office not to interfere with the movement of Army drums (R 128). The Caltex Company was, however, responsible for the "CAF" drums (R 129).

Private Everard D. Lenox, Jr., testified that on 1 August 1947 he was on duty at the main gate at Kiangwan between 0600 and 1200 hours. At about 1115 hours he saw a line of trucks coming from the base toward the main gate. The trucks were "a mixture between Chinese civilian trucks and Chinese Army trucks," and were loaded with oil drums. The Chinese "MP" on duty halted the trucks. Later some more Chinese "MP's" came out and moved the trucks from the entrance (R 8,9). On cross-examination Lenox testified that he was sure that the drivers of the trucks were civilians. The drums were not covered but were marked and had a rusty OD color (R 9,10).

Private Archie D. Pettit testified that he was photographer for the 701st Military Police Battalion. On 4 September 1947 accompanied by Agent Price of the CID he went to Kiangwan Airfield and took pictures of some trucks which were loaded with drums. He identified Prosecution Exhibits 2 through 13 as being the pictures he took of the trucks and they were admitted in evidence without objection (R 42). On 6 October Pettit returned to Kiangwan and counted the drums on each of the trucks and found a total of 543 drums (R 40).

With reference to identifying characteristics of the drums which he found on the trucks Pettit testified:

"Q. Did you observe any markings on these drums at the time you were taking the pictures or while you were counting them?

A. Markings, sir?

Q. Yes. Lettering, marking, paint, anything like that.

A. While I was taking them pictures?

Q. Yes.

A. No.

Q. Did you observe any markings?

A. Yes, sir. There was U.S. Navy. It had Navy and Army stamped on the barrels.

Q. Were there any of them that had other markings, such as raised lettering, that were called to your attention or came to your attention while counting them?

A. What kind of marking, sir?

Q. Any other kind.

A. Yes, sir. Pretty near all the drums had white lettering on them, U.S. Navy and Army on them, sir." (R 43).

and on cross-examination:

"Q. Were all the five hundred and forty-three drums marked U.S. Navy or U.S. Army?

A. As far as I know, sir.

Q. Did you count every drum and look at every drum?

A. No, sir. I didn't look at the writing on it, sir. They looked all marked to me, sir.

\* \* \*

Q. Did the drums say U.S. Army and U.S. Navy?

A. Yes, sir. Most all the ones had U.S. Navy, had white letters, and U.S. Army was stamped right on the metal." (R 43,44)

The pictures taken by Pettit show identifying characteristics as to some of the drums. A number of the drums show the following painted identifying characteristic "1120 AVIATION OIL NAVY SYMBOL 1120," some show the stamped characteristic "USA 2MC," and some "PROPERTY AIR FORCES USA" (R 42; Pros Ex 3,7,9,10,11,12).

Wong King Yung testified as follows with reference to Prosecution's Exhibits 2,4,5, and 6:

"Q. I hand you Prosecution Exhibits 2, 4, 5, and 6. Do you know what these are?

A. Drums.

Q. Are they the drums that you were transporting?

A. Yes. It was.

Q. Do you recognize those trucks in the pictures?

A. Yes. They were.

Q. Did you hire the trucks?

A. I did not hire the trucks.

Q. Who did?

A. A man named Lam.

Q. Who was he?

A. He is the owner of iron shop.

Q. Why did he hire the trucks?

A. Because I sold the drums to Lam.

Q. Did you go with the trucks to Kiangwan airfield?

A. I did.

Chu Kong Sou, a typewriter repairman, testified that he had formerly been employed by ATC, first at Kiangwan Air Base, and then at the Shad Building. At the latter place he had occasion to be in accused's office

on numerous occasions. A Russian named George worked with Chu at the Shad Building, and in July Chu purchased 600 empty drums from George paying therefor "two gold bars and U.S. dollars one thousand, two hundred." On the sale Chu received a paper similar to a tally-out sheet, signed by accused (R 147,148,149,152). Accused signed the paper in Chu's presence and handed it to George who in turn gave it to Chu (R 152). Chu in turn sold the drums to a man named Chu, the drums being turned over at the Shad Building. The drums were transported to the latter place from Kiangwan by U.S. Army trucks (R 151).

Surinoff testified that during July a number of Army empty drums had been removed in Army trucks from the storage place at Kiangwan.

On cross-examination Chu testified that he gave the paper obtained from accused to the buyer who was to use it as a pass to get the drums. The Army trucks used to transport the drums were obtained by George who telephoned the ATC Motor Pool in accused's presence. Chu was also furnished two papers, similar to the one obtained from accused, by George. The location of the drums was pointed out to Chu by George and payment for the drums was made to George at the Airfield. Chu admitted that previously he had stated that payment had been made in two installments, but claimed that his present testimony was true (R 154,155,156). With reference to accused's involvement in the sale he testified:

- "Q. Then, at any time in your dealings with George in buying these six hundred drums, was Major Pierce involved at all?
- A. I never saw Major Pierce when we are dealing with this trucks.
- Q. At any time did you see Major Pierce involved in your buying of these drums?
- A. I did not." (R 156)

On redirect examination he stated that he had received eight papers in connection with the transaction and testified as follows concerning their use:

- "Q. Will you tell the court just how and from whom you received each of these papers?
- A. First time I got four papers and then I give those four papers to transport two hundred drums out of it. Then, when those trucks come back with those four papers.

INTERPRETER: Wait a minute, I will ask him again.

Whereupon, the interpreter again spoke to the witness.

- A. First time four trucks, four papers, four trucks went out, come back two trucks and bring along four papers. Two papers give back to George and again two papers leave to those two trucks to transport the other drums.

Q. Is that all?

A. The first time I loaded the drums, using four papers, telling the trucks going out along with the four papers then come back again the same two trucks, not four trucks, two trucks, and bring along with the two trucks the same four papers. And give back two papers to George and use the same two papers again transport the other drums. This was the first time, three hundred drums. On the next day I loaded another three hundred drums. George gave me two papers signed by George. I loaded one hundred drums on two trucks and at the same time I gave two papers signed by George to the truck and let them off, then afterwards came back those trucks with the papers signed by George, bring back, you see, then George then again type up four papers again and gave this four papers to Major Pierce to sign. And then he again tore up the two papers signed by George.

Q. These four papers signed by Major Pierce are the same ones that you testified previously as to being signed in your presence?

A. I saw Major Pierce sign the four papers." (R 158)

On re-cross-examination Chu stated that George told him the drums were being sold by accused (R 159), but admitted that when the arrangements for the sale were made and when George was paid, accused was not present.

On recall Chu identified four tally-out sheets as the papers which he had seen signed by accused 15 July 1947 and which he subsequently received (R 218,220; Pros Exs 19,20,21,22). Each tally-out sheet purported to release 50 empty drums to "Stand. Oil Co. Filling Station," and each sheet also had a truck registration number which was typed on the sheets by George from information furnished by Chu (R 221,222). Chu did not sell the drums to the Standard Oil Company Filling Station (R 222).

Other testimony by Chu showed that on a Monday morning during August he, George, and accused had a conversation. George acted as interpreter and told Chu that accused was involved in some case about drums. George handed a letter he had received from accused, to Chu. The letter was in Chinese and although George could speak Chinese he could not read the language. Chu read the letter to George who translated the contents to accused. The letter was addressed to accused at his residence in Cathay Mansions and informed him of the detention of Wong King Yung and the trucks and drums. The letter did not disclose its origin (R 163,164, 169). Accused through George told Chu to find out "who is the highest place in the Chinese Air Force and who detained Mr. Wong in the jail." Chu was unable to receive information about Wong but did find the trucks and drums at the airfield (R 164). With respect to the conversation involving Wong King Yung, Chu testified:

- "Q. When you met Major Pierce and George on that Monday morning, was there anything else said to you about drums?  
A. At the SHAD Building in the office were three men present including myself: Major Pierce, George and me. At that time Major Pierce told George to tell me that, don't let anybody know, just tell me to keep quiet. If anybody know, CID will come to pick up Major Pierce.

\* \* \*

Question by Law Member:

- Q. Was Major Pierce talking to you or to George?  
A. Major Pierce talked to me through George.  
\* \* \*  
Q. You testified that Major Pierce, through George, told you not to say anything about the drums. Was any reason given you?  
A. Because it was an illegal sale.  
\* \* \*  
Q. Was this statement made in respect to the purchase of drums which you made or the drum deal you testified Mr. Wong was placed in confinement for?  
\* \* \*  
A. Major Pierce told me to keep quiet only to the sale between Mr. Jong and Major Pierce, but on my dealing only George told me to keep quiet." (R 166,168)

On 1 August Soroka was visited by Mrs. Wong who informed him of Wong's detention and asked him to intercede with accused to effect Wong's release. Subsequently Soroka and Mrs. Wong visited accused. A Miss Bernardo was present and Soroka and Miss Bernardo interpreted the ensuing conversation. Mrs. Wong inquired of accused what he intended to do in the situation and accused replied that he was trying to contact a "higher-up commander" in the Chinese Air Force in order to get Mr. Wong out (R 204). Soroka again saw accused concerning Wong. Accused told Soroka "let them bother their own heads about it. I have got nothing to do with it. I signed nothing and they have nothing on me." Accused also told Soroka to keep quiet (R 215).

Soroka was later interrogated by the Chinese Air Force and by the CID. Sometime after these interrogations he received a telephone call from accused who arranged a meeting with him. Accused, who was accompanied by Miss Bernardo, met Soroka at the Weida Hotel. As to the meeting Soroka testified:

"\* \* \* He arrived in his jeep with Miss Bernardo in the front seat, asked Miss Bernardo to sit behind, made me sit next to him, and asked me the following questions: 'How are you?' I

mentioned, I believe, at that time, 'Not so good. I was interrogated by the CID authorities in regards to the sale of drums from Kiangwan airfield.' I believe at that moment he stopped me and he said, 'What are you afraid of? I am the one who should be afraid. I have jurisdiction over these drums and not you.' Something to that effect, anyway. Then he asked me, he says, 'This morning, I was also taken by the CID authorities or agents, brought over to the airfield and identified by the Major Chen', I believe he said, and Mr. Wong. 'They both identified me.' Then he also said that he would be brought for trial in a court martial and it all depended on me if I kept my mouth quiet or my mouth shut, he would be acquitted, but if I said something he would get, I think he said, twenty years. \* \*." (R 205)

Miss Bernardo testified that she was present when Mr. Wong's two wives visited the accused. They asked her to ask accused to get their husband out of jail but accused said there was nothing he could do. She was also present when accused met Soroka at the Weida Hotel. Soroka asked accused if the latter had called and accused replied that he had not. Accused asked Soroka "Do you know of any kind of paper signed by a certain McLaughlin?" Soroka replied that he did not know anything about it. Soroka mentioned that he had been interrogated by the Chinese police about stolen drums and was worried. Miss Bernardo did not recall anymore of the conversation (R 114,115).

Ralph H. Price, a CID agent, testified that in the course of his investigation of the alleged sale of drums by accused he asked an officer of the Chinese Air Force to have certain Army drums returned to Army control. Price identified Prosecution Exhibit 15 as a document which was given to him by the Chinese officer at the interview (R 62). The letter was admitted in evidence and translated to the court as follows:

"Date seventh October 1947. To Colonel Weissman, Headquarters Military Police, United States Army. Subject: Request forwarding an official receipt to the Fourth Battalion, Base Operation, Chinese Air Force, for the release of the drums which were previously detained by us re "Corruption Case" of Chen Zang. We acknowledge the receipt of your letter dated 27 September 1947. We shall be very glad to release to you the five hundred forty drums (53-gallon drums) if your official receipt be forwarded to the Fourth Battalion, Fourth Regiment, Base Operation, Chinese Air Force, in the Kiangwan airbase, as these drums are being kept at their premises. We also have informed the Fourth Regiment to carry out the release order. Sealed by Colonel Wong Wei Ming, Chinese Air Force, Supply Headquarters." (R 132)(Pros Ex 15).

Jason D. Stefanis, testified that he was, for the past two years, variously clerk, assistant chief clerk and administrative specialist,

ATC Air Supply Depot, Kiangwan Airfield, under the supervision of the supply officer, Captain Graham, later Captain (Major) Hash. For a time they carried drums on stock record cards but ceased to carry drums on such records sometime between June and August of 1946, on the advise of a Lt. Rogers, a TM 38-410 supply specialist, from Wake. That Caltex (The Texas Company) and later Standard Oil made monthly reports of the POL (petroleum-oil-lubricants) stocks on hand, which included drums. His office kept one copy of the report; Captain Hash signed the rest, which were sent to Supply and Service. The Supply and Service Officer was the accused. The accused's office was located in the SHAD Building (R 54-59).

Major Hugh W. Hash, Air Supply Officer, later Base Accountable Supply Officer (about November 1946), testified that from January until August 1947 he was stationed at Kiangwan Airbase, 1580th Base Unit, Air Transport Command. He identified Defense's Exhibit No. 2, saying he had seen it in Major Pierce's office but did not recall ever having received it in his own. Defense Exhibit 2 was a letter signed by accused transmitting to Major Hash a copy of accused's letter to "Caltex." He identified the signature on both Defense's Exhibit No. 2 and Prosecution Exhibit 13 as that of Major Pierce. He stated that he was accountable only for the United States Government property that was on his records at the time he assumed accountability; that Major Pierce was his immediate superior officer (R 107), and at no time was he (Major Hash) accountable for empty drums (R 107); that these items were carried on stock cards in the possession of Caltex (R 108) who had a contract with the aircraft maintenance section and handled all of this type of supply. Major Hash signed reports made out by Caltex Company for the gas and oil consumption but never for empty drums (R 110). Major Pierce did, however, advise Major Hash that he had absolved Texas Company from responsibility for empty drums, but did not give instructions for him (Major Hash) to assume accountability for them (R 111). Major Pierce prepared the area for the storage of empty drums (R 112). The form, prepared by the witness, on 5,765 drums (Prosecution Exhibit 17) was prepared on order of Major Pierce (R 114), and the number of drums was the number given by Major Pierce (R 116). Prosecution Exhibit 17 was a "Declaration of Surplus Property To Disposal Agency" addressed to the Foreign Liquidation Commission, Shanghai, China, declaring as surplus 5,765 empty drums of a total cost of \$26,576.65.

The cost to the United States for 55-gallon drums was \$7.50 (R 99).

4. Accused remained silent and no evidence was adduced by the defense.

5. The evidence thus shows that during 1947 the Texas Company supplied petroleum products to the Army at Kiangwan Airfield utilizing drums which were owned by the Army to transport and store the products

furnished. At the airfield were a large number of empty drums for which the Texas Company accounted in its reports to the Army. At the field were likewise a number of empty drums which were the property of the Chinese Air Force for which the Texas Company was also furnishing petroleum products. The empty drums on the field were segregated as to ownership, Army drums in one pile, and Chinese Air Force drums in another pile. In June 1947 accused, Director of Services and Supplies for the Air Transport Command Unit at Kiangwan, approached Noham Soroka who at the time was employed by the Texas Company at the airfield, and inquired of Soroka if he would release empty drums without authorization. Accused also mentioned that he had a purchaser for drums. Soroka according to his testimony stated that he would not release the drums. At a later meeting Soroka again refused to release them. Accused then gave Soroka a letter addressed to the Texas Company signed in accused's name informing the company that it need no longer account for the empty drums. At some time in June accused informed Major Hash, the base accountable officer at Kiangwan, that he was going to relieve the Texas Company of accountability for empty drums. After his conversation with accused Soroka met an acquaintance, Wong King Yung, a coolie contractor, who formerly had been interested in purchasing drums. Soroka upon learning from Wong that the latter was still interested in purchasing drums arranged a meeting between Wong and accused. Soroka, according to his testimony, was not present at this first meeting, but according to the testimony of Wong he was present on both occasions when Wong saw the accused. Nevertheless, about three weeks later Wong came to his home and made inquiry about the sale. At Wong's request Soroka accompanied him to see accused. In the conversation which ensued Soroka acted as interpreter. According to Soroka accused indicated his willingness to sell the drums and a price was agreed upon. Accused, however, would not agree to furnish a bill of sale, but told Soroka to pick up a tally-out sheet from accused's office the following day. Soroka did so, and upon observing that the tally-out sheet was unsigned asked accused to sign it. Accused refused. Soroka gave the unsigned tally-out sheet to Wong. Subsequently, according to Soroka's testimony, Wong returned with the tally-out sheet and told Soroka that accused wished Soroka to sign it. Soroka signed the tally-out sheet with the fictitious name, "McLaughlin" and returned the sheet to Wong. When Soroka first obtained the tally-out sheet it purported to be an outgoing tally of 1500 empty "P.O.C. drums" to a Chinese firm or consignee. When Wong returned the sheet to Soroka the figure "1500" had been changed to "1800."

Wong's version of the transaction differs from Soroka's in some aspects. According to Wong, Soroka was present when Wong first met accused and at that meeting the terms of the sale were agreed upon with Soroka acting as interpreter. On 27 July Wong again accompanied by Soroka visited accused and was told that he would receive a pass the next day. Wong received an unsigned tally-out sheet from Soroka containing

the figure "1500." He returned the paper to Soroka since it was not signed and the following day received it back from Soroka signed. Soroka told Wong that accused had told him (Soroka) to sign it. The number of drums had been changed from "one thousand, five hundred" to "one thousand, eight hundred." Wong at first testified that he had seen accused make the change in number, but later retracted and testified that Soroka told him that the change was made by accused.

Sometime in July, Major Chen Zang was visited by accused and an interpreter who was not known to Major Chen. It is a fair inference from the record that the conversation between accused and Major Chen was carried on through the interpreter. Major Chen testified that accused told him that 1800 drums were to be sold from his organization to a Chinese civilian. He asked Major Chen that a pass be issued to allow the removal of the drums. Chen responded that if United States Army property was involved there should be an official letter, and accused answered him that there would be such a letter prepared.

On 20 July Wong requested a pass from Major Chen and showed him an unsigned paper. Major Chen told Wong he would have to have an official letter from the United States Army authority. On 28 July Wong reappeared with a signed "chit" on which was written "the amount of one thousand, eight hundred drums." Major Chen instructed a non-commissioned officer to allow Wong to enter the field when he appeared with vehicles.

On 1 August Wong was admitted to the airfield with a number of trucks which he loaded with empty drums from the United States Army pile to which Wong was directed by a Texas Company employee after showing him the tally-out sheet. The following day the Texas Company employee observed that there were about 500 drums missing from the United States Army pile. Wong was apprehended by Chinese military police as he left the field and the trucks and drums were detained by the Chinese military authorities.

Subsequently Soroka at the behest of Wong's wife asked accused to assist in getting Wong released. Accused refused stating "I signed nothing and they have nothing on me." At another conversation which took place after an investigation of the matter had begun accused told Soroka to keep quiet. A Miss Bernardo, who according to Soroka was present at the latter conversation, testified that she did not hear accused tell Soroka to keep quiet. She testified, however, that in the course of the conversation Soroka denied knowledge of any paper signed by "a certain McLaughlin." She also stated that Soroka mentioned that he had been interrogated by the Chinese police about stolen drums and was worried.

At another time in August accused had a conversation with Chu K'ong Sou, a Chinese civilian. The conversation was had through the

medium of one George, the Russian, who could speak both English and Chinese but could not read Chinese. Accused gave a letter written in Chinese to George who in turn gave it to Chu to read. Chu read the letter to George who in turn translated Chu's reading to accused. According to Chu the letter did not disclose its origin but was addressed to accused at his residence in Cathay Mansions. The letter recited the detention of Wong King Yung and the trucks and drums. After investigating Wong's status at accused's request Chu was told by accused to keep quiet about the sale to Wong. This latter conversation was also interpreted by George, the Russian.

6. Much of the evidence adduced by the prosecution in this case, at first glance, appears to be hearsay evidence which falls within none of the recognized exceptions to the hearsay rule. While objections to much of this testimony were not made by defense counsel contemporaneously with its admission, it is considered that defense counsel effectively saved his objections to all such testimony, and the competency of the evidence under consideration will be discussed.

In general the evidence under consideration falls into two main categories, extra-judicial statements of Wong King Yung and Soroka testified to by the other, and extra-judicial statements of accused made through the medium of an interpreter without any judicial corroboration by the interpreter. In the latter situation we have reference to the conversations of accused with Wong King Yung, Major Chen Zang and with Chu Kong Sou as narrated in 5 above.

In general it may be said that the admissibility of such latter testimony is determined by the relationship of the declarant to the interpreter. Thus in cases where the declarant is under arrest and is undergoing interrogation through the medium of an interpreter in whose employment declarant has no choice the interpreter must authenticate his translation by testifying that his interpretation was accurately made. (People v. Chin Sing, 242 N.Y. 419, 152 N.E. 248; Indian Fred v. State, 36 Ariz 48, 282 p.930). In those circumstances, however, where the declarant's use of the interpreter is one which may be dictated by his choice his statements made through the interpreter are admissible without judicial authentication by the interpreter. Thus in Com. v. Vose, 157 Mass. 393, 32 N.E. 355, it was stated:

"When two persons who speak different languages and who cannot understand each other converse through an interpreter, they adopt a mode of communication in which they assume that the interpreter is trustworthy, and which makes his language presumptively their own. Each acts upon the theory that the interpretation is correct. Each impliedly agrees that his language may be received through the interpreter. If nothing appears to show that their respective relations to the

interpreter differ, they may be said to constitute him their joint agent to do for both that in which they have a joint interest . . . They cannot complain if the language of the interpreter is taken as their own by anyone who is interested in the conversation. Interpretation under such circumstances is prima facie to be deemed correct."

See Also 116 ALR 800, 803-807.

Thus since accused's employment of an interpreter in his conversations with Wong King Yung, Chen Zang and Chu Kong Sau was a matter of his personal choice his statements as heard through the interpreter are admissible without any judicial corroboration by the interpreter employed.

Soroka in his testimony was allowed to testify as to what Wong told him concerning a conversation Wong had with accused, and Wong was allowed to testify as to what Soroka told him concerning a conversation with accused. In both instances the conversation pertained to the signing of the tally-out sheet, Soroka testifying that Wong told him that accused told Wong to have Soroka sign the tally-out sheet and Wong testifying that when Soroka handed him the signed tally-out sheet Soroka told him that accused had told Soroka to sign it. In this respect the testimony is, in substance, conflicting. At first glance, however, the admitted testimony, conflicting as it is, appears incompetent as compounded hearsay. The evidence, however, shows that Wong, Soroka, and accused had entered into a conspiracy to misappropriate government property by a sale of the property by accused to Wong with Soroka acting as intermediary, and the circumstance that the evidence of conspiracy was established by the testimony of accomplices of dubious character does not render the evidence incompetent (*Woods v. U.S.*, 66 F. (2d) 262).

In regarding Wong as a conspirator despite his many disavowals of wrongdoing we merely point to his testimony wherein he stated that Major Chen was to receive a bribe of 300 drums; and to the testimony of Major Chen in which he testified that Wong was informed by him that to obtain a pass Wong would need an official letter from the United States Army authority and that subsequently Wong presented a signed "chit." There can be no doubt that Wong with guilty knowledge that the property involved in his transaction with accused was United States Government property, participated with accused and Soroka in a concerted action to deprive the United States of its property.

Applicable to the case at hand is the rule enunciated in par 118c, MCM, 1928: "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."

Thus extra-judicial statements of Wong and Soroka are admissible as statements made during and in furtherance of the conspiracy and the statements of accused contained therein are admissible as part of those statements and as such may be used against accused.

The statements of conspirators are admissible against accused despite the circumstances that a conspiracy was not charged and conspirators were not named in the Charges and Specifications (CM 275547, Garret; 48 BR 77,99).

7. The competent evidence thus shows that pursuant to an agreement for sale entered into by accused with the buyer, Wong, through the intermediary Soroka, Wong on 1 August 1947, at Kiangwan Airfield, China, took approximately 500 drums, property of the United States. There was evidence that the cost to the Government of 55-gallon drums was \$7.50 each. The cost of 40-gallon drums was not shown. Although it was shown that more than two months after the taking of the drums by Wong there were some 540 55-gallon drums in the trucks used by Wong, such evidence is not considered as competent to show that he took 540 55-gallon drums on 1 August. There is, however, competent evidence that Wong took approximately 500 drums from a pile which contained 55-gallon drums and a considerable number of 40-gallon drums, and that the drums taken by Wong had a value in excess of \$50.00.

8. The evidence in the case tended to show that the empty drums taken by Wong were impounded by Chinese military authorities. For the purpose of showing that the drums in question were United States Government property there was offered in evidence by the prosecution a letter addressed to Colonel Weissman, "Headquarters Military Police, United States Army" from Colonel Wong Mei Ming of the Chinese Air Force reciting that 540 drums would be released to Colonel Weissman upon his furnishing a receipt. The law member allowed the letter in evidence as "a circumstance of ownership of five hundred and forty empty gasoline drums and as indicating the willingness of the Chinese Air Force to deliver five hundred and forty empty gasoline drums, impounded by them, to the United States Army." As thus admitted the letter was incompetent to prove that the drums referred to therein were the drums which were the subject matter of the misappropriation, and hence as admitted the letter was clearly irrelevant. Under the circumstances its admission in evidence may not be said to have affected adversely accused's rights.

9. In the course of trial the prosecution was allowed to offer evidence of a similar offense by accused committed shortly before the commission of the offense upon which trial was had. In refusing to strike the testimony of the witness who gave the evidence concerning the alleged previous offense the law member commented:

"\* \* \* That part of the testimony that is competent, having to do with an alleged previous similar sale of empty drums,

is believed to be admissible as a circumstance tending to, with other facts, prove an element of proof of the offense with which the accused is charged. That is, that the act of which the accused is charged was wilfully and knowingly done, and upon the fact that where guilty knowledge in respect of the act is an element of the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that knowledge, is not inadmissible by reason of the fact that they may tend to establish the commission of another offense not charged." (R 172,173).

This was a correct statement of the rule contained in par 112b, MCM, 1928. In determining the question of the legal sufficiency of the finding of guilty (as modified here) we have not resorted to the evidence pertaining to such other offense except as to a collateral matter shown below.

10. Although Prosecution Exhibit 13, the letter to the Texas Company authorizing that company to drop accountability for empty drums and purportedly signed by accused, was admitted in evidence without objection, defense counsel in his closing argument stated that there was no proof that accused had signed the letter. In this connection Chu Kong Sou the witness who gave evidence of the other offense stated that Prosecution Exhibits 19,20,21 and 22, four tally-out sheets, were signed by accused in his presence. The four exhibits were introduced in evidence. These four exhibits contained known specimens of accused's handwriting and by comparison the court could determine that the signature on the Texas Company letter (Prosecution Exhibit 13) was that of accused (CM 325112, Halbert). In addition Major Hash identified the signature on the letter as that of accused.

11. Records of the Army show that accused is 42 years of age, married, and has two children. He was graduated from high school in 1923. There is no information as to his civilian employment. He had enlisted service in the Regular Army from March 1928 until March 1942 when he was appointed first lieutenant. Since then he was promoted through successive ranks to that of major attaining the latter rank in October 1943. On 26 June 1947 he was appointed Lieutenant Colonel, ORC. He is authorized to wear the following ribbons: Army Commendation Ribbon, Aviation Badge "Air Crew Member", Asiatic-Pacific Theater Ribbon, American Theater Ribbon, and World War II Victory Medal. His efficiency ratings range from "Excellent" to "Superior."

12. The court was legally constituted and had jurisdiction of the person and the offense. Other than as hereinbefore noted 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

(90)

is legally sufficient to support only so much of the finding of guilty of the Specification of the Charge as involves finding that at the time and place alleged accused, did, knowingly and willfully misappropriate about 500 drums (oil) of a value in excess of \$50.00 property of the United States furnished and intended for the military service, legally sufficient to support the sentence and to warrant confirmation of the sentence. A sentence to dismissal, and confinement at hard labor for one year is authorized upon conviction of a violation of Article of War 94.

*R. Kottstein*, Judge Advocate

*J. W. Lynch*, Judge Advocate

(On temporary duty), Judge Advocate

JAGH CM 328416

1st Ind

JAGO, Department of the Army, Washington 25, D.C. 23 JUL 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 Raymond C. Pierce (O-442171), Air Division, Army Advisory Group.

2. Upon trial by general court-martial this officer was found guilty of knowingly and willfully misappropriating about 540 empty oil drums of a value of about \$1670.00, property of the United States furnished and intended for the military service in violation of Article of War 94. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for one year. 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 only so much of the findings of guilty of the Specification of the Charge relating to amount and value as involves a finding of about 500 drums of a value in excess of fifty (\$50.00) dollars; legally sufficient to support the sentence and to warrant confirmation of the sentence. I concur in that opinion.

During the six months preceding 12 August 1947 accused was Director of Supply and Service at Kiangwan Airfield, Shanghai, China. At the field were stored a large number of drums used to transport petroleum products. These drums which were Army property were in the custody of the Texas Company (also referred to in the record as "Caltex") which was supplying petroleum products to the Army at Kiangwan. In June 1947 accused approached Nohom E. Soroka, a Texas Company employee, and asked Soroka if he would release empty drums without authorization. Soroka refused and subsequently accused gave him a letter addressed to the Texas Company authorizing the Texas Company to drop accountability for drums. Soroka then introduced accused to a Chinese named Wong King Yung, who was interested in purchasing drums. Accused agreed to sell Wong a number of drums and a price was agreed upon. Accused refused, however, to give Wong a bill of sale. Wong was furnished a tally-out sheet for 1800 drums which was signed by Soroka with a fictitious name. On the strength of the tally-out sheet Wong was admitted to Kiangwan Airfield with trucks and took approximately 500 drums. On leaving the field, however, he was apprehended and the trucks and drums were detained.

4. The accused is 42 years of age, married and has two children. He was graduated from high school in 1923. There is no information as

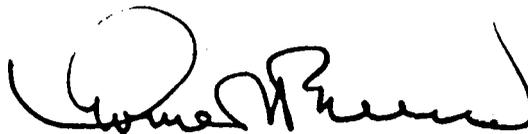
(92)

to his civilian employment. He had enlisted service in the Regular Army from March 1928 until March 1942 when he was appointed a first lieutenant. Since then he was promoted through successive ranks to that of major attaining the latter rank in October 1943. On 26 June 1947 he was appointed Lieutenant Colonel, ORC. He is authorized to wear the following: Army Commendation Ribbon, Aviation Badge "Air Crew Member," Asiatic-Pacific Theater Ribbon, American Theater Ribbon, and World War II Victory Medal. His efficiency ratings range from "Excellent" to "Superior."

5. I recommend that only so much of the findings of guilty of the Specification of the Charge relating to amount and value as involves a finding of about 500 drums of a value in excess of fifty (\$50.00) dollars be approved, 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 recommendations into effect, should such recommendations meet with your approval.

2 Incls  
1 Record of trial  
2 Form of action



THOMAS H. GREEN  
Major General  
The Judge Advocate General

~~110010/~~  
( GCMO 146, 2 August 1948).

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

(93)

JAGQ - CM 328447

23 JAN 1948

UNITED STATES )

PHILIPPINES-RYUKYUS COMMAND

v. )

Trial by G.C.M., convened at  
PHILRYCOM, 26 November 1947.  
Dishonorable discharge and  
confinement for one (1) year.  
PHILRYCOM Stockade.

Private MAURO B. TULAGAN )  
(10335340), Company C, 58th )  
Engineer Combat Battalion (PS) )

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that, Private Mauro B. Tulagan, Company C, 58th Engineer Combat Battalion (Philippine Scouts), with intent to defraud, did, at Camp Angeles, APO 74, on or about 20 October 1947, unlawfully pretend to Private First Class Isidro A Agregado that he was still on special duty with Military Police Detachment, Camp Angeles, APO 74, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Private First Class Isidro A Agregado, one Pistol Caliber .45 of the value of about \$38.00, two (2) magazines, Pistol Caliber .45 of the value of about \$0.60, and fourteen (14) rounds of ammunition, Caliber .45, of the value of about \$0.30, of a total value of about \$38.90, property of the United States.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence, designated General Prisoners Branch, PHILRYCOM Stockade as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. Evidence for the Prosecution.

Accused was relieved as member of the Military Police Detachment, Camp Angeles, P.I., and transferred to the 58th Engineer Combat Battalion on 6 October 1947 (R. 7, 10). Thereafter on 20 October 1947 accused

stated to Private First Class Agregado, who was on duty in the armory detail of the Military Police Detachment, Camp Angeles, that he desired to "draw a .45 because he go on duty at Engineer Depot" (R. 7,8). Accused was issued the pistol, two magazines and fourteen rounds of ammunition for which he signed a receipt under the name of "Espinoza" (R. 8,9; Pros Ex 1). After accused departed with the pistol, Agregado discovered the false name on the receipt and reported the matter to Corporal Soliven (R. 8). Later, the same day accused delivered the pistol to Sergeant Rogue at the latter's request (R. 9).

Accused stated to the officer who investigated the charges that he received the property in question, signed the receipt with a fictitious name and then went to his own organization (Pros Ex 2).

4. Evidence for the Defense.

Accused, after being advised of his rights as a witness elected to make an unsworn statement (R. 11, 12) to the effect that he had been assaulted by two soldiers on 17 or 18 October and that he drew the pistol in question on 20 October because he was afraid they would attack him again.

5. The Specification of which accused was found guilty alleges that accused did with intent to defraud "unlawfully pretend to Private First Class Isidro A. Agrigado that he was still on special duty with Military Police Detachment, Camp Angeles, APO 74, well knowing that said pretenses were false, and by means thereof did fraudulently obtain" the property in question. One of the essential elements of the offense charged, if not in fact the most important, is the "false pretense" or "statement" which accused is alleged to have made and on which the victim relied in parting with the property. In fact that is the gist of the entire offense and constitutes the "specific fraud involved" (CM 270454, Kreis; 45 ER 289 (292) CM 199641, Davis, 4 ER 145). This element of the offense charged in the instant case is alleged by the words in the specification that accused did unlawfully pretend "that he was still on special duty with Military Police Detachment, Camp Angeles." The record of trial has been searched in vain for any testimony tending to show that any such pretense, statement or representation was made by accused. Agregado, the person to whom such "pretense" is alleged to have been made, testified that accused stated that he desired to draw the pistol because he was going on duty at the Engineer Depot (R. 8). The Staff Judge Advocate stated in his review that it may be reasonably inferred that "to go on duty at the Engineer Depot meant to perform guard duty as a member of the Military Police Detachment." The record of trial is devoid of any evidence to the effect that only members of the Military Police Detachment were assigned such duty at the Engineer Depot and consequently it is difficult to understand how a statement that accused was to go on duty at the Engineer Depot could possibly give rise to any logical inference that he was on special duty with the Military Police Detachment.

Such a contention is without merit and is not sustained by the evidence.

It is recognized that no particular form of representation is necessary to constitute a false pretense and that the pretense may be made by mere actions as well as by oral or written statements. In those cases however where the actions of accused constitute the offense it is necessary to show that his actions in question were relied on by the victim in parting with his property. The record of trial contains no testimony that Agregado had ever issued accused a weapon prior to the date of this offense when accused was a member of the military police detachment nor that he issued the pistol in question for the reason that he believed accused was still a member of that organization. In fact there is not even any testimony to the effect that only members of the military police detachment were authorized to draw weapons from Agregado in his capacity as clerk in the armory detail of that organization. The Board of Review is of the opinion that the record contains no competent evidence to the effect that accused made the "pretense" alleged in the specification nor that any pretense by accused was relied upon by Agregado in parting with the property in question and accordingly two essential elements of the offense charged were not proved.

There is however an additional ground for holding the record legally insufficient even though it be assumed that the exact pretense, namely, "to go on duty at the Engineer Depot" was properly alleged in the specification. The principle is too well settled to admit of argument that the representation or pretense must relate to a past or existing fact and not an act to be performed in the future. The pretense which accused made and by which he obtained the pistol was that he was going on guard duty at the Engineer Depot. This representation was false as accused admits he went immediately to his organization but as it related to an act to be accomplished in the future it could not form the basis for the offense of obtaining property under false pretense. In Clark's Criminal Law, Sec 103-104, page 364, it is stated that "a request for a loan of money saying, 'I am going to pay my rent', is a representation as to the future, and not a false pretense within the statute."

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

W. H. Johnson, Judge Advocate  
Wm. T. Bangham, Judge Advocate  
A. J. Kane, Judge Advocate

(96)

JAN 29 1948

JAGQ - CM 328447-

1st Ind

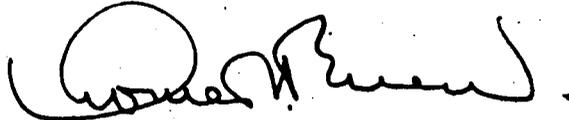
JAGO, Dept. of the Army, Washington 25, D. C.

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

1. In the case of Private Mauro B. Tulagan (10335340), Company C, 58th Engineer Combat Battalion (PS), I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

2. When copies of the published order in this case are forwarded to this office, 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 328447)



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 328451

10 FEB 1948

U N I T E D S T A T E S	)	AMERICAN GRAVES REGISTRATION COMMAND
	)	
v.	)	Trial by G.C.M., convened at Paris,
	)	France, 18 December 1947. Dismissal,
Captain RUSSELL P. ROBINSON	)	total forfeitures and confinement for
(O-319674), Infantry.	)	five (5) 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: Violation of the 58th Article of War.

Specification: In that Captain Russell P. Robinson, Embarkee Transient Detachment, 7749 Staging Area, then of Headquarters, 1533 Labor Supervision Company, did, at or near Berry-Au-Bac, France, on or about 5 October 1946, desert the service of the United States and did remain absent in desertion until he was apprehended at Paris, France, on or about 28 October 1947.

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

Specification 1: In that Captain Russell P. Robinson, \*\*\*, did, at Paris, France, on or about 5 November 1946, present for approval and payment, a claim against the United States, by presenting to Major A. A. Amunrud, FD, United States Army, duly authorized to approve and pay such claims, in the amount of \$121.40 for base and longevity pay, foreign service pay, subsistence allowance and rental allowance, as being due him for the period 1 October 1946 to 31 October 1946, totaling \$420.90, less debits totaling \$299.50, and did receive in payment therefor the sum of \$121.40 from the disbursing office of said Major A. A. Amunrud, FD, which claim was false and fraudulent in that the said Captain Russell P. Robinson was not entitled to base, longevity and foreign service, subsistence allowance and rental allowance pay for the period 5 October 1946 to 31 October 1946, inclusive, and was then known by the said Captain Russell P. Robinson to be false and fraudulent.

NOTE: Specifications 2 to 12, inclusive, vary materially from Specification 1 only as to date each alleged false claim was presented, the amount and period for which claim was made and the finance officer to whom each was presented, as follows:

<u>Spec.</u>	<u>Date Claim Presented</u>	<u>Amount Received</u>	<u>Period for which Claim Made</u>	<u>Finance Officer to Whom Presented</u>
2	15 Nov 46	\$241.40	1 Oct 46 to 31 Oct 46	Maj A A Amunrud, FD
3	17 Jan 47	\$380.65	1 Nov 46 to 31 Dec 46	Maj F S Stratton, FD
4	20 Mar 47	\$241.85	1 Jan 47 to 28 Feb 47	Maj F S Stratton, FD
5	4 Apr 47	\$192.90	1 Mar 47 to 31 Mar 47	Maj F S Stratton, FD
6	17 Apr 47	\$125.00	1 Apr 47 to 17 Apr 47	Maj F S Stratton, FD
7	20 May 47	\$125.00	1 May 47 to 20 May 47	Maj F S Stratton, FD
8	1 Aug 47	\$526.40	1 June 47 to 31 July 47	Maj F S Stratton, FD
9	5 Sep 47	\$263.90	1 Aug 47 to 31 Aug 47	Maj F S Stratton, FD
10	18 Sep 47	\$130.00	1 Sep 47 to 18 Sep 47	Maj F S Stratton, FD
11	22 Oct 47	\$640.30	1 July 47 to 30 Sep 47	Col B J Tullington, FD
12	23 Oct '47	\$250.00	1 Oct 47 to 23 Oct 47	Col B J Tullington, FD

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

Specification: In that Captain Russell P. Robinson, \*\*\*, did, at Paris, France, on or about 28 October 1947, wrongfully have in his possession false official orders, purportedly issued by the Commanding Officer of the 39th Reinforcement

Battalion, 17th Major Port, Bremerhaven, in words and figures, substantially as follows:

"39th REIN. BATTALION  
17th Major Port  
Bremerhaven, Germany

APO 751  
19 Oct. 47.

----- EXTRACT -----

SPECIAL ORDER NUMBER

136

4. The fol named O & EM will report to the Provost Marshal Office, Graves Registration, Paris, France, on or about 20 Oct 47. Upon completion of TDY, O & EM will return this Hq. Period not to exceed 10 da. Travel by rail is auth. (Auth. TWX, Hq. USFET dated 19 Oct 47 - TDN FD 33 P 433 - O2 A 0425 - 23)

CAPT. RUSSELL P. ROBINSON - O - 319674

Pvt. Albert J. Benedetto - 31145710

By order of Colonel LOCKETT:

H. A. GUNDERSON  
1st Lt., A.G.D.  
Adjutant

OFFICIAL:

H. A. GUNDERSON  
1st Lt., A.G.D.  
Adjutant

I certify this is a true copy:

S/ Russell P. Robinson

T/ RUSSELL P. ROBINSON  
Capt.                      Inf.\*

which said orders were, as he, the said Captain Russell P. Robinson then well knew, falsely made.

He pleaded not guilty to desertion in violation of Article of War 58 but guilty to absence without leave for the period alleged in violation of Article of War 61. He pleaded guilty to all other charges and specifications. He was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 48.

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

4. Records of the Department of the Army show that the accused is 34 years of age, has been married and is the father of one son. He graduated from Culver Military Academy in 1932 and was engaged as a salesman for several industrial concerns prior to being commissioned a second lieutenant, AUS, in April 1942. His efficiency reports average "Excellent."

5. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized for a violation of Articles of War 58, 94 or 96.

Charles A. Silvers . Judge Advocate

Edw. J. DeLoach . Judge Advocate

Harley A. Lanning . Judge Advocate

JAGK - CM 328451

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. FEB 26 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 Captain Russell P. Robinson, (O-319674), Infantry.

2. Upon trial by general court-martial this officer was found guilty of desertion in violation of Article of War 58, twelve offenses of presenting for approval false and fraudulent pay vouchers in violation of Article of War 94, and wrongfully having in his possession false official orders 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 ten years. The reviewing authority approved the sentence but reduced the period of confinement to 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 review of the Staff Judge Advocate, which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in the case.

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

On or about 5 October 1946 the accused absented himself without authority from his organization, the 1533rd Labor Supervision Company, then located at Berry-au-Bac, France. He became attached to a French girl with whom he lived in a hotel in Paris, France, until he was apprehended on 28 October 1947 by an agent of the Provost Marshal's Office in Paris. At various times within the period of the unauthorized absence the accused presented twelve false and fraudulent pay vouchers to U.S. Army Finance officers, collecting in excess of \$3,000.00 in pay and allowances to which he was not entitled. When apprehended the accused had on his person false orders purporting to place him on temporary duty in Paris.

Information leading to the accused's apprehension appears to have been furnished by various Frenchmen to whom the accused had become indebted for hotel bills and entertainment. The accused pleaded guilty to absence without leave for the period alleged in the specification of the Charge, in violation of Article of War 61. He pleaded guilty to all other charges and specifications. After the Law Member had explained to the accused the meaning and effect of his plea, he stated that he desired the pleas of guilty to stand.

The accused is 34 years of age and has been married but is now divorced. He is the father of a son about six years of age. He graduated from Culver Military Academy in 1932 and was a salesman for various companies prior to being commissioned a second lieutenant, AUS, in April 1942.

4. There is attached to the record of trial a letter from the reviewing authority recommending that, in view of accused's pleas of guilty, his repentance for his misdeeds and the probability that he can be rehabilitated, consideration be given to the designation of an appropriate disciplinary barracks as the place of confinement. There has also been received in my office a petition signed by all the members of the court wherein it is recommended that consideration be given to the designation of an appropriate U.S. disciplinary barracks as the place of confinement so that the accused might, if his conduct merited it, be eventually afforded the opportunity to reenlist in the Army. One of the members signing the petition excepted the portion thereof relating to possible reenlistment.

I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution. In view of the recommendations concerning the place of confinement, and the apparent absence of any prior criminal record of the accused, I recommend that an appropriate U.S. disciplinary barracks be designated as the place of confinement.

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

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



THOMAS H. GREEN  
Major General  
The Judge Advocate General

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GCMO 61, 4 March 1948).

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

(103)

JAGQ - CM 328477

3 FEB 1948

UNITED STATES )

FIFTH AIR FORCE

v. )

Private CLEVELAND N. MOORE  
(RA 18252245), Headquarters  
and Base Service Squadron,  
13th Air Depot, APO 704. )

Trial by G.C.M., convened at  
APO 704, 28, 29 October 1947.  
Dishonorable discharge and  
confinement for three (3)  
years. Federal Reformatory.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Private Cleveland N. Moore, Headquarters and Base Service Squadron, 13th Air Depot, did, at JAMA Army Air Base, Honshu, Japan, on or about 20 August 1947, wilfully, feloniously and unlawfully kill Shinnosuke Yamagata, a human being, by beating him on the head, face and body with a carbine and with one or more stones.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for seven (7) years. The reviewing authority approved only so much of the finding of guilty of the Specification of the Charge as involved a finding that the accused did, at the time and place alleged, feloniously and unlawfully kill Shinnosuke Yamagata, a human being, by beating him on the head, face and body with a carbine and with one or more stones, approved only so much of the sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for three (3) years, designated the Federal Reformatory, El Reno, Oklahoma, or elsewhere as the Secretary of the Army may direct as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

### 3. Evidence for the Prosecution.

At approximately 1825 hours, 20 August 1947, Private First Class Melvin B. Gable, a sentry on Post #17, Signal Supply Area Salvage Depot, APO 704, heard three shots fired (R. 10) and proceeded to the adjoining Post to investigate where he found accused, a sentry on that post, standing approximately 10 feet from a wounded Japanese. Accused was holding his calibre .30 carbine in the position of port arms (R. 10, 12), and the Japanese was lying " \* \* \* on his back and sort of twisted over \* \* \* he was trying to get up and blood was running from his right temple" (R. 10). The Japanese was wearing only shoes, leggings and trousers and was unclothed above the waist. Private Gable did not observe any blood or bruises on the body of the Japanese and accused would not permit him to approach within a distance of 40 to 60 feet of the scene but the light conditions were sufficiently good at that time for him to observe competently the events. Accused informed him that he had "just shot a man" and requested that Private Gable give him his weapon since his carbine was out of shells (R. 13). This request was refused (R. 13). After remaining at the scene for approximately one minute Private Gable left to summon the Corporal of the Guard. The accused's weapon was in good condition at that time, there appeared to be no blood on accused (R. 11, 12), or on the concrete upon which the Japanese was lying and the Japanese did not appear to be bleeding profusely from the wound in his temple (R. 11).

Private First Class Howard G. Guise, a Military Policeman on town patrol whose duty included checking the supply area every half hour, was informed of the difficulty by Private Gable whom he encountered at the main gate. Thereupon, Private Guise proceeded to the scene of the shooting arriving shortly after 1830 hours. He observed accused standing approximately 6 feet from a Japanese who was lying somewhat on his side and was covered with blood. Accused was holding his carbine at a port arms position, and he had blood on his hand and body and there was blood on the carbine. Accused related to Private Guise that he "yelled 'halt'" to the Japanese and then fired a shot whereupon the Japanese fell. When the Japanese regained his feet the accused fired again and the Japanese fell for the second time. Although uncertain as to whether or not the Japanese had regained his feet for the third time, accused stated that he broke his carbine by knocking him down at that time (R. 20). Accused further told Private Guise that if the Japanese got up once more he was going to knock him down again and was advised that this was unnecessary (R. 21). Private Guise observed a bloody rock in the immediate area. According to accused, the Japanese had struck his head on the rock when he fell. Private Guise left the area after three or four minutes to summon proper military authorities (R. 24). Shortly thereafter, Private Gable returned to the scene and upon approaching to within five or six feet of the Japanese, observed that the latter was covered with blood above his waist and was lying in a pool of blood (R. 12). The Japanese appeared motionless lying on his back with his head on the ground (R. 18).

Private Gable observed wounds upon the Japanese's upper extremities in addition to the wound upon his right temple previously noted. He likewise observed that accused had blood on his hands, that the carbine was broken at the balance and that there was blood on both the barrel and the stock of the weapon (R. 12). Some five or six minutes after Private Gable returned to the scene, Corporal George G. Whittaker of the Provost Marshal's Office arrived. Accused halted Corporal Whittaker by stating "stop, don't come any closer." Corporal Whittaker, upon observing that accused was in a highly nervous condition, obeyed his order. After talking to the accused for three or four minutes, however, the latter brought his rifle over and placed it upon the hood of the jeep Corporal Whittaker was driving (R. 25). At that time Corporal Whittaker observed that the carbine was bloody and had a broken stock, and that there was no shells in the gun (R. 25-27). While at the scene Corporal Whittaker saw the Japanese on the ground, covered with blood above the waist (R. 25); blood was flowing from the back of the Japanese's head and there were several pools of blood approximately three feet in diameter upon the concrete in the immediate vicinity (R. 25). Blood spots of approximately the same dimensions were seen at 2000 hours on the same night by Technical Sergeant Leo B. Reyes, investigator. Sergeant Reyes observed in addition to the blood spots on the pavement, a broken rock with blood in the cracks. This was "a few feet away" from the nearest blood stained area on the concrete and there was no blood under the stone or within any reasonable distance thereof (R. 30-32, 35). Six other blood stained stones were found within a radius of some 30 feet from the stains on the concrete at approximately 0900 hours the following day (R. 31, 32). Several cartridge cases were also found "a considerable distance" from the pavement (R. 31).

Captain James C. Caldwell, the Provost Marshal, talked to the accused concerning the incident at about 1900 hours, 20 August 1947. The captain informed accused that "there would probably nothing come of it; that if the man died he would probably be court-martialed and it would be placed on his record that this occurred in line of duty" (R. 42-45). Captain Caldwell explained that this was told to accused "to set his mind at ease," since he had recently been released from the stockade and was apprehensive about being reconfined (R. 45). Accused was placed in arrest and sent to his barracks (R. 42, 46). Later the same night Captain Caldwell summoned accused, warned him of his rights under Article of War 24 and obtained a verbal unsworn statement from him. Another statement was similarly taken from accused in Captain Caldwell's office the following morning and later the same day accused "went through the sequence of events as they happened" at the scene as he related the happenings to Captain Caldwell (R. 42-46). In all three statements, which were an "exact repetition" of each other (R. 46), accused stated that as he was walking his post in the 317th Signal Supply Area someone ran out from behind a building and proceeded toward the south. The accused challenged him and then fired a shot over the man's head. The man kept running and accused fired again. The victim staggered and "went down." Then he tried to get up and accused fired the

third time, which shot, according to accused, missed the man. Accused approached the intruder and "struck him with a vertical butt stroke and followed up with a slash with the butt at which time the rifle broke in two pieces. He kept calling for the Corporal of the Guard all of the time and very shortly another sentry came over" (R. 47). Accused also stated to Captain Caldwell that "after he had broken his rifle the Japanese tried to get up again and he picked up a rock and hit him on the head with it \* \* \* three or four times" (R. 47). He stated that he did not strike the Japanese after the other sentry went to summon the Corporal of the Guard and denied having anything to drink after 1500 hours the day in question (R. 47).

Approximately thirty minutes after the incident, an ambulance from the 376th Station Hospital removed the injured Japanese, who was subsequently identified as Shinnosuke Yamagata of Suginami-Ku, 4 Chome 48, Tokyo (R. 13, 53, 62, 63; Pros Ex B). The victim was given treatment at the Kyosai Hospital, Tachikawa Prefecture at about 2100 hours that night (R. 54, 65), subsequently on 20 August 1947, or a date "right close" thereto, Captain Robert E. Cook, a medical officer on detached service with the 376th Station Hospital, witnessed an autopsy performed upon the body of Yamagata at the Kyosai Hospital by a Japanese pathologist from Tokyo University (R. 39, 40, 53, 54; Pros Exs B, G, H, I). According to Captain Cook, it was not possible to determine from the autopsy the actual cause of death but, in general, Yamagata died of injuries to the head, either by bleeding to death as a result thereof or because of injury to the brain (R. 55). There were thirteen separate lacerations on the head of the deceased, with bruises under each, and five separate fractures of the skull - three depressed and two linear. In each of the three depressed skull fractures, the bone was broken away from the cranium and forced into the skull cavity. "The first was a fracture in the left parietal bone, round in shape, about one and one-half centimeters in diameter, and merely a depression of the outer table upon the inner table. The second was in the right frontal bone \* \* \* an elongated depressed skull fracture about three centimeters long and one-half centimeter wide, which penetrated the inner and outer tables of the skull. The third was in the left occipital region, deep on the neck under the muscles. The triangle of the bone pointed up (R. 55, 56, 58, 60). The brain itself showed multiple contusions and there were hemorrhages into the brain (R. 56). The dura or covering of the brain had not been penetrated, however" (R. 59). Captain Cook further testified that it required a "pretty hard blow" to produce a depressed skull fracture and that one of the blows "was through one of the thickest portions of the skull and it was also covered by the muscles of the neck. It takes a blow of great force to produce a fracture like that" (R. 56). The particular fracture last referred to could not have been caused by falling upon a rock, although several of the other fractures could have been so caused (R. 56). Of the several rocks exhibited to the witness (Pros Exs B, D), neither were, in the opinion of Captain Cook, of a character capable of being used to produce the fracture in the left occipital region

on the body of the victim (R. 57-59). The muzzle of a carbine, or the butt thereof, were, however, of such composition as to be capable of producing one or more of the skull fractures (R. 58, 59). In most cases a depressed skull fracture results in unconsciousness, but it is possible for a man having a depressed skull fracture to "walk away" (R. 62). Any of the blows producing a skull fracture would be capable of rendering a man unconscious (R. 58).

In addition to the above head injuries, the autopsy disclosed that on the left side of the body there were seven fractured ribs (R. 56). There were no wounds on the Japanese caused by a bullet insofar as Captain Cook could determine (R. 58).

#### 4. Evidence for the defense.

First Lieutenant Alan M. Hurst, Air Corps, was called as a witness for the defense and testified relative to the treatment of the Japanese Yamagata at about 2100 hours 20 August 1947 at the Kyosai Hospital. According to this witness, the deceased stated that he lived in Suginami-Ku, in answer to a question of the Japanese doctor, and later he uttered the word "tasukeri", meaning "save me" (R. 64-66, Pros Ex B). He further testified that he observed that the Japanese was conscious two or three hours prior to treatment at the hospital while he was lying at the rail-head in the 317th Area at "JAMA" (Japan Area Materiel Area) (R. 66).

The accused, who had been fully advised of his rights by counsel, elected to remain silent (R. 66).

In the course of the trial, evidence adduced by the prosecution favorable to the accused showed that he was posted as a sentinel at approximately 1800 hours 20 August 1947 on Post No. 14, 317th Area, Signal Supply Area, Salvage Depot "JAMA" (R. 9, 10, 19, 53); that he properly performed his duty when he halted the sentry from adjoining Post No. 17 and Corporal Whittaker some distance from the scene of the shooting (R. 14, 27); that no one was permitted in the area or on accused's post without proper authority and if a Japanese was found in the area after 1800 his presence would be unauthorized (R. 14, 51, 53); that on 20 August 1947 each guard on Posts No. 14 and 17 were issued only three shells but thereafter each was issued thirteen rounds (R. 14, 51); that the Japanese was wearing rubber or canvas Japanese-made shoes rather than wooden shoes (R. 29); that prowlers were reported in some areas practically every night (R. 51); and that deceased was still conscious immediately prior to being removed from the scene of the incident (R. 66).

5. Accused was arraigned and tried for the offense of manslaughter in violation of Article of War 93. Proof required for that offense includes:

"(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof

that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and (b) the facts and circumstances of the case, as alleged, indicating that the homicide amounted in law to manslaughter." (Par. 148a and 149a, MCM, 1928, p. 164, 167).

In view of the competent direct and circumstantial evidence in the record of trial in support of (a) above, the Board of Review is herein concerned only with the element of proof enunciated under paragraph (b). The omission of the word "willfully" in the Specification and the reduction of the sentence to that prescribed for involuntary manslaughter, by the reviewing authority, further limits consideration to that lesser included offense.

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life or by culpable negligence in performing a lawful act or in performing an act required by law (Clark) (Par. 149a, MCM, 1928, p. 165, 166). It is further provided in the Manual for Courts-Martial 1928:

"In involuntary manslaughter in the commission of an unlawful act, the unlawful act must be evil in itself by reason of its inherent nature and not an act which is wrong only because it is forbidden by a statute or orders. Thus the driving of an automobile in slight excess of a speed limit duly fixed, but not recklessly, is not the kind of unlawful act contemplated, but voluntarily engaging in an affray is such an act. To use an immoderate amount of force in suppressing a mutiny is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least (Par. 149a, MCM, 1928, p. 166).

In considering the facts in the instant case in the light of the above definitions, it is essential to emphasize at the outset that the defenses of "legal justification" and "legal excuse" prevail whether the offense be murder or manslaughter in either degree. In a homicide done in the performance of duty, "the general rule is that the acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority and such that a man of ordinary sense and understanding would know to be illegal" ((Wharton on Homicide) par. 148a, MCM, 1928, p. 163). This contemporary rule appears to be based historically upon such precedents as the early case of United States v. Carr, 25 Fed. Case 306-309, (cited in footnote p. 675, Winthrop's Military Law and Precedents, Second Edition, 1920 Reprint) wherein it is stated:

"It is not every killing of a human being that is criminal. Many homicides are of such a nature as to be no crimes at all \* \* \*

"It was the duty of the prisoner as officer of the guard to preserve the peace within the fort, and to suppress disorderly and mutinous conduct. He was authorized to use all proper and reasonable means to accomplish this end. But the means used and the force applied should be measured by the necessity of the case. For instance, the law would not justify the killing of a single unarmed soldier even though drunken riotous or even mutinous when he could be arrested without resort to such extreme means. The means used must be proportionate to the end to be accomplished. In order to determine whether the homicide, now under investigation, was lawful or unlawful you (the jury) should consider what under the circumstances of the case would appear to a reasonable man to be the demands of duty \* \* \* it must be understood that the law will not require an officer charged with the order and discipline of a camp to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required." (Underscoring supplied)

Thus it is clear that the Board of Review in the present case is concerned solely with the question of whether there is in the record competent evidence, either direct or circumstantial, establishing that the acts of the accused were manifestly beyond the scope of his authority as a sentinel and would be known to be illegal to a man of ordinary sense and understanding. Stating the principal somewhat differently the Board must determine whether there is substantial evidence of record in the case presented by the prosecution tending to show that accused was justified for his acts, or excused or, if not, whether he failed to meet the burden sometimes considered as cast upon him, viz:

"If the killing is proved or admitted by the accused, malice may be inferred from the circumstances already proved, and it is then incumbent upon the defendant to prove circumstances that will excuse, mitigate or justify the killing, unless (and this exception is extremely important) the proof offered by the state tends to show that the defendant was excused or justified. If circumstances are shown by the state from which, when uncontradicted or proved, a presumption of malice is drawn by the law, as, for example, the intentional use of a deadly weapon, or from which an inference may be drawn by the jurors, it is considered that the state has satisfied the rule casting the burden upon it, and that the accused, if he wishes to exculpate himself, must prove the facts on which his defense is based." (Sec. 575, Homicide, Underhill's Criminal Evidence, Fourth Edition; underscoring supplied).

The precedent last cited and legal authority of similar import from non-military jurisdictions are of questionable applicability to the instant case, especially in view of their remote relationships to the military and their lack of cognizance of military procedures and the exigencies of the military service. This is exemplified to a degree by the language of the following historical precedent recently cited in CM 326604, Gusik (1948):

"In respect to those compulsory duties while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been and never should be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. The officer, being entrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided to him in cases without his jurisdiction, or in a manner not confided in him, as with malice, cruelty or willful oppression, or, in the words of Lord Mansfield, that he exercised it as if 'the heart is wrong.' In short, it is not enough to show that he committed an error of judgment, but it must have been a willful and malicious error" (United States v. Clark, 31 Fed. Case 710).

Regardless of which of the above principles are applied in the instant case, however, the Board of Review finds the evidence of record of such a character as to satisfy either requirement in favor of the accused. It is clearly established that this youthful soldier was lawfully armed with a deadly weapon and duly posted as a sentinel in an area containing highly valuable property of the United States Government situated in the occupied country of a former enemy. The fact that accused was given the seemingly token number of three rounds for his weapon did not decrease its deadly character or minimize the seriousness of his assigned military duty. This limitation on the issuance of ammunition was however most instrumental in setting the stage for the events which followed. It is only reasonable to assume that if the accused had been issued more ammunition or had been given the weapon of the sentry on the adjoining post, as he requested when the latter went for the Corporal of the Guard, he would have been able to stand guard over the intruder on his post and there would have been no necessity for resort to the primitive type of force employed. It is significant in this connection that the number of rounds issued to the sentries on the accused's post and the post adjoining was increased over four fold immediately following the incident. In addition, in determining the reasonableness of the measures taken by the accused sentry, the Board attaches importance to the fact that accused was not attacking the intruder when he requested the weapon of the other guard, which indicates that he wanted the weapon for the purpose of standing guard over his prisoner and having a well defined means of protecting

himself while awaiting assistance. Of even more importance is the knowledge, within the common experience of mankind, that prowlers, burglars and other unlawful intruders frequently attack their detectors and captors, and that the Japanese was still conscious following the incident. Perception of the nature and demands of an event after it has happened is recognized by all as being far superior to perception at the time of the occurrence. Detached reflection can hardly be commanded, or legally demanded, where the mind is additionally taxed by emotions of apprehension, fear or surprise. It should not be a condition of immunity that one actually faced with a crucial situation should pause to consider detachedly all of the possibilities as such would appear to a reasonable man (Rowe v. United States, 163 US 546; CM 310179, Mertes, 61 HR 211). As above enunciated, courts in similar cases have made clear that one carrying out a lawful order or duty is not required to weigh with scrupulous nicety the amount of force necessary \* \* \* and that "it is not enough to show that he committed an error of judgment, but it must have been a willful and malicious error" (United States v. Carr, supra; United States v. Clark, supra)

The Board of Review is therefore of the opinion that the evidence failed to show acts chargeable to the accused which were manifestly beyond the scope of his authority or which reflected at most more than a mistake in judgment. In view of all of the facts and circumstances disclosed, considered in the light of the above precedents, it cannot be said that the homicide was not legally justifiable, having been accomplished by the accused in the execution of his duties as a sentinel.

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

W.A. Johnson, Judge Advocate

Wilbert T. Baughm, Judge Advocate

J. D. Kane, Judge Advocate

(112)

JAGQ - CM 328477

1st Ind

FEB 9 1948

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

TO: Commanding General, Fifth Air Force, APO 710, c/o Postmaster,  
San Francisco, California

1. In the case of Private Cleveland N. Moore (RA 18252245), Headquarters and Base Service Squadron, 13th Air Depot, APO 704, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and the sentence and recommend that the findings of guilty and the sentence be disapproved.

2. When copies of the published order in this case are forwarded to this office 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 328477)



THOMAS H. GREEN  
Major General  
The Judge Advocate General

6918

1 Incl  
Record of trial



(114)

and by means thereof, did fraudulently obtain from the said Fisher Company, Tacoma, Washington, \$75.00, he, the said 1st Lt. William E. Hubbard II, then well knowing that he did not have and not intending that he should have sufficient funds in the Oak Cliff Bank & Trust Company, Dallas, Texas, for the payment of said check.

And 14 additional Specifications, substantially the same in form with Specification 1, except as to dates, payees and amounts, which are respectively as follows:

	<u>Date of Check</u>	<u>Payee and to whom issued</u>	<u>Amount</u>
Spec 2	26 July 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 3	1 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 4	2 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 5	5 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 6	9 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 7	23 July 1947	Cash (Rhodes Bros Dept Store)	\$ 50.00
Spec 8	26 July 1947	Cash (Rhodes Bros Dept Store)	\$ 75.00
Spec 9	1 August 1947	Cash (Rhodes Bros Dept Store)	\$100.00
Spec 10	2 August 1947	Cash (Rhodes Bros Dept Store)	\$100.00
Spec 11	5 August 1947	Cash (Rhodes Bros Dept Store)	\$100.00
Spec 12	24 July 1947	Sears Roebuck & Company	\$ 75.00
Spec 13	1 August 1947	Sears Roebuck & Company	\$100.00
Spec 14	23 July 1947	Cash (Peoples Store Company)	\$ 75.00
Spec 15	10 August 1947	Cash (Hotel Winthrop, Tacoma)	\$ 75.00

Specification 16: In that First Lieutenant William E. Hubbard II, Headquarters and Headquarters Squadron, 62nd Airdrome Group, did, at Klamath Falls, Oregon, on or about 7 August 1947, with intent to defraud, wrongfully and unlawfully make and utter to the Wi-Ne-Ma Hotel, Klamath Falls, Oregon, a certain check in words and figures as follows:

-----  
FORT LEWIS, WASH., 7 Aug 19 47 NO. \_\_\_\_\_  
Fort Lewis Branch  
NATIONAL BANK OF WASHINGTON 98-401  
1251  
PAY TO THE  
ORDER OF Wi-Ne-Ma \$ 100 00/100  
One Hundred-----00/100 DOLLARS  
in current funds  
  
/s/ William E. Hubbard II.  
1 Lt. O-23378  
-----  
McChord

and by means thereof did fraudulently obtain from said Wi-Ne-Ma Hotel, Klamath Falls, Oregon, one hundred dollars, he, the said 1st Lt. William E. Hubbard II, then well knowing that he did not have and not intending that he should have sufficient funds in the Fort Lewis Branch, National Bank of Washington bank, Fort Lewis, Washington, for the payment of said check.

And 2 additional Specifications substantially the same in form with Specification 16 except as to dates, payees and amounts, which are respectively as follows:

	<u>Date of Check</u>	<u>Payee and to whom issued</u>	<u>Amount</u>
Spec 17	8 August 1947	Wi-Ne-Ma Hotel, Klamath Falls	\$100.00
Spec 18	7 August 1947	Klamath Billards	\$100.00

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

Specification 1: In that First Lieutenant William E. Hubbard II, Headquarters and Headquarters Squadron, 62nd Airdrome Group, did, at Tacoma, Washington, on or about 24 July 1947, with intent to defraud, wrongfully and unlawfully make and utter to The Fisher Company, Tacoma, Washington, a certain check in words and figures as follows:

\_\_\_\_\_ 24 July 19 47

Oak Cliff Bank & Trust Co. Dallas, Texas  
 (Fill in Name of Bank) (City)

PAY TO \_\_\_\_\_ OR ORDER \$ 75 00/100  
 (STAMPED: COUNTER CHECK)

Seventy-five-----00/100 DOLLARS

McChord /s/ William E. Hubbard II.  
1 Lt. 0-23378

and by means thereof, did fraudulently obtain from the said Fisher Company, Tacoma, Washington, \$75.00, he, the said 1st Lt. William E. Hubbard II, then well knowing that he did not have and not intending that he should have sufficient funds in the Oak Cliff Bank & Trust Company, bank, Dallas, Texas, for the payment of said check.

And 14 additional Specifications, substantially the same in form with Specification 1, except as to dates, payees and amounts, which are respectively as follows:

	<u>Date of Check</u>	<u>Payee and to whom issued</u>	<u>Amount</u>
Spec 2	26 July 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 3	1 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 4	2 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 5	5 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 6	9 August 1947	Cash (Fisher Co, Tacoma)	\$100.00
Spec 7	23 July 1947	Cash (Rhodes Bros Dept Store)	\$ 50.00
Spec 8	26 July 1947	Cash (Rhodes Bros Dept Store)	\$ 75.00
Spec 9	1 August 1947	Cash (Rhodes Bros Dept Store)	\$100.00
Spec 10	2 August 1947	Cash (Rhodes Bros Dept Store)	\$100.00
Spec 11	5 August 1947	Cash (Rhodes Bros Dept Store)	\$100.00
Spec 12	24 July 1947	Sears Roebuck & Company	\$ 75.00
Spec 13	1 August 1947	Sears Roebuck & Company	\$100.00
Spec 14	23 July 1947	Cash (Peoples Store Company)	\$ 75.00
Spec 15	10 August 1947	Cash (Hotel Winthrop, Tacoma)	\$ 75.00

Specification 16: In that First Lieutenant William E. Hubbard II, Headquarters and Headquarters Squadron, 62nd Airdrome Group, did, at Klamath Falls, Oregon, on or about 7 August 1947, with intent to defraud, wrongfully and unlawfully make and utter to the Wi-Ne-Ma Hotel, Klamath Falls, Oregon, a certain check in words and figures as follows:

---

FORT LEWIS, WASH., 7 Aug 19 47 NO. \_\_\_\_\_

Fort Lewis Branch

NATIONAL BANK OF WASHINGTON 98-401  
1251

PAY TO THE  
ORDER OF Wi-Ne-Ma \$ 100 00/100

One hundred-----00/100 DOLLARS  
in current funds

/s/ William E. Hubbard II.  
1 Lt. O-23378

---

McChord

and by means thereof did fraudulently obtain from said Wi-Ne-Ma Hotel, Klamath Falls, Oregon, one hundred dollars, he, the said 1st Lt. William E. Hubbard II, then well knowing that he did not have and not intending that he should have sufficient funds in the Fort Lewis Bank, National .

Bank of Washington Bank, Fort Lewis, Washington, for the payment of said check.

And 2 additional Specifications substantially the same in form with Specification 16 except as to dates, payees and amounts, which are respectively as follows:

	<u>Date of Check</u>	<u>Payee and to whom issued</u>	<u>Amount</u>
Spec 17	8 August 1947	Wi-Ne-Ma Hotel, Klamath Falls	\$100.00
Spec 18	7 August 1947	Klamath Billards	\$100.00

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of one previous conviction was considered. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor for two years, and to pay a fine of One Thousand Dollars. The reviewing authority approved the findings of guilty of Specifications 7, 8 and 9 of Charges I and II, and approved the findings of guilty of Specifications 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of Charges I and II, respectively, with the exception of the following words "and by means thereof, did fraudulently obtain from [parties alleged], \* \* \* the amount of cash alleged." The findings of guilty of Charges I and II were approved and only so much of the sentence was approved as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of two years. The record of trial was forwarded 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 Twelfth Air Force Acting Judge Advocate, dated 17 January 1948.

4. Records of the Department of the Army show that accused is 32 years of age, married, and the father of two minor children. He attended Texas A & M College for three and one-half years and left that institution to enter the military service. He enlisted as a cadet at Randolph Field, Texas, on 10 March 1938 and was discharged at Kelly Field, Texas, on 31 January 1939 to accept a commission as Second Lieutenant on 1 February 1939. He has served continuously in the Army Air Forces since the date of acceptance of the commission. His efficiency ratings for principal duty consist of the following: two "Very Satisfactory," four "Excellent," twelve "Superior," and the last three "Unsatisfactory." As a result of punitive action administered to accused for insubordination to his superior officers in December 1946, he was demoted on 27 March 1947 from his temporary rank of Lieutenant Colonel to his permanent rank of First Lieutenant. On 14 April 1947, he was convicted by general court-martial of three separate offenses for making and uttering checks without sufficient funds in the drawee bank and was sentenced to restriction for three months and forfeiture of \$100 per month for six months.

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 as approved by the reviewing authority and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of the 95th Article of War. A sentence to dismissal, forfeiture of all pay and allowances due or to become due and confinement at hard labor for a period of two years is authorized upon conviction of a violation of the 96th Article of War.

*A. H. Stein*, Judge Advocate

*J. W. Lynch*, Judge Advocate

*Joseph T. Beach*, Judge Advocate

JAGH CM 328486

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 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 E. Hubbard, II, (O-23378), United States Air Force.

2. Upon trial by general court-martial, this officer was found guilty of fraudulently making and uttering 18 checks with insufficient funds and fraudulently obtaining the proceeds, in violation of Articles of War 95 and 96 (Chg I and II, Specs 1 to 18, respectively). Evidence of one previous conviction by general court-martial for making and uttering checks with insufficient funds in violation of the 96th Article of War was introduced. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor for two years, and to pay a fine of One Thousand Dollars. The reviewing authority approved the findings of guilty except the words "and by means thereof, did fraudulently obtain from \* \* \*, \* \* \* /the amount of cash alleged/.", respectively alleged in Specifications 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the respective Charges. Only so much of the sentence was approved as provides for dismissal, total forfeitures and confinement at hard labor for two years and the record of trial was forwarded for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Twelfth Air Force Acting Staff Judge Advocate, dated 17 January 1948, which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in this 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.

Accused is charged with fraudulently making and uttering 18 checks. 15 of the checks were drawn on the Oak Cliff Bank and Trust Company, Dallas, Texas, and three checks were drawn on the Fort Lewis Branch, National Bank of Washington, Fort Lewis, Washington. The 15 checks drawn on the Oak Cliff Bank and Trust Company bear dates ranging from 23 July 1947 to 10 August 1947 and are in amounts varying from \$50.00 to \$100.00. From 30 June 1947 to and including 14 August 1947, the accused had only one account in the Oak Cliff Bank and the balance

in his account at no time during the period exceeded \$8.30. Under Specifications 7, 8 and 9, Charges I and II, accused stands convicted of fraudulently obtaining the sums of \$50, \$75, and \$100, respectively.

Two of the checks-drawn on the Fort Lewis Branch, National Bank of Washington, bear the date 7 August 1947 while the third check drawn on the same bank bears the date 8 August 1947. Each of these checks was drawn in the amount of \$100.00. From 1 August 1947 to 10 September 1947, the accused's checking account in this bank at no time exceeded \$44.67 and from 7 August 1947 to and including 16 September 1947, it never exceeded \$4.67.

The accused admitted that he made and uttered the checks. Prior to trial he told the investigating officer that he knew there were insufficient funds in his checking account at the Oak Cliff Bank and in the Fort Lewis Branch, National Bank of Washington, for payment of the checks drawn by him.

4. The accused is 32 years of age, married and the father of two minor children. He attended Texas A & M College for three and one-half years and left that institution to enter the military service. He enlisted as a cadet at Randolph Field, Texas, on 10 March 1938 and was discharged at Kelly Field, Texas, on 31 January 1939 to accept a commission as Second Lieutenant on 1 February 1939. He served continuously in the Army Air Forces since the date of acceptance of that commission. His efficiency ratings for principal duty consist of the following: two "Very Satisfactory," four "Excellent," twelve "Superior," and the last three "Unsatisfactory." As a result of punitive action administered to accused for insubordination to his superior officers in December 1946, he was demoted on 27 March 1947 from his temporary rank of Lieutenant Colonel to his permanent rank of First Lieutenant. On 14 April 1947, he was convicted by general court-martial of three separate offenses for making and uttering checks without sufficient funds and was sentenced to restriction for three months and forfeiture of \$100 per month for six months.

On 1 December 1947 the accused tendered his resignation for the good of the service in lieu of trial by court-martial. Action on the tendered resignation has been held in abeyance pending final action in this case.

5. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

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

2 Incls  
1 Record of trial  
2 Form of action



THOMAS H. GREEN  
Major General  
The Judge Advocate General

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( GCMO 79, 26 March 1948).



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

(123)

JAGK - CM 328542

27 FEB 1948

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Fort
	)	Slocum, New York, 19 December 1947.
First Lieutenant ELLIOTT C.	)	Dismissal
JEFFRIES (O-2044950), Air	)	
Force of the United States	)	

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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: Violation of the 61st Article of War.

Specification: In that First Lieutenant Elliott C. Jeffries, assigned 105th Army Air Forces Base Unit, Fort Slocum, New York, detailed for duty with Reserve Officer's Training Corps, Colgate University, Hamilton, New York, did, without proper leave while enroute from Craig Field, Selma, Alabama, absent himself from his organization at Colgate University, Hamilton, New York, from about 23 July 1947 to about 17 October 1947.

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

He pleaded not guilty to all charges and specifications. He was found guilty of the Charge and its specification, but not guilty of the Additional Charge and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

There was received in evidence, without objection, a certified true copy of paragraph 52, War Department Special Orders No. 89, 6 May 1947, which relieved the accused from the 450th Air Service Group, Langley Field, Virginia, and assigned him to the 430th AAF Base Unit, Harrisburg,

(124)

Pennsylvania, with thirty days temporary duty to report to the Commanding Officer, Craig Field, Selma, Alabama, not later than 16 May 1947 for the purpose of attending Air ROTC Indoctrination Course (R 8, Pros Ex 1). There was likewise received in evidence a certified true copy of paragraph 38, War Department Special Orders No. 117, 13 June 1947, which order relieved the accused from assignment with the 430th AAF Base Unit, Harrisburg, Pennsylvania, upon completion of his course at Craig Field, Alabama, effective on or about 16 June 1947 and assigned him to the 105th AAF Base Unit, Fort Slocum, New York, for duty at Colgate University, Hamilton, New York (R 8, Pros Ex 2). It was orally stipulated by the parties that if Colonel H. V. Bastin, AC, Secretary of the Air University, Army Air Forces Special Staff School, Craig Field, Alabama, were present he would testify that a document received in evidence as Prosecution Exhibit 3 was a true copy of the morning report of Squadron S, 44th AAF Base Unit, Craig Field, Alabama, for 13 June 1947. The pertinent entry therein is as follows:

"Jeffries Elliott C (AC) O-2044950 1st Lt  
Reld atchd & returned to 430th BU par 52  
SO 89 Hq WD departed" (R 8, Pros Ex 3).

There was also received in evidence, without objection, a certified true copy of paragraph 12, Special Orders No. 123, Headquarters 1st Air Force, Fort Slocum, New York, 23 June 1947, as follows:

"12. 1ST LT ELLIOTT C. JEFFRIES, O2044950, AC, this Hq., enroute to Colgate University, Hamilton, N.Y. per par 38, WD SO 117, 13 June 1947, is granted thirty (30) days delay enroute, chargeable as leave." (R 9, Pros Ex 4)

It was stipulated that if Lieutenant Colonel Charles C. Wilder, Jr., USAF, the Professor of Military Science and Tactics, Colgate University, Hamilton, New York, were present he would testify that in the latter part of June 1947 he received copies of paragraph 12, Special Orders No. 123, Headquarters First Air Force, 23 June 1947, assigning the accused to duty at Colgate University pursuant to paragraph 38, War Department Special Orders No. 117, 13 June 1947; that on 7 August 1947 the accused had not reported to his station at Colgate University; that he made an investigation concerning his whereabouts and that on 17 October 1947 the accused reported "to me for the first time" and was thereupon placed under arrest (R 9, Pros Ex 5).

Lieutenant Colonel Dee W. Rains, USAF, Commanding Officer of the 105th AAF Base Unit, Fort Slocum, New York, identified and there were received in evidence certified extract copies of the morning reports of the aforementioned unit for 8 September 1947, the extracted entries being as follows:

"8 Sep 47

Delay enroute to AWOL eff 8 Aug

47

CORRECTION M/R 8 Sep 47

Delay enroute to AWOL eff 8 Aug

47"

(R 10, Pros Ex 6).

First Lieutenant Stephen R. Halpin, 105th AAF Base Unit, Fort Slocum, New York, testified that he was the investigating officer in accused's case. He interviewed the accused prior to the trial and after having advised him of his rights under Article of War 24, the accused voluntarily made the following statement:

"The accused stated, that while at Craig Field he received orders from the War Department to proceed to the 430th AAF Base Unit, Harrisburg, Pa. upon completion of his school at Craig Field. However, prior to his departure at Craig Field, he received further orders from the War Department which cancelled his orders sending him to the Eleventh Air Force, and transferred him to the 105th AAF Base Unit, with duty station at Colgate University. The accused stated that he proceeded from Craig Field under authority cited. Prior to his arrival at Fort Slocum, the accused stated that he became ill and was unable to report to Colgate University upon the proper date. He did however, report to Fort Slocum on his way to Colgate and obtained a 30-day delay enroute to Colgate. It was after this time that he became sick." (R 11-12)

By agreement of the parties there were read into the record the detailed reports of physical and neuropsychiatric examinations of the accused made by competent medical officers who had examined the accused at the Station Hospital, Mitchel Field, New York. The neuropsychiatric report discloses the following findings:

"a. The accused, at the time of alleged offense was 'so far free from mental defect, disease, or derangement, as to be able concerning the particular act charged to distinguish right from wrong,' because he states he knew it was wrong, and that very likely he would be courts martialled.

"b. The accused, at the time of alleged offense, was 'so far free from mental defect, disease, or derangement, as to be able concerning the particular act charged, to adhere to the right, but this ability was impaired by reason of-Anxiety reaction, acute and chronic; mild stress of readjustment to a postwar army and domestic problems; the threat of 'heart disease' to his career and life; predisposition mild; impairment, mild and temporary; manifested by alcoholism, vasomotor instability, AWOL.

"c. The accused, at the time of trial possesses sufficient mental capacity intelligently to conduct or cooperate in his defense."

(R 25)

"**IMPRESSION:** Anxiety reaction, acute and chronic; mild stress of readjustment to a postwar army and domestic problems; the threat of 'heart disease' to his career and life; Predisposition mild; Impairment mild and temporary; manifested by alcoholism, vasomotor instability, AWOL." (R 28)

The report of physical examination contains the following conclusion:

"This officer is in good physical condition. There is no evidence of organic heart disease. Such instability as is present in his vascular system may be accounted for on the basis of his psychiatric diagnosis which is anxiety reaction, acute and chronic." (R 26)

#### 4. For the Defense

Major John M. Trossbach, 105th AAF Base Unit, was called as a character witness and stated that he was a fellow student with the accused at the Air Inspector's School, Craig Field, Alabama. The witness was favorably impressed with the accused as an officer and student and he was surprised to learn of his subsequent conduct (R 29).

The law member explained to the accused his rights to be heard in his own behalf and he elected to be sworn as a witness. He stated that he had been in the military service "all my life, sir; for over 22 years." For several months prior to trial he had been drinking heavily, suffered pains and aches in his shoulders and had experienced a slight heart attack. He attributed his physical condition to excessive drinking. The accused read into the record two letters of commendation which he had received. These letters, dated 21 September 1945 and 21 January 1946, respectively, avow that the accused had performed outstanding service in the pertinent commands and was rated as a superior officer. On motion of the defense the accused's WD, AGO 66-1 record was received in evidence as Defense Exhibit "A" (R 32-34). Testifying further with regard to his military record the accused stated that he had been punished under Article of War 104 for disorderly conduct on 14 July 1945 in France. When he reported to Colonel Wilder at Colgate University he learned about his two checks which had "bounced" because of insufficient funds. He had not "had a drink now for three months" (R 35).

On cross-examination the accused stated that upon being graduated from the Air Inspector's course and the ROTC Course at Craig Field he departed on VOGG for Fort Slocum, New York. He obtained a thirty-day leave on 23 June, but did not report to "Colonel Wilder" until about 17 October 1947 (R 40). He related in detail difficulties he had experienced relative to his personal and domestic affairs (R 41-46).

#### 5. Discussion

It is noted that the documentary evidence of both the prosecution and defense was received without objection or by agreed stipulation. However, it will be observed that the extracted matters contained in Prosecution Exhibit 6 make no reference whatsoever to the accused, or to any particular person. The form used, WD AGO Form 44, 1 May 1945, shows the name, rank and organization of the accused at the top thereof, and the certificate at the bottom contains the phrase "which relates to the person referred to in extract copy."

In CM 318685, Sustaite, 67 BR 389-393, it was held that where the extracted matter itself made no reference to the accused, the authentication certificate was impotent to supply the deficiency even in the absence of an objection. The Sustaite case overruled a prior opinion of the Board of Review, CM 307181, Christ, 60 BR 397-403, wherein it was held, in effect, that the certificate was of equal dignity, under the rules of evidence relating to the admissibility of public records, as the extracted matter appearing in the body of the exhibit. But the Board of Review pointed out in the Sustaite case that a mere authenticating certificate "is obviously not in itself a public document of record and thus the facts stated in such certificate have only the force and effect for which they were intended, that is, authentication." In other words, the authenticating certificate of the official custodian is competent to show that the extracted matter is a true and complete copy of matters recorded in the original documents and no more. We are therefore of the opinion that, in accordance with the rules of evidence as enunciated in the Sustaite case (supra) "Pros Ex. 6" herein is insufficient to establish accused's alleged absence without leave. It was stipulated however that if Colonel Wilder, the commanding officer of the Air Reserve Officer's Training Corps at Colgate University, were present he would testify that he had received copies of the orders (Pros Exs 2 and 4) transferring accused to his command and that the accused did not report until 17 October 1947. The probability of his unauthorized absence from 23 July to 17 October 1947 was therefore established by competent evidence other than by Prosecution Exhibit 6. The accused, in his testimony, admitted that he had received the orders mentioned but did not report to his new station until 17 October 1947. The unauthorized absence was clearly "through his own fault" even if it be admitted that his alleged illness, resulting from the intemperate use of liquor, contributed to or brought about such absence (par 132, MCM 1928).

The record contains evidence concerning the issuance of worthless checks and matters relating to accused's domestic affairs which were irrelevant to the issues except possibly as mitigating circumstances. The admission of this evidence does not appear to have prejudiced the accused's substantial rights. In fact these matters were brought out by the defense counsel or voluntarily recited by the accused in giving the history of his military career.

6. Department of the Army records show that the accused is 28 years of age, that he is married and the father of one child. He attended Purdue University for three years, majoring in mechanical engineering, and was commissioned a second lieutenant, AUS, in December 1 1943. He served about five years in overseas theaters and has been awarded service stars for the Northern France, Central European and Rhineland Campaigns.

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

Shirley D. Silver Judge Advocate

Robert J. Pickens Judge Advocate

Harley G. Lanning Judge Advocate

JAGK - CM 328542

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 First Lieutenant Elliott C. Jeffries (O-2044950), Air Force of the United States.

2. Upon trial by general court-martial this officer was found guilty of being absent without leave from 23 July 1947 to 17 October 1947 in violation of Article of War 61. No evidence of any previous conviction was presented. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On or about 13 June 1947 the accused, then on duty at Craig Field, Alabama, received orders assigning him to the 105th Army Air Force Base Unit, Fort Slocum, New York, for duty at Colgate University, Hamilton, New York. He departed Craig Field on 13 June 1947 with five days travel time allowed to his new station. On 23 June 1947 the accused reported to Headquarters First Air Force, Fort Slocum, New York, and obtained a thirty day delay en route to his new assignment chargeable as leave. He did not report to his new station until 17 October 1947 and voluntarily stated to the investigating officer that he had been drinking heavily and suffering from pains and a slight heart attack. He was given a complete physical and neuropsychiatric examination. The medical authorities found him to be legally sane, in good physical condition, and with a normal heart.

While stationed overseas this officer was married in Scotland and one child was born of the marriage. His wife has experienced difficulty in procuring an allotment for her support and as a result of her appeals to the military authorities at Langley Field, Virginia, the accused was caused to make an allotment to her in January 1947.

Testifying in his own behalf at the trial, the accused did not deny his unauthorized absence but related in detail his military service, his domestic difficulties and intemperate habits. He attributed his unauthorized absence to the latter.

I recommend that the sentence be confirmed and carried into execution.

(130)

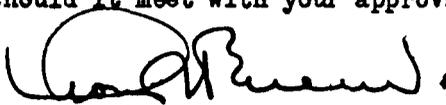
5. Inclosed is a form of action designed to carry into effect the foregoing recommendation should it meet with your approval.

CM 328,542

2 Incls

1. Record of trial

2. Form of action



THOMAS H. GREEN

Major General

The Judge Advocate General

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( GCMO 78, 26 March 1948 )

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

(131)

JAGQ - CM 328584

12 FEB 1948

UNITED STATES

v.

Private BRONIS J. YAKAVONIS  
(RA 31356685), Headquarters  
and Base Service Squadron,  
486th Air Service Group,  
Neubiberg, Germany

UNITED STATES AIR FORCES IN EUROPE

Trial by G.C.M., convened at  
Neubiberg, Germany, 9, 10  
December 1947. Dishonorable  
discharge and confinement  
for four (4) years. Dis-  
ciplinary Barracks

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Private Bronis J. Yakavonis, Headquarters & Base Service Squadron, 486th Air Service Group, APO 407, US Army, did at Neubiberg Air Base, Neubiberg, Germany, on or about 31 October 1947 feloniously take, steal and carry away six (6) American Express Travelers' Cheques of a total value of five-hundred dollars (\$500.00), and U.S. Military Payment Certificates of a total value of one thousand eight-hundred and ninety dollars (\$1,890.00), all of a total value of about two thousand three-hundred and ninety dollars (\$2,390.00), property of Technical Sergeant Frank J. Toscani.

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

Specification: In that Private Bronis J. Yakavonis, Headquarters and Base Service Squadron, 486th Air Service Group, APO 407, US Army, did at Neubiberg Air Base, Neubiberg, Germany, on or about 14 October 1947 feloniously take, steal and carry away one ecophone radio, of a value of less than twenty dollars (\$20.00), property of Private First Class Willard C. Pennington.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay

and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for four years. The reviewing authority approved only so much of the findings of guilty of the Specification of the Charge and of the Charge as finds the accused did, at the time and place and in the manner alleged, feloniously take, steal and carry away, United States Military Payment Certificates of a total value of One Thousand Six Hundred Ninety Dollars (\$1,690.00); 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. Evidence for the Prosecution.

On 7 October 1947 between 1630 and 1745 hours Private First Class Pennington was in the Enlisted Men's Club at Neubiberg Air Base. During this period he talked to accused and mentioned that he had a radio in his room which he was going to repair and send home. Accused asked him where he lived on the base and Pennington told him. Pennington asked accused to go to the show with him but accused declined. Pennington departed to go to the show at about 1745 (R. 11, 12). At approximately 2100 hours accused arose from the table where he had been sitting and told Private First Class Vedock that he had to see somebody and left the room. He returned at about 2130 hours and sat down at Vedock's table (R. 23, 24). Pennington and his roommate Corporal Schupe went to a show at about 1930 hours. After the show Pennington returned to the Enlisted Men's Club while Schupe went to his room. When Schupe entered the room he saw that Pennington's locker was open. This was unusual because he and Pennington always kept them locked. The screws were out of the hinges on the lock and Pennington's radio was missing. Schupe identified Prosecution Exhibit 1 as an Ecophone radio which he saw Pennington buy at the Post Exchange. Schupe had scratched Pennington's name on the back of the radio and indicated this to the court. He went to the Enlisted Men's Club and told Pennington what he had discovered (R. 7-10). Pennington then went to the room and found his cigarettes and radio missing. He reported the loss at the guardhouse and identified Prosecution Exhibit 1 as his radio which he paid \$31.50 for at Landsberg. His locker had been opened by the removal of four screws from the lock hinges as the lock was still locked. He recovered the radio from a Private Sadler at the dispensary about three weeks later (R. 13-20). Pennington identified the radio (Pros Ex 1) when he took it from Private Sadler by his initials "WP" which he had previously placed on one of the tubes. In open court he removed the bottom from the radio (Pros Ex 1) and showed the court the initials (R. 40-41).

Private Clinton P. Sadler testified that he has quarters in the base dispensary near accused's quarters. He picked up a radio similar to Prosecution's Exhibit 1 in the hall directly across from accused's room. The radio belonged to accused and he had seen it in accused's room. He

told accused he had the radio and accused told him to keep it until he was released from the guardhouse. Thereafter Pennington came "down", looked at the radio, said it was his and took it away (R. 36-40).

On 7 October 1947 Private Dubose at about 2325 hours was driving a bus coming into the base from Munich. He saw accused going out the gate with a radio under his arm (R. 27). Accused's girl friend Albertine Ebenback who lives in Munich saw accused the night of 7 October between 2300 and 2400 hours. He brought a radio and some baby clothes with him. The radio was similar to Prosecution Exhibit 1 (R. 32, 33). The next morning she and the accused took the radio to a radio shop to have it repaired. On 11 October she picked up the radio at the shop and took it to her house where she kept it for eight days when the accused picked it up and said he was taking it back to the base. Accused told her that a comrade had given him the radio (R. 33-35). Sergeant Stell testified that several days after the occurrence he was in accused's room, that he removed accused's belongings from his locker, that the locker was not locked, that among accused's belongings was a radio similar to Prosecution Exhibit 1 (R. 141, 142).

On 31 October 1947 about 1600 to 1700 hours Sergeant Perry was in a dice game in which accused also took part. Accused started playing with scrip and then used American Express Travellers Cheques. Perry at one time in the game won these checks which totalled about \$400 or \$500. Accused's name was on the corner of the checks. After losing, Perry left the game but returned about 2000 hours. Later in the evening accused "went broke" and borrowed \$102 from him (R. 43, 44). About 2230 he and accused went to Sergeant Toscani's room where Toscani and Sergeant Engle were counting Toscani's winnings and accused asked Toscani if he wanted him to sign the checks but Toscani said it would be all right to sign them the next day. Sergeant Toscani took the money, put it on his bed, pulled a sheet and blanket over it and they all left the room (R. 44-47). Sergeant Engle was in the same dice game on 31 October at about 2000 hours. Accused was present and lost quite a bit. Toscani was the big winner. Accused stopped playing about 2030 because he was "broke." Accused said that he had lost about \$950. Accused, Sergeants Perry and Toscani and he went to Toscani's room. They counted Toscani's money which amounted to \$2,390.00, composed of approximately \$1600.00 in scrip, \$550 in Travellers Cheques and \$100 in money orders. The checks were made out to accused and had his name on them. About 2230 they discussed going to Munich, left the room, Toscani locked the door and he and Toscani went to Munich (R. 47-49). Sergeant Toscani saw accused at the game around 2100 hours. Accused asked him how much he had won and he told accused about a "couple of grand, two thousand." When he returned to his room between 2000 and 2025 hours accused and Sergeants Perry and Engle were with him. He and Engle counted his money which amounted to \$2,390.00, composed of a \$100 money order, approximately \$600 in Travellers Cheques and the balance in scrip. He looked closely at three or four of the checks and they had accused's name on them and accused offered to sign them. Toscani won these checks in the crap game from some of the other

(134)

participants. Accused was not playing in the game when witness was playing. After counting the money he put it under his sheet, covered it with the sheet and blanket and departed. When he returned to his room about 0745 the next morning he unlocked the room and looked for his money but it was gone. Sergeant Stell was with him at the time (R. 51-54).

Sergeant Bowers testified that he was asleep at about 0300 on 1 November 1947 and that accused woke him by shaking him on the shoulder. He asked accused what he wanted and accused said he came down to buy his car. He told accused he did not want to sell the car but accused kept "arguing" with him. Three weeks previous he had offered the car to accused for \$2000 but that night he raised the price to \$2500 because he was going on furlough. Accused started pulling money out of his pocket and he asked him "where did you get all that money?" Accused said that he "won it at the 508th MP's." He finally agreed to take \$2200 for the car. Accused had \$2235 but stated that he would need some money so he kept a \$50 check and gave witness \$2185. He gave accused the keys, the title and insurance papers. The money which accused paid consisted of scrip and \$500.00 in Travellers Cheques. Accused's signature was in the upper left hand corner of the checks and one of them had been signed in the lower left hand corner (R. 54-56).

Sergeant Hall was desk sergeant at the Base Guard House, Neubiberg Air Base where he saw the accused at 1400 hours on 1 November 1947. He was brought into the guardhouse by four "non-coms." Accused seemed nervous. He called the investigators who came in 45 minutes to an hour. During the interval he did not hear anyone threaten the accused or make any promises to him. Fifteen or twenty minutes after accused was brought to the guard house he "settled down" (R. 57-59). Corporal Beatenbough testified that he was a special investigator, that on 1 November 1947 he saw the accused in his office at the guard house and that he had a conversation with him. There were present at the time Sergeants Toscani, Shields and Bowers and Sergeant Block was there part of the time. After explaining his rights under the 24th Article of War to accused, accused said in answer to a question that he had taken the money. Accused signified that he understood his rights under Article of War 24, neither witness or anyone present threatened accused or used violence toward him. He was not coerced, put under duress or offered any promises or inducements. The statement by accused was voluntarily made and of his own free will. Accused looked slightly nervous, his tie was slightly over to one side and he had a scratch on his face. The scratch looked like it was a couple of days old. He did not notice any bruised spots on accused (R. 60-65). Accused told him that he got in a dice game and lost approximately \$950; went to Toscani's room with him and Engle; saw the money counted out and covered with a blanket. He left Toscani's room with the other men and returned at approximately 0200 hours and took the money. Then he went to Sergeant Bowers' room awoke Bowers and bought Bowers' car paying \$2185 for it. He took the car and went to his girl's house (R. 81).

#### 4. Evidence for the Defense.

Corporal Phillips was on 2 November 1947 prison sergeant at the guardhouse. On that date he took accused to his quarters to pick up his personal items. While doing this accused picked up an Ecophone radio from the windowsill, put it in his locker and snapped the padlock shut (R. 94-96).

Accused having been advised of his rights as a witness testified that he bought the radio in July or August from a soldier named McLean or McLear. He had two radios and didn't want to buy another but since it was offered to him for \$10.00 he thought it was cheap and bought it. He put the radio in his footlocker as Sergeant Phillips had testified and had never taken it out. He locked the locker after putting the radio in it. He identified the radio (Pros Ex 1) as his own radio by some marks on it which had nearly faded out (R. 98, 99). Private First Class Sadler told him that he had found the radio in the hall and he told Sadler that he could take care of it until accused "got out of the stockade" (R. 100). He remembers being in the Enlisted Men's Club with Pennington, they were talking about marks and about a ring and a brooch which Pennington wanted to buy. They never discussed a radio nor did he have occasion to learn where Pennington lived on the base. He did not take the radio from Pennington's room. He did not leave the club that night until 2230 and the only move he made was one trip to the latrine which was one floor below the main entrance of the club (R. 100, 101). The radio (Pros Ex 1) might or might not be his. He believes it is because of the markings and the number (R. 102, 103). After he left the club he took the radio and some baby clothes to his girl's house in Munich. He returned to camp the next morning at 0600 and it was two or three days later when he and his girl friend took the radio to the radio shop (R. 106, 107). The man he bought the radio from is named McLean or McLear, he used to drink with him at the club but he didn't know him too well. McLean or McLear is not on the base at this time. Accused has not seen him for two months. Accused was in his room once after 2 November with Sergeant Phillips. They were trying to find who had brought his clothes to the guardhouse. He found his locker broken open. This was on or about 9 November and was the date on which he saw Private Sadler (R. 109-111). The radio was in his possession from the time he bought it from McLean or McLear until the time Sadler picked it up (R. 112).

Sergeant Bowers recalled as a witness for the defense testified that when he saw accused about 0300 hours on 1 November he did not have any marks on his face, that he saw him again between 1330 and 1400 hours in the company of Sergeant Toscani, a first sergeant with a "constabulary patch" and a sergeant with MP insignia. These men are now sitting outside the courtroom. Accused looked "pretty slouchy", his face was bruised and his lip looked like it had been hit. "He looked like he had been shoved around pretty rough." He had a swollen place on one side of his cheek. These marks were not on him at 0300 in the morning when he was

in witnesses' room. His necktie was not in order, it was pushed to one side. His clothing looked like he had been sleeping in them. "They were pretty well dirtied up" (R. 66, 67). There was a bloodshot place on his lip and a couple of red spots on the upper part of his cheek. There was a slight break in the skin around the lip (R. 68). He did not see anyone strike accused. The MP Sergeant made accused stand in a corner and in a rough voice told him to take his hands out of his pockets and stand like a soldier. In answer to whether accused was threatened he said "Well, someone around -- I don't know who. They all seemed to be pretty well teed off at him. \* \* \* There was someone said something about being so low as to steal from another soldier." Before the investigator came into the room one of the sergeants said something "about son-of-bitch ought to be killed" (R. 69, 70). Sergeant Shields testified that he rode from Munich to Neubiberg Air Base with accused shortly after 1200 hours on 1 November. He was under the impression that accused had stolen a large sum of money from Sergeant Toscani. He was not impressed by accused's appearance and thought he was the tool for a superior brain so he told accused to smarten up and tell what he did with the money. He thinks he said "Wise up and tell what you did with the money. Don't be a fall guy" (R. 72, 73). Sergeants Black and Engle were in the front seat of the car and witness and accused were in the back seat. Prior to accused being warned of his rights under Article of War 24 he did not hear any conversation directed toward the accused. He did not hear anyone use profane language toward accused (R. 72-75).

Albertine Ebenbach called as a witness for defense testified that on 1 November 1947 accused was at her home in Munich. About 1300 hours some soldiers came to her house. She knew two of them by name, Engle and Frank and the other two men she saw that day in the court room. Accused asked them what they wanted and they didn't say and one of them shook accused by the shoulder and one slapped his face. They asked the accused "Where is the money?" and "Where did you get the car?" The blonde soldier took him outside the house and then brought him inside and "beat him with his fist in the face." While he was doing this he used "cuss" words and said he would kill accused and throw him in the water (R. 76, 77). The soldier who told accused he was going to kill him told her that "she should be happy if she sees him alive again" (R. 78).

Sergeant Toscani recalled as a witness for the defense testified that on the morning of 1 November 1947 after discovering the loss of his money looked for accused and found him in Munich. Sadler and Engle were with him as were Sergeants Black and Shields. He asked accused if he had taken the money and accused denied it. Witness told accused that he did not believe him and that he wanted accused to go with him to the MP's at the base and accused agreed to do so. Sergeant Black walked over to accused, got hold of his tie and pushed him "slightly" against the wall. It was a friendly push, not much force to it. Black told the accused he thought he was lying, too and to "come clean with anything he knew." He heard no threats made to accused (R. 83-85). There were no marks on

accused's face, he did not "lay a hand" on accused and he never heard Sergeant Black say to accused "we throw punks like you in the river" (R. 86).

Sergeant Black testified that he is in the 2nd Constabulary Brigade, Munich, he knows the accused and saw him at a German house in Munich about 1 November 1947. He brought him to Neubiberg. They were in the German house ten or fifteen minutes. He refused to answer what he did during this period. He refused to say whether he had touched accused or testify to the gist of any conversation he had with him. He refused to answer whether he said to accused "We find punks like you in the river" or whether he or anyone else made threats to accused during the automobile trip from Munich to Neubiberg. He did not use profane language toward accused at the guard house. He refused to answer whether there was any change in the personal appearance of accused from the time he first saw him in Munich until the time they arrived at the guardhouse (R. 86-93).

Accused testified that on 4 October 1947 he sold a jeep which he owned for \$1250 (R. 115) and that after paying certain debts and making some loans he had between \$750 and \$800 left (R. 125). On the same date he won \$1900 in a crap game which took place at a Dutch Garden right across from 508th MP Headquarters (R. 115). There were between 10 or 15 soldiers in the game, they were not all "Air Forces", some of them were colored soldiers (R. 126). He didn't ask if he could play and none of the soldiers asked him to play. When he came out of the game he had between \$2500 and \$2700 (R. 127). On 31 October he was in a dice game with Sergeants Wilson, Morrison and Bowers and some others whose names he cannot remember. Later in the evening he saw Sergeant Toscani. He played until 2100 hours and lost \$400. He borrowed \$100 from Sergeant Perry and lost that. The balance of his money was hidden in his clothes in his locker. He didn't want to go back to his locker for more money so he borrowed the \$100 and when he lost it he quit (R. 116). On 31 October he had \$2600 in his room (R. 121). He had \$400 when he entered the game. He had \$750 in Travellers Cheques and \$200 in scrip (R. 127). He didn't say he went into the game with \$400 but that he lost \$400. At one time during the game he left and put about \$500 in Travellers Cheques in his locker (R. 127, 128). Before putting the Cheques in his locker he had between \$1900 and \$2100 in his locker (R. 128). Of the \$450 he lost, \$250 was in checks and \$200 was in scrip (R. 129). He cannot explain how Toscani obtained \$500 of his checks. He had not paid any debts with the checks and only lost \$250 in checks. He was lying when he told Perry and Toscani that he had lost \$950 (R. 120). After the game he went to Toscani's room. He was talking to Sergeant Perry while Toscani and Engle counted the money (R. 116). They stayed in Toscani's room about 10 minutes and when they left Toscani locked the door (R. 117). He then went to his room and drank a bottle of beer and about fifteen minutes later he went to Bliss's room. This was about 2100 or 2115 hours.

He stayed in Bliss's room for approximately half an hour to three quarters of an hour. Corporal Lewis and accused put Bliss to bed. This took about 20 Minutes (R. 131, 132). He and Lewis then went to his room for a drink and Lewis stayed until 0130 or 0145. Accused then sat around and figured whether he should buy Sergeant Bowers' car (R. 133, 134). About 0300 he went to Bowers' room and asked Bowers to sell him his car. Bowers first told him he was going on furlough and would not sell the car but finally told him he would but that it would cost more than what he had told accused the week before. Accused gave him \$2185 and told him he would give him the rest the next day (R. 117). He went to Bowers at that time of the morning to buy the car because he was afraid he might get in a dice game the following day and lose everything he had (R. 117). He did not buy the car a week or two before because he did not have his mind made up (R. 134). He gave Bowers \$550 in checks and \$1600 in scrip. After paying Bowers he had between \$50 and \$70. He had a \$50 Travellers Cheque (R. 135).

On the following morning accused was at his girl friend's house in Munich and was told some soldiers were outside looking for him. He went outside and saw Toscani, Sergeants Shields, Black and Engle. Sergeant Black grabbed his collar and asked him what he did with the money. The soldiers then took him inside and Black grabbed his necktie and "was hitting me on both sides of my face and my nose was bleeding. He hit me pretty hard. He had my back against a cupboard. Then he was choking me pretty tight until I just about got air" (R. 118). They asked him if he took the money and he denied it. They told him to smarten up, took him outside and said they would take him for a ride. They told his girl that she would be lucky if she ever saw him alive again. They put him in a car, Shields told him to smarten up and Black said "Punks like you are found in the river." He got scared, told them he had taken the money and asked them to take him back to Neubiberg. They asked him who he bought the car from and he told them Sergeant Bowers so they "got Sergeant Bowers and went to the guardhouse" (R. 118, 119). When they arrived at the guardhouse Sergeant Black was "cussing" him and made him stand up against the wall with his back facing Black (R. 119). When Black was assaulting him in the house in Munich accused tried to send his girl's brother for the MP's but one of the sergeants would not let the boy go out of the house (R. 119, 120). While Black was beating him the other soldiers were taking dishes out of the cupboards and everything out of the closets and throwing them in the middle of the floor. They were calling him a "lousy son-of-a-bitch." Black beat him for about an hour (R. 120). Corporal Beatenbough read and explained the 24th Article of War to him and thereafter he made the statement to the corporal. He made the statement because he was frightened. "They" were all gathered around him, all excited, and he "figured" if he did not make a statement he would be released from the guardhouse and the minute he "got out, they" would put him in a car and take him for another ride "or something." He made the statement because he was afraid of Toscani, Black, Shields and Engle. He was afraid if he did not make the statement they would take him out and "beat him up" (R. 119, 120).

5. With respect to the original Charge and Specification, viz: the larceny of approximately \$2390 the first question to be considered by the Board of Review is whether the confession of accused was voluntarily made.

The testimony of accused and his girl friend regarding the beating imposed on accused by Sergeant Black, a member of the constabulary and his threatening language to accused stands uncontradicted in the record. Black refused to answer any questions with respect to the alleged beating or to the threats made to accused on the grounds that he might incriminate himself. His companions were evasive in their answers as to what happened between Black and the accused although Toscani did admit that he saw Black grab accused by the necktie and give him a "friendly" push. Sergeant Shields admitted that when he, Engle and Black were with accused in the car he told the accused to "smarten up" and "tell what he did with the money." After the beating accused had received, Black's statements "that we find punks like you in the river" and that his girl "would be lucky if she saw him alive again" it is not difficult to visualize his reasons for confessing to the theft after being placed in an automobile with three of his interrogators who had previously told him they were going to take him for a "ride." His willingness to make and sign the statement at the guard house is likewise understandable. His four adversaries were present, they were using profane language toward him and Sergeant Bowers testified that the four sergeants "seemed to be pretty well teed off" at accused; that accused looked like he had had "a rough time" and that one of the sergeants said something about the "son-of-a-bitch ought to be killed." Accused testified that he was afraid that if he did not make the statement at the guardhouse he would be released and that the sergeants would "beat him up" or take him for a "ride." Under these circumstances the warning of the accused as to his rights under Article of War 24 was meaningless and pro forma only.

The Manual for Courts-Martial, 1928, paragraph 114a (Page 116) provides that -

"It must appear that the confession was voluntary on the part of the accused. \* \* \* A confession not voluntarily made must be rejected."

The test applied by the Federal Courts as to the voluntary nature of a confession was enunciated in Wilson v. United States, 166 U. S. 613, in which case the Supreme Court of the United States said at 623,

"In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." (Underscoring supplied).

In Wan v. United States, 266 U. S. 1, 14, the same court said -

"A confession is voluntary in law if, and only if, it was, in fact voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise."

It appears in this case by uncontradicted evidence that there was in fact compulsion and fear, and that the willingness of accused to make the confession was impelled by this compulsion and fear. The Board is of the opinion that the confession was not voluntary in fact or in law and that its admission by the court was error. Although accused was warned of his rights under Article of War 24 after the compulsion had been exerted and before he made the confession to Corporal Bettenbough nevertheless he was, at the latter time, accompanied by the non-commissioned officers who had participated in breaking down his unwillingness to confess. The conclusion is inescapable that the effects of the compulsion and fear of personal injury still persisted and there is no evidence to justify an inference that the influence which impelled accused to confess originally to the non-commissioned officers had ceased to operate on his mind. Only in the event it appeared that there had been a cessation of such influence could the confession properly have been deemed voluntary (Mangum v. United States, 289 Fed. 213; CM 187615, Bruton, CM 192609, Hulme, 2 BR 3, 17).

Having determined that accused's confession was involuntary and that its admission was error the next question presented is whether the error injuriously affected the substantial rights of the accused to such an extent that the findings and sentence as to the Charge and Specification with respect to the larceny of the military payment certificates must be disapproved notwithstanding the other competent evidence of record.

In the instant case the evidence aliunde the confession is conflicting. The prosecution's case was entirely circumstantial and the accused took the witness stand and categorically denied his guilt. From the whole record the Board is unable to say that the competent evidence was of such quality or quantity or of such a nature that it may now be said with reasonable certainty that it would have resulted in a conviction had the confession been excluded. The findings of guilty of the original charge and specification must therefore fall.

The Supreme Court of the United States has on numerous occasions expressed its views as to the fatally injurious effect upon criminal proceedings in Federal, civil and state courts of the reception in evidence of involuntary confessions obtained by duress.

The most cited case on this subject is Bram v. United States, 168 U. S. 532. In that case a statement of accused made to a police officer and not shown to have been voluntarily made was received in evidence over defense objection. Its admission was held by the Supreme Court to be reversible error. The court said at 542:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is involuntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

With respect to the effect of receipt in evidence of an involuntary confession the court said at 541:

"Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result." (Underscoring supplied).

This construction of the law is supported in the case of Lyons v. Oklahoma, 322 U. S. 596, in which the same court in discussing the effect of a confession which petitioner claimed was involuntary indicated that in cases of this character the voluntary nature of the confession is the sole issue for consideration by the court and consideration of the other evidence of record is unnecessary. The court said in Note 1 at 597:

"Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal."

Likewise the Supreme Court in discussing the so called "harmless error statute" said in Kotteakos et al v. United States, 328 U. S. 750 at 764,

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm (19) or a specific command of Congress."

Note 19 then states:

"Thus when forced confessions have been received, reversals have followed although on other evidence guilt might be taken as clear. See Malinski v. New York, 324 U. S. 401, Lyons v. Oklahoma, 322 U. S. 596, 597, N. I; Bram v. United States, 168 U. S. 532, 540-542; United States v. Mitchell, 137 F. 2d 1006, dissenting opinion at 1012." (Underscoring supplied).

In Malinski v. New York, supra, the Supreme Court said at 404:

"But the question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts. Chambers v. Florida, 309 U. S. 227; Lisenba v. California, 314 U. S. 219; Ashcraft v. Tennessee, 322 U. S. 143."

"If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U. S. 596, 597."

And to similar effect is the recent case of Lee v. Mississippi decided at the present term of the Supreme Court of the United States, Case No. 19, October Term 1947, 19 January 1948 in which the Court held:

"The due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice." (Underscoring supplied.)

So also in Haley v. The State of Ohio, No. 51, October Term 1947, 12 January 1948 the Supreme Court said with respect to the admission of an involuntary confession:

"If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment to stand even though without the confession there might have been sufficient evidence for submission to the jury."

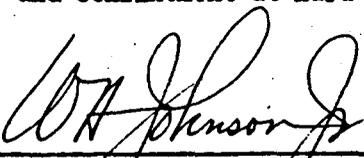
As stated in Bram v. United States, supra, the prohibition against the use of a confession obtained by force or fear stems from that portion of the Fifth Amendment to the Constitution of the United States which commands that no person

"shall be compelled in any criminal case to be a witness against himself."

Consequently, under the doctrine enunciated by the Supreme Court in the above decisions the use of a confession obtained by force would violate the constitutional guarantee against self-incrimination and constitute a denial of due process which cannot be cured by other clear or compelling evidence of guilt, Bram v. United States, Lyons v. Oklahoma; Kotteakos v. United States; Lee v. Mississippi; Haley v. Ohio, supra. This would seem to be a logical extension of the principal set forth in CM 312517, Kosytar et al., 62 BR 195, 200; CM 326450, Baez, 1947.

The competent evidence clearly establishes the guilt of accused as to the Additional Charge and the Specification thereof (larceny of the radio) and the confession of accused discussed above did not relate in any way to this offense. The maximum punishment permissible for this offense is dishonorable discharge, total forfeitures and confinement at hard labor for six months (Par 104c, MCM, 1928).

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

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

(144)

FEB 26 1948

JAGD - CM 328584

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

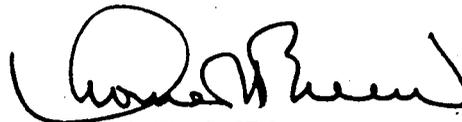
TO: Commanding General, United States Air Forces in Europe, APO 633  
c/o Postmaster, New York, New York.

1. In the case of Private Bronis J. Yakavonis (RA 31356685), Headquarters and Base Service Squadron, 486th Air Service Group, attention is invited to the foregoing holding by the Board of Review which holding is hereby approved. For the reasons stated therein it is recommended that the findings of guilty of the Original Charge and its Specification be disapproved and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 328584)

1 Incl  
Record of trial



THOMAS H. GREEN  
Major General  
The Judge Advocate General

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

(145)

JAGQ - CM 328590

UNITED STATES )

UNITED STATES CONSTABULARY

v. )

Trial by G.C.M., convened at  
Straubing, Germany, 14

Private WILLIAM O. WELCH )  
(RA 36692451), Head- )  
quarters Troop, 11th Con- )  
stabulary Regiment. )

November 1947. Dishonorable  
discharge and confinement for  
two (2) years and six (6)  
months. Disciplinary Barracks.

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

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

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

Specification: In that Private First Class William O. Welch, Headquarters Troop, 11th Constabulary Regiment, having been restricted to the limits of Raffler Kaserne, did, on or about 24 April 1947, break said restriction, by going to Wunsiedel, Germany.

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

Specification: In that Private First Class William O. Welch, Headquarters Troop, 11th Constabulary Regiment, did, at Brussels, Belgium, on or about 28 February 1947, wrongfully, knowingly and willfully misappropriate a 2½ ton truck, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Private First Class William O. Welch, Headquarters Troop, 11th Constabulary Regiment, did, without proper leave, absent himself from his organization at Regensburg, Germany, from about 24 April 1947 to about 24 May 1947.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of four 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 for five (5) years. The reviewing authority approved the sentence, reduced the period of confinement to two and one-half ( $2\frac{1}{2}$ ) years, designated Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. The only determination required of the Board of Review in the present case concerns the maximum legal punishment for the three offenses of which accused has been found guilty.

The Specification of Charge II alleging the misappropriation of a 2 $\frac{1}{2}$  ton truck, property of the United States furnished and intended for the military service thereof, in violation of Article of War 94 contains no averment as to the value of the vehicle. Although the property which is the subject matter of the offense must be of some value (Hope v. Com. 9 Metc (Mass.) 134; Payne v. People, 6 Johns (N.Y.) 103), value itself is not an element of such offense nor the gravamen thereof (CM 301154 Hufendick, 15 BR (E.T.O.) 137). Value is of legal consequence in the pleading, as well as in the proof, however, in determining the grade of the offense, notwithstanding dictum to the contrary in the last precedent above cited, and conclusions reached without supporting reasons by the Board of Review in 1921 in deciding CM 144867 Berrman. The contention that value in a specification or indictment may be left to inference, or later to proof in the case, when such relates directly to the grade of the offense, is no more tenable in a military than in a civilian tribunal. In this connection, it is stated in Sec. 65, Vol. 17 Ruling Case Law, p. 57, 58, citing as authority State v. Goodwin, 30 Atlantic 74, Woodring v. Territory, 78 Pac. 85, McCarty v. State, 25 Pac. 299:

"It is a well settled rule of the common law that an indictment for larceny must allege the value of the article alleged to have been stolen. This rule had its origin in the practice of distinguishing between grand and petit larceny with reference to the extent of the punishment, that being dependent in some measure upon the value of the article stolen. And at the present time the rule is that where the grade of larceny and consequently the punishment depends on the value of the property it is essential that the value be alleged. Although

it is essential that property stolen have some value, still the rule is that it is not necessary that the value be alleged in the indictment where the distinction between grand and petit larceny has been abolished. Hence where the statute does not make the grade of the offense or the punishment therefor dependent on the value of the property stolen, but determines them entirely by the class or species of such property, it is not necessary to allege the value \*\*\* And it has been held that the value of each article must be alleged, as it would be impossible to fix the grade of the offense if the proof showed a larceny of only a part of the article." (Underscoring supplied).

Clearly, for many years, in military procedure the value of the subject matter has determined the grade of offenses involving unlawful dominion over, or disposition of, Government or private property in violation of Articles of War 83, 84, 93, 94 and 96 (Sec. VI, MCM 1917, p. 163-166, incl; Sec. VI, MCM 1921, p. 279-282, incl.; Par. 104c, MCM 1928, p. 98-101, incl.). It is essential in the military, as well as in civilian procedure, that the value be affirmatively and expressly alleged and proved if a punishment greater than the minimum is to be imposed. This requirement that value be pleaded, if an offense such as larceny, embezzlement or misappropriation is to be punishable in excess of the minimum, should not be confused with the additional requirement relating to proof of value necessary for more than a minimum sentence, whether such proof be adduced through the medium of orthodox evidence or through judicial notice properly taken of particular items of Government property (CM 272306, Graham, 46 ER 280) or in an unusual instance of a civilian automobile (CM 262735, Kaslow, 41 ER 126; CM 302967, Grey, 59 ER 281, 282).

It is of equal importance clearly to distinguish cases involving larceny, embezzlement or fraudulent conversion of checks or other negotiable instruments wherein the amounts thereof have been expressly set forth in the specifications, and which the Boards of Review have rightly considered as sufficiently pleaded insofar as relates to value to support a greater sentence (CM 124998, Williams (1919), CM 125115, White (1919), Dig. Op. JAG, 1912-40, Sec. 451 (36) p. 323). Similarly, it is essential that the instant determination not be confused with the multitude of cases wherein value was either not pleaded or not proved or neither pleaded nor proved but where a minimum sentence was imposed or approved based on some value, and therefore the substantial rights of accused were not considered as prejudicially affected as to such minimum sentence only (Par. 149h, MCM 1928, p. 173; CM 124566, Randall (1919), Dig. Ops. 1912-40, Sec. 451 (36) p. 323; CM 224280, Garfinkle, 14 BR 94; CM 254498, Miller, 35 BR 269; CM 189745, Millerick, 49 ER 15).

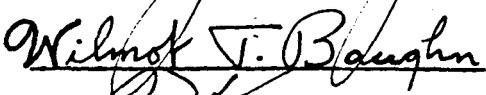
(148)

In view of the foregoing, the Specification of Charge II will support only a sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six (6) months.

The Specification of Charge I alleging breach of restriction on 24 April 1947 and the Specification of Charge III alleging absence without leave from 24 April 1947 to 24 May 1947, while separate offenses, obviously arose from a single transaction. The identical act of the accused which constituted the breach of restriction also gave rise to the offense of absence without leave. Accordingly, only punishment for the more serious aspect may be imposed (CM 241597, Fahey, 26 BR 305 and CM 257824, Cox, 50 BR 179, 205, and cases therein cited), same being in the instant case, confinement at hard labor for ninety (90) days, in addition to prescribed forfeitures for absence without leave for thirty (30) days (Par. 104c, MCM 1928, p. 97).

4. For 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 nine (9) months.

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

JAGQ - CM 328590

1st Ind

FEB 16 1948

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

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

1. In the case of Private William O. Welch (RA 36692451), Headquarters Troop, 11th Constabulary Regiment, I concur in the foregoing holding by the Board of Review and for the reasons stated therein 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 nine (9) months. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 328590)



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.

(151)

30 APR 1948

JAGH CM 328608

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

v.

Private ROSS C. DOOLEY (RA 18323453),  
Assigned (Operating) Guard Squadron,  
3705th Air Force Base Unit.

TECHNICAL DIVISION, AIR TRAINING COMMAND

Trial by G.C.M., convened at Lowry  
Field, Denver, Colorado, 15 December  
1947. Confinement at hard labor  
for five (5) months and to forfeit  
\$35.00 per month for a like period.  
The Post Guard House, Lowry Field,  
Denver, Colorado.

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

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally 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 Ross C. Dooley, Assigned (Operating) Guard Squadron, 3705th Air Force Base Unit, Lowry Field, Denver, Colorado, did, at Lowry Field, Colorado, on or about 17 November 1947, willfully, feloniously, and unlawfully kill Private First Class Harry L. Freeman, by shooting him in the body with a carbine.

The accused pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, "except the words 'willfully and feloniously', substituting therefor, respectively, the words 'involuntary and wrongfully', of the excepted words, not guilty, of the substituted words, guilty", and guilty of the Charge. He was sentenced to be confined at hard labor, at such place as the reviewing authority may direct for five (5) months and to forfeit thirty-five (\$35.00) dollars per month for a like period. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and designated the Post Guard House, Lowry Field, Denver, Colorado, as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 27, Headquarters, Technical Division, Air Training Command, Scott Field, Illinois, dated 23 January 1948.

### 3. Evidence for the prosecution.

At about 4:35 p.m. on the date alleged Corporal Thomas J. Taylor, Private Michael Walko, the accused, Private Ross C. Dooley, the deceased, Private First Class Harry L. Freeman and 8 or 10 other soldiers were in the "lobby" of the Lowry Field Guard House (R 8,9,12). At this time accused shot Freeman in the right side of his body with a carbine (R 6, 7,9,11,19). Several witnesses testified that they were within a few feet of accused at the time of the shooting and that they heard the shot but did not see the shooting. They did not hear any words between accused and Freeman prior to the time the shot was fired. Freeman had a pistol in his hand when he was shot (R 7,8,9,11,12,13). He "looked at his wound and fell on the floor and yelled that he had been shot and to get an ambulance and get a Doctor." He was taken to a hospital in a staff car.

A pre-trial statement by accused was identified and received in evidence without objection as Prosecution's Exhibit 2 (R 21). The pertinent part of this statement was as follows:

"On 17 November 1947, I was on duty as a Prison Chaser. At approximately 1645 hours, I brought my three (3) prisoners into Guardhouse #1 from detail. Pfc Harry L Freeman and I were standing close together. Freeman walked up to me, pulled his 45 out and stuck it in my stomach. Freeman was also on Prison Chasing detail on this date. I had my carbine in my hand, and I pointed it toward Freeman, and pulled the trigger. (I didn't know the gun was loaded.) When I pulled the trigger, the gun went off, and the bullet hit Freeman. It looked to me like it hit him just above the groin."

Freeman's wound was examined and treated at the Lowry Field Hospital. He was found to be suffering from a bullet wound in the "lower quadrant of the abdomen three inches in from the iliac spine." His pulse and blood pressure were within normal limits. At about 5:30 p.m. he was transferred to Fitzsimons General Hospital (R 13,14), where he was operated upon at about 7:15 p.m. His abdomen was opened to determine if any abdominal organs were damaged. The operation was completed shortly after 9:00 p.m. (R 15,16). In the opinion of Lieutenant Colonel Adanto A. S. D'Amore, Medical Corps, who was present throughout the operation, Freeman's wound was not mortal (R 17).

Lieutenant Colonel D'Amore testified:

"The patient was brought into the operating room and was anesthetized and at the early part of the anesthesia, there was the usual reaction of the patient going under, a body reaction and he started gasping and choking a little bit and apparently the patient had much in his stomach contents and he did throw up some, and after this was cleaned off and the patient was fully anesthetized for surgery, the Colonel operating made a right rectus incision and went through into the

abdominal cavity and observed thoroughly all internal viscus and the entrance to the bullet wound showed darkened area from apparently a very close rifle shot, but it was a clean wound, the underlying fat was all congealed like it was burned and liquified. Pfc. Freeman was fairly fat. There was a liquid seeping out of the bullet wound but no perforations were found. All that was found was a circle about the size of a nickel on the peritoneum, which is the lining of this cavity where the intestines are located. The bullet apparently had glanced off the peritoneum wall and traveled outwardly and laterally." (R 15).

A general anesthetic was administered (R 19). Colonel D'Amore also testified that the procedure used in the operation was normal and standard for a wound of the type being treated (R 19). Technically the operation could be considered of an emergency nature (R 16). Freeman died at 10:30 p.m., 17 November 1947. The cause of death as shown by the death certificate was "acute pulmonary edema, secondary to vomitus, due to anesthesia given for exploration of gunshot wound due to gunshot wound, right lower quadrant of abdomen and right thigh \* \* \*". (R 22, Pros Ex 3).

4. For the defense.

Three soldiers testified that accused and Freeman were good friends and did not have any harsh words or arguments prior to the shooting (R 23,24,25).

Mrs. Ross C. Dooley, wife of accused, testified that the deceased was a good friend of hers and of accused. Deceased was at their house for dinner on Saturday night, 15 November 1947. She had arranged for deceased to come to their house for dinner and have a "date" with a girl friend of hers on the evening of 17 November 1947 (R 25,26).

Accused has a good reputation in his home community and was never in trouble in civil life (R 30; Def Exs "B" through "G").

Captain William H. Moncrief, Assistant Chief of the Anesthetic Section, Fitzsimons General Hospital, testified that he administered the anesthetic to Freeman prior to the operation. The anesthetic given was "gas oxygen induction and ether maintenance." Prior to giving the anesthetic he asked deceased if he had eaten anything prior to the shooting and the deceased replied that he had not "eaten anything since the noon meal.", and that, "\* \* \* he had had nothing to drink before he was shot." (R 27). Captain Moncrief further testified as follows:

"Q Did the patient vomit?

A About one-half hour after the induction of the anesthetic, he did.

Q There was no tube placed in his stomach to aspirate the contents?

A No, sir.

Q After this vomitus, what occurred?

A An instrument was put into his mouth where you can look down into his trachea and into the lungs. It is a rubber affair and his lungs were aspirated of all material we could see.

\* \* \*

Q After the operation, what occurred?

A During the operation the patient had oxygen adequately maintained by pressure on his back with the mask on his face. His blood pressure and pulse didn't vary and everything was fine. Immediately after surgery the patient was bronchoscoped and vomitus aspirated from both main stem bronchi. It was observed that all the large bronchi were filled with what looked like tomato juice. When an attempt was made to aspirate the large bronchi, the tomato juice filled the lungs and the patient stopped breathing. He was given artificial respiration but the lungs were filled with liquid and contained no air.

\* \* \*

Q Did you examine the body of the man later?

A I witnessed the lungs after they had been removed.

Q Could you tell the court just what you observed?

A Well, the lungs were very heavy, being filled with fluid and contained no air. They had the appearance of an acute cardiac failure or somebody that had drowned.

Q Do you feel that this aspiration or vomitus contributed to the man's death?

A I do.

Q To what extent?

A He couldn't breathe with all this fluid in his lungs.

Q Did you check his heart?

A Yes, sir. It was in good shape.

Q How about his blood pressure? Was it higher than average or lower than average?

A I don't know what this man's blood pressure was normally or previous to the time I examined him, but there was nothing to indicate that it was not normal.

\* \* \*

Q Captain, from the nature of the wound of Pfc. Freeman, would you say it was necessary to perform an operation at all?

A Yes, sir, it was. From the nature of the wound and the possibility of penetration or damage to the abdominal organs, it was necessary, especially an exploratory operation.

Q It was necessary then that the man be anesthetized?

A Definitely.

- Q Do you personally feel that proper, accredited medical precedents were followed in this case?  
 A I do." (R 28-30).

Accused was advised of his rights and thereafter testified that he was 19 years of age and was married on 2 October 1947. Freeman was his best friend and had been to his house for dinner a night or two prior to the shooting. On 17 November 1947 he and Freeman were acting as prison chasers. They had lunch together on that day and never had any harsh words or arguments. About 2:00 p.m. accused went on a trash detail and was armed with a carbine. When on the detail he never opened the breech of the weapon to see if it was loaded, nor did he check to see if the safety was on. He returned to the guard house at about 4:00 p.m. At that time one detail was being relieved and another detail was going on duty. As he was changing clothes Freeman entered the guard house and they talked about having supper at accused's house. Upon returning from getting a drink of water, Freeman "pulled out his .45 from his back pocket and pulled the hammer back." The pistol was then pointed at accused who was holding his carbine at port arms. Accused "just pulled the trigger" of his weapon and the carbine discharged. Freeman "stood up for a few seconds, looked down where he was wounded and said "you've shot me Dooley" and "get an ambulance or get me to the hospital" or words to that effect and then fell to the floor. Thereafter accused placed the gun on the turnkey desk (R 30-35). Accused did not ascertain whether his carbine was loaded before he pulled the trigger (R 36).

5. By exceptions and substitutions, accused was convicted of an offense of involuntary manslaughter. To sustain the conviction, the evidence must necessarily establish the following elements of proof:

- "(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act);  
 (b) the facts and circumstances of the case, as alleged, indicating that the homicide amounted in law to manslaughter." (Par 149a, MCM, 1928, Proof). (Underscoring supplied).

The evidence shows conclusively that at the time and place alleged, accused unintentionally shot Private Freeman in the "lower quadrant of the abdomen three inches from the iliac spine" with a carbine, and that Private Freeman died about six hours after the shooting following an operation occasioned by the wound thus inflicted. It was established that cause of death was "acute pulmonary edema, secondary to vomitus, due

to anesthesia given for exploration of gunshot wound, due to gunshot wound, right lower quadrant of abdomen and right thigh; \* \* \*." An exploratory operation was performed upon Freeman about three hours after he was wounded to determine if any abdominal organs were damaged. In the opinion of the medical staff at the Fitzsimons Hospital, where the operation was performed, and in the opinion of Lieutenant Colonel D'Amore who first examined Freeman's wound at Lowry Field Station Hospital, the exploratory operation of the abdomen was necessary and of an emergency nature, that it was definitely necessary to administer an anesthetic to the patient and that proper, accredited medical precedents were followed in this case. It further appears that approximately one-half hour after the induction of a general anesthetic, Freeman vomited. An instrument was put into his mouth and his lungs were aspirated of all the material that could be seen. A surgical operation on Freeman's abdominal cavity followed which disclosed that the entrance to the bullet wound was surrounded by a darkened area caused by a very close rifle shot; the underlying fat was congealed as though it was burned and liquified; there was a liquid seeping out of the wound but no perforations were found; the peritoneum, which is the lining of the cavity where the intestines are located, was lacerated or "nicked" but none of the abdominal organs were damaged, the bullet having apparently glanced off the peritoneum wall and traveled outwardly and laterally. In the opinion of Lieutenant Colonel D'Amore the wound was not mortal. Immediately after the operation, the patient was bronchoscoped [inspection of the trachea or windpipe with a narrow tubular instrument] and vomitus aspirated from both main stem bronchi. At this time it was observed that the bronchi [windpipe] was filled with what looked like tomato juice. When an attempt was made to aspirate the large bronchi, this fluid filled the lungs and the patient stopped breathing. Under these circumstances it was the opinion of medical officers who conducted the operation that this aspiration of the vomitus contributed to Freeman's death. According to the testimony of eye witnesses at the scene of the shooting accused appeared to be on friendly terms with the deceased and gave no indication of bearing any malice or ill will against him. According to accused's testimony and his pre-trial statement, it appears that the shooting occurred while both accused and the deceased were engaged in play with their weapons and that accused pulled the trigger of his carbine which he believed to be empty when he shot the deceased.

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark)" (Par 149a, MCM, 1928).

The pointing of a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that

it would not be discharged is stated to be an instance of culpable negligence in performing a lawful act (MCM, 1928, at page 166). In view thereof, and in view of the circumstances surrounding the accused's act, we are of the opinion that the evidence supports a finding that the gunshot wound was inflicted by accused through his culpable negligence and that the circumstances indicate that the alleged homicide amounted in law to manslaughter.

Since the evidence shows, however, that cause of death was attributed to "acute pulmonary edema, secondary to vomitus, due to anesthesia given for exploration of gunshot wound," i.e., suffocation, it remains to be determined whether Freeman died in consequence of an injury inflicted by accused, i.e., the gunshot wound, or whether death resulted from an intervening, independent cause for which accused cannot legally be held accountable.

It is a long established principle of jurisprudence that a man is liable only for the natural and proximate consequence of his actions, and not for remote consequences resulting directly from some intermediate agent. Thus, in cases of homicide, as in the instant case, accused's responsibility for the death is governed by the causal relation of his wrongful act to the death. What, then, is proximity in causation? This subject is discussed by Professor Joseph H. Beale of the Harvard Law School in his treatise entitled "The Proximate Consequence of an Act" in 33 Harvard Law Review where, at page 643, he states:

"The connection of the defendant with the final active force may be sought in two ways. His connection with it may have been an active one; either by himself bringing it into existence, or by causing another person to do so. On the other hand, the defendant may have acted, and the force thereby loosed may have spent itself, coming to equilibrium in the form of a condition of forces which may or not be stable. If, then, this condition is unstable, if it is in appreciable danger of being acted upon by an oncoming force, the defendant who thus created a condition in the path of an oncoming force stands in a certain causal relation to the latter force, though the relation is worked out through the passive line. The same thing may be said if the defendant whose duty it was to change a condition which was in danger of such an oncoming force failed to remove the condition; in that case also he comes into a causal relation with the new force.

\* \* \*

"To sum up the requirements of proximity of result:

"1. The defendant must have acted (or failed to act in violation of a duty).

"2. The force thus created must (a) have remained active itself or created another force which remained active until it directly caused the result; or (b) have created a new active risk of being acted upon by the active force that caused the result." (Underscoring supplied)

Therefore, if it is found that accused created or set in motion an active force, as in this case, the gunshot wound, which remained active and created another force, i.e., the medical operation, the latter remaining active until it directly caused the result and if this latter force, unaccompanied by any independent element of maliciousness or gross negligence, contributed to the result, it may be concluded that the accused's initial wrongful act was the proximate cause of the homicide, and legal responsibility attaches thereto.

By the weight of authority in homicide cases in which, after the deceased received the wound, he is placed under the charge of a medical man, who in probing the wound or otherwise operating on the patient immediately causes his death, it is held, that if the medical man acts negligently or maliciously, and so introduces a new responsible cause between the wound and the death, this on the principle stated above, breaks the causal connection between the wound and the death. But if the medical man, following the usual course of practice which good practitioners under the circumstances are accustomed to adopt, occasions death when endeavoring to heal the wound, then the person inflicting the wound is chargeable with the death. This is on the basic concept that he who does an unlawful act is responsible for all the consequences that in the ordinary course of events proceed from the unlawful act. Obviously, it is one of the ordinary consequences of a wound that a medical man should be called in to treat it and it is one of the probabilities or risks of medical practice that the patient may die under treatment. In this respect the law does not exact from physicians the highest degree of professional skill, but only such skill as men of their professions are, under the circumstances, accustomed to apply. It is no defense that the deceased, under another form of treatment, might have recovered (Wharton's Criminal Law, Vol I, Sec 199; and cases cited therein).

Considering the factual situation in the instant case in the light of the foregoing discussion, it is our opinion that the accused's wrongful act of wounding the deceased was the proximate cause of his death and that while it appears that the immediate cause of death was occasioned by an incident involved in a medical operation, that operation was induced by accused's act of inflicting the wound and, in the absence of any showing that the operation was performed in a malicious or grossly negligent manner, accused is legally responsible for the natural and probable consequences which resulted in the ordinary course of events therefrom.

6. 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.

*B. Hottenstein*, Judge Advocate

(On leave), Judge Advocate

*George T. Brack* Judge Advocate

JAGH CM 328608

1st Ind

Board of Review No. 1, JAGO, Dept. of the Army

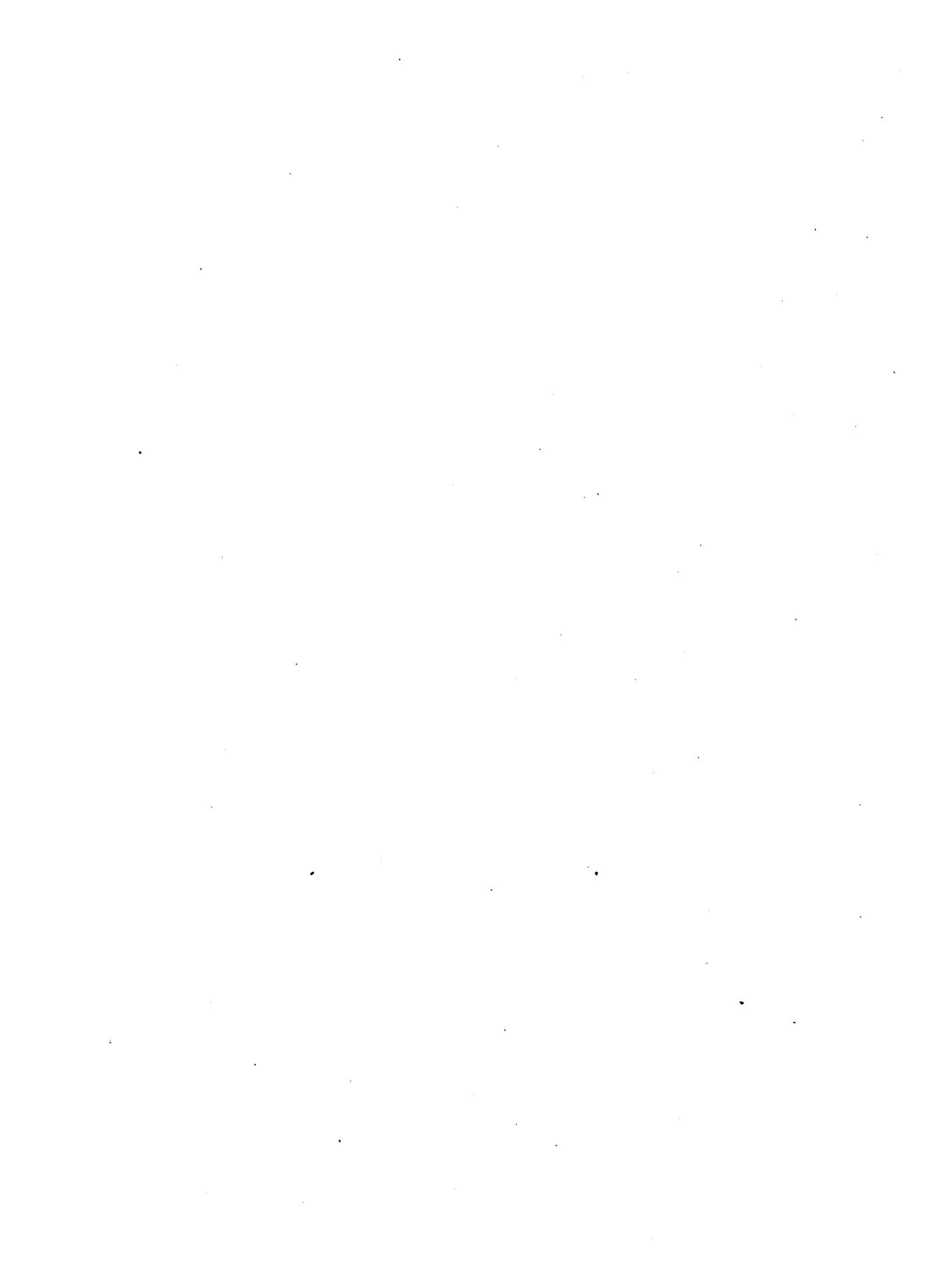
30 APR 1948

TO: The Judge Advocate General

For his information.

*B. Hottenstein*  
B. HOTTENSTEIN  
Colonel, JAGD  
Chairman, Board of Review No. 1

*Noted  
JAGD  
acting T.S.H.G.  
3 May 48*



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

JAGN-CM 328612

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at
	)	Heidelberg, Germany, 10 Octo-
Technician Fourth Grade	)	ber 1947. Dishonorable dis-
KENNETH WESTOVER (35850085),	)	charge and confinement for two
584th Ordnance Medium Automotive	)	and one-half (2½) years. United
Maintenance Company.	)	States Disciplinary Barracks.

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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 83rd Article of War.

Specification: In that Tec 4 Kenneth Westover, 584th Ordnance MAM Company, did, at Karlsruhe, Germany on or about 4 September 1947, willfully suffer a 4 ton wrecker, of the value of \$6,298.00, military property belonging to the United States, to be damaged.

CHARGE II: Violation of the 65th Article of War.

Specification 1: In that Tec 4 Kenneth Westover, 584th Ordnance MAM Company, did, at Karlsruhe, Germany on or about 4 Sept 1947 assault Tec 5 George E Otis, a non-commissioned officer, who was then in the execution of his office, by kicking him in the groin with his foot.

Specification 2: In that Tec 4 Kenneth Westover, 584th Ordnance MAM Company did, at Karlsruhe, Germany on or about 4 September 1947 assault Sgt Harry A Dollar, a non-commissioned officer, who was then in the execution of his office, by striking him in the face with his fist.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Tec 4 Kenneth Westover, 584th Ordnance MAM Company, did, at Karlsruhe, Germany, on or about 4 September 1947, wrongfully strike Eduard Gerritzen in the face with his fist.

Specification 3: In that Tec 4 Kenneth Westover, 584th Ordnance MAM Company, did, at Karlsruhe, Germany, on or about 4 September 1947, wrongfully strike Gerhard Neumann in the face with his fist..

Accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 1 of Charge III, but guilty of all Charges and all the remaining Specifications thereof. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, 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 Specifications, of Charge III and Specifications 2 and 3 thereof, and the sentence. The only question to be determined is the legal sufficiency of the record of trial to support the findings of guilty of Charge I and its Specification.

4. The evidence for the prosecution material to this question is contained in the testimony of First Lieutenant Joseph W. Parrett, officer in charge of the Ordnance Sub-base at Karlsruhe, Germany, Private First Class William J. Ruzinsky, acting motor sergeant of the 7772 Signal Group stationed at Frankfurt, Germany, and Private First Class Walter E. Turner, and reveals the following facts: On 4 September 1947 Private First Class Ruzinsky visited the Ordnance Sub-shop at Karlsruhe. During the day he had a few drinks of cognac with the men at the shop, ate lunch with them, and in the afternoon drank with them again (R. 7, 8). At about 1530 or 1600, accused, accompanied by Ruzinsky started on a road test with a four ton wrecker (R. 8, 9, 12, 19). This

vehicle was in the sub-shop for the purpose of having a new generator installed and the front bumper straightened (R. 60). The generator had been installed but the bumper had not yet been repaired (R. 61, 64). Accused was driving the vehicle for the road test (R. 9) and had the prescribed "road test" sign on it (R. 23), which was used in lieu of a trip ticket, for road testing of vehicles which were in the shop for repair (R. 19, 20). He attempted to negotiate a curve at a speed of 20 or 25 miles an hour and the truck struck a soft shoulder, went off the left-hand side of the road and turned over on its left side (R. 9, 13, 17, 18) mashing the left front fender (R. 11). Following the accident, a German driving a two and one-half ton truck stopped and pulled the wrecker back on its wheels on the road (R. 9, 22). Private First Class Turner passed the vehicle while it was in the ditch, but later returned and found it on the road but still at the scene of the accident. The witness Turner attempted to induce accused to return to the Kaserne but accused stated that he was going to get some cigarettes to give to the German who pulled the truck back on the road, and agreed to return to the Kaserne after that was done. Turner then joined accused in the truck and they proceeded toward the home of accused's girl (R. 22). They had not gone far when the vehicle stalled and Private Turner then towed it back to the sub-shop and turned it over to Sergeant Turley (R. 23). Lieutenant Parrett testified that when the vehicle was returned to the shop the engine and left front fender were damaged beyond repair (R. 60).

Private First Class Turner testified that the condition of the road at the scene of the accident was such that a four ton truck could not "normally" negotiate the curve at a speed of over 20 miles an hour (R. 26).

First Lieutenant Parrett testified extensively with regard to the "SOP" for road testing vehicles which were in the sub-shop for repair and his instructions to the men relative to such tests. His testimony was to the effect that vehicles were not to be road tested until all work was complete (R. 61) nor without authority from him or Technician Third Grade Turley, who was the noncommissioned officer in charge of the sub-shop (R. 61, 62) and that under the "SOP" accused would not be authorized to road test a vehicle on his own initiative (R. 62). He admitted, however, that although accused was the supply sergeant of the unit (R. 59, 65), as one of his duties he also made road tests of vehicles two or three times a week (R. 63) and that he did not know whether accused had authority for the road test of this particular vehicle (R. 61). In seeming conflict with this testimony Private First Class Ruzinsky testified that accused was in charge of the sub-shop at the time the wrecker was taken out (R. 19).

5. For the defense, the accused elected to be sworn, and testified with regard to this Specification substantially as follows:

The duties of accused in the company were supply sergeant and road testing vehicles (R. 68). It was the policy at the sub-shop to road test a vehicle unless there was a mechanical defect that made it unsafe for it to be on the road, even though there was a part to be replaced which did not affect the operation of the vehicle (R. 68). Accused had authority direct from the shop foreman to road test a vehicle whenever a mechanic working on it told him it was completed (R. 69). On 4 September an electrician at the shop told him that repair of the generator on the four ton wrecker had been finished (R. 70), and as there remained nothing to be done except to repair the bumper he started on a road test with the vehicle (R. 69). He drove through a railroad underpass and went into a sharp curve at about 20 miles per hour, attempted to slow down but the brakes were not working properly and the vehicle slowed only to 18 miles per hour, went off the road on a soft shoulder and turned on its side (R. 69). As a result of the accident a fender was crumpled (R. 69).

6. By the Specification of Charge I accused is alleged to have willfully suffered a four ton wrecker to be damaged. "A willful act is one that is done knowingly and purposely with the direct object in view of injuring another" (Bouvier's Law Dictionary, Unabridged, Rawles Third Revision, Vol. 2, p. 3455).

In the instant case there is no evidence that accused entertained any purpose or object to injure the vehicle concerned or the United States Government as the owner thereof. In fact, aside from some showing that he was driving at a speed slightly in excess of safety conditions, it appears that accused was proceeding in his normal duties in a reasonable manner.

The prosecution also attempted to show that accused took the vehicle from the shop without proper authority. In this connection the Manual for Courts-Martial provides:

"The willful or neglectful sufferance specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; \* \* \* permitting it to be \* \* \* injured by other persons; loaning it to an irresponsible person by whom it is damaged, etc. (Winthrop)" (MCM, 1928, par. 143, p. 158; underscoring supplied).

The only evidence introduced regarding the unauthorized use was the testimony of Lieutenant Parrett relative to the "SOP" of road testing vehicles at the sub-shop and his testimony that authorization for a road test was required from either him or the sergeant in charge.

From his testimony, however, it is evident that he did not know whether accused had authority to make the test, and he was only able to state that he himself did not authorize it. No evidence was introduced to show that accused did not receive such authority from Technician Third Grade Turley, the sergeant in charge of the sub-shop. Although accused told Private Turner he was going to "his girl's" house to get cigarettes to pay the Germany who pulled the truck back on the road, this occurred after the accident and in connection with the salvage of the vehicle. There is, therefore, not sufficient competent evidence from which it may be implied that accused suffered the property to be damaged through an unwarranted use. Moreover, the court so concluded in making its finding of not guilty of Specification 1 of Charge III. Considering the character of the offense charged we are compelled to the conclusion that in the absence of any evidence showing a willful act and a like failure to establish that accused's road test of the vehicle was without authority, the prosecution has not maintained its burden of proof, hence the court's finding as to this Specification may not be sustained. Assuming without deciding that suffering the property to be damaged through neglect is an offense necessarily lesser included within the willful act here charged, nevertheless there is not sufficient evidence of negligence of such a culpable nature as would support a finding of guilty of such lesser included offense.

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and its Specification and Charge III and Specifications 2 and 3 thereof and legally sufficient to support the sentence.

Edward J. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springsteen, Judge Advocate.

(166)

JAGN-CM 328612

1st Ind

MAR 8 1948

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

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

1. In the case of Technician Fourth Grade Kenneth Westover (35850085), 584th Ordnance Medium Automotive Maintenance Company, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Charge I and its Specification be disapproved. 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:

1 Incl  
Record of trial



A handwritten signature in black ink, appearing to read "Thomas H. Green".

THOMAS H. GREEN  
Major General  
The Judge Advocate General

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

JAGN-CM 328619

UNITED STATES )

ROME AREA MTOUSA )

v. )

Trial by G.G.M., convened at  
Rome, Italy, 21 August 1947.

Private MILTON G. HORTON  
(11102754), Headquarters  
& Headquarters Service  
Company, Rome Area, MTOUSA. )

Dishonorable discharge and con-  
finement for one (1) year.  
Disciplinary Barracks. )

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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. Accused was tried upon the following Charges and Specifi-  
cations:

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

Specification: In that Private Milton G Horton then  
1776th Engineer General Service Company and now  
Headquarters and Service Company Rome Area Mediter-  
ranean Theater of Operations did without proper leave  
absent himself from his station at or about Foggia,  
Italy from on or about 23 December 1946 to on or  
about 13 May 1947.

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

Specification: In that Private Milton G Horton then  
1776th Engineer General Service Company and now  
Headquarters and Service Company Rome Area  
Mediterranean Theater of Operations did at and  
about Naples Rome Leghorn and Milan Italy in and  
about the months of January February March April

and May 1947 with intent to defraud the United States of America falsely assume and pretend to be an officer acting under the authority of the United States that is a Second Lieutenant of the Army of the United States and an employee acting under the authority of the United States that is an agent of the Counter Intelligence Corps of the United States and an agent of the Criminal Investigation Division of the Army of the United States and in such pretended character did obtain from the United States rations quarters clothing and rail transportation being things of value in excess of the sum of fifty dollars in violation of the Act of 4 March 1909 Chapter 321 as amended being Section 32 United States Criminal Code 35 Statutes at Large 1095 and 52 Statutes at Large 83 being Title 18 Section 76 United States Code the statute in such case made and provided.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence but remitted so much thereof as imposed confinement at hard labor in excess of one year, designated the Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$ .

3. For the reasons hereinafter given a statement of the evidence is deemed unnecessary.

4. Due to the fact that the record of trial was lost, a new record was prepared, authenticated, and forwarded to The Judge Advocate General pursuant to the provisions of paragraph 85, Manual for Courts-Martial, 1928. The record of trial submitted shows, however, that there were introduced in evidence at the trial Prosecution's Exhibits 1 to 7 inclusive and Defense Exhibit A, listed as follows:

Extract copy of morning report, 1776 Eng Gen Sv Co	Pros 1
Officer's shirt, green	Pros 2
Liberty Pass from 115th M.P. Co.	Pros 3
Military service cap	Pros 4
Written statement of accused to CID, 13 May 1947	Pros 5
Written statement of accused to CID, 1 June 1947	Pros 6
Letter attaching accused to Hq & Sv Co, Rome Area MTOUSA	Pros 7
Written statement of accused to CID, 3 June 1947	Def A

None of these exhibits were attached to the reconstructed record of trial.

5. Article of War 33 and paragraph 85 of the Manual for Courts-Martial require that each record of trial by general court-martial contain a complete history of the proceedings in open court (CM 227459, Wicklund, 15 BR 302).

Even assuming that this record of trial contains some other evidence to support the Specifications of which accused was found guilty, the record is nevertheless fatally defective in that Prosecution's Exhibits, particularly 1, 5, and 7 and Defense Exhibit A are not included therein.

The record of trial shows that it was stipulated between the prosecution, defense, and accused that Prosecution's Exhibit 1 was a true extract copy of the morning report of the 1776 Engineer General Service Company which was submitted at Foggia, Italy, the place from which accused was alleged by the Specification of Charge I to have absented himself. Since the record of trial contains no other evidence of such initial absence the omission of this exhibit, which we may surmise showed it, is fatal as to the Specification in question.

Prosecution's Exhibits 5 and 7, and Defense Exhibit A are represented, by references in the record and by the index thereto, to be written pre-trial statements by accused. Respecting the fatality of the omission of exhibits of this nature from the record as forwarded for review under Article of War 50½ the Board of Review has held:

"It is evident that this statutory review could not be performed in this case with respect to the convictions of the offenses involved in Charges I and II and their specifications for the reason that there is no complete record of trial upon these charges and specifications within the contemplation of either Article of War 33 or Article of War 50½. \* \* \* Through no fault of his, accused has been, by the deficiency of the record, deprived of the right conferred by law to have the complete proceedings at his trial upon these charges and specifications reviewed in an appellate capacity. This right is of a highly substantial character; and it must be concluded that its denial to him is fatally injurious within the contemplation of the 37th Article of War. In cases in which records of trial were incomplete in the sense that it appeared that they had been in part prepared from unauthorized sources, it has been held by the Board of Review, with the concurrence of The Judge Advocate General, that the records were legally insufficient to support the findings and sentences adjudged

(C.M. 156085, Mayo; 156084, Alsup). It has been held by state courts in cases in which there was not an automatic appellate review as is provided for by Article of War 50 $\frac{1}{2}$ , that if, by reason of the loss of an important part of a record, a defendant is unable through no fault of his to perfect his appeal, the judgment will be reversed (State vs. McCarver, 20 S.W. (Mo.) 1058)' (CM 192451, Hajek)<sup>2</sup> (CM 227459, Wicklund, 15 BR 303).

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 Johnson Judge Advocate.

Frank C. Alfred Judge Advocate.

George B. Springston Judge Advocate.

MAR 9 1948

JAGN-CM 328619

1st Ind

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

TO: Commanding General, Headquarters Command, European Command,  
APO 757, c/o Postmaster, New York, N. Y.

1. In the case of Private Milton G. Horton (11102754), Headquarters & Headquarters Service Company Rome Area, MTOUSA, I concur in the foregoing holding by the Board of Review and for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated.

2. It is noted that by letter of transmittal dated 16 January 1948, the Commanding Officer, Military Liquidating Agency (US), APO 794, U. S. Army, stated in part that the missing exhibits may be secured from the soldier's 201 file. These exhibits were not found upon an examination of accused's field 201 file obtained from the Commandant, Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey.

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

(CM 328619).

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 328620

U N I T E D S T A T E S	)	ROME AREA MTOUSA
	)	
v.	)	Trial by G.C.M., convened at
	)	Rome, Italy, 31 July 1947.
Sergeant PAUL G. MANQUEN	)	Dishonorable discharge and
(42822998), 1419th Army Air	)	confinement for one (1) year.
Forces Base Unit, European	)	Disciplinary Barracks.
Division, Air Transport Com-	)	
mand.	)	

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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: Violation of the 94th Article of War.

Specification: In that Sergeant Paul G Manquen then 1419th Army Air Forces Base Unit Air Transport Command and now Headquarters and Service Company Rome Area Mediterranean Theatre of Operations did on or about 28 April 1947 make and present a claim against the United States by making and presenting for approval and for payment by the United States thru the War Department an agency thereof duly authorized thereunto to First Lieutenant Mary S Feliciotti an officer of the United States authorized to receive the same an application for payment of family allowances monthly from and after 12 April 1947 to Bruna Faccin also known as Bruna Ferron also known as Lucia B Manquen as a Class A dependent that is as the wife of said Manquen in the sum by the Servicemen's Dependents Allowance Act being the Act of 23 June 1942 as amended provided to be paid to

the wife of a soldier on active duty with the Armed Forces of the United States being about twenty-eight dollars per month which application and claim was false and fraudulent in that said Bruna Faccin was not the wife of said Manquen and was not a lawful dependent of said Manquen entitled to payment of moneys to her by the United States pursuant to said Act and was then known by said Manquen to be so false and fraudulent.

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

Specification 1: In that Sergeant Paul G Manquen then 1419th Army Air Forces Base Unit Air Transport Command and now Headquarters and Service Company Rome Area Mediterranean Theatre of Operations did at and about Rome Italy in and about the months of February March April and May 1947 acting jointly and in pursuance of a common intent wrongfully conspire in conjunction with Bruan Ferron also known as Bruna Faccin also known as Lulia B Manquen and Lucia Valentini and Alfredo De Cesare and Angelo Di Pippo and other persons unknown to commit an offense against the United States namely to cause to emigrate from Italy and immigrate into the United States said Faccin as a person pretendedly qualified for entry therein as an alien spouse pursuant to the Act of 28 December 1945 being an Act to expedite the admission to the United States of alien spouses and alien minor children of citizen members of the United States Armed Forces being Public Law 271 First Session 79th Congress she being a person not so qualified and by said Manquen known to be not his lawful spouse or child and not intended to be contrary to the provisions of said Act and in fraud of the United States and said Act and otherwise the Immigration Laws thereof and in pursuance of said conspiracy did thereafter in and about the month of April 1947 wrongfully representing said Faccin to be his lawful wife reside with said Faccin in the United States Army operated Boston Hotel at Rome Italy all in violation of and contrary to Section 37 United States Criminal Code being the Act of 4 March 1909 Chapter 321 Section 37 being 35 Statutes 1096 being Title 18 Section 88 United States Code.

Specification 2: In that Sergeant Paul G Manquen then 1419th Army Air Forces Base Unit Air Transport Command and now Headquarters and Service Company Rome Area Mediterranean Theatre of Operations having taken an oath before Captain Kerwin B Adams a Summary Court-Martial and a competent tribunal that a certain writing by said Manquen entitled Certificate of Request of US Military and Civilian Personnel to

Marry in the Mediterranean Theatre of Operations was true did at Rome Italy on or about 7 February 1947 willfully corruptly and contrary to such oath state and subscribe that Lucia Valentini was his fiancee and that he requested permission to marry said Lucia Valentini and that he would comply with all laws relating to marriage in effect in Italy in which country the marriage was to be performed which statement and subscription was a material matter and which said Manquen did not then believe to be true all in violation and contrary to Section 125 United States Criminal Code being the Act of 4 March 1909 Chapter 321 Section 125 being 35 Statutes 1111 being Title 18 Section 231 United States Code.

Specification 3: In that Sergeant Paul G Manquen then 1419th Army Air Forces Base Unit Air Transport Command and now Headquarters and Service Company Rome Area Mediterranean Theatre of Operations did at or about Rome Italy on or about 28 April 1947 in an application and claim pursuant to the Servicemen's Dependents Allowance Act being the Act of 23 June 1942 as amended for family allowances monthly to Bruna Faccin also known as Bruna Ferron also known as Lucia B. Manquen as a Class A Dependent that is as the wife of said Manquen did state that said Lucia B Manquen was his wife which statement was of a material fact and was false and was then known by said Paul G Manquen to be false all in violation of and contrary to Section 116 of said Act being the Act of 23 June 1942 Chapter 443 Title I Section 117 being 56 Statutes 385 being Title 37 Section 271 United States Code.

Accused pleaded not guilty to all Charges and Specifications and was found guilty of Specification 1 of Charge II, excepting the words "Alfredo De Cesare and Angelo Di Pippo," guilty of all other Charges and Specifications, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence but remitted so much thereof as imposed confinement at hard labor in excess of one year, designated the Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. For the reasons hereinafter set out, a statement of the evidence is deemed unnecessary.

4. Due to the fact that the record of trial was lost, a new record was prepared, authenticated, and forwarded to The Judge Advocate

General pursuant to the provisions of paragraph 85, Manual for Courts-Martial, 1928. The record of trial submitted, however, shows that there were introduced in evidence at the trial Prosecution's Exhibits 1 to 12 inclusive, listed as follows:

Application for Family Allowance	Pros. 1
Family allowance check	Pros. 2
Radiogram	Pros. 3
Acknowledgement of application for family allowance	Pros. 4
Application and processing of marriage papers	Pros. 5
(Stipulated in the record of trial to be an original record maintained in the personal 201 file of accused)	Pros. 6
Request for marriage	Pros. 7
(Stipulated in the record of trial to be the official records maintained at Ciampino in the personal 201 file of accused relating to marriage application and theater permit granting permission to marry Miss Lucia Valentini)	Pros. 8
Request for government quarters and subsistence	Pros. 9
Transportation request for alien dependents	Pros. 10
Billeting slip	Pros. 11
Statement of accused	Pros. 12

5. Article of War 33 and paragraph 85 of the Manual for Courts-Martial require that each record of trial by general court-martial contain a complete history of the proceedings in open court (CM 227459, Wicklund, 15 BR 302).

Even though this record of trial contains some evidence other than the exhibits to support the Specifications of which accused was found guilty, the record is nevertheless fatally defective in that the exhibits, particularly Prosecution's Exhibit 12 (Statement of accused) are not included therein. Respecting the fatality of the omission of exhibits of this nature from the record as forwarded for review under Article of War 50 $\frac{1}{2}$  the Board of Review has held:

"It is evident that this statutory review could not be performed in this case with respect to the conviction of the offenses involved in Charges I and II and their specifications for the reason that there is no complete record of trial upon these charges and specifications within the contemplation of either Article of War 33 or Article of War 50 $\frac{1}{2}$ . \* \* \* Through no fault of his, accused has been, by the deficiency of the record, deprived of the right conferred by law to have the complete proceedings at his trial upon these charges and specifications reviewed in an appellate capacity. This right is of a highly substantial character, and it must be concluded that its denial to him

is fatally injurious within the contemplation of the 37th Article of War. In cases in which records of trial were incomplete in the sense that it appeared that they had been in part prepared from unauthorized sources, it has been held by the Board of Review, with the concurrence of The Judge Advocate General, that the records were legally insufficient to support the findings and sentences adjudged (C.M. 156085, Mayo; 156084, Alsup). It has been held by state courts in cases in which there was not an automatic appellate review as is provided for by Article of War 50 $\frac{1}{2}$ , that if, by reason of the loss of an important part of a record, a defendant is unable through no fault of his to perfect his appeal, the judgment will be reversed (State vs. McCarver, 20 S.W. (Mo.) 1058)' (CM 192451, Hajek)" (CM 227459, Wicklund, 15 BR 303).

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 Johnson Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Spurgeon, Judge Advocate.

MAR 12 1948

JAGN-CM 328620

1st Ind

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

TO: Commanding General, Headquarters Command, European Command,  
APO 757, c/o Postmaster, New York, N. Y.

1. In the case of Sergeant Paul G. Manquen (42822998), 1419th Army Air Forces Base Unit, European Division, Air Transport Command, I concur in the foregoing holding by the Board of Review and for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated.

2. It is noted that by letter of transmittal dated 16 January 1948, the Commanding Officer, Military Liquidating Agency (IS), APO 794, U. S. Army, stated in part that the missing exhibits may be secured from the soldier's 201 file. Documents which appear to be copies of all these exhibits, except Prosecution's Exhibit 2, are contained in the field 201 file of accused in the possession of the Commandant, Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, and can probably be obtained in the event a rehearing is ordered.

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

(CM 328620).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
Record of trial



3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Ninth Air Force Judge Advocate, 26 January 1948.

4. The accused is 25 years of age, married and the father of one child. He was graduated from high school and attended a business academy for 9 months. On 13 February 1941 he enlisted in the Royal Canadian Air Force and served therewith until discharged for the purpose of accepting a commission as Second Lieutenant, Army of the United States, on 29 September 1942. He was shot down by the enemy while flying a mission in Africa on 26 December 1942 and remained a prisoner of war until liberated from a German prison camp in April 1945. In May 1945 he was returned to the United States and was promoted to the rank of First Lieutenant, Army of the United States, on 22 October 1945. Of the three efficiency reports of record (1 Jan 1946 to 30 June 1947), one lists accused's rating as "Unknown" while two rate him as "Excellent."

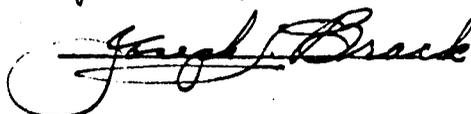
5. A letter, together with inclosure, from Honorable Toby Morris, Member of Congress, dated 6 January 1948, addressed to The Judge Advocate General, urging clemency on behalf of accused, has been considered by the Board of Review.

Attached to the record of trial is a letter addressed to the reviewing authority, signed by six of the nine members of the court, the defense counsel and the assistant defense counsel, all recommending that the confinement imposed be "suspended" and that he (accused) "be requested to resign his commission rather than be dismissed from the service." The petitioners based their recommendations on the fact that accused has been in restraint since 24 December 1946 and upon his reputable combat record.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. 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 61.

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

JAGH CM 328628

1st Ind

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

**FEB 19 1948**

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 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 B. Jones (O-385299), Air Force of the United States.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from about 4 July 1946 until about 24 December 1946, in violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence and forwarded the record of the trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Ninth Air Force 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 4 July 1946, accused absented himself without leave from his organization at Biggs Field, Texas. On 28 or 29 July 1946, while still absent without leave, he went to Mexico, where he sustained serious injuries when a private aircraft which he was piloting crashed in the vicinity of Mexico City on 12 October 1946. He was hospitalized in the American-British Cowdrey Hospital in Mexico City until 24 December 1946, when he was flown to Kelley Field, Texas, and from there was sent to Brooks General Hospital for further treatment and hospitalization.

Prior to his unauthorized absence, accused made and uttered a number of checks which were dishonored by the drawee bank when presented for payment because of insufficient funds. He also presented and received payment thereon, several false pay vouchers during the months of June and July, 1946. Accused testified that he went absent without leave in order to earn sufficient funds to make restitution for the fraudulent vouchers and to clear up his other financial difficulties.

Papers attached to the record of trial show that he was brought to trial for some of these latter offenses before the United States District Court, District of Arizona, on 23 July 1947, on two counts, each alleging the presentation of false claims against the Government in the total amount of \$572. He pleaded guilty to the charges. Imposition of the sentence was suspended for one year and he was returned to military control.

4. The accused is 25 years of age, married and the father of one child. He was graduated from high school and attended a business academy for 9 months. On 13 February 1941 he enlisted in the Royal Canadian Air Force and served therewith until discharged for the purpose of accepting a commission as Second Lieutenant, Army of the United States, on 29 September 1942. He was shot down by the enemy while flying a mission in Africa on 26 December 1942 and remained a prisoner of war until liberated from a German prison camp in April 1945. In May 1945 he was returned to the United States and was promoted to the rank of First Lieutenant, Army of the United States, on 22 October 1945. Of the three efficiency reports of record (1 Jan 1946 to 30 June 1947), one lists accused's rating as "Unknown" while two rate him as "Excellent."

5. A letter, together with inclosure, from Honorable Toby Morris, Member of Congress, dated 6 January 1948, addressed to The Judge Advocate General, urging clemency on behalf of accused, has been considered.

Attached to the record of trial is a letter addressed to the reviewing authority, signed by six of the nine members of the court, the defense counsel and the assistant defense counsel, all recommending that the confinement imposed be "suspended" and that he (accused) "be requested to resign his commission rather than be dismissed from the service." The petitioners based their recommendations on the fact that accused has been in restraint since 24 December 1946 and upon his creditable combat record.

6. I recommend that the sentence be confirmed but, in view of clemency recommended by the court and accused's combat record, I further recommend that the confinement be remitted, and as thus modified the sentence be carried into execution.

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



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls  
1 Record of Trial  
2 Form of Action

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( GCMO 53, 2 March 1948).

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

(183)

JAGK - CM 328643

27 FEB 1948

UNITED STATES )

82D AIRBORNE DIVISION

v. )

Trial by G.C.M., convened at Fort Bragg,  
North Carolina, 23 January 1948. Dis-  
missal, total forfeitures and confine-  
ment for one (1) year.

Captain JAMES B. HEANEY  
(O-1106196), Corps of  
Engineers )

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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 94th Article of War.

Specification 1: In that Captain James B. Heaney, Headquarters 307th Airborne Engineer Battalion, did at St Louis, Missouri, on or about 15 December 1947, present for approval and payment a claim against the United States by presenting to Lieutenant Colonel S. H. Smith, Finance Officer at St Louis, Missouri, an officer of the United States, duly authorized to pay such claims, in the amount of \$100.00 for services alleged to have been rendered to the United States by the said Captain James B. Heaney, which claim was false and fraudulent in that the said Captain James B. Heaney had not rendered any service to the United States subsequent to 8 November 1947, for which he was entitled to receive such remuneration, and was not in fact entitled to such pay, and was then known by the said Captain James B. Heaney to be false and fraudulent.

Specification 2: In that Captain James B. Heaney, \*\*\*, did at Fort Worth, Texas, on or about 19 December 1947, present for approval and payment a claim against the United States by presenting to Colonel J. W. Faulds, Finance Officer at Fort Worth, Texas, an officer of the United States, duly authorized to pay such claims, in the amount of \$150.00 for services alleged to have been rendered to the United States by the said Captain James B. Heaney, which claim was false and fraudulent

in that the said Captain James B. Heaney had not rendered any service to the United States subsequent to 8 November 1947, for which he was entitled to receive such remuneration, and was not in fact entitled to such pay, and was then known by the said Captain James B. Heaney to be false and fraudulent.

Specification 3: In that Captain James B. Heaney, \*\*\*, did at Barksdale Field, Louisiana, on or about 30 December 1947, present for approval and payment a claim against the United States by presenting to Lieutenant Colonel Morris Bush, Finance Officer at Barksdale Field, Louisiana, an officer of the United States, duly authorized to pay such claims, in the amount of \$150.00 for services alleged to have been rendered to the United States by the said Captain James B. Heaney, which claim was false and fraudulent in that the said Captain James B. Heaney had not rendered any service to the United States subsequent to 8 November 1947, for which he was entitled to receive such remuneration, and was not in fact entitled to such pay, and was then known by the said Captain James B. Heaney to be false and fraudulent.

Specification 4: In that Captain James B. Heaney, Headquarters 307th Airborne Engineer Battalion, did at Brooklyn, New York, on or about 10 November 1947, present for approval and payment a claim against the United States by presenting to Colonel C. A. Frank, Finance Officer at Army Base, Brooklyn, New York, an officer of the United States, duly authorized to pay such claims, in the amount of \$150.00 for services alleged to have been rendered to the United States by the said Captain James B. Heaney, which claim was false and fraudulent in the amount of \$81.17 in that said Captain James B. Heaney had rendered service to the United States only for the amount of \$68.83, and was not in fact entitled to such pay in excess of \$68.83, and was then known by the said Captain James B. Heaney to be false and fraudulent.

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

Specification: In that Captain James B. Heaney, \*\*\*, did without proper leave, absent himself from his organization and duties at Fort Bragg, North Carolina from about 8 November 1947, to about 31 December 1947.

He pleaded guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for one year. 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 law and evidence contained in the Staff Judge Advocate's review.

4. Records of the Department of the Army show that accused is 33 years of age and is married. He is a high school graduate and attended Manhattan College for one year. In civilian life, he was employed in steel and tunnel construction. From 25 March 1941 to 17 June 1942, he served as an enlisted man, finally attaining the grade of Staff Sergeant, while serving overseas on Ascension Island. Having graduated from the Engineer Officers' Candidate School at Fort Belvoir, Virginia, upon his return to the United States, he was, on 11 November 1942, commissioned and appointed a temporary second lieutenant in the Army of the United States. He was promoted to the temporary grade of first lieutenant on 21 April 1943. On 8 June 1943, he again left the United States for overseas service, this time in the Pacific Area. There he served on Guadalcanal, Biak, Leyte, Mindanao and Okinawa. He was promoted to the temporary grade of captain on 22 July 1945, while serving in the Pacific, and arrived back in the United States on 13 November 1945. His efficiency reports are uniformly superior.

5. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 61 or 94.

Charles W. Liberty, Judge Advocate

Gilbert E. Adcock, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 328643

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAR 3 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain James B. Heaney (O-1106195), Corps of Engineers.

2. Upon trial by general court-martial this officer pleaded guilty and was found guilty of having presented for approval and payment four false and fraudulent claims against the United States in the amounts of \$100 (at St. Louis, Missouri, on 15 December 1947), \$150 (at Fort Worth, Texas, on 19 December 1947), \$150 (at Barksdale Field, Louisiana, on 30 December 1947), and \$81.17 (at Brooklyn, New York, on 10 November 1947), respectively, in violation of the 94th Article of War (Charge I and Specs. 1, 2, 3 and 4 thereof). He was also found guilty of having absented himself from his organization without proper leave from about 8 November 1947 to about 31 December 1947 (Charge II and its Spec.). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, designated the Southeastern Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, or elsewhere as the Secretary of the Army might direct, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the 82nd Airborne Division Judge Advocate's review which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and the law in the case. 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.

Although accused pleaded guilty to all charges and specifications, the prosecution established accused's guilt thereof by documentary and other evidence showing his absence without leave, as alleged, and that he had on four occasions drawn partial payment for services which, because of such absence, he had not in fact rendered. At the trial, accused testified that when he returned from overseas in the latter part of 1945, he noticed that his wife was in a "bad financial condition." From that time until the date he went absent without leave, he tried to prevail upon her to live

within their means, but without success. She was very nervous, continually complained in a nagging manner over their inability to purchase luxuries, insisted upon taking several trips to Florida, and twice tried to take her own life, once by turning on the gas jets in their quarters and the second time by taking an overdose of sleeping pills. After his wife's second attempt at suicide, he checked his financial status and found that "he was in a heck of a mess." He had borrowed heavily and, deciding to "pay off all the debts we owed and make a clean break of it," he asked his commanding officer for a pass so that he could go to Washington, D.C., in an attempt to borrow money on an insurance policy. When he arrived in Washington sometime between 7 and 10 November 1947, he was informed by the insurance company that the policy had not been in effect long enough to have attained a loan value. He "felt pretty bad" about his failure to procure a loan and went up to his room "and started drinking." From Washington, D.C., he went to Brooklyn, New York, where he cashed a partial pay voucher. He had not thought about whether he was entitled to this payment because "he had been drinking for a long time" and "had been in a fog" for five or six days. From New York he then traveled by bus "to the next town," St. Louis. He had "no logical reason" for not coming back when his pass was up and although he "guessed" that he knew what he was doing when he cashed "these partial payment vouchers", he was "in a fog." He had "no excuse" for his conduct. He "just bummed around the country" and was now "ready to take my punishment."

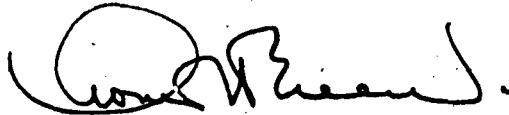
The record of trial contains a letter from one Lieutenant Colonel J. A. Smedile, who was accused's commanding officer overseas, in which the latter writes in highly laudatory terms of accused's character, ability and accomplishments under adverse conditions. Officers who had served with accused in his last assignment testified that he was a generally excellent officer but seemed worried over his domestic difficulties.

4. Records of the Department of the Army show that accused is 33 years of age and is married. He is a high school graduate and attended Manhattan College for one year. In civilian life, he was employed in steel and tunnel construction. From 25 March 1941 to 17 June 1942, he served as an enlisted man, finally attaining the grade of Staff Sergeant while serving overseas on Ascension Island. Upon his return to the United States he attended Engineer Officers' Candidate School at Fort Belvoir, Virginia and after his graduation therefrom he was, on 11 November 1942, commissioned and appointed a temporary second lieutenant in the Army of the United States. He was promoted to the temporary grade of first lieutenant on 21 April 1943. On 8 June 1943, he again left the United States for overseas service, this time in the Pacific Area. There he served on Guadalcanal, Biak, Leyte, Mindanao and Okinawa. He was promoted to the temporary grade of captain on 22 July 1945, while serving in the Pacific, and arrived back in the United States on 13 November 1945. His efficiency reports are uniformly superior.

(188)

5. I recommend that the sentence be confirmed but, in view of all the circumstances of the case and the long and excellent service of accused prior to the commission of these offenses, that the forfeitures and confinement be remitted and that the sentence as thus modified be carried into execution.

6. Inclosed is a form of action designed to carry 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 69 , 23 March 1948 ).

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

(189)

JAGK - CM 328648

2 MAR 1948

UNITED STATES )

FIFTH ARMY

v. )

Captain EDGAR O. BROWN )  
(O-1821203), Medical Corps )

Trial by G.C.M., convened at Fort  
Sheridan, Illinois, 5 January  
1948. "Dishonorable discharge," total  
forfeitures and confinement for two (2)  
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 charge and specification:

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

**Specification:** In that Captain Edgar O. Brown, Attached, 5012 Area Service Unit, Station Complement, Detachment X, did, while en route from Benicia, California to Fort Winfield Scott, California, on or about 19 April 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 7 October 1946.

He pleaded not guilty to and was found guilty of the charge and its specification. No evidence of any previous conviction was introduced. He was sentenced to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. 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 facts and law contained in the Staff Judge Advocate's review.

4. It is noted that the accused was sentenced to be "Dishonorably discharged the service \*\*\*." "Dishonorable discharge" is inappropriate in the case of an officer, but the sentence is not thereby illegal and the irregularity may be cured by the action of the confirming authority

(CM 249921, Maurer, 32 BR 229; CM 271119, Simpson, 46 BR 53, 58).

5. The accused is 50 years of age and unmarried. He graduated from Knox College with a BS Degree in 1921 and Northwestern University with an MD Degree in 1926. He engaged in the practice of medicine until 19 August 1942 when he was commissioned a captain, MC, AUS, and ordered to active duty. No efficiency reports are shown in his file.

6. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 58.

Charles W. Silver Judge Advocate

Robert J. Schroy Judge Advocate

Harley A. Lanning Judge Advocate

JAGK - CM 328648

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAR 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 Captain Edgar O. Brown (O-1821203), Medical Corps.

2. Upon trial by general court-martial this officer was found guilty of deserting the service of the United States on or about 19 April 1944 and remaining absent in desertion until he was apprehended at Chicago, Illinois, on or about 7 October 1946. No evidence of previous convictions was introduced. He was sentenced to "be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two (2) 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 review of the Fifth Army judge advocate which was adopted in the accompanying opinion of the Board of Review as a statement of the facts and the law of the case. I concur in the opinion of the Board of Review that the record is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

On 18 September 1942 the accused, then a 44 year old practicing physician at Chicago Heights, Illinois, was commissioned a captain, Medical Corps, and ordered to duty at Camp Haan, California. On or about 17 April 1944 the accused was relieved from assignment with the Medical Detachment, 218 AAA Gun Battalion (temporary station, Benicia, California) and assigned to the 18th Coast Artillery Regiment (HD) (Type B), Fort Winfield Scott, California. He did not report to his new organization and was carried as absent without leave from 19 April 1944 to 7 October 1946 when he was apprehended by civilian police in Chicago Heights, Illinois.

Testifying in his own behalf the accused admitted his unauthorized absence. He testified that he told his commanding officer that he would not "accept" his new assignment and that "I thought that my country had a need to my services in the proper fashion." He had become dissatisfied with routine inspections and felt that he should be given more dignified duty such as physicians perform in hospitals. Except for several vacation periods, the accused had been practicing medicine in Chicago Heights, Illinois, since he absented himself from the service. He used his proper name and wore civilian clothes most of the time and military clothes on

occasion. When apprehended he was wearing khaki shorts. It has been heretofore stated that the accused was apprehended and returned to military control on 7 October 1946. He was held in arrest of quarters, or in restriction from that date until the time of his trial, 5 January 1948. Counsel for the defense raised the issue at the trial that an injustice had been done the accused by such undue delay in bringing him to trial. The Staff Judge Advocate attributes the delay to the difficulty encountered in procuring proper documentary evidence and the negligence and procrastination of a former staff officer who had been hospitalized on account of mental illness. Both of these factors appear to have contributed to the delay in bringing the accused to trial.

On 29 January 1947 the accused tendered his resignation for the good of the service. By third indorsement thereto the Commanding General, Fifth Army, recommended to The Adjutant General that the resignation of the accused for the good of the service in lieu of trial be accepted. General Walker stressed the fact that the report of medical examination of the accused showed a diagnosis of "inadequate personality, chronic, severe." He noted however that there appeared to be no symptoms of psychosis or neurosis.

After the record of trial was received in the office, there was forwarded to this office for consideration a recommendation by the defense counsel and four of the members of the court which tried the case wherein clemency was recommended. Three of the members stated in part:

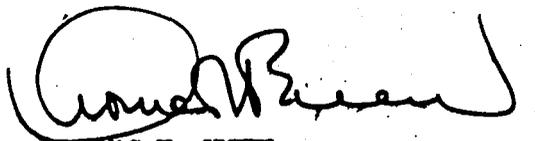
"3. Our reason for this recommendation is based on the fact that Captain Brown is a medical doctor, as well as a Medical Officer. From the presentation of the evidence it is apparent that his training as a soldier was somewhat lacking, and this probably led to his desertion. We believe that the reason for his desertion was not necessarily for personal gain but due to the fact that Captain Brown believed he could be of a greater service to humanity by practicing medicine in a civilian community instead of complying with his assignment as a field surgeon, where his duties were inspection of kitchens, treating minor ailments at the dispensary, and the like. Although his attitude was mistaken and the nature of his assignment was not his choice, Captain Brown still has the qualities of a medical doctor and those of a surgeon. These abilities could be better utilized on the outside if Captain Brown were dismissed from the Service, rather than if he were imprisoned for two years at a disciplinary barracks.

"4. Due to unfortunate circumstances, Captain Brown remained in arrest and in restriction at Fort Sheridan, Illinois, for a matter of 13 months before he received the assignment of any duties. Fifteen months elapsed from the time of his apprehension until the time of his trial. It is considered by us that the length of time he remained in restriction and arrest that Captain Brown has adequately served and has been punished for his offense of

desertion, except that he should be dismissed from the Service. It is our belief that the matter of his paying for his offense might have been adequately handled by the acceptance of his resignation and the losses of all privileges."

The accused is now 50 years old. The record demonstrates that he never possessed any proper conception of the requirements of military discipline. I recommend that the sentence be confirmed but in view of the accused's age, the delay in bringing him to trial, and all the circumstances, I also recommend that the confinement and forfeitures be remitted.

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



2 Incls

1 Record of trial

2 Form of action

THOMAS H. GREEN

Major General

The Judge Advocate General

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/ ( GCNO 81, 26 March 1948).



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

19 MAY 1948

JAGH CM 328797

UNITED STATES )

EIGHTH ARMY

v. )

Trial by G.C.M., convened at  
 APO 343, 25 November, 15, 16

Captain MALCOLM C. MANSFIELD )

December 1947. Dismissal and  
 total forfeitures.

(O-1583321), Quartermaster 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 95th Article of War.

Specifications 1, 3, 4, and 5: (Findings of not guilty).

Specification 2: In that Captain Malcolm C. Mansfield, Headquarters Eighth Army, did, at or in the vicinity of Yokohama, Honshu, Japan, during the period from 1 November 1946 to 30 June 1947, become indebted to the United States for meals consumed by himself and his family in a total amount of more than fifty dollars (\$50.00), and did wrongfully, fraudulently, willfully and knowingly fail and neglect to pay said debt.

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

Specifications 1, 6 and 7: (Findings of not guilty).

Specification 2: (Same as Specification 2, Charge I).

Specification 3: In that Captain Malcolm C. Mansfield, Headquarters Eighth Army, being then and there a married man, having a lawful wife living, did, during the period from about 21 May 1947 to about 16 July 1947, at or in the vicinity of Yokohama, Honshu, Japan, wrongfully, dishonorably, and unlawfully have sexual intercourse with one Ayoko Ikoma, a woman not his wife.

(196)

Specification 4: (Same as Specification 3 except the time alleged, "1 November 1945 to about 1 December 1946," and the accomplice alleged, "Shizuko Ogasawara.")

Specification 5: (Same as Specification 3 except the time alleged, "1 September 1946 to about 1 April 1947," and the accomplice alleged "Fumiko Osumi.")

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 3, 4 and 5, Charge II, except the word "dishonorably," guilty of Specification 2, Charge I, and Charge I, and Specification 2, Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

3. Evidence for the prosecution.

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

a. (Charges I and II, Specification 2; Failure to pay debt to United States).

Accused is in the military service and had been Eighth Army Club Officer from about October 1945 to the first of August 1947 (R 29,37,48, 51,67). The Eighth Army Officers' Clubs were the Bankers' Club, the Hodogaya Country Club and the New Grand Hotel (R 29,37,51). From August 1946 to August 1947 First Lieutenant Robert J. Crook was an assistant to accused in the operation of the three clubs and at various times was either manager or assistant manager at each club (R 29). From March to August 1947 First Lieutenant Leland K. Sneen served as an assistant to accused and was manager of each of the three clubs at different times (R 37). First Lieutenant J. F. Sansom served as manager of the Bankers' Club from 27 February 1947 to July or August 1947. Technical Sergeant Robert N. Nartker was accused's chief steward and Nartker's duties embraced the activities of all three clubs. Private Frank Tesseyman was steward at the Bankers' Club from November 1945 to September 1947 (R 62).

As to the mess operated in the Bankers' Club Lieutenant Crook testified:

"Q During the time that you were connected with the Bankers' Club, was there an Army mess operated for the military staff of the Bankers' Club? I mean by that an official Army mess for which the food was obtained from Quartermaster sources.

A Yes, there was.

Q Do you know that to be a fact?

A Well, I have never seen anything on paper. I assumed that after a period it was.

Q Did you have anything to do with operating a mess? As the manager of the club, did you have anything to do with operating a mess?

A Well, the mess was under--I was the building manager at the time. It was under my inspection and supervision.

Q Then don't you know whether or not it was an official, authorized Army mess?

A Well, I assumed it was. I had never been notified to the contrary." (R 31)

On cross-examination Lieutenant Crook testified that he knew of no authorization for the operation of the mess at the Bankers' Club. He also admitted that at the New Grand Hotel a large number of private parties were given. The food for these parties was purchased from the Quartermaster Commissary. Usually there was a large surplus of food left over from these parties and the surplus would be distributed among the unauthorized messes. At the Bankers' Club there was also a snack bar operated. The food used at the snack bar was all purchased by the club, and food purchased from the snack bar would be paid for by chits (R 33,34). Lieutenant Crook ate his meals at the Bankers' Club mess and paid for them by deduction on his pay voucher (R 36).

Lieutenant Sneen denied that the food furnished at the Bankers' Club mess was obtained from Quartermaster sources. As to where the food was obtained he testified:

"Q Do you know whether or not the food furnished the mess at the Bankers' Club was obtained from Quartermaster sources?

A As far as I know it was not.

Q Do you know where it was obtained?

A Yes, sir. During my stay at the Bankers' Club it was common practice with various units and messes who had contact with people on ships in the harbor which were going back to the States with, say, 300 personnel when they had food aboard for 1800, food which was perishable, to do what they call a little scrounging and get food from these various ships. During the time there were private parties being thrown at the New Grand Hotel there were, of course, always considerable leftovers in the line of foods in big parties thrown. That was used. And there were also purchases made from the Quartermaster commissary sales store and the Army Exchange.

Q Now, these ships from which food was obtained, were they Army transports or ships in the Army service?

A That I can't say, sir. I was never connected directly with it.

(198)

Q Was the food obtained from these ships Government food?

A I would have no way of knowing, sir." (R 38,39)

The mess at the New Grand Hotel, however, was an authorized Army mess (R 44). Concerning the operation of officers' messes Lieutenant Sneen testified upon examination by the court as follows:

"Q Is there, to your knowledge, a constitution or set of rules or regulations governing the installation and operation of officers' messes at these clubs?

A I presume there is. Of course, there is but one officers' mess, and that is the New Grand Hotel, sir." (R 45)

Lieutenant Sansom testified that the Bankers' Club mess was supplied by a ration drawn from Headquarters Eighth Army Special Troops (R 49). Lieutenant Sansom ate at the Bankers' Club Mess and paid for his meals by deduction on his pay vouchers.

Sergeant Nartker testified that he had nothing to do with the operation of the mess at the Bankers' Club, and had no knowledge of where the food for the mess was procured. He stated, however, that as far as he knew the food for the mess was drawn from Headquarters Company (R 52).

Although Private Tesseyman was steward of the Bankers' Club he had nothing to do with procuring food for the mess (R 63).

Captain George L. Mizer, Sales Officer for the Yokohama Quartermaster Sales Store testified that the Eighth Army Officers' Club was authorized to make purchases at the Commissary (R 24).

According to Lieutenant Crook a woman whom he called accused's wife and their child were in Japan for six, seven or eight months during which time accused had private family quarters in the Bankers' Club. During this period Lieutenant Crook saw accused eat at the Bankers' Club mess "quite a few times" and saw accused's wife and their child eat in the mess "infrequently." (R 30,31). At other times he saw accused and his wife eat at the snack bar (R 34).

Lieutenant Sneen placed the time of arrival of the woman he recognized as accused's wife and their child in Japan as October 1946. He was unable to state the length of time they remained in Japan, but while there they lived in the Bankers' Club with accused (R 38). Lieutenant Crook never saw accused's wife and child eat at the messes operated at the club under accused's supervision and saw accused eat at them "infrequently." (R 39). He never saw accused eat at the authorized Army mess at the "New Grand Hotel" (R 45).

Accused's family was at the Bankers' Club for a short time while Lieutenant Sansom was there. During that period Lieutenant Sansom observed the woman he called accused's wife in the mess quite frequently but was unable to state that it was the usual practice for accused and his wife and child to eat at the mess.

Sergeant Nartker testified that it was the regular practice for accused and his wife and child to eat at the Bankers' Club mess (R 52).

Private Tesseyman stated that accused's wife and child stayed in Japan for about six months. He observed accused and his family eating at the Bankers' Club mess but was unable to state how many times. Prior to the arrival of his family accused ate at the Bankers' Club mess several times (R 64).

On 23 May 1946 and 16 October 1946 accused was authorized commissary privileges for three individuals (R 22). The records of the Quartermaster Sales Store at Yokohama show that during the period from May 1946 through May 1947 accused made purchases at the sales store in a total amount of \$66.70 (R 22,23). Through error or omission in the records, however, it was possible that other purchases were made by the accused (R 23).

Lieutenant Colonel Edmund S. Garland testified that he was Finance Officer of the Eighth Army, that his office maintained pay records of officers paid within the area, and that he had Finance Form 3, pertaining to accused. Colonel Garland stated that Finance Form 3 is the master pay card from which pay vouchers are made and computed. Finance Form 3 pertaining to accused was admitted in evidence without objection and showed the following deductions for meals:

"For May, 1945, 75 meals; June, 1945, 90 meals; July, 1945, 93 meals; August and September was deducted on one voucher, 183 meals; October, 93 meals; November, none; December, 1945, none.

January, 1946, none; February, 1946, none; March, 1946, none; April, 1946, none; May, 1946, 66; June, 1946, none; July, 1946, none; August, 1946, none; September, 1946, none; October, 1946, none; November, 1946, none; December, 1946, none.

January, 1947, none.

February, 1947, none; March, 1947, none; April, 1947, none; May, 1947, none; June, 1947, none; July, 1947, 93; August, 1947, 93; September, 1947, 90; October, 1947, 93." (R 17)

Captain Raymond A. Cole, Assistant to Eighth Army Finance Officer identified Prosecution Exhibit 2 previously admitted in evidence without

objection (R 18) as a receipt issued by him to accused for money paid into the Finance Office for non-deduction of meals (R 26). The receipt which was entered on Finance Form 38, "receipt for miscellaneous collections," acknowledged payment by accused of \$481.25 on account of "non deduction for 1925 meals from Nov. 1945 to June 1947 incl @ 25 cents per meal." On the reverse side of the receipt are the following entries:

<u>1945</u>	<u>No.Meals</u>	<u>1946</u>	<u>No. Meals</u>
Nov.	75	July	75
Dec.	75	Aug.	75
<u>1946</u>		Sept.	135
Jan.	75	Oct.	150
Feb.	75	Nov.	150
Mar.	75	Dec.	150
Apr.	75	<u>1947</u>	
May	-0-	Jan.	150
June	75	Feb.	150
	<u>525</u>	Mar.	140
525 meals @ \$.25 per meal--\$131.25		Apr.	75
		May	75
		June	75
			<u>1400</u>
		1400 meals @ \$.25 per meal--\$350.00."	

Captain Cole testified that every officer not maintaining a home or "domicile establishment known as family quarters" was required to pay for meals by pay voucher deduction (R 27). As authority for his conclusion Captain Cole cited Par 7c(1)b, Circular 256, Headquarters Eighth Army, 24 August 1946 which reads as follows:

"\* \* \*Collection for pay voucher deductions from officers, nurses and warrant officers will be effected by placing the following notation on their pay vouchers: "Due United States for \_\_\_\_\_ meals at 25 cents per meal for the month of \_\_\_\_\_.""  
(R 46,47)

b. (Charge II, Specifications 3, 4 and 5; Adultery).

The following entry appears on Finance Form 3 pertaining to accused: "Lawful wife Alice H. Mansfield - Leeds New York." It also appears from Finance Form 3 that since September 1945 accused was credited with the allowances payable to officers with dependents. In October 1946 accused was joined in Japan by a woman described as his wife and by a child recognized to be their child and that the woman and the child lived with him in the Bankers' Club for a period of six or seven or eight months (R 30,37,38,48,52,63).

Mr. Asato Okuda was employed as an interpreter at the Hodogaya Country Club from the first part of August 1946 to 25 October 1946. On

one occasion while he was at the Bankers' Club accused requested Okuda to have Fumiko Osumi, a Japanese girl, employed at the Bankers' Club to report to accused's quarters. Okuda gave the message to Fumiko and saw her go into accused's quarters. Okuda did not see Fumiko anymore that evening (R 58).

Fumiko Osumi testified that she worked at the Bankers' Club from 4 August 1946 to 16 or 17 March 1947 and that on two occasions between 1 September 1946 and 1 April 1947 she had sexual intercourse with accused. The first occasion was after a party when a Nisei, "name of Eddie," requested her to see the accused (R 93).

Eiko Matsumoto was employed at the Bankers' Club between April 1946 and October 1947. On one occasion she served drinks in accused's quarters to Shizuko Ogasawara (R 86). Takako Hirano worked at the Bankers' Club, from October 1945 to August 1946. She testified that she saw Shizuko Ogasawara in accused's room, that she had seen Shizuko sitting on accused's lap, and that she had seen accused kiss her (R 88,89). Shizuko Ogasawara testified that she had been employed at the Bankers' Club from October 1945 to July 1946. She admitted that on one occasion she spent part of one night with accused, and that she had intercourse with accused.

Captain Woodrow T. Wilson, Assistant Inspector General, Eighth Army, conducted an inspection of the Eighth Army Officers' Club between 15 July and 4 August 1947. In the course of the inspection he visited the Bankers' Club. He entered accused's room and found a Nisei woman, Mrs. Ikoma, lying on the bed asleep. Mrs. Ikoma was fully dressed with the exception of shoes and stockings. Her dress, however, was disarranged to the extent that "you could see approximately to her waist." An inspection of the room disclosed two chests of drawers full of women's wearing apparel and accessories of which Mrs. Ikoma admitted ownership (R 69,70,71). Mrs. Ikoma also told Captain Wilson that she was "lying down" as she had had a tooth extracted that day. Sergeant Nartker who acted as Captain Wilson's guide also observed Mrs. Ikoma on accused's bed (R 76).

Miss Matsumoto recalled serving a drink to Mrs. Ikoma in accused's quarters (R 84).

Mrs. Ayako Elizabeth Ikoma testified that she was an American citizen and that she had been employed at the Bankers' Club from August 1946 to August 1947 (R 80). She admitted that she was a friend of accused but refused under the 24th Article of War to testify to the degree of intimacy of their friendship (R 81,82,83,84).

#### 4. Evidence for the defense.

Accused after being apprised of his rights as a witness elected to remain silent.

Major John G. Turner, the Trial Judge Advocate, was called as witness for the defense. He testified that assisted by First Lieutenant Oliver T. Robinson he had conducted two audits of the books of the Eighth Army Officers' Club and found no discrepancies in cash whatever (R 96,97, 98).

Colonel Herbert J. McCrystal testified that he had formerly been a member of the board of governors of the Eighth Army Officers' Club and that during the time of his term accused was club officer and the Board was satisfied that the clubs were being operated in the best interests of its members (R 99).

Major Richard T. Knowles testified that he succeeded accused as club officer for the Eighth Army. When he took over operation of the club he found no discrepancies of any major importance. He further asserted that accused was very cooperative and answered all his questions freely and honestly (R 100,101).

Major Demetrio D. Diaz, "Chief CID," Office of the Provost Marshal, Metropolitan Yokohama, testified that his office investigated an allegation that accused was living with a young lady known as "Suzie." The investigation determined that accused was not living with the woman (R 102). At another time Major Diaz at the request of the Inspector General's Department, Eighth Army, caused an investigation to be made concerning an incident in which a Mrs. Ikoma was found lying on accused's bed in his quarters at the Bankers' Club (R 102). As a result of the investigation it was determined that on the day in question Mrs. Ikoma had had a tooth extracted and was recovering from the operation. She had asked accused's permission to use his room and it had been granted (R 103).

5. a. Specification 2, Charges I and II; Failure to pay debt to the United States.

Accused was found guilty of becoming indebted between 1 November 1946 and 30 June 1947, to the United States for meals consumed by himself and his family in an amount greater than \$50.00 and of wrongfully, fraudulently, willfully and knowingly failing and neglecting to pay the debt. The evidence shows that accused who was Eighth Army Club Officer during the period in question was joined by a woman known as his wife and a child known as his daughter in October 1946. The family was quartered in the Bankers' Club, one of the Eighth Army Officers' Clubs. A mess which was patronized by accused and his family was operated in the Bankers' Club. The prosecution's evidence varied as to the source of the food served at the mess. There was evidence, however, that the food served was drawn from an Eighth Army Organization and it is a fair inference from the testimony naming that source that the food was not obtained by purchase. It was not shown for how long a period accused's purported

wife and child were living with him in Japan but the period was variously estimated as being of six, seven, or eight months duration. One witness testified that during their stay it was the regular practice for accused and his family to eat at the Bankers' Club. Accused's master pay card from which his vouchers were prepared shows for the period in question no entries following the heading "Due United States for Meals." On 30 October 1947 accused paid to Captain Raymond A. Cole, Deputy Finance Officer of Eighth Army \$481.25 for which Captain Cole gave to accused a receipt entered on Finance Form 38, Receipt for Miscellaneous Collections. Captain Cole testified that this money was collected from accused "Because he had not shown deductions for meals on his pay voucher previous to that." The receipt recited the collection of \$481.25 on account of the non-deduction for 1925 meals from November 1945 to June 1947 at \$.25 per meal. The receipt further reflected that for the period from November 1946 through June 1947 accused had not made deductions for 965 meals on his pay voucher.

Paragraph 104, TM 14-501 provides that reimbursement to the government for meals furnished will be at the rate of \$.25 per meal.

The legal sufficiency of the finding of guilty of the offense under discussion depends upon the evidentiary value of the "receipt of miscellaneous collections." Paragraph 108, TM 14-501, June 1946, provides as follows:

"Whenever a disbursing officer makes a cash or voucher collection or deduction \* \* \* from an officer, because of an indebtedness to the Government, receipts on WD AGO Form 14-144 \* \* \* will be issued in triplicate by the former for the amount collected. The disbursing officer will furnish a copy of the receipt to the remitter and will dispose of the original as follows: \* \* \*."

WD AGO Form 14-144 in substance constitutes but a redesignation of Finance Form 38 upon which the receipt in this case was entered.

It would appear, therefore, that Captain Cole, the officer who executed the receipt reciting accused's payment of \$481.25 on account of non-deduction of 1925 meals on his pay vouchers during the period stated in the receipt, had a duty to record the fact of payment on the form prescribed, to record the occasion for the payment as required by the words "on account of" appearing on the form, and of necessity had the duty to know the facts so recited. As to the facts recited in the receipt it would appear that it could not be said they were obviously

not within the personal knowledge of Captain Cole. This is particularly true as to the fact of non-deduction on accused's pay vouchers, since it appears that accused received his pay from the Finance Office in which Captain Cole served. It may be seen, therefore, that the receipt was properly admitted in evidence and was competent evidence of the facts recited therein (par 117a, MCM 1928).

While the receipt recited that payment was made because of non-deduction of meals on pay vouchers it is apparent that payment was made because in fact the amount due for meals was unpaid.

The competent evidence of record thus shows that during the period from November 1946 through June 1947 accused was furnished some 965 meals by the Government thus incurring a debt to the United States in an amount in excess of \$50.00, for which he did not make payment until 30 October 1947. It also appears that the charges against accused were preferred 2 October 1947. From the circumstances surrounding his payment of the debt it may be considered that his prior failure to pay the debt was wrongful, fraudulent, and willful and as such was violative of both Articles of War 95 and 96.

b. Specifications 3, 4 and 5, Charge II; Adultery.

It was alleged that accused being a married man, having a lawful wife living, wrongfully, dishonorably, and unlawfully had, on three separate occasions, sexual intercourse with a woman not his wife. He was found guilty of the Specifications except the word "dishonorably." The offense of which accused was found guilty under the Specifications enumerated was adultery. That offense has been defined as "sexual connection between a man and a woman, one of whom is lawfully married" (Sec 2081, Vol 2, Wharton's Criminal Law). An essential element of the offense of adultery, therefore, is the subsisting lawful marriage of one party to the adulterous act to a person other than the partner in the adulterous act, and it was incumbent upon the prosecution to establish accused's lawful marriage in order to prove the offense alleged.

To sustain the burden of establishing accused's lawful marriage the prosecution showed that in October 1946 accused was joined in Japan by a woman described as his wife, and a child reputed to be the daughter of accused and accused's purported wife. The family group so comprised lived together in quarters at the Bankers' Club for some six, seven, or eight months. On the master pay card, pertaining to accused, kept in the Eighth Army Finance Office, there appears the following entry: "Lawful wife Alice H. Mansfield - Leeds New York." The Eighth Army Finance Officer testified that pay vouchers were "made up and computed" from the "master pay cards."

Assuming that the entry on the Master Pay Card was admissible in evidence, it is not legal proof of marriage. Although the evidence shows that pay vouchers were made up and computed from the Master Pay Card

there was no evidence showing the content of the pay vouchers executed by accused, and it cannot be said that the pay vouchers executed by accused also contained the entry "lawful wife Alice H. Mansfield - Leeds New York." Thus the prosecution has relied upon evidence of reputation and cohabitation to maintain its burden of proving accused's lawful marriage. We are of the opinion that such evidence is not sufficient in law to prove the element of marriage in a penal prosecution (p 724, Vol 1, Wharton's Criminal Evidence, Eleventh Edition; State v. Wakefield, 111 Or 615, 228 p.115; p.1247, Sec 658, Underhill's Criminal Evidence, Fourth Edition.)

There are two reasons advanced for stating that evidence of reputation and cohabitation is not sufficient proof of a lawful marriage in a criminal prosecution. The first is that to presume marriage from such evidence would conflict with the general presumption of innocence of the offense charged (Wharton, supra). More persuasive to our mind, however, is the view that although such evidence is corroborative of a lawful marriage it is not in itself inconsistent with a meretricious relationship of the cohabiting couple (p 639, Vol 1, Wharton's Criminal Evidence, Eleventh Edition).

The rule to which we adhere is the majority view and examination of the cases, with the exception of cases decided in jurisdictions recognizing the validity of common-law marriages, leads us to the conclusion expressed in State v. Wakefield, supra; "No case has been cited, and we have been unable to find any case where a conviction for adultery has been sustained without evidence of the marriage ceremony, except where the statute has expressly provided that cohabitation and reputation shall be sufficient evidence of marriage." (Emphasis supplied)(See also Sec 638, Underhill's Criminal Evidence.)

Commonwealth v. Bockes, 103 Pa. Super. 378, 157 A 214, which has been cited for the contrary view, arose in a jurisdiction where common-law marriages had not been declared invalid. In this case it was stated "on full consideration we are of the opinion that, at least until so-called common-law marriages are declared invalid in this commonwealth, proof of marriage by cohabitation and reputation, under proper instructions from the court as to the effect of such evidence, may be sufficient to sustain a conviction of adultery or bigamy."

We conclude that the evidence adduced by the prosecution is not sufficient in law to prove accused's subsisting lawful marriage at the time of the alleged adulterous acts and for that reason are of the opinion that the findings of guilty of Specifications 3, 4 and 5, Charge II, are not supported by the record of trial.

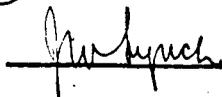
6. Records of the Army show that accused is 39 years of age, that he was divorced from his first wife, by whom he had three children, on 28 July 1939, and that on 14 February 1942 he married his present wife.

He is a high school graduate and in civilian life was employed as a motor vehicle inspector for the Evanston, Illinois Police Department, and as a bus driver. He had enlisted service in the United States Marine Corps from 1930 to 1934 and in the United States Marine Reserve from 1935 to 1939. He had Army enlisted service from May 1942 until he was commissioned as Second Lieutenant on 13 November 1942. He was subsequently promoted to First Lieutenant and Captain. He has served in the Pacific Theatre since March 1945, and has been awarded the Army Commendation Ribbon, USMC Good Conduct, Army Good Conduct, 2nd Nicaraguan Campaign, American Theater, Asiatic Pacific with two battle stars, Philippine Liberation; Victory Medal and Occupation Ribbon. His efficiency ratings are as follows: "Satisfactory" (3), "Very Satisfactory" (5); "Excellent" (5); and "Superior" (4).

In December 1945 he was punished under Article of War 104 for appearing in improper uniform, acting in a disrespectful manner toward a superior officer, and failing to obey the order of a superior officer.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. Except as noted hereinbefore, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specifications 3, 4 and 5, Charge II, legally sufficient to support the findings of guilty of the other Specifications and the Charges and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon a conviction of a violation of Article of War 95 and a sentence to dismissal and total forfeitures is authorized upon conviction of a violation of Article of War 96.

 \_\_\_\_\_, Judge Advocate

 \_\_\_\_\_, Judge Advocate

 \_\_\_\_\_, Judge Advocate

JAGH - CM 328797

1st Ind

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

23 JUL 1948

TO: The Secretary of the Army.

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Malcolm C. Mansfield (O-1583321), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully, fraudulently, willfully and knowingly neglecting and failing to pay a debt due the United States in an amount of more than \$50.00 in violation of Articles of War 95 and 96 (Chgs I and II, Spec 2) and of adultery on three occasions in violation of Article of War 96 (Chg II, Specs 3,4 and 5). 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 pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 3, 4 and 5, Charge II (adultery), legally sufficient to support the findings of guilty of the other Specifications, and the Charges and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

Accused was Eighth Army Club Officer from about October 1945 to 1 August 1947. In October 1946 he was joined in Japan by a woman supposedly his wife and a child reputed to be their child. The family group so comprised had quarters in the Bankers' Club and there was evidence that the family ate substantially all their meals at a mess operated in the Bankers' Club. Accused's reputed wife and child were in Japan for approximately six months. The evidence was contradictory as to the source of the food furnished at the mess but there was substantial evidence that the source was rations supplied to the mess by the Eighth Army. Other patrons of the mess paid for their meals by deductions on their pay vouchers. On 30 October 1947 subsequent to the filing of charges in this case accused paid into the Eighth Army Finance Office \$481.25 for which a "receipt of miscellaneous collections" was issued to accused. The receipt recited the collection of \$481.25 on account of the non-deduction for 1925 meals from November 1945 to June 1947 at \$.25 per meal. The voucher further reflected that for the period November 1946 through June 1947 the period when the debt alleged was incurred accused had not made deductions for 965 meals.

The evidence also shows that at the times alleged, from 1945 to 1947, accused had sexual intercourse with two Japanese women neither of whom was his wife. As to a third Japanese woman with whom it was alleged accused was intimate sexually, there was insufficient evidence to sustain the allegation. As to the three incidents in issue it was alleged that at the times in question accused was married to another woman, and hence accused was charged with adultery. There is no competent evidence in the record of accused's lawful marriage to anyone and for this reason the findings of guilty of adultery (Charge II, Specs 3,4, and 5) are not supported by the evidence.

4. Records of the Army show that accused is 39 years of age, that he was divorced from his first wife, by whom he had three children, on 28 July 1939, and that on 14 February 1942 he married again. He is a high school graduate and in civilian life was employed as a motor vehicle inspector for the Evanston, Illinois, Police Department, and as a bus driver. He had enlisted service in the United States Marine Corps from 1930 to 1934 and in the United States Marine Reserve from 1935 to 1939. He had Army enlisted service from May 1942 until he was commissioned as Second Lieutenant on 13 November 1942. He was subsequently promoted to First Lieutenant and Captain. He has served in the Pacific Theater since March 1945, and has been awarded the Army Commendation Ribbon, USMC Good Conduct Medal, Army Good Conduct Medal, 2nd Nicaraguan Campaign Medal, American Theater Ribbon, Asiatic Pacific Ribbon, with two battle stars, Philippine Liberation Medal, Victory Medal and Occupation Ribbon. His efficiency ratings are as follows: "satisfactory" (3), "very satisfactory" (5), "excellent" (5), and "superior" (4).

In December 1945 he was punished under Article of War 104 for appearing in improper uniform, acting in a disrespectful manner toward a superior officer, and failing to obey the order of a superior officer.

5. I recommend that the findings of guilty of Specifications 3, 4 and 5, Charge II, be disapproved, that the sentence be confirmed, but that the forfeitures imposed be remitted, and that as thus modified the sentence be carried into execution.

6. Inclosed is a form of action designed to carry the foregoing recommendations into effect, should such recommendations 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 144, 2 August 1948 ).

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

(209)

27 FEB 1948

JAGH CM 328817

UNITED STATES )

v. )

First Lieutenant ROBERT S.  
STROUP (01178000), Field  
Artillery. )

THE ARMORED CENTER

Trial by G.C.M., convened at  
Fort Knox, Kentucky, 23 January  
1948. Dismissal and total for-  
feitures.

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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 58th Article of War.

Specification: In that 1st Lt Robert S. Stroup, Headquarters and Headquarters Company, 526th Armored Infantry Battalion, did, at Fort Knox, Kentucky on or about 6 March 1947, desert the service of the United States and did remain absent in desertion until he surrendered himself to Civil authorities at Bakersfield, California, and was returned to control of Military authorities 4 December 1947.

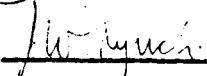
He pleaded guilty to the Specification of the Charge "except the words 'desert', 'in desertion' and '4 December 1947', substituting therefor the words, respectively, 'absent himself without leave from', 'absent without leave' and '22 November 1947', of the excepted words, not guilty, of the substituted words, guilty."; to the Charge he pleaded not guilty, but guilty of a violation of the 61st Article of War. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the Armored Center Judge Advocate, dated 4 February 1948.

4. The accused is 35 years of age and married. He attended high school for three years and prior to entering the service was employed as a furniture upholsterer. He served in the Hawaiian Islands, as an enlisted man in the Field Artillery, from 1939 until 1942 when he was returned to the United States for enrollment in the Field Artillery, OCS, at Fort Sill, Oklahoma. On 18 February 1943 he was commissioned a Second Lieutenant, Army of the United States, and on 10 February 1944 he was promoted to the rank of First Lieutenant. He served overseas in the European Theater from 10 February 1944 to 19 July 1945 and is authorized to wear five campaign stars on his EAME ribbon. On 18 October 1945 he was separated from the service, but recalled to active duty on 8 November 1946. His performance ratings of record, since the date of his commission, have all been "Excellent."

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 to dismissal and total forfeitures is authorized upon conviction of a violation of Article of War 58.

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

  
\_\_\_\_\_, Judge Advocate

JAGH CM 328817

1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAR 9 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Robert S. Stroup (O-1178000), Field Artillery.

2. Upon trial by general court-martial this officer pleaded not guilty to desertion from 6 March 1947 to 4 December 1947, in violation of Article of War 58, but pleaded guilty to absence without leave from 6 March 1947 until 22 November 1947 in violation of Article of War 61. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Armored Center 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.

Prior to the date accused absented himself without leave from his organization at Fort Knox, Kentucky, on or about 6 March 1947, he had been drinking heavily, gambling and had become "pretty far in debt." He first went to St. Louis, Missouri. From there he went to California, by "riding trucks," where he had worked for nine years before entering the service. In California he was given part-time work by a former employer, as a mattress maker, whereby he earned about \$30 a week. His wife joined him in California and also secured part-time employment. Accused continued to drink while working there and his financial conditions were "just as bad as they had been." On 22 November 1947, after having been drinking for three days, accused "turned himself in" to the civilian authorities at Bakersfield, California, and "asked them to lock me up and notify the Army." He was returned to military control on or about 4 December 1947.

4. The accused is 35 years of age and married. He attended high school for three years and prior to entering the service was employed

as a furniture upholsterer. He served in the Hawaiian Islands, as an enlisted man in the Field Artillery, from 1939 until 1942 when he was returned to the United States for enrollment in the Field Artillery, OCS, at Fort Sill, Oklahoma. On 18 February 1943 he was commissioned a second lieutenant, Army of the United States, and on 10 February 1944 he was promoted to the rank of first lieutenant. He served overseas in the European Theater from 10 February 1944 to 19 July 1945, and is authorized to wear five campaign stars on his EAME Ribbon. On 18 October 1945 he was separated from the service, but recalled to active duty on 8 November 1946. His performance ratings of record, since the date of his commission, have all been "Excellent."

5. I recommend that the sentence be confirmed but that the forfeitures be remitted and, that as thus modified, the sentence be carried into execution.

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



THOMAS H. GREEN  
Major General  
The Judge Advocate General

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

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( 72 GCMO, 24 March 1948).

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

JAGN-CM 328855

UNITED STATES )

TRIESTE UNITED STATES TROOPS )

v. )

Private RALPH E. JOHNSON )  
(35229224), Company I, )  
351st Infantry. )

) Trial by G.C.M., convened at  
) Trieste, Free Territory of  
) Trieste, 23 December 1947. Dis-  
) honorable discharge and confine-  
) ment for two (2) years. Dis-  
) ciplinary Barracks.

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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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Ralph E. Johnson, Company I, 351st Infantry, did, at Roiano Barracks, Trieste, Free Territory of Trieste, on or about 11 October 1947, feloniously take, steal and carry away two shirts wool olive drab, officer type, value about \$15.00, three pair trousers wool, olive drab, value about \$29.82, three pair of trousers cotton khaki, value about \$7.20, two shirts cotton khaki, value about \$3.78, one barracks bag, value about \$1.17, and one jacket, combat value about \$7.65 of a total value of \$64.62, the property of First Sergeant A. A. Longo, 61st Engineer Service Company.

Accused pleaded not guilty to and was found guilty of the Charge and its Specification in the following words and figures: "Guilty, except the words 'one barracks bag value about \$1.17' and the figures '\$64.62'"

and substituting therefor, respectively, no words substituted, and the word and figure 'about \$60.00.' Of the excepted words and figures, not guilty; of the substituted words and figures, guilty." No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence, designated the 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. Evidence for the prosecution.

First Sergeant A. A. Longo found, on 11 October 1947, two khaki shirts, three OD pants, three khaki pants, one combat jacket and two OD shirts missing from his locker (R. 7). Accused confessed their theft and sale by him on that date to an Italian civilian (Pros. Ex. 3). The value of the items, other than the two OD shirts, was proved, as limited by the allegations of the Specification, to be \$44.58. The two OD shirts were purchased a year previously by Sergeant Longo, through an officer, from the Post Exchange at Gorizia for \$15.50. A shirt similar in type to the ones stolen was introduced in evidence as Prosecution's Exhibit 1. Thereafter the following appears in the record:

"PROSECUTION: It is stipulated between the prosecution, the defense and the accused that Captain Bryn, if he were present and called as a witness, he would say that he is the Post Exchange Officer and Prosecution's Exhibit No 1 is a shirt that belongs to the PX and this shirt is sold in the PX for \$8.10. I ask that this stipulation be accepted by the court.

DEFENSE: No objection.

PRESIDENT: Subject to objection by any member of the court the stipulation is accepted" (R. 8).

No evidence was offered as to the condition of the stolen shirts at the time of the theft.

4. Evidence for the defense.

Accused, not under oath, testified that on the morning of 11 October 1947 he was in a bar in Trieste drinking and "had quite a few" (R. 15). His unsworn statement did not otherwise touch upon the elements of the offense charged.

5. The only question presented for determination is the legality of confinement in excess of one year. Other than the two OD shirts, the value of the items stolen was established at \$44.58. The recognized standard for determining the punishment authorized for larceny is the sale value of the stolen goods in the open market at the time and place

of the offense (CM 217051, Barton et al, 11 BR 193; CM 323640, Pamintuan, (22 Sept 47); TM 27-255, par. 100b). A recognized exception to this rule is that the value as stated in Government price lists may be used by the court in determining value of serviceable articles issued or used in the military service based upon the fact that such property is distinctive in character and usually has no fixed value in the open market (CM 325739, Morin et al (17 Oct 47)).

The only evidence pertaining to value of the shirts was the testimony of Sergeant Longo that he paid \$15.50 for the two OD shirts a year previous in Gorizia, which was without probative context as pertaining to value at the time the property was taken, and the stipulation that a shirt similar in type was on sale by the Post Exchange for \$8.10 at the time of trial, which likewise fails to establish any value as to the stolen shirts. The evidence further indicates that no open market existed for the sale of such shirts as were stolen at the time and place of the theft.

In this case no evidence of market value is obtainable as the shirts were purchased from the Army Exchange Service and resale is prohibited under pertinent regulations. The use of Government price lists was not appropriate because the condition and usability of the shirts was not shown (CM 325739, Morin et al, (17 Oct 47)). Lacking proof of the condition of the shirts, which were not available as evidence, there was nothing before the court upon which it could base any fixed value and it could only conclude the shirts were of some value. The record, therefore, fails to contain sufficient evidence to support the court's finding beyond the larceny of property of a value of \$50.00 or less, and more than \$44.58, for which offense a maximum confinement of one year may be imposed (par. 104c, MCM, 1928).

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as to value as finds a value of more than \$44.58 but not more than \$50.00, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Edward Robinson Judge Advocate.

Frank C. Alfred Judge Advocate.

Georges Springston Judge Advocate.

(216)

JAGN-CM 328855

1st Ind

APR 2 1948

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

TO: Commanding General, Trieste United States Troops, APO 209,  
c/o Postmaster, New York, N. Y.

1. In the case of Private Ralph E. Johnson (35229224), Company I, 351st Infantry, I concur in the foregoing holding by 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 as to value be approved as finds a value of more than \$44.58 but not more than \$50.00, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. Upon taking such action you will have authority to order 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 328855).

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.

(217)

JAGK - CM 328856

10 MAR 1948

UNITED STATES )

THIRD ARMY

v. )

Trial by G.C.M., convened at Fort  
McPherson, Georgia, 20 January 1948.  
Dismissal and total forfeitures.

Captain HAROLD W. HILLER, JR. )  
(O-1286649), Infantry )

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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 specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Captain Harold W. Hiller, Jr., Infantry, ASU 3140, Atlanta Recruiting District, US Army & US Air Force Recruiting Service, did at Atlanta, Georgia, on or about 21 October 1946, desert the service of the United States and did remain absent in desertion until he was returned to military control at Lancaster, Ohio, on or about 17 November 1947.

He pleaded not guilty but 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 six months. The reviewing authority approved the sentence but remitted the confinement imposed and forwarded the record of trial for action under Article of War 48.

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

4. Records of the Department of the Army show that the accused is 33 years of age and is married. He is a high school graduate, and served as an enlisted soldier from 15 October 1940 until 4 July 1942 when he was commissioned a second lieutenant, Infantry, at the Officers' Candidate School, Fort Benning, Georgia.

The accused served about two years in the Burma Theater where on 1

March 1945 he was promoted to captain as a member of "Merrill's Marauders". Upon being returned to the United States he was discharged as an enlisted man, appointed a captain in the Officers' Reserve Corps and on 4 October 1946 ordered to active duty with the 1409 ASU, Atlanta, Georgia. He has been awarded the Combat Infantryman's Badge and the Unit Citation.

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

Charles W. Pilsub. Judge Advocate

Albert E. Atkroyd. Judge Advocate

Harley L. Lanning. Judge Advocate

JAGK - CM 328856

1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Harold W. Hiller, Jr. (O-1286649), Infantry.

2. Upon trial by general court-martial this officer was found guilty of deserting the service of the United States on or about 21 October 1946, and of remaining absent in desertion until he was returned to military control at Lancaster, Ohio, on or about 17 November 1947, in violation of Article of War 58. 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 six months. The reviewing authority approved the sentence, but remitted the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Third Army Staff Judge Advocate's review, which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in the case.

The uncontradicted evidence established that on or about 21 October 1946, while on duty with the Atlanta (Ga.) Recruiting District the accused absented himself without authority and remained absent until he was taken into custody and returned to military control at Lancaster, Ohio, on 17 November 1947.

Testifying in his own behalf at the trial, the accused admitted his unauthorized absence and related to the court his prior military service, including his service in the Burma campaign and stated that on "Easter Sunday 1944" while in North Burma he received a letter that his wife had divorced him. He had burned this letter in accordance with security directives. When he returned to the United States he remarried and lived with his second wife until August 1946 when, as the result of a disagreement, she left him and returned to her home in Columbus, Ohio. He later learned that his first wife had not in fact secured a divorce from him. When he was ordered to active duty in Atlanta, Georgia, on 8 October 1946 he was confronted with the situation of being married to two women, both of whom were living. He left Atlanta and went to Columbus, Ohio, where he assisted his second wife in procuring a divorce. The divorce was granted in December 1946. He then returned to his first wife and four children.

(220)

From 4 April 1947 to 10 November 1947 he was employed by the Kenosha Auto Transport Corporation, Springfield, Ohio, as a truck driver. He intended to turn himself in to military authorities when his domestic difficulties became settled. When "picked up" by the police he was on his way to "turn in."

The record of trial contains a letter from the Kenosha Auto Transport Corporation, Springfield, Ohio, dated 10 November 1947, wherein it is stated that the accused's record of service with that company was good.

4. Records of the Department of the Army show that accused is 33 years of age and is married. He is a high school graduate, and served as an enlisted soldier from 15 October 1940 to 4 July 1942 when he was commissioned a second lieutenant, Infantry, at the Officers' Candidate School, Fort Benning, Georgia.

The accused served about two years in the Burma Theater where on 1 March 1945 he was promoted to captain as a member of "Merrill's Marauders". Upon being returned to the United States he was discharged as an enlisted man, appointed a captain in the Officers' Reserve Corps and on 4 October 1946 ordered to active duty with the 1409 ASU, Atlanta, Georgia. He has been awarded the Combat Infantryman's Badge and the Unit Citation.

I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, and that as thus modified the sentence be carried into execution.

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

2 Incls

1. Record of trial
2. Form of action

  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

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( GCMO 71, 24 March 1948).

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

(221)

10 JUN 1948

JAGH CM 328857

U N I T E D S T A T E S	)	TRIESTE UNITED STATES TROOPS
v.	)	Trial by G.C.M., convened at
Captain THOMAS H. COCKERHAM,	)	Trieste, Free Territory of Trieste,
01797087, CMP, 7177th Allied	)	28 November - 1 December 1947.
Military Government Detachment	)	Dismissal, total forfeitures and
(Overhead).	)	confinement for two (2) years, and
	)	to pay the United States Government
	)	a fine of \$2000.00.

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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 95th Article of War:

Specification: In that Captain Thomas H. Cockerham, 7108th Military Government Detachment (Overhead), 88th Infantry Division, did, at Trieste, Italy, on or about 15 January 1947, agree and conspire with one Enrico Sonnichler and one Bela Weinckheim to solicit and accept contributions of money from persons and firms with whom the said Captain Cockerham, as officer in charge of demolitions and rubble removal, Public Works Division, Allied Military Government, Venezia Giulia, personally and through his employees, was to carry on negotiations as an agent of said Allied Military Government.

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

Specifications 1, 2, 5, 6, 7: (Findings of not guilty).

Specification 3: In that Captain Thomas H. Cockerham, 7108th Military Government Detachment (Overhead), 88th Infantry Division, did, at Trieste, Italy, on or about 22 January 1947, wrongfully accept the sum of 50,000 lire from Mario Rustia, the said Rustia being a contractor with whom the said Captain Cockerham, as agent for Allied Military Government, Venezia Giulia, had negotiated for said Allied Military Government.

Specification 4: (Same as Specification 3 except the date "2 May 1947," and the amount "200,000 lire.")

Specification 8: (Same as Specification 3 except the date "15 March 1947," the donor, "Triestina Attalti e Costruzioni," and the amount "1,100,000 lire.")

Specification 9: (Same as Specification 3 except the date "2 May 1947," the donor, "Industriale Costruzione," and the amount "125,000 lire.")..

Specification 10: In that Captain Thomas H. Cockerham, 7108th Military Government Detachment (Overhead), 88th Infantry Division, did, at Trieste, Italy, on or about 1 June 1947, wrongfully hold British paper currency in the sum of about 1300 pounds sterling in violation of Allied Force Headquarters Administrative Memorandum No. 3, dated 11 January 1945, as amended by Allied Force Headquarters Administrative Memorandum No. 22, dated 9 April 1945.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 1, 2, 5, 6 and 7, Charge II; guilty of Specification 9, Charge II, except the "figure" "125,000 lire," substituting therefor the "figure" "115,000 lire;" of the excepted "figure" not guilty, of the substituted "figure" guilty; and guilty of the other Specifications and the 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, to be confined at hard labor for a period of two years, and to pay to the United States Government a fine of \$2,000.00. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

### 3. Preliminary matters.

In June 1945, the armed forces of the United States and Great Britain jointly occupied Venezia-Giulia, a province in Northeastern Italy, and the occupying forces established what was designated as the Allied Military Government over the area. The seaport city of Trieste, Italy, which later became the Free Territory of Trieste, was located within the geographical boundaries of Venezia-Giulia. Field Marshall Harold Alexander was the Supreme Allied Commander of the Mediterranean Theatre of Operations, under which Theatre, the Allied Military Government, Venezia-Giulia, operated. The military government was staffed by both American and British military personnel and included many civilian employees (CM 328248, Richardson).

### 4. Evidence for the prosecution.

#### a. General.

It was stipulated that if Major Edward H. Richardson were in court

and sworn as a witness he would testify:

"\* \* \* that from about 17 October 1945 to about 8 July 1947 he was Chief Public Works Officer of Allied Military Government, Trieste; that he knew the accused, Captain Thomas H. Cockerham, who was assigned to his division about May 1946 and remained with his division from that time until about 18 June 1947. During this period of time he was in charge of one of the sections of Public Works Division, Allied Military Government, Trieste. He was in charge of the Miscellaneous Section which pertained to Mine and Bomb Disposal and Rubble Removal in the Trieste area and British-American occupied area of Venezia Giulia. During the time the accused was assigned to Public Works, AMG, he was a member of 7108th Allied Military Government Detachment (Overhead) and to the best of Major Richardson's knowledge was a member of the military service of the United States. Captain Cockerham, like all other officers in the division, was empowered and delegated with the authority to sign certain forms pertaining to the functions of the Public Works Division, Allied Military Government. He was authorized to sign PW 1 forms for amounts not exceeding 1,000,000 lire. He was also, like all other officers in the division, authorized to sign PW 2 forms in any amount." (R 53,54)

PW 1 Forms which originated in either the Genio Civile or V.S.V.S., Italian Government agencies, were utilized to show work which was required to be done and a request for permission to have the work done, and were sent to the Public Works Division, Allied Military Government for approval. (R 84). In effect it was a request to set up an appropriation (R 87). Upon approval by the Chief of Public Works or a deputy the PW 1 was returned to Genio Civile and the project would be sent out for bids to persons on a list compiled by "the director of the technical office of the Commune, Provence, Popular Institute." (R 84,86,89). The Chief Engineer of Genio Civile was authorized to add names to the list (R 86). On some occasions accused would add names to the list (R 69). Upon receipt of the bids they would be opened by an officer from Public Works in the presence of a representative of the "Genio Civile." Sometimes the opening of the bids was done in private and sometimes in public. A tabulation of the bids was then made up and signed by the public works officer and by the representative of the Genio Civile (R 87). The bids were then returned to an Italian agency and the contract for the work would be awarded to the lowest bidder (R 84,87). The parties to the contract would be an Italian agency and the contractor (R 85). At that time a form PW 2 would be initiated by the Italian agency and sent to Public Works for approval. The form would state the date that work would start and that the contractor was entitled to draw money for his work (R 85). At Public Works the PW 2 would be checked against the tabulation of bidders to insure that the contract had been awarded to the lowest bidder (R 88).

The approval of the PW 2 gave authority to spend the appropriation set up by approval of the PW 1, and the appropriation would be drawn "on" the Bank of Italy (R 87).

Accused made two pre-trial statements, one of which was read to the court by the stenographer who took it down, and the other a written statement signed by accused which was admitted in evidence as Prosecution Exhibit 18. Both statements are of substantially identical content and for that reason reference in the following statement of facts will be made only to Prosecution Exhibit 18. The latter statement in reality consists of eleven separate statements each pertaining to an offense with which accused was charged. Thus in the following statement of facts pertaining to the specific offenses with which accused is charged, the pertinent statement of accused with other evidence tending to corroborate the statement will be set forth in the order in which the offenses appear upon arraignment.

b. Charge 1, Specification (Conspiracy).

"I was approached various times by my two employees, Bela Weinckheim and Enrico Sonnbackler prior to 15 January 1947 with the proposal to make some money from certain Public Works contracts which were negotiated through my office. Many times I rejected their proposals but finally after seeing that every other officer in P.W. Divisions and a number of civilian employees were all making large amount of money I finally acquiesced. This occurred about 15 January 1947.

Our arrangement was that I would receive 50% of the proceeds and Weinckheim and Sonnbackler would equally divide the remainder. I can recall no instance when this division was not followed. Weinckheim and Sonnbackler made all arrangements with contractors and received all payments from contractors with one exception this being one time that I received money from Fabio Sforza. Weinckheim made all arrangements with contractors except for twice that Sonnbackler carried this out.

One job that Sonnbackler arranged was the contract for electrical installations for the V.G. Police Barracks at Duino. The electrical installation contract netted us 20% of Lire 1,500,000. Sonnbackler personally paid me my share of 50%. I do not recall the contractor's name. The other job which Sonnbackler arranged and received payment was bunker demolition at Duino for Lire 2,200,000 approximately. We received 10% of this total. My share was personally paid me by Sonnbackler. The contractor's name was ICEC. I know that at times after Bela Weinckheim received money from contractors he placed sums in an envelope and left this in Sonnbackler's desk."

Lieutenant James H. Williams testified that during 1946 he had a conversation with accused in the Excelsior Hotel in Rome, Italy. At

the time accused mentioned that perhaps he would like to transfer from Allied Military Government because he said that everyone, including the Senior Civil Affairs Officer, seemed to be getting rich and he was afraid he might become involved innocently or otherwise (R 82,83).

Enrico Sonnlichler testified that he worked in the Miscellaneous Section, Public Works, Allied Military Government from September 1946 to 5 August 1947 and in that section served with accused who was head of the section until May 1947. The Miscellaneous Section was concerned with electrical work, demolition work, and rubble removal. It was Sonnlichler's duty to take care of the technical part of the projects which accused received from "Genio Civile." Another employee in the Miscellaneous Section was Bela Weinckheim who was employed as an interpreter. Sonnlichler had the impression that accused was on very friendly terms with Weinckheim's sister, and on several occasions saw accused and the Weinckheims leave the office together and drive away in the same automobile (R 81). On occasions Sonnlichler was asked to leave the office when Weinckheim and accused would have a conversation. In January or February 1947 Sonnlichler was sent out of the office while accused and Weinckheim had a conference (R 60). In February Sonnlichler and Weinckheim had a conversation in which the latter related a conversation he had with accused. The substance of that conversation was as follows:

"\* \* \* Weinckheim asked Captain Cockerham what his reaction was about the rumours going on in the building about money which was to be received from contractors. Captain Cockerham allegedly answered, 'Yes, he would like to make money as well but through another way.' \* \* \*." (R 62)

When asked by Weinckheim his reaction to what he had been told Sonnlichler expressed his surprise that Weinckheim would broach such a subject to accused. Weinckheim terminated the conversation by saying "You should not know about it." Sonnlichler stated that the matter was never brought up again (R 62).

Sometime after this conversation Sonnlichler received 100,000 lire from accused (R 62). On 28 January 1947 Sonnlichler's father-in-law died and at that time Sonnlichler requested financial assistance from accused (R 57). When he received the money he told accused he did not know if he would be able to pay it back. Accused told him not to worry about it (R 60). Sonnlichler never repaid the money (R 61). On a prior occasion Sonnlichler had borrowed 50,000 lire from Weinckheim which he had repaid.

Sonnlichler also testified that on a number of occasions the contractors, Crismani, Rustia and Sforza visited accused in his office. Sonnlichler had no knowledge of the business transacted between accused

and these visitors as he was asked to leave the room when they came in (R 61). He thought that accused may have made the 100,000 lire loan to him "as a counter-part" for the insult which was made to him when he was asked to leave the room (R 77). Sonnichler was also requested to leave the office when accused had military visitors (R 68).

In connection with projects received from Genio Civile, Sonnichler had been instructed by accused to check carefully the estimates for the projects, and on a number of occasions Sonnichler recommended a reduction in the estimates. Invariably accused followed the recommendation. Sonnichler did not know of any occasion when the estimates for a project were increased by accused and he had never been instructed by accused to increase estimates (R 73,74).

With reference to an agreement between himself, Wenckheim, and accused to solicit and accept gifts from contractors, Sonnichler on cross-examination testified:

- "Q. Did you agree, about the month of January, with Bela Wenckheim and Captain Cockerham, or either of them, to solicit and accept gifts from contractors?
- A. Besides the conversation I have already mentioned as having taken place between myself and Wenckheim, I have never spoken with either Captain Cockerham or with Mr. Wenckheim about this thing.
- Q. Was there any agreement that you know of between Captain Cockerham and Mr. Wenckheim to solicit and accept gifts from contractors?
- A. I know only of that conversation which took place between myself and Mr. Wenckheim.
- Q. You never agreed to accept any money from the contractors, did you?
- A. Agree to whom?
- Q. Agree with Captain Cockerham or Mr. Wenckheim to accept money from the contractors?
- A. No.
- Q. Did you receive any money in regard to a contract on or about 1st February in connection with 400,000 lire that Captain Cockerham is alleged to have received from Crismani?
- A. Have I personally, no.
- Q. Have you received either from Captain Cockerham, Bela Wenckheim or Mario Rustia any money in connection with a contract about 12 January in connection with the demolition at Scalo Legnami?
- A. No.

- Q. Have you received any money from Mario Rustia, Captain Cockerham or Bela Wenckheim in connection with the demolition at Duino on anti-tank traps, 2 January 1947?
- A. No.
- Q. Did you receive any money from Mario Rustia, Captain Cockerham or Bela Wenckheim on or about 2 May in connection with the demolition of anti-tank traps at Prosecco?
- A. No.
- Q. Did you on or about 20 February 1947 receive any money from Mario Rustia, Captain Cockerham or Bela Wenckheim in connection with the demolition at Punta Sottile?
- A. No.
- Q. Did you on or about 3 May 1947 receive any money from Navarra, Captain Cockerham or Mr. Wenckheim in connection with the electrical work at Duino?
- A. No.
- Q. Did you on or about 15 March 1947 receive from Mr. Roli of the firm Sacchi, or from Captain Cockerham, or from Mr. Wenckheim, any money from the demolition contract near Cave Faccanoni?
- A. No.
- Q. Did you on or about 15 March 1947 receive any money from Fabio Sforza of the firm T.A.E.C., Captain Cockerham, or Mr. Wenckheim for the demolition of bunkers at Monfalcone?
- A. No.
- Q. Did you on or about 2 May 1947 receive from the firm Inco, with which Mr. Zumin is connected, or from Captain Cockerham, or from Mr. Wenckheim, any money from the demolition of bunkers at Duino?
- A. No.
- Q. Have you received any money from any contractors, or did you solicit any money from any contractors in connection with awards of Public Works?
- A. No.
- Q. Was there any agreement between you and Captain Cockerham as to sharing any gifts which might have been received from contractors?
- A. No.
- Q. Did you share with Captain Cockerham any gifts from any contractors?
- A. I never received any so I could not share." (R 74,75).

As evidence of an overt act under the conspiracy the prosecution over objection by the defense offered in evidence a Form PW 1 showing that on 24 January 1947 accused approved a project in the amount of 450,000 lire for "additional clearing away work in the establishment of Zaule the S.A. 'Aquila' Trieste." (R 123, Pros Ex 5). Concerning this particular PW 1 Sonnlichler testified:

"A. \* \* \*. I have a good recollection as to this project. It was sometime in January when Captain Cockerham had a conversation with a gentleman about Bela. Suddenly, Captain Cockerham became very excited and shouted something about Genio Civile, alleging that they did not work properly. Later on, Captain Cockerham, Bela, and a gentleman who I learned later on to be Mazzetti, went to see Major Richardson. Later on when Bela came back from Major Richardson, I inquired from him the reason why Captain Cockerham was so angry. He said because the Genio Civile had forgotten to pay a gentleman for work that had already been performed and Major Richardson had issued instructions to the effect that this gentleman has to be paid. This is what I know about it. Therefore I assume that Captain Cockerham acted merely upon instructions received from Major Richardson.

Q. Is this payment in reference to this PW1 or in reference to the original contract?

A. It was in connection with the main job.

Q. Not with this supplementary?

A. The gentleman had already performed this job. He has not been paid for the work he has done because Genio Civile had forgotten to pay him. Therefore, this PW1 became as a supplementary.

Q. When did this conversation take place?

A. Some time in January I believe.

Q. When this PW1 was signed?

A. Yes.

Q. In other words, Mazzetti had already performed the work before the PW1 was originated?

A. A long time before.

Q. And this PW1 was merely to regularize the records of the administration?

A. Only to settle a mistake committed by Genio Civile.

Q. And this work was 450,000 lire?

A. As it appears here. I have never seen that job, but I saw it on this record.

Q. In connection with that job, did Mazzetti give you 45,000 lire?

A. I have never received a penny from Mazzetti.

Q. Do you know whether Mazzetti gave Wenckheim 45,000 lire?

A. No.

Q. Do you know whether he gave Captain Cockerham 45 or 50,000 lire?

A. No.

Q. Do you know whether he gave somebody in Finance 45 or 50,000 lire?

A. I don't know." (R 124,125).

Vicenzo Mazzetti, "a constructor," testified that in December of 1946 or January of 1947 he received 450,000 lire for work which had already been completed. Prior to the arrival of accused in Trieste, Mazzetti was awarded a contract for the removal of rubble in the establishment of D'Esola Aquila, Trieste. The work was performed in the period May to August 1946 and in the course thereof Mazzetti performed extra work, the removal of 1500 cubic meters of rubble for which he received payment of 450,000 lire in January of 1947. Of the 450,000 lire Mazzetti gave a gift of 45,000 lire to a Public Works employee. Mazzetti testified that he did not know "The physical person" to whom he paid the money, and that the money was paid in a cafe or bar. Mazzetti had been in a big hurry to obtain the money due him and he was advised by "Genio Civile" to see the person to whom he made the payment. Although he had been to accused's office on other matters he never saw the person to whom he made the payment in that office (R 92,93,94).

He did testify that he had consulted with accused about receiving compensation for the extra work he had performed. Accused took him to Major Richardson to whom the matter was explained and Major Richardson told him that he would be paid (R 94,95). Mazzetti admitted that prior to trial he had made a statement concerning the gift. With reference to the statement he testified:

"Q. When you made that statement on 1st September 1947, were you telling what you then believed to be the truth?

A. As it appears on the record indicated by me, I have been solicited by the police.

Q. What do you mean when you said 'I do not deem it necessary to reveal the name of the person to whom I gave 45 or 50,000 lire. I can only say he was a member of Captain Cockerham's office?

A. I did not specify the name because the police wanted me to state it and as I was not sure about it, I released this statement.

- Q. You were sure he was a member of Captain Cockerham's office, but you were not sure what the name was?
- A. At the time I made a statement I thought it was so, but during the trial against me when I saw all the people involved in it, I came to the conclusion that it was not, so." (R 96,97).

c. Specification 3, Charge II (Acceptance of a sum of money).

In his pre-trial statement accused admitted the receipt of 50,000 lire from Bela Weinckheim and stated that this amount represented 50 per cent of the amount received by Weinckheim from Mario Rustia in connection with the demolition of an anti-tank wall at Duino Castle (R 121, Pros Ex 18).

There were introduced in evidence as Prosecution Exhibit 10, a letter from the Chief Engineer, Genio Civile, sent to various contractors inviting them to bid, a tabulation of the bidding for demolition of a barrier wall and defense work in "Porticciolo di Duino" showing Mario Rustia as low bidder, and a PW 2 form bearing accused's signature approving the award of a contract in the amount of 991,700 lire to Mario Rustia for the work at "Porticciolo di Duino." (R 64).

d. Specification 4, Charge II (Acceptance of a sum of money).

Concerning this offense accused in his pre-trial statement stated:

"Reference specification n 4 the sum of 200,000 lire was paid to me by Bela Weinckheim on or about 2 May 1947 which was 50% of the total amount received by Bela Weinckheim from Mario Rustia. I believe that the remaining 50% or 200,000 lire was divided between Bela Weinckheim and Enrico Soonbickler. This transaction was payment for demolition of anti-tank traps at Prosecco."

There were admitted in evidence as Prosecution Exhibit 8, a list of the contractors invited to bid on the demolition work at Prosecco, the bid for the work submitted by Mario Rustia in the amount of 4,140,750 lire, a tabulation of the bids submitted showing Rustia as the low bidder, and a PW 2 bearing accused's signature approving the award of the contract for the work at Prosecco to Rustia (R 63).

e. Specification 8, Charge II (Acceptance of a sum of money).

With reference to the offense here charged accused in his pre-trial statement stated:

"Reference specification n 8, I received from Bela Weinckheim the sum of Lire 500,000 which he had received for me from Mr. Fabio Sforza and I personally received from Mr. Fabio Sforza the sum of Lire 1,200,000 of which I kept and the remainder I paid to Bela Weinckheim with instruction to pay

Enrico Soonbickler one half of that amount. When I received Lire 500,000 from Bela Weinckheim, both Bela Weinckheim and Enrico Soonbickler had received their share of Lire 250,000 each. These sums represented 10% of a contract of roughly 22,000,000 lire demolition of Bunkers at Monfalcone. These sums were paid in lire in my office on or about 15 March 1947."

There were admitted in evidence as Prosecution Exhibit 13 a letter from the Chief Engineer, Genio Civile, inviting various contractors to bid on a demolition project at Monfalcone, a bid for the project submitted by "T.A.E.C." in the amount of 7,292,800 lire, a tabulation of the bids received showing that "T.A.E.C." was the lowest bidder, and a PW 2 bearing accused's signature approving the award of the contract for the project to "T.A.E.C. (Triestina Attalti e Costruzioni)."

f. Specification 9, Charge II (Acceptance of a sum of money).

With reference to the offense charged here accused prior to trial stated:

"Reference specification 9, I did accept the sum of Lire 115,500 from Enrico Soonbickler on or about 2 May 1947 as my share of the 230,000 lire payment personally made by Mr. Zumin Mario of INCO to Enrico Soonbickler. This was as a consequence of the 2,200,000 lire contract for the demolition of Bunkers at Duino."

An invitation to bid on a demolition job at Duino, a tabulation of the bids submitted showing "IN.CO." as the low bidder with a bid of 2,542,000 lire, and a PW 2 bearing accused's signature approving the award of the contract to "IN.CO.", were admitted in evidence as Prosecution Exhibit 11 (R 64).

Mario Zumin was called by the prosecution as a "hostile witness." Zumin testified that he was a contractor, and that the name of his construction firm was "Industrial Construction" generally called "I.N.C.O." (R 102). The total amounts of his contracts with Genio Civile which had been approved by Public Works was approximately 6,000,000 lire (R 103). On two or three or four occasions in connection with these contracts he went to accused's office to receive instructions from Sonnlichler. He admitted that he had lost money on some of his contracts but denied being told that in connection with future contracts arrangements would be made that he would be awarded contracts. He did, however, receive additional contracts but denied paying Sonnlichler 230,000 lire in connection with the awards (R 104).

With reference to an extra-judicial statement made by him concerning his dealings with Public Works, Zumin testified:

"Q. Do you remember making a statement on the 5th day of August 1947 to Mr. Di Lillo, Giovami?

A. I have released a statement.

Q. At the time that you gave that statement, you gave what you considered to be the truth, did you not?

A. No.

Q. Why?

A. I knew that it was an untruth.

Q. You were later tried in the Civilian Courts for giving money, were you not?

A. Yes.

\* \* \*

Q. And you were convicted were you not?

A. Yes.

Q. Now before you were tried in the Civilian Courts, you gave a statement on the 5th August 1947?

A. I released a statement.

Q. Is that the statement you gave?

A. This is the record which has been made out on that occasion.

Q. Now directing your attention to the last paragraph, I want you to explain this to the court?

'All these works were awarded to us through biddings and more exactly the works under para 1) through notices posted up on the public roll at disposal of all building contractors; the works under paras 2), 3) and 4) through letters inviting to submit bids. Considering that the demolition works at the bunker of Faro della Vittoria, carried out in Winter time and through various difficulties, had brought to the firm a damage instead of a profit also owing to the low price of adjudication and the successive salary raises, the firm asked the office of Captain Cockerham to be taken into special consideration on occasion of other biddings which would have allowed it to cover the suffered loss also owing to the fact that the leases of little works, in which shared many firms, did not permit to obtain prices even remunerative. In consequence of this request, the firm was informed that the demolition work of bunkers located in Duino Zone would be carried out and that for its lease the firm was invited to submit - for information - the names of contractors which would not submit bids with excessive reduction. For this facilitation, Engineer Sonnlichler of P.W.O. asked a reward of 10% on the price of the work to be carried out, if the firm had obtained it. The engineer wanted that this payment should be carried out at work assignment. However, owing to monetary financial difficulties, the award was paid as follows: 50,000 lire immediately and the

remaining 180,000 lire in a second time when the work was in part carried out. I myself gave the money to Engineer Sonnichler.

(Sgd) ZUMIN Mario'

Q. What do you mean by that?

A. What do you mean, what was intended?

Q. When you made that statement, what did you mean? Did you mean what you said or did you mean something else?

A. It is necessary that I give an explanation as to my statement."  
(R 104,105-106)

Zumin explained that the "NCO" conducting his interrogation informed him that accused and Sonnichler had both stated that he had paid money to get certain work. At the time Zumin denied to the "NCO" that this was so. Finally Zumin made the statement in reliance upon a promise that he would be released from jail and also because he believed that he was merely confirming specific statements made by both Sonnichler and accused (R 106,107).

On cross-examination he denied paying anything to accused, Sonnichler or Weinckheim in connection with contracts (R 107).

g. Specification 10, Charge II (Unlawful holding of British currency).

Finally, with reference to this offense accused stated:

"\* \* \* I did have purchased by a third person about 1300 pound sterlings which I gave to Capt. J.R. Squire in return for which he gave me a check for 4000 American dollars on the Community National Bank, Knoxville Iowa."

John R. Squire testified that he had known accused from the time that the latter had joined Public Works and knew him during the month of June 1947. During June 1947 Squire gave accused a check in Trieste in the amount of \$4,000.00 drawn upon the Community National Bank & Trust Company of Knoxville, Iowa. At the time Squire did not receive anything from accused but later in June, in Trieste, Squire received a bag from accused in which were some British pound notes. Squire imagined that the approximate number of pounds sterling in currency which he received from accused was approximately 1,000 (R 16,17,18,19).

On cross-examination Squire testified as follows concerning his receipt of the currency:

"Q. Major Squire in relation to this transaction that you have testified to, did you ever see in the possession of Captain Cockerham any pounds sterling, British paper currency?

A. No.

Q. Did you ever see him with any money any time before this transaction?

A. No.

Q. Is it not true that on the day of this transaction a third person came in to the office and deposited this money on your desk?

A. That I cannot remember. It came in a bag.

Q. Do you recall whether Captain Cockerham handed it to you or was it a third person?

A. That I cannot remember too well but I know I was given a bag."  
(R 20-21)

On redirect examination he testified:

"Q. You say this bag was brought to your office, by whom?

A. I think by Captain Cockerham." (R 21)

And upon examination by the court he testified:

"Q. Will you please describe the procedure you went through in receiving this bag? How did it appear? Who brought it? Was it on your desk when you walked in? How did you obtain possession of the bag?

A. It was brought to me.

Q. In person?

A. As far as I can remember - -

Q. By some other party?

A. I think by Captain Cockerham.

Q. But you cannot state definitely who the person was that brought you the bag, is that correct?

A. It is going back a while, but I took it that the pound notes that were inside were for that purpose.

Q. You mentioned a deal with Captain Cockerham for about \$4,000.00. Did you assume when you received this bag that that was the consummation of the deal that you had referred to?

A. I did, yes." (R 22)

5. Evidence for the defense.

Accused testified as to the conditions under which he made the two pre-trial statements which were admitted in evidence and elected to remain silent as to the merits. His testimony with reference to his pre-trial statements will be hereinafter considered.

Other evidence introduced by the defense was pertinent to the Specification of Charge I, and the first nine Specifications of Charge II, but in our view of the case it is not necessary to set forth this evidence. Stipulated testimony showed that the memoranda pertaining to Specification 10, Charge II, were not published to accused's command.

6. Charge I, Specification; Charge II, Specifications 3, 4, 8 and 9 - Conspiracy to solicit and accept gifts, and acceptance of sums of money.

The Specification of Charge I alleges a conspiracy between accused and others to solicit and accept gifts from persons and firms with whom accused was to carry on negotiations as agent of the Allied Military Government (CM 320681, Wachte, 70 BR 125,133; CM 325762, Edwards). The offense alleged constitutes conduct of a nature prejudicial to good order and military discipline and tending to bring discredit upon the military service in violation of Article of War 96 (CM 296630, Siedentop, 58 BR 191,197). Where as in the instant case the accused was an officer, and if the object of the conspiracy was dishonorable, the offense is in violation of Article of War 95 (CM 320455, Gaillard, 69 BR 345,377; CM 328248, Richardson).

Specifications 3, 4, 8 and 9 allege that at the time and place alleged accused accepted money from certain named individuals and firms with whom accused, as agent of the Allied Military Government, Venezia Giulia, had negotiated for said Allied Military Government.

It is not necessary under the Specifications enumerated to determine that accused was or was not carrying on negotiations directly or indirectly with the persons alleged in order to support the convictions. A conspiracy to solicit gifts, and the acceptance of the same, under conditions clearly conducive to corruption and disloyalty to the military service, are violative of Articles of War 95 and 96 (Richardson, supra).

The pre-trial statements of accused if properly considered by the court, sustain every element of the offenses of which accused was found guilty. The accused's statements clearly show that a conspiracy was entered into between accused and two civilian subordinates in his office, Weinckheim and Sonnichler, to solicit from persons having contracts approved by accused in his capacity as an officer of the Public Works Division, a gratuity equal to ten per cent of the contract price. Accused was to receive fifty per cent of the amounts so received and Sonnichler and Weinckheim were to divide the remainder. Accused also admitted - 1. The receipt of 50,000 lire from Weinckheim representing fifty per cent of what Weinckheim received from the contractor Rustia in connection with a project at "Duino Castle" (Charge II, Specification 3); 2. The receipt of 200,000 lire from Weinckheim representing fifty per cent of what Weinckheim had received from the contractor Rustia on a project at Prosecco (Chg II, Specification 4); 3. The receipt of 500,000 lire from

Weinckheim which the latter had received for accused from one Sforza and the receipt by accused from Sforza of 1,200,000 lire of which accused kept half and paid the remainder to Weinckheim. The money was received in connection with a project at Monfalcone (Charge II, Specification 8); 4. The receipt of 115,000 lire from Sonnlichler which was fifty per cent of what Sonnlichler had received from Mario Zumin in connection with a project at Duino (Charge II, Specification 9).

The question presented is whether the accused's pre-trial statements, which amounted to confessions to the offenses with which he was charged, were properly considered by the court. The pertinent rule is stated as follows:

"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.\* \* \*."  
(Par 111a, MCM, 1928).

The other competent evidence in this case fails completely to establish the probability that any of the offenses under discussion were committed.

In connection with the offense of conspiracy the prosecution showed that at an unspecified time in 1946 accused stated that he would like to transfer from Allied Military Government because everyone seemed to be "getting rich" and he was afraid he might become involved innocently or otherwise.

The prosecution introduced as a witness, Sonnlichler, one of accused's alleged co-conspirators. Sonnlichler's testimony was completely innocuous to accused. Sonnlichler denied that he was a party to any conspiracy to solicit gifts from contractors, and likewise denied that he received any gifts from contractors. He admitted receiving a loan of 100,000 lire from accused which he had not repaid and which he had not been requested to repay. On numerous occasions when contractors came to accused's office Sonnlichler was asked to leave the room and Sonnlichler "asked" himself if that was the reason for the loan.

Sonnlichler also testified that Weinckheim, the other alleged co-conspirator, related to him a conversation had with accused. The substance of that conversation was that accused upon being asked by Weinckheim his reaction to the rumors of money being received from contractors, responded that he would like to make money, too, but in another way.

Other testimony of Sonnlichler tended to show that accused was on friendly terms with Weinckheim and Weinckheim's sister.

The testimony of Mazzetti showed that prior to the arrival of accused in Trieste, Mazzetti had been awarded a contract for the removal of rubble at D'Esola Aquila, Trieste. In connection with the contract Mazzetti performed extra work for which he had not received compensation. He brought his problem to accused who in turn introduced him to Major Richardson, Chief of Public Works, who assured him that he would be paid. In connection therewith accused approved a PW 1 form involving "additional clearing away work in the establishment of Zaule of the S.A. 'Aquila' Trieste." Mazzetti received 450,000 lire in addition to what he had received on the original contract. Mazzetti had been anxious to expedite the additional payment and on the advice of an official of the "Genio Civile" had paid 45,000 lire to an employee of Public Works whom he did not know. He admitted that in a pre-trial statement he stated that the payment had been made to an employee in accused's office but claimed that during his own trial he came to the conclusion that it was not so.

To establish a basis for consideration of accused's confession there must be some evidence which shows that the offense charged was probably committed and which in some measure corroborates the confession. In a conspiracy case the evidence outside the accused's confession must indicate the probability of the existence of a confederation or agreement between two or more persons for the purpose alleged (*Tingle v. U.S.*, 38 F.2d 573). Outside of accused's pre-trial statements there is not an iota of evidence establishing such a confederation or agreement, nor are there any circumstances shown from which such a confederation or agreement may be inferred. It is true, of course, that the pre-trial statement of Mazzetti that he had paid 45,000 lire to an employee in accused's office to expedite payment of the 450,000 lire together with the circumstance that accused interceded in Mazzetti's behalf, would tend to establish at least a suspicion of irregular conduct by accused. Mazzetti, however, renounced his pre-trial statement on the stand, and the statement may not be considered as substantive evidence of the facts recited therein. (CM 297312, Westfield, 18 BR (ETO) 269,281; CM 328121, Wilson; CM 327866, Hill; CM 323083, Davis, 72 BR 23,32-34); nor may a pre-trial statement not adopted by the declarant in his testimony before the court be considered as establishing the corpus delicti (CM 325056, Balucanag). It may be seen, therefore, that there was no evidence outside the confession which tended to establish the probability that two or more persons had entered into a confederation or agreement for the purpose alleged.

Specifications 3, 4, 8 and 9, Charge II, allege that accused wrongfully received sums of money from contractors with whom he negotiated as agent for Allied Military Government. Accused's pre-trial statements, if admissible for consideration by the court, would fully establish accused's guilt of the offenses alleged. The other evidence of record, however, fails to establish the probability that the offenses alleged were committed.

Under Specification 3, Charge II, which alleges the acceptance of a gift from one Rustia, the evidence other than accused's pre-trial statement

consisted of a list of contractors invited to bid on a project at Duino Castle, the bid submitted by Rustia, the alleged donor, a tabulation of bids showing that Rustia was low bidder, and a PW 2 form signed by accused approving the award of a contract for the project to Rustia. There was no showing of irregularity in connection with accused's approval of the contract, nor was there any showing that Rustia was not entitled to the contract. There was no evidence adduced from which it could be inferred that money was offered or accepted.

As to Specification 4, Charge II, which likewise alleged the acceptance of money from Rustia, the evidence other than accused's statement showed merely that Rustia was the low bidder on a project at Prosecco and accused approved the award of a contract to him for the project. There was no evidence direct or circumstantial outside accused's confession which tended to show the offer or acceptance of money.

In support of Specification 8, Charge II, alleging the acceptance of money from Triestina Attalti e Costruzioni, the evidence adduced outside of the confession showed that the alleged donor was low bidder on a demolition project at Monfalcone and that the contract awarded to the low bidder was approved by accused. There was no evidence that any gratuity had been offered or accepted in connection with the contract or otherwise.

Similar evidence was introduced in connection with Specification 9, Charge II, and showed that accused approved the award of a contract to "In.Co." the low bidder on a demolition project at "Duino." The owner of that firm was called as a witness by the prosecution. He admitted that his contracts with "Genio Civile" which were approved by Public Works amounted to 6,000,000 lire. He had suffered some losses on some of these contracts but denied he had been informed that arrangements would be made that he would be awarded contracts in order to make up the losses. He had received additional contracts but denied that he paid Sonnichler 230,000 lire in connection with those awards, and repudiated a pre-trial statement in which he stated that he had paid 230,000 lire to Sonnichler for the award of a contract for demolition work at "Duino." The repudiated pre-trial statement could not be considered as substantive evidence of the facts recited therein nor could it serve to establish the corpus delicti of the offense alleged (See Westfield, Wilson, Hill, Davis and Balucanag cases, supra). There was no competent evidence which established the offer or acceptance of money as alleged.

To recapitulate, as to the Specification of Charge I, and Specifications 3, 4, 8 and 9 of Charge II, there was no evidence outside of accused's pre-trial statements which established the probability that the offenses charged were committed. Accused's pre-trial statements were not, therefore, subject to consideration by the court, and it follows that the findings of guilty of the Specifications under discussion are not supported by the record of trial.

7. Accused was found guilty of wrongfully holding British paper currency in violation of Allied Force Headquarters Administrative Memorandum No. 3, dated 11 January 1945, as amended by Allied Force Headquarters Memorandum No. 22, dated 9 April 1945, of which memoranda the court took judicial notice. In pertinent part the memoranda provide: "1. Except as otherwise duly authorized, personnel in this theatre are prohibited from: a. Importing, holding, transferring, exporting, or in any way dealing in United States or British paper currency." The memoranda were signed "by Command of Field Marshal Alexander" by the Adjutant General. These memoranda had the effect of legal, operative standing orders applicable to accused (CM 291176, Besdine, 18 BR (ETO) 181,185,186).

The testimony of John R. Squire shows that at sometime in June 1946 he gave accused a check in the amount of \$4,000.00 drawn upon the Community National Bank and Trust Company of Knoxville, Iowa. Subsequently in the same month at Trieste, Italy, he received a bag in which were approximately 1,000 British pound notes. To the best of his memory the bag was given to him by accused. Here there was sufficient evidence of corpus delicti to render proper the consideration by the court of accused's pre-trial statements concerning this offense, and the uncontradicted evidence thus shows that at the time and place alleged accused wrongfully held British currency as alleged.

8. In oral argument before the Board of Review, and in his brief submitted for consideration by the Board, civilian counsel has made numerous assignments of error. It is not necessary in our view of the case to consider those assignments of error pertaining to Charge I and its Specification and Specifications 3, 4, 8 and 9 of Charge II. The other assignments of error are hereafter discussed.

a. Prior to the trial of accused a Major Richardson, one time Chief of Public Works, Allied Military Government, Trieste, had been convicted by General Court-Martial upon Charges and Specifications substantially identical with those upon which accused was arraigned. Major Richardson had been found guilty of conspiracy to solicit gratuities from contractors with whom he negotiated in his official capacity, of accepting sums of money from contractors with whom he had negotiated in his official capacity, and of wrongful possession of United States currency in violation of the same memoranda considered in this case. Accused was not involved as an accomplice or otherwise in the offenses for which Major Richardson was tried. In the Richardson case, accused appeared as a witness not on the merits of that case but upon a challenge for cause directed to one of the members of that court. The challenge was sustained. Two of the members of the court which tried accused, Colonel Watson, law member and president, and Lieutenant Colonel Oyster, sat as members of the court which tried Major Richardson. In the instant case they were challenged for cause in that they had sat as members of a court which had tried a closely related case. Upon voir dire both challenged officers testified that they had formed an opinion to the effect that Allied Military Government officers

(240)

"negotiated." The challenges were not sustained and Lieutenant Colonel Oyster was challenged peremptorily and withdrew. It is contended that the failure of the court to sustain the challenges for cause was error. We disagree.

In the first place the trial of Major Richardson was not a closely related case to the instant case. Mere similarity of the Charges and Specifications without implication of the accused in the instant case in the offenses upon which trial was had in the former case does not render the cases "closely related" within the meaning of Par 58e, MCM, 1928 (CM 138312, Hammett).

We have hereinbefore concluded that under the Specification of Charge I, and Specifications 3, 4, 8 and 9 of Charge II, it is immaterial whether accused was negotiating with the persons alleged, and for that reason it is unnecessary to consider the challenges on the basis that the challenged members had formed an opinion on the issues of the case.

Finally as to the finding of guilty of Specification 10, Charge II, the only finding of guilty which the Board has found to be supported by the evidence, the Board is of the opinion that the uncontradicted evidence of guilt is compelling, and, therefore, the failure to sustain the challenges could not affect injuriously the substantial rights of the accused (CM 221991, Edgerton, 13 BR 255).

Civilian counsel has noted that the record of trial fails to show that voting on the challenges was by secret written ballot as required by Article of War 31. Since we are of the opinion that adequate grounds for the challenges did not exist we are also of the opinion that the failure to show that the challenges were not sustained on a vote by secret written ballot is immaterial.

b. It is contended that accused's pre-trial statements were improperly admitted in evidence on the ground that the statements were involuntary.

On 4 August 1947 accused was interviewed in the C.I.C. billets in Trieste by Leo J. Pagnotta, Chief C.I.C. Agent in Italy. At the time Pagnotta informed accused that he was not obliged to answer any questions, that Pagnotta could not promise him anything and that anything he said could be used against him. Following this accused dictated a statement to Staff Sergeant Michael W. Clark while Pagnotta sat about 15 feet away (R 24,25).

Accused testified that he was placed in arrest in the United States on 19 July 1947 and was returned to Italy in that status. He was first questioned by Pagnotta on 2 August 1947 and was not given any explanation of his rights. He was questioned for about an hour on this occasion and

was subsequently kept under guard until his next interview by Pagnotta. At the second interview accused was concerned about keeping a certain woman out of the investigation and made his statement in reliance upon Pagnotta's promise that he would keep the woman out of the investigation. He also claimed that Pagnotta was not present when the statement was dictated to Sergeant Clark (R 32-34). He admitted, on cross-examination, that he had made previously a statement in the United States and that prior to making the statement he had been advised of his rights under the 24th Article of War. He further stated that his statement to the investigating officer, Captain Leno, which was admitted in evidence as Prosecution Exhibit 18, was made in reliance upon the original inducement by Pagnotta. He also claimed that Captain Leno did not advise him of his rights under Article of War 24. Captain Leno testified to the contrary.

There was presented to the court a clear-cut issue as to whether accused's statement to Pagnotta and Clark was induced by a promise made by Pagnotta, and as was its prerogative the court chose to believe that no improper means were used by Pagnotta to induce his statement. There being no improper inducement as to the statement made to Pagnotta, the second statement was likewise free from such influence.

It is also shown in the record of trial (R 155) that accused was in confinement from 21 July 1947 to 18 August 1947 and from that date until the trial, he was under arrest in quarters. His statement to Pagnotta was made on 4 August 1947 and his statement to Captain Leno was made on 28 August 1947. It is contended that because of the restraints placed on accused at the times he made his two pre-trial statements that the statements were made under duress. The Board of Review has held contrariwise that the circumstance that a statement was made by an accused while in restraint, even if illegal, does not create an inference of duress (CM 328248, Richardson).

c. It is contended that there was not substantial compliance with the provisions of Article of War 70 in connection with the pre-trial investigation conducted by Captain Leno. It is alleged that Captain Leno, the investigating officer, assisted C.I.C. Agent Pagnotta in the latter's preliminary investigation, and that Pagnotta was the accuser in fact, that Captain Leno was not impartial, and that Captain Leno did not permit accused to examine available witnesses although accused had requested permission to do so. Finally, it is contended that the failure to comply substantially with the provisions of Article of War 70 resulted in the court lacking jurisdiction to try accused. With this latter contention we are not in accord. Accused has other remedies, complaint made pursuant to the provisions of Article of War 121, and if due to inadequacy of the investigation he is unable to prepare properly for his defense a request to the court for continuance "for the purpose of securing witnesses or producing evidence" (CM 323486, Ruckman, 72 BR 267,273-274).

In CM 229477, Floyd, 17 BR 149,156, it was shown that the legislative intent was to make the provisions of Article of War 70 merely administrative and not a matter affecting the jurisdiction of general courts-martial.

In the Ruckman case, supra, the Board in support of its opinion that the provisions of Article of War 70 were merely administrative stated:

"\* \* \* A contrary view would allow a defect in a purely administrative and preliminary hearing to vitiate the judicial proceeding. Analogies cannot be effectively drawn between the investigation required by Article of War 70 and the grand jury procedure required by the Fifth Amendment to the Constitution of the United States. The Fifth Amendment specifically excepts cases arising in the land and naval forces from the grand jury requirement. The state and federal courts empanel grand juries and, within the purview of the various statutory and code provisions, supervise the conduct of such bodies. In military jurisprudence, the court-martial ordered to try a given case may not have been in existence during the investigation and as has been stated has no relation thereto. \* \* \* a plea in bar of trial upon the ground of defective investigation, if granted, would amount to an unauthorized invasion of the prerogatives of the appointing or referring authority. The function of the court is to 'well and truly try and determine, according to the evidence, the matter now before' it, between the United States of America and the person to be tried, and 'to administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States \* \* \*' (AW 19). Its function does not include a determination of whether the appointing or referring authority ordered trial without a fair and impartial investigation."

In any event the appellate jurisdiction exercised by the Board of Review under Article of War 50 $\frac{1}{2}$  is limited to the record of trial (Floyd, and Ruckman, supra).

d. Finally it is contended that there was no proof of promulgation of the memoranda, a violation of which was alleged in Specification 10, Charge II.

The memoranda in question, Administrative Memorandum No. 3, Allied Force Headquarters, 11 January 1945, and Administrative Memorandum No. 22, same Headquarters, 9 April 1945, were not in evidence but were the subject of judicial notice by the court, and duly authenticated copies of the memoranda have been considered by the Board. The memoranda were originally classified as "restricted" and were published "By command of

Field Marshal Alexander" signed by the Adjutant General and marked distribution "C". In discussing the promulgation of a similar memorandum issued by Supreme Headquarters, Allied Expeditionary Force, and notice thereof to accused, the Board of Review has stated:

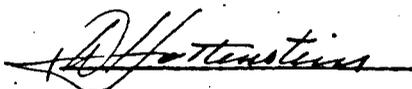
"The prohibition \* \* \* is a matter of importance directive in nature and evidently of permanent duration. \* \* \* It became effective as part of the written military law \* \* \* on the date of its promulgation, i.e., the date of its release and distribution by deposit in the mails (AR 310-50, WD, 8 Aug 1942, par 2). In the absence of evidence to the contrary, it may be presumed that the directive was released and distributed on or about the date it bears in the regular course of performance of their duties by the officers concerned \* \* \*. Accused was thus chargeable with notice of the prohibition." (CM 307097, Mellinger, 60 BR 199; CM 291176, Besdine).

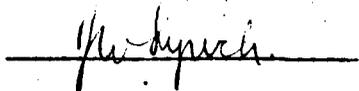
We conclude that in the instant case the pertinent memoranda were properly promulgated and that accused had notice thereof.

9. Accused is 32 years of age and married. He was graduated from high school in 1932 and in civilian life was employed as an automotive worker and ship fitter. He had enlisted service from 22 May 1942 to 12 February 1943 when he was commissioned a Second Lieutenant. He was subsequently promoted to First Lieutenant and Captain. He had foreign service in the Mediterranean Theatre from April 1946. The adjectival equivalent of his overall efficiency rating is "Excellent."

10. Mr. A. Frank Reel, attorney, of Boston, made oral argument in behalf of accused before the Board of Review. The Board in its review of the case has also considered a brief submitted by Mr. Reel.

11. The court was legally constituted and had jurisdiction of the person and the offenses. Except as hereinbefore noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, and Specifications 3, 4, 8 and 9, Charge II, legally sufficient to support the findings of guilty of Specification 10, Charge II, and Charge II, and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal, forfeiture of all pay and allowances due or to become due, confinement at hard labor for two years, and to pay the United States a fine of \$2,000.00, is authorized upon conviction of a violation of Article of War 96.

 , Judge Advocate

 , Judge Advocate

On Leave , Judge Advocate

(244)

JAGH CM 328857

1st Ind

JUL 5 1945

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Thomas H. Cockerham, 01797087, CMP, 7177th Allied Military Government Detachment (Overhead).

2. Upon trial by general court-martial this officer was found guilty of conspiring to solicit and accept sums of money from contractors with whom he was to carry on negotiations as an officer of Allied Military Government, Venezia Giulia, in violation of Article of War 95 (Charge I, Specification), of accepting sums of money from contractors with whom he had negotiated as an officer of Allied Military Government, Venezia Giulia (Charge II, Specifications 3, 4, 8 and 9, and of wrongfully holding British currency in violation of Allied Force Headquarters Memoranda in violation of Article of War 96 (Charge II, Specification 10). 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 be confined at hard labor for two years, and to pay to the United States Government a fine of \$2,000.00. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, and Specifications 3, 4, 8 and 9 of Charge II; legally sufficient to support the findings of guilty of Specification 10, Charge II, and of Charge II, and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

From May 1946 to May 1947 accused was on duty in the Public Works Division, Allied Military Government, Venezia Giulia. The Public Works Division was concerned with the approval of projects originated by Italian Government Agencies for the reconstruction of facilities, both public and private, damaged in the course of war. Projects would be set forth on a form designated as "PW 1" which would be sent to Public Works Division for approval. The Chief of Public Works was empowered to approve projects in any amount, and other officers including accused were authorized to approve any project not exceeding a cost of 1,000,000 lire. Upon approval of a project, contractors on a list prepared by an Italian Government Agency would be invited to bid. Accused on occasions would add names to the lists. The bids would be opened in the Public Works Division,

a tabulation of the bids made, and the lowest bidder would be awarded the contract for the project. The parties to the contract would be the contractor and the Italian Government Agency concerned. After the award was made a form "PW 2" would be sent to Public Works Division for approval. Upon this form would be set forth the date work would start and a statement that the contractor was entitled to draw money for his work. At the Public Works Division the form would be checked against the tabulation of bids for the project, to insure that the contract had been awarded to the low bidder. Approval of the form "PW 2" by an officer of the Public Works Division was necessary to give effect to the terms set out therein. Accused was authorized to approve "PW 2" forms in any amount. Payments to the contractors were made by the Bank of Italy.

Accused in pre-trial statements admitted that in January 1947 he and two Italian Civilian Employees of his office, Sonnlichler and Weinckheim, entered into an agreement to solicit money from contractors whose contracts came through his office. Accused was to receive fifty per cent of the sums obtained by virtue of such solicitation and the two employees were to divide the remainder (Charge I, Specification). Accused also admitted the receipt of 250,000 lire from Weinckheim representing fifty per cent of what Weinckheim had received from a contractor named Rustia on two contracts which were shown to have been approved by accused (Charge II, Specifications 3, 4) He admitted the receipt of 500,000 lire from Weinckheim which the latter had received from one Sforza, and the receipt by accused of 1,200,000 lire from Sforza half of which accused retained and the other half paid to Weinckheim. He stated that these payments were realized upon a contract which other evidence showed had been approved by accused (Charge II, Specification 8). He also admitted the receipt of 115,000 lire from Sonnlichler which the latter had received from one Zumin in connection with a contract which other evidence showed had been approved by accused (Charge II, Specification 9). As to these offenses (Charge I, Specification, Charge II, Specifications 3, 4, 8 and 9) there was no evidence independent of accused's confession, direct or circumstantial, which established the probability of their commission, and for that reason the findings of guilty pertaining thereto are not supported by the record of trial.

Accused admitted and the evidence otherwise showed that in June 1947 he came into the possession of some 1300 pounds in British currency which he exchanged with one John R. Squire for a check in the amount of \$4,000 drawn upon an American Bank (Charge II, Specification 10). Accused's holding of the British currency was in violation of memoranda promulgated by Allied Force Headquarters, and the finding of guilty of this Specification was supported by the evidence.

4. Accused is 32 years of age and married. He was graduated from high school in 1932 and in civilian life was employed as an automotive

(246)

worker and ship fitter. He had enlisted service from 22 May 1942 to 12 February 1943 when he was commissioned a Second Lieutenant. He was subsequently promoted to First Lieutenant and Captain. He had foreign service in the Mediterranean Theatre from April 1946. The adjectival equivalent of his overall efficiency rating is "Excellent."

5. I recommend that the findings of guilty of Charge I and its Specification, and of Specifications 3, 4, 8 and 9 of Charge II be disapproved, that the sentence be confirmed, but in view of the circumstance that the only finding of guilty which is supported by the record of trial involves a violation of a standing order, I further recommend that the confinement be remitted.

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



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls  
1 Record of trial  
2 Form of action

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( GCMO 139, 14 July 1948 ).

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

JAGK - CM 328876

7 JUN 1948

UNITED STATES )

MARIANAS BONINS COMMAND

v. )

Trial by G.C.M., convened at Saipan,  
Marianas Islands, 12 and 14 January  
1948. Dismissal, total forfeitures,  
and confinement for seven (7) years.  
Penitentiary

Captain JOHN T. MULLARKEY )  
(O-400135), Quartermaster )  
Corps, Marbo Sector, American )  
Graves Registration Service, )  
APO 244 )

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

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

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

Specification 1: In that Captain John T. Mullarkey, Quartermaster Corps, Marbo Sector, American Graves Registration Service, APO 244, was, at APO 244, Saipan, Marianas Islands, on or about 18 December 1947, drunk and disorderly in camp.

Specification 2: In that Captain John T. Mullarkey, \*\*\*, did, at APO 244, Saipan, Marianas Islands, on or about 18 December 1947, through carelessness, discharge a firearm in his quarters.

Specification 3: In that Captain John T. Mullarkey, \*\*\*, did, at APO 244, Saipan, Marianas Islands, on or about 18 December 1947, wrongfully strike Pedro R. Dela Cruz in the face with his hand.

Specification 4: In that Captain John T. Mullarkey, \*\*\*, did, at APO 244, Saipan, Marianas Islands, on or about 18 December 1947, wrongfully and unlawfully kidnap Pedro R. Dela Cruz, a native of Saipan, by forcibly and without authority of law seizing, imprisoning, detaining, and carrying away the same Pedro R. Dela Cruz, against his will.

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

Specification 1: In that Captain John T. Mullarkey, \*\*\*, did, at APO 244, Saipan, Marianas Islands, on or about 18 December 1947, with intent to do him bodily harm, commit an assault upon Pedro R. Dela Cruz, by shooting at him with a dangerous weapon, to wit, a revolver.

Specification 2: In that Captain John T. Mullarkey, \*\*\*, did, at APO 244, Saipan, Marianas Islands, on or about 18 December 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Pedro R. Dela Cruz.

Specifications 3 through 6: (Findings of not guilty).

He pleaded guilty to Specification 2 of Charge I and not guilty to all other charges and specifications. He was found guilty of Charge I and its specifications and of Charge II and Specification 2 thereunder. He was found not guilty of Specification 1 of Charge II "but guilty of a lesser included offense under the 96th Article of War by omitting the words, 'with intent to do him bodily harm' and the words 'by shooting at him,'" and not guilty of Specifications 3 through 6 of Charge II. 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 twenty years. The reviewing authority approved the sentence but reduced the period of confinement imposed thereby to seven years, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

### 3. Evidence

On the evening of 17 December 1947, accused was present in the Marine Officers Club located on the Island of Saipan. With him was Mr. Arch. Booth Outlan, a civilian assistant embalmer working with the American Graves Registration Service. Both men drank a considerable amount of intoxicating liquor at the Club and left in a jeep driven by accused between 10:00 and 10:30 p.m. About 12:00 that night they called at the quarters occupied by Sergeant William H. Proctor where accused asked the Sergeant to "pour a couple of drinks." At this time, Mr. Outlan was "absolutely drunk," reeled over the bar in the kitchen and was only half awake. Accused was "under the influence of drink" but was not as drunk as Mr. Outlan. Accused brandished a .38 caliber revolver in a somewhat careless manner, and was admonished by the Sergeant not to "throw that thing around unless you want to use it." When, about 2:00 a.m., accused and Mr. Outlan took leave of the Sergeant, Mr. Outlan had to be "more or less dragged" out and "put" in the jeep. Accused returned about five minutes later to recover the revolver he had left behind and departed immediately thereafter (R 8,17,42,54,55,65-67).

En route to accused's quarters, the two men overtook a truck going in the same direction. Accused told Mr. Outlan that he was going to stop the truck for speeding. Accused did stop the truck, which was traveling up hill at a speed of about 15 miles an hour. In the truck were a number of natives employed as guards by the Army garrison force of the island. The guards were dressed in khaki uniforms and wore a white helmet marked "AGF Guard." Accused asked the occupants of the truck where they were going and whether they were Filipinos or Chamorros. Receiving a reply from the driver of the truck that he was a Chamorro and that the guards were proceeding to their place of duty, accused told them to drive on. After they got under way, accused stopped the truck a second time and, at the point of his revolver, lined up the occupants outside the vehicle. He asked each man his name and age and then allowed them to again proceed. Shortly after the truck started on its journey accused ordered it to stop for a third time, firing three shots from his revolver apparently to give force to his order. At this time, the truck was "right on top of the hill in front of the Marine Barracks." The guards were again lined up. Accused asked them whether they liked Americans or Japanese better and was informed by the driver of the truck that he liked Americans better than Japanese. Accused then once more asked each man his name and age and "pulled out the 19 year old one and the 20 year old one," making them stand close together. The 19 year old guard was Pedro R. Dela Cruz and the 20 year old guard was Victorino Guerreo, the driver of the truck. Accused held Pedro by the shirt front and fired two or three shots between the two guards. He said to Pedro, "Do you want to die now?" Pedro was then placed in the jeep by accused, who held his revolver pointed at Pedro's side, and the jeep proceeded towards accused's quarters. Pedro did not get in the jeep "willingly." One of the guards heard accused say that he was taking Pedro to "the Navy brig." Mr. Outlan at one time got out of the jeep to tell accused "to leave the natives alone." It was Mr. Outlan's "impression" that accused was taking Pedro away to question him about the "murder" of one Captain Whitmarsh which had occurred on the Island of Saipan sometime previously (R 7,8,11,14,16,19-22, 24-28, 30-32).

On the way back to his quarters accused stopped the jeep, blindfolded Pedro with a handkerchief, "pointed" the revolver at him, and told him he was going to kill him "now." Pedro took the blindfold off, said that he was "sorry" and asked accused not to kill him. Accused then drove on. Arriving at accused's quarters, which were located in the 53rd Station Hospital area, accused, Mr. Outlan and Pedro went inside, accused leading Pedro by the arm. The lights in the quarters were turned on and accused asked Pedro for his billfold. When it was handed over to accused, he looked through it and laid it on the table. Accused then ordered Pedro to undress and when Pedro refused accused slapped him three or four times with his open hand. Pedro started to undress and accused and Mr. Outlan went out to the porch for a can of beer. After accused and Mr. Outlan finished their beer they went back inside. At this time Pedro had taken off his outer clothing but still had on his shorts and undershirt. Accused

pointed his revolver at Pedro and ordered him to completely undress, and since Pedro was afraid he obeyed accused. Accused then fired his revolver "up at the ceiling," reloaded the weapon and asked Pedro if he knew "what is this for." Receiving a negative answer, accused made Pedro sit on a bench, blindfolded him with a towel and told him he was going to kill him. Pedro felt the revolver pointing at his side and told accused he was "sorry" and took off his blindfold. Accused then fired another shot and Pedro saw that accused's left thumb was bleeding. According to his testimony, Mr. Outlan had gone to the latrine before accused fired his weapon and had returned to accused's room just as "the shot" was fired. He saw accused with the revolver in his right hand. Accused's left thumb was injured. According to Pedro's testimony, Mr. Outlan was in the room when both shots were fired. According to the testimony of both Mr. Outlan and Pedro, after accused was wounded, Mr. Outlan took the revolver away from accused and Mr. Outlan and accused left the room (R 8,11,16,19,33-34,47).

As Mr. Outlan left he asked accused to let him take Pedro with him, but accused refused. Accused was "pretty drunk" at this time. Mr. Outlan started for his quarters in the jeep and after proceeding a short distance returned to get accused's trip ticket. When he returned he noticed the lights in accused's quarters were off. They had been on when he left. He called to accused to bring him the trip ticket and accused "came out" and gave it to him. At this time accused said the native was going to "blow" him and asked Mr. Outlan if he wanted a "blow job." Mr. Outlan said he did not and departed in the jeep. The lights on the jeep were not working and somewhere along the road Mr. Outlan failed to make a turn, went off into the ditch and injured himself. He made his way to an Army installation where he sought help to get the vehicle back on the road. The jeep could not be found that night because "the bank was so steep." The jeep was recovered the next day. In it was found Pedro's AGF helmet (R 8,10,14,41,42,46).

After Mr. Outlan had left, accused turned off the light and told Pedro to lie on the bed. When Pedro refused, accused "pushed" him over to the bed where he laid on his stomach. Accused, who was completely nude at this time got on top of Pedro. Accused then made Pedro turn over on his back. He put his penis between Pedro's legs and asked Pedro to "play on" it. After Pedro had complied with this request, accused got up and the lights were turned on. Pedro "saw that it was all over" and tried to take his clothes and leave but accused refused to permit him to go. Accused made Pedro sit down and told him to open his mouth. When Pedro refused, accused slapped him and Pedro then obeyed accused. Accused put his penis into Pedro's mouth. Pedro choked and tried to "throw it out" and was again slapped by accused. Accused put his penis in Pedro's mouth three times, there being about a two minute interval between each time. "After awhile," accused pulled his penis out of Pedro's mouth and ordered Pedro to get back on the bed. Pedro did so and accused turned off the lights. Accused "came down pretty soon and we lay together and hold my hands and told me

to play on his penis again." Finally accused went to sleep and Pedro took his clothes and left the house (R 34,35,40).

Shortly after 5:00 a.m. on 18 December 1947, the Officer of the Day of the Army Garrison Force received a complaint that some of the native guards had been molested. Investigating this complaint, the Office of the Day rode to accused's quarters with Pedro. After being admitted by accused, the officer noticed that there was blood on accused's bed sheet and that accused's "finger" was bleeding. Accused said he did not "remember" Pedro. On this day also the Provost Marshal of the Army Garrison Force examined accused's room. He found five empty .38 caliber cartridge cases on a table. He noticed that there were blood stains on "both sides" of accused's bed and on the floor but there was no evidence of a "struggle." There was a hole in one of the ceiling panels. There was no evidence of more than one bullet having been fired. An agent of the Criminal Investigation Division examined accused's bed clothes for spermatozoa stains but found none (R 44,47,48,59).

Mr. Outlan was a man "of a very nervous temperament and he got his escape by going after beer and alcohol." On several occasions during "the last two months" he had been "very drunk." He was an "habitual drinker." His pre-trial statement had been "incomplete" and he so informed the Trial Judge Advocate. The Trial Judge Advocate had promised Mr. Outlan immunity for telling "all the facts" (R 15,16,58,60).

Pedro had lived in Japan during the war and had attended school for two years in that country. He sees "not so clearly \*\*\* like something faded." At the trial, when asked if he could identify Mr. Outlan, he replied that he had never seen him before (R 30,38,39).

Accused, having been advised of his rights as a witness, elected to testify under oath in his own behalf. He stated that

"On the 17th, sir, about ten minutes before 6:00, I arrived at the Marine Officers' Club. It has been my habit to have dinner there. I go the Marine Club every evening for dinner at 1800. I arrived there about 1750. Mr. Outlan was there and CWO Mills, USMC. We had a few drinks then Mr., Warrant Officer, Escross and Mrs. Escross came in. We all sat down and had dinner around 1800. After dinner Mr. Outlan and myself and CWO Mills went to the bar. We had started drinking. I remember mentioning that we should go down to see Mr. Maloney of AGRS because he had been up around Boston and CWO Mills was from Boston. Mr. Mills, Mr. Outlan and myself were going to see Mr. Maloney. I remember being at Sergeant' Proctor's House. I remember being there because Mrs. Proctor was there and spoke to me. I remember being alongside of a truck. I remember that I was in my quarters and that I hurt my finger. I remember starting to undress and I remember lying down on

the bed. That's all I remember, sir." (R 62)

Accused did "a lot of drinking." He had been "out" with Mr. Outlan for the first time on the night of 17 December 1947 but had met him on several prior occasions at the Marine Officers Club. The .38 caliber revolver had been given to him by an officer. He had taken the revolver with him on the night of 17 December but had "no specific reason" for doing so. He did not remember using it that night and was "not sure" of how he had come to hurt his thumb. On other occasions, he had failed to remember "some of the things" which had happened while he was drinking (R 61-65).

A Marine Corps captain, stationed on Saipan, testified that he had known accused for about seven months. He had considered accused to be a gentleman "in all his actions and conversation." Accused was a member of the Marine Officers Club on Saipan and the Marine captain had noticed that accused was "always able to walk and his actions never showed that he was anything but under good control" (R 50-51). A Marine Corps lieutenant testified that on 17 and 18 December 1947 he was Officer of the Day at the Marine Barracks. The Barracks was located about 75 yards from the main road. There were no reports of any disturbance during his tour of duty and he thought it likely that if anything unusual had happened on the highway near the Barracks about 2:00 a.m. on 18 December some "recognition" thereof would have been taken by the Marine Corps. He had no personal knowledge that "anybody was watching that particular stretch of road at that particular time." The Marine guards were "up at the guard house" (R 52-53).

The military record of accused as it appeared on Forms 66-1 and 66 was received in evidence. Also introduced in evidence were several letters of commendation which accused had received throughout his military career (R 66). It appears from accused's Form 66 that his service from September 1940 to September 1947 was, on the average, superior.

#### 4. Discussion

##### Specifications 1, 2 and 3 of Charge I

Under Specification 1 of Charge I, accused was found guilty of having been drunk and disorderly in camp. The evidence shows that accused was drunk and disorderly on the road near the Marine Barracks, where he stopped the truck carrying the native guards, and in his quarters located in the 53rd Station Hospital area. It does not appear that the road in front of the Marine Barracks was situated within the confines of a military encampment, unless it can be considered that the whole of the Island of Saipan was an encampment. Accused's quarters, however, being within the 53rd Station Hospital Area, were certainly "in camp" as that phrase is used in military parlance. The evidence, then, is legally sufficient to sustain the finding of guilty of this specification.

Accused pleaded guilty to Specification 2 of Charge I in which it was alleged that he discharged a firearm in his quarters through carelessness. The evidence presented at the trial established that he had in fact committed this offense and the court's finding of guilty was warranted by the proof as well as by accused's plea.

Accused was convicted under Specification 3 of Charge I of having wrongfully struck Pedro Dela Cruz in the face with his hand. The evidence shows that accused "slapped" Pedro several times on the night of 17-18 December 1947 but whether these blows with the open hand were struck upon Pedro's face or upon some other part of his body was left to conjecture. However, the words "in the face" contained in this specification serve only to more particularly describe the battery alleged, do not set forth an element of that offense and do not, by way of limitation, prevent a finding of guilty of a battery upon some other part of the alleged victim's body or upon his person generally (CM 246044, Copeland, 2 BR (ETO) 291, 295; CM 193292, Olles, 2 BR 79,81). The proof adduced with respect to this specification, then, supports a finding that accused wrongfully struck Pedro Dela Cruz with his hand.

#### Specification 4, Charge I

Under this specification accused was found guilty of having unlawfully kidnapped Pedro Dela Cruz by forcibly and unlawfully seizing, imprisoning, detaining and carrying him away against his will. The word "kidnap" is a common law word of art and is the name of an offense which may be defined as the forcible carrying away of a person from his own country to another. It is an aggravated form of the offense of false imprisonment, which lesser offense is defined as the unlawful restraint of another's freedom of locomotion (4 Bl. Com. 219; CM 275337, Francis, 2 BR (CBI-IBT) 1,12; CM 265225, Conrad, 4 BR (NATO-MTO) 99,104; CM 212505, Tipton, 10 BR 237,245; Wharton's Criminal Law, 12th Ed, §. 773). It is obvious, therefore, that the proof in this case fails to support an allegation that accused kidnapped Pedro, for the element of asportation from the victim's country to another is lacking. (And see s. 22-2101, D.C. Code; 18 USC 408a.) However, the evidence does show, beyond any reasonable doubt, that accused committed the lesser and included offense of falsely imprisoning Pedro by, in the terms of the specification, forcibly and unlawfully seizing, imprisoning, detaining and carrying him away against his will (CM Tipton, supra).

#### Specification 1, Charge II

Accused was found guilty, under this specification, of having committed an assault upon Pedro Dela Cruz with a dangerous weapon, to-wit, a revolver, in violation of Article of War 96. The evidence in the record of trial reveals that several times on the night of 17-18 December 1947 accused pointed a loaded .38 caliber revolver at Pedro, accompanying each act with menacing words and gestures, whereby Pedro was put in reasonable fear of immediate bodily harm. Any and each of these acts constitute the offense of assault

(254)

with a dangerous weapon (CM 320750, Price, 70 BR 175).

Specification 2, Charge II

Under this specification, accused was convicted of having committed the crime of sodomy in violation of Article of War 93 in that feloniously and against the order of nature he had carnal connection per os with Pedro Dela Cruz. According to the testimony of Pedro Dela Cruz, accused inserted his penis into Pedro's mouth. Pedro's testimony in this respect is corroborated by that of Mr. Outlan to the effect that accused had told him that the native was going to "blow" accused. True, Mr. Outlan was very drunk on the night of 17-18 December, <sup>and</sup> had obtained a promise of immunity for telling "all the facts," but these circumstances, of course, go only to the weight to be given to his testimony and do not destroy his competency as a witness (CM 275547, Garrett, 48 BR 77, 106). After weighing the evidence upon a careful examination of the record of trial, we find no reason to disturb the court's finding, implicit in its verdict of guilty of this specification, that accused had carnal copulation per os with Pedro Dela Cruz.

Civilian defense counsel for accused, in his brief, contends that carnal copulation per os (fellatio in medical jurisprudence) is not sodomy and that even if it were no such copulation was shown in the record of trial due to the lack of evidence of emission of seed. We shall consider firstly counsel's contention that sodomy cannot be committed per os.

Congress, in the 93rd Article of War, denounced "sodomy" as a crime without defining that term in the Article and no definition of the crime of sodomy can be found in the reported decisions of the civil Federal courts or in other acts of Congress. Sodomy was probably first made punishable in the common law courts by a statute passed in the reign of Henry VIII. This statute made "the detestable and abominable vice of buggery committed with mankind or beast" a felony (25 Hen 8, c. 6). It was to remain in effect for a limited time only but was made perpetual in the reign of Queen Elizabeth (5 El c. 17). Neither the Statute of Henry VIII nor that of Elizabeth set forth what acts constituted the "vice of buggery" although it was well understood that unnatural sexual intercourse was decried thereby. Such unnatural acts were called sodomy when performed with a human being and bestiality when performed with an animal (9 Halsbury's Laws of England (2d Ed) p. 397). In the case of Rex v. Jacobs (Russ & Ry 331, 168 Eng Rep 830), decided in 1817, it was held that sexual copulation per os was not sodomy, leaving the impression that sodomy could be committed only in ano. No reasons for this decision appear in the report of the case. There seems to have been no earlier or later reported English case on this particular question. The Offenses against the Person Act of 1861 (24 & 25 Vict c. 100, s. 61), which again denounced the offense of buggery, threw no new or additional light on the subject here under

discussion. The case of Rex v. Jacobs, although apparently neither followed, distinguished nor overruled in England, has had considerable influence on American law. Some courts and text writers have followed it, or cited it with approval, as a matter of stare decisis, giving reasons of their own for doing so. These authorities generally rely upon Biblical passages having to do with the unnatural practices of the men of Sodom and the Biblical injunction against ~~lying~~ <sup>lying</sup> with mankind "as he lieth with a woman" (Genesis 19, 4-8; Leviticus 20,13). Other courts and authorities regard the lone case of Rex v. Jacobs as very slim authority indeed for the proposition that sexual connection per os is not sodomy, refuse to follow that case, and hold to the view that sexual copulation at either end of the alimentary canal is sodomy, both being equally unnatural, detestable and abominable (Glover v. State, 179 Ind 459, 101 N. E. 629; State v. Cyr, 135 Me 513, 198 A 743; Garrad v. State, 194 Wis 391, 216 N W 496; Wise v. Commonwealth, 135 Va 757, 115 S E 508. See collection of authorities in 45 LRA (NS) 473; 58 CJ, p. 789, 8 RCL p 334; CM 278548, O'Neal, 51 BR 385 and 1st Ind at p. 396). We are disposed to follow the rationale of the latter line of authority. In this connection it may be noticed that unnatural sex connection was first denounced in Anglo-Saxon law as "buggery," the word "sodomy" not being used. Apparently, the word "sodomy" was first used in English law simply as a convenient term to distinguish the act of buggery with a human being from buggery with an animal, although later, for some reason lost in the fog of history, "sodomy" came to be employed, particularly in the United States, as a generic term describing unnatural sex coition with both man and beast (Wharton's Criminal Law, 12th Ed., s. 754). Under these circumstances, the propriety of applying the Biblical references concerning the inhabitants of Sodom by way of definition of the Anglo-Saxon statutory crime of buggery, or of the American common law (or statutory) crime of sodomy which clearly derives from the buggery statute of Henry VIII, seems extremely doubtful.

We need not rest our decision on this point upon our concept of the common law only. The 1917 Manual for Courts-Martial, in defining the crime of sodomy, stated that:

"Penetration of the mouth of the person does not constitute this offense" (MCM 1917, p 271).

This definition is found under the general discussion of assault with intent to commit any felony, the substantive offense of sodomy not being specifically denounced in the Articles of War in effect in 1917 although it was listed in the 1917 Manual as a "crime or offense not capital" in violation of the general article (MCM 1917, p 285). In the 1921 Manual, however, the following language appears in the definition of the crime of sodomy, which crime was made an offense in violation of Article of War 93 in the 1920 revision of the Articles of War,

"Penetration of the mouth of the person also constitutes this offense" (MCM 1921, p 439).

Thus, the two conflicting views as to whether carnal connection per os constitutes the crime of sodomy were brought into sharp and bold relief. It is inconceivable that the abrupt change in the proof required to make out a case of sodomy, as portrayed in the 1917 and 1921 Manuals, should not have come to the attention of Congress (see AW 38). That Congress has acquiesced in the definition of sodomy given in the 1921 Manual seems certain, for in the 1928 Manual for Courts-Martial it is stated -

"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" (par 149k, MCM 1928. Underscoring supplied.)

We shall next consider the contention that failure of proof of emission is fatal to a conviction of sodomy, or, otherwise stated, that there is no copulation, in the eyes of the law, without emission. At the early common law there was much confusion on this question, there being some decisions to the effect that proof of emission was necessary in prosecution for both rape and sodomy and other decisions to the effect that it was not (1 East, PC 437; Rex v. Russell (1831), 2 M&R 122, 174 Eng Rep 42; Rex v. Reekspear (1832), 1 Mood CC 342, 168 Eng Rep 1296; Rex v. Cozins (1834), 6 C&P 351, 172 Eng Rep 1272). In 1828, Parliament resolved, or attempted to resolve, all doubt upon this issue by legislation making it unnecessary in prosecutions for buggery, rape and statutory rape to prove

"the actual Emission of Seed in order to constitute a carnal Knowledge, but that the carnal Knowledge shall be deemed complete upon Proof of Penetration only" (9 Geo 4, c. 31, s. 18).

Needless to say, the above Act of George IV came too late to have any direct effect upon the common law of this country or its political subdivisions and if the only effect of that Act were to make criminal that which was not criminal before, it would be of mere academic interest here. Such is not the case, however, for as can be seen from the reporter's commentary upon the case of Rex v. Russell, supra, there is sound reason for regarding the statute as a legislative declaration of the former law on the subject. The confusion existing in English law prior to the passage of the Statute of George IV is reflected in the jurisprudence of this country, some authorities holding that emission must be proved in both rape and sodomy cases and other authorities, construing the Act of George IV as declaratory of the former law, holding that it need not be proved (State v. McGruder, 125 Iowa 741, 101 NW 646, 647; Comstock v. State, 14 Neb 205, 15 NW 355, 356; State v. Peterson, 81 Utah 340, 17 P (2d) 925, 927; 8 RCL, p 335; 22 RCL, p 1178; 58 CJ, p 790; 52 CJ, p 1016; Wharton's Criminal Law, 12th Ed., s. 759, 699). We are inclined to the belief that the latter position is sounder, for the unnatural, or otherwise odious, sexual penetration of an orifice of the body is fully as detestable and as damaging to the public morals where the act stops short of the occurrence

of an orgasm as it is where the erotic desires are thoroughly satisfied. The law should not be so solicitous of the welfare of the criminal as to make an issue of whether or not he has satisfied his sexual appetite, for the outrage to the public weal is obviously complete upon the merest penetration.

Moreover, as far as military law is concerned, both the 1921 and 1928 Manuals for Courts-Martial, in discussing the crime of sodomy, state that: "Penetration alone is sufficient." (MCM, 1921, p 439; par 149k, MCM 1928. So also in rape cases, MCM 1921, p 412; par 148b, MCM 1928.) Again we must hold, for the reasons stated in our discussion of the first contention posed by defense counsel, that the instructions in the Manual as to what is required by way of proof of the crime of sodomy may be considered a Congressional definition of that crime.

We conclude, therefore, that the crime of sodomy is not limited to unnatural coition in ano but comprehends other acts of copulation contrary to nature, such as those per os, and that emission is not an element of proof of that crime, a showing of penetration alone being sufficient. Sodomy being an offense which does not require proof of a specific intent, voluntary intoxication of an accused party to the act may not be considered a defense thereto unless, of course, the intoxication is of such a degree that accused was physically disabled from performing, or participating in, the alleged criminal act (CM 237825, Gage, 1 BR (ETO) 299,307). The court was not convinced that accused's intoxication was disabling, from a sexual standpoint, at the time he was shown to have had sexual intercourse per os with Pedro Dela Cruz and we find no reason to disagree with the court in this respect. Consequently, we are of the opinion that the findings of the court that a accused was guilty of having committed sodomy per os with Pedro Dela Cruz, in violation of Article of War 93, are supported by the evidence.

5. Records of the Department of the Army show that accused is 34 years of age, is married and has one child. He is a high school graduate and attended the Newark, New Jersey, Vocational School for four years, studying Industrial Chemistry. In civilian life he was a salesman for the Hub Vacuum Stores, Newark, New Jersey. He served in the New Jersey National Guard from 18 November 1932 to 17 November 1938 and from 13 October 1939 to 2 August 1940 as an enlisted man. On the latter date he was appointed a second lieutenant of Infantry in the New Jersey National Guard. He was commissioned a second lieutenant of Infantry in the National Guard of the United States on 16 September 1940 and was ordered to active duty on that date. On 1 February 1942 he was promoted to the grade of first lieutenant, in the Army of the United States, and on 20 November 1943 he was promoted to the temporary grade of captain. He served in the American Theater as an Infantry platoon leader, company commander, and special service officer and in the Mediterranean Theater, from 25 January 1945 to 16 August 1945, as an Infantry unit training

officer and commander in a replacement depot. Returning to the United States, he entered upon terminal leave on 23 October 1945 to revert to inactive status on 13 February 1946. Before his terminal leave expired, he again entered upon active duty at his own request. On 29 November 1946, he was detailed in the Quartermaster Corps and by War Department Orders, dated 9 December 1946, he was assigned to the Pacific Theater.

6. William A. Lord, Jr., Esquire, and Thomas A. O'Callaghan, Esquire, appeared before the Board of Review and made oral argument and filed a brief on behalf of accused. Careful consideration has been given to both argument and brief, including the exhibits attached to the brief consisting of affidavits of accused and others relating to the conduct of the pre-trial investigation and the trial and to the credibility of certain witnesses against accused. Accompanying the brief are letters and affidavits from twenty-six persons who knew accused in military and civilian life testifying to his excellent character as an officer, gentleman, husband and father. The Board of Review is also in receipt of a letter from civilian defense counsel inclosing a letter from accused's wife to the President and photographs of accused, his wife and child.

7. The court was legally constituted and had jurisdiction over accused and of the offenses. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge I and Specifications 1 and 2 thereunder, legally sufficient to support only so much of the finding of guilty of Specification 3, Charge I, as involves a finding that accused wrongfully struck Pedro R. Dela Cruz with his hand at the time and place alleged, legally sufficient to support only so much of the finding of guilty of Specification 4 of Charge I as involves a finding that accused wrongfully, unlawfully and falsely imprisoned Pedro R. Dela Cruz at the time and place and in the manner alleged, legally sufficient to support the findings of guilty under Specification 1, Charge II, legally sufficient to support the findings of guilty of Charge II and Specification 2 thereunder and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of an officer of a violation of Article of War 93 or 96 and penitentiary confinement is authorized under Article of War 42, where the period of confinement adjudged is more than one year, upon a conviction of false imprisonment (D.C. Code, s. 22-107), assault with a dangerous weapon (D.C. Code, s. 22-502) or sodomy per os (D.C. Code, s. 22-107; par 90a, MCM 1928).

Arthur W. Ailbert Judge Advocate

Robert E. Alford Judge Advocate

Harley A. Lanning Judge Advocate

JAGK - CM 328876

1st Ind

JUN 16 1945

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John T. Mullarkey (O-400135), Quartermaster Corps, Warbo Sector, American Graves Registration Service, APO 244.

2. Upon trial by general court-martial this officer was found guilty of having been drunk and disorderly in camp (Spec 1, Chg I), of having, through carelessness, discharged a firearm in his quarters (Spec 2, Chg I), of having wrongfully struck Pedro R. Dela Cruz in the face with his hand (Spec 3, Chg I), of having wrongfully and unlawfully kidnapped Pedro R. Dela Cruz by forcibly and without authority of law seizing, imprisoning, detaining and carrying him away against his will (Spec 4, Chg I) and of having assaulted Pedro R. Dela Cruz with a dangerous weapon, to-wit, a revolver (Spec 1, Chg II), all in violation of the 96th Article of War. He was also found guilty of having committed the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Pedro R. Dela Cruz, in violation of Article of War 93 (Chg II and Spec 2 thereunder). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for twenty years. The reviewing authority approved the sentence but reduced the period of confinement to seven years, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specifications 1 and 2 thereunder, legally sufficient to support only so much of the finding of guilty of Specification 3, Charge I, as involves a finding that accused wrongfully struck Pedro R. Dela Cruz with his hand at the time and place alleged, legally sufficient to support only so much of the finding of guilty of Specification 4 of Charge I as involves a finding that accused wrongfully, unlawfully and falsely imprisoned Pedro R. Dela Cruz at the time and place and in the manner alleged, legally sufficient to support the findings of guilty under Specification 1, Charge II, legally sufficient to support the findings of guilty of Charge II and Specification 2 thereunder and legally sufficient to support the sentence as approved by the reviewing authority and

to warrant confirmation thereof.

On the evening of 17 December 1947, accused and a civilian embalmer named Orch Booth Outlan were present in the Marine Officers Club located on the Island of Saipan. They imbibed a considerable amount of intoxicating liquor at the Club and about 10:30 p.m. left in a jeep driven by accused. They then went to the quarters of a Sergeant Proctor, where accused brandished a .38 caliber revolver in a somewhat careless manner. Outlan was "absolutely drunk" and accused was "under the influence of drink" but was not as drunk as Outlan. Accused and Outlan left the sergeant's quarters about 2:00 a.m., on 18 December, and proceeded towards accused's quarters in the jeep. On the way, they came upon a truck carrying native guards to their places of duty. Accused stopped the truck and questioned the occupants as to their business. Receiving a satisfactory reply, he told them to proceed but almost immediately stopped them again. This time, at the point of his revolver, he lined up the guards outside their vehicle and asked each his name and age. He then allowed them to go on their way once more. Shortly thereafter, he ordered the truck to come to a halt for a third time, firing three shots from his revolver to give force to his order. When the truck stopped, he again lined up the guards. Accused pulled out of the line a 19 year old guard named Pedro R. Dela Cruz and a 20 year old guard Victorino Guerreo. He held Pedro by the shirt front and fired two or three shots between the two guards, saying to Pedro, "Do you want to die now." Pedro was then placed in the jeep by accused, who held his revolver pointed at Pedro's side, and the jeep proceeded towards accused's quarters. Outlan was under the impression that accused had taken Pedro for the purpose of questioning him about the murder of one Captain Witmarsh which had occurred on the Island of Saipan sometime previously. On the way, accused blindfolded Pedro and told him, pointing the revolver at him, that he was going to kill him "now." Pedro took the blindfold off, said he was "sorry" and asked accused not to kill him. Accused then drove on.

Arriving at accused's quarters, which were located in the 53rd Station Hospital area, accused, Outlan and Pedro went inside, accused leading Pedro by the arm. When the lights in the quarters were turned on, accused asked Pedro for his billfold. It was handed over to accused who looked through it and then laid it on the table. Accused then ordered Pedro to undress and when Pedro refused accused slapped him three or four times with his open hand. Pedro began to undress and accused and Outlan went outside on the porch for a can of beer. When they returned, Pedro had taken off only his outer clothing and accused pointed his revolver at him and ordered him to completely undress. Pedro, being afraid, obeyed accused. Accused fired his revolver at the ceiling, reloaded the weapon and asked Pedro if he knew "what this is for." Accused again told Pedro he was going to kill him, whereupon Pedro again said he was "sorry." Accused fired another shot, wounding his thumb in the process. Outlan was apparently in the latrine when the revolver was fired and upon returning he took the revolver away from accused. Outlan and accused then went outside where Outlan asked

accused to let him take Pedro with him. Accused, who was "pretty drunk" at the time, refused. Outlan left accused and started for his quarters in the jeep but after travelling a short distance he decided to return for accused's trip ticket. The lights in accused's quarters were off when he arrived and he called for accused to come out and to bring the trip ticket with him. This accused did. At this time, accused told Outlan that Pedro was going to "blow" him and asked if Outlan wanted a "blow job." Outlan refused and departed in the jeep.

After Outlan had left, accused told Pedro to lie on the bed. When Pedro refused, accused pushed him on to the bed and got on top of him. Accused was completely nude at the time. Thereafter accused performed several acts of unnatural sexual copulation with Pedro by inserting his penis in Pedro's mouth. He slapped Pedro on several occasions when Pedro refused to submit to his lascivious advances.

Accused chose to testify under oath in his own behalf at the trial. He stated that he had been drinking with Outlan at the Marine Officers' Club on the evening of 17 December. He remembered going to Sergeant Proctor's quarters, being alongside a truck, hurting his "finger" in his quarters, starting to undress and lying down on his bed. That was "all" he remembered. On other occasions, he had failed to remember "some of the things" which had happened while he was drinking.

4. As pointed out by the Board of Review in its opinion, the evidence fails to show that accused wrongfully struck Pedro in the face with his hand as alleged in Specification 3, Charge I, but does sufficiently show that he committed the offense of wrongfully striking Pedro with his hand, which offense is included in the specification in question. Also, although the record of trial contains no proof that accused kidnapped Pedro as alleged in Specification 4, Charge I, an essential element of kidnapping being asportation of the victim from his own country (or state) to another, there is ample evidence that accused falsely imprisoned Pedro. The offense of false imprisonment is lesser than and necessarily included in the offense of kidnapping here alleged.

5. Accused is 34 years old, married and has one child. He is a high school graduate and attended the Newark, New Jersey, Vocational School for four years, studying Industrial Chemistry. In civilian life he was a salesman for the Hub Vacuum Stores, Newark, New Jersey. He served in the New Jersey National Guard from 18 November 1932 to 17 November 1938 and from 13 October 1939 to 2 August 1940 as an enlisted man. On the latter date he was appointed a second lieutenant of Infantry in the New Jersey National Guard. He was commissioned a second lieutenant of Infantry in the National Guard of the United States on 16 September 1940 and was ordered to active duty on that date. On 1 February 1942 he was promoted to the grade of first lieutenant, in the Army of the United States, and on 20 November 1943 he was promoted to the temporary

grade of captain. He served in the American Theater as an Infantry platoon leader, company commander and special service officer and in the Mediterranean Theater, from 25 January 1945 to 16 August 1945, as an Infantry unit training officer and commander in a replacement depot. Returning to the United States, he entered upon terminal leave on 23 October 1945 to revert to inactive status on 13 February 1946. Before his terminal leave expired, he again entered upon active duty at his own request. On 29 November 1946, he was detailed in the Quartermaster Corps and by War Department Orders, dated 9 December 1946, he was assigned to the Pacific Theater. The military record of accused as it appeared on Forms 66-1 and 66 was received in evidence at the trial. Also introduced in evidence were several letters of commendation which accused had received throughout his military career. It appears from accused's Form 66 that his service from September 1940 to September 1947 was, on the average, superior.

6. William A. Lord, Jr., Esquire, and Thomas A. O'Callaghan, Esquire, appeared before the Board of Review and made oral argument and filed a brief on behalf of accused. Careful consideration has been given to both argument and brief, including the exhibits attached to the brief consisting of affidavits of accused and others relating to the conduct of the pre-trial investigation and the trial and to the credibility of certain witnesses against accused. Accompanying the brief are letters and affidavits from twenty-six persons who knew accused in military and civilian life testifying to his excellent character as an officer, gentleman, husband and father. The Board of Review is also in receipt of a letter from civilian defense counsel inclosing a letter from accused's wife to the President.

7. I recommend that only so much of the finding of guilty of Specification 3, Charge I, as involves a finding that accused wrongfully struck Pedro R. Dela Cruz with his hand at the time and place alleged and only so much of the finding of guilty of Specification 4, Charge I, as involves a finding that accused wrongfully, unlawfully and falsely imprisoned Pedro R. Dela Cruz at the time, place and in the manner alleged be approved. I also recommend that the sentence as approved by the reviewing authority be confirmed, but, in view of the long and excellent service of accused prior to the commission of these offenses, that the period of confinement be reduced to five (5) years and that the sentence as thus modified be carried into execution. I further recommend that a U. S. penitentiary be designated as the place of confinement.

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



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

( GCMO 122, 23 June 1948 ).

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

JAGK - CM 328877

5 APR 1948

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

1ST AIR DIVISION

v. )

Trial by G.C.M., convened at Head-  
 quarters 1st Air Division, APO 239,  
 5 and 6 January 1948. Dishonorable  
 discharge and confinement for life.  
 Penitentiary.

Private CHARLES O. DIXON )  
 (RA 18177658), Company C, )  
 822nd Engineer Aviation )  
 Battalion )

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 REVIEW by 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 soldier named above.
2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Charles O Dixon, Company C, 822nd Engineer Aviation Battalion, APO 239, did, at Kosa, Okinawa, on or about 1 October 1947 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one, Shige Okuma, a human being, by striking her on the head with a pistol.

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 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 remainder of his natural life. The reviewing authority approved the sentence, designated the "United States Penitentiary, McNeil Island, Steilacoom, Washington," as the place of confinement and forwarded the record of trial for action "under Article of War 48."

3. Evidence.

The accused was seen in the area of his quarters at about 11:00 p.m. on 30 September 1947 (R. 91, 93, 94, 95). At about midnight

or shortly thereafter on 1 October 1947 he appeared at the house of Inafuko in the district of Koza, where he tried to purchase a female child. Being unsuccessful he went to the house next door, where he found a high school boy, Tokeshi Isao, standing at the door. Tokeshi pushed the accused aside as he tried to enter. The accused retaliated by beating the boy but left when Inafuko threatened the accused with a stick (R. 7, 8, 12-18). About this time three civilian policemen arrived. When one of them drew his pistol the accused ran away and the policemen gave chase. They caught up with the accused who then snatched a pistol from one of the policemen and thereupon again ran away (R. 19, 20, 27). He was next observed at the house of Seiyei Okuma whose wife, Shige Okuma ran out the back door (R. 30, 31). The accused pointed a pistol at Seiyei Okuma who ducked behind a water barrel. The accused then chased after Shige Okuma, caught her by the arm and dragged her to the top of a rise about 100 meters from Okuma's house. In the meantime Seiyei Okuma climbed to the top of his roof, where he beat on a can to summon help. He then proceeded in the direction taken by the accused. While Seiyei Okuma was climbing up the hill the accused fired one shot at him, two shots in the direction of a native who was sounding an alarm in the village, and two more shots the direction of which could not be ascertained. The accused was recognized as the person who was dragging Shige as it was a bright moonlight night (R. 14, 27, 40, 52). Seiyei Okuma after reaching a point within thirty-six feet of accused, saw the accused's "hand go in a striking motion, up and down" (R. 20, 34-38, 39, 40). Seiyei Okuma went to the side of his wife who was unconscious and bleeding badly. He observed four wounds about her face and head (R. 34). She died a few hours later in a hospital as a result of the wounds inflicted upon her. The injuries to Shige Okuma according to Kishimoto Koken, the attending physician, consisted of compound fractures of the parietal bone and the occipital bone, a fracture of the left cheek bone, a contusion of the left temple bone and the brain, bruises in the vagina and outer genital organs and scratches in front of the vagina (R. 54-55).

The accused, upon leaving the scene of his attack upon the Okinawan woman, was pursued and captured by civilian policemen and other Okinawans (R. 28, 41, 44, 45, 52) at a point about 200 meters (R. 22) from the place where the attack took place.

The defense stipulated accused was the same colored soldier who was captured near the scene of the crime (R. 45). The pistol was found near the scene of the attack about 6:00 a.m. (R. 21, 22).

The accused's written pretrial statement was identified by Lieutenant Rogers, the criminal investigation officer who took the statement and admitted in evidence over the objection of the defense after accused and other witnesses testified as to the voluntary nature thereof (R. 58-62).

The accused was sworn as a witness and testified only concerning his pretrial statement. Lieutenant Rogers brought him to his office at about 11 a.m. on 1 October 1947 without the accused having had any sleep since his commission of the offense. After having been questioned by Lieutenant Rogers the accused signed a two page typewritten statement within an hour of his arrival at the office. He claimed he neither read the statement nor was it read to him. He further claimed he did not know what the statement contained until it was read to him by his assistant defense counsel just prior to the trial. After a recess of the court he corrected himself saying that Lieutenant Dallman, the investigating officer had read it to him. He could not remember what occurred after he was taken into custody because he was "beat up". Lieutenant Rogers told him "If you keep lying, you'll have more knocks on your head". He signed the statement because he was afraid of the .45 calibre pistol which Lieutenant Rogers had laid on his desk pointing toward him and because he had heard of the brutal methods used by police. He was also intimidated by the presence of other C.I.D. agents and an interpreter. However, they did not "strike, shove or slap" him or make any threats or promises to him. Lieutenant Rogers told him it would be easier for him if he told the truth and if he didn't he would hang (R. 63-76).

The C.I.D. agents and the interpreter took the stand and denied they were present during any of the time that accused was with Lieutenant Rogers (R. 76, 77, 82).

Lieutenant Rogers testified he explained to the accused all of his rights under Article of War 24. He denied all of the contentions of the accused except that he did say he may have made some reference to the obvious bumps on accused's head while they were at the provost marshal's office, where they had an argument. Also, he may have told accused to cease lying and he could not remember whether he put his gun on his desk or not (R. 58-62, 79-82).

The accused's statement contained an admission of his attack upon Shige Okuma by striking her three times with the pistol he had taken from the civilian policeman.

The defense produced several witnesses who testified that they observed accused in the area of his quarters from 10 to 11 p.m., and that in their opinion he was drunk. However, the civilian policeman and other witnesses testified that he did not appear to be drunk although some of them detected an odor of alcohol on his breath (R. 25, 28, 91-95).

The rights of accused as a witness were explained to him and he elected to remain silent (R. 96).

#### 4. Discussion.

The evidence produced in this case establishes beyond a reasonable doubt the guilt of the accused of the charge and its specification. Shortly after midnight on 1 October 1947 the accused, after having made an illegal entry into one native's house, and having been frustrated in an attempt to enter another, committed an assault and battery upon the native boy who was guarding the entrance thereto. He then entered a third native's house with a drawn pistol. When his presence was discovered the woman of the house, Shige Okuma, ran out the back door. The accused pointed his pistol at Seiyei Okuma, the woman's husband, ran after the woman, caught her by the arm and dragged her bodily a distance of about 100 meters to the top of a knoll for the apparent purpose of having illicit sexual relations with her. While dragging his victim along the ground and upon reaching the top of the knoll he fired five shots from his pistol in the direction of various natives. He then committed a most brutal and vicious attack upon his victim by striking her about the face and head with a pistol within plain sight of several natives. As a direct result of such attack by the accused, Shige Okuma died in a hospital a few hours later.

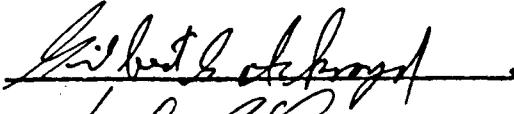
Malice, which is the essential element of murder, may be presumed where a deadly weapon is used in a manner likely to produce death and death is actually the result of such use (CM 324519, Davis, butt or stock of carbine considered a deadly weapon; CM 325492, Mosley, a blunt instrument so considered).

The defense objected to the admission in evidence of the accused's pretrial statement, which amounted to a confession, wherein the accused stated he did attack Shige Okuma by striking her several times with a pistol. The claim of the accused that he was compelled to sign the statement through fear of the pistol of Lieutenant Rogers or of being beaten is not tenable. If Lieutenant Rogers had his pistol on his desk, which fact he could not remember, he must have had it there as a natural precaution in view of the character of the crime it was suspected the accused had committed. There was no evidence that Lieutenant Rogers picked up the pistol or threatened accused with it in any way. In the absence of such evidence it is impossible to understand why the accused was afraid unless the sight of the gun produced unwelcome memories in his mind concerning his attack upon Shige Okuma. Even if the latter be true, it can hardly be said that the confession was involuntary if accused was thus induced to make it. The accused could not have been afraid of being beaten because he admits before the court no violence or threats were used by Lieutenant Rogers. It does not appear in the record how or when he received the "bump on his head".

It is as reasonable to assume they were result of the violent handling he received at the hands of the Okinawans when he was captured as to assume such injuries were result of a beating given accused by military authorities. The record fails to disclose any substantial evidence that the statement of accused was given involuntarily. It follows that the court committed no error by admitting the accused's statement.

Complete evidence having been produced as to the voluntary nature of the statement of the accused it became a question of fact and the decision of the court is final thereon (CM 320230, Huffman, 69 BR 261, 267; CM 325378 Catubig; CM 329162 Sliger).

5. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, Section 2404, District of Columbia Code.

 Judge Advocate  
 Judge Advocate  
 Judge Advocate





the vicinity of Yokohama, Honshu, Japan, on or about 7 June 1947, forcibly, feloniously, against her will, have carnal knowledge of one Hatsuko Kanai, a Japanese woman.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentences, but reduced the period of confinement to twenty years as to accused Jensen, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

### 3. Evidence for the prosecution.

Miss Hatsuko Kanai, the prosecutrix, a Japanese national, testified substantially as follows: at about 2100 hours, 7 June 1947, she, her mother Ichi Kanai, and a friend, Atsuko Murai, were walking home from a theater in the vicinity of Yokohama, Japan. An American Army truck with three soldiers aboard approached them from the rear and stopped about eight feet away from them. She identified the accused, Sergeant Mullinnix, as the driver of the truck, Pfc Hale as the soldier who sat next to the driver in the cab of the truck and Private Jensen as the soldier who was in the body of the truck (R 22-23). The accused Hale dismounted from the truck and spoke the words "pom-pom" (meaning sexual intercourse) to the Japanese nationals, apparently in the interrogatory form, to which Hatsuko Kanai replied "No." Accused Hale then pulled Hatsuko by the hand and put her on the truck on the driver's seat between Mullinnix and himself (R 23,25). Witness stated that she did not go with Hale willingly, that it was against her will and that she tried to get off the truck but that Mullinnix, the driver, grabbed her, pressed her down and said "don't you get off." (R 24). She did not cry for help when she was being placed in the truck (R 39) but when she heard the soldiers talking about "mama-san" (her mother) she was afraid her mother might be put into the truck so she told her mother "Go away mother." (R 25). After the prosecutrix was on the truck, the truck started down the road and when another vehicle approached them from the opposite direction, the soldiers pushed her head down between the seat and the engine. The truck turned off the highway into a side road and got stuck in a rice field (R 26). Accused Hale then took Hatsuko's kimono off completely and he told her to take off her underwear. She tried to prevent her clothes from being removed by holding her two arms across her breast but Mullinnix pulled off a part of her clothes and Hale "helped" her take another part off. Hale told her that if she did not remove her

clothes "I am going to strike you." (R 26-27). When all of Hatsuko's clothes were taken off one of the soldiers (she did not know who) told her to come to the back of the truck and lifted her from the cab to the ground. One of the soldiers spread her clothes on the ground and told her to lie down (R 28). Hale told her "If you don't lie down I going to strike you." (R 30). Hatsuko lay down and the driver (Mullinnix) got on top of her and had sexual intercourse with her. Witness stated that she knows what sexual intercourse is "Because I wasn't a virgin."; that the driver (Mullinnix) put his penis within her sexual organ; and that she could tell when his penis was in or out (R 30-31). She further testified that she did not try to stop the driver from having sexual intercourse with her because "That was late at night and if I run away I might get caught again so I did not call for help. If I refused him why I might get killed so I did not do anything." She then testified as follows:

"Q. Did the driver hit you?

A. Yes, he hit me.

Q. How many times?

A. Once or twice.

Q. Did the driver threaten you?

A. Yes, he did." (R 31,33)

After accused Mullinnix finished having sexual intercourse with her, the accused Hale got on top of her and had sexual intercourse with her. His penis penetrated her female organ. When asked whether she tried to stop him, she replied, "I tried rise but he told me 'lay down.'" She then testified as follows:

"Q. Did he hit you?

A. Yes, he struck me.

Q. Did he threaten you?

A. He did." (R 31-32,33)

When accused Hale completed this act of intercourse, the accused Jensen got on top of Hatsuko and had sexual intercourse with her. His penis penetrated her female organ. Accused Jensen did not hit or threaten Hatsuko and she stated that she did not try to stop Jensen from having sexual intercourse with her because "I thought the little fellow Hale might strike me if I do not obey him.", and that she was afraid of Hale because "He threatened me most so I was scared." When asked, "At any time during any of the three periods did you give any one of these men permission to have sexual intercourse?", she replied, "No, I did not; but I might get killed if I don't let them do it what they want." (R 31-32). Following the accused Jensen's act of sexual intercourse, each

accused, in turn, again had sexual intercourse with the witness and the accused Hale repeated the sexual act a third time (R 32-33). During this period of sexual intercourse with the three accused a Japanese civilian passed through the area and talked to the little fellow (Hale) and to the taller fellow (Jensen). Hale was saying something about "uma uma," which means "horse" in Japanese. The Japanese national passed alongside where Hatsuko was lying and the witness stated that at that time she called for help saying "tasukette." She only called out for help once because Mullinnix, who was having intercourse with her then put his hand over her mouth and told her "quiet." Mullinnix hit her at that time. Accused Hale and Jensen then went away looking for a horse (for the purpose of pulling the truck out of the mud) and Hatsuko tried to run into a house which was nearby but Mullinnix caught her (R 33-34). When asked why she did not call out for help when she saw a house nearby, she stated, "I could not say or speak anything because that little fellow [Hale] -- 'if you talk I am going to strike you! So I did not.'" (R 35)

When the accused completed their acts of intercourse with the witness at the truck, they took her to a farmhouse close by. To the question, "Did you go with them willingly?", she answered, "I been accompanied by them and they took me to this house. If I get there I could see someone at least and I could call for help. \* \* \* I just put my okoshi on and I followed them. \* \* \* Yes, I put my clothes on and went." At the farmhouse the farmer let them in and gave them a room to sleep in. She did not say anything to the farmer and could not "because this little fellow [Hale] following me even I go to the latrine or any other place." When they went to bed she slept between accused Hale and Jensen while Mullinnix slept in an adjoining room. During the night Hale again had sexual intercourse with her. She stated that she did not give Hale permission to have intercourse with her but she did not call for help for the reason that "If I talk I might get struck again, and I didn't know where this occupant sleeps in this house." (R 36).

The accused went to sleep and when the witness heard them snoring she got out of bed, woke up the lady of the house and asked her where the closest police box was. The lady of the house refused to help the witness at that time of the night (midnight) so the witness returned to the room where she had been originally. The witness did not sleep during the night and at 0500 hours in the morning she borrowed a kimono from the lady of the house, wore it under her own kimono and then walked outside barefooted and went home (R 36-37).

On cross-examination the witness explained certain pertinent questions as follows:

"Q. Did you cry for help while you were being supposedly carried to the truck?

A. No, I did not cry at the time.

\* \* \*

- Q. How did you expect to gain help if you did not cry for help?
- A. I didn't think so because it was 9:00 o'clock and there were not so many people walking. The spot this incident happened--usually they have quite many incidents happens in that spot. Even though I called for help it is just girl friend and my mother and they could not be rescued me and after I placed in truck one of the men pushed me down between seat.
- \* \* \*
- A. Since there were nobody around, so even though I called for help I do not think it could be rescued.
- Q. Is it not true then you assumed that no one would hear you and made no effort to call for help?
- A. Even though I call for help it wasn't much time because as soon as they place me on truck, truck started moving. When I saw oncoming vehicle I try to call out for help but at the time they press hand over my mouth and told me to shut up.
- \* \* \*
- Q. You stated that your clothing was removed by force in the vehicle. Were any of your clothes torn?
- A. It wasn't any part been torn but been get muddy.
- Q. As you struggled to prevent the soldier from taking your clothes off, how can you account for the fact that your clothing was not torn?
- A. I don't think it would tear off if they carefully removed it.
- \* \* \*
- Q. Did you help the soldiers remove part of the clothing when they asked you?
- A. Yes, that is correct.
- \* \* \*
- Q. Did the soldiers force you to the ground or tell you to lie down and you lay down on the ground?
- A. I been told to lie down and been pushed.
- Q. Is it not true that when the driver had intercourse with you you cooperated to the extent of spreading your legs and inserting the penis for him?
- A. No, it is not so; I didn't do.
- Q. While the driver was having intercourse where were your arms?
- A. Hand down normally.
- Q. Did you try to fight with your arms, cross your legs, move your body or cross your legs?
- A. Yes, I did once try to roll on the side way.

Q. What happened?

A. When I started rolling the side he forced my legs to spread open and he pressed me down.

\* \* \*

Q. Why did you not cry for help?

A. If I call for help they may get angry.

Q. Are you afraid of American soldiers?

A. Yes, I was afraid of them at that time. (The translations of the last answer was corrected as follows; 'A. She said that she was afraid of these three soldiers but she wasn't afraid of the others, and she thought that American soldiers were good soldiers').

\* \* \*

Q. At any time while the driver was having intercourse, did the other two soldiers hold you?

A. No, they did not.

Q. Where were the other two soldiers?

A. I was mainly afraid and I didn't know where they were.

\* \* \*

Q. Did he [Hale] push you back down or did you remain there after the driver finished?

A. I tried to rise and I been told to lie back down again.

Q. You were not forced?

A. No, did not.

\* \* \*

Q. At the time the soldiers went to the farmhouse did they force you to accompany them?

A. Yes, they asked me to go and then I followed them because if I get this farmhouse I can ask someone to help me. After I get there I seen no lights in that house. I thought it was warehouse and I was disappointed because I would not be able to get any help there.

Q. If the soldiers only asked you to accompany them and not force you, why did you go?

A. Because if I get farmhouse should be someone in farmhouse and I could ask them to help me.

Q. Why go to the farmhouse; why not refuse to go to the house with the soldiers when they asked you?

A. Because they might give me help at farmhouse. If I resist they might harm me more so I tried to get on good side with them-- tried to fool them and get to farmhouse and try to get some help.

\* \* \*

- Q. You stated that while after you went to sleep in the farmhouse that the little soldier Hale had intercourse again. Since you were among friends why did you not cry out for help?
- A. After I came back from bathroom they were in other room and that house was quite large and I did not know occupant and I could not call out for help-- this soldier might get angry. So I try to fool them and try to be nice to them.

\* \* \*

- Q. You did not try to call for help?
- A. No, I did not call for help that moment. (R 39,40,41,43,45,48).

Mrs. Ichi Kanai, mother of the prosecutrix and Miss Atsuko Murai, testified substantially as follows: that at about 2100 hours, 7 June 1947, they were walking home from a movie with Hatsuko Kanai when an American army truck stopped about ten feet away from them and an American soldier spoke the words "pom pom." Then a soldier dismounted from the truck and both witnesses ran away. Neither witness could identify the soldiers on the truck. Both witnesses saw the truck drive away and both witnesses heard Hatsuko call to them to "go away." They saw Hatsuko again the next morning. Her hair was "messy"; she had a bruise under her eye; she had someone else's kimono under her clothes and she did not have any shoes on. Ichi Kanai further testified that when Hatsuko was six years old, she was given away to a geisha house but it was not known that time that the geisha house was "in the business." (R 20,13,16,53-57).

Mr. Kiyoshi Hiruma, a Japanese national, identified the accused Jensen, Hale and Mullinnix, as the three soldiers who broke into his house on the night of 7 June 1947 and, after finding witness in bed, stated "We are sleepy and want you to let us stay over night." A Japanese girl was with the accused and "She came in with just underwear and Okoshi. She did not have any kimono on at that time. \* \* \* Her feet were middy and seems she was trembling \* \* \* I could not state whether she was trembling, but she didn't have any kimono on and she was barefooted.\* \* \* She asked me to help her \* \* \* at the time she came in." Witness did not help the girl because the soldiers seemed to be drunk and he was afraid they might harm him. The accused and the girl stayed at the witness' home overnight (R 57-63).

Mr. Robert D. Allen, an agent of the 44th Criminal Investigation Division, Yokohama, Japan, identified Prosecution's Exhibits No. 1 and 2, as the sworn pre-trial statements he received from accused Mullinnix; Prosecution's Exhibits No. 3, 4 and 5, as the sworn pre-trial statements he received from accused Hale; and Prosecution's Exhibits No. 6 and 7, as the sworn pre-trial statements he received from the accused Jensen. Each accused was advised of his rights under Article of War 24 prior to making each statement and no promises or threats were offered to anyone of the accused and each wrote his statement in his own handwriting. Each

statement was received in evidence over objection by the defense, who contended that the statements were involuntarily given, but the defense stated that it was unable to present any proof in support of its contention (R 70-85).

In Prosecution's Exhibits Nos. 1 and 2, accused Mullinnix stated, that on the night of 7 June 1947, he, accused Hale and Jensen were in a truck driven by himself. At about 2245 hours, they were returning to camp from the "Seven Mile House," where they had been drinking, and came upon three women who were walking in the same direction they were traveling. He stopped the truck about ten yards in front of the women. Hale, who was sitting in the front seat of the truck, spoke to the women and when they started to walk off Hale stopped one of them by force and put her in the truck. He (Mullinnix) drove off into a side road and the truck stuck in a rice patty. Hale undressed the woman, put her on the ground next to the truck and had intercourse with her. When Hale finished his act of intercourse, he (Mullinnix) had intercourse with her and Jensen was next. Hale and Jensen then went to a Japanese house in the area to find a place to stay for the night. When Mullinnix went over to the house he noticed that the door of the house had been broken off but did not know that it had been broken until later. When he learned it was all right for them to stay there for the night, he (Mullinnix) went into one room, where he slept on the floor, while Hale, Jensen and the girl went into another room and closed the door. The next morning when he woke up, the other two men were already up and dressed and the woman had left the house. When Private Hale had intercourse with the woman he spoke something in Japanese and she lay down on the ground and he mounted her. She offered no resistance whatsoever. She did not try to rise or raise her voice and seemed to cooperate with Hale. When he (Mullinnix) had intercourse with her, she cooperated in every way. When he mounted her, "she even put it in for me" and she did not seem to mind the intercourse whatsoever. At the time he was having intercourse with the woman, a man passed by on a bicycle and the woman tried to holler so, he being in a passionate state of mind, believes that he put his hand over her mouth but is not certain. At no time during the evening did he strike the girl.

In Prosecution's Exhibits 3, 4 and 5, accused Hale stated, in pertinent part, that on the night in question when he, Mullinnix and Jensen came upon "this girl," he got out of the truck and put the girl in the front seat of the truck with Mullinnix and himself. The girl yelled something to the girl she was with and as she did this, Mullinnix and he pulled her down in the seat and drove away. A jeep approached them so Mullinnix and he pushed and held the girl down between the seats until the jeep passed. Just before they turned off the main road, Jensen and he pulled her dress down around her waist. When the truck got stuck in the rice field he and Mullinnix forced the girl to lie down in the back of the truck so that Mullinnix could have intercourse with

her while he and Jensen watched. The girl struggled. Then he had intercourse with her on the ground outside of the truck. During this intercourse two Japanese men came by the road and the girl "yelled sigi or help." He put his hand over her mouth at this time. Jensen next had intercourse with the girl and then Mullinnix again had intercourse with the girl. During the latter intercourse, a man came by on a bicycle and stopped. Mullinnix put his hand over the girl's mouth and he (Hale) went over to ask the man where he could get a horse. He again had intercourse with the girl. After he and Jensen found a house where they could sleep that night, he went back to the truck "and got the girl" and then returned to the house. Jensen and he slept with the girl and Mullinnix slept in another room. He again had intercourse with the girl. When he woke up the next morning the girl was gone.

In Prosecution's Exhibits No. 6 and 7, accused Jensen stated that when he, Hale and Mullinnix saw two ladies and the girl walking down the road, Hale told Mullinnix to stop. Then Hale jumped out of the truck and forced "her" to get in the truck and they drove off. The girl was screaming, so Hale put his hand over her mouth to keep her quiet. After the truck got stuck in the rice field, Hale took her out of the truck. She screamed and Hale slapped her. Hale took her clothes off and had intercourse with her. Then Mullinnix and he (Jensen) had intercourse with her. Hale took the girl to a house where they slept that night. Hale slept with the girl and he (Jensen) lay down and went to sleep. The court was reminded that each of the accused's statements was offered in evidence only against the accused who made that particular statement (R 83).

#### 4. Evidence for the defense.

Mr. Toyoaki Katori, a Japanese national, testified that on the night in question he passed within 30 inches of three soldiers and a Japanese girl near a truck. One soldier was on top of the girl. He did not see the girl struggling as to free herself but he heard her call out for help in a low tone saying "tasukete kudasai--please help me." The voice sounded like a sweet voice and he did not think it was in a frightened manner. "I believe she was lying there as helpless; could not do anything." The nearest house to the truck was about twelve feet away (R 86-87).

Mr. Masayuki Shiruma and Mrs. Kiyo Shiruma testified that at about 2100 hours, 7 June 1947, a truck stopped and was stuck about 25 feet away from their house. They heard English speaking voices which they did not understand and a girl's voice. There was some commotion going on but the tone of the voices was normal and they did not hear any voice calling for help (R 93-94,96).

Mrs. Miyoko Sugiyama and her daughter, Miss Sumi Sugiyama, testified that Hatsuko Kanai rented a room in their house from October 1946 to

(278)

about June or July 1947; that during this period Hatsuko had an American boy friend and Japanese boy friend visit her two or three times a month and that on some occasions her boy friend stayed with her overnight (R 98-102).

Miss Hatsuko Kanai, the prosecutrix, was called as a defense witness and testified that she had never reported the alleged incident to the police because "I hate to see it brought to court and interfere some other people", and that she did not know any of the accused prior to the alleged incident (R 102-103).

Staff Sergeant James E. Trippe testified that on the day in question the accused were with him at the Seven Mile House, Japanese cabaret, celebrating his birthday. They were all drinking American and Japanese beer and whiskey, and in his opinion, they were all drunk. "We were all feeling good but majority knew what we were doing. I could not state about the others. As far as myself I knew what I was doing. I could not state. I do not know how whiskey affects them" (R 103-104).

After the accused were duly informed as to their rights to present evidence in their own behalf, they respectively elected to submit the following unsworn statements through their counsel.

The statement of the accused Mullinnix was read as follows:

"On the 7th of June the three of us went with some others to the Seven-Mile House where we had quite a bit to drink. We started drinking that afternoon at about 2:00 PM and were drinking GI beer at the beer hall; then went to the Seven-Mile House where we had a lot of Japanese beer and Tommy's Malt, which is a Japanese whiskey. At about 8:30 that night we left the others at the Seven-Mile House and started to go back to the company-- when we first encountered the girl. She got into the truck; she didn't seem to resist in any manner. After Jack Hale got out and brought her back it seems as if he didn't use any force, and that she came along willingly. He helped her into the vehicle by lifting her from the back. That seemed natural because the step of the weapons carrier is so high. When the truck got stuck we helped the girl over the back of the seat because there was a top on the vehicle and it seemed a lot easier for her to get over that way. I had the first intercourse with her and I spread my raincoat on the ground. She spread her underwear on top of this. When I told her to lay down she did and assumed the normal position for intercourse. I didn't push her and no one else did. She just lay down and got into the proper position without being told. When I mounted she seemed to cooperate in every way and even inserted the penis for me. At the time the intercourse was over she seemed more pleased than anything else. At no time during the two times I had intercourse with her did I use any force

whatsoever to hold her down or to make her do anything she didn't want to do. She didn't put up any struggle, didn't cross her legs, didn't do anything to prevent me from doing it. She didn't try to roll out of reach; she didn't bite or kick me. I may have hit her inadvertently during my excitement but I don't remember if I did."

The statement of the accused Hale was read as follows:

"Me and Jensen and Mullinnix was at the Seven-Mile House that night celebrating a birthday. When we saw the girls the truck stopped. I got out and asked the girl: "You pom pom?" She said something I couldn't understand and then I put my hand on her shoulder and motioned toward the truck and then she started walking toward the truck. And then when we got to the truck I helped her in by lifting her onto the running board. Then we started on the road toward Tsurumi. She helped us remove some of her clothing. As a jeep came toward us we put the girl out of sight because it might be an MP and we didn't have permit to carry Japanese. I may have been rough with her at this time and may have hurt her a little because of the drinking but I don't remember. And then we turned off on a side road where the truck became stuck. We helped her to the rear of the truck by lifting her over the front seat. As I had my intercourse with her I did not force her in any way and as I had my intercourse I was the only one near the girl. The others was down on the highway trying to get help. When I started to have intercourse with her I said "lay down" and she did. She spread her legs apart. As I remember as I started my second intercourse with her she said "dozo" which means in English "help yourself." After we had gone to the farm house and had gone to bed for the night we were lying in bed talking and joking with each other and then I had intercourse again. I do not remember when she left the house for I was asleep and when I woke up she was gone. I don't remember hitting her on purpose. I may have accidently. I think she got hurt most when I pushed her down between us when the vehicle came the other way, and when we run into the rice paddy-- we stuck fast and I think she bumped into the windshield. I know I did."

The statement of the accused Jensen was read as follows:

"We were at the Seven-Mile House drinking that night and about 8:30 Hale and Mullinnix and I started to go home. When we stopped to pick up the girl I didn't see what Hale did because the top of the truck was in the way. So when the girl got in I naturally thought that she had come along willingly. I did not see her struggle with anybody, if she did. When I had intercourse with her she lay down. The other boys were trying to get the truck out. I told her to lay down and she did. She seemed to help me in

every way. She didn't twist or squirm. She put her arms around my back and seemed to enjoy it. The second time I told her I would take her home. I did not use force on her at any time."

5. Specification of the Charge: Under this Specification, the accused are charged with acting jointly and in pursuance of a common intent, in willfully, unlawfully and feloniously, forcefully and against her will, seizing, kidnapping and carrying away Hatsuko Kanai, a Japanese woman, with intent to hold and detain her for the purpose of committing rape in violation of Article of War 96. Thus it appears that the Specification was intended to charge the accused with the commission of the crime of kidnapping, in violation of Article of War 96, as "a crime or offense not capital." To come within the meaning of this particular phrase of the 96th Article of War, the Specification must allege and the evidence prove that the offense charged violated the public criminal law of the United States, which public law of the Federal Government was in full force and effect at the place where the offense was committed (MCM 1928, par. 152c). Accordingly, the offense charged and proven must be one defined by Act of Congress or existing in the common law as enforced at the situs of the offense by the Federal Government (MCM 1921, par. 446 III). At common law the crime of kidnapping was committed only if the victim was carried out of his own country and beyond the protection of its laws (31 Am. Jur., Kidnapping, Sec. 5; Black's Law Dictionary, 3rd Ed. p.1055). That offense was neither charged nor committed in this case.

The only Federal kidnapping statute in effect throughout the United States is the so-called "Lindberg Act," 18 United States Code 408a. This statute by its own language, necessitated by constitutional limitations on Federal jurisdiction, defines the violation as the transporting of the victim in interstate or foreign commerce. Section 408b thereof defines "interstate or foreign commerce" as "transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to another state, Territory, or the District of Columbia." That offense was not charged in this case. Since the Specification alleges and the evidence shows that the entire incident occurred within the city of Yokohama, Japan, it cannot be said that the Specification alleges or that the proof sustains the commission of a crime under the "Lindberg Act" or of "a crime or offense not capital" within the meaning of that provision of Article of War 96 (CM 324802, O'Brien, 1947; CM 265225, Conrad, et al., 4 BR (NATO-MTO) 105).

It clearly appears, however, that the offense charged is a disorder to the prejudice of military discipline and conduct of a nature to bring discredit upon the military service, properly chargeable under Article of War 96 (CM 265225, Conrad et al, supra; CM 324802, O'Brien, 1947,

supra.) The words of the Specification "feloniously" and "kidnap" add nothing to the Specification, they being mere surplusage and an inaccurate conclusion of law (CM 233182, Blue, 19 BR 345; CM 328133, Konno, 1948; State v. Sutton, 116 Ind. 527, 8 Am. Crim. Rep. 452,454; Sec. 780, Wharton's Crim. Law, and cases therein cited). Accordingly, since the Specification suitably alleged an offense, other than kidnapping, and the word "kidnap" not being necessary or sufficient in itself to charge the crime of kidnapping, that word need not be excepted from the Specification in holding that the Specification alleged a military offense or to support the findings of guilty thereunder.

The evidence of record amply supports the several properly pleaded allegations of this Specification against each accused. In this regard it was shown that at the time and place alleged, the three accused approached the alleged victim in a truck and the accused Hale asked her if she was agreeable to engage in sexual intercourse. When she replied in the negative, the accused Hale grabbed her by the hand and put her in the truck where she was forcefully, and against her will, restrained and then carried away to a place where each accused had sexual intercourse with her. The victim did not know any of the accused and there is no evidence that the accused knew or had ever seen her before the night in question. She was seized from among her two companions who ran away and were warned by the victim to "go away." The incident occurred on a dark night under circumstances of overpowering intimidation likely to produce fright and fear of great bodily harm if resistance to the force employed were interposed. The victim testified that she was afraid and scared of being killed if she resisted. She cried for help when she saw another vehicle approaching while she was being carried away on the truck, but her cry for help was stifled by the hand of one of the accused who placed it over her mouth and by being pushed down between the seat of the truck and the engine thus concealing her from public view. She tried to jump from the truck but was restrained by force and by threat of bodily harm. The evidence shows that the accused Hale and Mullinnix both applied physical force and asserted verbal threats against the victim during her restraint in the truck. While the evidence does not show affirmatively that accused Jensen used any physical force to restrain the victim in the truck or that he initially, with his co-accused, performed any act to seize or abduct the victim, it is a reasonable inference from all the evidence, that his participation in the fruits of the crime and especially from his pre-trial statement which was adduced in evidence, indicating his complete knowledge of the abduction at the time it was being performed, that he was, prior thereto and at the time thereof, acting in concert with his co-accused and that he was abetting the accomplishment of the abduction. Such an inference is further warranted by the showing that accused Jensen's unsworn statement in court in which he stated that he was unmindful of the manner in which the victim was "picked up" in the truck because the top of the truck (weapon's carrier) obstructed his

view, is directly contradicted by his statement in his pre-trial statement (Pros Ex 6) wherein he related that they (the accused) saw two ladies and the girl walking down the road and Hale told Mullinnix to stop; that Hale then jumped out of the truck and forced her to get into the truck. In CM 123444, Cook, et al., it was held that to constitute any of the accused aiders and abettors, it is not necessary that they should have assisted in the particular acts of criminal violence, but it is sufficient if they were acting in general concert with the actual perpetrators of such acts in their commission (CM 248793, Beyer, et al., 50 BR 40, 244). The United States Code provides that, "Whoever directly, commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." (Title 18, USC, Sec 550). We are therefore of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification of the Charge as to each accused. Since the sentence adjudged and as approved by the reviewing authority as to each accused, is within the authorized maximum limit of punishment for the offense of rape, of which each accused was convicted, and as hereinafter reviewed, it is unnecessary to determine the authorized maximum punishment which could have been awarded for this separate offense.

6. As to the Specification of the Additional Charge each accused was charged and convicted of forcibly, feloniously, against her will, having carnal knowledge of one Hatsuko Kanai, a Japanese woman, in violation of Article of War 92.

The offense thus charged and of which the accused were convicted constitutes the crime of rape as denounced by paragraph 149b, Manual for Courts-Martial, 1928, which provides: "Rape is the unlawful carnal knowledge of a woman by force and without her consent." The essential elements of proof of this offense are therein set forth as:

- "(a) That the accused had carnal knowledge of a certain female, as alleged, and
- (b) that the act was done by force and without her consent."

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent. Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent (MCM, supra).

The evidence is undisputed that each of the accused had carnal knowledge of the prosecutrix as is shown by the testimony of the prosecutrix, by the pre-trial statements of the accused (Pros Ex Nos 1 to 7

incl), and by the admissions of each accused in his unsworn statement in court. The only question requiring consideration in connection with the offense charged is whether the act of carnal knowledge by each accused was committed against the will of the prosecutrix, that is, without her consent, in order to constitute each such act, an act of rape within the definition of that offense as hereinabove noted.

In order to properly evaluate the evidence on this question, the following authoritative statements, generally cited on this subject, are quoted as a guide:

"The importance of resistance is to establish two elements in the crime--carnal knowledge by force by one of the parties and nonconsent thereto by the other. These are essential in every case in which the complainant had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. If there is a lack of resistance, there is small occasion to use force.

"Resistance or opposition by mere words is not enough; the resistance must be by acts, and must be reasonably proportionate to the strength and opportunities of the woman. She must resist the consummation of the act, and her resistance must not be a mere pretense, but must be in good faith, and must persist until the offense is consummated.

"The authorities are not in harmony as to what degree of resistance is necessary to establish the absence of consent in a prosecution for rape. Some cases require the utmost resistance, and the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person. Other authorities refuse to recognize opposition to this degree, and hold that to make the crime hinge on the uttermost exertion the woman was physically capable of making would be a reproach to the law as well as to common sense; and if her resistance was bona fide, and the utmost, as far as she knew, that she could offer, it will be sufficient, and it will not be necessary to show that she did not offer all the resistance in her power. Notwithstanding the different formulæ adopted and approved by the various courts in stating the rule as to resistance, the generally accepted doctrine as deduced from the decisions seems to be that if the woman at the time was conscious, had the possession of her natural, mental, and physical powers, was not overcome by numbers or terrified by threats, or in such place and position that resistance would have been useless, it must appear that she did resist to the extent of her ability at the time and under the circumstances.

"Resistance is necessarily relative. It is accordingly not necessarily illogical for courts to apply the requirement of most vigorous resistance to common cases, and to modify it in varying degrees and peculiar circumstances, and to refuse to apply it to exceptional cases. In all cases, the circumstances and conditions surrounding the parties to the transaction are to be considered in determining whether adequate resistance was offered by the female. It is proper to consider the age and strength of the woman, and her mental condition as bearing upon the question whether the act was against her will and consent, and upon the extent of the resistance which the law required her to make. \* \* \*.

"\* \* \* The yielding to overpowering force is submission, and not consent, but if the force is short of that, there may be consent, or the act may not be against her will, and it is therefore often a vital question whether the woman ceased resistance because it was useless or dangerous, or because she ultimately consented. After the offense has been completed by penetration, no submission or consent of the woman will avail the defendant." (Am. Jur., Criminal Law, Vol 14, p.905,906).

The review of the evidence before us clearly shows that force and violence were used by the accused in the accomplishment of their sexual gratification and that the alleged victim exerted and interposed a certain degree of resistance to those acts of sexual intercourse. In the light of the foregoing legal requirements it need only be determined whether, under all the attendant circumstances, the degree of resistance and non-consent to the alleged act was commensurate to the physical ability and means of the prosecutrix.

Obviously, the kind and degree of resistance which may be reasonably expected under the circumstances of this case must be gauged by the physical and mental condition of the parties, the amount and manner of the force employed and the existing relationship between the parties. Considering the manner in which Hatsuko was violently seized and carried away, the terror of her plight, the number of the accused acting against her and the existing relationship between them, a comparison of physical strength is deemed hardly necessary. It is a matter of common knowledge that because of relations existing between these conquered people and our occupation forces they are more susceptible to threats, subjugation and intimidation than people in our homeland would be, and consequently, that utmost degree of resistance, normally required in the homeland, cannot be reasonably expected of such a foreign individual who is placed in the position of the victim in this case.

The evidence of nonconsent throughout the alleged episode appears compelling to the Board of Review. A Japanese woman is seized in the

dark of night from a public street, in the presence of her mother and a friend, by a soldier of the occupation forces, toward whom the Japanese people are pledged to spiritual submission. Desire for sexual gratification is evidenced and the victim immediately indicates her nonconsent. She calls to her mother to escape; she tries to resist, is struck, pushed down in the truck, struck repeatedly throughout the occurrence, her attempts to call for help stifled, and her two actual contacts with possible help from Japanese sources meet with disappointing failure. Her later reluctance to complain or testify against occupation soldiers who had already exhibited such lawless and unchecked force is readily understandable. The issue as to her chastity goes both to the point that consent may be more readily inferred on the part of a person of loose morals than otherwise and to the argument that a lower penalty would suffice where such a person is the victim than in the case of one without this history. As to the first point, the evidence is compelling that the victim did resist with all the force that could reasonably be expected of a woman of a beaten nation in the presence of three soldiers of the conqueror. As to the second argument, it is outstanding in evidence that the accused had no way of knowing and did not know whether or not the victim was previously chaste. For aught they knew, she may well have been the virtuous daughter of the most respectable and moral persons in Japan.

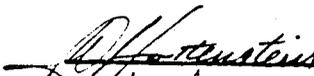
The case of Jensen has a slightly different aspect. He did not participate in the violence or threats except by the addition of his presence. He took advantage of the brutality of others to secure personal sexual gratification. This indicates that he like the others, is possessed of a malignant spirit, the outcropping of which resulted in a crime of the worst sort. He was no doubt led by older and more experienced men, one of whom (Mullinnix) apparently was his work "boss." The evidence against the accused Jensen under the specification of Charge I is that he was drinking and was seated in the back of the truck. According to his statement (Pros Ex 6), while in the back of the truck, he saw the three women walking along the road. It has been held that under a joint indictment against the perpetrator and those who were present to aid and abet in a felony, each is responsible for the acts and may be convicted as a principal (31 CJ 845). For one to be guilty as principal in the second degree or as aider and abettor, he must share in the criminal intent of the principal in the first degree. However, intent or preconcert may be shown by all attendant circumstances and by the conduct of accused subsequent to the criminal act (22 CJS 155-156 quoted with approval in CM 234118, Reis, 20 BR 243). There is ample evidence that Jensen was present and saw that the girl had been struck, and forced by Mullinnix and Hale during their intercourse with her. Her fear and weakened condition were apparent to him. Nevertheless he took advantage of her while in this state of fear and had intercourse with her. Although there is no evidence that Jensen physically mistreated her during his intercourse with her, it was not necessary for him to use force to

accomplish his desires, as the girl had reached a state where further resistance on her part would have been futile (CM 255335, Besherse and List, 50 BR 83). During the intercourse with Jensen she showed her unwillingness by crying and asking him to let her go home. His conduct subsequent to the original offense in sharing in the fruits of the crime is evidence of the criminal intent. Intent being a mental process must be judged from all the attending circumstances. The following well-established rule is applicable with respect to the second specification: Consent, however, reluctant, negatives rape; but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity) the consummated act is rape (Vol I, Wharton's Criminal Law, 12th Ed, Sec 701, p.942). Thus the Board of Review concludes that the evidence, under all the attendant circumstances, is legally sufficient to sustain a finding that the act of carnal knowledge alleged, as against each accused, was committed against the will and without the consent of Hatsuko Kanai.

7. Attached to the record of trial is a recommendation for clemency in the case of the accused Jensen, signed by all members of the court, in which it is urged that the period of confinement be reduced to 20 years in view of his age, inexperience and influence of his co-accused. This recommendation was effectuated by the action of the reviewing authority.

Consideration has been given to communications in behalf of the accused submitted by the following persons: accused Jensen's mother; Right Reverend Monsignor E. J. Flanagan; Honorable Kenneth S. Wherry and Honorable Lister Hill, United States Senate; Honorable Howard Buffett and Honorable A. Leonard Allen, House of Representatives. Oral presentation on behalf of accused Jensen was made by Honorable Howard Buffett and Honorable Frank A. Barrett, House of Representatives, and Mr. John R. Berry, American Legion. Oral presentation on behalf of the accused Mullinnix was made by Mr. John Lawis Smith.

8. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 278, Criminal Code of the United States (18 USC 457). Where part of the whole sentence is punishable by confinement in a penitentiary, the whole sentence may be served therein (AW 42).

 , Judge Advocate  
 , Judge Advocate  
 , Judge Advocate

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

JAGN-CM 328886

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

v. )

Private EVERETT L. WORTHY )  
 (19241889), Assigned Squadron )  
 TQ-1 (Pipeline), 3704th Air )  
 Force Base Unit. )

TECHNICAL DIVISION  
 AIR TRAINING COMMAND

Trial by G.C.M., convened at  
 Keesler Field, Mississippi,  
 27 January 1948. Dishonorable  
 discharge and confinement for  
 one (1) year. Disciplinary  
 Barracks.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 69th Article of War.

Specification: In that Private Everett L. Worthy, Squadron TQ-1, 3704th Air Force Base Unit, having been duly placed in confinement in the Post Guardhouse, on or about 11 October 1947, did, at Keesler Field, Mississippi, on or about 31 December 1947, escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to, and was found guilty of, the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Camp Gordon, Georgia, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$ .

3. To prove the offense the prosecution introduced the pertinent guard report (Pros. Ex. 1), the testimony of the soldiers who were guarding accused at the time of his alleged escape, and the testimony of an officer to establish the fact of confinement. Such evidence stands uncontradicted and unimpeached and is of a nature and extent to establish the guilt of accused beyond any reasonable doubt. However, during the trial the prosecution also introduced into evidence a pre-trial statement by the accused and the sole question before us is whether certain improprieties, related to the admission of such document into evidence, are of such a nature as to constitute fatal error despite the positive and conclusive nature of the remaining legal evidence.

4. Preparatory to the introduction of accused's pre-trial statement the prosecution called as a witness Captain William Karr, who testified, in substance, as follows: That he was the officer appointed to investigate the charge in this case; that he first warned accused of his rights under the 24th Article of War, and that accused thereafter, no promises or threats having been directed toward him, executed the written statement then identified by the witness and offered in evidence by the prosecution as exhibit 3 (R. 16-17). Whereupon the following colloquy took place:

"PROSECUTION: Subject to objection by the Defense Counsel, the Prosecution would like to introduce as Prosecution's Exhibit #3, the statement about which Captain Karr just testified.

DEFENSE: If the Court pleases, I would like to ask Captain Karr a question.

#### CROSS-EXAMINATION

Questions by Defense:

Q. Did Private Worthy ever state to you that he was a trusty?

A. (No answer).

DEFENSE: I object to the statement and wish to call Private Worthy to the stand before it is admitted.

PROSECUTION: This statement has been properly qualified. The statement has been identified by the witness as the one given to him by Private Worthy and signed by Private Worthy in his presence, which he subscribed, the witness himself subscribed as having witnessed the signature of Private Worthy, and it has been properly identified for introduction into evidence.

DEFENSE: I am objecting to the statement and not being given a chance to show why. I object to the introduction of the statement on the grounds that the accused was not aware, and does not know at the present time, just exactly what he was saying in the statement at the time of the investigation.

PROSECUTION: The Court has before it a statement properly identified, the statement is a confession which the Prosecution is trying to introduce into evidence, and there are no grounds for an objection by the Defense Counsel in any way whatever.

LAW MEMBER: The objection of the Defense is over-ruled. The admissibility of the statement has been properly identified by an officer who is authorized to administer oaths and it was given to him and in his presence and was subscribed by him. It is admissible.

PROSECUTION: Does the Court admit it in evidence?

DEFENSE: I wish the record to show that the statement was entered over the objection of the Defense and that the Defense was not given a chance to prove why the statement should not be entered.

LAW MEMBER: The statement is admitted into evidence and will be read.

PROSECUTION: Before we read the statement will the Court excuse the witness?

(Witness excused)

The Trial Judge Advocate read the contents of Prosecution's Exhibit #3 to the Court.

PROSECUTION: The Prosecution rests.

DEFENSE: Will the Court please advise the accused of his rights as a witness.

LAW MEMBER: Private Worthy, it is my duty to explain to you that you have the legal right to be sworn as a witness and testify in your own behalf, under oath, like any other witness, and be subject to cross-examination on the whole substance of any offense to which you testify in explanation or denial; make an unsworn statement, either written or oral, to the Court, which will be taken

for what it is worth in explanation, denial, or excuse or you may do both without being subject to cross-examination; or you may remain silent, in which case no inference of your guilt or innocence will be drawn by the Court, nor will the Trial Judge Advocate comment on your silence in his closing argument. Take time to confer with your counsel and decide what you intend to do.

DEFENSE: The accused elects to remain silent.

The defense rests" (R. 17-19).

5. Since the contents of accused's pre-trial statement constitute a confession of guilt of the offense with which he is charged it is quite obvious that its admissibility in evidence was a material if collateral issue before the court. The right of accused to testify in his own behalf, to such a material issue of fact is clearly and positively established by Title 28, United States Code, Section 632, in which the following language is used:

"In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in \* \* \* courts martial \* \* \*, the person so charged shall, at his own request but not otherwise, be a competent witness. \* \* \* (Mar. 16, 1878, ch. 37, 20 Stat. 30)."

The Supreme Court of the United States denied certiorari in the case of Wolfson v. United States, (101 F 430, 436, 41 CCA 422, certiorari denied 21 S. Ct. 919, 180 U S 637, 45 L. Ed. 710), wherein the court held that "The purpose of this section [28 USC 632] was to make defendants competent witnesses, but reserving to them the right to refrain from testifying without prejudice, and when any defendant chooses to testify he may do so." This principle is expressed in the Manual for Courts-Martial, 1928, in the following language: "The accused is at his own request, but not otherwise, a competent witness" (par. 120d, MCM, 1928). It is equally well established in military jurisprudence that an accused has the right to testify for the limited purpose of establishing the involuntary nature of his confession offered in evidence by the prosecution (CM 275738, Kidder, 48 BR 148).

In this case the only statement of defense counsel expressly setting out the nature of his objection, or what he proposed to prove by accused in support of it, was as follows:

"I object to the introduction of the statement on the grounds that the accused was not aware, and does not know at the present time, just exactly what he was saying in the statement at the time of the investigation" (R. 17).

Such a statement can hardly be said to reflect the niceties of legal procedure properly applicable to a statement of the ground for an objection or to an offer of proof (CM 318045, Henderson, 67 BR 115). Nevertheless, we are of the opinion it was a sufficient statement under the circumstances. If the accused "was not aware \* \* \* just exactly what he was saying in the statement at the time of the investigation" then obviously such statement may not be said to be voluntary. It seems equally obvious that accused was being offered as a witness to testify that at the time the confession was made he was not aware of what he was saying, thus rendering such statement involuntary. Since such an objection and offer of proof are sufficient we are in no position to here speculate upon what reason accused might be able to put forth in his testimony to support such a claim since the only reason he did not testify upon that point was because of the unwarranted and arbitrary action of the court. We thus conclude as a matter of fact that the defense objected to the admission of the confession upon the ground that it was not voluntary, and that the testimony of the accused, if he had been allowed to testify and had his testimony been believed, would have satisfied the court as to its involuntary nature and resulted in its exclusion.

Clearly the court was in error in not allowing the accused to testify concerning the voluntary nature of his confession. However, we are of the opinion that since such testimony was offered for a limited purpose the only way in which accused might have been prejudiced by such error would be by his failure to accomplish his obvious purpose of excluding his pre-trial confession from the evidence. In other words if the court had refused to admit the confession into evidence the accused could not possibly have been injured by the court's error concerning his offer to testify relative only to its admissibility.

6. In this case, however, the court did admit the confession into evidence, thus compounding its error. We are of the opinion that such fundamental errors, unless cured by some proper means, are fatal. It follows that we must now determine whether such error was cured by some means reflected in the record of trial, or by operation of Article of War 37.

After the prosecution rested its case during trial, the

accused was advised, pro forma, of his right to testify, make an unsworn statement, or remain silent. However, at such time the court did not advise the accused that he would then be given an opportunity to supply the limited testimony which had been earlier denied him, and it appears quite clear from the statements of the court that it had no intention of reversing its former ruling on this point. We conclude that there is nothing contained within the record of trial which may be said to cure the errors in question.

In the recent case of CM 328584, Yakavonis (1948), after holding a confession improperly admitted because it was obtained through compulsion and fear, the Board of Review reasoned that such error was fatal, regardless of the nature and extent of the remaining evidence in the record, because:

"The use of a confession obtained by force would violate the constitutional guarantee against self-incrimination and constitute a denial of due process which cannot be cured by other clear or compelling evidence of guilt, Bram v. United States [168 U.S. 532]; Lyons v. Oklahoma [322 U.S. 596]; Kotteakos v. United States [328 U.S. 750]; Lee v. Mississippi [case No. 19, October Term 1947, 19 January 1948]; Haley v. Ohio [case No. 51, October Term 1947, 12 January 1948]. This would seem to be a logical extension of the principle set forth in CM 312517, Kosytar, et al, 62 BR 195, 200; CM 326450, Baez, 1947."

In determining whether the errors complained of have injuriously affected the substantial rights of the accused within contemplation of the remedial provisions of Article of War 37 the Board, in view of the obviously arbitrary and unwarranted denial to the accused of his mandatory right to testify concerning the voluntary nature of his confession, must presume that such testimony, if the court had permitted him to give it, would have been the most favorable to his cause. Irrespective of its ultimate nature the action of the court, when viewed in the light of the legal rule above stated, deprived the accused of a fundamental right, and forces us to the conclusion that the provisions of Article of War 37 are ineffective to cure these errors.

Thus we conclude, as a matter of law, that the refusal of the court to allow the accused to testify concerning the voluntary nature of his purported confession, coupled with the admission of that confession into evidence, is such fundamental error as to be

fatal to at least every portion of the case included within the terms of such confession.

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

Edward Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springston, Judge Advocate.

(29L)

MAR 18 1948

JAGN-CM 328886

1st Ind

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

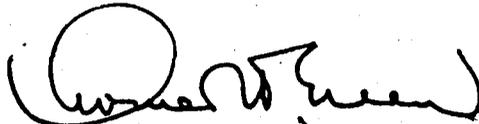
TO: Commanding General, Technical Division, Air Training Command,  
Scott Air Force Base, Belleville, Illinois.

1. In the case of Private Everett L. Worthy (19241889), Assigned Squadron TQ-1 (Pipeline), 3704th Air Forces Base Unit, I concur in the foregoing holding by the Board of Review and for the reasons stated recommend that the findings and sentence be vacated. Upon taking the action recommended you will have authority to direct a rehearing.

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

(CM 328886).

1 Incl  
Record of trial



THOMAS H. GREEN  
Major General  
The Judge Advocate General

013096

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

(295)

JAGH CM 328889

31 March 1948

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

THE ARTILLERY CENTER

v. )

Trial by G.C.M., convened at Fort  
Sill, Oklahoma, 22 January 1948.

Private First Class BILLY D. )

Dishonorable discharge (suspended)  
and confinement for six (6) months.

VERNER (RA 38609719), Enlisted )

The Post Guardhouse, Fort Sill,  
Oklahoma.

Detachment, 4011th Area Service )

Unit, Station Complement, Fort )

Sill, Oklahoma. )

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Billy D. Verner, Reception Center Detachment, 1850th Service Command Unit, Reception Center, did, at Camp Chaffee, Arkansas, on or about 27 December 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Rush Springs, Oklahoma, on or about 25 November 1947.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "desert" and "in desertion," substituting therefor, respectively, the words, "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words, guilty, and not guilty of the Charge, but guilty of a violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for six months. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of the dishonorable



JAGH CM 328889

1st Ind

1PK 7 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 50 $\frac{1}{2}$  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 Billy D. Verner (RA 38609719), Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma.

2. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated, that the accused be released from the confinement imposed by the sentence in this case, and that all rights, privileges, and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

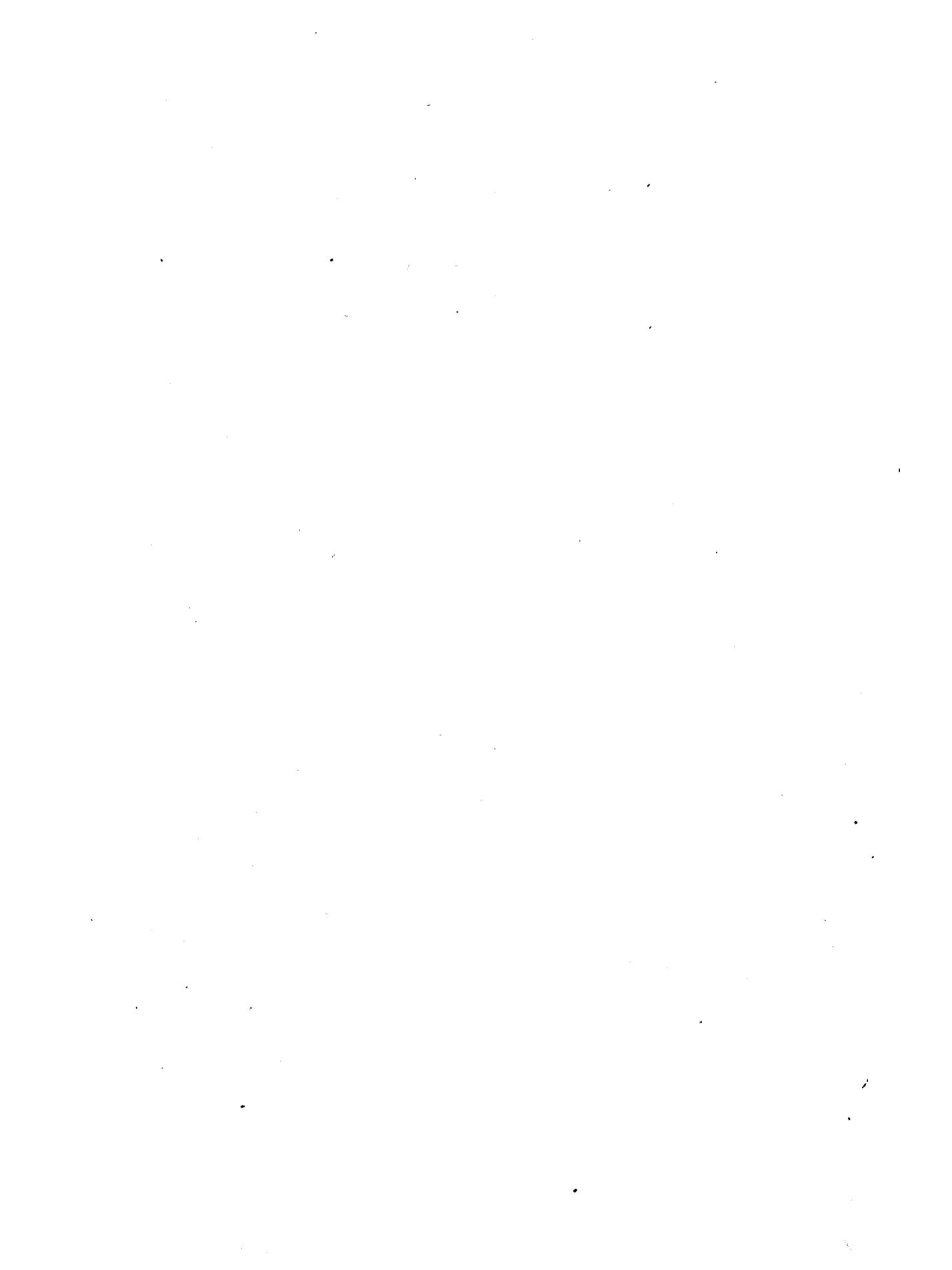
3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls  
1 Record of trial  
2 Form of action

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( GCNO 91, 20 April 1948 ).



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

20 APR 1948

JAGH CM 328910

UNITED STATES	)	SECOND ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Lee, Virginia, 29-30 December
First Lieutenant EDWARD P.	)	1947. Dismissal and confinement
KELLY (01583196), Quarter-	)	for three (3) years.
master 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that 1st Lieutenant Edward P. Kelly, Student Detachment, 9135th Technical Service Unit, Quartermaster Corps, The Quartermaster School, Camp Lee, Virginia, did, at Camp Lee, Virginia, on or about 1 December 1947, with intent to defraud, falsely indorse a certain check or draft by writing on the back thereof, the name "Carl B. Acton", which check is in the following words and figures to wit:

WAR			
FINANCE		CAMP LEE, VA.	44,208
MH 12-2-47			
		TREASURER OF THE UNITED STATES	<u>15-51</u> 000
Seal			NOV 30 1947
Thesaur	PAY	***648. DOLLARS AND 21 CTS	***648.21
Amer.			
Septent	TO THE		
Sigil.	ORDER OF	Carl B. Acton, Lt. Col.,	QM-Res***

Vo. No. 5940-13

OBJECT FOR WHICH DRAWN:  
Pay  
QAB2

	Stamp	
	UNITED STATES ARMY	
U		U
S	/s/ W.S.Abalt	S
A		A
1	USA FINANCE OFFICER	
	213,457	

KNOW YOUR ENDORSER-REQUIRE IDENTIFICATION

REVERSE SIDE OF CHECK

IDENTIFICATION PROCEDURE

When cashing this check for the individual payee, you should require full identification and endorsement in your presence, as claims against endorsers may otherwise result.

Unless this check is presented for payment within one year beginning July 1, next, after date of issue (U.S. Code, Title 31, Section 725t), it should be sent by the owner direct to the Secretary of the Treasury with request for payment after settlement of account.

The payee should endorse below in ink or indelible pencil.

If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.

/s/ Carl B Acton  
/s/ Edward P. Kelly

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

Specification 2: Identical with Specification 1 except forgery of indorsement of William B. Young, Major, and the amount \$470.50.

Specification 3: In that First Lieutenant Edward P. Kelly, Student Detachment, 9135 Technical Service Unit, Quartermaster Corps, The Quartermaster School, Camp Lee, Virginia, did, at Camp Lee, Virginia, on or about 1 December 1947, feloniously embezzle by fraudulently converting to his own use a certain United States Treasury Check, Number 44,260, dated 30 November 1947, in the accounts of W. S. Ahalt, Finance Officer, United States Army, Symbol 213,457, payable to the order of William B. Young, Major, Quartermaster Corps, in the amount of four hundred seventy dollars and fifty cents (\$470.50), the property of Major William B. Young, entrusted to him for delivery to Major Young by Captain N. F. Browning.

Specification 4: Identical with Specification 3 except the payee of the check, Carl B. Acton, Lieutenant Colonel, and the amount \$648.21.

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

Specification 1: In that First Lieutenant Edward P. Kelly, Student Detachment, 9135 Technical Service Unit, Quartermaster Corps, The Quartermaster School, did, at Camp Lee, Virginia, on or about 25 November 1947, with intent to defraud, wrongfully and unlawfully make and utter to Camp Lee Officers' Recreational Center, Camp Lee, Virginia, a certain check in words and figures as follows, to wit:

25 November 1947 No.

<hr/>		
First National Iron Bank		
Rockaway, N. J.		
<hr/>		
Pay to the		
order of	Cash	\$25 00/xx
<hr/>		
Twenty Five	-----00/xx	Dollars
Gibsons 1191		

/s/ Edward P. Kelly

and by means thereof, did fraudulently obtain from Camp Lee Officers' Recreational Center, twenty-five dollars and no cents (\$25.00) in payment of said check, he, the said Lieutenant Kelly, then well knowing that he did not have and not intending that he should have an account in the First National Iron Bank, Rockaway, New Jersey, for the payment of said check.

Specification 2: Identical with Specification 1.

Specification 3: Identical with Specification 1.

Specification 4: Identical with Specification 1, except the holder of the check, "Camp Lee Branch Exchange."

Specification 5: Identical with Specification 4, except the date, "26 November 1947."

Specification 6: Identical with Specification 1, except the date, "26 November 1947."

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

Specification: In that First Lieutenant Edward P. Kelly, Student Detachment, 9135 Technical Service Unit, Quartermaster Corps,

The Quartermaster School, Camp Lee, Virginia, did, without proper leave, absent himself from his organization at Camp Lee, Virginia, from about 1 December 1947 to about 15 December 1947.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years, and 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 summarized as follows:

Accused is in the military service and was a member of "associated Basic Class Number 2," Camp Lee, Virginia.

On the evening of 25 November 1947 accused cashed three checks payable to cash in the amount of \$25.00 each at the bar in the Officers' Club, Camp Lee, Virginia, and the following evening cashed one additional check in the same amount at the same place (R 33,34,36). The four checks were drawn on the First National Iron Bank, Rockaway, New Jersey, and bore the signature "Edward P. Kelly" (R 35,36; Pros Exs 7,8,9,10). First Sergeant Victor S. Boeckman who worked at the bar in the evenings, cashed the four checks and payed the amount of the checks to accused (R 34,36). Boeckman also testified that on the evening of 25 November accused was playing the slot machines in the club, and had some beer or ale to drink (R 37,38).

On 25 November 1947 Miss Virginia Williams, an employee of the Post Exchange, Camp Lee, cashed a check drawn on the First National Iron Bank, Rockaway, New Jersey, in the amount of \$25.00 payable to cash and bearing the signature "Edward P. Kelly." Miss Williams cashed a check identical in all respects, except the date, the following day (R 40). She identified Prosecution's Exhibits 11 and 12 as the two checks which she cashed (R 40). Miss Williams testified that she always required identification of persons cashing checks and did so in connection with her cashing of the two checks in question (R 39,40).

Mr. William J. Richards, Assistant Cashier and Branch Manager, First National Iron Bank of Morristown, New Jersey, Rockaway Branch, Rockaway, New Jersey, testified that the checks designated Prosecution's Exhibits 7,8,9,10,11 and 12 were received at the bank on December 2 and 3 and were returned on December 4 because accused did not have an account in the bank. Mr. Richards had had dealings with accused in the matter of

loans but to his knowledge accused had never had a checking or savings account in the bank, had never made any arrangements to cover any checks he might write against the bank, and he had made no arrangements to cover the checks in question (R 42,43). He also stated that accused might have an account in the main office in Morristown (R 43).

On 27 December 1947 William T. Campbell, CID Agent, interviewed accused at the Station Hospital, Camp Lee, Virginia. Accused was informed of his rights and his responses to Campbell's questions were voluntary. In the course of the questioning Campbell showed accused the six checks designated at the trial as Prosecution's Exhibits 7,8, 9,10,11 and 12 (R 46), and the following colloquy pertaining to the checks ensued:

- "31. Q. Do you recognize these six checks?  
A. Yes.
32. Q. Would you tell me about those checks, Captain Kelly?  
A. What about them?
33. Q. How you happened to draw them. Is there a reason for it?  
A. I was down to the Officers' Club I believe on the 25th of November. I was having some ale. I started to play the quarter slot machine. I had about \$48.00 in my pocket to go home with. I played a little while and quit and had a few more ales and started to play again. It hit once and I walked over to quit and cash in my quarters. Mr. Davis kidingly passed a remark about whether I was going to quit. I then walked back to the machine and started to play, lost those and kept changing the rest of the money in my pocket and lost all of that. I then got the stupid idea of writing out a check in the hopes of getting enough back to go home on. I put that in the machine and lost that. Then I asked for permission to cash another one. It was OK'd; I lost that, then another one and lost that. It was then about \$133.00, so I quit.
34. Q. You put \$133.00 in the machines?  
A. Without a hit, in the same machine. The next day I wondered how I was going to get home, so I could straighten out this matter, so I cashed a check at the PX. I tried once more that night and lost that one, so I quit. The next day I cashed one check at the PX and one at the Officers' Club for enough money to go home, in the hopes of seeing the necessary person who could clear up this matter for me." (Pros Ex 13)

On 1 October 1947 accused was appointed to pick up checks for his class on pay day (R 18; Pros Ex 3). On 1 December Captain Newton D.

Browning, Officer in Charge of the Officers' Section, Headquarters 9135 Technical Service Unit, Camp Lee, Virginia, received from the Finance Office checks for the officers attending the Quartermaster School. The checks were then segregated according to classes and a roster was made of each class by Corporal James F. Forbes (R 18). Accused received the checks for his class from Corporal Forbes, and signed the roster which Forbes had prepared. The list showed the names of officers for whom there were treasury checks and the amounts of each check. Listed on the roster were the names William B. Young and Carl B. Acton and the amounts listed beside their names, respectively, were \$470.50 and \$648.21. Both Forbes and Captain Browning identified Prosecution's Exhibits 1 and 2 as the Young and Acton checks and they were admitted in evidence (R 19,22,23). Accused received these checks from Forbes (R 22,23; Pros Ex 4). The checks in question represented pay for the month of November (R 20).

On 1 December George G. Davis, manager of the Citizens' National Bank, Camp Lee, Virginia, was cashing checks in the Finance Office, Camp Lee, Virginia, and among the checks he cashed were two treasury checks, one payable to "Carl B. Acton, Lt Col, QM-Res" in the amount of \$648.21, and one payable to "William B. Young, Major, QMC" in the amount of \$470.50. He identified Prosecution's Exhibits 1 and 2 as these checks (R 24,25). Each check had an indorsement in the name of the payee and each had as a second indorsement the signature "Edward P. Kelly" (R 23, Pros Exs 1 and 2). Carl B. Acton testified that on 1 December 1947 he was on duty at Camp Lee as a Lieutenant Colonel and was attending school in the same class as accused. He did not receive his check for the month of November, and denied that he had signed the name "Carl B. Acton" appearing on the reverse side of the check made payable to the person so designated (Pros Ex 1) and further stated that he had not authorized anyone to sign his name to the check (R 12,14).

William B. Young testified that he had been on active duty at Camp Lee as a Major and had been attending the Quartermaster School since September in the same class as accused. He likewise did not receive a check for his November service and he testified that the signature "William B. Young" appearing on the reverse side of the check made payable to a person of that name was not his signature nor was it authorized by him (R 16).

Accused was interviewed by Reuben H. Van Alst, an Agent of the United States Secret Service, at the hospital at Camp Lee, Virginia, on 21 December. At the time accused gave Van Alst some specimens of his handwriting (R 30; Pros Ex 5). Later accused made a voluntary statement to Van Alst (R 30, Pros Ex 6). In his statement accused admitted that he had received a number of checks from the Officers' Pay Section, Post Headquarters, Camp Lee, Virginia, for the officers of his class at the

Quartermaster School. He cashed his own check and took two checks from the others and "signed the names to which they were made out on the back of the checks," and then signed his own name to the checks. As to the identity of the checks he stated:

"\* \* \* I have been shown photostatic copies of two U.S. Treasurers checks described as follows: (1) No. 44,208, dated at Camp Lee, Va., Nov. 30, 1947, made payable to Carl B. Acton, Lt. Col., QM-Res, in the amount of \$648.21 over symbol No. 213,457, (2) No. 44,260, dated at Camp Lee, Va., Nov. 30, 1947, made payable to William B. Young, Major, QMC, in the amount of \$470.50 over symbol No. 213,457. I recognize these photostats as being copies of the two checks I removed from the group of checks in my possession and to which I signed the names of the payees:\* \* \*. (Pros Ex 6)

He then cashed the two checks at the bank in the Finance Office and left the post. He arrived in Richmond and purchased a ticket for Florida and while waiting for the train mailed the other checks which he had received from the Officers' Pay Section to First Lieutenant Frank J. Lynch. He had been doing considerable drinking during the day. He arrived in Miami, Florida, the following night, remained there for a few days and then went to the West Coast of Florida. On 13 December he purchased a railroad ticket for New York, for the following day. On the night of 13 December his hotel room was ransacked and \$930.00 was missing. On the following day he left for New York arriving on 15 December. He pawned his watch and ring and after pondering his situation for some time he turned himself in to the military police.

Mr. Lon H. Thomas, a Treasury Department handwriting expert testified that he had compared the indorsements appearing on Prosecution's Exhibits 1 and 2, with the handwriting on Prosecution's Exhibit 5, written by accused, and was of the opinion that the indorsements were written by accused (R 32,33). The prosecution introduced in evidence without objection an extract copy of morning report with the following entry: "Re: M/R 1 Dec 47 KELLY Edward P (QMC) O-1584424 1st Lt Dy to AWOL 1030 EST" (R 47; Pros Ex 14). The defense called the court's attention to the fact that the serial number on the morning report was incorrect and offered to stipulate. The law member instructed the Trial Judge Advocate to insert the correct serial numbers on the exhibit (R 47).

#### 4. Evidence for the defense.

Accused after being apprised of his rights elected to testify in his own behalf.

He testified in substance that he cashed the six checks dated 25 and 26 November 1947, knowing that he had no account in the bank but intending to deposit funds to cover the checks; that upon his return to Morristown, New Jersey, he attempted to locate a friend of his to obtain the money but was unsuccessful; that he was afraid to speak to the manager of the bank because he had recently obtained a loan from the bank which was still unpaid; that he did not remember signing the payees' names to the two pay checks on 1 December 1947, or cashing them; that he was worried about home conditions and had been drinking. His daughter had had a tonsillectomy which developed hemorrhages. That condition had, however, cleared up.

He went to Richmond, wandered around the city for a while and bought a railroad ticket to Florida; that when he arrived in Florida he won \$60.00 on the horse races the first day but lost \$100.00 on the horse races the second day; that he sent a letter inclosing three \$100.00 bills to a friend in Morristown, New Jersey, to be delivered to his wife; that he inclosed a note to his wife requesting her to use the money for expenses and send the balance to Colonel Acton and Major Young and try to make arrangements with them for repayment; that he became ill in Florida but did not seek medical attention; that just before he left Florida for New York he had approximately \$930.00, of which \$500.00 was in his suitcase in a hotel room, and the remainder in his pocket; that he remembered being in the bar of the hotel at about 10 o'clock at night but did not remember anything until he woke up in his room the next afternoon and discovered that the \$500.00 in the suitcase was gone, his pockets ripped and all the money gone except a dime; that he used his railroad ticket to return to New York the next day; that upon arriving in New York he pawned his watch and ring for \$10.00; that he attended various movies and finally called the military police and turned himself in; that he was taken to Fort Jay, New York, and from there to Valley Forge General Hospital, Phoenixville, Pennsylvania, where he was placed in a Neuro-psychiatric ward and given an examination; that he was subsequently returned to Camp Lee, Virginia, under guard; that his pay for the month of November 1947 was sufficient to cover the six checks written on 25 and 26 November 1947; that the way in which he happened to select the two officers' pay checks to cash was by taking the top and bottom check; that he knew he had no authority to sign the payees' names to the two checks or to cash them; that he did not intend to defraud; and that he intended to repay those officers (R 48-59,71).

Accused also testified that he enlisted in the Army in 1940 and received an honorable discharge on 20 September 1941. He subsequently received another honorable discharge on 3 January 1943 to accept a commission as a second lieutenant. He received a certificate of service when he was separated in 1945 (R 84,85).

Mrs. Mary Kelly, accused's wife, testified that accused came home at about 3 or 4 o'clock on the morning of 27 November 1947 and was at

home for the weekend. He sat around and did not appear his normal self and did more drinking than usual (R 73,74). He left home on 30 November and Mrs. Kelly next heard from him in a letter from Tampa, Florida. In the letter accused stated he was going to give himself up. She next received a telegram from him in New York just before he gave himself up. She related two incidents in which accused had left home for short periods after drinking (R 76,77). She testified that she and accused had one child, a daughter, whom accused loved very much. The daughter had an operation on 14 November and during that week accused called several times from Camp Lee to ask about her. Mrs. Kelly also stated that although she was in poor health she was working to support herself and their child.

Michael Skivic, Mrs. Kelly's brother-in-law, testified that accused was unable to control himself when drinking (R 80).

First Lieutenant Louis Sokoloff, Medical Corps, testified that he was doing neuropsychiatric work at the Station Hospital, Camp Lee, and that on 21 December he had occasion to examine accused. He found that physically accused looked all right. Otherwise he appeared "somewhat agitated, emotionally retarded, rather unhappy, crying several times, some depression." He had the impression that accused "was not the criminal type personality," but that he was "somewhat immature emotionally and unstable." Lieutenant Sokoloff's examination disclosed nothing that he could diagnose as mental illness and he expressed the belief that accused's depression was within normal limits considering his difficulties.

It was stipulated that if Captain O. B. Douglas, Medical Corps, Station Hospital, Fort Jay, New York, were present to testify in court, his testimony would be in substance as follows:

"That he examined Captain Edward Kelly on 16 December 1947 and this 40 year old white male has been well, no difficulties until he went AWOL and larceny this year and they gave himself up to military police, an officer of the day, it all began by losing money on slot machines. He appears pursued after and displayed definitely a tendency of suicide. Diagnosis; depressive; recommended disposition; transfer to Valley Forge General Hospital." (R 83,84)

Without objection by the prosecution the defense introduced in evidence a report of a Board of Officers convened at Valley Forge General Hospital under the provisions of paragraph 35c, Manual for Courts-Martial. The report which was dated 19 December 1947 expressed the following opinion as to accused's mental status:

"\* \* \* at the time of the alleged offense, so far free from mental defect, disease, or derangement as to be able, concerning

the particular act charged, to distinguish right from wrong and to adhere to the right, except insofar as the ability so to distinguish and the ability so to adhere may have been temporarily interfered with by drunkenness." (Def Ex A)

First Sergeant Victor S. Boeckman recalled as a defense witness testified that once or twice when he observed accused at the bar accused was staring off into space as if his mind was some place else. (R 88).

On rebuttal, however, Sergeant Boeckman testified that on 25 November accused appeared normal and gave no indication of being intoxicated. On 26 November Boeckman saw accused for only a few minutes (R 89,90).

Corporal Forbes testified that accused appeared to be normal when he saw him on 1 December 1947.

Lieutenant Colonel David W. Hassemer testified that on the morning of 1 December 1947 he observed accused cashing three checks in the Finance Office. Colonel Hassemer observed that although accused was not dressed in a very neat manner he did not appear intoxicated (R 90,91).

5. (Charge I, Specifications 1, 2, 3 and 4; forgery and embezzlement of checks). The uncontradicted evidence shows that on 1 December 1947, accused received from the Officers' Section, Headquarters 9135 Technical Service Unit, Camp Lee, Virginia, the November pay checks for the officers of his class at the Quartermaster School pursuant to orders directing him to obtain the checks. He extracted two of the checks, one made payable to Major Young, and the other made payable to Lieutenant Colonel Acton. After indorsing these two checks with the respective payee's name, he cashed them and received therefor the sum of \$1118.71. The evidence clearly establishes the forgeries and embezzlements alleged.

(Charge II, Specifications 1, 2, 3, 4, 5 and 6; making and uttering checks drawn upon a bank in which he had no account). The evidence shows that on 25 and 26 November 1947, accused cashed four checks at the Officers' Club, Camp Lee, Virginia, and two checks at the Post Exchange, Camp Lee. Each check was drawn upon "The First National Iron Bank, Rockaway, New Jersey," in the amount of \$25.00, and each check bore accused's signature as drawer. Accused had no account in the First National Bank of Morristown, New Jersey, Rockaway Branch, Rockaway, New Jersey. The six checks under discussion were received in the latter bank and were returned because of the fact that accused had no account in the bank. It was not shown positively that "The First National Iron Bank, Rockaway, New Jersey, and "The First National Iron Bank of Morristown, New Jersey, Rockaway Branch, Rockaway, New Jersey" were the same bank. In a pre-trial statement and in his testimony accused, however, admitted the fact that he had no account in the bank upon which

the checks under discussion were drawn, but did state that he had made loans from that bank. The manager of the Rockaway Branch of the First National Iron Bank of Morristown, New Jersey, testified that accused had been the recipient of loans from his bank. The conclusion is inescapable that "The First National Iron Bank, Rockaway, New Jersey," and "The First National Iron Bank of Morristown, New Jersey, Rockaway Branch, Rockaway, New Jersey," are one and the same bank, and that the designation used by accused in making his checks sufficiently approximated the correct designation of the bank. The findings of guilty of the Specifications of Charge II, and Charge II, are supported by the evidence.

(Charge III, Specification; absence without leave). The prosecution introduced in evidence an extract copy of morning report of accused's organization at Camp Lee, Virginia, with the following entry:

"Re: M/R 1 Dec 47  
Kelly Edward P (QMC) O-1584424 1st Lt  
Dy to AWOL 1030 EST."

The defense counsel called to the court's attention the fact that the serial number in the entry was not the correct serial number of accused, offered to stipulate as to the correct serial number of accused, and offered no objection to the admission of the extract copy of the morning report in evidence. The law member instructed the Trial Judge Advocate to insert the correct serial number in the extract and this was done. The inclusion of a serial number in a morning report entry is for the purpose of specifically identifying the person to whom the entry pertains. Under the circumstances it is clearly shown that there was no question that the entry in the morning report referred to accused in spite of the insertion of an incorrect serial number in the entry. The extract copy of morning report was, therefore, competent to show that accused absented himself without leave from his organization at Camp Lee, Virginia, on 1 December 1947. The pre-trial statements of accused, his testimony before the court, and other documentary evidence, show that accused, after leaving Camp Lee, went to Florida and thence to New York where he surrendered to the military police on 15 December 1947. The findings of the court that accused absented himself without leave at the place, time, and for the duration alleged in violation of Article of War 61 is supported by the evidence.

6. The sole issue raised by the defense pertains to the statement in the report of the Board of Medical Officers that accused as to the acts charged had the ability "to distinguish right from wrong and to adhere to the right, except insofar as the ability so to distinguish and the ability so to adhere may have been temporarily interfered with by drunkenness." Accused in his testimony asserted that at the times in question he had been drinking. Drunkenness "may be considered as affecting mental capacity to entertain a specific intent where such intent is a necessary element of the offense" (Par 126a, MCM 1928). The issue of drunkenness does not arise as a defense to the offense of

absence without leave as this offense does not require a specific intent in the commission. The other offenses of which accused was found guilty, forgery, embezzlement, and making and uttering checks drawn upon a bank in which he had no account, with intent to defraud, do require a specific intent in their commission.

The evidence shows that on 25 and 26 November 1947 accused cashed 4 worthless checks at the Officers' Club. The person cashing these checks testified that on 25 November when three of the checks were cashed accused appeared normal. This person saw accused for only a few minutes on 26 November when he cashed the other check. It was also shown that accused cashed two other worthless checks at the Post Exchange on 25 and 26 November 1947. The person cashing these checks was not questioned concerning accused's appearance at the time. As to the embezzlement and forgery of two treasury checks the evidence shows that accused appeared normal when he received the treasury checks from Corporal Forbes and also when he cashed the two forged checks. There was thus presented to the court positive evidence that at the time accused uttered three of the worthless checks and at the time he cashed the two forged treasury checks accused appeared normal. In addition accused's voluntary pre-trial statements show beyond peradventure that accused intended to commit the offenses of which he was found guilty. With reference to the issue of drunkenness there was substantial evidence that when the offenses in question were committed accused's mental capacity was not affected by drunkenness.

Accordingly, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all Specifications and Charge I.

7. Records of the Army show that accused is 40 years of age, married, and the father of one child. In civilian life he was variously employed as a bartender, restaurant manager, clerk, and aircraft worker. He enlisted on 21 September 1940. After serving a year he was discharged to the Enlisted Reserve Corps and then called to active duty on 1 January 1942. He attended an Officers Candidate School and was commissioned a second lieutenant on 4 January 1943. He went overseas in 1944, earned four campaign stars, came home and was separated from the Service on 29 November 1945 and accepted a commission in the Officers Reserve Corps. On 20 September 1947 he was called to active duty to attend an Army school at Camp Lee, Virginia. His efficiency ratings of record are uniformly "Excellent." On 18 December 1944 he received a reprimand and forfeiture of \$90.00 of his pay under Article of War 104 for borrowing money from enlisted men.

8. The Board of Review has considered the following letters pertaining to accused: letter to The Judge Advocate General dated 22

January 1948 from The Honorable H. Alexander Smith, United States Senate; letter to The Judge Advocate General dated 24 February 1948 from Mrs. Mary Kelly, wife of accused; and letters to the Secretary of the Army and The Judge Advocate General dated 26 and 16 March 1948, respectively, from Mr. Charles Kelly, brother of accused.

9. 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 as modified by the reviewing authority and to warrant confirmation of the sentence. A sentence to dismissal and confinement at hard labor for three years is authorized upon conviction of Articles of War 93, 96 and 61.

*L. H. Hottelstein*, Judge Advocate

*J. W. Hughes*, Judge Advocate

*Joseph B. Brash*, Judge Advocate

1st Ind

CM 328,910

APR 29 1948

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Edward P. Kelly (01583196), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of the embezzlement and forgery of two treasury checks (Chg I, Specs 1,2,3, and 4); of making and uttering with intent to defraud, 6 checks drawn upon a bank in which he had no account (Chg II, Specs 1,2,3,4,5 and 6); and of absence without leave from 1-15 December 1947 (Chg III, Spec). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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.

On 25 November 1947 accused was on duty as a student at the Quartermaster School, Camp Lee, Virginia, and on that date cashed one check at the Post Exchange in the amount of \$25.00, and three at the Officers' Club each in the amount of \$25.00. The following day he cashed two additional checks in the same amount, one at the Officers' Club and one at the Post Exchange. All the checks bore accused's signature and all were drawn on the First National Iron Bank, Rockaway, New Jersey, in which bank accused did not have an account.

Accused was responsible for collecting the pay checks for the officers who were members of his class at the Quartermaster School. On 1 December 1947 accused collected the pay checks for the month of November. He extracted two of the checks, forged the name of the payee on each check and cashed the two checks, receiving therefor the sum of \$1118.71. Accused, on the same day, absented himself without leave, made a trip to Florida, and surrendered himself to the Military Police in New York, New York, on 15 December 1947.

In a voluntary pre-trial statement accused admitted the commission of the offenses of which he was found guilty, but as a witness in his own behalf he stated that he could not recall the forgery and cashing of the two treasury checks. He attributed his offenses to domestic troubles, and more specifically to the illness of his daughter who in November 1947 had undergone a tonsilectomy which caused hemorrhages.

CM 328,910

First Lieutenant Louis Sokoloff, Medical Corps, testified that upon examination of accused on 21 December he found that accused appeared "somewhat agitated, emotionally retarded, rather unhappy, crying several times, some depression." Lieutenant Sokoloff had the impression that accused "was not the criminal type personality," but that he was "somewhat immature emotionally and unstable". The examination disclosed nothing that could be diagnosed as mental illness.

According to the stipulated testimony of Captain O. B. Douglas, M.D., accused displayed "a tendency of suicide" on the day following his surrender. He was transferred to Valley Forge General Hospital, and upon examination by a Board of Medical Officers at that hospital was found to be mentally responsible except insofar as drunkenness may have temporarily interfered with his ability to distinguish right from wrong and adhere to the right. Accused does not appear to have been drunk at the time of his offenses.

4. The accused is 40 years of age, married, and the father of one child. In civilian life he was variously employed as a bartender, restaurant manager, clerk, and aircraft worker. He enlisted on 21 September 1940. After serving a year he was discharged and assigned to the Enlisted Reserve Corps and then called to active duty on 1 January 1942. He attended an Officers Candidate School and was commissioned a second lieutenant on 4 January 1943. He went overseas in 1944, earned four campaign stars, came home and was separated from the service on 29 November 1945. Upon separation he accepted a commission in the Officers Reserve Corps. On 20 September 1947 he was called to active duty to attend an Army school at Camp Lee, Virginia. His efficiency ratings of record are uniformly "Excellent". On 18 December 1944 he received a reprimand and forfeiture of \$90.00 of his pay under Article of War 104 for borrowing money from enlisted men.

5. The following letters pertaining to accused have been considered: letter to The Judge Advocate General, dated 22 January 1948, from The Honorable H. Alexander Smith, United States Senate; letter to The Judge Advocate General, dated 24 February 1948, from Mrs. Mary Kelly, wife of accused; and letters to the Secretary of the Army and The Judge Advocate General, dated 26 and 16 March 1948, respectively, from Mr. Charles Kelly, brother of accused. Correspondence between accused and the Army Judge Advocate, Headquarters Second Army, indicate that accused has made restitution in a considerable amount of the obligations which he incurred by his offenses.

6. I recommend that the sentence as modified by the reviewing authority be confirmed and ordered into execution and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

(314)

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

CM 328,910

2 Incls  
1 Record of trial  
2 Form of action



THOMAS H. GREEN  
Major General  
The Judge Advocate General

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( GCMO 98, 6 May 1948 ).

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

JAGQ - CM 328924

8 MAR 1948

UNITED STATES )

FIFTH AIR FORCE

v. )

Privates JAMES E. FLOYD )  
 (RA 14221108) and WILLIAM R. )  
 WOOD (RA 16215381), both of )  
 13th Air Supply Squad., APO )  
 704, and Private WALLACE A. )  
 STONE (RA 15211311), and )  
 Private First Class CARLOS )  
 J. LAWSON (RA 14144780), )  
 both of 4th Air Supply Squad., )  
 APO 704. )

Trial by G.C.M., convened at  
 Tachikawa AAB, Japan, 4 Decem-  
 ber 1947. All: Dishonorable  
 discharge and total forfeitures.  
 Lawson: Confinement for two (2)  
 years. Floyd, Wood and Stone:  
 Confinement for two (2) years  
 and six (6) months.  
 All: Disciplinary Barracks

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

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The accused were tried upon the following Charges and Specifications:

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

Specification 1: In that, Private James E. Floyd and Private William R. Wood, both of 13th Air Supply Squadron, and Private Wallace A. Stone, 4th Air Supply Squadron, acting jointly and in pursuance of a common intent, did, at Tokyo, Honshu, Japan, on or about 3 June 1947, by force and violence and putting him in fear, feloniously take, steal and carry away from the person of Seiki Matsuzaki, about 500 yen, lawful money of Japan, the property of the said Seiki Matsuzaki, value about \$10.00.

Specification 2: In that Private James E. Floyd and Private William R. Wood, both of 13th Air Supply Squadron, and Private Wallace A. Stone, 4th Air Supply Squadron, acting jointly and in pursuance of a common intent, did, at Tokyo, Honshu, Japan, on or about 3 June 1947, by force and violence and by putting him in fear, feloniously take,

steal and carry away from the person of Gu Kanshaku, about 1000 yen, lawful money of Japan, the property of the said Gu Kanshaku, value about \$20.00.

Specification 3: In that Private James E. Floyd and Private William R. Wood, both of 13th Air Supply Squadron and Private Wallace A. Stone and Private First Class Carlos J. Lawson, both of 4th Air Supply Squadron, acting jointly and in pursuance of a common intent, did, at Tokyo, Honshu, Japan, on or about 5 June 1947, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Toku Goto, about 6000 yen, lawful money of Japan, the property of the said Toku Goto, value about \$120.00.

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

Specification 1: In that Private James E. Floyd and Private William R. Wood, both of 13th Air Supply Squadron and Private Wallace A. Stone, 4th Air Supply Squadron, acting jointly and in pursuance of a common intent, did, at Tokyo, Honshu, Japan, on or about 5 June 1947, wrongfully strike Kanas Kawata on the face and head with their fists.

Specification 2: In that Private James E. Floyd and Private William R. Wood, both of 13th Air Supply Squadron, and Private Wallace A. Stone and Private First Class Carlos J. Lawson, both of 4th Air Supply Squadron, acting jointly and in pursuance of a common intent, did, at Tokyo, Honshu, Japan, on or about 5 June 1947, wrongfully strike Mitsuko Goto on the head with their hands and fists.

Each accused pleaded not guilty to the Charges and all Specifications. Accused Floyd was found guilty of Specifications 1, 2, and 3 of Charge I and Charge I, and not guilty of all other Specifications and Charge II. Accused Wood was found guilty of Specification 3 of Charge I and Charge I,

and not guilty of all other Specifications and Charge II. Accused Stone was found guilty of Specifications 1, 2, and 3 of Charge I and Charge I, and not guilty of all Specifications of Charge II and Charge II. Accused Lawson was found guilty of Specification 3 of Charge I and Charge I, and not guilty of Specification 2 of Charge II and Charge II. Evidence of two previous convictions of accused Wood were introduced. Accused Floyd, Wood, and Stone were sentenced to be dishonorably discharged the service; to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 10 years. Accused Lawson 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 5 years. The reviewing authority approved "only so much of the finding of guilty of Specification 1 of Charge I as involves finding that the accused, Private James E. Floyd and Private Wallace A. Stone, acting jointly and in pursuance of a common intent did, at the time and place alleged, feloniously take, steal and carry away 500 yen, value about \$10.00, the property of said Seiki Matsuzaki, \* \* \* only so much of the finding of guilty as to Specification 2, of Charge I as involves finding that the accused Private James E. Floyd did, at the time and place alleged, feloniously take, steal and carry away 1000 yen, value about \$20.00, the property of Gu Kanshaku, \* \* \*" and disapproved the finding of accused Stone guilty as to Specification 2 of Charge I. In accordance with the limitation upon the sentences resulting from an earlier trial of the same four accused, of which the present case is a rehearing, the reviewing authority approved only so much of the sentence as to accused Lawson as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 4 years, and only so much of the sentences as to accused Floyd, Wood, and Stone as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 5 years. The reviewing authority further reduced the period of confinement as to accused Lawson two (2) years, reduced the period of confinement as to accused Floyd, Wood and Stone to two (2) years six (6) months, designated the Branch, United States Disciplinary Barracks, Camp Cook, California, 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 under Article of War 50 $\frac{1}{2}$ .

3. The question initially presented for determination by the Board of Review concerns the legal effect of the ruling of the law member hereinafter set forth. One or more confessions of each accused were received in evidence over the objection of the defense on the grounds that the confessions were obtained under duress (R. 32, 35, 39). Following the reading of the confessions to the court, the defense counsel stated that accused Floyd desired to take the witness stand for the limited purpose of showing that his confessions were obtained under duress (R. 41), whereupon the Law Member stated:

"Any evidence relating to the confessions at this point is irrelevant. The confessions have been admitted. There is nothing that the defense can introduce at this point."

Immediately thereafter, the prosecution introduced Master Sergeant Nelson G. Copp as a witness in rebuttal "\* \* \* for the sole purpose to clearly indicate that each accused had been advised of their rights all along." (R. 42) After Sergeant Copp had finished testifying the Law Member stated:

"While it would be improper for the accused to take the stand at the present time to testify relative to the confessions, the court does not want the rights of the accused to be denied in any way whatsoever. In the opinion of the law member, to take the stand and testify solely as to the confessions at the present time would be irrelevant and, as the rule, they cannot do it. Yet, on consideration, I think it would be better for the record if these four accused be permitted, if they so choose, that they take the stand and testify as to the circumstances surrounding the taking of the confessions on the basis there may have been some misunderstanding as to what their rights were relative to the confessions. While the testimony on the confessions cannot be taken into consideration, and cannot be properly and legally admitted into evidence in this court, the opinion of the court is that if they desire to take the stand, it may well be considered by the reviewing authority." (R. 43) (Underscoring supplied.)

On behalf of the accused the defense counsel then stated that each accused elected to remain silent (R. 43). The court was thereafter closed and upon reopening the following occurred:

"DEFENSE: I would like, for the sake of the record, to have each individual indicate his preference in regards to any statement pertaining to the examination of the evidence pertaining to the confessions.

"DEFENSE: Private Floyd, do you have anything to say?

"ACCUSED FLOYD: No, sir.

"DEFENSE: Private Wood, do you have anything to say?

"ACCUSED WOOD: No, sir.

"DEFENSE: Private Lawson, do you have anything to say?

"ACCUSED LAWSON: No, sir.

"DEFENSE: Private Stone, do you have anything to say?

"ACCUSED STONE: No, sir.

"LAW MEMBER: The defense counsel indicated previously that the accused desired to take the stand and testify solely as to circumstances surrounding the taking of the confessions. Now you say that they do not. (Addressing accused): Do you so desire now to take the stand and testify under oath solely to the circumstances surrounding the taking of these confessions? Private Floyd?

"ACCUSED FLOYD: No, sir.

"LAW MEMBER: Private Stone?

"ACCUSED STONE: No, sir.

"LAW MEMBER: Private Lawson?

"ACCUSED LAWSON: No, sir.

"LAW MEMBER: Private Wood?

"ACCUSED WOOD: No, sir.

"DEFENSE: The defense rests." (R. 44)

It is thus manifest that the law member, by ruling that it would be irrelevant and not proper or permissible for any of the four accused to take the witness stand for the purpose of testifying as to the manner in which the confessions were procured, unequivocally denied to each accused a right long recognized. In this connection the Board of Review in CM 275738, Kidder; 48 BR 145, quoted the following excerpt from Grantello v. United States, 3 F 2nd 117, viz.

"It is a fundamental principle of our government, repeatedly emphasized and applied by the Supreme Court, that the provisions of its Constitution and statutes for the protection of the rights and privileges of its citizens accused of crimes shall not be limited, qualified, or frittered away, but shall be fairly and broadly construed and enforced for their protection."

and the Board then stated:

"This decision clearly recognizes the right of an accused to testify for a limited purpose provided he does not testify concerning facts relative to his guilt or innocence. Similarly the Board of Review has recognized the right of the accused to testify for the limited purpose of attacking the alleged voluntary character of his confession."

On the basis of the same authority the Board of Review in the recent case of CM 326450, Baez (November 1947), said:

"It has been uniformly held by the Board of Review that an accused has the right to testify for a limited purpose without being subject to examination regarding the merits of the case and to refuse him such privilege constitutes fatal error."

In fact it has been held by the Board of Review that for the court to limit the cross-examination of the defense on the issue of whether a confession was voluntary constitutes highly prejudicial error (CM 206090 Koehler (8 BR 249-254)).

It is equally clear in the present case that each accused had an unqualified right to testify for the courts consideration, as well as for subsequent consideration by the reviewing authority, concerning the involuntary character of his confession. The matter being one of substantive right rather than one of procedure, untimeliness on the part of the defense to offer accuseds' testimony for such limited purpose was of no consequence. The ruling of the law member was therefore erroneous and was not in any manner remedied by the fact that the confessions of each accused were in evidence prior to the offer of the testimony of accused by defense counsel. From a careful examination of the record of trial subsequent to such ruling, including that part of the record relating to the polling of each accused by the defense counsel and by the law member relative to his rights as a witness, it is only reasonable to infer that each accused elected to remain silent because of the law member's erroneous ruling that his testimony would be considered only by the reviewing authority and not by the court.

This ruling of the law member precluded from the court's consideration proper evidence attendant to the taking of the confessions and it cannot, therefore, be said that the court made a determination of fact that the confessions were voluntary. To the contrary, it is indicated by the record, through questions posed and statements made by the defense counsel that the confessions were obtained through duress. The right of any accused before a court-martial to have an involuntary confession excluded from evidence stems from constitutional guarantees and from Article of War 24, just as do other similar rights against self-incrimination. As stated by the Board of Review in CM 275738, Kidder, 48 BR 145, supra:

"The right of an accused soldier against self-incrimination is specifically protected by the provisions of Article of War 24 which are as follows:

'No witness before a military court, \* \* \* shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.'

"This same right is safeguarded by the provisions of the fifth amendment of the United States Constitution which are in part, as follows: 'No person \* \* \* shall be compelled in any criminal case to be a witness against himself \* \* \*'.

"So obnoxious to the law is the use of a forced confession that the Supreme Court of the United States has stated that:

'The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with government dedicated to an opposite

policy; governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody and wring from them confessions, by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.' (Ashcraft v. Tennessee, 88 Law Ed. 858)."

Of similar import is the language in CM 328584, Yakavonis (February 1947) wherein the Board of Review stated:

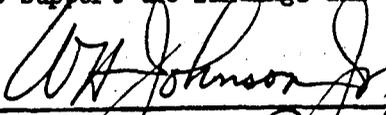
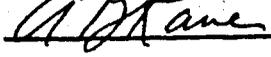
"The Supreme Court of the United States has on numerous occasions expressed its views as to the fatally injurious effect upon criminal proceedings in Federal, civil and state courts of the reception in evidence of involuntary confessions obtained by duress.

\* \* \* \*

"Consequently, under the doctrine enunciated by the Supreme Court in the above decisions the use of a confession obtained by force would violate the constitutional guarantee against self-incrimination and constitute a denial of due process which cannot be cured by other clear or compelling evidence of guilt, Bram v. United States; Lyons v. Oklahoma; Kotteakos v. United States; Lee v. Mississippi; Haley v. Ohio, *supra*. This would seem to be a logical extension of the principle set forth in CM 312517, Kosyter et al., 62 BR 195, 200; CM 326450, Baez, 1947."

Accordingly, in the instant case, it is clear that the ruling of the law member concerning the right of each accused to testify as to the voluntary or involuntary character of his confession was erroneous; that such ruling was not retracted or legally nullified by the subsequent polling of each accused; that when the only testimony which could have created an issue of fact on this point was erroneously excluded by such ruling there could not conceivably have been a factual determination by the court that such confessions were voluntary (CM 192609, Hulme, 2 BR 9); that as a result of the erroneous ruling and receipt in evidence of the confessions, the right of each accused against self-incrimination as guaranteed by Article of War 24 was violated; and that a violation of such safeguard constituted error so fundamental that it injuriously affected the substantial rights of accused within the contemplation of Article of War 37 and is fatal notwithstanding the character of other evidence of record.

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

  
 \_\_\_\_\_, Judge Advocate  
  
 \_\_\_\_\_, Judge Advocate  
  
 \_\_\_\_\_, Judge Advocate

(322)

MAR 19 1948

JAGQ - CM 328924

1st Ind

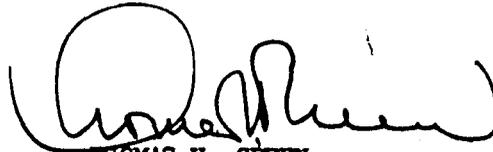
JAGO, Dept. of the Army, Washington 25, D.C.

TO: Commanding General, Fifth Air Force, APO 710, c/o Postmaster,  
San Francisco, California.

1. In the case of Privates James E. Floyd (RA 14221108) and William R. Wood (RA 16215381), both of 13th Air Supply Squadron, Private Wallace A. Stone (RA 15211311) and Private First Class Carlos J. Lawson (RA 14144780), both of 4th Air Supply Squadron, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and sentence as to each accused and for the reasons stated therein, recommend that the findings of guilty and the sentences be disapproved. Upon taking this action you will have authority to direct a rehearing.

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

(CM 328924).



THOMAS H. GREEN  
Major General  
The Judge Advocate General

✓ 1 Incl  
Record of trial

11087

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

(323)

20 APR 1948

JAGH CM 328930

UNITED STATES )

1ST CAVALRY DIVISION )

v. )

Private First Class Robert V. Williams (RA 19276787), Headquarters and Headquarters Troop, 8th Cavalry Regiment. )

Trial by G.C.M., convened at Headquarters 2d Cavalry Brigade, 17 December 1947. Dishonorable discharge (suspended) and confinement for two (2) 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 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 of voluntary manslaughter but legally sufficient to support findings of guilty of involuntary manslaughter and the sentence. 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private First Class Robert V. Williams, Headquarters and Headquarters Troop 8th Cavalry did, at Tokyo, Japan, on or about 12 October 1947, willfully, feloniously, and unlawfully kill Naka Iida, a Japanese female, by hitting her with a GHQ bus Number 123, which he was driving.

Accused pleaded not guilty to and was found guilty of the Specification and the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of two years. One previous conviction was considered by the court. The reviewing authority approved the sentence, ordered it duly executed, but suspended the execution of that portion thereof adjudging 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 result of the trial was promulgated by General Court-Martial Orders No. 10, Headquarters 1st Cavalry Division, APO No. 201, dated 23 January 1948.

3. Evidence for the prosecution.

The evidence shows that on the afternoon of 12 October 1947 after accused and two other American soldiers had left a beer hall at "Shibuya," Japan, the former, who was under the influence of liquor, flagged a bus and he and his companions boarded it. Shortly thereafter the bus developed motor trouble and the driver and a mechanic, both Japanese, got out to repair it. Accused then took the driver's seat, started the motor and drove the bus. Accused proceeded to drive at a high rate of speed and one of his companions pleaded with him to let the Japanese mechanic drive. One of the soldiers turned off the ignition and threw the bus out of gear in an effort to stop the vehicle but accused again turned on the ignition, put the bus in gear and continued to drive. While accused was driving the vehicle it struck an elderly Japanese woman identified as Naka Iida (R 6,8,10,11,13-15,19,22). When the bus struck the woman its speed was estimated to be 25 to 35 miles per hour and 60-70 kilometers per hour (R 8,11,18,19). At the place where the accident occurred, two street cars had stopped and many people were "standing around." The elderly woman was "one of the crowd right in front" (R 14). The road was very narrow and the woman was "trying to adjust her 'geta'" (R 16-18). She straightened up just before being struck by the bus (R 20-21). As a result of injuries sustained the woman died the same day (R 6,7,22). The injuries consisted of "fracture of the auricle and fracture of second, third, fourth and fifth ribs and inner bleeding resulted" (R 22). A medical witness testified that in his opinion the cause of death was "inner bleeding as a result of contusions" (R 22).

4. Evidence for the defense.

Accused testified that he was 18 years of age and had been drinking beer from about noon or 1:00 p.m. until about 4:00 p.m. on 12 October 1947. When he left the beer hall he was "under the influence of alcohol." He further testified that he drank very little before entering the Army, and that he had not driven an automobile very much when in the United States. He had driven "between six months and a year" in California, with a "learner's permit" but he had no license. He had "flunked" the driver's test and "was waiting" to take it again (R 23,24).

5. Accused was charged with and was found guilty of "willfully, feloniously and unlawfully" killing a human being.

The Manual for Courts-Martial, 1928, defines manslaughter as follows:

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

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

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, not likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law." (MCM, 1928, par 149a) (underscoring supplied).

Voluntary manslaughter is intentional homicide and possesses all of the elements of the crime of murder except that of malice aforethought. Involuntary manslaughter, on the other hand, is unintentional homicide, which occurs in the commission of an unlawful act less than a felony and not likely to endanger life or by reason of culpable negligence committed in performing a lawful act.

There can be no doubt that accused was charged with and found guilty of voluntary manslaughter since the word "willfully" appears as an allegation of the Specification.

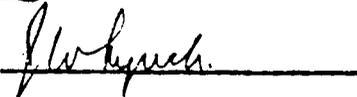
Bouvier's Law Dictionary (Vol 2, p 3454) states that in an indictment "willfully" means intentionally. It implies that the act is done knowingly and of stubborn purpose, but not with malice (State v. Swain, 2 S.E. 68). A willful act is one that is done knowingly and purposely, with the direct object in view of injuring another (Hazle v. Southern Pacific Company, 173 Fed 431). It is synonymous with intentionally, designedly, without lawful excuse, and, therefore, not accidentally. (Miller v. State, 130 Pac 813).

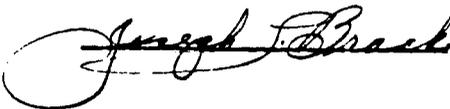
The evidence shows that accused while, under the influence of intoxicating liquor, drove a motor vehicle without authority, at a rate of speed estimated to be 25 to 30 miles per hour or 60 to 70 kilometers per hour, and while so driving he struck a Japanese national who died as a result of the injuries received. This death, therefore, resulted from his unlawful act of driving a motor vehicle in a culpably negligent manner while under the influence of intoxicating liquor. There is nothing in the record of trial indicating an intention or purpose to strike the victim, nor is there any evidence present from which willfulness, as defined above, can be inferred. The element of willfulness necessary for a conviction of voluntary manslaughter being absent, the record of trial is legally sufficient to sustain only a finding of guilty of the lesser included offense of involuntary manslaughter, which is a felonious and unlawful killing without the element of willfulness required for voluntary manslaughter (CM 234896, Nieder, 21 ER 209).

The sentence is within the maximum limit for involuntary manslaughter (MCM, 1928, par 104c) and therefore legal.

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 finding of guilty of the Specification of the Charge as finds that accused did, at the time and place alleged, feloniously and unlawfully kill one Naka Iida, a Japanese female, by hitting her with a GHQ bus number 123, which he was driving, legally sufficient to support the finding of guilty of the Charge and the sentence.

 \_\_\_\_\_, Judge Advocate

 \_\_\_\_\_, Judge Advocate

 \_\_\_\_\_, Judge Advocate

JAGH CM 328930

1st Ind

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

APR 26 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$  as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Private First Class Robert V. Williams (RA 19276787), Headquarters and Headquarters Troop, 8th Cavalry Regiment.

2. 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 alleging voluntary manslaughter as finds the accused guilty of involuntary manslaughter. I concur in that opinion and recommend that so much of the finding of guilty of the Specification of the Charge as involves a finding of guilty of the word "willfully" be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of the findings 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 104, 6 May 1948 )



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

(329)

19 MAR 1948

JAGH CM 328967

UNITED STATES	)	HEADQUARTERS COMMAND
	)	EUROPEAN COMMAND
v.	)	
First Lieutenant RICHARD J.	)	Trial by G.C.M., convened at
FRANZ (O-1306831), Infantry.	)	Frankfurt-am-Main, Germany, 9
		January 1948. Dismissal and
		total forfeitures.

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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, on a rehearing, upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Richard J. Franz, 7702 Headquarters and Service Battalion, Headquarters Command, European Command, then of 41st Engineer General Service Regiment, did without proper leave, absent himself from his place of duty at Goeppingen, Germany, from about 31 July 1946 to 21 May 1947.

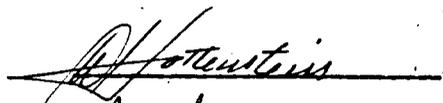
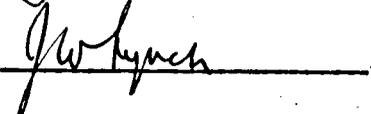
He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved only so much of the sentence as involves dismissal and forfeiture of all pay and allowances due or to become due and forwarded the record of trial for action pursuant to Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Headquarters Command, European Command Judge Advocate, dated 9 February 1948.

4. Records of the Army show that accused is 29 years of age and divorced. He is a high school graduate and had 2½ years in college.

In civilian life he was employed as a shipping clerk. He had enlisted service from 17 March 1941 to 5 January 1943 when he was commissioned a Second Lieutenant. He was promoted to First Lieutenant on 16 August 1945. He served in the Aleutians from 2 June 1943 to 18 April 1944 and has served in the European Theater since 15 July 1944. In the latter theater he had extensive combat service and is authorized to wear two combat participation stars, the Bronze Star Medal for exemplary conduct in combat, the Distinguished Unit Badge, the French Croix de Guerre, and the Combat Infantry Badge. His efficiency ratings of record are as follows: satisfactory (1), very satisfactory (4), excellent (7), and superior (2).

5. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed. 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 to dismissal and forfeiture of all pay and allowances due or to become due is authorized upon conviction of a violation of Article of War 61.

 \_\_\_\_\_, Judge Advocate  
 \_\_\_\_\_, Judge Advocate  
 \_\_\_\_\_, Judge Advocate

JAGH CM 328967

1st Ind

WAR 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 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 Richard J. Franz (01306831), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from 31 July 1946 to 21 May 1947 in violation of Article of War 61 (Chg, Spec). 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 only so much of the sentence as involves dismissal and forfeiture of all pay and allowances due or to become due, and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the review of the Headquarters Command, European Command Judge Advocate, which was adopted in the accompanying opinion of 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 approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

On 22 July 1946 by Special Orders Number 166, Headquarters Third Infantry Regiment, accused was transferred from the 30th Infantry Regiment to the 41st Engineer General Service Regiment, the effective date for change in the morning reports of the two organizations concerned being 31 July 1946. Testimony of officers who were members of the 41st Engineer General Service Regiment from 31 July 1946 to its deactivation at the end of December 1946, shows that accused never reported to that organization and did not have permission to remain away. For a few days in the early part of August 1946 accused was a patient in a civilian hospital in Kassel, Germany, and in the succeeding three months was seen in the vicinity of Kassel by members of the United States military establishment. On 21 May 1947 accused went to Headquarters, European Command, seeking permission to marry his German fiancée. At this time he admitted to Captain Lynn C. Vermillion that he was absent without leave and he was taken into custody. In his voluntary pre-trial statement accused substantially admitted the offense alleged. He stated that prior to his transfer he had sought civilian employment with the Post Exchange and had been promised such employment upon his separation from the service. His plans for separation did not materialize and he was told

sometime in September 1946, that he would have to report to the 41st Engineer General Service Regiment to which organization he admitted he had been on orders to report. At this time a child which accused had had by a German girl became ill and accused chose to stay with the child and its mother as winter was coming on and the mother was without assistance.

4. The accused is 29 years of age and divorced. He is a high school graduate and had 2½ years in college. In civilian life he was employed as a shipping clerk. He had enlisted service from 17 March 1941 to 5 January 1943 when he was commissioned a Second Lieutenant. He was promoted to First Lieutenant on 16 August 1945. He served in the Aleutians from 2 June 1943 to 18 April 1944 and has served in the European Theatre since 15 July 1944. In the latter theater he had extensive combat service and is authorized to wear two combat participation stars, the Bronze Star Medal for exemplary conduct in combat, the Distinguished Unit Badge, the French Croix de Guerre, and the Combat Infantry Badge. His efficiency ratings of record show one rating of satisfactory, four very satisfactory, seven excellent and two superior.

5. I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

6. Inclosed is a form of action designed to carry the foregoing recommendations into effect, should such recommendations 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 90, 20 April 1948).

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

(333)

JAGK - CM 329008

19 APR 1948

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

v. )

Captain EDWARD A. JENSEN )  
(O-572150), Air Corps )  
4 )

HEADQUARTERS EASTERN PACIFIC WING  
PACIFIC DIVISION - AIR TRANSPORT COMMAND

Trial by G.C.M., convened at Fairfield-Suisun Army Air Field, California, 6, 7 and 8 January 1948. Dismissal, to pay to United States a fine of \$1,000, and confinement for five (5) 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 61st Article of War.

Specification: In that Captain Edward A Jensen, Headquarters Eastern Pacific Wing (1504th Army Air Forces Base Unit), Pacific Division, Air Transport Service, Fairfield-Suisun Army Air Field, California, did, without proper leave, absent himself from his station at 1504th Army Air Forces Base Unit, Fairfield-Suisun Army Air Field, California, from about 0800, 12 November 1947, to about 1130 13 November 1947.

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

Specification 1: In that Captain Edward A Jensen, \*\*\*, with intent to defraud the Finance Officer, 1504th Army Air Forces Base Unit, Fairfield-Suisun Army Air Field, California, unlawfully pretend to the said Finance Officer, that his mother, Mrs W F Johnson was dependent upon him, the said Captain Edward A Jensen, wholly for her support, well-knowing that said pretenses were false, and by means thereof, did on or about 24 September 1947, fraudulently obtain from the said Finance Officer, the sum of one hundred eleven dollars and seventy cents (\$111.70).

Specifications 2 and 3 of Charge III are identical with Specification 1 thereof with the following exceptions:

<u>Spec.</u>	<u>Amount obtained</u>	<u>Date</u>
2	\$111.00	30 Sept 1947
3	\$111.70	31 Oct 1947

Specification 4: In that Captain Edward A Jensen, \*\*\*, did, from about 5 September 1947 to about 11 November 1947, at Room 705, Hotel Governor, San Francisco, California, knowingly, willfully and wrongfully reside with Duane W Ricketts, a homosexual.

Specification 5: In that Captain Edward A Jensen, \*\*\*, did, between August 1946 and May 1947, at 1240 Randolph Street, Napa, California, wrongfully and unlawfully take, develop and print nude pictures of Duane W Ricketts, a homosexual.

Specification 7: In that Captain Edward A Jensen, \*\*\*, did, between June 1946 and August 1946, at 1240 Randolph Street, Napa, California, wrongfully and unlawfully sleep and associate with Duane W Ricketts, a homosexual.

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

Specification 1: (Same as Specification 4, Charge III).

Specification 2: (Same as Specification 5, Charge III).

Specification 4: (Same as Specification 7, Charge III).

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

Specification 1: In that Captain Edward A Jensen, \*\*\*, did, at Fairfield-Suisun Army Air Base, California, on or about 31 December 1945 make a claim against the United States, by presenting to Captain W W Clements, Finance Officer at Fairfield-Suisun Army Air Base, California, an officer of the United States duly authorized to pay such claims, a claim in the amount of six hundred sixty four dollars and twenty cents (\$664.20) for rental allowance and subsistence allowance from 1 August 1945 to 31 December 1945, which claim was false and fraudulent, in that from the period of 1 August 1945 to 31 December 1945, the said Captain Edward A Jensen did not have a dependent mother and was entitled only to a subsistence and rental allowance of one hundred seven dollars and ten cents (\$107.10) and no dollars and no cents (\$00.00) respectively, and which claim was then known by the said Captain Edward A Jensen to be false and fraudulent.

Specifications 2 to 15, inclusive, of Additional Charge I are identical with Specification 1 thereof with the exception of the name of the finance officer to whom each claim was presented and the following differences with respect to the date and amount of each claim:

<u>Spec.</u>	<u>Amount Claimed</u>	<u>Amount to which entitled</u>	<u>Date (on or about)</u>
2	\$133.40	\$21.70	31 Jan 1946
3	129.20	19.60	28 Feb 1946
4	132.00	21.00	30 Apr 1946
5	133.40	21.70	31 May 1946
6	132.00	21.00	30 June 1946
7	133.40	21.70	31 July 1946
8	133.40	21.70	31 Aug 1946
9	132.00	21.00	30 Sep 1946
10	133.40	21.70	31 Dec 1946
11	133.40	21.70	31 Jan 1947
12	129.20	19.60	28 Feb 1947
13	133.40	21.70	31 Aug 1947
14	132.00	21.00	30 Sep 1947
15	133.40	21.70	31 Oct 1947

(NOTE: It was alleged that the amounts claimed as shown above were for rental and subsistence allowances for the monthly period ending on the date shown.)

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

Specifications: In that Captain Edward A Jensen, \*\*\*, did, in the Conner Hotel, Napa, California, on or about January 1946, commit the crime of sodomy by feloniously and against the order of nature have carnal connections per os with Lieutenant John W. Franks.

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

Specifications 1 to 3, inclusive, of Additional Charge III are identical with Specification 1 of Additional Charge I with the exception of the name and station of the finance officer to whom each claim was presented and the following differences with respect to the date and amount of each claim:

<u>Spec.</u>	<u>Amount Claimed</u>	<u>Amount to which entitled</u>	<u>Date (on or about)</u>
1	\$133.40	\$21.70	31 Mar 1946
2	\$133.40	\$21.70	31 Oct 1946
3	132.00	21.00	30 Nov 1946

(336)

4	\$133.40	\$21.70	31 March 1947
5	132.00	21.00	30 April 1947
6	133.40	21.70	31 May 1947
7	132.00	21.00	30 June 1947
8	133.40	21.70	31 July 1947

(NOTE: It was alleged that the amounts claimed as shown above were for rental and subsistence allowances for the monthly period ending on the date shown.)

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

Specifications: In that Captain Edward A Jensen, \*\*\*, did, at Napa, California, on or about February 1946, commit offenses contrary to good order and military discipline by holding, caressing and otherwise fondling the penis of First Lieutenant John W. Franks until he the said First Lieutenant John W Franks experienced sexual orgasms and simultaneously permitting the said First Lieutenant John W Franks to hold, caress and otherwise fondle his penis until he the said Captain Edward A Jensen experienced orgasms.

Accused pleaded not guilty to all charges and specifications. He was found guilty of all the charges and specifications upon which he was tried except the words "develop and print" in Specification 5 of Charge III and Specification 2 of Charge IV and except the words and figures "six hundred sixty four dollars and twenty cents (\$664.20)" and "1 August" and "1 August" and "one hundred and seven dollars and ten cents (\$107.10) and no dollars and no cents (\$00.00)" in Specification 1 of Additional Charge I, substituting for the excepted words in that specification the words and figures "one hundred and thirty three dollars and forty cents (\$133.40)" and "1 December" and "1 December" and "twenty one dollars and seventy cents (\$21.70)." No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to pay to the United States a fine of one thousand dollars and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. Records of the Department of the Army show that accused is 35 years of age and is unmarried. He is a high school graduate and attended the University of Detroit, Detroit, Michigan, for two years. In civilian life he was, for a time, assistant manager of a theater and then engaged in hotel work. He was inducted into the Army in June 1942 and served as

an enlisted man until January 1943 when he was appointed and commissioned a second lieutenant in the Army of the United States upon graduation from the Army Air Forces Officer Candidate School. On 13 June 1944, he was promoted to the temporary grade of first lieutenant and on 31 January 1945 to the temporary grade of captain. He served overseas in the Pacific Theater from 2 January 1944 to 25 July 1945, participating in the China Offensive, China Defensive, Luzon, New Guinea, Bismarok Archipelago and Northern Solomons Campaigns. He received the Purple Heart after having been wounded in action over Ceram Island on 10 August 1944. On 2 January 1945 he was awarded the Air Medal and on 2 June 1945 he was awarded an Oak Leaf Cluster to the Air Medal. Both awards were for participation in sustained operational flight missions over hostile territory.

5. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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. A sentence of 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 Articles of War 61, 93, 94 or 96. Penitentiary confinement is authorized upon conviction of the offense of obtaining anything of value by false pretenses (18 USC 467a) or upon conviction of the crime of sodomy per os (D. C. Code, s. 22-107; par 90a, MCM 1928) where the sentence is for more than one year (AW 42).

Charles T. Silsby, Judge Advocate

Gilbert E. LeMay, Judge Advocate

Harley B. Lanning, Judge Advocate

(338)

JAGK - CM 329008

1st Ind

APR 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 May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Edward A. Jensen (O-5721504), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absence without leave from about 0800, 12 November 1947, to about 1130, 13 November 1947, in violation of Article of War 61 (Chg I and Spec); of knowingly, willfully and wrongfully residing with one Duane W. Ricketts, a homosexual, from about 5 September 1947 to about 11 November 1947 at the Hotel Governor, San Francisco, California (Spec 4, Chg III, and Spec 1, Chg IV), of wrongfully and unlawfully taking nude pictures of Duane W. Ricketts, a homosexual, between August 1946 and May 1947 (Spec 5, Chg III, and Spec 2, Chg IV) and of wrongfully and unlawfully sleeping and associating with Duane W. Ricketts, a homosexual, between June 1946 and August 1946 at 1240 Randolph Street, Napa, California (Spec 7, Chg III, and Spec 4, Chg IV), in violation of Articles of War 95 and 96; of sodomy by feloniously and against the order of nature having carnal connections per os with one Lieutenant John W. Franks on or about January 1946 at the Comer Hotel, Napa, California, in violation of Article of War 93 (Add'l Chg II and Spec); and of having committed an offense contrary to good order and military discipline at Napa, California, on or about February 1946, by holding, caressing and otherwise fondling the penis of Lieutenant Franks until Lieutenant Franks experienced sexual orgasms and simultaneously permitting the said Lieutenant Franks to hold, caress and otherwise fondle his penis until accused experienced orgasms, in violation of Article of War 96 (Add'l Chg IV and Spec). Accused was also found guilty of three specifications alleging that he had on 24 September, 30 September and 31 October, 1947, respectively, in violation of the 95th Article of War, obtained certain sums of money from a finance officer under the false pretense that his mother, Mrs. W. F. Johnson, was wholly dependent upon him for support (Specs 1, 2 and 3, Chg III). The sum stated in each specification was equal to one monthly rental allowance of an officer in the third pay period "having a dependent" (\$90.00), plus one additional subsistence allowance (\$21.00 for 30 days month). Accused was further found guilty of twenty-three specifications, in violation of Article of War 94, alleging that for each monthly period from December, 1945 through October, 1947, both months inclusive, he had made false claims against the United States by presenting to various finance officers claims for rental and subsistence allowances in excess of the allowances to which he was legally entitled (Add'l Chgs I and III and their specs). The allowances he was alleged to have claimed in each of

these specifications were equal to a \$90.00 rental allowance plus two subsistence allowances, whereas, it was also alleged, he was entitled to allowances amounting to the value of only one subsistence allowance..

No evidence of any previous conviction was introduced. Accused was sentenced to be dismissed the service, to pay to the United States a fine of one thousand dollars and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Staff Judge Advocate, Headquarters Eastern Pacific Wing, Pacific Division, Air Transport Command, which review was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and the law in the case. 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.

Accused was carried as absent without leave from 0800, 12 November 1947, to 1130, 13 November 1947, on the morning report of his organization. He admitted this unauthorized absence in his testimony on the witness stand, stating as an excuse therefor that he had slept all day on 12 November, having become exhausted by a police interrogation which had taken place on the night of 11-12 November in his room in the Hotel Governor, San Francisco. He had been residing in this hotel room with one Duane Ricketts since 5 September 1947. Accused knew Ricketts had been convicted of a crime involving homosexuality in 1944 and, in a pre-trial statement, accused described Ricketts as "a known homosexual." About "Mothers' Day," 1947, accused took two photographs of Ricketts who was posing in the nude. These photographs were introduced in evidence and accompany the record of trial. Considering the subject matter, the court was clearly warranted in concluding that these photographs were lewd. From the "middle" of 1946 to the "middle" of 1947, accused lived in an apartment in a house at 1240 Randolph Street, Napa, California. Ricketts also resided in this apartment, which at first contained only one bedroom although a second bedroom was finally added. During accused's period of residence at this address, he was seen in bed with Ricketts on many occasions by enlisted men who were visiting there or were calling for accused in the morning hours to take him to work. Accused admitted sleeping with Ricketts "part of the time."

Sometime in February, 1946, accused and First Lieutenant John W. Franks rented a room in the Conner Hotel, Napa, California. During the period the two officers tayed in this room, accused "took" Lieutenant Franks' penis "in his mouth" five or six times. Each time Lieutenant Franks had an orgasm. A "couple of times" accused and Lieutenant Franks performed mutual acts of masturbation, described by Lieutenant Franks as follows: "We jerked each other off." These acts took place in bed and while Lieutenant Franks was intoxicated.

(340)

Photostatic copies of pay vouchers signed by accused and presented by him through financial channels for each monthly period from December, 1945, through October, 1947, both months inclusive, were received in evidence at the trial. Each voucher contains a claim for a \$90 rental allowance and two subsistence allowances for the monthly period concerned. Each voucher is accompanied by a certificate, signed by accused, to the effect that the total gross income of his mother from all sources, including any payment or contribution of other persons, other than his contribution, was nil during the period covered by each voucher.

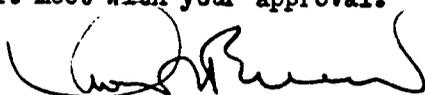
Accused's mother, Mrs. William F. Johnson, formerly Mrs. Minnie C. Jensen, was married to Mr. William F. Johnson on 19 November 1945. Mr. Johnson received a yearly income of from \$900 to \$1000 from various investments and lived with his wife in the latter's home in Ludington, Michigan. He was now retired but was able to and has supported his wife since their marriage, using some of his capital from time to time to do so. Mrs. Johnson, before her marriage, received a \$200 monthly allotment from accused. After her marriage she received an allotment of \$150 a month from him. This sum of \$150 was used to pay an indebtedness incurred by her and accused in a business venture which had failed about the time accused was called into the service in 1942. It was not used for food or other household expenses. The mortgage on her home had been paid off before she started receiving the \$150 monthly allotment.

4. Accused is 35 years of age and is unmarried. He is a high school graduate and attended the University of Detroit, Detroit, Michigan, for two years. In civilian life he was, for a time, assistant manager of a theater and then engaged in hotel work. He was inducted into the Army in June 1942 and served as an enlisted man until 13 January 1943 when he was appointed and commissioned a second lieutenant in the Army of the United States upon graduation from the Army Air Forces Officer Candidate School. On 13 June 1944, he was promoted to the temporary grade of first lieutenant and on 31 January 1945 to the temporary grade of captain. He served overseas in the Pacific Theater from 2 January 1944 to 25 July 1945, participating in the China Offensive, China Defensive, Luzon, New Guinea, Bismarck Archipelago and Northern Solomons Campaigns. He received the Purple Heart after having been wounded in action over Ceram Island on 10 August 1944. On 2 January 1945 he was awarded the Air Medal and on 2 June 1945 he was awarded an Oak Leaf Cluster to the Air Medal. Both awards were for participation in sustained operational flight missions over hostile territory.

5. I recommend that the sentence be confirmed and carried into execution. I further recommend that a U. S. penitentiary be designated as the place of confinement.

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

CM 329008



THOMAS H. GREEN  
Major General  
The Judge Advocate General

2 Incls

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

( GCMO 96, 5 May 1948 ).



(342)

3. The accused's unauthorized absence from his organization for the period indicated in the Specification was established by competent evidence adduced at the trial.

The only question presented for determination by the Board of Review is whether it is obligatory upon the court to advise an accused of his right to plead the statute of limitations when, as in this case, he has been charged with an offense not barred by the statute of limitations but found guilty of a lesser included offense which has been barred by said statute. In this connection the pertinent portion of Article of War 39 provides:

"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: \* \* \*" (Underscoring supplied.)

This same question has been decided by the Board of Review recently in CM 313593 Sawyer, 63 BR 185; CM 315512 Pittman, 65 BR 5; CM 315713 Williams, 65 BR 81; and CM 316772 Martinez (October 1946), and in all cases it has been uniformly held that a failure of the court to advise the accused of his rights in the premises constitutes fatal error. In deciding that the principle of an earlier case, CM 231504 Santo 18 BR 235, should no longer be followed, the Board in CM 313593 Sawyer, supra, stated:

"This rule rests not only on the presumption that defense counsel did his duty, but also on the premise that he was familiar with his duty. Military law, like all law, has its technicalities which only training and practice can thoroughly master. As applied to the facts in the case the assumption is made that defense counsel not only anticipated that the court might find accused guilty of absence without leave, an unusual result since accused was gone just 18 days short of two years, but also that he was aware that the period of limitations for this offense was different than that with which accused was originally charged.

"It is interesting to note that the paragraph of the Manual describing defense counsel's duties (par. 45) states that he shall advise accused of his right to remain silent or testify and yet it is almost the universal practice for the court to instruct an accused as to these rights. If the court feels it necessary to give this instruction relative to a situation which is elementary and which occurs in every trial, what is left of the presumption that defense counsel performed his duty in explaining the rare and recondite point which is involved in this case?

"To be sure the attention of accused and his counsel was directed toward the fact that he had been found guilty of absence

without leave but this was done under such circumstances that there was little real opportunity to plead the bar of the statute. Where an accused is found guilty the prescribed procedure is to open the court for evidence of previous convictions and personal data, close the court, vote on the sentence, open the court, and announce the findings and sentence (MCM, 1928, App. 6, pp. 267, 268). That procedure was followed in this case and immediately thereafter the court adjourned. All that defense counsel knew when the court opened after closing for a vote on the findings was that his client had been found guilty of some offense and, as we have said, he might not unreasonably assume that it was desertion. After the court had fixed the punishment it reopened and then for the first time accused and his counsel learned that he had been found guilty of absence without leave. Immediately after that announcement, however, the court pronounced the sentence and adjourned. Neither accused nor his counsel had any genuine opportunity to ponder the effect of these findings or reflect upon the legal principles which might govern the changed situation. In our opinion, it would be grossly unfair to penalize accused on the basis of an assumption that his failure to plead the statute at that point in the trial was the result of a conscious choice made with full knowledge of his rights.

"It may be argued that the Manual, in stating that in the situation here involved the "court may advise the accused in open court of his right to plead the statute" (MCM, 1928, par. 78a), has laid down the applicable rule and we are bound to follow it. This argument gains force from the fact that in the 1917 and 1921 Manuals it was mandatory upon the court to make such an explanation if the facts in the particular case warranted it. We do not believe, however, that the permissive character of the present rule is a bar to our holding in the present case that the court was bound to advise the accused of his rights. There are situations where the giving of such advice would be an idle gesture. It may appear that the accused is cognizant of his rights. It may be plain that the statute has been tolled. In these circumstances to require that the court give an explanation would only serve to create confusion. In brief, we think that the Manual, in failing to require such advice by the court in all circumstances, does not preclude us from requiring it in those cases where consideration of justice and fairness demand it.

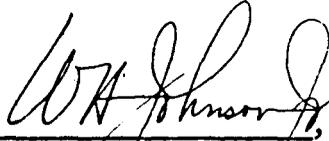
"Doubtless some of the arguments adduced above would have equal application in the case where it appears that the statute has outlawed the original specification brought against accused. On the other hand, there are considerations, to which we have had reference, applicable here that are inapplicable in that situation. That case is not before the Board, however, and does not have to be decided. What the Board does decide is that where, as here, an accused is found guilty by exceptions and substitutions of an offense against which the statute has apparently run, although it had not run against the offense with which he was originally charged, and the record

(344)

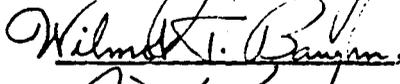
fails to disclose that he was cognizant of his rights to plead the statute, and there is no indication that it had been tolled, a failure of the court to advise accused of his rights in the premises is fatal error voiding the conviction of that specification."

Accordingly, on the basis of the authority last cited, as subsequently reaffirmed by CM 315512 Pittman, CM 315713 Williams, and CM 316772 Martinez, supra, the record of trial in the present case is legally insufficient to sustain the findings and the sentence.

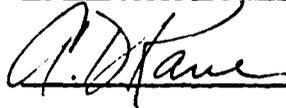
4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.



Judge Advocate



Judge Advocate



Judge Advocate

MAR 3 1948

JAGQ - CM 329022

1st Ind

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

TO: Commanding General, The Infantry Center, Fort Benning, Georgia.

1. In the case of Private Fred G. Mathews (34080031), Headquarters Headquarters Detachment Section I, 3440 Area Service Unit, I concur in the foregoing holding by the Board of Review and, for the reasons stated therein, recommend that the findings of guilty and the sentence be disapproved.

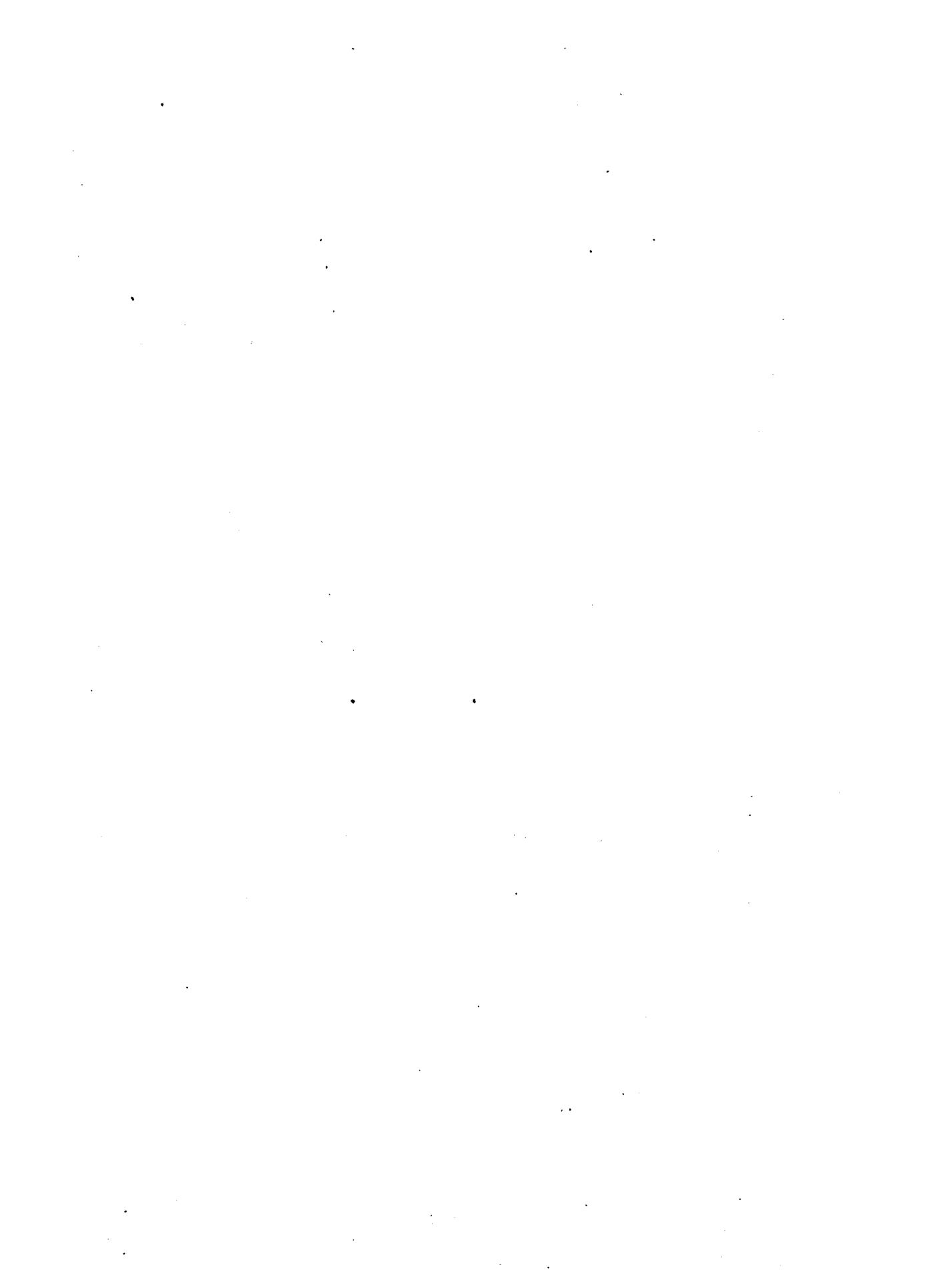
2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of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

(CM 329022)



THOMAS H. GREEN  
Major General  
The Judge Advocate General

1 Incl  
Record of Trial





Infantry, did, at Bad Tolz, Germany, on or about 30 November 1946, with intent to defraud, wrongfully and unlawfully make and utter to Private George Huffman 20453717, a certain check, in words and figures as follows, to wit:

30 November 1946  
City Bank & Trust Company  
McMinnville, Tenn.  
George Huffman \$1000.00  
One Thousand Dollars  
(Signed) John D. Rees

and by means thereof, did fraudulently obtain from Private George Huffman, Military Payment Certificates of a value of \$1000.00, he, the said Captain John D. Rees, then well knowing that he did not have and not intending that he should have sufficient funds in the City Bank & Trust Company, McMinnville, Tenn. for the payment of said check.

He pleaded not guilty to and was found guilty of all Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Specifications 1 and 2 of the Charge, and of the Charge, as involves findings that the accused did, at the time and place alleged in each Specification, wrongfully and unlawfully make and utter the described check to the person alleged and did fail to maintain a balance in the drawee bank sufficient to meet payment thereof, in violation of Article of War 96; approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the Division Judge Advocate, First U. S. Infantry Division, dated 10 February 1948.

4. Records of the Department of the Army show that accused is 30 years of age and married. He attended the Booneville High School in Arkansas for four years but left school without graduating in 1934. From June 1934 to September 1936 he was employed in the circulation department of the Pictorial Review Magazine as a salesman. From January 1937 to May 1937, he was employed as a bottling machine operator in Arkansas State Sanitary Dairy. In June 1937, he enlisted in the Regular Army and was honorably discharged from enlisted service on 22 May 1942, at which time he completed the course at the Officers Candidate School, Fort Benning, Georgia, and was commissioned a Second Lieutenant, AUS, Infantry. He was promoted to First Lieutenant on 30 November 1942 and to Captain on 8 June 1943. He served in the combat

zone of France from 10 March 1945 to 23 March 1945; in Germany from 23 March 1945 to 3 May 1945; and in Austria from 3 May 1945 to 9 June 1945. He is authorized to wear the Combat Infantryman's Badge and American Theatre Ribbon. His efficiency ratings for principal duty consists of the following: 10 "Superior," 11 "Excellent," and 2 "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, as approved by the reviewing authority, and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of a violation of Article of War 96.

*W. H. Hattenstein*, Judge Advocate

*J. W. Lynch*, Judge Advocate

*George J. Beach*, Judge Advocate

(350)

JAGH CM 329082

1st Ind

JAGO, Department of the Army, Washington 25, D.C. MAY 26 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 John D. Rees (O-1284212), Infantry.

2. Upon trial by general court-martial, this officer was found guilty of fraudulently making and uttering two checks with insufficient funds in payee bank and fraudulently obtaining the proceeds, in violation of Article of War 95 (Chg I, Specs 1 and 2). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Specification 1 and 2 of the Charge, and of the Charge, as involves findings that the accused did, at the time and place alleged in each Specification, wrongfully and unlawfully make and utter the described check to the person alleged and did fail to maintain a balance in the drawee bank sufficient to meet payment thereof in violation of Article of War 96; 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 Division Judge Advocate, First U. S. Infantry Division, dated 10 February 1948, which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in this 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 12 November 1946, at Bad Tolz, Germany, the accused drew a check, described in Specification 1, on the City Bank and Trust Company of McMinnville, Tennessee, for \$2000 payable to a Lieutenant Parker. The latter cashed this check giving accused \$1500 in military payment certificates and \$500 in postal money orders. Lieutenant Parker forwarded the check for deposit to his bank at Carmel, California, but the check was not honored by the drawee bank and was returned with the notation "account closed." When Lieutenant Parker advised accused that the check was dishonored and asked him what he intended to do about it, accused replied that his wife had closed their joint bank account without his knowledge but that he would take care of the matter. After numerous requests for payment were made by Lieutenant Parker to accused personally, and by letters addressed to him "thru channels," accused arranged to make restitution on the check, about a year later, by an allotment of \$100 per month from his pay.

During the latter part of October 1946, accused borrowed \$1,000 from a Private Huffman, giving him an I.O.U. to evidence the debt and promising to return the money to him in a "couple" of weeks. On 30 November 1946, the day Huffman was transferred to Munich, accused drew a check on the City Bank and Trust Company of McMinnville, Tennessee, payable to Huffman's order in the sum of \$1000 and gave it to him. This check was returned to Huffman marked "Insufficient Funds." When accused was advised that this check was dishonored, the accused told Huffman he did not have the money to pay the check at the time but would see that Huffman got a payment each month until June or July and he would then pay the balance in full. When Huffman did not receive restitution from accused after several requests he referred the matter to accused's Commanding Officer on 10 September 1947.

4. The accused is 30 years of age and married. He attended the Booneville High School in Arkansas for four years but left school without graduating in 1934. From June 1934 to September 1936 he was employed in the circulation department of the Pictorial Review Magazine as a salesman. From January 1937 to May 1937, he was employed as a bottling machine operator in Arkansas State Sanitary Dairy. In June 1937, he enlisted in the Regular Army and was honorably discharged from enlisted service on 22 May 1942, at which time he completed the course at the Officers Candidate School, Fort Benning, Georgia, and was commissioned a Second Lieutenant, AUS, Infantry. He was promoted to First Lieutenant on 30 November 1942 and to Captain on 8 June 1943. He served in the combat zone of France from 10 March 1945 to 23 March 1945; in Germany from 23 March 1945 to 3 May 1945; and in Austria from 3 May 1945 to 9 June 1945. He is authorized to wear the Combat Infantryman's Badge, the ~~EAME~~ ribbon with two bronze campaign stars and American Theatre Ribbon. His efficiency ratings for principal duty consists of the following: 10 "Superior," 11 "Excellent," and 2 "Very Satisfactory."

5. Attached to the record of trial is a recommendation for clemency addressed to the reviewing authority signed by each member of the court wherein it is recommended that the execution of the sentence be suspended. A separate recommendation for clemency signed by the defense counsel is also attached to the record of trial.

6. The accused's conduct in borrowing a large sum of money from an enlisted man and his failure to make satisfactory arrangements for repayment evidences the accused's unfitness to be an officer. I, therefore, recommend that the sentence be confirmed and carried into execution.

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

CM 329082

2 Incls  
1 Record of trial  
2 Form of action



THOMAS H. GREEN  
Major General  
The Judge Advocate General

(CCMO 108, May 28, 1948).



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

JAGQ - CM 329089

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at
	)	Stuttgart, Germany, 21
Private WILBERT L. SMITH	)	November 1947. Dishonorable
(RA 18220501), 129th	)	discharge and confinement
Ordnance MAM Company.	)	for one (1) year. United
	)	States Disciplinary Barracks.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this its holding to The Judge Advocate General.
2. The accused was tried upon the following Charge and Specification:  
 CHARGE: Violation of the 93rd Article of War.

Specification: In that, Private Wilbert L. Smith, 129th Ordnance MAM Company, did, at Berchtesgaden, Germany, on or about 5 October 1947, feloniously, take, steal, and carry away one (1) ARGUS C-3, Camera Number 23649 together with case, value of about thirty five dollars (\$35.00), and one (1) pair of E. LEITZ Binoculars Number 484668, together with case, value of about thirty five dollars (\$35.00) both items being the property of T/5 Russel F. Mayo, Company "C" 508 Military Police Battalion.

Accused pleaded not guilty to, and was found guilty of the Charge and Specification. 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 (1) 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 50 $\frac{1}{2}$ .

3. Evidence for the Prosecution.

On 5 October 1947 Corporal Mayo was on leave and staying at a hotel in Berchtesgaden, Germany. He had in his possession his Argus C-3 camera, serial No. 23649 and his E. Leitz binoculars, serial No. 484668 (R. 7-8). On the morning of 6 October upon discovering that the camera and binoculars were missing from his room, he reported the loss to the Military Police. The latter apprehended the accused on a train which was leaving Berchtesgaden at 1310, 6 October 1947, and upon searching accused's baggage found the above-described camera and binoculars therein (R. 8-10). Accused stated to the Military Police that he had borrowed the articles and later that he had purchased them.

Private Charles Murray testified that he is a member of the 520th Military Police Service Platoon stationed in Berchtesgaden and that he was with Corporal Maloney when they apprehended the accused on the train (R. 11). After identifying the camera and binoculars as being the articles found in accused's baggage, he further testified that he was present when Captain Rice interrogated the accused, warned him of his rights under the 24th Article of War and when accused made a statement to Captain Rice but that he was not present when the written statement was made and did not see accused sign the statement (R. 11). He recognized the signature of Captain Rice on Prosecution's Exhibit 3. This exhibit was then introduced in evidence over the objection of the defense that no evidence had been adduced showing that the purported statement was made by the accused (R. 11a). The statement (Pros. Ex. 3) is a full, complete and detailed confession of the theft charged.

4. Evidence for the Defense.

Private George R. Gordon testified that he was with accused in Berchtesgaden on 5 and 6 October 1947; that accused had been drinking heavily and it was necessary to assist him to his room (R. 12).

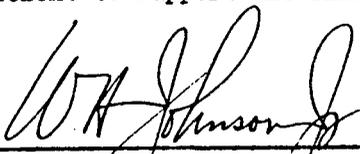
Accused, after being warned of his rights as a witness, elected to testify under oath (R. 14) to the effect that he received a letter from his parents on 15 September stating that his grandfather was seriously ill and that accused's wife desired a divorce. He expected to be returned to the United States in the near future for discharge from the army for reasons of dependency. He does not recall any of the events with which he is charged and his memory is "clouded" as to his stay in Berchtesgaden because of his intoxicated condition. He did not recall "very well" of being apprehended by the Military Police (R. 14-16).

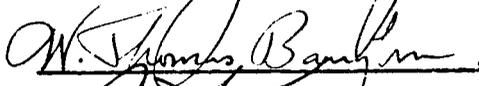
5. The evidence clearly shows that the camera and binoculars described in the Specification were stolen from the hotel room of the victim and that a prompt report was made by the latter to the proper military authorities. On the same day the accused was apprehended on a train leaving Berchtesgaden and the camera and binoculars were discovered secreted in his baggage. The above evidence is uncontradicted and is sufficient to sustain the findings of guilty under the well settled principle that unexplained possession of recently stolen articles raises a presumption of guilt.

The most important question presented by the record of trial, however, arises from the introduction in evidence of the purported confession of accused. The record is devoid of any evidence to the effect that the signature appearing on Prosecution's Exhibit 3 is that of the accused, and there is no evidence tending to show that accused executed the document in question or that it is in fact the "statement" that one witness testified accused made to Captain Rice. Under these circumstances it cannot be seriously contended that the exhibit was sufficiently identified as the confession of accused to allow its reception in evidence over the explicit objection of the defense. The mere fact that one witness testified that accused did make "a statement" to Captain Rice on 6 October 1947 and identified Captain Rice's signature on Prosecution Exhibit 3 is clearly an insufficient foundation to allow its acceptance in evidence as the sworn confession of accused. Hence, the Board of Review is of the opinion that it should have been excluded and its reception in evidence constituted error.

The next question for determination is whether the erroneous reception in evidence of the confession of the accused constituted prejudicial error which affected his substantial rights. There is no direct evidence to the effect that accused stole the camera and binoculars. These articles were found within a few hours after their theft was discovered, secreted in his baggage and he made no attempt to explain his possession of them. While such evidence is, in a proper case, sufficient to sustain a finding of larceny, it creates only an inference upon which the court may justify its finding of guilty. A confession in the language of the manual (p. 114) "is indeed one of the strongest forms of proof known to the law." The particular confession here in question was so explicit and sweeping that, having been admitted in evidence, it necessarily foreclosed any possibility of acquittal on the Charge and it cannot be said that the findings of guilty by the court do not rest at least in part upon the confession itself. Thus, it appears that the evidence of guilt, exclusive of the confession, was not of such a nature that it may now be said with reasonable certainty that it would have resulted in conviction had the confession been properly excluded from evidence. Such being the case, it must be assumed that the confession substantially influenced the findings of the court and the Board of Review can reach no conclusion other than that the error in question did injuriously affect the substantial rights of accused. (CM 192609, Hulme; 2 BR 9.)

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

  
 \_\_\_\_\_, Judge Advocate

  
 \_\_\_\_\_, Judge Advocate

  
 \_\_\_\_\_, Judge Advocate

(356)

JAGQ - CM 329089

1st Ind

MAR 10 1948

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

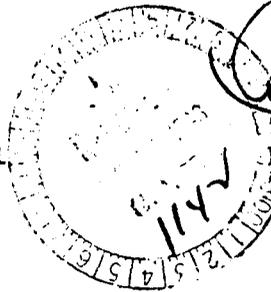
TO: Commanding General, United States Constabulary, APO 46, c/o  
Postmaster, New York, New York.

1. In the case of Private Wilbert L. Smith (RA 18220501), 129th Ordnance MAM Company, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and 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 329089)

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 329093

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at
	)	Straubing, Germany, 17 and 20
Private LEONARD EDWARDS	)	October 1947. Dishonorable
(13206559), Troop C,	)	discharge and confinement for
25th Constabulary Squadron.	)	fifteen (15) years. Disciplinary
	)	Barracks.

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

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

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

Specification: In that Private Leonard Edwards, Troop "C", 25th Constabulary Squadron, APO 305, U.S. Army, having been duly placed in arrest of quarters on or about 25 August 1947, did, at Straubing, Germany, on or about 4 September 1947, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Private Leonard Edwards, Troop "C", 25th Constabulary Squadron, APO 305, U.S. Army, did, at Mainburg, Germany, on or about 6 September 1947, with the intent to commit a felony, viz, rape, commit an assault upon Theresia Sommerer by wilfully and feloniously putting his arm around her throat and bending her backwards.

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

Specification: In that Private Leonard Edwards, Troop "C", 25th Constabulary Squadron, APO 305, U.S. Army, did, at Straubing, Germany, on or about 2400 hours 4 September 1947 feloniously take, steal, and carry away a 1/4 ton truck WD #20624013 of the value of about \$1051.00, property of the United States furnished and intended for the military service thereof.

Accused pleaded not guilty to all Charges and Specifications and was found guilty of Charges I and II and the Specifications thereof; guilty of the Specification of Charge III, except the words "feloniously take, steal and carry away" substituting therefor, respectively, the words, "wrongfully and knowingly misappropriate and apply to his own use"; of the excepted words not guilty; of the substituted words guilty, and guilty of Charge III. 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 twenty years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen years, designated the 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. The record of trial is legally sufficient to support the findings of guilty of Charges I and II and their Specifications, and to support the sentence. The only question for consideration here is the legal effect of the findings of the court as to Charge III and its Specification. In view of the holding of the Board of Review, as hereinafter set out, it will not be necessary to summarize the evidence contained in the record of trial.

4. The court attempted, by exceptions and substitutions, to find accused not guilty of larceny but guilty of misappropriation as a lesser offense necessarily included in the larceny charged.

In the case of CM 318499, White, et al, 67 BR 338, 339, respecting a similar set of circumstances the Board of Review stated:

\*\*\* we are of the opinion that misappropriation of military property is incidental to larceny, embezzlement, misapplication, wrongful selling and wrongful disposition of military property. It does not follow, however, that it is an offense necessarily included in the other offenses denounced by the 9th subparagraph of Article of War 94. The indivisible and unexpungeable elements of larceny are a taking and carrying away by trespass. In misappropriation, the devotion to an unauthorized purpose, it is

immaterial whether the initial taking is by trespass or not, or that there be any taking at all. Thus all types of misappropriation can not be included in larceny, since misappropriation may involve wrongful dealings with property which are in no way connected with larceny.

\* \* \*

"\* \* \* it is clear that the finding of guilty of misappropriation as approved by the reviewing authority does not indicate how the accused misappropriated the property described in the specification. Obviously the reviewing authority attempted to exclude a taking by trespass. Trespass being eliminated and the kind of misappropriation not being specified, it cannot be said that the offense as approved was necessarily included in that charged.

"It is also apparent that the specification in the instant case did not fairly apprise the accused of the offense of which he was found guilty as approved by the reviewing authority. Since misappropriation may involve acts which are in no way connected with larceny, it is impossible to determine in the instant case, of what particular offense the accused stands convicted."

This reasoning was followed by the Board of Review in the case of CM 319857, Dingley, 69 ER 166. We are of the opinion that the reasoning thus expressed is equally applicable to this case.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Specification of Charge III and Charge III, legally sufficient to support the findings of guilty of Charges I and II and the Specifications thereof and legally sufficient to support the sentence.

Edward Johnson, Judge Advocate.  
Frank C. Alfred, Judge Advocate.  
George Springer, Judge Advocate.

(360)

REC-100

JAGN-CM 329093 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.

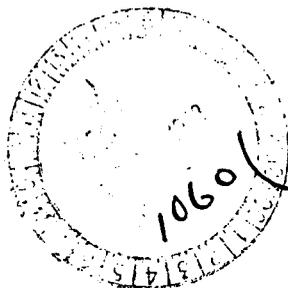
1. In the case of Private Leonard Edwards (13206559), Troop C, 25th Constabulary Squadron, I concur in the foregoing holding by the Board of Review and for the reasons stated recommend that the findings of guilty of the Specification of Charge III and Charge III be disapproved. Upon taking such action you will have authority to order execution of the sentence.

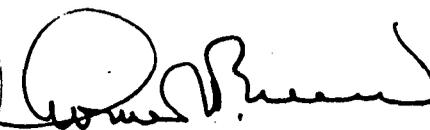
2. In view of the evidence that the assault with intent to rape involved in Charge II and its Specification was not accompanied by a great degree of violence and was followed by consent to intercourse, it is recommended that the term of confinement be reduced to three years.

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

(CM 329093).

1 Incl  
Record of trial



  
THOMAS H. GREEN  
Major General  
The Judge Advocate General

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

CM 329162

5 MAR 1948

UNITED STATES )

v. )

Privates First Class CARSON )  
 C. SLIGER (AF 13231562), )  
 CHARLES A. PETERSON (AF )  
 13286258) and Private REX )  
 R. HORTON (AF 16245546), all )  
 of Squadron K, 3543d Air )  
 Force Base Unit. )

AIR TRAINING COMMAND  
 BARKSDALE AIR FORCE BASE

Trial by G.C.M., convened at  
 San Antonio, Texas, 5 Febru-  
 ary 1948. All: Dishonorable  
 discharge and confinement for  
 four (4) years. United States  
 Disciplinary Barracks.

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

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The accused were tried jointly upon the following Charges and Specifications:

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

Specification: In that Private First Class Charles A. Peterson, Private First Class Carlson C. Sliger, and Private Rex R. Horton, all of Squadron K, 3543rd Air Force Base Unit, acting jointly and in pursuance of a common intent, did, at San Antonio, Texas, on or about 27 December 1947, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the person of Frank B. Martinez, about \$7.00, lawful money of the United States, the property of Frank B. Martinez.

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

Specification: (Disapproved by the Reviewing Authority.)

Each accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of one previous conviction was introduced as to accused Horton. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for eight years. The reviewing authority disapproved the findings of guilty of the Specification of Charge II and Charge II, approved the sentences but reduced the period of confinement imposed to four years as to each accused, designated Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, or elsewhere as the Secretary of the Army may direct as the place of confinement and forwarded the record of trial pursuant to Article of War 50 $\frac{1}{2}$ .

### 3. Evidence for the Prosecution.

Mr. Frank B. Martinez, a driver for the Yellow Cab Company, identified the three accused as the passengers who entered his cab at approximately 0130 hours on 27 December 1947 in San Antonio, Texas (R. 37). They directed him to drive to the "500 block" on Burr Road but when they arrived at this destination accused told him to keep on driving which he did until the cab entered the "700 block." When accused said "this is the place" he stopped and "then they struck me on the back of the head and grabbed me around the neck and put his hand on my mouth. I begged them not to hit because they would break my glasses. One of them asked where my money was and I said it was in my left-hand pocket and so he got it out and the rest turned me loose and they left the cab" (R. 37-38). He found a bottle in the back of the cab after the three accused had departed and approximately \$5 in United States money was taken from him. The robbery took place between 0200 and 0205 hours on 27 December 1947. He positively identified the three accused present in the courtroom as "the same boys" who assaulted and robbed him on the night in question (R. 39). He further testified that he had previously identified the three accused at about 0500 in the sheriff's office on the same morning the robbery occurred (R. 39-40).

Mr. Joseph Di Stefano, a detective of the San Antonio Police Department, identified the three accused by stating "I know them, but I can't associate their names with their faces" (R. 40). Stefano testified that "at approximately 2 o'clock in the morning of the 27th of December 1947, I received a call by, over the radio for a pickup for three young men. One was described as having a red jacket and the taller of the three and two of them had brown jackets" (R. 41). A few minutes later Stefano and his coworker, Detective Ethridge, while driving near Brackenridge Park, noticed three boys out on the street "thumbing a ride" and pulling over "asked them to get in." He stated that the boys he picked up are the "three boys right there" (R. 47). He testified that the jackets of the three accused attracted his attention and he took them to the Sheriff's Office. Mr. Martinez then came to the Sheriff's Office about 0500 hours and identified the three accused in his (Stefano's) presence (R. 41).

Mr. Oscar Warnke, Chief Investigator of the Bexar County Sheriff's Office identified Prosecution's Exhibits 2, 3 and 4 as the written statements he procured from each of the three accused. He stated that in taking the statements he was under the impression that "high-jacking or robbery was one of the offenses the local district attorney was to handle" and admitted that a number of other "investigators and deputy sheriffs" had interrogated the three accused before he obtained the statements in question (R. 13). He further admitted that all three accused "had been misinformed by my investigators and by these deputy sheriffs" and that he would not have taken the statements had he known that they had made threats or promises to the accused (R. 15). He further testified that accused Sliger told him that investigators Christoph, Villareal, Beckman and Higdon had "talked to him, (Sliger) and made a lot of promises to these boys about turning them over to you and about sending them to the penitentiary and working in the cotton patch" (R. 16). He advised accused Sliger "to make a clean breast of it and to make a statement and whatever I could, I would do towards helping him" (R. 16). After the statement was procured from Sliger, the latter came to him "crying and pleading to return him to the Army as he had been promised before making the statement, so he would not land up in Huntsville." He warned the accused of their rights before taking the statements and did not threaten them. Prosecution's Exhibits 2, 3 and 4 are full, complete and detailed confessions by each of the accused admitting the offenses with which they were jointly charged.

#### 4. Evidence for the Defense.

Each of the accused testified in effect that prior to making their written statements to Mr. Warnke they were questioned by officers Higdon, Beckman, and others who promised them that they knew Colonel Shown, the Provost Marshal at the Air Base, and that if they made the statements "just to clear the civil record" they would be returned to the military authorities immediately but if they did not make the statements they would stay in the county jail, be tried in the State Court "and probably we would be sentenced to Huntsville prison where we would be hoeing cotton and not out here at Lackland picking up papers" (R. 24, 43-49).

Mr. Stefano admitted on cross-examination that while he was in the sheriff's office awaiting identification of the three accused by Mr. Martinez, the victim of the robbery, that "there was something said about if they were tried in a civil court they would go to Huntsville" (R. 42).

5. The testimony of the victim of the alleged robbery and his identification of the accused as the perpetrators of the offense is neither denied nor corroborated. Standing alone, however, it is sufficient to sustain the findings of guilty of the offense of robbery. The only question presented by the record, and indeed it is one of the utmost importance, is whether the findings of guilty may be sustained in view of this evidence regardless of the erroneous

admission in evidence of the confessions of the three accused induced as they were by the threats and promises of the civil police authorities.

The testimony of the three accused to the effect that they were threatened with trial in a state court, penitentiary confinement including hard labor in the "cotton patch" coupled with the promise that they would be immediately returned to their organization to be dealt with by the military authorities if they would make the statements in question, stands uncontradicted in the record. Accused identified by name two of the officers whom they contended made the threats and promises, yet neither of those individuals were called as witnesses at the trial to rebut these accusations. The testimony of each accused in this regard is substantiated by detective Stefano when he admitted on cross-examination that "there was something said" concerning trial in a civilian court and the possibility that it would be followed by sending accused to the penitentiary in Huntsville (R. 42), as well as by the testimony of Chief Investigator, Warnke, when he admitted that accused Sliger told him prior to the taking of his statement that "a lot of promises had been made to him about sending them to the penitentiary and working in the cotton patch." Further, this testimony shows beyond any doubt that such "threats and promises" were the procuring cause of the confessions even though accused were subsequently warned of their rights prior to signing the written statements.

In view of such uncontradicted evidence regarding the threats and promises made to each of the accused in order to procure his confession, the Board of Review can reach no conclusion other than to agree with the statement in the review of the Assistant Staff Judge Advocate that the confessions were induced by threats and promises, were not the product of reasoned or voluntary choice on the part of the accused and were procured by coercion and duress. Consequently, their reception in evidence was error, and as these confessions were so explicit and sweeping their introduction in evidence must have foreclosed any possibility of acquittal on the charges (CM 192609, Hulme, 2 BR 9).

Having concluded that the confessions in question were obtained through duress and should not have been received in evidence, the Board of Review must now determine whether their erroneous admission vitiates the findings of the court regardless of the fact that the record contains other evidence sufficient to support the findings of guilty. The Staff Judge Advocate states that "where it can be said with reasonable certainty that a conviction would have resulted, even if the erroneously admitted confession had been excluded, the conviction will stand, and the substantial rights of an accused have not been injured (CM 160896 (1924); 192609 (1930), and CM 206090 (1936), Section 395 (10), Dig Ops JAG 1912-1940)." In addition to the cases cited above, CM 237711, Fleischer, 24 BR 89 and CM 243384, Rowley, 27 BR 353 support this proposition. In CM 237711, Fleischer, *supra*, the Board of Review expressed this principle in the following language:

"The Board of Review is of the opinion that the evidence other than the confession is of such quantity and quality as practically to compel in the minds of conscientious and

reasonable men the finding of guilty, and that the substantial rights of accused were not injuriously affected by the erroneous admission of his confession."

However, since the above decisions were rendered the Supreme Court of the United States has decided this particular question in several recent opinions. In Lyons v. Oklahoma, 322 U.S. 596 the Supreme Court said in Note 1, page 597:

"Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal."

Likewise the Supreme Court in discussing the so-called "harmless error statute" said in Kotteakos et al. v. United States, 328 U.S. 750 at 764,

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm (19) or a specific command of Congress."

Note 19 then states:

"Thus when forced confessions have been received, reversals have followed although on other evidence guilt might be taken as clear. See Malinski v. New York, 324 U. S. 401, Lyons v. Oklahoma, 322 U. S. 596, 597, N. I; Bram v. United States, 168 U. S. 532, 540-542; United States v. Mitchell, 137 F. 2d 1006, dissenting opinion at 1012." (Underscoring supplied).

And to similar effect is the recent case of Lee v. Mississippi; 68 Sup. Ct., p. 300, decided at the present term of the Supreme Court of the United States, 19 January 1948 in which the Court held:

"The due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice." (Underscoring supplied).

In a separate opinion concurring in the reversal of the state court judgment in the case of Haley v. Ohio, 68 Sup. Ct., p. 302, Mr. Justice Frankfurter expressed his views upon this precise question in the following language:

"It is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's secret interrogation. But this

only affords one more proof that in guarding against misuse of the law enforcement process the effective detection of crime and the prosecution of criminals are furthered and not hampered. Such constitutional restraints of decency derive from reliance upon the resources of intelligence in dealing with crime and discourage the too easy temptations of unimaginative crude force, even when such force is not brutally employed."

Also Mr. Justice Rutledge in a separate opinion concurring in the reversal of the state court judgment in the case of Malinski v. New York, supra, p. 420, disposed of the contention of the prosecution that the evidence of record other than the confession was sufficient to sustain the conviction. He expressed his views on this point as follows:

"I agree that Malinski's oral confession of October 23, 1942, was coerced, was used in evidence against him and that this requires reversal of the judgment against him.

\* \* \* \* \*

"However great the proof against him otherwise may be, under our system no man should be punished pursuant to a judgment induced wholly or in part by a coerced confession. In my opinion the entire procedure, from the time Malinski was taken into custody until his written confession was obtained nearly five days later, was a single and continuous process of coercion of the type commonly known as 'the third degree.' I do not think the Constitution has room for this in company with all the protections it throws around the individual charged with crime." (Underscoring supplied).

In commenting upon the above decisions of the Supreme Court, the Board of Review in CM 328584, Yakovonis; (12 Feb 1948) concluded that the principle which would be applied by that court in cases of this character would compel the reversal of any criminal trial in a civilian court in which an involuntary confession was introduced in evidence. The Board stated:

"As stated in Bram v. United States, supra, the prohibition against the use of a confession obtained by force or fear stems from that portion of the Fifth Amendment to the Constitution of the United States which commands that no person

'shall be compelled in any criminal case to be a witness against himself.'

"Consequently, under the doctrine enunciated by the Supreme Court in the above decisions the use of a confession obtained by force

would violate the constitutional guarantee against self-incrimination and constitute a denial of due process which cannot be cured by other clear or compelling evidence of guilt, Bram v. United States; Lyons v. Oklahoma; Kotteakos v. United States; Lee v. Mississippi; Haley v. Ohio, *supra*. This would seem to be a logical extension of the principle set forth in CM 312517, Kosytar et al., 62 BR 195, 200; CM 326450, Baez, 1947."

Although it is clear that the above decisions of the Supreme Court were based upon the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, it is not necessary to decide whether the "Due Process Clause" applies to trials by court-martial in concluding that the doctrine of those decisions should be followed in the administration of military justice. The 24th Article of War is explicit in its provisions that no accused "shall be compelled to incriminate himself or to answer any question, the answer to which may tend to incriminate him" and the conclusion is inescapable that such provision is equally as binding upon military trials as are the Fifth and Fourteenth Amendments to the Constitution of the United States on criminal proceedings in the Federal and State courts respectively. The standard or "yardstick" which each of these systems of jurisprudence apply to determine the fairness and validity of its proceedings should be, and is in our opinion, identical. Consequently, the principles applied by the Supreme Court in determining whether a trial in a civilian court violates the "Due Process Clause" are precedents of the highest order which the military jurisdiction should follow in determining the rights of an accused under the 24th Article of War.

It necessarily follows therefore that the erroneous admission in evidence in a trial by court-martial of a confession which is obtained through coercion or duress violates the express provisions of the 24th Article of War, is highly prejudicial to the substantial rights of the accused and that the findings of guilty in such a case cannot be sustained regardless of the other evidence in the record, clear and uncontradicted though it may be.

In view of these recent decisions of the Supreme Court it is considered that the doctrine enunciated in CM 160896 (1924); 192609 (1930), and CM 206090 (1936), Section 395 (10), Dig Ops JAG 1912-1940; CM 237711, Fleischer, 24 BR 89 and CM 243384, Rowley, 27 BR 353, to the extent that it is in conflict with this opinion should no longer be followed.

It should be clearly recognized, however, that the principle of the instant case does not govern those cases in which there is a conflict in the evidence relating to whether the confession is voluntary or

involuntary. In the latter instance the court as the triers of fact must determine this collateral, yet important issue, and if there is substantial evidence in the record of trial which supports the court's finding that the confession was voluntary, its admission in evidence is not error and the findings and sentence, if any, will not be disturbed.

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

W. H. Johnson, Judge Advocate  
W. M. T. Saul, Judge Advocate  
W. K. Kane, Judge Advocate

MAR 10 1946

JAGQ - CM 329162

1st Ind

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

TO: Commanding General, Air Training Command, Barksdale Air Force Base, Shreveport, Louisiana.

1. In the case of Privates First Class Carson C. Sliger (AF 13231562), Charles A. Peterson (AF 18286258) and Private Rex R. Horton (AF 16245546), all of Squadron K, 3543d Air Force Base Unit, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and sentence as to each accused, and for the reasons stated therein, recommend that the findings of guilty and the sentences be disapproved. Upon taking this action you will have authority to direct a rehearing.

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

(CM 329162)

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 329178

UNITED STATES )

AIR TRAINING COMMAND

v. )

) Trial by G.C.M., convened at  
) San Antonio, Texas, 28 January 1948.  
) Horton: Acquitted. Smith: Dishonorable  
) discharge and confinement for ten (10)  
) years. Evans: Dishonorable discharge  
) and confinement for two (2) years.  
) McMillan and Hayden: Dishonorable  
) discharge and confinement for one  
) (1) year. All: Disciplinary Bar-  
) racks.

) Privates MERREL R. EVANS  
) (16247213), CLARENCE McMILLAN  
) (12290587), Squadron BR-3,  
) CHARLES T. HAYDEN (19293453),  
) Squadron BR-1, WALTER SMITH, JR.  
) (17229786), and WHITTEN HORTON  
) (12290402), Squadron BR-3, all  
) of 3543d Air Force Base Unit. )

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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 soldiers named above has been examined by the Board of Review.

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

As to accused Evans

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Merrel R. Evans, Squadron BR-3, 3543rd Air Force Base Unit, did, in conjunction with Private Walter Smith Jr. Squadron BR-3, 3543rd Air Force Base Unit, and Private Whitten Horton, Squadron BR-3, 3543rd Air Force Base Unit, at San Antonio, Texas, on or about 5 October 1947, wrongfully take and use without the consent of the owner a black chevrolet coupe automobile, of the value of more than \$50.00, the property of Margaret Kilday Sandlin.

Specification 2: In that Private Merrel R. Evans, Squadron BR-3, 3543rd Air Force Base Unit, did, in conjunction with Private Walter Smith Jr. Squadron BR-3, 3543rd Air Force Base Unit, Private Charles T. Hayden Squadron BR-1, 3543rd Air Force Base Unit, and Private Clarence McMillan, Squadron BR-3, 3543rd Air Force Base Unit, at San Antonio, Texas, on or about 1 December 1947, wrongfully take and use without the consent of the owner, a blue two tone 1947, chevrolet two door sedan automobile of a value of more than \$50.00, the property of Mrs. Edward Mika.

As to accused McMillan

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Clarence McMillan, Squadron BR-3, 3543rd Air Force Base Unit, did, in conjunction with Private Walter Smith, Squadron BR-3, 3543rd Air Force Base Unit, Private Merrel R. Evans, Squadron BR-3, 3543rd Air Force Base Unit, and Private Charles T. Hayden Squadron BR-1, 3543rd Air Force Base Unit, at San Antonio, Texas, on or about 1 December 1947, wrongfully take and use without the consent of the owner a two tone, blue, tudor 1947 Chevrolet sedan automobile of a value of more than \$50.00, the property of Mrs. Edward Mika.

As to accused Hayden

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Charles T. Hayden, Squadron BR-1, 3543d Air Force Base Unit, did, in conjunction with Private Walter Smith, Jr., Squadron BR-3, 3543d Air Force Base Unit, Private Merrel R. Evans, Squadron BR-3, 3543d Air Force Base Unit, and Private Clarence McMillan, Squadron BR-3, 3543d Air Force Base Unit, at San Antonio, Texas, on or about 1 December 1947, wrongfully take and use, without the consent of the owner, a two-tone blue two-door 1947 Chevrolet sedal automobile, of a value of over \$50.00, the property of Mrs. Edward Mika.

Each accused pleaded not guilty to and was found guilty of all pertinent Charges and Specifications. Accused Evans was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. Accused McMillan

and Hayden were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. As to accused Evans the reviewing authority approved "only so much of the findings of guilty of Specification 1 of the Charge as involves a finding that the accused did, at the time and place alleged, in conjunction with Private Walter Smith, Jr., Squadron BR-3, 3543d Air Force Base Unit, wrongfully use without the consent of the owner a black chevrolet coupe automobile, of the value of more than \$50.00, the property of Margaret Kilday Sandlin; and only so much of the findings of guilty of Specification 2 of the Charge as involves a finding that the accused did, at the time and place alleged, in conjunction with Private Walter Smith, Jr. Squadron BR-3, and Private Charles T. Hayden Squadron BR-1, both of 3543d Air Force Base Unit, wrongfully take and use without the consent of the owner, a blue two tone 1947, chevrolet two door sedan automobile of a value of more than \$50.00, the property of Mrs. Edward Mika, in violation of Article of War 96." As to accused McMillan the reviewing authority approved "only so much of the findings of guilty of the Specification of the Charge as involves a finding that the accused did, in conjunction with Private Walter Smith, Squadron BR-3, Private Merrel R. Evans, Squadron BR-3, and Private Charles T. Hayden Squadron BR-1, all of 3543d Air Force Base Unit, at the time and place alleged, wrongfully use without the consent of the owner a two tone, blue, tudor 1947 Chevrolet sedan automobile, of a value of more than \$50.00, the property of Mrs. Edward Mika, in violation of Article of War 96." As to accused Hayden the reviewing authority approved "only so much of the findings of guilty of the Specification of the Charge as involves a finding that the accused did, at the time and place alleged, in conjunction with Private Walter Smith, Jr., Squadron BR-3, and Private Merrel R. Evans, Squadron BR-3, both of 3543d Air Force Base Unit, wrongfully take and use, without the consent of the owner, a two-tone blue two-door 1947 Chevrolet sedan automobile, of a value of over \$50.00, the property of Mrs. Edward Mika, in violation of Article of War 96." As to each accused the reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Gordon, Georgia, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The only question presented by the record is the maximum punishment which may be imposed upon each of the accused for the offenses of which they have been found guilty. For this reason it is deemed unnecessary to summarize the evidence.

Accused Evans and Hayden were found guilty of the offense as to each alleged, in essence, as the wrongful taking and using of a motor vehicle without the consent of the owner. Accused Evans and McMillan were found guilty of the offense as to each alleged, in essence, as the wrongful using of a motor vehicle without the consent of the owner.

Acts of the nature here in question, when alleged in essentially the same manner as here, have been held to constitute no more than simple disorders. Thus an allegation that an accused "did \* \* \* wrongfully and without lawful permission or authority" use a government truck was held to state only a simple disorder in violation of Article of War 96 (CM 326883, Meece (Feb 48)). Similarly an allegation that an accused "did \* \* \* wrongfully take, and use without consent of the owner," a certain automobile, was held to state no more than a mere disorder (CM 329200, Staley et al (Mar 48)). In both the Meece and Staley cases the Board of Review held that such disorders were forms of the offense listed in the table of maximum punishments (par. 104c, MCM, 1928) as "Disorderly under such circumstances as to bring discredit upon the military service" with a maximum authorized punishment not to exceed, for each such offense, confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. We are of the opinion that the conclusions reached in the Meece and Staley cases are equally applicable here.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty; legally sufficient to support only so much of the sentence as to the accused Evans as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for eight months; and legally sufficient to support only so much of the sentence as to each of the accused McMillan and Hayden as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period.

Edward Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George B. Spring, Judge Advocate.

MAR 26 1947

JAGN-CM 329178

1st Incl

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

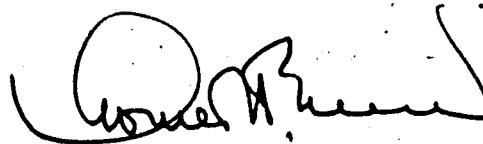
TO: Commanding General, Air Training Command, Barksdale Air Force Base, Shreveport, Louisiana.

1. In the case of Privates Merrel R. Evans (16247213), Clarence McMillan (12290587), Squadron BR-3, Charles T. Hayden (19293453), Squadron BR-1, Walter Smith, Jr. (17229786), and Whitten Horton (12290402), Squadron BR-3, all of 3543d Air Force Base Unit, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the sentence as to the accused Evans be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for eight months, and that only so much of the sentences as to accused McMillan and Hayden be approved as involves in each case 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 execution of the sentences as thus modified as to accused Evans, McMillan and Hayden

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 329178).

1 Incl  
Record of trial



THOMAS H. GREEN  
Major General  
The Judge Advocate General

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