OFFICE OF
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GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 78

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JUDGE ADVOCATE GENERAL'S DEPARTMENT

BOARD OF REVIEW

Holdings Opinions and Reviews

VOLUME 78

including

CM 329200 - CM 330299

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

JAGQ - CM 329200

10 MAR 1948

UNITED STATES v. Privates MAX L. STALEY (RA 45010333), Detachment A, 6th Air Vehicle Repair Squadron and FIRMAN K. BONE (RA 17188027), Hq. and Base Service Squadron, 466th Air Service Gp, both of Rhein/Main Air Base, APO 57, US Army.	UNITED STATES AIR FORCES IN EUROPE Trial by G.C.M., convened at Rhein Main, Germany, 3 February 1948. Each: Dishonorable discharge and confinement 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 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 Bone:

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

Specification: In that Private Firman K. Bone, Headquarters and Base Service Squadron, 466th Air Service Group, did, at Rhein/Main Air Base, Frankfurt, Germany, on or about 28 November 1947, wrongfully take, and use without consent of the owner, a certain motor vehicle, to wit, a one-quarter (¼) ton, 4x4 truck, license number E 0903, the property of Corporal Harold Mood, 14th Troop Carrier Squadron, 61st Troop Carrier Group, of the value of more than fifty dollars ($50.00).

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

Specification: In that Private Firman K. Bone, Headquarters and Base Service Squadron, 466th Air Service Group, did, without proper leave, absent himself from his command at Rhein/Main Air Base, Frankfurt, Germany, from about 1 November 1947 to about 7 November, 1947.

As to accused Staley:

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

Specification: In that Private Max L. Staley, Detachment "A", 6th Air Vehicle Repair Squadron, did, at Rhein/Main Air Base, Frankfurt, Germany, on or about 28 November 1947, wrongfully take, and use without consent of the owner, a certain motor vehicle, to wit, a one-quarter (¼) ton, 4x4 truck, license number E 0903, the property of Corporal Harold Mood, 14th Troop Carrier Squadron, 61st Troop Carrier Group, of the value of more than fifty dollars ($50.00).

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

Specification 1: In that Private Max L. Staley, Detachment "A" 6th Air Vehicle Repair Squadron, did, on or about 28 November 1947, wrongfully and unlawfully drive a motor vehicle at Russelsheim, Germany, while under the influence of intoxicants.

Specification 2: In that Private Max L. Staley, Detachment "A", 6th Air Vehicle Repair Squadron, did, on or about 28 November 1947, at or near Ruesselsheim, Germany, wrongfully and unlawfully operate a motor vehicle, to wit, one-quarter (¼) ton, 4x4 truck, at a speed in the excess of fifteen (15) miles per hour.

Each accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of three previous convictions as to accused Bone and two previous convictions as to accused Staley was introduced. Each of the accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentences, reduced the period of confinement as to each accused to one year, 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 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 were found guilty. In view of this fact it is deemed unnecessary to summarize the evidence.

Accused Staley was tried and found guilty of wrongfully taking and using an automobile without the consent of the owner, driving while under the influence of intoxicants and operating a vehicle at an excessive speed. Accused Bone was tried and found guilty of wrongfully taking and using an automobile without the consent of the owner and of absence without leave for seven days.

The specification as to each accused with respect to the wrongful taking of the automobile alleges in pertinent part that each did:

> "wrongfully take, and use without consent of the owner, a certain motor vehicle, to wit, a one-quarter ($\frac{1}{4}$) ton, 4x4 truck, * * * of the value of more than fifty dollars."

The Board of Review held in CM 326588, Sattler, (December 1947), that a specification which alleges the mere "wrongful taking and carrying away" of property of another charges in essence only a disorder for which the maximum punishment authorized by paragraph 104c, MCM, 1928, is confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. That opinion pointed out however, that the type, character, and value of the property, and the circumstances under which it was taken are factors which must be considered in determining whether the offense is in law and fact more closely related to a "disorder" than to the more serious charge of larceny.

Thereafter, it was determined in CM 326883, Meece (Feb. 1948), that the doctrine enunciated in the Sattler case, supra, applied to a Specification which alleged that accused did "wrongfully and without lawful permission or authority use" a vehicle, property of the United States. The basis of the decision in the Meece case, supra, was that such a Specification charged only the commission of a tortious act in such a manner and under such circumstances that accused's conduct constituted the criminal offense of a disorder to the prejudice of good order and military discipline in violation of Article of War 96. This holding was in conformity with CM 307097, Mellinger, 60 BR 214 wherein the Board of Review stated:

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

The only facts in the instant case which distinguish it from the Meece case, supra, are that the Specification in the present case alleges that accused did "wrongfully take and use" a vehicle while the Specification in the Meece case, supra, alleged that accused did "wrongfully and without lawful permission or authority use" a vehicle, and the fact that the value of the vehicle was alleged in the instant case while no value was charged in the Meece case. Consequently, the sole question for the Board of Review to determine is whether the use of the additional word "take" and the allegation of value in the Specification in this case is sufficient to hold that as a matter of law the offense so charged is more than a tortious act constituting a mere "disorder" to the prejudice of good order and military discipline. The Board of Review is constrained to hold that

the principles applied in the Sattler and Meece cases are controlling in the present case. The following excerpt from the Meece holding is equally applicable to the present case and clearly shows that the reasons upon which that decision was based makes the conclusion inescapable that the Specification in the present case charges a mere "disorder" as distinguished from the more serious charge of larceny or misapplication:

> "It is within the province of the Board of Review to examine the evidence in the record of trial to determine whether it is legally sufficient to establish the wrongful nature of the act alleged. However, it cannot affirm a punishment inflicted for the commission of an offense which may have been proven but which is not alleged by, contained within, or reasonably to be implied from the original verbiage of the Specification. Sans "wrongfully" the allegations contained in this Specification do not state or imply misconduct, since the accused might well have committed such an act through mistake, and a will to do wrong may not be inferred where it is not inherent in the act. The physical act of accused might, depending upon all of the circumstances including the nature of accused's intent, constitute on the one hand the offense of a simple disorder and on the other hand any one of several felonies cognizable in military law. In such cases, when used alone as the charging word, "wrongfully" indicates only the slightest degree of criminality which might be applicable to the acts alleged. Thus here, in the absence of other or additional words by which an offense of greater gravity would be stated or might be reasonably implied, we are forced to the conclusion that the offense of which accused has been found guilty is a simple disorder in violation of Article of War 96."

The offense of wrongfully taking and using a vehicle without the consent of the owner is not specifically listed in the Table of Maximum Punishments (par 104c, MCM, 1928). However, the offense described as "disorderly under such circumstances as to bring discredit upon the military service" is listed therein with a maximum authorized punishment not to exceed confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period. Accordingly, the sentence as to the accused Bone is excessive because the maximum punishment for the offense of wrongful taking and using of the motor vehicle, combined with an absence without leave of seven days is confinement at hard labor for four months and twenty-one days and forfeiture of two-thirds of his pay per month for a like period.

As to accused Staley another question is presented for consideration by the Board of Review. In addition to the wrongful taking Staley was tried and found guilty of driving the motor vehicle in question while under the influence of intoxicants and driving it in excess of 15 miles per hour. The record discloses that the charge of speeding was committed contemporaneously with the offense of driving while under the influence of intoxicants. Speeding being a simple disorder is punishable as heretofore stated

by confinement not in excess of four months and forfeiture of two-thirds pay per month for a like period. There is no maximum punishment prescribed in the Manual for Courts-Martial for the offense of driving while under the influence of intoxicants nor is there a Federal statute on this subject. Accordingly, we must look to the District of Columbia Code for the maximum punishment for this offense (CM 212505, Tipton, 10 BR 237, 246). Paragraph 609, Title 40, District of Columbia Code provides that:

> "No individual shall while under the influence of any intoxicating liquor * * * operate any motor vehicle in the District. Any individual violating any provision of this subdivision shall upon conviction for the first offense be fined not more than $500 or imprisoned not more than six months, or both; * * *" (4 Bull. JAG 56).

Since the additional offenses with which accused Staley was charged arose out of the same act, viz., the operation of the vehicle, he may only be punished for the most important aspect of the act, to wit; driving while intoxicated (CM 313544, Carson, 63 BR 137, 5 Bull. JAG 202 and cases cited). Accordingly, the maximum punishment which the court was permitted to impose upon the accused Staley was dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten months. It is noted that the court considered a previous conviction of accused Staley for absence without leave beginning on 23 December 1947. Since this offense was not committed during the one year preceding the commission of the offenses here under consideration it should not have been considered by the court (par 402 (5) Dig Ops JAG 1912-1940). In view of the failure of the defense to object, however, this is harmless error (par 79c, MCM, 1928).

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty as to each accused and legally sufficient to support only so much of the sentence as to accused Bone as involves confinement at hard labor for four months and twenty-one days, and forfeiture of two-thirds of his pay per month for a like period; and as to the accused Staley, 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 ten months.

W. H. Johnson Jr., Judge Advocate

Wilfred T. Baughman, Judge Advocate

[illegible], Judge Advocate

(6)

JAGQ - CM 329200 1st Ind

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

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

1. In the case of Private Max L. Staley (RA 45010333), Detachment A, 6th Air Vehicle Repair Squadron and Private Firman K. Bone (RA 17188027), Headquarters and Base Service Squadron, 466th Air Service Group, 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 as to accused Staley be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten months; and that only so much of the sentence as to accused Bone be approved as involves confinement at hard labor for four months and twenty-one days and forfeiture of two-thirds pay per month for a like period. Upon taking such action you will have authority to order execution of the sentences.

2. In view of the circumstances in this case which show that both accused were jointly involved in the enterprise out of which all of the offenses of which accused Staley was found guilty arose, and the fact that a previous conviction by court-martial of accused Staley was erroneously introduced, it is further recommended that consideration be given to suspension of the execution of the dishonorable discharge in his case until his release from confinement, reduction of the period of confinement to six months and designation of an appropriate place of confinement within your command for each of the accused.

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 329200).

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.

19 MAR 1948

JAGH CM 329238

U N I T E D S T A T E S	)	THE INFANTRY CENTER
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Benning, Georgia, 8
Second Lieutenant DEREK R.	)	January and 12 February 1948.
COMPTON (O-1341214), Infantry.	)	Dismissal and total forfeitures.

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 58th Article of War.

Specification: In that Second Lieutenant Derek R. Compton, Infantry, Detachment Headquarters, Infantry School Detachment, The Infantry School, Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about 30 January 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Chattanooga, Tennessee, on or about 10 November 1947.

He pleaded not guilty to the Specification but guilty to absence without leave at the place, time, and for the duration alleged and not guilty to the Charge, but guilty to a violation of Article of War 61. He was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. 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 evidence and the law contained in the review of The Infantry Center Judge Advocate dated 27 February 1948.

4. Records of the Army show that accused is 23 years of age and divorced. He left school just prior to completing the eleventh grade.

His civilian occupation, if any, is unknown. He had three years and nine months prior service in the Navy, which was terminated by an honorable discharge. Thirty-eight months of his naval service was served overseas during hostilities and he received three combat participation stars. He had enlisted service in the Army from 8 January 1946 until 29 August 1946 when he was commissioned a Second Lieutenant. His one efficiency rating of record is "Excellent."

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 during trial. 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 total forfeitures is authorized upon conviction of a violation of Article of War 58.

A. Hortenstein, Judge Advocate.

J. W. Lynch, Judge Advocate.

Joseph J. Brack, Judge Advocate.

JAGH CM 329238 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Derek R. Compton (01341214), Infantry.

2. Upon trial by general court-martial this officer was found guilty of desertion from 30 January 1947 until his apprehension on 10 November 1947, in violation of Article of War 58 (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 one year. The reviewing authority approved the sentence, but remitted the confinement imposed and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the review of the Infantry Center Judge Advocate which has been 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 modified by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

Accused, who had been on sick leave from Fort Benning, Georgia, failed to return to Fort Benning at the expiration of his leave on 30 January 1947. He was apprehended in Chattanooga, Tennessee, by the police of that city on 10 November 1947.

Accused testified in his own behalf that he had had three years and nine months of service in the Navy during the war and had two tours of overseas duty totalling 38 months. Prior to departing for his second tour he was married. On returning to the United States after 21 months he found that his wife had given birth to a child the day before his return. He was discharged from the Navy on 2 October 1945 and enlisted in the Army on 8 January 1946. His domestic life was unsatisfactory and he finally obtained a divorce on 10 December 1946. On 18 December 1946 he contracted pneumonia and was sent to the Station Hospital, Fort Benning. He was subsequently given a convalescent leave from which he did not return due to the state of his mind occasioned by his marital difficulties.

4. The accused is 23 years of age and divorced. He left school just prior to completing the eleventh grade. His civilian occupation,

if any, is unknown. He had three years and nine months prior service in the Navy, which was terminated by an honorable discharge. Thirty-eight months of his naval service was served overseas during hostilities and he received three combat participation stars. He had enlisted service in the Army from 8 January 1946 until 29 August 1946 when he was commissioned a Second Lieutenant. His one efficiency rating of record is "Excellent."

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 82, 26 March 1948).

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

JAGH CM 329321

16 July 1948

UNITED STATES	ZONE COMMAND AUSTRIA
v.	Trial by G.C.M., convened at Horsching Base, Austria, 20-21 January 1948. To be hanged by the neck until dead.
Private OSCAR MARINEZ, RA 19219316, Troop "A", 24th Constabulary Squadron, APO 174.	

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Oscar Marinez, Troop A, 24th Constabulary Squadron, did, at Horsching Base, Austria, on or about 12 December 1947, withmalice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gottfrieda Knogler, a human being by shooting her with a pistol.

He pleaded to the Charge and Specification "not guilty and not guilty by reason of temporary insanity at the time the act was committed," and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

Accused is in the military service and on the date of the offense alleged was a member of Troop "A", 24th Constabulary Squadron, Horsching Base, Austria (R 10,24,25). For sometime prior to 12 December 1947 accused had been on friendly terms with the deceased, Gottfrieda Knogler, also known as Trudi, who was employed at the "PX" at Horsching Base (R23,45),

and accused was reputed to be Trudi's "boy friend" (R 24). At some time during November 1947 the deceased had papers pertaining to a marriage between herself and accused (R 45). Their relationship was, however, marred by quarrels (R 45). Concerning one quarrel Eva Humer, also an employee at the "PX" testified as follows:

"Q What was this statement that the accused made to Gottfrieda Knogler at that time?
A They argued and he said, 'You son-of-a-bitch if I catch you I will shoot you'.

Q Who said that?
A Oscar Marinez.

Q Why did he say he would shoot her if he caught her?
A That I don't know. I didn't hear it. I only heard that.

PROSECUTION: Nothing further.

DEFENSE: We want to move to exclude that from the record.

PROSECUTION: We will join with him and ask that it be stricken and ask that the court be instructed not to regard the statement.

LAW MEMBER: It will be stricken and the court is cautioned not to regard the statement.

* * *

Q Miss Humer, have you reconsidered the statement you made just a few minutes ago about the conversation between the accused, Marinez, and Gottfrieda Knogler?
A Yes, what I said is all correct.

Q Was there anything else to that statement that you did not give on your previous testimony?
A No.

Q You did not speak to me a few minutes ago and tell me additional words that were included in that statement?
A Yes.

* * *

Q Miss Humer, before the recess you stated that the accused said to Gottfrieda Knogler, 'You son-of-a-bitch if I catch you I will kill you'; did he say anything else in that statement?
A Yes, 'When I catch you with somebody else I kill you'." (R 42,43,44)

Miss Humer also testified that when accused had been in the hospital the deceased had gone out with another man (R 45).

On the night of 11 December accused rode to Linz on a truck on which, among others, were deceased and Private First Class Norman Minuth. After arriving in Linz accused learned that deceased had a date with Minuth who was taking deceased to her home (R 18,19). After speaking with the deceased alone for a few minutes accused accompanied her and Minuth part of the way to her home (R 19). Munith testified that he had heard accused ask deceased for the return of some property (R 24).

At 10:00 a.m. on the morning of 12 December accused gave a sealed envelope to Technician Fifth Grade Kyle Parriott, mail orderly of "A" Troop, and requested that it be given to the Troop Commander at 2:00 p.m. Parriott testified that at the time there was nothing unusual about accused's appearance. Parriott gave the envelope to Captain John K. Brier, Commanding Officer of Troop "A", at 2:00 p.m. (R 28). Captain Brier identified Prosecution Exhibit 3 as a letter which was contained in an envelope given to him by Parriott at about 1400 hours 12 December 1947. Captain Brier identified the signature on the letter as that of accused and the letter was admitted in evidence (R 32,35; Pros Ex 3). The contents of the letter were as follows:

"Dear Sir:

I writting you these few lines to let you know why I am doing what I am going to do. Well Sir I guess you were right when you said that I was no good!

But Sir I want you to know that I loved her more than anythink in the world. But the way she done me today I'll never forget. She has been going with some one else for a long time now.

Sir I gave her $ 80,00 Dollars every month now for 9 months now out of my $ 83.50.

Do I am doing this so she wont do it to some more G.I. Well Sir by the time you read this It will be over with. As you know we were planning to get married! I hope you understand. O-Yes Sir everythink I done was for her.

s/Pvt Marinez Oscar

I hope that you can read this. I am as (illegible) as I am no good. See I am writing this to you because you tryed to help me before But I was thinking you were trying to do me bad.

I am sorry Sir if by any chance I dont't come back to A Troop. tell the men that there the best guys I ever know. And that I think that they can make this Troop the best one over here. But not to do what I did. I writting this on the 11 of Dec 1947 at 12:00 P.M.

I'll allways rember you guys.

s/ Marinez Oscar."

At approximately 1030 the same morning accused drew "a .45 pistol," serial number 319223, from the troop "armorer" stating that he was going

out for training. He did not, however, receive any ammunition (R 25). Technician Fourth Grade Theodore J. Guskie, the armorer, testified that accused's appearance was normal.

At 1105 hours accused appeared at the "PX," went to deceased's counter, and asked for the return of a watch. She gave him a watch and asked him to return her watch. He claimed that he had lost her watch and left, but returned to deceased's counter about ten minutes later (R 39).

Three employees of the "PX", Eva Humer, Isabella Reiter, and Paula Boeck, were eyewitnesses to the ensuing incident. Their testimony was in substantial accord and is summarized as follows. After some soldiers who were nearby had "gone on", accused asked deceased if she would come back to him. The deceased refused and accused told her he was going to kill her. He drew his pistol and fired three or four shots at deceased and after she fell to the floor leaned over the counter and fired three more shots (R 40,52,54). On cross-examination Miss Humer testified that she had known accused for approximately eight months. When he first came into the "PX" on the day in question she was able to observe his face and stated that she had never seen him as he appeared at that time, that "He wasn't even white. He was green or gray when he came in." His appearance did not change during the incidents which followed (R 44).

Miss Reiter observed that just prior to the shooting accused appeared "very pale" (R 52). Miss Boeck described his color as "yellow and green," and stated it was not his natural appearance (R 55).

Technical Sergeant Robert H. Bohl was entering the "PX" at the time of the shooting and disarmed accused. He subsequently recovered seven rounds of brass and one projectile for "a .45 calibre" at the scene of the shooting. He turned over the brass, projectile and the pistol he obtained from accused to Lieutenant Hall, the Provost Marshal at Horsching Base (R 56).

Captain Clark C. Bohannan who was in the "PX" at the time of the shooting, had his attention attracted by the shooting and saw accused apparently shooting at the wall and then at the floor. He and Sergeant Charles H. Mabry who was entering the "PX" during the shooting took accused into custody, and a short time later turned him over to Lieutenant Hall, the Provost Marshal (R 57,59).

Major Leonard A. Johnson, Medical Corps, examined deceased at the Post Exchange. She was lying on the counter and was bleeding profusely from the nose. The bleeding was occasioned by bullet wounds. Major Johnson's examination which was superficial disclosed bullet wounds of the left orbital socket and of the abdomen, and "a grazing shot of the left shoulder." Major Johnson cleaned out the nasal passages in order

that deceased might breathe more easily and had her taken to the "Allgemeinee Krankenhaus, Linz." (R 74,75).

Doctor Kurt Mueller testified that he treated the deceased at the "Allgemeinee Krankenhaus" (General Hospital) at Linz. She was brought to the hospital on 12 December and Dr. Mueller's examination at that time disclosed that she was seriously injured by five "shots." The "shots" were on the left side of the face piercing the left eyeball, the right upper part of the abdomen, the right arm, the left thigh, and on the back. The most serious injury was sustained from the "shot" in the abdomen, but the injury sustained from the "shot" in the head was also serious. The deceased was at the hospital approximately a week prior to her death (R 76,77). Concerning the treatment given deceased Dr. Mueller testified as follows:

> "On the first day right after she was received she was treated with medicines against the shock of the injury. In a short time after that the wounds were treated in the way of an operation.
>
> * * *
>
> At first the abdominal shot was treated and it was determined that the duodenum had been torn and the shot pierced the abdomen. A suture of the abdomen was applied and all other necessary operations of the abdomen done. That consisted of a drainage and the suture of the wound. The next days blood transfusions, heart medicines and penicillin were applied, and her state improved rapidly. On or about the 8th day it was necessary to remove the destroyed left eye. This operation was performed by an ophthalmologist of the General Hospital, the Allgemeinee Krankenhaus." (R 77)

Death occurred shortly after the eye operation (R 77). On cross-examination Dr. Mueller testified that there was some improvement in deceased's condition on 14 December and on 17 December there was a definite improvement and it was determined that another abdominal operation was not necessary (R 78-80). As to her condition on 20 December Dr. Mueller testified:

> "Q Now, getting to the 20th of December, what was the condition of the patient on the 20th of December, prior to this operation?
>
> A She was without temperature, the heart activity was good. There was no symptom of peritonitis of a large degree, and, therefore, the eye operation, which was absolutely necessary, was conducted on that day.
>
> Q. Doctor, before you consented to the eye operation, was it your firm opinion that the deceased was well on the road to recovery and that she was strong enough to stand the operation?
>
> * * *
>
> A Yes." (R 81)

With reference to the necessity for the eye operation he testified:

"Q Doctor, was an eye operation on this particular day absolutely necessary?
A The operation actually would have been necessary from the first day on, but it was possible to wait without any damage.

Q How long could you have waited before you operated on the eye before any actual damage did set in?
A It was about the utmost limit because the ophthalmologist asked the previous days several times when the eye operation would be possible.

Q Assuming that the condition of the deceased had not changed for the eight days that she was in the hospital, would you still have operated on the deceased on the 20th day of December?
A It is hard to tell, because if the condition had not improved probably a catastrophe would have occurred previous to that day.

Q Was the eye becoming infected during this eight day period?
A It had not become infected but the danger was that this eye and also the other eye could have become infected unless the destroyed eye was taken out.

Q Up until the 20th of December it had not as yet shown any signs of infection?
A No.

Q And during all this time you were administering penicillin to the deceased so that there would be no infection?
A During the first day penicillin was administered to prevent an infection, but the danger of the eye was not so much infection as decomposition.

Q Let me ask you a hypothetical question. Assuming that the deceased had nothing wrong with her left eye, and she was in the condition she was in on the 20th of December just prior to the operation, what, in your opinion, would be the possibility of her complete recovery?
A If it only be a question of the abdominal wound the peritonitis could have been held within three weeks.

Q Therefore, you state that if it were not for her eye injury, under the circumstances and condition she was in on the 20th of December, she could have been cured completely?
A This possibility exists.

Q Doctor, will you explain to the court exactly what transpired just prior to, during and after this eye operation?

A Before the operation the condition was the same as the previous day. The operation itself consisted in removing the eye with a local anesthetic. And during the next hours the heart activity became very fast and bad, and an intravenous infusion had to be done again within the next hours. Every fifteen minutes cardiac tonics were given and oxygen respiration was performed. With short interruptions the patient was conscious. No complications on the part of the eye wound and the abdominal wound were found. At five PM a slight improvement was there, but at six-twenty the death occurred.

* * *

I realize that some details may have skipped your mind. You have a lot of work. It is my purpose as much as possible to get before this court all of the details. Now, Doctor, I am going to read you a statement which will first tend to refresh your memory, or you, yourself, can deny that you made that statement. 'On 20 December 1947, the general condition was satisfactory, so that the urgent removal of the destroyed left eye ball could be effected. This operation took a normal course under local anesthetic, but in its sequence provoked a heavy collapse of the blood circulation and entailed death, despite all possible measures.'

* * *

'The cause of the failure of the blood circulation probably originates from the general condition of weakness, as a result of the injuries sustained. It may also be assumed that the peritonitis, which at first could be restricted locally, took an acute turn. The relevant circumstances may be clarified by the autopsy. However, there is no doubt left that death was exclusively caused by the injuries from the shots on 12 December 1947.'

A I can remember this statement as it reads in these original papers here, and the meaning of it is that no other thing could be assumed to be causing the death." (R 81,82,84,85)

He also testified that under the circumstances of deceased's condition the shock caused by the eye operation which in itself was not severe could cause death (R 88).

Doctor Karl Bauer whose qualifications as a pathologist were conceded by the defense testified that on 22 December 1947 he performed an autopsy upon the body of Gottfrieda Knogler and as a result found several "shot wounds" (R 90). Concerning the cause of death he testified:

"The main wound was a shot through the abdomen, with the shot entering in front and leaving the body in back. By this shot,

the duodenum was severely injured. Then, there was a second shot which destroyed the left eye, and finally there was a shot that only pierced the muscles. The shot through the abdomen finally caused the severe peritonitis. This was the actual cause of death.

* * *

The duodenum was wounded by the shot. This wound was sutured. In the duodenum there are very important digestive juices which went to the abdomen through this wound, through this suture which was made by the surgeon. This suture was dissolved by the digestive juices again and this caused the severe peritonitis." (R 90)

and upon cross-examination he testified:

"Q You are not familiar with the circumstances leading up to the immediate cause of death?

A The circumstances leading up to the peritonitis consisted of the fact that the suture on the duodenum was dissolved by the digestive juices.

Q Doctor, in your opinion, if such a patient were on the road to recovery, would a premature operation on a patient's eye, cause a sufficient shock to cause the said patient to have a relapse and take a turn for the worst?

* * *

A 'It is possible." (R 92)

Subsequent to the shooting accused was taken under armed guard to the CID office in Linz where he was interrogated by CID Agent Frank DiTore and William B. Burden. Prior to their interrogation accused was advised of his rights under Article of War 24 (R 63-65). He was questioned for approximately an hour from 1600 hours to 1700 hours (R 67). His statement was taken down in longhand by Agent DiTore. On 15 December accused was interrogated for about a half hour and his statement was completed. On this occasion DiTore also took down what accused said, in longhand (R 68). DiTore then had the complete statement typewritten and the following day gave it to accused to read. Accused was then brought before Lieutenant Hall who apprised accused of his rights under Article of War 24 and accused then signed the statement (R 66,68-70). Burden upon cross-examination testified that accused was not advised that he had a right to counsel (R 66). DiTore testified on cross-examination that although the statement was substantially as given by accused, DiTore had changed the wording as the statement was being given "merely to correct the English" (R 69). The statement was received in evidence as Prosecution Exhibit 5 over objection by the defense (R 71). In the statement accused related that he had been keeping company with the deceased for approximately ten months, and that for eight months he had been giving the deceased eighty dollars a month of his pay with the understanding that she should save it for them. Approximately four months

prior to the shooting accused found out that deceased was going out with other soldiers and after accused remonstrated with deceased she promised that she would not do so any more. A month later accused and deceased submitted "marriage papers" to the chaplain at Horsching Base. On the night of 11 December 1947 in Linz accused learned that deceased had a date with a soldier named "shorty" and was told at that time by deceased that she had been going out with this soldier for two months. At the time accused had been "restricted." Accused asked deceased if he could accompany her to her home to get some items of personal property which he had left there. She refused and accused told her he would see her in the morning. With reference to the incidents which occurred on 12 December 1947 accused stated:

> "The following morning, 12 December 1947, at approximately 1030 hours I drew from the Armorer's room the pistol assigned to me and proceeded towards Hangar 2 to join the rest of the men in my Troop who were engaged in basic training. I stopped first in the PX in order to get a shave and haircut. I met another soldier on my way there and we walked together. I was carrying the pistol in my parka-coat pocket because we have no holster in the Armorer's room. In the same pocket I also had a full clip which I had picked up the night before in the orderly room. As I walked the clip kept hitting the pistol and was making a lot of noise in my pocket, so I decided to insert the clip in the pistol. I did this without taking the pistol out of my pocket. In the PX I dropped by the candy counter where TRUDY was working. I waited until she was free then I asked her if I could have my watch back. She said I could not have it until I returned her watch. I explained that the watch had been stolen from my footlocker, and that everything I had given her ought to make up for her watch. She still refused so I grabbed the watch from her wrist. The band broke I got the watch and put it in my pocket. She began cursing me. After she got thru I said to her 'Do you remember what I told you, that if you ever fuck me up, you have had it?'. Those are the very same words I used. Then I asked her if we were finished as she had told me the night before and she said 'Yes.' Then I pulled out the pistol and fired at her. I kept on firing until the ammunition was finished. I do not know how many rounds there were in the magazine. Some soldier took the pistol away from me and after a while the Provost Marshal got there and put me under arrest.
>
> "On the morning of 12 December 1947 I sent a letter to my CO thru the mail clerk. I told him that by the time he received my letter it would be all over. I did not mean that I was going to kill her. I just meant that I was going to give her a good beating." (Pros Ex 5)

The brass and projectile which had been picked up by Sergeant Bohl and other projectiles recovered at the "PX" by DiTore, along with the

pistol taken from accused were turned over to Karl Denk, a ballistics expert. Denk testified that in his opinion the brass and projectiles were fired from the pistol which had been taken from accused (R 56,61, 62,63,71,72,73,94,95).

b. For the defense.

Paula Boeck testified that she had known accused and deceased for approximately eight months and knew they were going together. During the eight month period accused used to visit the "PX" two or three times a day, and would accompany deceased to her home almost every day after work was finished (R 98).

Isabella Reiter testified that she knew that accused and deceased were going to marry. She also testified that accused visited the "PX" frequently, and usually accompanied deceased to her home after work (R 99).

Staff Sergeant R. T. W. Hendricks testified that he had known accused since 1946 and that accused had a reputation of good character and peacefulness. (R 101).

Captain Oscar R. Sears testified that he had known accused since April 1947 and had been accused's commanding officer. While accused was under Captain Sears he was a good soldier. Captain Sears had known the deceased and that accused had intended to marry her. After accused had started going with deceased Captain Sears observed that he became lackadaisical in his work and missed bed check and guard several times (R 101-102).

Captain Hugh W. Glenn, Chaplain at Horsching Base, testified that he had received from accused an application to marry deceased and an application purportedly signed by deceased requesting permission to marry accused (R 103-106).

Accused upon being apprised of his rights elected to testify in his own behalf. He testified that he was 19 years of age, had enlisted in the Army in October 1945 and had been overseas twenty-one months. He had been going with deceased for about ten months and was planning to marry her. He had been giving her $80.00 a month to save for their marriage. In addition he had given her two radios. On the 11th he had been told by other men in his troop that deceased was going out with other soldiers, and one man told him that she had been going out with "a colored boy" (R 108). The same night he rode into Linz with deceased and on arriving there learned that she had a date with another boy. The other "boy" told accused that he had been going with deceased for two months and that deceased had been having fun with accused. Accused talked to deceased alone and asked her if there was anything he could

do to change her mind. She answered in the negative stating that she had had her mind made up for quite a while. He asked if he could go to her home to get some personal belongings and was informed that she did not have them (R 109). He testified that he "picked up" a clip of ammunition in the orderly room of Troop A on "the 11th" to use on himself and this was what he meant in his letter to Captain Brier wherein he stated that he was not going to come back (R 108). On the morning of the twelfth he was informed by a Private Bailey that the latter's girl friend had told Bailey that she had seen deceased with a colored soldier on several occasions (R 111-112). With reference to his subsequent acts accused testified:

> "* * So I drew my .45 to go out to train with the troop. I went up toward the hangar. On the way up there, I had the clip in my pocket and tried to draw a holster from the arms room, but they didn't have any. On the way to the hangar, I thought I would go into the PX and ask my girl if she had changed her mind about me. I walked into the PX and I asked her if she still meant what she said last night or if there was any way I could talk her out of what she said. She said I couldn't talk her out of it. I asked her if she had any money. She said she had no money.
>
> * * *
>
> She said she hadn't any of the money. I never asked what she done with it, I took it for granted she spent it. I said I was broke now and I would have to have my watch. She didn't give it to me and I saw it on her hand so I reached over the counter and took my watch away from her. She started cussing me. Everything just went. I don't know what I done. Everything just went black. That is all I have to say, sir." (R 112)

On cross-examination he denied stating after the shooting that he intended to shoot deceased (R 116). He also stated that he had been told by Sergeant Reiter on the 11th to report for training (R 117).

c. Prosecution in rebuttal.

Eva Humer testified that in the course of the two conversations which preceded the shooting deceased used no curse words and further that deceased gave the watch to accused and the latter did not take it off her wrist (R 120).

Captain Robert L. Brown testified that on the afternoon of 12 December 1947 accused stated that he had intended to kill deceased and inquired as to her condition. Upon being told that deceased's condition was unknown accused expressed the hope that she was dead (R 123).

First Sergeant Edward W. Render denied that on 11 December he ordered accused to report for training (R 126).

Other evidence introduced in rebuttal by the prosecution tended to show that prior to trial accused did not claim that deceased had been going out with colored soldiers (R 122).

d. Defense rebuttal.

Private James K. Bailey testified that on the morning of 12 December 1947 he informed accused that his (Bailey's) girl friend had seen deceased in company of colored soldiers. Upon cross-examination Bailey admitted that he had been confined in the stockade two days prior to his appearance at the trial and that while in the stockade he had conversed with accused (R 135).

e. Sanity.

Captain Irwin F. Bennett, Chief of the Neuropsychiatric Section, 98th General Hospital, whose qualifications as a psychiatrist were conceded by the defense, testified that he examined accused between 8-10 January 1948, and as a result of the examination found that accused at the time of the offense knew right from wrong, had the ability to adhere to the right, and the present ability to understand the nature of the proceedings against him and to do what should be necessary to present his defense. Upon cross-examination Captain Bennett testified that his opinion of accused's mental condition at the time of the offense was based upon his observation of accused when he saw him and from his history and that accused's mental condition could have changed. With reference to hypothetical factors which could affect accused's mental condition at the time of the offense Captain Bennett testified:

"Q I will ask you, are not there certain conditions that might exist that would affect a man of this young man's age, to such a respect that he would be deranged and would not have control over his actions, -- not this particular case, but is that a fact?

A The answer to the hypothetical question is yes.

Q Could a man on account of certain facts and in heat of passion, couldn't he commit an act and not have control over his action and not be able to distinguish right from wrong?

A Again the answer to the hypothetical question is yes." (R 15)

4. Accused has been found guilty of murder in violation of Article of War 92. The evidence shows that accused and deceased had prior to 12 December 1947 been engaged in courtship and were reputed to have been contemplating matrimony. Their relationship had, however, been marred by quarrels. On the evening of 11 December accused learned that deceased had a "date" with another soldier. On the morning of 12 December accused sent a letter to his commanding officer in which, at

least by inference, was contained a prophecy of impending events. Accused also drew a pistol from his troop armorer ostensibly for training purposes. At approximately 1100 hours on 12 December 1947 he appeared at the Post Exchange where deceased was working and demanded and obtained his watch from the deceased. He left, returned, and after a short exchange of words drew a pistol and fired three or four shots at deceased, and after she fell to the floor fired three more shots at her. Deceased sustained five wounds, the most serious being a wound of the duodenum. She also sustained a wound in the left orbital socket damaging the left eye. An operation on the duodenum met with initial success and there was an improvement in deceased's physical condition. It was considered, however, absolutely necessary to remove the left eye, in order to save the other eye, and on the eighth day after the shooting an operation was performed. The suture in the duodenum gave way and a severe peritonitis set in. Deceased died the same day the eye operation was performed. Although the wound in the duodenum was the cause of death it was possible that the eye operation might have produced sufficient shock to cause a relapse.

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * Malice aforethought * * * may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation);". All the requisite elements of murder as defined above are shown by the uncontradicted evidence of record, unless the shooting occurred in the heat of a sudden passion upon adequate provocation. Giving full credence to the testimony of accused that he and deceased were engaged to marry, that he had given deceased nearly a thousand dollars of his pay to save for their marriage, and that she in fact was playing fast and loose with his heart and money, we fail to find that there was adequate legal provocation for his act. Thus it is stated:

> "* * *, the provocation must not, in every case, be held sufficient or reasonable because such a state of excitement has followed from it, for then, by habitual and long-continued indulgence of evil passions and on account of that very wickedness of heart which in itself constitutes an aggravation both in morals and in law, a bad man might acquire a claim to mitigation which would not be available to better men. It is generally agreed that in the determination of whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard, unless, indeed, the person whose guilt is in

question is shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition." (26 Am. Juris., Homicide, 25).

We are of the opinion that the provocation was not of such a nature as to move the average person to the degree of violence to which accused resorted. It would appear, moreover, that accused's actions were not the result of ungovernable passion but were the result of deliberation, and while premeditation is not a required element of murder as defined by Par 148, MCM, 1928, the record of trial would sustain that element if required.

Accused's acts must, however, be the proximate cause of deceased's death. The only question necessitating consideration in this aspect is the eye operation preceding deceased's demise and which possibly caused shock reacting adversely upon deceased's abdominal condition, resulting in severe peritonitis which produced death. Conceding that but for the eye operation death would not have ensued we conclude that accused's acts of 12 December 1947 were the proximate cause of the death which took place some eight days later. The eye operation which was occasioned by accused's wounding of deceased's left orbital socket was considered by the attending physicians to be absolutely necessary in order to avoid damage to and loss of the other eye. There is no suggestion in the record that the procedures used in the eye operation were not proper and no question of negligence upon the part of the operating physician is raised. It may even be conceded that the wounds inflicted by accused were not necessarily fatal. It is sufficient, however, to sustain a conviction for murder in this case to show as does the record that death resulted from an unbroken chain of causation from the wounds inflicted by accused (CM 270744, Brazelle, 45 BR 345,349; CM 328608, Dooley).

Under questioning by the Trial Judge Advocate Miss Humer testified that approximately fifteen days prior to the shooting accused said to deceased, "You son-of-a-bitch if I catch you I will shoot you." Upon motion by the defense, concurred in by the prosecution, this testimony was stricken. Subsequently Miss Humer on examination by the trial judge advocate stated that her testimony was correct insofar as it went but that accused in reality said more, the additional words being "When I catch you with somebody else I kill you." It is apparent that the amended out-of-court declaration of accused to which no objection was made is in substance the same as the declaration which was excluded by the law member. It is sufficient to say that both declarations were in fact competent and relevant evidence to establish malice, premeditation and to prove the state of accused's mind (40 CJS 1107). The lapse of 15 days between the voicing of the threat and the homicide does not

affect the admissibility of the threat. "As a rule, only the probative force, not the admissibility of threats, is affected by the circumstances under which they were made, their repetition, the lapse of time intervening between their utterance and the killing, whether they were absolute or conditional, whether there was opportunity for carrying them into execution, and other similar circumstances" (13 RCL 925). Thus where a period of four or five weeks elapsed between a telephonic communication to the victim's sister of a threat against the victim and the homicide the evidence pertaining to the threat was held not to be too remote to be admissible (State v. Roy, 40 N.M. 397, 60 P(2d) 64b, 110 ALR 1,8). We conclude, therefore, that the exclusion by the law member of Miss Humer's testimony concerning the threat voiced against deceased fifteen days prior to the shooting was error and that her testimony as subsequently admitted pertaining to the same subject matter was competent.

The record of trial also shows that the prosecution introduced evidence that accused had been placed in arrest on 8 December 1947 some four days prior to the homicide. This evidence was clearly incompetent as tending to show the accused to be of bad character (Par 112b, MCM, 1928). Under the circumstances of this case such evidence was not prejudicial inasmuch as similar evidence was adduced by the defense to show that accused's qualities as a good soldier detoriated after his acquaintance with deceased.

Accused prior to trial made a statement in which he admitted the offense of which he was convicted. Prior to making his statement he was apprised of his rights under Article of War 24. The person to whom he made the statement recorded it in longhand editing the language used by accused. Subsequently the statement in its edited form was typewritten, read and signed by accused. Under these circumstances it may not be contended that the typewritten edited statement was not accused's statement, and it was properly admitted in evidence.

Although the defense pleaded not guilty by reason of insanity there was no evidence presented which sustained that plea. The prosecution, however, over objection by the defense introduced evidence that accused at the time of the offense was able to distinguish right from wrong and had the capacity to refrain from wrongdoing, and at the time of trial had the ability to cooperate in his own defense. The defense objected to such evidence, which was presented immediately after accused's plea, on the ground that it was premature. We do not pretend to understand the nature of this objection but content ourselves in answer thereto to cite paragraph 41b, MCM 1928 to the effect that "Subject to the provisions of this Manual, he [Trial Judge Advocate] should be left free by the court to introduce his evidence in such order as he sees fit."

Thus in addition to the presumption of accused's sanity at the time of the offense (Par 112a, MCM 1928) the court had positive evidence to

the same effect. No question of accused's mental competency is presented by the record of trial.

5. Records of the Army show that accused is now over 20 years of age. According to a birth certificate of the Arizona State Department of Health, Division of Vital Statistics, accused attained the age of nineteen on 13 March last. He has a grammar school education and prior to his entry in the Army was employed as a construction worker. He attained a score of 84 on his Army General Classification Test. He enlisted in the Army on 17 October 1945 and he had service in the European Theatre extending from June 1946. On 11 December 1947, it was recommended that he be ordered before a board of officers pursuant to AR 615-369, because he had been given troop punishment on several occasions for infractions of discipline and was not considered fit for further military service by his troop commander. The record of hospitalization in connection with the recommended board proceedings indicates an emotional instability with a severe acute reaction. The Medical Officer, however, stated that a maladjustment in the accused's present environment indicated the desirability of a transfer to another organization.

6. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Death or imprisonment for life as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

H. Hottenstein, Judge Advocate

Geo Lynch, Judge Advocate

(On temporary duty), Judge Advocate

JAGH CM 329321 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 27 JUL 1949

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Private Oscar Marinez, RA 19219316, Troop "A", 24th Constabulary Squadron, APO 174.

2. Upon trial by general court-martial this soldier was found guilty of the murder of an Austrian female in violation of Article of War 92. He was sentenced to be hanged by the neck until dead, all the members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but in view of the deceitful nature of deceased's conduct toward accused and the age of accused at the time of the offense, I recommend that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life, that the sentence as thus commuted be carried into execution and that a United States Penitentiary be designated as the place of confinement.

On 16 June 1948 the Honorable Clair Engle, House of Representatives, together with Mr. Samuel R. Friedman and Mr. Harold V. Boisvert, attorneys for the accused, made oral argument in accused's behalf before the Board of Review. In addition the Board considered a brief submitted by Mr. Boisvert.

4. Inclosed is a draft of letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry the foregoing recommendations into effect, should they meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

****

(GCMO 148 , 3 August 1948).

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

JAGN-CM 329375

U N I T E D S T A T E S v. Private WILLIE GREEN, JR. (38500074), 4106 Army Service Unit Fourth Army Guard Detachment, New Orleans Personnel Center.	)	NEW ORLEANS PORT OF EMBARKATION Trial by G.C.M., convened at New Orleans Port of Embarkation, 3 March 1948. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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 58th Article of War.

Specification: In that Private Willie Green, Jr., 4106 Army Service Unit, Fourth Army Guard Detachment, New Orleans Personnel Center, Camp Leroy Johnson, New Orleans, Louisiana, then attached to Detachment of Patients 1872nd Service Command Unit, LaGarde General Hospital, New Orleans, Louisiana, did, at New Orleans, Louisiana, on or about 4 August 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at New Orleans, Louisiana, on or about 31 January 1948.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort

Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The only evidence introduced by the prosecution consists of two extract morning report entries reading as follows:

"September 1945.
4 August. Above EM fr atchd unasgd sk in hosp to AWOL as of 2300 4 Aug 45." (Pros. Ex. 1).

and

"31 Jan 48. Green Willie Jr. 38500074 Pvt (Atchd fr Det of Patients LaGarde Hosp NOLa) Fr AWOL to app by mil auth NOLa Conf guard house this sta 1300." (Pros. Ex. 2)

The accused made an unsworn statement in which he admitted "going off from the Army" (R. 12) but in no way otherwise elaborated upon the time, circumstance, or length of such absence.

4. The record fails to contain sufficient evidence to sustain the court's finding.

Failure to identify the accused in the extract copy of the morning report (Pros. Ex. 1) by name or serial number resulted in a failure to establish proof of initial absence without leave (CM 318685, Sustaite, 6 Bull JAG 61; CM 323109, Kingery (1947)). That portion of the entry in the morning report under date of 31 January 1948 (Pros. Ex. 2) indicating an AWOL status, does not establish the date of initial absence and is obviously hearsay. Since nothing is found in accused's unsworn statement that would establish the initial date of absence without leave such proof is lacking.

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

Edward J. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springston, Judge Advocate.

MAR 25 1946

JAGN-CM 329375 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, New Orleans Port of Embarkation, New Orleans, Louisiana.

1. In the case of Private Willie Green, Jr. (38500074), 4106 Army Service Unit Fourth Army Guard Detachment, New Orleans Personnel Center, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the findings and sentence be vacated. Upon taking this action you will have authority to direct a rehearing.

2. If a rehearing is directed a correct authenticated copy of the pertinent morning report entry should be obtained for introduction in evidence at the rehearing.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 329375).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 329380

24 MAY 1948

UNITED STATES v. Private LaRUE SUMMERS (RA 12243215), Company C, 526th Armored Infantry Battalion, Fort Knox, Kentucky	THE ARMORED CENTER FORT KNOX, KENTUCKY Trial by G.C.M., convened at Headquarters, The Armored Center, Fort Knox, Kentucky, 23 October 1947. Confinement for six (6) months and forfeiture of $50 pay per month for six (6) months. Stockade

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

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Pvt LaRue Summers, Company C, 526th Armored Infantry Battalion, having received a lawful command from Major Charles A. Henne, Headquarters and Headquarters Company, 526th Armored Infantry Battalion, his superior officer, to serve at hard labor for a period of 30 days (thirty), did at Fort Knox, Kentucky, on or about 30 September 1947, willfully disobey the same.

He 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 at such place as the reviewing authority might direct for one year. The reviewing authority approved and ordered executed "only so much of the findings and sentence as provides for confinement at hard labor for six months and a forfeiture of $50.00 of his pay per month for six months in violation of Article of War 96." The Post Stockade, Fort Knox, Kentucky, or elsewhere as the Secretary of the Army might direct, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 28, Headquarters The Armored Center, Fort Knox, Kentucky, dated 26 February 1948.

3. Evidence for the Prosecution

On 26 September 1947 accused was convicted by summary court and sentenced to perform hard labor for thirty days and to forfeit $50.00 of his pay (R 6,9; Pros Ex 1). Captain Wilder S. Deamud was the summary court officer. Captain Deamud informed accused and First Sergeant Dunn of the findings and sentence (R 6,7). On 26 September 1947 the summary court findings and sentence were approved and ordered executed by Major Charles A. Henne, Cavalry, Commanding Officer, 526th Armored Infantry Battalion, the reviewing authority (R 8, Pros Ex 1). On 30 September 1947 First Sergeant Sidney C. Dunn told the Charge of Quarters to send accused to battalion headquarters to perform the hard labor imposed (R 9). On the evening of 30 September 1947, accused was told by Sergeant Wayne W. Smith, who was in charge of a work detail at battalion headquarters, to secure some cleaning equipment and to go to work. Accused picked up a lawn mower and started away. Sergeant Smith ordered accused to leave the lawn mower alone and to go to work. Accused took away the lawn mower and said that if he was not back in 15 minutes he would not be back. He left the area and did not return. He did not perform hard labor on that evening (R 13, 14).

4. Evidence for the Defense

Accused was informed of his rights as a witness in his own behalf and testified that he was not advised that his sentence had been approved (R 8,25). On the night in question he had just finished supper and advised Sergeant Mills that he wanted to sit down before starting work (R 24).

5. Discussion

Accused was found guilty of a violation of the 64th Article of War in that he willfully disobeyed the lawful command of Major Henne, his superior officer, to serve at hard labor for a period of thirty days. The reviewing authority approved only so much of the findings of guilty as involved a violation of Article of War 96. When Major Henne approved accused's sentence to perform hard labor for thirty days and ordered it executed he breathed life into the sentence already adjudged and made it lawful for, and, indeed, ordered, those directly charged with the enforcement of the sentence to give whatever orders might be necessary to execute it in fact. Major Henne, then, by his action as reviewing authority, did not himself order accused to perform hard labor for thirty days but simply made it obligatory upon others to do so. It follows, then, that the record of trial fails to show that any order to perform hard labor emanated from Major Henne to accused. Since under the pleadings herein accused could not have been convicted of disobedience, in violation of Article of War 64 or 96, of orders issued by any person other than Major Henne, the findings of guilty and the sentence as approved by the reviewing authority

should be set aside.

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

Robert W. Silvers, Judge Advocate

Gilbert G. Ackroyd, Judge Advocate

Harley B. Lanning, Judge Advocate

JAGK - CM 329380 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 4 JUN 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724, 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private LaRue Summers (RA 12243215), Company C, 526th Armored Infantry Battalion, Fort Knox, Kentucky.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 131, 25 June 1948).

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

10 MAY 1948

JAGQ - CM 329445

UNITED STATES v. WILLIAM L. BENEZETTE AES No. 6, Army Exchange Service Civilian Employee assigned to Kassel Military Post Exchange, APO 171.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Heidelberg, Germany, 11 December 1947. Five Hundred Dollar Fine ($500) to be paid on or before 15 January 1948 and in the event such fine is not paid on or before said date, confinement until paid but in no event more than six (6) months. Wetzlar Military Post Guardhouse.

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

1. The record of trial in the case of the civilian employee named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence has 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 Charges and Specifications:

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

Specification 1: In that William L. Benezette, Army Exchange Service Employee, a person accompanying the armies of the United States without the territorial jurisdiction of the United States, did, at Eschwege, Germany on or about 15 March 1947, unlawfully sell to one Technician Fifth Grade Paul S. Cain 25 Cartons of cigarettes for $80.00 in violation of USFET Circular No. 140 dated 26 September 1946.

Specification 2: In that William L. Benezette, Army Exchange Service Employee, a person accompanying the armies of the United States without the territorial jurisdiction of the United States, did, at Eschwege, Germany on or about

25 March 1947, unlawfully sell to one Technician Fifth Grade Paul S. Cain 25 cartons of cigarettes for about $100,00 in violation of USFET Circular No. 140 dated 26 September 1946.

Specification 3: (Finding of not guilty).

CHARGE II: Violation of the 94th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

Accused pleaded not guilty to and was found guilty of Specifications 1 and 2 of Charge I and of Charge I, not guilty of Specification 3 of Charge I and not guilty of the specification of Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced "to pay to the United States a fine of five hundred dollars ($500.00) to be paid in one lump payment on or before 15 January 1948; and in the event such fine is not paid on or before said date, to be confined at hard labor, at such place as the reviewing authority may direct, until so paid, but in any event not to be confined for more than six (6) months." The reviewing authority approved the sentence and ordered it duly executed, "and, in case confinement is necessary," designated the Wetzlar Military Post Guardhouse, Wetzlar, Germany, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 85, Headquarters United States Constabulary, APO 46, dated 25 February 1948.

3. On or about 15 March 1947, accused in a conversation with Technician Fifth Grade Paul Cain, agreed to sell to Cain 25 cartons of cigarettes for $80 and as a result of this conversation Cain received the cigarettes from accused's servant at accused's billet. Cain paid the servant the $80 as directed by accused. On or about 25 March 1947, accused and Cain had another conversation during which Cain asked accused if he had any cigarettes for sale and accused replied that he could get 25 cartons from the post exchange warehouse in Kassel. Two or three days later Cain received 25 cartons of cigarettes from accused, for which he paid accused $100 (R 8-11). The court took judicial notice of Circular 140, Headquarters, United States Forces, European Theater, 26 September 1946 (R 27). The provisions of this Circular which are pertinent to the case are:

"2. Policy. It is the policy of the Theater Commander that all persons in the theater who are -

a. U.S. military personnel
b. Employed by, serving with or accompanying the U.S. forces, or
c. Authorized to be present within the theater with the permission and authority of the Theater Commander

shall not, insofar as can be avoided, disturb the economy of the occupied territories of Germany or Austria, nor use their presence here in order to obtain or to plan to obtain any commercial or monetary advantage for themselves or for others."

* * *

"4.b(2) Sales and Trading. No person subject to this circular may sell tangible personal property to any person (including Germans and Austrians) not subject to this circular. No tangible personal property subject to US Department of Commerce export restrictions may be transferred to persons other than US citizens. (This headquarters is compiling and will publish lists of US exports which are prohibited by US law or regulations from resale except to US citizens.) Privately owned motor vehicles may be sold or transferred only as prescribed by Sec 3 (g) of the 'Motor Vehicle and Traffic Code'.

* * *

"4.d. Engaging in Professions, Trade or Industry. No individual may engage in any profession, trade, business, transportation, mining or other industry, in any capacity in the US occupied territories of Germany and Austria, whether as owner, director, manager, officer, consultant, employee or stockholder, whether or not for profit, gain or other advantage ***"

Accused after being advised of his rights elected to remain silent.

4. It is clear that a sale of cigarettes in the authorized course of post exchange business, by accused to Technician Fifth Grade Cain would not violate paragraph 4b(2) of the Circular since Cain was a member of the armed forces and was not within the class of persons to whom sales were prohibited. This was recognized in the argument of individual defense counsel on his motion to strike Specifications 1 and 2 of Charge I on the grounds that they did not charge an offense (R 6, 7), and the trial judge

advocate at that time affirmatively asserted that the alleged offense consisted of "engaging in business" in violation of paragraph 4d of the circular. Thus, the only question presented for determination by the Board of Review is whether the sale by accused of cigarettes to Technician Fifth Grade Cain on two different occasions constituted "engaging in business" in violation of paragraph 4d of USFET Circular No. 140.

The general rule in the United States as defined by court decisions is that "the phrase 'engage in business' means that the business shall be carried on as a regular occupation or constant employment as distinguished from a single isolated act" (Commonwealth v. White, 260 Mass. 301, 157 N.E. 597; Dane v. Brown, 80 Fed. (2d) 164). Obviously, in the European Theater it would be extremely difficult for military personnel and civilians serving with the armed forces to "engage in business" under this definition of that term. The Board of Review must therefore look to the peculiar problems there presented to determine the legal implications of the language used in the circular. Consequently in determining the meaning of the phrase "engage in business" as used in Circular No. 140 the commonly accepted definition of the term as used in the United States is not controlling. The policies announced and the results sought to be accomplished by the Theater Commander in publishing the circular must be considered. One of the announced policies enunciated in the circular is that no person or class of persons enumerated therein shall "use his presence" in the theater to "obtain monetary advantage" for himself. To implement this announced policy one of the prohibited practices is "engaging in business".

In the instant case accused on two separate occasions, ten days apart, sold large amounts of cigarettes at unconscionable prices to Technician Fifth Grade Cain. The conclusion is inescapable that these sales were made by accused to obtain monetary advantage for himself. The evidence clearly establishes that the sales were not isolated transactions entered into as a favor or accommodation but were sales on a commercial scale, in a "black market" business for the personal gain of accused.

The Board of Review is therefore of the opinion that the facts and circumstances of this case, judged by the policies announced and the practices enjoined by Circular No. 140, supra, establish that accused's conduct amounted to "engaging in business" in violation of Paragraph 4d of said circular.

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

W H Johnson, Judge Advocate

_____, Judge Advocate

A. D. Kane, Judge Advocate

JAGQ - CM 329445 1st Ind

JAGO, Dept. of the Army, Board of Review No. 4 10 May 1948

TO: The Judge Advocate General

For his information

William H. Johnson Jr

WILLIAM H. JOHNSON, JR.
Lt. Col., JAGD
Chairman, Board of Review No. 4

Noted, for TJMG.
12 May '48 RWH

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

JAGK - CM 329496

20 APR 1948

UNITED STATES	PHILIPPINES-RYUKYUS COMMAND
v.	Trial by G.C.M., convened at Headquarters PHILRYCOM, APO 707, 2, 6 and 7 January 1948. Dismissal.
First Lieutenant BAUTISTA DELIGERO (O-2027080), Infantry.	

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

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

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

CHARGE I: (Finding of not guilty).

Specification 1: (Special plea in bar sustained).

Specification 2: (Finding of not guilty).

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

Specification: In that First Lieutenant Bautista Deligero, 44th Infantry Regiment (Philippine Scouts), having on or about 26 April 1945, become indebted to Flaviana Taotao in the sum of ₱50.00 per month for the support of his natural child, and having on or about 26 April 1945 promised in writing to said Flaviana Taotao that he would each month pay on such indebtedness the sum of ₱50.00, did, without due cause, within the area of PHILRYCOM Command, to wit: the Philippine Islands and RYUKYUS Islands from on or about December 1945 to on or about December 1947, dishonorably fail to keep said promise.

He pleaded not guilty to all charges and specifications. The court sustained a plea in bar under the Statute of Limitations as to Specification 1 of Charge I and found the accused not guilty of Charge I and Specification 2 thereof. The accused was found guilty of Charge II and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the

sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

There was received in evidence, over objection of the defense counsel, the deposition of Miss Flaviana Taotao taken on interrogatories propounded by both the prosecution and defense on 12 December 1947 at Tigbao, Libagon, Leyte, Philippine Islands (R 10-28, Pros Ex 5). In her deposition, Miss Taotao testified that during the year 1944 she lived with the accused as his wife, although she had never been married to him, and that as a result of their relations a girl child was born to her in January 1945. While she was confined, the accused had contributed to her support but about the time the child was born he abandoned her. The witness identified and there was also received in evidence over the defense's objection a document duly proven to have been signed by the accused which was by consent withdrawn and a certified true copy substituted for the record as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"That I, BAUTISTA DELIGERO, of age, single and at present stationed as officer of the Philippine Scouts (U.S. Army) at the Fourth Replacement Battalion, Marasbaras, Tacloban, Leyte, on first being duly sworn, depose and say:

"That I recognize and acknowledge as my natural child the girl infant born in January, 1945, to Flaviana Taotao and I promise to pay her Fifty Pesos (₱50.00) for the monthly support of said child.

"IN WITNESS WHEREOF, I sign this deed of acknowledgment this 26th of April, 1945, in Tacloban, Leyte.

IN THE PRESENCE OF:

(Signed) - (?) (Signed) Bautistao Deligero
(Typed) BAUTISTA DELIGERO

(Signed) Antonio Montilla

MUNICIPALITY OF TACLOBAN

PROVINCE OF LEYTE SS

"Before me personally appeared Mr. Bautista Deligero known to me to be the person who executed the foregoing instrument and he acknowledge before me that he executed the same freely and voluntarily. He did not exhibit to me his residence certificate, he being exempt therefrom as he belongs to the Army. This deed of acknowledgment is composed of but one page duly signed by the executor and his

witnesses.

(Signed) Antonio Montilla
(Typed) ANTONIO MONTILLA
Notary Public
My commission expires Dec. 31, 1946

Not. Doc. 88
Page 41
Book One
Series of 1945.

CERTIFIED TRUE COPY:
/s/ Eaton J Bowers III
EATON J BOWERS III
Capt, FA" (Pros Ex 1)

The original document referred to above was further identified by Mr. Antonio Montilla, an attorney and notary public residing at Tacloban, Leyte, Philippine Islands (R 28, Pros Ex 6). Miss Taotao asserted that at some subsequent date the accused agreed to increase the amount set forth in the agreement to ₱100 per month. On various occasions Miss Taotao had sent letters and telegrams to the military authorities and had visited the Inspector General of PHILRYCOM at Manila in May 1947 in an effort to compel the accused to pay her the money as agreed. She gave the following itemized statement of all payments made to her during the period December 1945 to December 1947 inclusive:

"Answer:

February,	1945	P ----	(None)	August	1946	P	None
March	1945	----	(None)	September	1946		None
April	1945	50.00		October	1946		98.00
May	1945	50.00		November	1946		None
June	1945	50.00		December	1946		None
July	1945	50.00		January	1947		None
August	1945	100.00		February	1947		None
September	1945	100.00		March	1947		None
October	1945	100.00		April	1947		None
November	1945	100.00		May	1947		None
December	1945	----	(None)	June	1947		None
January	1946	----	(None)	July	1947		None
February	1946	----	(None)	August	1947		100.00
March	1946	----	(None)	September	1947		80.00
April	1946	100.00		October	1947		None
May	1946	98.00		November	1947		None
June	1946	95.00		December	1947		None
July	1946	----	(None)"				

(Pros Ex 5)

Without objection there was received in evidence a letter dated 26 July 1947 from the accused to Miss Taotao wherein the accused acknowledged signing the contract, stated that it was not his intention to deprive the child

of his support, and that "from now on" the payments would be made regularly (R 27, Pros Ex 4).

4. Evidence for the defense

There was received in evidence a request on behalf of the accused for a cable transfer to Miss Falavia Gastao (subsequently changed to Flavia Taotao) in the amount of ₱100 and dated 2 March 1946 (R 92, Def Ex G).

Being cognizant of his rights as a witness, the accused elected to make an unsworn statement. He asserted that he did send Miss Taotao "some money" for the months he was not given credit, that there was a strong possibility that he was not the father of the child and that he had never agreed to increase the payments to ₱100 per month. The accused stated that Miss Taotao had threatened him with publicity and that he had no assurance that the child was receiving the benefit of the money he had sent her. The accused recounted his military experience, including that as a member of the Philippine guerrillas in Leyte during the Japanese invasion (R 98-99).

In view of the court's findings no further evidence need be summarized.

5. Comment

Civilian defense counsel, at the trial, objected to the reception in evidence of the deposition of Miss Flaviana Taotao on the ground that the accused was not present in person at the taking of the deposition. In other words, the contention is that accused was denied the right of confrontation at such time. Regularly appointed defense counsel had also recorded an objection, in the deposition itself, to the absence of the accused at the taking thereof (R 10,28, Pros Ex 5). This deposition, in all respects, appears to have been accomplished in compliance with Article of War 25 and the provisions of the Manual for Courts-Martial, 1928, in implementation thereof. The deposition bears evidence that the deponent therein had been subjected to a lengthy cross-interrogation by the regularly appointed defense counsel.

In CM 325056, Balucanag, the Board of Review said:

> "The right of confrontation is an ancient right, a rule of evidence which existed in Anglo-Saxon jurisprudence before the adoption of the Sixth Amendment to the Constitution. As embodied in that Amendment, and in the constitutions of the various states, it is not to be taken as an absolute prohibition against any evidence which does not come from the mouth of a living witness on the stand and under oath, but is subject to the general exceptions to the hearsay rule which were recognized before and at the time of its enshrinement in constitutional provisions in this country and which have since come into being due to various statutory extensions of these exceptions" (Underscoring supplied).

Without launching upon a discussion as to the applicability of the various constitutional provisions to trial by court-martial, we believe a somewhat brief inquiry into the historical background of the use of depositions in criminal cases might prove of some value. In the American Articles of War of 1786 we find the following provision:

> "Art. 10. On the trials of cases not capital, before courts-martial, the depositions of witnesses, not in the line or staff of the Army, may be taken before some justice of the peace, and read in evidence, provided the prosecution and person accused are present at the taking of the same."

Article 74 of the Articles of War of 1806 reenacted the above quoted Article 10, using the same language, but added thereto the words: "or are duly notified thereof." Article 91 of the Articles of War of 1874 provided:

> "The depositions of witnesses, residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital."

With respect to Article 91, Winthrop has this to say:

> "*** In general, all that the notice is really needed for is to afford the party sufficient time within which, (in consultation with his counsel, if he has any,) to examine the interrogatories, note objections, (if desired,) and prepare cross-interrogatories."
>
> * * *
>
> "A deposition may be taken - as sometimes in civil cases - by both parties appearing, personally or by counsel, before the designated commissioner or officer, and propounding questions to the witness. This course, however, is rarely pursued in military cases." (Winthrop's Mil Law and Prec (2d Ed), pp 353,355.)

Both the above methods of taking depositions, that is, on written interrogatories or upon oral examination, are provided for in the Manual for Courts-Martial currently in use (par 98b, g, MCM 1928). The present Article of War 25, enlarging the scope of the old Article 91 in some respects not here material, retains the requirement that depositions be taken "upon reasonable notice to the opposite party" but, as in the case of the 1806 and 1874 provisions, does not require that the deponent be confronted, "face to face," by accused in person or even by his counsel, nor does it, expressly or by implication, give accused any right to insist upon such confrontation.

It is obvious, then, that there can be no overall constitutional

objection to the use of depositions, by either party, in prosecutions for non-capital crimes by court-martial, for this was the custom before the adoption of the Bill of Rights. (See also General Crowder's discussion before the Senate on the revision of the Articles of War, Senate Report No. 130, 64th Congress, 1st Session, p. 54.) The question remains, however, as to whether the provision in the 1786 Articles to the effect that an accused must be present at the time of taking a deposition is to be considered a determination by the Continental Congress that the right to confrontation existed in the case of deposition evidence or whether this requirement was merely a procedural regulation, having no more significance in the long history of the law than that it simply seemed to be a good idea at the time.

In this connection, it is most interesting to note that the requirement of confrontation found in Article 10 of the 1786 Articles became only an alternate method of taking depositions in the Articles of 1806 and that even the mention of accused's presence was entirely omitted in the Articles of 1874. Also, we are not aware of any challenge on constitutional grounds having been interposed to the reception of deposition testimony by military courts during the many decades of their operation under statutes similar, in respect of the matter here under discussion, to the present Article of War 25. All this does not augur well for the contention that deposition testimony is not considered an exception to right of confrontation in its vis-a-vis, as distinguished from cross-examination, aspect. Moreover, looking to the land where that right was nurtured and where it first became part of the law, we find that in 1772 the British Parliament passed an act providing for the taking of deposition testimony in India for use in criminal cases in the Court of King's Bench. In that act, provision was made for the representation of accused before the commission taking the testimony overseas but it was obviously thought unnecessary to require or authorize the attendance of accused in person (East India Company Act of 1772, 13 Geo. 3, c. 63, s. 40). In 1831 the provisions of this act were extended to other overseas possessions of Britain (Evidence on Commission Act of 1831, 1 Will. 4, c. 22). Parliament, apparently, has found no reason, throughout the years, to regret the passage of this type legislation and no opposition thereto has appeared. Indeed, further legislation has provided for the taking of deposition testimony in criminal cases, not necessarily in the presence of accused, under other circumstances where, were a deposition not possible, the evidence gathered thereby would have been unobtainable. (See, for example, Criminal Law Amendment Act of 1867, 30 & 31 Vict. c. 35, s. 6 - testimony of persons dangerously ill.)

Having regard to the general historical background of the right of confrontation, we are of the opinion that the present practice of obtaining depositions for use in court-martial trials, as provided for in Article of War 25 and the Manual for Courts-Martial, 1928, is not in conflict with the existence of that right. We believe that the reception in evidence of such a deposition, taken out of the presence of accused by written interroga-

tories or otherwise, is warranted either upon the ground that depositions thus taken constitute one of the several exceptions to the right of confrontation existing prior to or simultaneously with the adoption of the Sixth Amendment or upon the equally tenable theory that the legislative authority for the admission of such evidence is a permissible statutory extension of an exception then existing. Thus, in the instant case, no error lies in the admission in evidence of the deposition of Miss Taotao.

Under Charge II and its specification, the accused was found guilty of dishonorably failing, during the period December 1945 to December 1947, to keep his promise to pay Flaviana Taotao ₱50 per month for the support of her girl child, which child he had acknowledged to be his own. The formal agreement or promise of the accused to pay the money, introduced in evidence as Prosecution Exhibit 1, is not denied, in fact, it is verified by accused's letter of 26 July 1947, wherein he further acknowledges the agreement and states that "the money will be sent to you regularly from now on." Having voluntarily promised the woman ₱50 per month for the support of the child the court was obliged to determine only (1) whether the payments were made as alleged, and (2), if they were not so made, was the failure dishonorable within the meaning of Article of War 95. Except for a credit claimed for March 1946 in the sum of ₱100, which is in dispute, the evidence shows that for the 25 months in question he agreed to pay Miss Taotao a total of ₱1250, but that he actually paid her only ₱571. Such payments as were made appear to have followed her pleas for intervention by the military authorities and inasmuch as accused's ability to make the payments is not questioned we conclude as did the court that his failure to keep his promise was arbitrary, characterized by evasion and false promises, and was of such a nature as to seriously compromise accused's standing as an officer and a gentleman (CM 274930, Curley, 47 BR 375, 383).

We are not here concerned with the contractual liability of the accused under Philippine law as was contended by counsel, nor are we impressed by the reasons advanced for not complying with the agreement. The accused cannot now be heard to cast doubt on the paternity of the child or to imply that he was coerced into signing the agreement. It appears that he signed the agreement voluntarily and did not elect to have the civil courts determine his liability for the support of the child.

Having made his election to pay a liquidated amount, his failure under the conditions stated brings dishonor to his status as an officer.

6. Department of the Army records show that the accused is 37 years of age and was graduated from high school. He was an enlisted soldier serving with the 93rd Infantry Division, USAFFE, and was stationed at Ormoc, Leyte, when war was declared with Japan. In January 1942 he was appointed a second lieutenant (PS) in the field. This appointment was confirmed by paragraph 5, Special Orders No. 129, Headquarters USAFFE, 11 May 1945. In May 1942 the accused escaped capture by the Japanese, hid in the mountains, and carried on guerrilla activities until August 1943 when he was captured

and imprisoned for two months at Camp Langit, Leyte. He escaped in October 1943 and engaged in raids and sniping on enemy patrols until the Japanese were driven out of the islands, at which time he again joined the Philippine Scouts. He was promoted to First Lieutenant (PS) on 22 May 1945.

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 thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Charles D. Gilroy, Judge Advocate

Gilbert E. Hoagland, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 329496 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. APR 29 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 Bautista Deligero (0-2027080), Infantry.

2. Upon trial by general court-martial this officer was found guilty of dishonorably failing for the period December 1945 to December 1947 to keep his written promise to pay Flaviana Taotao the sum of ₱50 per month for the support of his natural child in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record 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 sentence and to warrant confirmation of the sentence.

In 1938 the accused, then an enlisted man in the Philippine Scouts, married one Marta Balles of Pampanga, P.I. One or more children were born to this marriage and the parties were never divorced. At the outbreak of the war the accused was an enlisted instructor in the 93rd Infantry, USAFFE, and stationed at Ormoc, Leyte. When the Japanese overran the Islands the accused refused to surrender and escaped to the mountains where he engaged in sniping on Japanese patrols and in other guerrilla activities. In 1944 he lived with one Flaviana Taotao, a native woman, who appears to have supplied food for the accused and other guerrillas. As a result of accused's relationship with Miss Taotao a girl child was born in January 1945. On 26 April 1945 the accused appeared before a Philippine lawyer and notary public and signed an agreement acknowledging the infant to be his natural child and agreeing to pay the mother ₱50 per month for the support of said child. During the years 1945 and 1946 the accused made payments to Miss Taotao approximating ₱50 per month. For the year 1947 he made no monthly payments to her excepting ₱100 in August and ₱80 in September. These payments appear to have resulted from action taken by the Inspector General, PHILRYCOM.

At the trial the defense challenged the accused's paternity of the child and argued the validity of the contract or agreement under Philippine law. In his unsworn statement the accused recounted his military service and contended that Miss Taotao was actuated by revenge in pressing him for

payment. It appears that in December 1945 the accused married one Isidora D. Evarretta at Banday, Malitbog, Leyte.

4. Department of the Army records show that the accused is 37 years of age and was graduated from high school. In January 1942 he was appointed second lieutenant (PS) in the field. This appointment was confirmed by paragraph 5, Special Orders No. 129, Headquarters USFFE, 11 May 1945. He was promoted to first lieutenant in May 1945.

5. In view of the accused's war record and all the circumstances, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $100 pay, and that the sentence as commuted 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.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 99, 6 May 1948).

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

JAGH CM 329497

30 JUN 1948

UNITED STATES v. First Lieutenant JOE K. ANDERSON, 01336732, Headquarters Company, Third Battalion, 18th Infantry.	))))))))	HEADQUARTERS COMMAND, EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 20, 21,22 January 1948. Dismissal and total forfeitures.

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Joe K. Anderson, Headquarters Company, Third Battalion, 18th Infantry, did, on the Autobahn, at or near Frankfurt-am-Main, Germany, on or about 4 August 1947, wrongfully and unlawfully cause the death of Yvette Heluin, by recklessly and negligently driving an automobile.

Specification 2: (Same as Specification 1, except the name of the deceased "Alma Poritzke.").

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Charge I and its Specifications and guilty of Charge II and the Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of one year. The reviewing authority approved only so much of the sentence as provides for dismissal and forfeiture of all

pay and allowances, and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. General. The situs of the motor vehicle collision upon which the issues of this case are based is variously described as the Autobahn between Frankfurt and Bad Nauheim, and between Frankfurt and Bad Homburg, in Germany. Reference to maps of the Department of the Army shows a road running north from Frankfurt to Bad Homburg and thence on to Bad Nauheim. It is concluded that the road variously described by the witnesses was one and the same road. It also appears that the Autobahn at the point of the accident was a dual highway with one-way traffic prevailing in opposite directions. The two traffic lanes were separated by a "grass plot" (R 112). The lane in which the accident took place was for northbound traffic and was approximately seven or eight meters in width. The situs of the accident was by measurement 1.3 miles north of a gasoline station designated as "POL /Petroleum, Oil and Lubrication/ Station No. 5." Station No. 5 was approximately 4 and one half miles out of Frankfurt (R 10,20). An overpass or bridge was situated over the Autobahn between Station No. 5 and the situs of the accident and another double overpass was situated over the Autobahn about 60 or 70 meters north of the situs of the accident (R 49,97,98). There was a slight incline in the road north of the place of accident (R 98). From Station No. 5 to the point of the accident the road was straight although one witness testified that he remembered "more or less a slight curve there." (R 75,97). Another witness testified that at the location of the accident the road was "straight on as a string." (R 61).

b. For the prosecution. At approximately 1900, 3 August 1947, First Lieutenant Terrence V. Jones, Chief Warrant Officer Cecil V. Booth, and two ladies were sitting on the terrace of the 18th Infantry BOQ Club in the Drake Area, Bonames, Germany, when they were joined by the accused (R 27,28,33,34). Normally American whiskey was obtainable at the bar of the Club, but on the evening in question, none was available (R 30,36). When someone in the party asked for a drink, accused obtained a "fifth" of whiskey, which was full, from his maroon colored Ford V-8 and poured approximately an ounce and a half of whiskey into glasses for Booth, Jones and himself, and before leaving, poured a substantial amount of whiskey into Jones' and Booth's glasses (R 28-37). When he left the party at approximately 2000 hours, he took the bottle with him, which was a little less than one half or about one third full (R 30,32,35,37). Both Booth and Jones, who had been acquainted with accused for some time, testified that accused conducted himself in a normal manner, his walk was normal, his speech was perfect, and his eyes were not blurred or bloodshot (R 31,38).

At about 10:20 or 10:30 p.m. the same evening Second Lieutenant Don C. Marche was with accused at "Club 18" located just outside of the

compound in Frankfurt. Accused was at the Club prior to Marche's entrance. Marche was at the Club for about 25 or 30 minutes and left. During this interval, accused had one coke and whiskey which he had not consumed when Marche left (R 53,54,56). In Marche's opinion accused's actions were "perfectly normal," his walk, eyes, and speech were normal (R 55,56).

At approximately 11:00 p.m. 3 August 1947, accused drove into "POL" Station No. 5, located about four and one half miles outside of Frankfurt on the Autobahn between Frankfurt and Bad Homburg, where he obtained some gasoline (R 10,20). His car was a red 1946 or 1947 Ford and he was accompanied by two women who were sitting in the front seat of the car (R 10,11). Accused also obtained three "cokes," one each for his two companions and himself (R 11,12). Accused was observed by Technical Sergeant Lester Bachelor, night manager of the station, and Technician Fifth Grade Milton O. Thompson, an attendant at the station. In Thompson's opinion, accused was normal in his walk and speech (R 19) and in Bachelor's opinion, accused's speech was normal (R 25). In addition Thompson observed accused driving his car in and out of the station. The speed limit within the station was 15 miles per hour, and accused, while driving within the station, did not exceed the speed limit. His manner of driving was that of the average person (R 12,13). The duration of accused's stay at the station was between five and eight minutes (R 12). Accused and his two women companions drove out of the "POL" station in the direction of Bad Nauheim (R 11). About a half hour later Thompson saw accused's car towed back into the "POL" station (R 11,19). At that time the roof was pushed in, "front grill and so forth" all smashed up, and the windows were all broken in front (R 21).

Sergeant Bachelor testified that he saw accused between 12:00 m. and 12:30 a.m. about one and a quarter miles from the station. Accused was lying on the ground unconscious. Bachelor also saw a red 1947 Ford which was wrecked. The Autobahn was "laid off" in two driveways with a lane approximately ten feet in width between, and the Ford was sitting across this lane. Bachelor described the damage to the Ford as follows: "On the right hand corner the top was torn out, the windshield was broken; the right side of the fender was caved in, the wheels knocked out of line." Two women were lying unconscious at the scene. On the right hand side of the Autobahn going north, approximately 20 or 30 feet from the red automobile, there was a German truck which was facing north. Bachelor towed the Ford into Station No. 5. The weather that night according to Bachelor was fair and warm (R 22-24).

At the time of the accident in question, Gerhard Bender, a German civilian, was driving a 5-ton truck on the Autobahn between Frankfurt and Bad Homburg, in a northerly direction. Herbert Karge, also a German, was riding in the truck on the seat next to him. This truck was powered by a diesel engine, was dark blue in color, had a closed-in driver's cab

and had a regular body platform with tarpaulin bows over the platform which were uncovered (R 39,40,51,58). The tail light on the truck was lit and in working order and was visible for quite a distance. There was a covering of red cellophane on it which was clean and undamaged (R 40). When they reached a point on the road near Eschborne, just before the underpass there, the truck was traveling at a speed of about 35 to 37 kilometers per hour. With reference to the events that transpired thereafter, Bender testified as follows:

> "* * * at that time I saw that vehicle was approaching from behind which was travelling with a very bright light, and this bright light grew in strength and I gathered that this vehicle eventually would overtake me. The light grew brighter and brighter, and I thought that this vehicle would be about ready to pass me. For that reason I moved my vehicle, pulled my vehicle to the right of the road as far as possible, but instead of the vehicle passing me, all of a sudden I received a very sharp impact from the rear. At that moment my vehicle was pushed as taking a jump forward, and I received a shock. My head was bumped, the back part of my head, and I sort of found myself in a numbness. After I had collected myself a bit I looked out on the left side through the door, and I saw that a passenger car was turning over in the air and then landed on the other side of the road, the opposite side of the road next to the green lane. * * *." (R 59-60).

Herbert Karge testified that just before the accident he was attracted by the oncoming lights of a car approaching them from the rear which he saw through the rear window of the truck cab. He could state merely that the car was "quite aways back." when he first saw its lights. He did not look again until the impact occurred, and then when he looked again he noticed the car turning over in the air (R 40,41). The German truck stopped about 60 to 70 meters from the underpass (R 49). Karge dismounted from the truck and found the vehicle which had struck the truck lying on its wheels on the other side of the green lane, the motor still running. He also saw the bodies of the two women lying close to the green lane on the side of the Autobahn on which the accident occurred. (R 43,49). The wrecked vehicle was a Ford, reddish in color. The driver of the Ford was sitting at the wheel with his arms hanging down (R 43,44). One of the women did not move or do anything at all, and the other was still breathing (R 44). An American civilian who was at the scene helped Karge move the bodies of the two women to the green lane. Karge also noticed the civilian pick up a German identification card (R 44).

When Bender finally dismounted from the truck he inspected it and found the platform to be "Kaput." He proceeded on back to where the

collision occurred and observed two women lying on the green lane. One of the women was lying face down in "a lot of blood." Bender had the impression that she was dead. The other woman was lying on her back and was "exhibiting a heavy rattle of the throat." Bender noticed a brief case nearby and placed it under her head. Bender then turned to the wrecked car and ascertained that the driver who he stated was accused was still sitting behind the steering wheel. Bender, Karge, and a Swiss National, Verrey, removed accused from the car and laid him on the green lane. Verrey and Bender removed his coat and saw a lot of blood coming through his shirt on the left side. With reference to his examination of accused, Bender testified:

"Q. Did you smell anything unusual?
A. Well, after Lieutenant Anderson had been laid down on this green lane I bent over Lieutenant Anderson, something I always do when an accident happens to ascertain if the alcohol matter might be involved, and at the time when I bent over Lieutenant Anderson he was breathing heavily and I ascertained that he was smelling strongly from alcohol." (R 61).

and on cross-examination he testified:

"Q. How many accidents have you been involved in while you have been a driver for the Teves Company?
A. As far as I can remember I only was involved in one, and that was caused at the time when I backed up and bumped a bicycle driver.

Q. Have you ever had any medical training?
A. No.

Q. Have you ever had any first aid training?
A. No.

Q. How many accidents have you seen in your life where you found it necessary to bend over somebody who was hurt and see if he had any alcohol on his breath?
A. Well, this case connected with Lieutenant Anderson was the first case in which I did that, to bend over to ascertain if there was alcohol on his breath because on other occasions I never had any reason to do that.

Q. Then why did you say to the court a few minutes ago that you always bend over the man to see if you smell any alcohol?
A. Well, now, that is my idea. Whenever an accident happens they should ascertain if the driver smells from alcohol." (R 62,63).

The same evening Fritz Saemann (a German taxi driver) was driving three women and a man on the Autobahn to Nauheim. Saemann was driving his vehicle at a speed he estimated as "60 kilometers." He was overtaken by an American car traveling at a speed he estimated as "100 kilometers." The lights of the passing car were "very good" and in "full beams." About 200 or 300 meters from the point where he was passed by the American car he came on the scene of an accident (R 69,70,75). At the scene of the accident he found an American passenger car standing on the green lane of the Autobahn, a human body lying on the paved part of the road, and a damaged truck standing on the right side of the road (R 69,70). Between the time he was passed by the American car and his arrival at the scene of the accident no other vehicle passed him. After one of his passengers alighted from his car Saemann turned around and drove back to the American filling station to get help (R 70). He estimated the distance to the filling station from the scene of the accident to be about 1 to 2 kilometers (R 74).

Jean Verrey, a Swiss civilian andpassenger in Saemann's car, testified that they had just entered the Autobahn when they were passed by a red Ford sedan (R 76). Verrey estimated the speed of the Ford to be about 80 kilometers an hour (R 81). Approximately five minutes after the Ford passed, the car in which Verrey was riding stopped at a gas station (R 76,83). Three to five minutes after leaving the gas station, they came onto the scene of an accident (R 83). Here he observed a red car "completely broke" on the left side of the Autobahn. It was the same car which had passed them at a high rate of speed (R 78,84). On the right side of the Autobahn, about 300 meters away, was a German truck (R 79). Accused was in the red car (R 78). A German girl was lying in the green lane and another German girl was on the right side of the road. Concerning the two girls Verrey testified:

> "* * One of these girls, I guess -- I guess one on the way to die. She was very -- she couldn't talk. She was without -- I don't know how you call it auf English -- she couldn't recognize nobody. She couldn't even talk, and it was the same with the other girl on the right side of the street. She was almost dead, I guess." (R 79).

At first no other people were at the scene but shortly afterward several "G.I.'s" drove up in a jeep. Verrey and one of the soldiers removed accused from the car and laid him in the lane. Examination of the two girls revealed that there was nothing to do but to wait for the arrival of an ambulance (R 79). He found a handbag near one German girl which he gave to an M.P., and in the rear of the Ford car he found a whiskey bottle which was given to a lieutenant. Verrey did not notice whether the bottle was empty or not (R 79).

Miss Phyllis Males and Miss Sadie Salamon were riding in the same car with Verrey (R 120,128). Their testimony was substantially as

follows. They were in Frankfurt trying to get transportation to Bad Nauheim. They had been waiting for the "EES" vehicle which was a relatively new maroon Ford sedan. When that failed to appear they got a German to drive them to Bad Nauheim. After they got on the Autobahn they were passed by a "red Ford maroon car," which was going "very fast." They thought it was the "EES" vehicle. It zigzagged and they thought it unusual for the "EES" vehicle to go that fast (R 122,128). Miss Males estimated that the speed of the car in which she was riding was between "50 and 60." (R 122). The car in which Miss Males and Miss Salamon were riding stopped at a gas station which was the equivalent of a city block from where they had been passed. After a stop of a few minutes they proceeded on their way and three to five minutes later came on the scene of the accident in question (R 122,128,132). At the scene of the accident they saw a red car at the extreme left-hand side of the road on the grass which they assumed was the car that had passed them. A fender was on the road alongside of a truck parked there. There were two bodies on the pavement (R 122,127,129). Verrey got out of the car to lend assistance and the car returned to the filling station to summon help (R 123,130). Between the time they had been passed by the red Ford and the time they had arrived at the accident no other car had passed them (R 126,131).

About midnight of the night in question Corporals Selbia B. Copeland and Nelson R. Altman accompanied by Pfc John R. Loop and a German policeman were on patrol duty on the Autobahn between Frankfurt and Bad Homburg. They were riding in a "jeep" headed in the direction of Bad Homburg. Copeland was seated in the front seat and was conversing with Loop who was seated in the rear. As he was looking to the rear his attention was attracted to lights. "One light seemed to be going over and over" and he saw something fall, "smoke or dust or something." He had the driver turn around and drive back some 500 yards to the scene of an accident. On arriving at the accident Loop alighted from the jeep to render assistance while the others drove on back to Gas Station No. 5 to summon assistance (R 86,87,99,116). At the station they summoned a wrecker to the scene of the accident. About ten minutes later an ambulance arrived and they escorted it back to the scene. In the meantime Loop met Verrey at the scene of the accident and set about rendering assistance. He and Verrey removed accused, who was unconscious, from the automobile and placed him on the dividing lane. Loop turned off the lights and motor of the wrecked car (R 101). A German truck was parked on the right side of the road approximately 50 to 100 feet further down the road in the direction of Bad Nauheim (R 102). When they opened the door to the wrecked car, a whiskey bottle fell out. Loop stated it was approximately quart size but could not say exactly how much liquid was in it. A pair of women's shoes was laying "on the right front seat * * * on the floor" (R 104). They also found two girls lying in the middle of the Autobahn. One had no pulse, and after laying her beside accused in the dividing lane, they noticed that the other girl who was found a few feet away from the spot where the first one was found, still had a little life (R 101). Loop

noticed a piece of material which looked like a piece of cloth that had been torn from one of the girls' clothing on "top of the fragments of the car." However, he did not inspect the clothing of either girl. Near the spot where he had found the first girl, Loop picked up a "kin /identification/ card." He asserted that he would recognize the name he saw on the "kin card" if he saw it again. He identified Prosecution Exhibit 5 as "part of the kin card," that he found at the scene of the accident and testified that the picture on the "kin card" was a picture of the first woman whom he saw at the scene of the accident. The "kin card" bore the name "Yvette Heluin" and was received in evidence as Prosecution Exhibit 5 over objection by the defense (R 104,105). Loop remained at the scene of the accident until accused and the two girls were removed to the hospital.

The following day Loop saw accused's car at Gas Station No. 5 and took some pictures of it. He identified Prosecution Exhibits 2 and 3 as views of the left-hand side of the car and Prosecution Exhibit 4 as a front view of the car. He testified that the pictures show exactly the damage to the vehicle which he observed on the night of the accident. Prosecution Exhibits 2, 3 and 4 were admitted in evidence over objection by the defense (R 110). The pictures show an inside tear in the roof of the car.

After midnight, 3 August 1947, Staff Sergeant James A. Costello, of the 2nd General Medical Dispensary, Frankfurt, picked up the accused and two women at the scene of an accident on the Autobahn near "POL" Station No. 5, and took them to the dispensary. He observed one of the women being treated at the dispensary and on being shown Prosecution's Exhibits 5, 6 and 7, identified Prosecution Exhibit 6 as a picture of the woman he observed being treated (R 135).

Captain Reginald Holder, 97th General Hospital, testified that shortly after midnight on 3 August 1947 he saw the accused at the dispensary of the 97th General Hospital. Two females were brought in with accused, one already dead, and one who appeared to be seriously injured. Captain Holder gave emergency first-aid treatment to the one that was still alive. He attempted to stop her bleeding, to find out the extent of her injuries, and was making preparations to give her a blood transfusion. He had been treating her for a period of between 6 and 10 minutes when her heart stopped and she ceased breathing. As to the extent of her injuries Captain Holder testified:

> "She appeared to have a very severe laceration, that is, cut, on her head that had seriously severed her scalp from her skull, that also had severed several blood vessels which were bleeding profusely. She also appeared to have a depressed fracture of the skull which might have been sufficient to cause her death, and several other minor lacerations of her arms and legs." (R 136).

With reference to the cause of her death he testified:

> "* * my guess would be it was a combination of things; one, probable skull fracture with possible internal injuries to the brain and two, possible severing of the spinal cord through a broken neck." (R 137).

He believed that the injuries occurred within an hour of his examination. On being shown Prosecution Exhibits 5, 6 and 7, he identified Exhibits 6 and 7 as pictures of the woman he had treated and stated he was unable to identify Prosecution Exhibit 5 with certainty (R 137).

Captain Norman J. Cantley, Medical Corps, 97th General Hospital, Frankfurt, Germany, testified that he was the Registrar of the 97th General Hospital and as such was the official custodian of the records of the hospital (R 149). He identified a WD AGO Form 18-33 containing entries pertaining to accused, Yvette Heluin, and Alma Poritzke as an official record of the hospital which was kept in the regular course of business and the form was admitted in evidence (R 154). A certified copy of WD AGO Form 18-33 substituted for the original (R 155). The following entries appear thereon:

> "1. HELUIN, Yoette born 14 Dezember 1924 in Berlin
> address: Frankfurt am Main, Hinter den Ulmen 7. DOA
>
> 2. PORITZKI, Ama Frida born 4 Febr 1927
> address: Dortmund Macharinstr 10 present address in Frankfurt: Frankfurt Sossenheim Schaumburgstrasse Nr. 35
> Died in Hospital - 0230 hours
>
> 0930 4 Aug 1947
>
> Above Germans were in company of a 2nd Lt. ANDERSON, Joe K. now in shock ward.
> /s/ NJC" (Pros Ex 8)

Captain Cantley further testified that among its official records the hospital maintained a ledger in which it recorded the names of all patients upon whom laboratory procedures had been performed and the results thereof according to dates. Captain Cantley disclaimed making any laboratory procedures upon accused. He stated that he had no knowledge of the identity of the person who took the blood specimen of accused's blood or the identity of the person who tested the specimen, and he did not know the time which elapsed between the taking of the blood and the running of the test, nor did he know the method used to preserve the blood prior to the test. With reference to the taking of the test Captain Cantley testified as follows:

"There were two different times of day involved. I would say, in answer to your question, that I do not know if the same individual who took the specimen was also the one who performed the laboratory test for the fact that the man came in in the middle of the morning and the test was performed during the regular day hours of laboratory personnel." (R 161).

The ledger was admitted in evidence as Prosecution Exhibit 9 (R 162). It contained the following entry pertaining to accused:

"4.8.47 Disp Anderson Joe K

Blood Alcohol 1.6

Mg./ML" (Pros Ex 9)

There was also admitted in evidence over objection by the defense Vol I, No. 1, Medical Bulletin, Office of the Theatre Chief Surgeon, European Theatre, August 1946 (R 162, Pros Ex 10). An extract of the bulletin was substituted with permission of the court. In pertinent part the extract states:

"General hospital laboratories are equipped to perform blood alcohol tests. Samples should be properly prepared, as follows:

a. Blood is collected aseptically.
b. Tubes for collection are paraffined inside and out.
c. Oxylated blood is used for sample (2 mgs/cc blood).
d. Tube stoppers wax sealed.
e. Laboratory slip noting:
   (1) Time sample was taken.
   (2) Date sample was taken.

"Samples will be sent to nearest general hospital by most expeditious means: 97th Gen Hosp, Frankfurt, or 98th Gen Hosp, Munich.

"Values of interpretations, extracted from 'Laboratory Methods of the US Army', Simmons & Gentzkow, are as follows:

0.5 mgs	May have been drinking, but questionable.
1.0 to 1.5 mgs	Individual is usually under the influence of liquor; but not definitely intoxicated.
2.0 to 2.5 mgs	Individual may be regarded as definitely intoxicated.
3.0 to 3.5 mgs	Individual is quite seriously intoxicated.
4.0 mgs	Individual is either at, or quite close to the 'dead drunk' stage." (Pros Ex 10).

August Poritzke testified that he had a daughter, Alma, who died 4 August 1947. He later saw her body at the Institute of Courts Medicine and Criminology. He identified Prosecution Exhibits 6 and 7 as pictures of his daughter and the same were admitted in evidence (R 148,149).

Anna Hoflender identified Prosecution Exhibits 7 and 8 as pictures of Alma Poritzke. She also testified that Alma Poritzke had resided with her and that she had last seen her alive a little after 10:00 p.m. on the evening of 3 August 1947 when she was leaving the house. At the time Alma had an umbrella and three keys which belonged to Mrs. Hoflender. Mrs. Hoflender subsequently received the umbrella and keys from the Criminal Police (R 156,157).

Elizabeth Schindewolf testified that Yvette Heluin had formerly lived with her and that the last time she had seen her was at the beginning of August. Mrs. Schindewolf identified Prosecution Exhibit 5 as a picture of Yvette Heluin (R 158).

c. Evidence for the defense. Accused elected to remain silent.

First Lieutenant Eugene J. Epstine testified that he saw accused at the "Club 18" in Frankfurt between 2330 and 2345, 3 August 1947. When Lieutenant Epstine and his party arrived at the Club he and the accused had a short conversation. In Lieutenant Epstine's opinion, accused's speech and walk were normal, and his eyes were not bloodshot (R 170). Lieutenant Epstine did not see accused drinking. Subsequently, Lieutenant Epstine observed accused back his car out of the narrow driveway of the Club some 35 to 40 yards without mishap (R 171).

First Lieutenant William Arnold, Junior, regimental surgeon, 18th Infantry, testified that he was a graduate of the College of Physicians and Surgeons, Columbia University. As part of the curriculum of that school he took a course in pharmacology and laboratory work. With relation to the alcoholic content of blood Lieutenant Arnold stated that in his instructions the crucial point at which a man could be definitely considered as intoxicated was "200 milligrams per cc." Not every person with that alcoholic content could be considered as intoxicated, but a majority of persons with that alcoholic content would be intoxicated. Ninety percent of individuals with an alcoholic content of "300 per cc" would be intoxicated. With reference to the laboratory procedures in making a blood alcohol test Lieutenant Arnold stated that prior to taking a sample of blood from the person to be tested the area of the body to be punctured is swabbed with a disinfectant. The use of alcohol or a disinfectant might influence the test to some extent. It would likewise be important. In any event a physical examination in which the subject's reflexes, equilibrium, speech, and mental capacity are tested would be an important means of determining the degree of intoxication (R 180-182). On cross-examination Lieutenant Arnold stated that anyone with one drink or any evidence of blood alcohol in the blood stream feels the effects of alcohol (R 184).

First Lieutenant William W. Herris, 18th Infantry, testified that on 4 August 1947 Major Thomas H. Farnsworth was appointed to investigate accused's accident. Lieutenant Herris at Major Farnsworth's request accompanied him on the investigation. They went to Gas Station No. 5 on the Autobahn where they interviewed Sergeant Bachelor who had towed accused's car from the scene of the accident. Later in company with Sergeant Bachelor, Lieutenant Herris drove from Gas Station No. 5 to the scene of the accident. In two tests to determine the distance from the station to the accident Lieutenant Herris found the distance to be one and three-tenths miles. Lieutenant Herris went over the same course at different speeds and found that at a speed of 50 miles per hour it took one minute and twenty-five seconds to cover the course and at 25 miles per hour it took two minutes and fifty-five seconds. At the scene of the accident Lieutenant Herris observed a bridge crossing the Autobahn at a distance of about 50 to 70 yards from the point where the accident occurred. He described the bridge as "more or less a dark blue-gray steel, concrete structure, has steel uprights supporting it and concrete abutments" (R 188-189). Lieutenant Herris observed accused's car. The hood had a long scratch in it. The scratch did not damage the metal but something had depressed the hood near the rear by the windshield, and had sprung out of shape. The junction where the windshield corner post, door post, and the place projections of the hood meet and are riveted, was pulled loose (R 189). Lieutenant Herris also examined the German truck involved in the accident. He found that the platform of the truck was four and a half feet above the ground. The left rear portion of the truck bed was damaged. He also examined the taillight of the truck. Concerning the taillight he testified as follows:

"Q. Did you see anything else?
A. Yes, sir. I noticed the taillight.

Q. Where was the taillight?
A. It was laying in the bed part of the truck, sir.

Q. Can you describe this taillight to the court? Was it covered with anything or can you give a description of that object?
A. Yes, sir. The bracket of the taillight was in the rear of the truck and connected with the electric cap of the light fixture. It was round about that size.

Q. How big is that?
A. I would say about 4" in diameter.

Q. Is that circular?
A. Yes, sir.

Q. Continue.
A. And the bracket had previously been torn loose in order to release it, and laying in that position. The light itself

had an orange plastic - the fixture had an orange plastic cover to it. It looked like it was possibly red at one time but was very sunburned, faded, and cracked. Underneath, the underneath side of the fixture was opened - apparently been used for the convenience of putting bulbs in and out - was apparently left open.

Q. Is that the only aperture in it where you could put bulbs in, in that hole?
A. Yes, sir, without taking it apart.

Q. Continue.
A. And inside was a broken light bulb and I examined the bulb in the presence of Major Farnsworth and pointed out certain things to him with regard to the bulb. And at that time I pointed out to him that there appeared to be an excessive amount of dust in the broken light portion which indicated to me at that time-------

* * * *

Q. Tell the court the facts, not your opinion. Was that dust which you saw on what was left of the inside portion of that broken bulb, was it loose dust or crusted dust?
A. It didn't appear to be fresh dust; it looked pretty densely packed.

Q. You say the taillight bulb itself was broken?
A. Yes, sir.

Q. Was the box around it broken, with the exception of the crack in the isinglass?
A. No, sir.

Q. Was it badly bent up?
A. No, sir; there was a slight bend, but no excessive damage to it.

Q. It was intact?
A. Yes, sir.

Q. Did you handle this light contrivance in your hand?
A. Yes, sir.

Q. Did you examine it carefully inside, turn it around and look down through the aperture?
A. Yes, sir.

Q. Did you see any small portions or pieces of loose glass in that thing?
A. No, sir, I didn't. That was one of the things I considered in this-----

Q. Please, for the matter of the record. But you did notice that? There were no pieces of glass in that?
A. No, sir." (R 191-192)

On cross-examination Lieutenant Herris testified as follows concerning the top of accused's car:

"Q. Tell the court what the condition of the top of the automobile was, along in the neighborhood of the top of the windshield.
A. The top was torn, say the middle portion, about the center portion was torn where it was riveted to the body support, and pushed back and down.

Q. How far back was it pushed?
A. Perhaps two feet.

Q. How far down?
A. I would say six to eight inches.

Q. Were there any holes in the top part of the automobile where it was pushed back and down?
A. I think I see what you mean, yes. There were no holes directly in the metal but the whole projection on that side had been pulled back and left an opening there." (R 193)

Captain William B. Pearce testified that he had formerly been accused's superior officer and during the time he was such had never recommended accused for a rating lower than "5.5." As a company commander Captain Pearce wouldddesire to have accused in his company.

4. Accused was found guilty of wrongfully and unlawfully causing the deaths of Yvette Heluin and Alma Poritzke by recklessly and negligently driving an automobile (Charge II, Specifications).

The evidence shows that on the night of 3-4 August 1947 accused accompanied by two women drove into "POL" Station No. 5 on the Autobahn between Frankfurt and Bad Homburg, Germany. After obtaining gasoline accused drove off in the direction of Bad Homburg. A short time later, between 12:00 m. and 12:30 a.m. Sergeant Bachelor, the night manager of the gas station, was summoned to the scene of an accident which occurred approximately one and a quarter miles from the station. At the scene of the accident Bachelor saw the accused and two women lying on the ground in an unconscious condition and a red 1947 Ford sedan which was wrecked. The Ford was towed backto the gas station and approximately a half hour elapsed from the time that accused left the station until his wrecked car was towed into the station. One of the attendants at the station identified the wrecked Ford as the car in which accused had driven off from the station. The accident happened when accused drove

his car into the rear of a 5-ton German truck which was traveling in the same direction as the accused was driving on the Autobahn. When the impact occurred Herbert Karge, who was riding in the German truck, observed the accused's car turn over three or four times in the air and finally come to rest across the dividing lane of the Autobahn. When he dismounted from the truck, Karge observed two women lying on the ground and found accused unconscious behind the wheel of the Ford. Prosecution Exhibit 5 was identified as a picture of Yvette Heluin by Heluin's landlady and Prosecution Exhibits 6 and 7 were identified as pictures of Alma Poritzke by her father. Both women were brought to the 97th General Hospital where one was pronounced dead on arrival and the other died shortly after arrival. The ambulance driver who brought the women to the hospital observed one of the women being treated. He identified Prosecution Exhibit 6 as a picture of that woman. This woman died shortly after her arrival at the hospital and the doctor who attended her identified Prosecution Exhibits 6 and 7 as pictures of the woman who died while he was treating her. A military policeman who was at the scene of the accident identified Prosecution Exhibit 5 as a picture of the other woman who was found at the scene of the accident, and observed her body and the body of the other woman loaded into the ambulance. The woman pictured in Prosecution Exhibit 5, Yvette Heluin, was dead on arrival at the 97th General Hospital.

It is a fair inference from the record that the women found at the scene of the accident were not passengers in the German truck found at the scene of the accident. It may also be inferred from the record that the two women were not pedestrians who were struck at the time of collision between accused's vehicle and the German truck, nor that they had been struck at a prior time. Accused had left Station No. 5, approximately a mile and a quarter from the scene of the accident, accompanied by two women. Approximately one half hour later accused's car had been returned to Station No. 5. After the accident accused's Ford had a wide tear in the roof. The sole inference which may be drawn from the record is that the two women found at the scene of the accident were the same two women who were in accused's vehicle when it left Station No. 5.

Thus it is shown that two women, Alma Poritzke and Yvette Heluin, were alive at Station No. 5 and were subsequently found unconscious at the scene of the accident. One was lying face down in a pool of blood and the other was "exhibiting a heavy rattle of the throat." Yvette Heluin was dead on arrival at the 97th General Hospital and Alma Poritzke died subsequent to her arrival there. Concerning the injuries of Alma Poritzke the evidence shows that her scalp was severed from her skull, several blood vessels were severed and bleeding profusely, her skull appeared to have sustained a depressed fracture, and that her arms and legs had several minor lacerations. A medical officer of the 97th General Hospital concluded that she had died of multiple injuries.

In view of the nature of the injuries sustained the evidence justifies the conclusion that the death of the two alleged victims resulted from the accident.

By virtue of the allegations contained in Specifications 1 and 2 of Charge II, of which accused was convicted, he has been found guilty of involuntary manslaughter. As defined by paragraph 149a, Manual for Courts-Martial, 1928, 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." It is necessary to evaluate the evidence of record against the background of this definition in order to assess accused's liability for the deaths of the persons named in the Specifications. In the first place there is evidence that accused was operating his vehicle while under the influence of intoxicating liquor. At about 1900 3 August he was observed drinking one drink of whiskey and "coke," and again at 2230 the same evening he was again observed drinking one drink of "whiskey and coke." After the accident sometime after midnight the driver of the German truck observed an odor of alcohol on accused's breath. A ledger of the Chemistry Department, 97th General Hospital, kept in the regular course of business shows that on 4 August 1947 a blood alcohol test was performed upon accused and showed a concentration of 1.6 milligrams of alcohol to one milliliter of blood (note: 1 milliliter = 1 cubic centimeter.) From the testimony of Captain Cantley, registrar of the 97th General Hospital, it may be inferred that the blood test was not performed until mid-morning 4 August 1947, some ten hours after the accident. There is no evidence as to the type of test performed, nor the procedures used in taking and processing the blood taken from accused.

It was shown, however, that there was a definite procedure prescribed by the Office of the Theatre Chief Surgeon for the taking of blood tests. In the absence of evidence to the contrary with reference to the subject test it must be presumed that the test was performed as prescribed. The hospital record reflecting the result of the test was properly admitted in evidence as a record made in the regular course of business of the hospital. A concentration of 1.5 mg of alcohol per cc. of blood indicates that an individual is under the influence of alcohol but not definitely intoxicated. It might be argued that a blood test taken some ten hours after the accident would not be relevant to show the extent of accused's intoxication at the time of the accident (State v. Kelley, 40 SE 454, 227 NC 62). Where as in the instant case accused was hospitalized in a United States Army Hospital shortly after the accident it is extremely improbable that he consumed additional alcohol. With this circumstance in mind it might be claimed with some justification that the alcohol content of accused's blood at the time of accident was considerably higher than when he was tested, and the circumstance certainly negatives a conclusion that the blood test was irrelevant.

Evidence that accused drank intoxicating liquor two to five and one half hours prior to the accident was likewise admissible on the question of his intoxication at the time of the accident and such evidence would not exclude an inference that accused was under the influence of intoxicating liquor at the time of the accident (Crump v. State, 191 So. 475, 79 Ala App 22).

There is uncontradicted evidence on the other hand that accused's actions were normal up to and including the time he left Station No. 5 a short time prior to the accident.

On the night in question a German car driven by Fritz Saemann with one male passenger and three female passengers was proceeding on the Autobahn. Jean Verrey, a Swiss National, and the Misses Phyllis Males and Sadie Salamon were passengers in Saemann's car.

Saemann testified that he was driving his car at a speed of 60 kilometers an hour when he was passed by an American car traveling at an estimated speed of 100 kilometers an hour. At a point, 200 or 300 meters beyond the point where he was passed he came onto the scene of an accident and found an American passenger car standing on the green lane of the Autobahn, a human body lying on the road and a damaged German truck nearby. No other vehicle passed him from the time the American car passed him to the time he arrived at the scene.

Testimony of other passengers riding in Saemann's car shows that they were passed by a "red Ford Maroon car going at a high rate of speed and zigzagging." Subsequently their car stopped at a gas station for three to five minutes and approximately five minutes after leaving the gas station they came to a scene of accident in which a red Ford car had been involved. Verrey, one of the passengers, observed accused in the wrecked car and helped remove him from the automobile. The question is presented whether this testimony concerning the speed and reckless operation of a car similar in appearance and make to that of accused at a time prior to but not too remote to the time of accident is competent to prove speed and reckless operation at the time of the accident. We are of the opinion that the question must be answered affirmatively, inasmuch as such evidence establishes the probability that such speed and operation continued up to and including the time of accident and as evincing the reckless disregard for the safety of others inherent in the offense alleged (Conn v. Leone, 146 NE 26, 250 Mass. 512; Williams v. State, 84 SO 424, 17 Ala App 285; Sims v. State, 115 SO 217, 149 Miss 171; Bradford v. State, 146 SO 635, 166 Miss 296; State v. Leonard, 141 SE 736, 195 NC 242; State v. Peterson, 194 SE 498, 212 NC 758; Contra People v. Barnes, 148 NW 400, 182 Mich 179; Ronning v. State, 200 NW 394,396; Olson v. Hermansen, 220 NW 203,204; Toft v. Crolius, 270 NW 226.)

Finally, the evidence shows that on a straight road on which it is fair to presume that only one way traffic was allowed the vehicle operated by accused ran into the rear end of the truck. The car

operated by accused had bright lights which were shining at the time of the accident. The truck with which accused collided was equipped with a rear light which inspection prior to the trip the truck was making showed was operating; this is a circumstance standing alone which would show that the rear light was lit at the time of the accident. From this evidence alone the court could have made an inference of negligence on the part of accused. Thus it has been stated: "The mere happening of a rear end collision does not prove negligence * * * Where, however, as here, the uncontradicted evidence shows a broad, smooth highway with only a wagon at the extreme right and one, possibly two, trucks moving at a reasonable speed behind it, with the road open and free from vehicles for a long distance in front; and further shows that a truck struck the wagon from behind; the evidence certainly justifies, though it may not require a conclusion that some one was negligent." (Washburne v. Owens, 252 Mass 47, 147 NE 504,506; Pickwick Stages v. Messinger, 36 P2 168,171; Harvey v. Borg, 257 NW 191) In connection with the collision the German driver of the truck testified that prior to the collision, upon seeing the oncoming lights, he pulled his truck to the right to enable the oncoming vehicle to overtake and pass him. We do not believe that this circumstance takes the case out of the rule stated in Washburne v. Owens, supra. It would appear that the German truck was on the road for sufficient period to allow accused, had he been driving in a careful manner to observe the operation of the truck, and further to observe the truck being pulled to the extreme right of the road (CM 274812, Tracy, 47 BR 293,325).

We do not state, however, that a rear end collision of the sort in issue is evidence of culpable negligence in and of itself. The other evidence of record that accused was under the influence of intoxicating liquor, and was operating the vehicle recklessly and at a high speed, taken into consideration with the circumstances of the collision justify the conclusion that accused was culpably negligent in the operation of his vehicle and that such culpably negligent operation of the vehicle was the proximate cause of the deaths alleged. The evidence justifies the findings of guilty.

5. Records of the Army show that accused is 25 years of age and single. He is a high school graduate and had two and one half years of college work at Tennessee Polytechnic Institute. He has no record of civilian employment. He had enlisted service from November 1942 to July 1945 when he was commissioned Second Lieutenant. He was subsequently promoted to First Lieutenant 14 March 1947. He has had foreign service in the European Theatre from November 1945. His efficiency ratings of record are Superior (2), Excellent (2).

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial. 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 is authorized upon conviction of violations of Article of War 96.

On Leave, Judge Advocate

, Judge Advocate

, Judge Advocate

JAGH CM 329497 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 6 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 First Lieutenant Joe K. Anderson, 01336732, Headquarters Company, Third Battalion, 18th Infantry.

2. Upon trial by general court-martial this officer was found guilty of unlawfully killing Alma Poritzke and Yvette Heluin by recklessly and negligently driving his automobile in violation of Article of War 96 (Charge II, Specifications 1 and 2). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures, and forwarded the record of trial for action under Article of War 48.

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

At about 12:30 a.m., on 4 August 1947, accused, accompanied by Yvette Heluin and Alma Poritzke, German civilian women, was driving in a northerly direction on the Autobahn running between Frankfurt and Bad Homburg, Germany. Approximately six miles north of Frankfurt his vehicle ran into the rear of a moving civilian truck, and turned over three or four times and landed in the dividing lane of the highway. The two German women were thrown out of his car and both died a short time thereafter as a result of the injuries sustained. During the five or six hours preceding the accident, accused was observed drinking whiskey on two occasions and immediately after the accident one witness noted the odor of alcohol on accused's breath. A blood alcohol test taken several hours after the accident showed a concentration of 1 cc. of alcohol to 1 mg. of blood. A short time prior to the accident accused's vehicle was observed proceeding at a high rate of speed and "zig zagging."

4. Records of the Army show that accused is 25 years of age and

single. He is a high school graduate and had two and one-half years of college work at Tennessee Polytechnic Institute. He has no record of civilian employment. He had enlisted service from November 1942 to Julu 1945 when he was commissioned Second Lieutenant. He was promoted to First Lieutenant 14 March 1947. He has had foreign service in the European Theatre from November 1945. His efficiency ratings of record are Superior (2), Excellent (2).

A line of duty investigation was conducted with reference to accused's participation in the accident, giving rise to the Charges in this case. The line of duty report which was approved "by order of the Secretary of the Army" found that accused's injuries were sustained "in line of duty" and "not due to his own misconduct."

5. It is recommended that the sentence as modified by the reviewing authority be confirmed and carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 138, 14 July 1948).

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

10 MAY 1948

JAGH CM 329500

UNITED STATES v. Private MELVIN D. DURDEN (RA 38316398), 1512th Engineer Construction Company.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Heidelberg, Germany, 26 June, 22, 23, 27 October, and 11 December 1947. Dishonorable discharge and confinement for life. The U. S. Federal Penitentiary, Leavenworth, Kansas.

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

1. The Board of Review has examined the record of trial in the case of the 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 Melvin D. Durden, 1512th Engineer Construction Company did, at Mainz Kastel, Germany, on or about 22 April 1947, withmalice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Martha Petzke, Kostheim, Germany, a human being by choking her to death with a piece of cloth.

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 for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. At about 0700, 23 April 1947, one Adam Spindler, a German, found the body of a dead German girl lying by a tree in the "Klassie" woods at a point about 250 to 300 yards from accused's camp in Mainz-Kastel, Germany (R 16,17,62,79). He sent for the German police and they arrived at the scene about an hour later, photographed the body,

and found a hospital receipt in a purse lying beside the body, which receipt bore the name Martha Petzke (R 22,23,27,28). The Army Criminal Investigation agents were summoned and they also took photographs of the body, while it was still at the scene, on the morning of 23 April 1947 (R 23,58-60,79). The body was removed to the morgue of the City Hospital of Wiesbaden, Germany, where an autopsy was performed at about 1600, 24 April 1947 (R 30,79). The autopsy disclosed that the person had been dead about 24 hours, that the cause of death was suffocation due to strangulation effected by a piece of cloth. Examination of the body showed a strangulation mark, bleeding of the conjunctiva of the eyes, a strong swelling and flowing of blood in the face, overfilling of blood in the brain, bleeding on the surface of the right lung, and lack of coagulation of the blood. It further appeared that the deceased had been in good health and died from no other cause than strangulation (R 30-32).

At about 2100 hours, 22 April 1947, a German girl known as Mary and as Martha Petzke was in the company of a Private Dan Tisdale, Irmgard Kandlei and the accused at the enlisted men's club of his organization at Mainz-Kastel (R 33,37). Accused escorted Irmgard Kandlei, a German girl, to the railroad station at 2145 hours. On his return from the railroad station, accused met Tisdale and Mary (Martha Petzke) on the street at about 2200 hours (R 33,68). Tisdale left Mary in accused's company at that time and returned to camp (R 38,40).

Private Clarence Miller, a member of accused's organization, testified that on the night of 22 April 1947, at about 2250 he entered the "Klassie" woods at a point about 100 or 200 yards from the edge of camp, with a German girl, where they spent the night. While he and his girl were lying in the woods they heard a conversation between a man and a woman, sounding as if it were about 50 feet away, subsequently fixed to be near a single tall tree. The woman's voice was calling something like "Hilda" which was repeated twice. His, (Miller's) companion explained that the woman was calling for help and Miller went over to the place where he had heard the voices and where he had seen the silhouette of a man and a woman before, but when he did not hear or see anything there he returned to his companion. The next morning when Miller and his companion awoke in the woods, they saw two German civilians looking at a body about 50 feet away. He went over to this spot, which was where he had heard the cries the previous night, and saw the dead body of a German girl lying beside the single tall tree and it looked as though her throat had been cut, "although there wasn't any blood her throat was real red." (R 48-52).

Josef Daschmann, a German civilian, testified that at about 2340, 22 April 1947, he passed the "Klassie" woods or park on his way to work and heard a woman scream four or five times in a loud voice. These screams came from the "Klassie" woods and sounded as though they were about 20 meters away from him. The voice screamed "Ach" and was a scream of pain. On his return home from work at 0700 hours the next morning he passed the location where he had heard the screams the previous night and saw a body lying under a tree (R 18-21).

Photographs of the deceased's body taken at the scene where it was found (Pros Ex 2,3, and 4) were identified by Emil Kletti, a German police photographer who took the pictures, and were received in evidence (R 22,23,35). The picture of the body shown in these photographs was identified by Kletti (R 23), Spindler (R 17), Daschmann (R 18), and the "CID" agent William J. Bryan (R 78) as pictures of the dead German girl who was found in the "Klassie" woods at 0700 hours, 23 April 1947. Private Tisdale identified the girl in the photographs as the girl he knew as Mary, whom he last saw with the accused on the night of 22 April 1947 (R 38). Irmgard Kandlei who last saw the girl on the night of 22 April 1947 in the club, identified the photographs as being of a girl she had known for four weeks, and whose identification card she had seen two weeks before the night of the incident, and knew that the girl in the photograph was Martha Petzke (R 33,34). Doctor Hans Wurm identified the body pictured in the photographs as the body upon which he performed an autopsy at 1600 hours, 24 April 1947, at the City Hospital of Wiesbaden (R 30). Kletti and Bryan also identified the body in the photographs as the same body upon which they observed the autopsy performed at the City Hospital of Wiesbaden at 1600, 24 April 1947 by Dr. Wurm (R 24,79).

Pursuant to information obtained from one Gertrud Liebhaber, a German national, "CID" agents Bryan and Eckl conducted a lineup in the accused's organization at about 1300 hours, 23 April 1947, and Liebhaber pointed out the accused as the soldier who was seen with the deceased on the previous evening (R 56,71). The "CID" agents took accused and Private Clarence Miller to the office of the 31st CID at Wiesbaden for the purpose of interviewing them. Before any interrogation took place between the CID agents and the accused, Agent Bryan read the 24th Article of War to the accused from the Courts-Martial Manual, then explained it to him and asked him if he understood it, to which question accused replied that he did (R 72,76,54-55). At this time, accused was interrogated by CID agents Bryan and Eckl for three-quarters of an hour to about one hour and fifteen minutes (R 73). He denied participation in the alleged offense (R 75). Five days later, at about 1330 hours, 28 April 1947, the accused, Private Tisdale and Private Miller were taken from the Stockade and brought to the 31st CID Headquarters for further interrogation. Accused was interrogated for about one and one-half hours and was then served supper. At about 1930 hours Private Tisdale, Private Miller and accused were taken by agents Bryan, Eckl and Barnett to the scene of the alleged offense. At the scene, the CID agents discussed the route supposedly taken by Martha Petzke to the spot where her body was discovered. Then the three suspects with Agents Barnett and Eckl went to the orderly room of accused's organization to contact Sergeant Wheeler, the First Sergeant, and Agent Bryan went to the enlisted men's club to talk to the club manager and other members of accused's unit. Agent Bryan remained in the club until 2130 hours and then joined his co-agents and the suspects in Sergeant Wheeler's room. Accused was sitting in a chair in the Sergeant's room and he and the Sergeant alone

carried on a conversation for about 30 minutes. After a short period of silence, accused asked the Sergeant if the other enlisted men in the room could be excused because he wanted to talk to the CID agents. When the other enlisted men left the room accused made a verbal statement implicating himself in the alleged offense. Agent Bryan then asked accused if he would agree to sign a statement embodying the salient features of his verbal statement and the accused replied, "Do I have to do it tonight," to which Agent Bryan replied, "No, not necessarily, but if you care to we can do it now and get it over with." (R 74-75,76,77) Accused did not appear to have wanted to wait to make a written statement the next day but seemed to have asked it purely as an "academic" question. At no time did anyone in the room tell accused that he had to sign a statement that night nor did anyone "browbeat" him or call him a liar. Neither did anyone ever threaten to lock accused in the jail at Mannheim nor to have him tried by a white jury (R 77-78). At 2300 hours, 28 April 1947, accused executed a written statement (Pros Ex 5) which was admitted in evidence (R 72,78). Prior to taking this statement, Agent Barnett, in Agent Bryan's presence, again read the 24th Article of War to accused and upon completion of the reading, again explained it to him. Agent Bryan asked accused if he understood the provisions of the Article of War and he said he did (R 72). In his statement the accused admitted being with Martha Petzke at the club on the night of 22 April, and walking with her after the club closed. They talked about her kennkarte which the accused had previously torn up, and she told him she had talked with an officer about it and threatened to tell the officer the accused had beaten and raped her, if the accused would not give her some money with which to obtain another kennkarte. The accused took a rag which he had picked up to dust off his shoes, and placed it around her neck. She asked what he was doing and he said nothing. Accused pulled the rag "tight." He did not remember whether she screamed or not, and after suddenly realizing she was dead he hung her handbag on her arm and returned to camp (Pros Ex 5).

The proceedings and findings of two medical boards appointed in accordance with paragraph 35c, Manual for Courts-Martial, were received in evidence as Prosecution Exhibit 1 (R 10). The first, dated 29 July 1947, found the accused unable to adequately understand the nature of the charges against him or to take part in his own defense, due to mental deficiency. The second, dated 29 September 1947, found the accused sane as of the time of the alleged offense, and possessing sufficient mental capacity to intelligently conduct his own defense (Pros Ex 1). A letter dated 3 December 1947 was received in evidence as Prosecution Exhibit 6 (R 108). It recited that the accused had been in the hospital for observation a third time, as a consequence of an attempt he had made to commit suicide by slashing his left forearm, and that no change was found in his mental condition (Pros Ex 6).

4. The accused's First Sergeant testified that during the time the accused was being examined by the CID, the CID agents did not call the

accused a liar nor did they threaten to take him to Mannehim and lock him up (R 80). That what he said in a pre-trial investigation was that they called Tisdale and not the accused a liar (R 81). When the accused said he would rather make a statement the day following 28 April, the Sergeant stated that he told accused, "I would rather have it now." (R 81,82).

Private Tisdale testified that the CID agents returned the accused while handcuffed to the scene of the alleged crime, and he could hear one of them saying to the accused, "can you see the girl lying there?" This was at a time when no corpse was there. Tisdale also recalled the CID agent calling the accused a liar on one occasion and thought that they said something about sending the accused down to Mannheim but he stated he was not "definite" about this (R 85-87).

The rights of the accused were explained to him and he elected to remain silent (R 108). A stipulation was received as Defense Exhibit A (R 108), which recited the attempted suicide by the accused, during a court recess on 27 October 1947 (Def Ex A).

5. Major Galvin, a member of both medical boards appointed under paragraph 35c, MCM, testified that no change of mental status on the part of accused had occurred during the period between the two boards, explaining that the accused was deemed incompetent the first time (29 July) as the result of using the criterion: "could he defend himself against simple trick questions?" At the second board (29 September) the following criterion was used: "Does he remember events and is he able to answer simple questions of fact put to him by his counsel?" (R 97,98,99,100,101, 102).

Captain Garvin, a member of the second medical board, testified that the accused was administered personality and intelligence tests which showed him to be mentally low, of dull intelligence and of dubious value to the Army. Accused has no mental disease (R 102,103,104,105).

6. The defense moved to dismiss the charge and specification on the ground that the accused had once been pronounced insane and incapable of conducting or participating in his defense (R 11,12,13,14,15), and in support thereof offered to call as witnesses the members of the medical boards, for the purpose of explaining the opposing conclusions as to accused's sanity. The motion was denied (R 16). Whether the rejection of the offered proof was proper need not be decided inasmuch as the proceedings and findings of both boards were received in evidence, and the court, itself, subsequently called as witnesses two of the board members, thus curing any error that may have existed in the failure to receive the testimony offered at the time of the motion. The motion was properly denied for the reason that the sanity of the accused was a matter to be proved or disproved before the court and there was no substantial proof

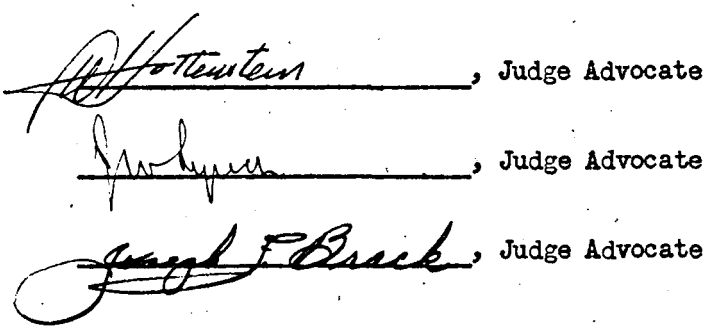
of the accused's insanity either at the time of the motion, or subsequently adduced (see Dig Op JAG 1912-40, sec 395(36), CM 204790, at p. 227; CM 205621, Curtis, 8 BR 207 at page 220-226; CM 262735, Kaslow, 41 BR 124).

The defense objected also to the admission in evidence of the confession signed by the accused, and adduced testimony tending to show lack of voluntariness (R 89,94). This was offered to establish threats or verbal mistreatment, and to show the accused's low intelligence indicating his incapacity to understand his rights fully. Likewise it was contended that accused denied committing the offense charged and refused to talk for five days, and that he was refused a request to wait until the sixth day to make a statement. It is the opinion of the Board of Review, however, that the voluntariness of the confession was sufficiently established, and that the confession was properly admitted (See CM 240949, Monsalve, 2 BR (ETO) 129).

Considering now the offense itself, the accused is charged with the murder of Martha Petzke, in violation of Article of War 92. The corpus delicti was established: a human being, identified as Martha Petzke, was found dead as the result of suffocation caused by strangulation. The limits as to the time of death were fixed by the doctor performing the autopsy, as taking place between the time she was last seen alive, and when she was found the next morning. Screams were heard by three people. Two of them, (Miller and his girl friend) fixed the time at a few minutes prior to 2300, the third person (Daschmann) fixed the time he heard the screams at 2340. Miller had gone into his barracks from about 2255 till after 2330, and it is thus possible that there was more than one series of screams. Assuming, however, there was not, the evidence with respect to time is not so conflicting as to compel a doubt as to the time of the alleged offense. The accused was not accounted for at about 2315 hours (bed check) in the barracks, and he was the last person seen with the deceased. The evidence is sufficient, when coupled with the accused's confession, to establish all the elements of the offense. That the act was done with malice aforethought is inferable from the facts stated in the confession. That element need not exist long prior to the act, nor does the intent to kill (MCM, para 198a, p.163). Both elements here existed at the time of the commission of the act, and the alleged offense is adequately established. There was no proof of any adequate provocation, which would reduce the offense to one of the forms of manslaughter. The strongest defense urged is the contended insanity of the accused. Such a defense is primarily one of fact for the court, and the facts indicate that the court was justified in finding as it did (CM 246548, Maxwell, 2 BR (ETO) 273; CM 268822, Wade, 44 BR 351).

7. 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 during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support

the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275, Criminal Code of the United States (18 USC 452,454).



, Judge Advocate

, Judge Advocate

, Judge Advocate

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

JAGK - CM 329503

29 APR 1948

UNITED STATES)	SECOND ARMY
)	
v.)	Trial by G.C.M., convened at Pittsburgh, Pennsylvania, 27 and 28 January 1948. Dismissal, total forfeitures and confinement for five years.
First Lieutenant FRANK N. FRITH (0-2011497), Adjutant General's Department)	

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

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

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

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

Specification 1: In that 1st Lt. Frank N. Frith, 2313th Area Service Unit, Pittsburgh, Pennsylvania, did, at Pittsburgh, Pennsylvania, on or about 12 November 1947, feloniously embezzle by fraudulently converting to his own use about twenty dollars ($20.00) lawful money of the United States, the property of the 2313th Area Service Unit, Pittsburgh, Pennsylvania, entrusted to him, the said First Lieutenant Frank N. Frith, by virtue of his office as custodian of the Unit Fund, 2313th Area Service Unit, Pittsburgh, Pennsylvania.

NOTE: Specifications 2 to 15 are identical with Specification 1 except as to date of offense and amount embezzled, as follows:

Spec.	Date	Amount Embezzled
2	7 Oct 47	$60.00
3	15 Oct 47	25.00
4	8 Oct 47	25.00
5	15 Oct 47	50.00
6	15 Oct 47	40.00
7	18 Oct 47	50.00

8	21 Oct 47	$25.00
9	21 Oct 47	25.00
10	22 Oct 47	30.00
11	22 Oct 47	70.00
12	24 Nov 47	20.00
13	25 Oct 47	40.00
14	28 Nov 47	20.00
15	28 Nov 47	35.00

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

Specification 1: In that 1st Lt Frank N. Frith, 2313th Area Service Unit, Pittsburgh, Pennsylvania, did, at Pittsburgh, Pennsylvania, on or about 24 November 1947, with intent to deceive, wrongfully and unlawfully make and utter to Sergeant John W. Tipton, 2313th Area Service Unit, Pittsburgh, Pennsylvania, a certain check, in words and figures as follows, to wit: "The Colonial Trust Company, Carrick Office, Pittsburgh, Pa., 24 Nov 1947, Pay to the Order of Cash, $19.95/00 nineteen and 95/100 dollars, Frank N. Frith" in partial payment of a personal debt, he, the said 1st Lt Frank N. Frith, then well knowing that he did not have and not intending that he should have sufficient funds in the Colonial Trust Company Bank for the payment of said check.

Specification 2: In that 1st Lt Frank N. Frith, ***, on or about 1 November 1947, with intent to deceive Captain Frank G. Thompson, Custodian, Post Trust Fund, Carlisle Barracks, Pennsylvania, officially report as custodian of the 2313th Area Service Unit Fund to the said Captain Frank G. Thompson, a statement of account of the said 2313th Area Service Unit Fund as of 31 October 1947, which statement was known by the said 1st Lt Frank N. Frith to be a false statement of the said account.

Specification 3: In that 1st Lt Frank N. Frith, ***, did, at Pittsburgh, Pennsylvania, on or about 1 December 1947, with intent to deceive Captain Frank G. Thompson, Custodian, Post Trust Fund, Carlisle Barracks, Pennsylvania, officially report as Custodian of the 2313th Area Service Unit Fund to the said Captain Frank G. Thompson, a statement of account of the said 2313th Area Service Unit Fund as of 30 November 1947, which statement was known by the said 1st Lt Frank N. Frith to be a false statement of the said account.

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

Specification 1: In that 1st Lt Frank N. Frith, Adjutant General's Department, 2313th Area Service Unit, Pittsburgh, Pennsylvania, did, at South Park, Pittsburgh, Pennsylvania, on or about 20

November 1947, feloniously take, steal and carry away, one (1) Gruen gold lady's wristwatch, value about fifty-seven dollars and fifty-five cents ($57.55) the property of the Post Exchange, South Park, Pittsburgh, Pennsylvania.

ADDITIONAL CHARGE II: Violation of the 96th Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specifications 2,3,4,5 and 6: (Nolle Prosequi).

He pleaded not guilty to all charges and specifications. He was found guilty of Charges I and II and all specifications thereunder; guilty of the Additional Charge I and its specification, substituting, however, "Forty-two dollars and ninety cents ($42.90)" for the words and figures "Fifty-seven dollars and fifty-five cents ($57.55)". He was found not guilty of Additional Charge II and Specification 1 thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. Charge I and its Specifications and Specifications 2 and 3 of Charge II.

On or about 1 August 1947 the accused was duly appointed custodian of the Unit Fund, 2313th Area Service Unit, Pittsburgh, Pennsylvania, and he remained as custodian until about 2 January 1948 (R 8,21,48; Pros Ex 1). At the time of his appointment, the accused and his predecessor signed a communication to the First National Bank, Wood and Fifth Ave., Pittsburgh, Pennsylvania, which was the depository, informing the bank that the fund was, on 1 August 1947, transferred to the accused and that from the date thereof he would have authority to draw on the 2313th Area Service Unit Fund (R 50, Pros Ex 23). Subsequent to 1 August 1947 the "First National Bank at Pittsburgh" changed its name to "Peoples First National Bank and Trust Company" (R 13,16, Pros Ex 18). Mr. John T. Judge, Assistant Bookkeeping Manager, Fifth Ave. Office, Peoples First National Bank and Trust Company, identified in court the bank's original ledger account of the 2313th Area Service Unit Fund. It was stipulated that as shown by the bank's records, the balances in the fund at the close of business for the months hereinafter stated were as follows:

Oct 1947 -	$28.27	
Nov 1947 -	$106.87	(R 44)

It was further stipulated that Prosecution Exhibits Nos. 2 to 16, inclusive, were true photostatic copies of checks which cleared through the Peoples First National Bank and Trust Company, Pittsburgh, Pennsylvania, and were charged against the 2313th Area Service Unit Fund (R 45). These exhibits form the basis of Specifications 1 to 15 inclusive of Charge I and are checks drawn on the fund by the accused at various times during October and November 1947, and in the amounts set forth in the specifications. All are signed as follows: "2313th A.S.U. Frank N. Frith." The witness further stated that accused had no individual account in the bank. The checks (Pros Exs 2 to 16) were considered by the bank as having been drawn on the Unit fund (R 47-48).

Prosecution Exhibits Nos. 3 to 12, inclusive, and 14, totaling $440.00, bear October 1947 dates and the cancellation stamp shows that each was cashed during that month. Prosecution Exhibits Nos. 2,3, 15 and 16, totaling $95.00, have November 1947 dates and the cancellation stamps show that they were cashed during that month.

Captain Frank G. Thompson, M.C., Carlisle Barracks, Pennsylvania, testified that he was custodian of the "Post Trust Fund" and that the 2313th ASU Unit Fund, Pittsburgh, Pennsylvania, was a "satellite" of his fund. Captain Thompson officially received from the accused monthly reports on the condition of the 2313th ASU Unit Fund. He identified, and there were received in evidence as Prosecution Exhibits Nos. 24 and 25 monthly financial statements of the 2313th ASU Unit Fund as of 31 October 1947, and 30 November 1947 duly signed by the accused as custodian thereof. The October 1947 statement (Pros Ex 24) shows in part the following:

"ASSETS (Cash and Investments, exclusive of ration savings) $498.27
LIABILITIES *** None"

(Pros Ex 24)

The November 1947 statement (Pros Ex 25) shows in part the following:

"ASSETS (Cash and Investments, exclusive of ration savings) $623.07
LIABILITIES *** None"

(Pros Ex 25)

On 8 December 1947 the accused's commanding officer, Major Frank E. Oliver, USAF, was detailed to investigate the condition of the 2313 ASU Unit Fund. He procured a statement including the cancelled checks from the Peoples First National Bank and Trust Company, depository of the fund. Major Oliver identified Prosecution Exhibits 2 to 16, inclusive, as the cancelled checks he had received with the bank statement. He testified that he was familiar with the accused's handwriting and that the signature appearing

on all of the checks was that of the accused. The checks totaled in amount $535.00. The Unit fund consisted solely of money on deposit in the bank and an inter-office communication "rig" or system (R 6-13).

During the course of his investigation Major Oliver confronted the accused with the cancelled checks (Pros Exs 2 to 16, Incl), the financial statements (Pros Exs 24 and 25), and other related papers, advised him of his rights regarding self-incrimination and took a voluntary statement from the accused which was received in evidence as Prosecution Exhibit 18 (R 16). Briefly summarized, the accused admitted making and cashing the checks (Pros Exs 2 to 16, Incl). He stated that he had intended the checks to be written on a personal bank account that he had in a Cincinnati, Ohio, bank but that he forgot to change the name of the bank. He never at any time had had a personal checking account with the Pittsburgh, Pennsylvania, bank. The money drawn from the bank by the checks in question was used by the accused for his personal requirements and none of it was ever used for the benefit of the 2313th Area Service Unit. He did not include the withdrawals made by these checks in his monthly statements because he had intended making restitution of the funds before the withdrawals came to the attention of the military authorities (R 14-16).

Major Joseph G. Gregg testified that he audited the account of the accused as custodian of the Unit fund and that there were no vouchers to support the checks (R 79).

b., Specification 1 of Charge II

On 24 November 1947 the accused executed and delivered to Sergeant John W. Tipton, 2313th Area Service Unit, his personal check in the sum of $19.95 drawn on the Colonial Trust Company, Carrick Office, Pittsburgh, Pennsylvania. Sergeant Tipton presented the check to the bank for payment without delay and the check was dishonored with notation, "Short according to our books." The check and notation thereon were received in evidence without objection as Prosecution Exhibit 26 (R 68). On cross-examination it was proven that the check was given as a partial payment on a pre-existing debt, Sergeant Tipton having on some prior date loaned the accused the sum of one hundred and fifty dollars ($150.00) (R 71).

c. Additional Charge I and its specification

In addition to his other duties the accused was inventory officer of the post exchange located at South Park, Pittsburgh, Pennsylvania. On 20 November 1947 the accused, Master Sergeant Clifford J. Rainford, and Miss Rosemary Smith conducted an inventory of the exchange. The establishment was closed. Prior to taking the inventory Miss Smith, who worked at the jewelry counter, had placed a Gruen gold ladies' wrist watch in one of the jewelry cases. The watch was of a unique type, rather large for ladies' wear, and was the only one of this type carried in stock. At about 1900

hours the accused left the Post Exchange. About an hour later Miss Smith noticed that the watch was missing from the case. On the following morning she reported to the accused that the ladies' wrist watch was missing and was therefore omitted from the inventory. Miss Smith identified a watch which was received in evidence as Prosecution Exhibit 17 as being identical to the one described as missing from the Post Exchange. It was stipulated that the value of the watch (Pros Ex 17) was $42.90 (R 59-64).

Sergeant Clifford J. Rainford, 2303rd Area Service Unit, the manager of the Post Exchange, identified Prosecution Exhibit 17 as being identical to the watch which was missing from the Post Exchange. He also corroborated the testimony of Miss Smith as to the circumstances surrounding its disappearance. On 21 November 1947 he and Miss Smith reported the loss of the watch to Major Johnson. He identified Prosecution Exhibit 22 as the box in which the watch (Pros Ex 17) had been displayed at the Post Exchange. He also testified that the missing watch had never been sold (R 72-76).

On 21 and 22 November 1947 Major Frank E. Oliver noticed that the accused was wearing a wrist watch similar to Prosecution Exhibit 17 which he remarked was a "little feminine." The accused told Major Oliver that he bought it at "Kaufman's", Pittsburgh, Pennsylvania (R 13,14). On about 10 December 1947 Major Vern E. Johnson, the provost marshal and post exchange officer, found a pawn ticket on a watch in the officers' lounge. The ticket bore the accused's name. Major Johnson on 15 December 1947 took the ticket to J. A. Johnston Company, 405 Smithfield Street, Pittsburgh, and redeemed the watch for $8.50. This watch was identical with Prosecution Exhibit 17 and the one missed from the Post Exchange in November 1947. Major Johnson searched accused's quarters at the "BOQ" and found in a bureau drawer an empty watch case, similar to ones used at the post exchange. The described pawn ticket and empty watch case were received in evidence without objection as Prosecution Exhibits 21 and 22, respectively (R 36-43). It was stipulated that the described watch did not appear in the Post Exchange inventory taken by the accused of 20 November 1947 (R 39).

On 23 December 1947 the accused, after having his rights explained to him, made another statement to Major Oliver who showed him the pawn ticket (Pros Ex 21). The accused admitted that the signature appearing thereon was his and that he had pawned a watch at the J. A. Johnston Company for "$8.00." He denied stealing the watch from the Post Exchange and asserted that he had bought the watch in Cincinnati, Ohio, for "a little over $71.00." He offered no further evidence of the alleged purchase. He had shown this watch to Major Oliver on some prior date (R 19, Pros Ex 19).

4. The accused was fully advised of his rights as a witness and elected to remain silent (R 91). No witnesses were called by the defense.

5. Comment

Charge I and its Specifications and Specifications 2 and 3, Charge II

The record conclusively shows that during October and November 1947

while he was custodian of the 2313 Area Service Unit fund the accused, in his fiduciary capacity, executed and cashed fifteen checks against the fund as shown in Prosecution Exhibits 2 to 16, inclusive, in a total amount of $535.00, and that he used this money for his own private gain. Each transaction constituted a breach of trust denounced in law as embezzlement (Moore v. U.S., 160 U.S. 268; par 149h, MCM 1928). Eleven of these checks, totaling $440.00, were cashed in October 1947 and four totaling $95.00 were cashed in November. By design, the accused failed to reflect any of these withdrawals in his monthly financial statements of the Unit fund account for October and November 1947 which were official reports required to be made by accused as custodian of the 2313 ASU Fund to Captain Frank G. Thompson, Custodian of the Post Trust Fund. It follows that the October and November financial statements rendered to Captain Thompson were false official reports in that each statement showed assets in the fund that did not exist.

Additional Charge I and its Specification

The larceny of the ladies' gold wrist watch is established by circumstantial evidence of such forceful character as to leave no doubt as to the accused's guilt. The accused was the Post Exchange inventory officer on the day the watch was missed, his assistants saw the watch in the Post Exchange at the close of business the day before the inventory and missed it directly after the inventory was taken. They reported the loss to the Post Exchange officer the following morning. It was a unique watch and the only one of that type the Post Exchange had ever carried in stock. It was not sold nor did it appear on the inventory. The accused was seen the following day wearing an identical watch and the empty box in which the watch had been displayed in the Post Exchange was found in his quarters. Within a short time thereafter he pawned an identical watch for $8.00. The court was fully justified in rejecting accused's statement to Major Oliver that he had purchased the watch in Cincinnati, Ohio.

Specification 1, Charge II

Specification 1 of Charge II alleges, in effect, that with intent to deceive, the accused wrongfully made and uttered to Sergeant Tipton the described check in partial payment of a debt, then well knowing and not intending that he should have sufficient funds on deposit with the bank for payment thereof. It was contended by the defense counsel at the trial, and in his brief which was forwarded with the record of trial, that inasmuch as the worthless check given Sergeant Tipton was toward payment of an antecedent debt, no criminal offense was alleged or legally found. Counsel cites authorities construing various so-called "cold check" statutes wherein it was said that the intent to defraud can only be inferred in cases where the party alleged to have been defrauded parted with something of value at the time the check was given. But we do not understand the specification herein as pleading an intent to defraud. The specification is laid under the 96th Article of War and this office has uniformly held that the giving

of a check by military personnel, although ostensibly in payment of an antecedent debt, the maker well knowing that he did not have and not intending to have sufficient funds on deposit to meet payment thereof, is conduct prejudicial to good order and punishable under that Article (CM 202601, Sperti, 6 BR 171, 219; CM 307491, Haire, 61 BR 133,145; CM 320578, Himes, 70 BR 31,37). It cannot be said that Sergeant Tipton was not deceived as that word appears to have been used in the specification because he accepted the check in good faith, and went to the bank to get the money thereon only to be refused payment.

6. Department of the Army records show that the accused is 24 years of age and has been married. He attended high school and was employed as a clerk and elevator operator until being inducted into the Army on 3 March 1943. He was promoted to sergeant on 11 December 1944 and was commissioned second lieutenant, AUS, on 22 March 1945. He served 32 months in the European Theater.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence as approved by the reviewing authority. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96.

Robert T. Wilson, Judge Advocate

(Sick in Hospital), Judge Advocate

Harley A. Lanning, Judge Advocate

APR 30 1948

JAGK CM 329503 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Frank N. Frith (0-2011497), Adjutant General's Department.

2. Upon trial by general court-martial this officer was found guilty of fifteen offenses of embezzlement of funds of the 2313th Area Service Unit Fund in violation of Article of War 93 (Charge I and its specs.); wrongfully making and uttering a check to an enlisted man in part payment of a debt not having and not intending to have sufficient funds on deposit in the drawee bank for payment (Spec. 1, Chg. II), and making two false official statements as to the condition of the 2313th Area Service Unit Fund in violation of Article of War 96 (Specs. 2 and 3, Chg. II), and larceny of a wrist watch of the value of $42.90, property of the Post Exchange, South Park, Pittsburgh, Pennsylvania, in violation of Article of War 93 (Add'l Chg. I and its spec.). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at 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 will be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

The accused was the custodian of the Unit Fund, 2313th Area Service Unit, Pittsburgh, Pennsylvania. During October and November 1947 he withdrew a total of $535.00 from the fund by sixteen checks drawn thereon in various amounts ranging from $20.00 to $70.00 and applied the money to his own use. His monthly statements for October and November failed to reflect any of the withdrawals and certified the balance in the fund to be an amount greater than actually existed. On 24 November 1947 the accused executed and delivered to a sergeant in his organization a check in the sum of $19.95 as partial payment on a pre-existing debt of $150.00. The drawee bank declined payment for insufficient funds. On 20 November 1947, while taking an inventory of the Post Exchange, the accused took a ladies' wrist watch which he subsequently pawned at a shop in Pittsburgh, Pennsylvania.

The staff judge advocate, in his review, stated that on 16 June 1947 accused submitted his resignation under the provisions of paragraph 6,

War Department Circular 385, 1945, as amended by War Department Circular 85, 1946. The resignation was not accepted.

4. Department of the Army records show that the accused is 24 years of age and has been married. He attended high school and was employed as a clerk and elevator operator until being inducted into the Army on 3 March 1943. He was promoted to sergeant on 11 December 1944 and was commissioned second lieutenant, AUS, on 22 March 1945. He served 32 months in the European Theater.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 97 , 5 May 1948).

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

25 MAR 1948

JAGQ - CM 329522

UNITED STATES v. Private ARTHUR C. LOVE (RA 34855520), 661st Transportation Truck Company.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Heidelberg, Germany, 11 December 1947. Dishonorable discharge and confinement for three (3) years. Federal Reformatory.

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by reviewing authority).

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that Private Arthur C. Love, 661st Transportation Truck Company, did, at Mannheim, Germany, during the period from September 1946 to June 1947, wrongfully and unlawfully engage in sexual relationships with Inge Trunk, a woman not his wife.

Accused pleaded not guilty to and was found guilty of the Charge and its three specifications. Evidence of three previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2 of the Charge, approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years, designated the Federal Reformatory, Chillicothe, Ohio, 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 for the offense with which accused was charged and of which he was found guilty. In view of this fact it is deemed unnecessary to summarize the evidence.

Accused was tried and found guilty of wrongfully and unlawfully engaging in sexual relationships with one Inge Trunk, a woman not his wife. The specification alleges in pertinent part that accused did:

> "during the period from September 1946 to June 1947, wrongfully and unlawfully engage in sexual relationships with Inge Trunk, a woman not his wife."

The staff judge advocate contends in his review that regardless of the fact that the specification does not allege that either accused or the woman involved was married it does not "exclude that fact". Therefore as it is "impossible to determine from the specification" whether adultery or fornication was alleged and since "the specification will admit of proof of either status" and the woman was specifically named, the pretrial investigation and the evidence of record may be examined to determine with which of these two offenses accused was actually charged and found guilty. The evidence is uncontradicted that the woman named in the specification was married during the entire period in which accused is alleged to have committed the offense in question and consequently, the staff judge advocate reached the conclusion that accused was properly convicted of adultery which offense would authorize a maximum confinement for three years (Title 18, U.S.C., Sec. 516).

The Board of Review is constrained to disagree with the contention above set forth. It is an axiomatic principle that an accused cannot lawfully be convicted of an offense with which he has not been charged (CM 229477, Floyd, 17 BR 149, 152). It is clear that an offense is not charged unless all its necessary elements are alleged in the specification (CM 320623, Bato, 70 BR 81, 82). One of the necessary elements of the offense of adultery is the marital status of one of the parties involved. Wharton's Criminal Law, Volume 2, after defining the offense of adultery as "sexual connection between a man and a woman, one of whom is lawfully married to a third person" (Sec. 2081) states that the allegation of marriage in an indictment charging adultery is essential (Sec. 2091):

> "The allegation of marriage is essential, and has been already discussed. It is sufficient, in several jurisdictions, to aver a lawful marriage on the part of the married defendant to some other person except the paramour, but in any view the adulterer must be averred to be married to a person other than the paramour."

When this necessary element of the offense is not alleged in the specification it cannot be said that the accused was charged with this serious offense when the specification as drawn clearly charges the lesser offense of fornication. It must follow therefore that if the accused was not charged with the offense of adultery the fact that the evidence at the trial showed that the woman involved was married cannot be taken into consideration in determining the offense of which he was found guilty nor permit a more severe punishment than would be legal under the specification as originally drawn.

The Boards of Review have consistently held that a specification which charges a less serious offense will not support a finding of a greater offense regardless of the fact that the evidence adduced at the trial clearly shows accused guilty of the more serious offense. In CM 325046 (1947), 6 Bull. JAG 240, accused was charged with the unlawful killing of another soldier. No words of intention or willfulness were used in describing the offense. The evidence clearly showed that the record would have sustained a conviction for voluntary manslaughter but the Board held that as accused was charged with the lesser offense of involuntary manslaughter the evidence could not be taken into consideration to determine the grade of the offense with which he was originally charged and that the record of trial would support only a finding of guilty of involuntary manslaughter and the maximum sentence applicable thereto.

As the specification in the instant case failed to allege a necessary element of the offense of adultery and by its terms did allege the offense of fornication, the Board of Review holds that accused was found guilty of only the latter offense and accordingly the sentence is excessive. The offense of fornication is not listed in the Table of Maximum Punishments but it is made an offense by Section 22-1001, Chapter 10, Title 22 of the District of Columbia Code, which provides a maximum sentence to confinement for six months. Consequently, the legal maximum sentence which the court could impose for the offense of fornication is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and only so much of the sentence as involves confinement at hard labor in some place other than a penitentiary, reformatory or Federal correctional institution for six months and forfeiture of two-thirds of his pay per month for a like period.

W. H. Johnson Jr, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 329522 1st Ind MAR 3 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 Arthur C. Love (RA 34855520), 661st Transportation Truck Company, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as involves confinement at hard labor in a place other than a penitentiary, reformatory or Federal correctional institution for six months and forfeiture of two-thirds of his pay per month for a like period. 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 329522).

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.

JAGN-CM 329553

UNITED STATES	)	FIRST U. S. INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Regensburg, Germany, 10 February 1948. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
	)	
Private JOHN GRDINICH (15216930), Battery B, 7th Field Artillery Battalion.	)	

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 94th Article of War.

Specification: In that Private John Grdinich Battery 'B' Seventh Field Artillery Battalion did, at Landshut Germany on or about 25 December 1947, knowingly and willfully misappropriate a One Quarter (1/4) ton four by four (4X4) truck of the value of over fifty (50) dollars, property of the United States furnished and intended for the Military service thereof.

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 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. Accused, a member of "B" Battery, 7th Field Artillery Battalion, was detailed as Battalion "stand-by driver" for the period from 1700 hours

25 December 1947 to 0800 hours 26 December 1947 (R. 6-7, 20). The following testimony appears in the record concerning the duties of the Battalion stand-by driver:

Technician Fifth Grade Willard E. Campbell, Charge of Quarters of "B" Battery on the night in question, testified:

"Q. * * * What are the duties, to the best of your knowledge, of Battalion stand-by driver?

A. To the best of my knowledge he is to carry the O. D. around, the Officer of the Day, and that is about all I know, sir.

Q. In other words, general routine business after duty hours?

A. Yes, sir" (R. 7).

First Lieutenant John N. Kennedy, motor officer of the 7th Field Artillery Battalion, testified:

"Q. What are the duties of a Battalion stand-by driver <u>after</u> duty hours?

A. The Battalion stand-by driver in the 7th Field Artillery Battalion is assigned at Battalion Headquarters to remain in the sergeant major's office, to be on call for any official duty between 1700 and 0800 in the morning" (R. 20).

The accused testified, under oath:

"Q. What are the normal uses of the Battalion stand-by driver?

A. Well, we take soldiers to the theater, downtown, or RTO, or take officers to their home or to the club, or taking the first three graders or EM up to the Red Cross by the Caserne" (R. 43).

From the records of the Battalion motor office it appears that a one-quarter ton truck, bumper number "B-3" was assigned as "stand-by" vehicle for the period in question (R. 21). Through some error, the exact nature and extent of which are not clear from the evidence, accused entered upon the execution of his duties using a one-quarter ton truck with the bumper number "B-5" (R. 10, 14, 21-26, 41).

At "approximately 5:30 or 6 o'clock," on the evening in question, Private Charles Gibson, a soldier in accused's Battery, requested accused to drive him "to my girl's house." Accused agreed to do so (R. 10). The only testimony concerning the permission given accused to make such a trip is the uncontradicted testimony of accused himself:

"Q. Did you have permission to make this trip?

A. Well, yes, sir, the [Battalion] CQ said it was OK to go.

* * *

Q. Did the [Battalion] CQ know where you were going?

A. No, sir, he didn't ask me where I was going; all he said, it was OK with him.

* * *

Q. Who normally makes out the trip tickets for holidays?

A. The Battalion CQ at Battalion Headquarters. The CQ made the trip ticket and he was in the Battalion Headquarters in the sergeant major's office" (R. 42, 43-44).

A "Daily Dispatching Record of Motor Vehicles," admitted in evidence as prosecution's exhibit 1, shows that "B-3" was dispatched to "Landshut" at 1720 hours 25 December 1947, with accused listed as the driver, and the Battalion Charge of Quarters as dispatcher.

Accused, with Gibson as passenger, thereafter drove to the main gate where he was stopped by the guard because his trip ticket was incorrect, the guard sending him "back to the Battery for a proper trip ticket" (R. 10). Upon accused's return to the Battery the Battery Charge of Quarters, Campbell, told accused "he was relieved" (R. 7). Accused then threw his trip ticket and his "C" card on the table, indulged in an oral altercation with Campbell, picked up his trip ticket and "C" card, and said he was going to the Battalion Headquarters (R. 8, 14, 16, 42). Accused then returned to the vehicle he had been driving, drove "uptown" with Gibson, and while returning to his Battalion area the vehicle was wrecked (R. 11).

4. The Specification of which accused was found guilty alleges, in essence, that he "did * * * knowingly and willfully misappropriate" a Government truck. The term "misappropriate," as used in Article of War 94, is defined as "devoting to an unauthorized purpose" (par. 150i, MCM, 1928).

From the evidence in the record of trial the court had the

right to determine that the accused made use of the truck without having personal authority to do so. However, since he is charged with the offense of misappropriation, the question to be resolved is whether there is sufficient evidence in the record to establish, or from which the court could reasonably infer that the truck itself was devoted to an unauthorized purpose without regard to the personal authority of its operator. A somewhat similar question was discussed in the following terms in the case of CM 324029, Pass (Oct 47):

> "While the accused may have been operating the tractor without proper authority or without proper dispatch of the vehicle to him, no evidence was adduced to support the contention that he misapplied the tractor or that he had converted it to his own use and benefit. To the contrary, the evidence shows affirmatively that, at the time in question, the tractor was being used for hauling cargo in the government service pursuant to direction and under supervision of proper authority. In the absence of evidence showing that accused had used the tractor for his own personal use and benefit, it follows that the findings pertaining to Charge III cannot be sustained."

Although the offense in question in the Pass case was one of misapplication we are of the opinion that the reasoning expressed by the holding of the Board of Review therein is equally applicable here.

The fact that accused apparently was using a truck which was never properly dispatched, as a substitute for one that was, cannot be made the basis for this prosecution in view of the aspects of the case as disclosed by the evidence. It was, at most, simply a case of a mistake in the identity of the vehicle. Although the evidence does not clearly show the authorized purpose for the vehicle in use, or for the vehicle for which it had been substituted, the evidence does indicate the probability that it was officially dispatched to make the trip it actually made (Pros. Ex. 1). Certainly it may be said that there is no sufficient evidence in the record from which the court could reasonably infer that the purpose for which the vehicle was used, was unauthorized.

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

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

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NAVY DEPARTMENT

JAGN-CM 329553 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, First U. S. Infantry Division, APO 1,
c/o Postmaster, New York, N. Y.

1. In the case of Private John Grdinich (15216930), Battery B, 7th Field Artillery Battalion, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the findings and 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 329553).

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.

26 APR 1948

JAGQ - CM 329581

UNITED STATES v. Private First Class HARLEY LEMLEY (37069825), Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma.	)	THE ARTILLERY CENTER Trial by G.C.M., convened at Fort Sill, Oklahoma, 17 and 24 February 1948. Dishonorable discharge (suspended) and confinement for six (6) months. Post Guardhouse.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Harley Lemley, formerly Headquarters and Headquarters Battery, Field Artillery Training Detachment #2, Fort Sill, Oklahoma, now assigned Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma, did at Fort Sill, Oklahoma on or about 22 March 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Corning, Arkansas, on or about 4 December 1947.

Accused pleaded not guilty to and was found guilty of the Charge and Specification except the words "apprehended at Corning, Arkansas", substituting therefor the words "returned to military control", of the excepted words not guilty, of the substituted words 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 at such place as the reviewing authority may direct for five years. The reviewing authority approved only so much of the finding of guilty of the Specification as "involved a finding of

guilty of absence without leave in violation of the 61st Article of War" and only so much of the sentence as provides for dishonorable discharge, "total forfeiture" and confinement at hard labor for six months, suspended the execution of the dishonorable discharge and designated the Post Guardhouse, Fort Sill, Oklahoma, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 26, Headquarters The Artillery Center, Fort Sill, Oklahoma, dated 11 March 1948.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support the sentence in view of the findings of guilty as approved by the reviewing authority. The record shows that accused was arraigned on 17 February 1948 and pleaded not guilty to the Specification and the Charge. While there is no doubt that accused was absent without leave for the period specified in the approved findings it is also clear that more than two years had elapsed between the date of the initial absence (22 March 1945) and the date (17 Feb. 1948) on which accused was arraigned.

Article of War 39 provides in part that:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person:"

Paragraph 87b, MCM, 1928, provides in part as follows:

> "* * * Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A.W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense."

This precise question was decided in CM 217172, Rosenbaum, 11 BR 225, wherein the Board of Review quoting the above-mentioned paragraph in the Manual for Courts-Martial held the record of trial legally insufficient to support the sentence. See also CM 328217, Kulcsar, 9 March 1948. The principle enunciated in these opinions is based upon the theory that as

the action of the reviewing authority which approved only so much of the findings of guilty as involved an offense which was barred by the Statute of Limitations, was taken after the trial had been completed, in the absence of accused and in a situation where he could not assert his rights, it would be manifestly unfair to hold that he had in any manner waived the pleading of the Statute of Limitations.

It follows that the reviewing authority, after he had approved only so much of the findings of guilty of desertion as involved a finding of guilty of absence without leave, was without power to consider such absence as a basis of punishment because punishment for such absence was barred by Article of War 39. As the accused was tried upon this single Specification, the record of trial is not legally sufficient to support the sentence.

4. For the reasons stated the Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the sentence.

W. H. Johnson Jr., Judge Advocate

Wilmot V. Vaughan, Judge Advocate

C. B. Kane, Judge Advocate

APR 28 1948

JAGQ - CM 329581 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 725; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Harley Lemley (37069825), 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 adjudged by the sentence in this case and that all rights, privileges and property of which the accused has been deprived by virtue of the findings of guilty and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 100, 6 May 1948).

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

9 APR 1948

JAGH CM 329585

U N I T E D S T A T E S	)	11TH AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 468, 26 February 1948. Dishonorable discharge (suspended) and confinement for three (3) years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Technician Fifth Grade WAYNE P. ROGERS (RA 16240924), 3rd Transportation Military Railway Service, APO 503.	)	

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

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge II and Charge II, and legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2, Charge I as involves findings of guilty of involuntary manslaughter, and legally sufficient to support 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. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Technician Fifth Grade Wayne P Rogers, 3rd Transportation Military Railway Service, APO 503, did at or in the vicinity of Hakodate, Hokkaido, Japan on or about 29 November, 1947 willfully, feloniously, and unlawfully kill Hatsuyo Fuyita a Japanese female by striking her about the head and body with a motor vehicle.

Specification 2: In that Technician Fifth Grade Wayne P Rogers, 3rd Transportation Military Railway Service, APO 503, did at or in the vicinity of Hakodate, Hokkaido, Japan on or about 29 November, 1947 willfully, feloniously, and unlawfully kill Norimitsu Muramoto, a Japanese male by striking him about the head and body with a motor vehicle.

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

Specification 1: In that Technician Fifth Grade Wayne P Rogers, 3rd Transportation Military Railway Service did at or in the vicinity of Hakodate, Hokkaido, Japan on or about 29 November, 1947 wrongfully drive a motor vehicle upon a public highway to wit: Tsuruoka-Cho Street, carelessly and heedlessly in wanton disregard of the safety of others.

Specification 2: In that Technician Fifth Grade Wayne P Rogers, 3rd Transportation Military Railway Service, APO 503, did at or in the vicinity of Hakodate, Hokkaido, Japan on or about 29 November, 1947 while operating a motor vehicle on a public highway, to wit: Tsuruoka-Cho Street, strike with a motor vehicle Heizo Sojiki, Japanese male causing bodily injury thereto and wrongfully failed to stop and give assistance and make his identity known.

The accused pleaded not guilty to and was found guilty of the 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 at such place as the reviewing authority may direct for a period of three years. No evidence of previous convictions was introduced. 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 in General Court-Martial Orders No. 10, Headquarters 11th Airborne Division, APO 468, dated 6 March 1948.

3. The record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge II, and Charge II, and the only question presented is whether the record is legally sufficient to support the finding of guilty of Specifications 1 and 2 of Charge I, alleging voluntary manslaughter.

4. Evidence for the prosecution.

On the evening of 29 November 1947, at Hakodate, Japan, the accused, his commanding officer, Captain John L. Clark, and some enlisted members of accused's unit attended a Japanese party at the Wakamatsu Hotel. The party began at about 1800 hours (R 16,26; Deposition of Captain Clark). Food, beer, saki and Japanese Nikka whiskey were served and accused partook of the food and drink (R 18,26; Deposition of Captain Clark). Two jeeps were furnished by accused's unit for transporting members to the party. Accused drove one jeep which had a known defective headlight and Captain Clark drove the other (R 24). At approximately 2100 hours,

accused took one of the soldiers from the party to the unit billets and stated that he was going to return to the party. During this trip to the billets he was "speeding" and was thought to be "under the influence of liquor" (R 20).

At about 2145 hours, a jeep with only one headlight, travelling on a street in Hakodate at a high rate of speed, estimated at from over 50 to over 60 kilometers per hour, was observed by Japanese witnesses (R 7,8,11; Stipulation A). The street was dark due to a temporary failure of the city lighting system (R 8,15). The jeep struck and killed Norimitsu Muramoto, one of three pedestrians on the left side of the street and then swerved to the right and struck and killed Hatsuyo Fujita on the opposite side of the street (R 7,8,10; Stipulations A and B; Pros Ex 1 and 2). The jeep did not decrease its speed. Shortly thereafter, a jeep struck and injured a Japanese national by the name of Sojiki on Tsuruoka-Cho Street, Hakodate. (R 11,13,14). The unit motor sergeant examined the jeep which had been driven by the accused, pursuant to a call from Captain Clark at about 2230 hours, 29 November and found that it had a bent windshield, hood and radiator grille (R 25). Accused was thereafter questioned by Captain Clark and a Major Harris at approximately 0400 hours, 30 November 1947, and admitted he had struck a Japanese national on Clark Street (Deposition of Captain Clark, p. 7,11). From a number of witnesses called successively, representing the several small military detachments in the city of Hakodate, it was adduced that all vehicles assigned to them were properly accounted for on the night of 29 November 1947 and that none bore any marks of collision (R 27,28,29,30,31,32,34,37,38).

5. Evidence for the defense.

Accused, after having been warned of his rights, testified that a jeep was dispatched to him for recreation purposes at about 1700 hours on 29 November 1947. He arrived at the Wakamatsu Hotel at about 1810 hours. At approximately 2030 hours several enlisted men requested that he take them back to their billets. After making this trip he returned to the hotel. Sometime later he left the hotel and while proceeding back to his billet, struck a Japanese national. He slowed down after the accident but did not stop because he was too scared. Accused indicated the scene of the accident on a map of Hakodate, and denied hitting more than one person. He admitted drinking three or four beers and one "shot" of saki at the party. He further stated that the vehicle he drove had one defective headlight, and that when it was dispatched to him it did not have a dented hood or dented radiator grille. His maximum speed on this second trip from the hotel was 30 miles per hour (R 39,40).

6. Under each of the Specifications in question, 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 each 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. Swaim, 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 at a rate of speed between 30 and 40 miles per hour (50-60 kilometers per hour), and while so driving he struck two Japanese nationals who died as a result of the injuries received. These deaths, 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 victims, nor is there any evidence present from which willfullness, as defined above, can be inferred. The element of willfullness necessary for a conviction of voluntary manslaughter being absent, the record of trial

with respect to the Specifications of Charge I 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 willfullness required for voluntary manslaughter (CM 234896, Nieder, 21 BR 209).

The sentence is within the maximum limit for involuntary manslaughter (MCM, 1928, par 104c) and therefore legal.

7. 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 Specification 1, Charge I, as finds that accused did, at the time and place alleged, feloniously and unlawfully kill one Hatsuyo Fuyita, a Japanese female, by striking her about the head and body with a motor vehicle and legally sufficient to support only so much of the findings of guilty of Specification 2, Charge I, as finds that accused did, at the time and place alleged, feloniously and unlawfully kill one Norimitsu Muramoto, a Japanese male by striking him about the head and body with a motor vehicle, legally sufficient to support the finding of guilty of Charge I, legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge II, and Charge II, and the sentence.

A Hottenstein, Judge Advocate

J W Lynch, Judge Advocate

Joseph T. Brack, Judge Advocate

JAGH CM 329585 1st Ind APR 21 1948

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Technician Fifth Grade Wayne P. Rogers (RA 16240924), 3rd Transportation Military Railway Service, APO 503.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2, Charge I, as finds the accused guilty of the Specifications except the word "willfully," legally sufficient to support the findings of guilty of Charge II and its Specifications and legally sufficient to support the sentence. I concur in that opinion and for the reasons stated therein recommend that so much of the findings of guilty of Specifications 1 and 2, Charge I, as involves findings of guilty of the word "willfully," in each Specification 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

(GCMO 105, 6 May 1948).

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

JAGH CM 329587

23 JUN 1948

UNITED STATES v. Private JOHN D. SIPES, JR., RA 13222019, Battery "A", Private ALBERT E. LITTLEJOHN, RA 15228674, Battery "B", and Private BOBBY C. PEMBERTON, RA 14238292, Battery "B", all of 753rd Antiaircraft Artillery Gun Battalion, APO 503.	HEADQUARTERS EIGHTH ARMY Trial by G.C.M., convened at APO 343, 5-6 January 1948. Sipes: Confinement for six (6) months and forfeiture of $50.00 per month for a like period. Littlejohn: Confinement for nine (9) days and forfeiture of $7.50 of his pay. Pemberton: Confinement for six (6) months and forfeiture of $50.00 per month for a like period. The Eighth Army Stockade.

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

1. The record of joint trial in the case of the soldiers named above has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the sentences as to accused Littlejohn and Pemberton, but legally insufficient to support the sentence in part as to accused Sipes. The record of trial 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 Sipes was tried upon the following Charges and Specifications:

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

Specification: (Finding of not guilty).

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

Specification: In that Private John D. Sipes, Jr., Battery "A", 753rd Antiaircraft Artillery Gun Battalion, APO 503, did, without proper leave, absent himself from his organization at Tomioka Seaplane Base, Honshu, Japan, from about 3 November 1947 to about 10 November 1947.

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

Specification 1: In that Private John D. Sipes, Jr., Battery "A", 753rd Antiaircraft Artillery Gun Battalion, APO 503,

having been restricted for medical purposes to the 753rd Antiaircraft Artillery Gun Battalion Area, did, at Tomioka, Honshu, Japan, on or about 3 November 1947, break said medical restriction, by going beyond the limits thereof.

Accused Sipes pleaded not guilty to Charge I and its Specification, guilty to Additional Charge I and its Specification, and not guilty to Additional Charge II and its Specification. He was found not guilty of Charge I and its Specification and guilty of Additional Charges I and II and the Specifications thereunder. He was sentenced to be confined at hard labor at such place as the reviewing authority may direct for a period of six months and to forfeit $50.00 per month for a like period. Sentence was adjudged on 6 January 1948. The reviewing authority approved the sentence, ordered it duly executed, and designated The Eighth Army Stockade, APO 343, as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 29, Headquarters Eighth Army, dated 28 February 1948.

3. Accused Sipes was found guilty of absence without leave for a period of seven days and of a breach of "medical" restriction. The record of trial is legally sufficient to support the findings of guilty of each offense and the only question requiring consideration is the legality of the sentence. Both offenses were but different aspects of the same act and thus the maximum limit of punishment is governed by the punishment prescribed for the most serious offense (par 80a, MCM, 1928). Since the accused Sipes was sentenced to confinement at hard labor for six months and forfeiture of $50 per month for a like period, it becomes necessary to determine whether the punishment thus adjudged is within the authorized limit of punishment prescribed for either offense of which he was convicted.

The maximum punishment authorized for absence without leave for seven days is limited to confinement at hard labor for 21 days and forfeiture of 14 days-pay (par 104c, MCM, 1928, p.97) and obviously it does not legally sustain the sentence adjudged. Therefore, it remains to be determined whether the offense of breach of "medical" restriction constitutes the more serious offense and legally supports the sentence.

The Table of Maximum Punishments, Manual for Courts-Martial, provides a maximum punishment of confinement at hard labor for one month and forfeiture of two-thirds of one month's pay for a "Breach of Restriction (other than quarantine) to command, quarters, station, or camp." (par 104c, MCM, 1928, p.100). However, since the offense of "breach of quarantine" is expressly excluded from the foregoing authorized limit of punishment, and in view of the nature of the offense here charged, i.e., breach of "medical" restriction, it must be decided whether the instant offense constitutes a "breach of quarantine," within the exception to the foregoing limit of punishment and whether, as such, it supports the sentence adjudged. For this purpose, only so much of the evidence as pertains to the Specification of Additional Charge II will be summarized.

4. Captain John F. Fulton, battalion surgeon for the 753rd AAA Gun Battalion, identified the accused Sipes and testified in pertinent part as follows: On or about the 28th of August the accused was sent to the hospital for observation for venereal disease. On 8 September witness placed accused on a 30 day restriction. During those 30 days, accused was sent to the medical clinic at the 155th Station Hospital for consultation. He failed to return to the dispensary after the consultation. The next morning the witness examined accused again and found that the symptoms of his venereal disease had been very much aggravated by his drinking alcoholic beverages the previous night. At that time witness told the accused that due to his behavior the previous night his disease had been aggravated and that he (witness) was extending his (accused's) medical restriction from 30 days to a maximum of 90 days. Accused's medical restriction extended to the 6th or 7th of December (R 56-57). Witness never released accused from this medical restriction (R 59). He further testified that under Army Regulations when a medical officer finds symptoms that a soldier has contracted venereal disease he is required to place the soldier in medical restriction for a minimum of 30 days. In the event of a recurrence or aggravation of the symptoms, the medical officer may extend that restriction to 60 or 90 days, depending on whether or not the case is severe enough to warrant it (R 57). "Medical restriction means that the man is restricted to the battalion insofar as off-duty hours. He may pull his regular duty outside of the battalion. It also included abstinence from alcohol, coffee, coca-cola, pepsi-colas. The idea in keeping him in the battalion is to keep him from contacting anybody else." (R 59). During the period of a medical restriction the soldier is examined periodically and at the end of the period, if no further symptoms of the disease are found, the man is notified and released from his restriction (R 58-59).

Sergeant Warren Johns, administrative clerk in the 753rd AAA Gun Battalion Dispensary, testified that among his duties in the medical department he maintains the records pertaining to individuals placed in medical restriction and assists Captain Fulton in regard to the records. Sometime during the month immediately preceding 6 November 1947, witness saw the accused in the battalion dispensary and heard Captain Fulton (battalion medical officer) tell accused that his medical restriction was extended for a period of 90 days retroactive from the date of his present restriction. That restriction was due to be terminated on the 7th of December. After the added restriction was placed on accused no part of it was ever lifted (R 61-64).

Second Lieutenant Robert V. Kane, testified that he was officer in charge of the rehabilitation camp, 753rd AAA Gun Battalion (R 43,49). All personnel in that camp were soldiers who had contracted venereal disease and who were under medical restriction. They were under this restriction as long as they were in the camp, i.e., from the time they

were placed in the camp until they were ordered by the medical officer to be released from the camp. A medical restriction consists of a restriction to the camp. If a man was in that camp he was automatically under medical restriction (R 48-50).

Accused Sipes went AWOL from his organization on 3 November 1947 (Pros Ex 8).

5. After being fully advised of his rights as a witness, accused elected to remain silent and no evidence pertinent to the Specification of Charge II was adduced by the defense.

6. As to the charge of a breach of medical restriction, as laid in the Specification of Additional Charge II against the accused Sipes, the evidence shows that on 8 September 1947, he was placed inmedical restriction at the 753rd AAA Gun Battalion Rehabilitation Camp (A special camp area instituted for quarantine of venereal disease patients) by the battalion medical officer because of a venereal disease infection. Sometime within the normal 30 day restricted period, accused was reexamined and it was found that his affliction was aggravated due to his imprudent consumption of alcohol. Consequently Captain Fulton, the battalion medical officer, extended the period of restriction to the maximum 90 days, as authorized by official army directives and imparted this order directly to the accused. Therefore, on 3 November 1947, the accused was in medical restriction and was well aware of his status. When accused went AWOL on the same day, he thereby committed the breach of the medical restriction as alleged.

It is the opinion of the Board of Review that under the circumstances of this case, the nature of the medical restriction as alleged and proven, is in fact one of quarantine rather than one of ordinary restriction to command, quarters, station, or camp. The evidence adduced shows conclusively that the primary purpose of the camp to which accused was restricted was to prevent the spread of venereal disease and reinfection of the patient in accordance with the following provisions of Army Regulations and directives:

Paragraph 3, Army Regulations 40-210, 25 April 1945, Establishment of quarantine.--

> "a. How and when established.--Quarantine measures will be instituted as directed by the commanding officer upon recommendation of the surgeon. In the control of most communicable diseases all quarantine measures may be dispensed with, reliance being placed upon careful physical inspections conducted at intervals to insure detection of cases in their incipiency. Absolute quarantine of large bodies of troops or of entire stations will be instituted only under the most unusual circumstances. The applicable quarantine measures will be found in the sections dealing with specific diseases."

Paragraph 23, Army Regulations 40-210, Change 6, Special preventive measures.--

"g. Medical care.--Every known case of venereal disease will be promptly treated. Individuals in the infectious stages of a venereal disease may be either hospitalized or treated on an out-patient or duty status. Commanding officers will assure that all cases treated without hospitalization are restricted to the post until noninfectious. * * *."

War Department Circular No. 227, 20 August 1947, Section IV - Venereal Disease Control. - 1. Command responsibility.

"b. Commanders will--* * *

(5) Restrict military personnel infected with venereal disease to the unit areas for a minimum of 30 days, and, on recommendation of the surgeon, up to 90 days after the completion of treatment in order to diminish the chance of relapse or early reinfection and to insure, in the case of gonorrhea, that a coexisting syphilitic infection has not been masked by the treatment for gonorrhea. Individuals infected with venereal disease will not be evacuated to the zone of interior until 30 days have elapsed following completion of treatment. Exceptions to this working quarantine may be made only for medical reasons and when extreme hardships will result." (Emphasis supplied)

Although not directly shown by the evidence, the Staff Judge Advocate, in his review of the instant case, indicates that the court was undoubtedly aware and took judicial notice of paragraph 3 of Circular 41, General Headquarters, Far East Command, dated 17 April 1947, providing for the restriction of venereal disease patients to their areas, or specially constituted rehabilitation centers, for 30 or 90 day periods, according to the recommendation of the surgeon. Thus, while it appears that the policy and method of control of this communicable disease was a matter of common knowledge among the personnel in the command, the evidence is otherwise sufficient to show that a special camp was provided into which venereal disease patients were restricted and segregated from uninfected troops and that the nature and purpose of the restriction was carefully explained to the restricted troops by the camp commander. There is no doubt that the accused was well aware of the nature of the medical restriction imposed upon him, and therefore, a breach of that restriction was tantamount to a breach of quarantine. Because of the vital importance of regulations governing the general welfare and health of troops by which the type of restriction, here alleged, was imposed, and the serious

consequences which were likely to follow upon breach of such restriction, it is obvious that such a breach constitutes a more serious offense than that described in paragraph 104c, Manual for Courts-Martial as a "breach of restriction to command, quarters, station, or camp." By virtue of the express exception of the offense of breach of quarantine from the punishment prescribed for the latter offense, it is quite obvious that the measure of punishment contemplated for an offense of breach of quarantine should be greater, although none is therein specifically provided. However, while no specific punishment is prescribed for the offense in question in the Table of Maximum Punishments (par 104c, MCM, 1928), the maximum limit of punishment therein prescribed for any included offense or for any closely related offense may be applied (MCM, supra). Under the circumstances here presented it is the opinion of the Board of Review that since the breach in question was in effect a violation of an order of accused's superior officer issued pursuant to standing Army Regulations and directives (See III Bull JAG, Feb '44, p.84), it is thereby closely related to and punishable as the offense of "Failing to obey the lawful order of a superior officer," in violation of Article of War 96, for which punishment involving confinement at hard labor not to exceed six months and forfeiture of two-thirds pay for a like period is prescribed.

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

On Leave, Judge Advocate

J. W. Lynch, Judge Advocate

Joseph T. Brick, Judge Advocate

JAGH CM 329587 1st Ind

Board of Review No. 1, JAGO, Department of the Army 23 JUN 1948

TO: The Judge Advocate General.

For his information.

Noted.
For T.J.A.G.
28 June 48

J. W. LYNCH
Major, JAGD
Member, Board of Review No. 1

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

JAGN-CM 329615

U N I T E D S T A T E S	)	FIRST U. S. INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Bad Tolz, Germany, 20 January
Private CARROLL C. JONES	)	1948. Dishonorable discharge
(34988904), 1st Signal	)	and confinement for three (3)
Company, Signal Corps.	)	years. Disciplinary Barracks.

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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Carroll C. Jones, then Technician Fifth Grade, 1st Signal Company, did, at or near Bad Tolz, Germany, on or about 7 September 1947, willfully, feloniously and unlawfully cause to be destroyed, before delivery to the persons to whom they were directed, about ten (10) letters, which said letters had been in an authorized depository for mail matter, to wit, an Army Post Office, and which letters were entrusted to the said Private Carroll C. Jones, then Technician Fifth Grade, as mail clerk 1st Signal Company.

Specification 2: In that Private Carroll C. Jones, then Technician Fifth Grade, 1st Signal Company, did, on or about 30 August 1947, at or near Bad Tolz, Germany, willfully, feloniously and unlawfully secrete, before they had been delivered to the persons to whom they

> were directed, about ten (10) letters which had been in an authorized depository for mail matter, to wit, an Army Post Office, and which were entrusted to the said Private Carroll C. Jones, then Technician Fifth Grade, as mail clerk, 1st Signal Company.

He pleaded not guilty to both Specifications and the Charge. He was found guilty of Specification 1 of the Charge "except the words 'an Army Post Office,' substituting therefor the words 'an U. S. Army Unit Mail Room,' of the excepted words Not Guilty, and of the substituted words, Guilty"; guilty of Specification 2 of the Charge "except the words 'an Army Post Office,' substituting therefor the words 'an U. S. Army Unit Mail Room,' of the excepted words Not Guilty, and of the substituted words, Guilty"; and guilty of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three 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 and the only question to be here discussed is the legal sufficiency of the record to support the sentence. Evidence will be summarized only to the extent necessary to clarify such legal discussion.

4. Accused is charged, in two separate Specifications, with secreting (Spec. 2) and later destroying (Spec. 1) certain described "letters" as otherwise alleged. The evidence indicates that the letters were secreted by the accused to avoid their detection by inspectors, and that the destruction of the same letters was directed by the accused as an added precautionary measure in the accomplishment of his original and continuing nefarious purpose. While it might conceivably be argued to the contrary we are of the opinion that these performances of accused, affecting the same property, actuated by the same intent, and accomplished for the same ultimate purpose, must be considered, in fixing the proper applicable punishment, as but separate aspects of a single continuing act (par. 80a, MCM, 1928; CM 313544, Carson 63 BR 137).

5. Paragraph 104c, MCM, 1928, reads in part as follows:

> "The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed and for any offense closely related to either, if not so listed."

The offense as variously described in the Specifications of which accused has been found guilty is not expressly listed in the table of

maximum punishments (par. 104c, MCM, 1928). Neither does it appear to be "included" in any offense which is there listed. However, it does appear to be "closely related" to the offense of embezzlement, which is listed in the table, and which is defined in the Manual for Courts-Martial as "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come" (par. 149h, MCM, 1928; see CM 234468, Rhea, 20 BR 404). Since the value of the letters in this case was not alleged we are of the opinion that while there was sufficient evidence before the court from which it could infer some value such finding must be limited in all respects to a finding of some value not more than twenty dollars. The maximum punishment authorized by law for the offense of embezzlement "of property of a value of $20.00 or less" is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months (par. 104c, MCM, 1928). We conclude that so much of the sentence of accused as is in excess of that amount is unauthorized and illegal (See CM 205475, Kelly, 8 BR 193).

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty but 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.

Edward J. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springston, Judge Advocate.

APR 2 1948

JAGN-CM 329615 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, First U. S. Infantry Division, APO 1, c/o Postmaster, New York, N. Y.

1. In the case of Private Carroll C. Jones (34988904), 1st Signal Company, Signal Corps, 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 be approved as involves dishonorable discharge, forfeit 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 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 329615).

IN
HQ. 1st U.S. EXP. DIV

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.

2 APR 1948

JAGQ - CM 329621

UNITED STATES v. Private WHITMAN G. SNYDER (RA 12251489), 552d Ordnance Tank Maintenance Company.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Wetzlar, Germany, 10 December 1947. Dishonorable discharge and confinement for one (1) year. United States Disciplinary 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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Whitman G. Snyder, 552nd Ordnance Tank Maintenance Company, did, at Lohfelden, Germany, on or about 0100 hours, 16 October 1947, with intent to do her bodily harm, commit an assault upon Frau Anna Siebert, German Civilian, by willfully and feloniously striking her in the face with his fist, twisting her right arm, tripping her with his foot, causing her to fall to the ground, and grabbing her mouth with his hand.

Specification 2: (Disapproved by the reviewing authority).

He pleaded not guilty to the Charge and Specifications. He was found guilty of Specification 1, except the words "tripping her with his foot, causing her to fall to the ground," guilty of Specification 2 and of the Charge. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority disapproved the finding of guilty of Specification 2 of the Charge, 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.

Frau Anna Siebert testified that she knows the accused who is in the military service (R 5). On 16 October at approximately 0100 hours

accused came to her house and said "open the door" and later "open the window". She refused and accused broke a window. She requested him and his companion to leave but accused refused and began to climb in the window, "grabbed" her arm and twisted it (R 5, 6). Witness had her small baby in her arms and accused told her to put the baby on the bed. When she refused accused struck her in the mouth with his fist. He struck at her again and hit the baby. She took her baby and ran for help. Accused pursued her and she was struck again and fell to the ground. She "got up" and accused "grabbed" her and the baby on their mouths because she was crying for help. Accused asked his companion to take the baby and he tried to push witness upon the grass (R 6). Accused had been to witness' house about eight days before this incident with another girl. He was never at her house alone. He was not invited to her house on the night the incident occurred (R 7).

Fraulein Annaliese Siebert, thirteen year old daughter of Frau Siebert, testified that she knows the accused. That on the night of October 16 he broke a window pane in her house and climbed in the window. Accused twisted her mother's arm, hit her in the face and struck the baby on the forehead. Her mother then took the baby, ran outside and cried for help.

4. Evidence for the Defense.

Accused after being warned of his rights testified that he knows Frau Anna Siebert and had been to her house once with another girl and once by himself. On the night he was there alone he stayed with Frau Siebert.

5. The only question for consideration by the Board of Review is whether the competent evidence supports the finding that accused committed the assault "with intent to do bodily harm". Except for the conclusion of Fraulein Siebert that the baby was "knocked unconscious" the record does not show that the action of accused in twisting Frau Siebert's arm and striking her in the mouth caused any injuries whatever. The victim was not knocked from her feet by the blow. The record is entirely silent on the force with which the blow was struck. It must be concluded that the evidence proved only a simple assault and battery in violation of Article of War 96, and was insufficient to prove that the assault was committed with the specific requisite intent to do bodily harm. It has been held that a blow with the fist causing a nose bleed will not justify a conviction of assault with intent to do bodily harm, CM 294238, Ritts et al, 19 BR (ETO) 97, nor will a blow which splits the victim's lip (CM 229366, Long, 17 BR 125, 11 Bull. JAG 99)(CM (ETO) 1690 Armijo, 5 BR (ETO) 223)). In the latest case on this subject, CM 323707, Moyer (August 1947) in which accused grabbed a woman and threw her to the ground, tried to pull down her pants, clasped his hand over the victim's mouth and pressed her in the eye, causing

her eye to become swollen, the Board held that the assault therein committed did not constitute assault with intent to do bodily harm.

In CM 294238, Ritts et al, supra, the Board of Review said:

"Except for the nosebleed suffered by Gillette the record does not show that the blows caused any injuries. None of the victims was knocked down. The record is entirely silent on the force with which the blows were struck. It must be concluded that the evidence proved only assault and battery on each of the persons named in the specifications and was insufficient to prove that any of the assaults was committed with the requisite specific intent to do bodily harm. A nosebleed of unknown severity, without more, is insufficient to prove that the blow or blows with the fist that caused it were struck with such force as to justify the inference that they were struck with intent to do bodily harm (CM 229366, II Bull. JAG 99; CM ETO 1177, Combess; CM ETO 1690, Armijo; CM 238970, Hendley, 25 B.R. 1)."

So in the instant case there is no showing of injury to the victim, no threats or statements indicating intent to do bodily harm and no evidence of the nature, extent and force applied in the assault. It follows that the decision in this case is governed by the principles enunciated in the Ritts case supra. The offense of assault and battery is, however, established by the evidence adduced (CM 229366, Long, supra; CM 238970, Hendley, 25 BR 1).

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 as involves a finding that accused did at the time and place and in the manner alleged in the specification commit an assault and battery on the person named therein in violation of Article of War 96 and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

W. H. Johnson Jr., Judge Advocate

Wilmot R. Smith, Judge Advocate

A. L. Rave, Judge Advocate

APR 5 1948

JAGQ CM 329621 1st Ind

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

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

1. In the case of Private Whitman G. Snyder (RA 12251489), 552d Ordnance Tank Maintenance Company, I concur in the foregoing holding by the Board of Review and recommend that only so much of the findings of guilty of the Charge and Specification 1 thereunder be approved as involves findings that accused did at the time and place and in the manner found commit an assault upon the person named, in violation of Article of War 96, and that only so much of the sentence be approved as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. Upon taking such action you will have authority to order execution of the sentence as thus modified.

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

(CM 329621).

1 Incl
Record of trial

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

RECEIVED U.A.G.O. #1150

File
MAR 19-46
MAR

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

5 APR 1948

JAGQ - CM 329635

UNITED STATES v. Privates First Class POLICARPIO MEJIA (10323766), DEMETRIO PORQUES (10317121), ALEJANDRO MOJICA (10313691) and Privates NARCISO SORIANO (10313637) and BENITO C. PANGANIBAN (10324013), all of Company H, 57th Infantry Regiment (PS).	)	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at Camp Angeles, PHILRYCOM, APO 74. All: Dishonorable discharge and confinement for two (2) years. PHILRYCOM Stockade, General Prisoner Branch.

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 Charge and Specifications:

CHARGE: Violation of the 83rd Article of War.

Specification: In that Private Benito C. Panganiban, Private Narciso Soriano, Private First Class Alejandro Mojica, Private First Class Demétrio Porques, and Private First Class Policarpio Mejia, all of Company "H", 57th Infantry Regiment (Philippine Scouts), acting jointly and in pursuance of a common intent, did, at Philippines-Ryukyus Command Quartermaster Depot (APO 900), on or about 8 September 1947, willfully suffer eighteen (18) bales of clothing of the value of over fifty dollars ($50.00), military property belonging to the United States, to be wrongfully disposed of by allowing unauthorized civilians to carry away said property.

Each accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two (2) years. The reviewing

authority approved the sentence as to each accused, designated the O'Donnell Division, Philrycom Stockade, General Prisoner Branch, APO 613, 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 50½.

3. The evidence shows that during the night of 8-9 September 1947 eighteen (18) bales of khaki cotton trousers, property of the United States furnished and intended for the military service, value in excess of fifty ($50.00) dollars, were removed from Warehouse No. 4, Quartermaster Depot A.P.O. 900 (R 6-11, 20; Pros. Exs. 1, 2). The eighteen bales of clothing were discovered missing at approximately 0745 on the morning of 9 September 1947 (R 10). A lock on the warehouse door had been broken and about twenty-five or thirty yards from this door a hole had been cut in both the inner and the outer barbed wire fences surrounding the warehouse area (R 9, 12, 13; Pros. Ex. 3). Sentry posts 13, 14, 15, 16, and 17, each being approximately one hundred and fifty (150) yards in length, extended along Warehouses 1 to 9 inclusive, inside of the barbed wire inclosure (R 14; Pros. Ex. 3). There were electric lights on the warehouses and lights located around the fence line illuminating the fence area (R 13).

None of the five accused was connected with the taking except through his voluntary statement made to security personnel of the Philrycom Quartermaster Depot, A.P.O. 900 (R 16-20; Pros. Exs. 4, 5, 6, 7, 8). Accused Panganiban (formerly Technical Sergeant) as Sergeant of the Guard between the hours 2000 to 2400, 8 September 1947, and accused Soriano, Mojica and Mejia, as guards on posts 15, 17 and 14 respectively during the same period, admitted their prior knowledge and complicity in the transaction whereby civilians were allowed to enter the premises and unlawfully carry away the property in return for money paid to accused Panganiban on behalf of the military personnel involved. Accused Porques in his statement admitted being a guard on post number 13 during the same period and receiving the sum of thirty (₱ 30.00) pesos from the Sergeant of the Guard on the following day but he denied knowing in advance that the theft was to take place or, any knowledge thereof while the property was being removed. Pertinent parts of his statement are as follows:

"Q - Please state on your own words exactly what happened on your post during your tour of duty?
A - While I was walking on my post I reached Post #41, the end of my post. The sentry of that post told me about civilians having entered the depot. But I didn't see them. The following morning the sentry at Post #41 told the Sgt. of the guard that the sentry at post #13 knew about the civilians having entered the depot, So that said Sgt.

would share the sentry at post #13, with the money he got from the civilians. Consequently the Sgt of the guard gave me thirty pesos (₱30.00) at the Co. "H" latrine. I tried to return the money to the Sgt. but he ran away. So I kept the money.

Q - Was it not a fact that the getting inside of the depot and subsequently the giving of the money by the civilians to the Sgt. of the guard and the other sentries involved the success of bringing outside the depot nineteen (19) bales of clothes?
A - What I heard only was that some civilians got inside the depot.

Q - Was it not a fact the Sgt. of the guard told you that (₱30.00) he gave you was your share in the money the civilians gave to the Sgt. of the guard for entering the depot and getting US Army properties?
A - No, he did not say anything.

Q - What did he tell you then?
A - He said what did the sentry ef Post #41 tell you.

Q - What did you say?
A - I said nothing. And immediately he got (P30.00) from his pocket and handed it over to me. I refused to get it but he put it in my pocket.

* * *

Q - If that is not true, why did you not see the Sgt. of the guard about the money again or report it to the higher officials if you did not approve the giving the money to you?
A - Because the Sgt. of the guard told me to keep the money and not to reveal the secret.

Q - And you kept the money because of that statement?
A - Yes.

Q - And you said about Secret. What is that secret about?
A - The Sgt. said that the secret is about the revealation which the sentry of Post #41 told me.

Q - Was the revealation about the civilians having succeeded in having US Army property from the depot?
A - Yes." (Pros Ex 8, pp 1 and 2).

After having been fully advised of their rights by the law member each of the five (5) accused elected to remain silent (R 21).

4. The record of trial is legally sufficient to support the findings and the sentence as to each of accused Panganiban, Soriano, Mojica and Mejia. The only question presented by the record concerns the legality of the findings of guilty and the sentence of accused Porques.

In the case of all five of the accused, the findings of guilty are dependent upon their respective statements to security officials of the Quartermaster Depot. In the case of accused Porques, however, examination and analysis of his statement fails to show any connection with the actual perpetration of the offense or with any preconceived criminal plan or design relating thereto. The only admission contained in the statement of this accused connecting him with commission of the offense in point of time is that he was on guard on Post 13 between 2000 and 2400 hours on the night in question. With reference to his subsequent admission therein that the sentry on Post Number 41 told him during his tour of guard duty "... about civilians having entered the depot", there is a patent ambiguity as to whether the civilians had been in the depot or were actually in the depot at that time. Only in the latter event could the accused conceivably be chargeable with willfully suffering Government property to be wrongfully disposed of in the manner alleged. Acceptance of the construction last mentioned would be tantamount to resolving a serious doubt against this accused and would accordingly violate well established concepts and principles of our criminal jurisprudence. Thus it is evident that accused Porques, who had no advance notice of the theft, or contemporaneous knowledge thereof and no trespass to property having been committed on or reasonably near his post, was not guilty as a principal within the contemplation of Title 18, Section 550, United States Code, page 1602, which provides:

"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. (Mar. 4, 1909, ch. 321, Sec. 332, 35 Stat. 1152.)"

The accused's admission in his statement that he received thirty pesos (₱ 30.00) from the Sergeant of the Guard on the following morning because he knew of the "secret" or of the incident, is sufficient however to make him criminally responsible as an accessory after the fact, viz.:

"Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years. (Mar. 4, 1909, ch. 321, Sec. 333, 35 Stat. 1152.)" (Title 18, Sec. 551, United States Code, p. 1602).

But the accused has been charged as a principal and not as an accessory after the fact. In this connection, the following legal principle is well established:

"An accessory after the fact cannot be convicted on an indictment charging him as principal." (1 Wharton's Criminal Law, 12th Edition, sec. 285, p. 373 and cases cited thereunder).

The accused having been charged as a principal and the only evidence on which his conviction rests being his confession which establishes his guilt only as an accessory after the fact, it follows that his conviction in the present case cannot be sustained. If he is legally to be convicted as an accessory after the fact in accordance with the clear import of the competent evidence, it is necessary that he be so charged.

5. For reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences as to accused Panganiban, Soriano, Mojica and Mejia and legally insufficient to support the findings of guilty and the sentence as to accused Porques.

W. H. Johnson Jr, Judge Advocate

Wilmot T. Blaugher, Judge Advocate

A. B. Rane, Judge Advocate

(132)

APR 8 19

JAGQ - CM 329635 1st Ind

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

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

1. In the case of Privates First Class Policarpio Mejia (10323766), Demetrio Porques (10317121), Alejandro Mojica (10313691) and Privates Narciso Soriano (10313637) and Benito C. Panganiban (10324013), all of Company H, 57th Infantry Regiment (PS), I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as to accused Mejia, Mojica, Soriano and Panganiban and legally insufficient to support the findings of guilty and the sentence as to accused Porques and recommend that the findings of guilty and the sentence as to accused Porques be disapproved. Upon taking such action you will have authority to order execution of the sentences as to accused Mejia, Mojica, Soriano and Panganiban.

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 329635).

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 329666

3 MAY 1948

UNITED STATES v. First Lieutenant JAMES E. GLOVER (O-55699), Air Forces	TECHNICAL DIVISION, AIR TRAINING COMMAND Trial by G.C.M., convened at Keesler Air Force Base, Biloxi, Mississippi, 9 March 1948. Dismissal.

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

CHARGE: Violation of the 95th Article of War.

Specification: In that 1st. Lt. James E. Glover, Squadron TS-1, 3704th Air Force Base Unit, did, at Biloxi, Mississippi, on or about 22 November 1947, wrongfully endorse and utter to the First Bank of Biloxi, Biloxi, Mississippi a certain check in words and figures as follows:

Biloxi, Miss., November 18 1947 No. 55

FIRST BANK OF BILOXI
85-74

Pay to the order of William H. Ault $ 20.00

Twenty and no/100 Dollars

K-F
Loan /s/ Richard J Wheeler

REVERSE /s/ William H. Ault
/s/ James E. Glover
TS-1

and by means thereof did wrongfully obtain from the said First Bank of Biloxi, Biloxi, Mississippi the sum of $20.00, knowing at the time that said check was not his property and that he was not entitled to the proceeds thereof.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of war 48.

3. Evidence for the Prosecution

On 18 November 1947 Technical Sergeant Richard J. Wheeler, Squadron A-1, 3704th Air Force Base Unit, Keesler Air Force Base, Biloxi, Mississippi, made a loan to Staff Sergeant William H. Ault of the same unit in the amount of $20 by executing and delivering to Sergeant Ault his personal check for said amount drawn on the First National Bank of Biloxi, Mississippi. Sergeant Ault did not cash the check forthwith but took it to his quarters. On 20 November 1947 at about 1300 hours Mrs. Oda Pauline Ault, wife of Sergeant Ault, took the check to her husband's office at the Mail and Records Section, Post Headquarters, had him indorse the check in blank, took it with her and visited the Post Exchange and other places on the Post. About one-half hour after she procured the indorsement on the check she lost it. The maker of the check, Sergeant Wheeler, was notified that the check had been lost and he immediately issued a stop payment notice to the drawee bank. This was about two days after he had issued the check. On about 2 December 1947 Sergeant Wheeler received his November statement from the bank. Included therein was a cancelled check, No. 55, which he identified in court as being the check he had given to Sergeant Ault on 18 November and which had been reported as lost. Sergeant Ault and his wife also identified this check as being the one drawn by Wheeler, payable to Ault in the sum of $20.00, and which Mrs. Ault had lost on 20 November. The check was received in evidence without objection as Prosecution Exhibit 1. On the back thereof there are two indorsements in the order as follows: "William H. Ault, James E. Glover, TS-1." Perforations thereon show - "Paid 11-22-47 8574" (R 6-11,14). When he received the check from the bank and observed the indorsement thereon, Sergeant Wheeler contacted the accused who offered to refund to Wheeler the amount represented by the check. The assistant adjutant advised Wheeler not to accept the money at that time but a few days later he did accept $20.00 from the accused (R 12-13).

It was stipulated that if Miss Edna Scheurich were present she would testify that she was a teller in the First National Bank of Biloxi, Mississippi, and that on 22 November 1947 she cashed the check (Pros Ex 1) for a person representing himself to be James E. Glover and that she paid to such person $20.00 (R 15). It was further stipulated that Prosecution Exhibits 2 and 3 were voluntary statements made by the accused to Captain James E. Marquis, the investigating officer, and Captain Herman J. Shaprin, the Base legal officer, respectively. The statements were received in evidence without objection (R 16,17). The substance of the statements will appear in the accused's testimony hereinafter summarized.

4. For the defense

After being duly advised of his rights the accused elected to testify under oath. He stated that on or about 19 November 1947 he found the check (Pros Ex 1) in front of "BOQ #7 on A Street right off the curb." He immediately placed a notice on the bulletin board reciting that the owner of the lost check could locate the accused at Squadron TS-1. Two days later he took the notice from the bulletin board and cashed the check at the bank. He needed the money to pay his rent and did not consider his actions to be dishonorable. He believed that he could rightfully cash the check and reimburse the "loser" the amount thereof when the check was returned to the drawer. On cross-examination he stated that he had not consulted the post locater files or made other inquiry concerning the ownership of the check. The accused identified and there were received in evidence as Defense Exhibits "A" and "B" two cancelled checks previously drawn by him showing his signature thereon as "James E. Glover" (R 18-23). The defense presented several witnesses who testified that the accused had a good reputation as an officer and gentleman (R 26-28).

5. Rebuttal

Captain Robert L. Wiley, Squadron TS-1, 3704th Air Force Base Unit, Keesler Air Force Base, testified that he was with Mrs. Oda Pauline Ault and her mother-in-law on the afternoon of 18 November 1947 when she reported the loss of the check in question. He had watched the bulletin board every day for four or five days thereafter but had never seen any notice thereon referring to the check (R 30).

The defense thereupon called First Lieutenant John L. Krohn, Keesler Air Force Base, who asserted that "between 18-21 November 1947" he had seen such a notice as was described by the accused on the bulletin board at the officers club (R 32).

6. Comment

The specification alleges in substance that the accused did on or about 22 November 1947 wrongfully indorse and utter to the First National Bank the described check and did thereby wrongfully obtain $20.00 knowing that the check was not his property and that he was not entitled to the proceeds thereof. The ownership, loss, the finding and cashing of the check are admitted. The only conflict in the evidence relates to whether the accused posted the notice on the bulletin board, but the guilt or innocence of the accused does not turn on the question of whether he was diligent in attempting to ascertain the true owner, who, incidentally, appears to have been stationed at the same base. The gist of the offense charged consists in the wrongful indorsement and uttering of the check thereby obtaining the sum of $20 without having any legal right thereto. The accused was not the true owner of nor entitled to any benefits accruing from the check. It is contended by the defense that under established principles of the law of negotiable instruments the accused was legally authorized

to indorse and utter the check. It is universally held however that a finder of a negotiable instrument acquires no title against the true owner (10 CJS, Sec. 507). The accused's intent to repay the loser and the actual repayment, although possibly a mitigating circumstance, is no defense. Such conduct was unbecoming an officer and a gentleman in violation of Article of War 95.

7. Department of the Army records show that the accused is 26 years old and married. He is a high school graduate and was inducted as a private on 23 April 1942. The accused was commissioned a second lieutenant, Air Corps, AUS, on 8 February 1944 and a first lieutenant, Air Corps, Regular Army, on 5 November 1947. He has had considerable experience as mechanic and pilot and his efficiency ratings are "Excellent."

8. 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 mandatory upon conviction of a violation of Article of War 95.

Robert D. Silvers, Judge Advocate

(Sick in Hospital), Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 329666 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAY 11 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 James E. Glover (O-55699), Air Forces.

2. Upon trial by general court-martial this officer was found guilty of wrongfully indorsing and uttering a check to the First National Bank, Biloxi, Mississippi, in the amount of $20, and receiving payment thereon well knowing that the check was not his property and that he was not entitled to the proceeds thereof, in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action 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 18 November 1947 Technical Sergeant Richard J. Wheeler executed and delivered to Staff Sergeant William H. Ault his personal check drawn on the First National Bank of Biloxi, Mississippi, in the sum of $20.00. Two days later, on 20 November 1947, Sergeant Ault indorsed the check in blank and gave it to his wife who lost it. On the same day the check was lost the accused found it on a street at the Keesler Air Force Base, Biloxi, Mississippi. Two days later, 22 November 1947, he took it to the drawee bank, indorsed his name after that of Sergeant Ault and cashed it. On about 2 December 1947 Sergeant Wheeler received his statement from the bank, including the cancelled check in question. He reported the incident to the assistant adjutant. The accused was contacted and offered to make restitution. Several days thereafter Sergeant Wheeler accepted $20.00 from the accused in satisfaction of his loss.

The accused admitted finding, indorsing and cashing the check but asserted that when he found the check he placed a notice to that effect on the bulletin board. He took the notice from the board two days later when he cashed the check.

4. Department of the Army records show that the accused is 26 years old and married. He is a high school graduate and was inducted as a private on 23 April 1942. He was commissioned a second lieutenant, Air Corps, AUS, on 8 February 1944, and first lieutenant, Air Corps, Regular

Army , on 5 November 1947. He has had considerable experience as mechanic and pilot. All of his efficiency ratings are "Excellent."

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 109, 28 May 1948).

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

8 JUN 1948

JAGH CM 329699

UNITED STATES	)	HEADQUARTERS BERLIN COMMAND OFFICE OF MILITARY GOVERNMENT FOR GERMANY (US)
v.	)	
Private VAITO A. PIRTTINEN, RA 31184302, Company "A", 7782d Special Troops Battalion.	)	Trial by G.C.M., convened at Berlin, Germany, 9-10, March 1948. Dishonorable discharge (suspended) and confinement for one (1) year. Branch United States Disciplinary Barracks, Fort Knox, Kentucky.

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

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

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

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

Specification: (Finding of Not Guilty).

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

Specification: In that Private Vaito A. Pirttinen, Company A, 7782 Special Troops Battalion, US Army, while serving with the 68th Army Postal Unit, Headquarters and Headquarters Company, 7782 Special Troops Battalion, US Army, did, at Berlin, Germany, between 20 June 1947 and 19 July 1947, in violation of Paragraph 176, Title 18, US Code, wrongfully, unlawfully and feloniously embezzle Funds and Postage Stamps of a value of $426.50 more or less, property of the United States, entrusted to the said Pirttinen in his official capacity as Bonded Postal Clerk of the Army Post Office 742, by the United States Government through 1st Lieutenant Ralph Paxman, Postal Officer, Army Post Office 742, Berlin, Germany, by failing to render his accounts of the said Funds and Postage Stamps.

The accused pleaded not guilty to both Charges and the Specifications under each, and was found not guilty of Charge I and its Specification, and guilty of Charge II and its Specification. Evidence of two convictions was considered. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two (2) years. The reviewing authority approved the sentence but reduced the period of confinement to one year and, as thus modified, ordered the sentence executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated The Branch United States Disciplinary Barracks, Fort Knox, Kentucky, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 13, Headquarters, Berlin Command, Office of Military Government for Germany (US), Berlin, Germany, APO 742, dated 19 March 1948.

3. The evidence, insofar as is necessary for purposes of this opinion, is summarized as follows:

The accused was, during the period 20 June 1947 to 19 July 1947, and for several months prior thereto, a bonded Postal Clerk at Army Post Office 742 in Berlin, Germany. His principal duty was Registry Clerk, but he also sold stamps (R 19, Pros Ex 5). The Postal Officer was First Lieutenant Ralph Paxman (R 18,24). During April 1947 Lieutenant Paxman turned over to accused cash and stamps in the total amount of $500, and he held accused's receipt therefor, dated 17 April 1947. The stamps furnished accused were for sale and the money was used for making change (R 19,20,24; Pros Ex 1). Accused had received a copy of a booklet entitled "The Army Mail Service." Paragraph 8, page 23, of the booklet directed Army mail clerks to protect the stamp stock and cash in their possession and stated that they would be held personally responsible for loss resulting from failure to give the property the best possible protection (R 48; Pros Ex 4).

On the 20th of each month the accounts of Lieutenant Paxman at Army Post Office 742 were audited by two officers appointed by "headquarters." The audit for 20 June 1947 showed the correct balances on hand, with an overage of $2.30. Of this amount $1.36 was cash held by accused. As required by Postal Circular Number 1, these overages were turned in to the Postal Finance Officer (R 23,25; Pros Exs 2 and 3). The July audit was made on 19 July 1947 (the 20th being Sunday). Accused went absent without leave on 17 July 1947 and he was not present at the time of the audit. Accused's cash and stamps were counted at this time. (R 38). His safe was opened with the Postal Officer's key and his cash drawer with the key of another clerk. Money and stamps amounting to $78.58 were found, thus showing a shortage of over $420 (R 28,33,39,40,45,71,81).

The Postal Officer, Lieutenant Paxman, testified that he had instructed all clerks to give an accounting of stamps and funds in their possession on the 20th of each month. It also appeared from his testimony and the testimony of Private Hilliard, another postal clerk, that all that was actually required was that each clerk have in his possession at the time of audit the required amount in stamps, or cash or both. The clerk was held responsible for any shortage (R 60, 61,62,72,94,95,96,99).

4. The accused was tried upon two separate charges. Charge I and its Specification alleged embezzlement in violation of Article of War 93. Accused was found not guilty of this offense. The Specification of Charge II alleges in part that accused:

> "did * * * in violation of Paragraph 176, Title 18, US Code * * * embezzle Funds and Postage Stamps of a value of $426.50 more or less, * * * entrusted to the said (accused) in his official capacity as Bonded Postal Clerk * * * by failing to render his accounts of the said Funds and Postage Stamps."

United States Code Title 18, Section 176 reads, as follows:

> "Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years."

The offense punished by this section is not, in fact, embezzlement. It is failure to render an account as required by law. In CM 312533, Moore, 62 BR 215,220, the Board of Review in considering the above section of the United States Code said:

> "The offense denounced by the above statute is not the imputed embezzlement of the money but the failure of the officer or agent of the United States to render his accounts for the same as provided by law. The offense may be complete without any actual embezzlement of the money. It is committed when there is a failure to comply with the requirements of law in rendering his accounts of money received by him. Such an offense, not being included in the definition of embezzlement contained in the Manual for Courts-Martial, 1928, paragraph 149h, is properly laid under the 96th Article of War within the classification of 'crimes or offenses not capital' (CM ETO 1631, Pepper, 5 BR (ETO) 125;141; MCM, 1928, par 152c; CM NATO 154, Armstrong, 1 BR (NATO-MTO) 97)."

Thus, with respect to the succeeding section (18 USC 177) wherein a failure to deposit money is similarly "deemed" embezzlement and similarly punished, it has been held that the offense consists not in the imputed embezzlement, but in the failure to comply with the direction to deposit (Dimmick v. U.S., 121 Fed. 638, affirming U.S. V. Dimmick, 112 F.352, cert. den. 191 U.S. 574).

The evidence in this case, particularly the testimony of Lieutenant Paxman and of Private Hilliard, as well as the pre-trial statements of accused, shows that none of the postal clerks did in fact "render accounts," or that they were ever required to do so. The only requirement was that on the occasion of the monthly audit of Lieutenant Paxman's accounts the auditors, or at other times, the Postal Officer would count the cash and stamps in the possession of each clerk. The Postal Officer was the accountable officer, and it was his accounts which were audited. In this respect it is noted that the "Certificate of Accountability" signed by the auditing officers (Pros Ex 2), which is one of the documents required by Postal Circular No. 1, paragraph 3b and which was read to the court (R 35), stated that the auditing officers "have personally counted the cash and stamped paper and verified the balance actually in the custody of 1st Lt. Ralph Paxman, F.A., AUS, 0-1185415, pertaining to his accountability as agent disbursing officer * * *" (Underscoring supplied). The cash and stamped paper referred to included that in possession of accused. The certificate clearly indicates that Lieutenant Paxman as Postal Officer was the one who, for purposes of accounting, had custody of all the stamps and money and that it was his accounts that were audited. It does not purport to audit any accounts of the clerks. In fact they kept no accounts, but merely had a certain amount in cash and stamps in their possession.

There is considerable confusion in the record of trial, particularly in the testimony of Lieutenant Paxman, in the use of the word "account." It is true that accused was responsible for his cash and stamps, and that he would be held responsible in case of a shortage which he could not satisfactorily explain. In this sense, accused did have to "account for" the money. But a requirement that an accounting be made of shortage is not the legal equivalent of the statutory requirement "to render * * accounts * * * as provided by law." Lieutenant Paxman also interchangeably used the words "account" and "inventory" when he referred to the monthly audit which included counting the stamps and cash of the clerks. Such an audit, however, was not the rendering of an account by the clerks.

It is clear that although accused was responsible for the money and stamps entrusted to him and, to avoid being required to make reimbursement, had to satisfactorily "account for" any loss, it is not shown that he was such an officer or agent of the United States as is required to render accounts within the purview of Title 18, Section 176, of the United States Code.. In this connection, it is to be noted that United States Code Title 31, Section 496 requires "every officer or agent of the United

States who receives public money which he is not authorized to retain as salary, pay or emolument" to render his accounts monthly, and contains a further provision for sending such accounts, with vouchers, for prompt settlement thereof, to the bureau to which they pertain and from there to the General Accounting Office. It is apparently this statute which Title 18, Section 176 is designed to enforce by penalizing a failure to render accounts. It would seem clear that not every clerk in every office who is entrusted with public money for daily business transactions, such as selling stamps, is expected to render separate accounts to the General Accounting Office, even though he may be responsible for the cash in his possession; and we have been unable to find any provision of law or regulations which requires a clerk in an Army Post Office to render such accounts.

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

D. Hottenstein, Judge Advocate

F. W. Lynch, Judge Advocate

On Leave, Judge Advocate

(344)

JAGH CM 329699 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Private Vaito A. Pirttinen, RA 31184302, Company "A", 7782d Special Troops Battalion.

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.

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 127, 23 June 1948).

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

15 APR 1948

JAGQ - CM 329711

UNITED STATES v. Private First Class RAMON TUMANG (PS 10326543), 98th Transportation Port Company, 501st Port Battalion, APO 246.	MARIANAS BONINS COMMAND Trial by G.C.M., convened at Marianas-Bonins Command, Guam, Marianas Islands, APO 246, 11 December 1947. Dishonorable discharge and confinement for nine (9) months. General Prisoner Branch, Philippine-Ryukyus Command Stockade.

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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Ramon Tumang, 98th Transportation Port Company (PS) APO 246, did, at Guam, Marianas Islands, on or about 2200, 8 October 1947, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per anum with Technician Fifth Grade Charlie M Rodgers, the same being a human being.

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 for nine months. The reviewing authority approved only so much of the findings as involves a finding of guilty of an attempt to commit sodomy in violation of Article of War 96, approved the sentence, designated the General Prisoner Branch, Philippine-Ryukyus Command Stockade as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

Accused and Technician Fifth Grade Charlie M. Rodgers were apprehended in a truck parked in a restricted area on the island of Guam. At the time of apprehension accused's pants were partway down and he told the arresting officers that Rodgers had "fucked him in the ass" (R 12) and that "the negro made him do it" (R 14). Rodgers testified that while the vehicle was parked accused asked him if he (Rodgers) would suck his penis and Rodgers said "Hell, no" (R 9). The prosecution then asked Rodgers if the words "Hell, no" constituted all of his answer to accused and he replied "Nothing else pertaining to me" (R 9). Rodgers refused to answer any further questions on the grounds of self-incrimination whereupon he was shown a "piece of paper" which he admitted he had seen before and that the signature thereon was his own (R 9). The defense declined to cross-examine Rodgers and he withdrew from the courtroom. The prosecution then called as its next witness Mr. Erickson, agent in charge, 38th MP Criminal Investigation Department, who testified that he obtained on the 9th of October 1947, a written statement from Rodgers after properly warning him of his rights under the 24th Article of War (R 10). He then identified the sworn statement which he took from Rodgers and the same was received in evidence (Prosecution Exhibit A) as "the sworn statement of the accused" (R 10). In this document Rodgers stated that when accused asked him to suck his penis he (Rodgers) replied, "Hell no, but I'll screw you in the ass" (Pros. Ex. A). The statement further revealed that Rodgers attempted to have carnal connection per anum with accused, with the latter's acquiescence and consent. He did testify later in the trial (R 20) that on the night of the alleged offense he did not penetrate accused's rectum with his penis. Accused's pretrial statement was admitted in evidence (Pros. Ex. B) in which accused stated that Rodgers attempted to have carnal connection with him by anum, that such was occasioned only by the use of force by Rodgers and that Rodgers did not succeed in the act.

4. Evidence for the defense.

Accused having been warned of his rights as a witness elected to testify under oath to the effect that he met Rodgers on the night of October 8th and went for a ride with him. Rodgers, by the use of force, attempted to have carnal connection per anum with him but was unsuccessful because of accused's resistance. He categorically denied that he consented to any act of Rodgers in the latter's attempt to commit the offense of sodomy.

5. The first question presented for the Board's determination is the effect of the reception in evidence of the extra-judicial pretrial statement of the witness Rodgers. The record does not show that the

"piece of paper" which was shown to Rodgers and which he admitted he had signed was the same document as that identified by witness Erickson and which was received in evidence as Prosecution Exhibit A. Even, if such fact be assumed, however, the statement was clearly hearsay and inadmissible as probative evidence in the case against the accused. Rodgers was present at the trial and refused to testify regarding the actions of accused or statements made to him by the accused prior to the arrival of the apprehending officers. This he had a perfect right to do and the prosecution could not under these circumstances place in evidence before the court his pretrial statement as to what occurred between himself and the accused on the night in question when testimony regarding such events could not be adduced from the witness on the stand. To permit such evidence to be introduced in this manner obviously constitutes an unwarranted denial of accused's right of confrontation and denies to the defense its right of cross-examination. In CM 325056, Balucanag (5 Jan. 1948), the Board of Review in deciding this precise question and after citing certain state court decisions to the contrary stated:

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

It follows therefore that the reception in evidence of the pretrial statement of the witness Rodgers as probative evidence tending to prove accused's guilt was error. While the Board of Review is of the opinion that this statement was offered by the prosecution and accepted by the court as probative evidence against accused, it might be contended that the statement in question was actually admitted only for the purpose of impeaching the testimony of the witness Rodgers to the effect that when the accused asked him if he would suck his penis Rodgers replied "Hell, no" (R 9). Rodgers' answer to this identical question as set forth in the pretrial statement was "Hell, no but I'll screw you in the ass". Even if the statement of Rodgers was admitted for this purpose alone the

Board of Review is of the opinion that the reception in evidence of the statement in its entirety was error. Only that portion thereof which was inconsistent with the testimony of the witness as given from the witness stand should have been admitted and in this case such would merely have been that part of the statement reading, "Hell no, but I'll screw you in the ass". Under this procedure the testimony of Rodgers given from the witness stand would have been adequately impeached by his previous inconsistent statement and no other portion of the pre-trial statement which was so prejudicial to the accused would have been introduced in the record. Wharton's Criminal Evidence, Volume 3, Section 1364, page 2248 states:

> "But only that part of the transcript of former testimony should be admitted for this purpose as is contradictory to the present testimony".

To the same effect Volume 70, Corpus Juris, page 1082, states:

> "The cross-examination as to prior inconsistent written statements or statements reduced to writing should be confined to that part of the writing inconsistent with the testimony sought to be impeached."

Regarding the proper method of using a prior inconsistent written statement to impeach a witness, Volume 70, Corpus Juris, page 1130, provides:

> "If the writing, as a whole, is contradictory, the whole should be read to the jury; but where the writing by which it is sought to impeach the witness contains matter which is irrelevant and incompetent, only such parts of the writing as are contradictory to, or inconsistent with, the testimony of the witness should be read to the jury by the impeaching party. In such case, where the incompetent or irrelevant matter cannot safely be read to the jury, the writing should be marked for identification and the competent part thereof read into the minutes, so as to form part of the record. ***"

To the same effect see Chicago, Milwaukee and St. Paul Railway Co. v. Harrelson, 14 Fed. 2d. 893; New York Central Railway Co. v. Dunbar, 296 Fed. 57 (Cert. denied, 44 Sup. Ct. 456), Charlton v. Kelly, 156 Fed. 433.

The above procedure was not followed in the instant case and the entire pretrial statement of Rodgers was received in evidence. This statement recounts in detail the actions of the accused on the night in

question in consenting to and acquiescing in the acts of Rodgers which constituted the offense charged and concerning which Rodgers refused to testify at the trial. Consequently, error was committed in receiving the entire statement of Rodgers in evidence even though it was introduced only for the purpose of impeaching the witness.

The next question for determination is whether the error in receiving this statement in evidence requires that the conviction of accused be set aside. The 37th Article of War provides that the proceedings of a court-martial shall not be held invalid nor the findings or sentence be disapproved on the ground of improper admission of evidence unless it shall appear that the error "has injuriously affected the substantial rights of an accused". In determining whether an error in the admission of irrelevant or incompetent evidence offered by the prosecution has injuriously affected the substantial rights of accused within the meaning of this Article of War, it is necessary to consider whether the legal evidence of guilt appearing in the record is relatively conclusive or inconclusive and the extent to which the evidence for the prosecution is contradicted or explained consistent with innocence by the evidence on behalf of the accused. It is obvious that evidence improperly admitted might affect the ultimate result in one case and not in another. Therefore, it follows that a conviction in the latter instance would be upheld (CM 237711, Fleischer, 24 BR 89, 99, 100) while in the former instance the admission of improper evidence on behalf of the prosecution would constitute substantial and prejudicial error and require setting aside the conviction (CM 211829, Parnell, 10 BR 133, 137).

In applying the above principle to the instant case it is at once obvious that the evidence of record tending to prove accused's guilt (other than the extra-judicial statement of the witness Rodgers) is purely circumstantial, inconclusive and both contradicted and explained by the evidence on behalf of the accused. The record is devoid of any direct evidence that accused consented to any act of Rodgers in the latter's attempt to commit the offense of sodomy and in fact accused testified that Rodgers forcibly assaulted him in attempting to perpetrate the offense. Consequently, it does affirmatively appear that the erroneous reception in evidence of Rodgers statement did affect the ultimate result in this case and was therefore highly prejudicial to the substantial rights of the accused within the meaning of the 37th Article of War.

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.

W H Johnson Jr, Judge Advocate

Wilmot V. Vaughn, Judge Advocate

A. J. Kane, Judge Advocate

JAGQ - CM 329711 1st Ind APR 23 1948

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

TO: Commanding General, Marianas Bonins Command, APO 246,
c/o Postmaster, San Francisco, California

1. In the case of Private First Class Ramon Tumang (PS 10326543), 98th Transportation Port Company, 501st Port Battalion, APO 246, I concur in the foregoing holding by the Board of Review 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 329711).

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

1 Incl
Record of Trial

REC'D. HQ. [illegible] 22 [illegible]

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

24 JUN 1948

JAGH CM 329712

UNITED STATES	)	HEADQUARTERS COMMAND, EUROPEAN COMMAND
	)	
v.	)	Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 5-6 February 1948. To be reprimanded and pay to the United States a fine of five hundred ($500.00) dollars.
	)	
Captain EDWARD L. HUMM, 01549298, 582d Ordnance Medium Automotive Maintenance Company.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Edward L. Humm, 582d Ordnance Medium Automotive Maintenance Company, then the Commanding Officer of the said organization, after receiving information that two enlisted men, Technician Third Grade Wendell L. Nelson and Private First Class Edward F. Hoffman, both members of his command, had recently committed a serious offense: To wit, larceny of a Dodge motor, property of the United States, did, at Hanau, Germany, during or about September, 1947, wrongfully fail to take action to apprehend and punish the offenders or to prevent recurrence of the loss of government property.

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

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

The accused pleaded not guilty to all Specifications and the Charge and was found guilty of Specifications 1 and 2, and not guilty of Specifications 3 and 4 and guilty of the Charge. He was sentenced to be reprimanded and to pay the United States a fine of five hundred dollars. The reviewing authority disapproved the findings of guilty of Specification 2 of the Charge and so much of the findings of guilty of Specification 1 of the Charge as involves the words "or to prevent recurrence of the loss of government property," approved the sentence and ordered it executed and, in accordance with the sentence, reprimanded the accused. The result of trial was published in General Court-Martial Orders No. 29, Headquarters Command, European Command, APO 757, U. S. Army, dated 19 March 1948.

3. The evidence, so far as it pertains to Specification 1 of the Charge is briefly summarized as follows:

For the prosecution: From April 1947 to 17 November 1947 accused was commanding officer of the 582nd Ordnance Medium Automotive Maintenance Company, stationed at Hanau, Germany (R 17,161). He was hospitalized on 22 July 1947 and returned to duty with his organization on 19 August 1947 (Pros Ex 3).

First Sergeant Arthur J. Miller, 582nd Ordnance Company, testified that on 22 September 1947 he received a report from the company Charge of Quarters that two men of the company, Technician Third Grade Nelson and Private First Class Hoffman were involved in the taking of a jeep motor from the company motor pool and hiding it behind a coal pile in the "Military Caserne." Miller questioned Hoffman and Nelson, and they stated that they "were involved."

Later the same day, a military policeman, Staff Sergeant Thomas W. Farrell, telephoned witness and reported that the military police had found a motor behind a coal pile (R 50,81). The motor was returned to the company (R 52,56,81). At one o'clock on this day, Miller told accused about the incident and informed him that Hoffman and Nelson were involved (R 51). Farrell testified that other than finding the motor and his talking to Sergeant Miller, the military police made no further investigation or report of the case (R 82).

Within a day or two after receiving the report, accused called Hoffman, together with other men who had automobiles of their own, into the orderly room and lectured them on doing work on their cars in the motor pool and using Government parts. He told them that they could no longer have their cars in the company area, or use any parts (R 41, 43,46,47,51,52). Accused also told Hoffman that he knew Hoffman had taken a motor and that he did not want to find him taking anything from supply again. No disciplinary action was taken by accused against Hoffman or Nelson (R 41,42,52). Nelson was not present when the men were called together because on the day Sergeant Miller received the report and

reported the matter to accused, Nelson was seriously injured when a vehicle fell from a freight car and struck him. He was hospitalized and later returned to the United States (R 41,44,53).

Accused made a pre-trial statement which was admitted in evidence as Prosecution Exhibit 3. In this statement accused described conditions of dissension and laxity in enforcement of rules and regulations which he found in his organization upon his return from the hospital, and related his efforts to remedy the situation by calling the men together at various times, holding "complaint sessions," and warning them regarding various violations of the Articles of War, which he read to them. With respect to the Hoffman incident in particular, he stated that the first sergeant had reported Hoffman had been involved in the theft of a Dodge motor and that he had been caught by the military police. Accused thought that an incident report would "come through," but it never did. Accused admitted he did not "take any action and cause an investigation," but stated that he "called Hoffman in" and ordered him to get rid of the Plymouth coupe he was using and to return it to the owner. With respect to the Hoffman incident and other incidents accused stated he did not take disciplinary action because he did not want to reflect discredit on the unit as a result of an investigation but that he "called everyone in and warned them" and that he hoped that he could "stop everything right where it was." (Pros Ex 3).

The evidence shows that Hoffman (but not Nelson) was later charged with and tried for the taking of the motor, but that accused had nothing to do with the preferring of these charges. Hoffman's trial was about a week prior to the present trial (R 22-24,27,28,31,32).

For the defense: Accused testified that the incident respecting Hoffman and Nelson was brought to his attention by the first sergeant, who told accused that he heard about the incident through the Charge of Quarters who had been advised about the matter by the military police. The sergeant also told accused that he knew nothing about the incident other than that. Accused stated he told the first sergeant "Well, if the M.P.'s have got it, they will send an official report and as soon as it comes, we'll know." (R 151). No official report arrived. Accused testified that when, after four or five days, no further report had arrived, he assumed it was false and the matter was dismissed at that time (R 151). Accused never took any action against Nelson as the latter went to the hospital the day after the alleged larceny, nor did accused take any action against Hoffman (R 151). He did not question Hoffman about this particular incident, but did tell him to get rid of a car he possessed (R 151).

4. As approved, accused was found guilty of wrongfully failing "to take action to apprehend and punish the offenders," (Nelson and Hoffman).

Insofar as apprehension of Hoffman and Nelson is concerned the Specification alleges, in substance, the wrongful failure to take action to arrest or confine them. Such failure could be wrongful only if he had a duty to arrest. The Manual for Courts-Martial with respect to arrest of persons accused or suspected of offenses states:

> "Any person subject to military law charged with crime or with a serious offense under the Articles of War shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. (A.W. 69). This requirement is not mandatory, Arrest or confinement may, in the interest of the Government, be deferred until arraignment, and failure to arrest or confine does not affect the jurisdiction.
>
> "* * * The character and duration of the restraint imposed before and during trial, and pending final action upon the case, will be the minimum necessary under the circumstances." (MCM, 1928, Cor. 4-20-43, Par 19, p. 13.) (Underscoring supplied).

This provision clearly makes the matter of arrest or confinement entirely discretionary. If accused considered that no restraint was necessary, he was not required to impose any, and in fact it is implied that if he did not consider it necessary none should be imposed. No abuse of this discretion was shown, as Nelson was in the hospital with a serious injury and Hoffman, it is noted, was in fact available during all the period from the time of the incident until he was subsequently tried.

Insofar as punishment is concerned, if Hoffman or Nelson had committed larceny or any other serious crime, accused would have no authority to punish such an offense under Article of War 104, as minor offenses only are covered by this article. Punishment under Article of War 104 for serious offenses would not bar a future trial for such offenses (462 (2), III Bull JAG, pp. 292,474-475). Inasmuch as accused could impose disciplinary punishment for any offense for which punishment under Article of War 104 is authorized and adequate, whether or not to have done so was a matter entirely within his own discretion.

Assuming that the allegation, "wrongfully fail to take action to apprehend and punish the offenders," as contained in the Specification, necessarily includes an implication that accused wrongfully failed in his duty to prefer court-martial charges against the alleged offenders for an offense reported to him, we conclude that such inaction, under the circumstances of this case, would not constitute an offense inasmuch as such action was a matter within his discretionary powers as commanding officer. Thus it has been stated:

"A person subject to military law can not legally be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility; but he may legally be ordered by a proper superior to prefer such charges as in his (the subordinate's) opinion he may properly substantiate by the required oath." (Par 25, MCM, 1928).

There is no evidence in the record nor is it alleged that accused was ordered by any superior to prefer charges. Needless to say that in this respect accused's inaction does not constitute an offense.

Moreover, it is incumbent upon the commanding officer to whom charges are forwarded to "take such action with respect to each offense charged as is within his authority and is deemed by him best in the interest of justice and discipline" (Emphasis supplied) (Par 30c, MCM, 1928). We are of the opinion that accused as the commanding officer of the offenders had this same discretionary power with reference to the preferring of charges in the first instance. Accused's failure to prefer charges would not, therefore, constitute an offense in the absence of a showing of an abuse of his discretionary authority. Such abuse of discretion has not been alleged nor is it shown by the record of trial.

The Specification does not allege a failure by accused to investigate and report the incident to superior authority, or to take any other specific and appropriate action. Although the evidence indicates that under all the circumstances accused was clearly bound to perform such duties and that he wrongfully failed to do so he may not, having been charged with a failure to do one thing, be found guilty of a failure to do something else, that is, he may not be found guilty of an offense substantially different in nature from that alleged.

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

(On Leave), Judge Advocate

J. W. Lynch, Judge Advocate

Joseph T. Brooks, Judge Advocate

JAGH CM 329712 1st Ind

JAGO, Department of the Army, Washington 25, D.C.- 23 JUL 1948

TO: The Secretary of the Army

1. Pursuant to the provisions of Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) there is transmitted herewith for your action the record of trial and accompanying papers in the case of Captain Edward L. Humm (01549298), 582d Ordnance Medium Automotive Maintenance Company.

2. Upon trial by general court-martial accused was found guilty of a specification alleging that after receiving information that two enlisted men, Technician Third Grade Wendell L. Nelson and Private First Class Edward F. Hoffman, both members of his command, had recently committed a serious offense, to wit: larceny of a Dodge motor, property of the United States, he did, at Hanau, Germany, during or about September 1947, wrongfully fail to take action to apprehend and punish the offenders, in violation of Article of War 96. He was also found guilty of another specification of similar import which was disapproved by the reviewing authority. The accused was sentenced to be reprimanded and to pay to the United States a fine of $500.00. The reviewing authority approved the sentence and ordered it executed and, in accordance with the sentence, reprimanded the accused. The result of trial was published in General Court-Martial Orders No. 29, Headquarters Command, European Command, APO 757, U.S. Army, dated 19 March 1948. The record of trial has been considered by the Board of Review under Article of War 50½ and the Board holds the record of trial legally insufficient to support the findings of guilty and the sentence. I do not concur with the Board's holding, and for the reasons hereinafter stated am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

3. As indicated by the holding by the Board of Review, there is in this case substantial evidence showing that the accused, a company commander, was informed by his first sergeant that Technician Third Grade Nelson and Private First Class Hoffman, members of the company, were involved in the wrongful taking of a crated Dodge motor from the company motor pool and that they had admitted their involvement. The motor was later recovered and returned to the motor pool. Nelson was severely injured on the day the accused was informed of the wrongful taking and he was subsequently returned to the United States. No action was taken by the accused with respect to Hoffman other than to advise the latter that he had been involved in the taking of a motor and to warn him against taking anything more. About four months after the facts were reported to the accused as above related, Hoffman was tried for taking the motor but the accused took no part in initiating the charges.

The accused, in a pre-trial statement and as a witness before the court, admitted being informed of the wrongful taking of the motor but contended that he did not take disciplinary action because he did not receive an official report of the matter from military police and because he did not wish to bring discredit on the company.

The Board of Review is of the view that the word "apprehend" as used in the specification means to arrest or confine and that there was no abuse of discretion on the part of the accused in failing to arrest or confine Nelson and Hoffman. It is further of the view that the accused, because of his limited authority as a company commander, did not have authority appropriately to punish the two soldiers and that he was not required to prefer charges against them. It concludes that it was not wrongful for the accused to fail to arrest, confine, punish or prefer charges. The Board, however, admits that the accused was clearly bound to investigate and report the incident to superior authority or to take other specific and appropriate action and that he wrongfully failed to do so, but it contends that the specification does not allege such failure.

The word apprehend is defined in Webster's New International Dictionary (2nd Ed) as meaning, specifically, "to come to know; to discover," as well as in the sense of taking or seizing a person by criminal process.

In the light of the foregoing definition of the word "apprehend," and on considering it in context with the words "to take action" as used in the specification, it is my opinion that the specification fairly alleges that the accused, on learning that Government property of considerable value had wrongfully been taken by members of his organization, failed to initiate the appropriate preliminary investigative and disciplinary measures contemplated by the customs of the service and the provisions of the Manual for Courts-Martial, and so patently required by the circumstances. It can hardly be contended that the specification should precisely state each specific omission on the part of an accused where, as here, he did substantially nothing. It is considered sufficient that the specification state in simple and concise language the facts constituting the offense and that the facts so stated and those reasonably implied therefrom include all the elements of the offense sought to be charged (see Par 29, MCM, 1928). It is my opinion that the specification of which accused was found guilty reasonably meets that test. The theory of the prosecution's case was obvious to the accused, the proof put him on notice of the full import of the pleading, and there is no indication that he was misled.

Failure by an officer to bring offending inferiors to punishment has long been recognized as an offense in violation of Article of War 96 (GCMO 8 of 1890; G.O. 88, Army of the Potomac, 1862 (cited in Winthrop's

Mil. Law and Prec., 2nd Ed, 1920)), and a specification alleging that an accused officer, having knowledge of a criminal act by a member of the command, did "fail to take any action thereon" was found legally sufficient in CM 286184, Williams, 20 BR (ETO) 307, as recently as 1945.

For the foregoing reasons I am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. However, the fine is believed somewhat excessive under the circumstances. Therefore, I recommend that the sentence be confirmed, but that $400 of the fine be remitted.

4. Inclosed herewith are two forms of action prepared for your signature. Draft "A" will accomplish confirmation and reduction of the sentence in accordance with my views. Draft "B" will accomplish the vacation of the findings and sentence in accordance with the holding by the Board of Review.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 149, 3 August 1948).

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

10 MAY 1948

JAGH CM 329747

UNITED STATES	)	MACDILL AIR FORCE BASE
v.	)	Trial by G.C.M., convened at MacDill Air Force Base, Florida, 19 February and 12 March 1948. Dismissal.
First Lieutenant QUINTIN R. STAUFFER (O-1118984), Corps of Engineers.	)	

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 Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that first lieutenant Quintin R. Stauffer, 2173d Engineer Maintenance Company (Aviation), 937th Engineer Aviation Group, MacDill Air Force Base, Tampa, Florida, did in front of the Academy of the Holy Names, Bayshore Boulevard, Tampa, Florida, on or about 21 January 1948, willfully and wrongfully in an indecent manner expose to public view his penis.

Specification 2: In that first lieutenant Quintin R. Stauffer, 2173d Engineer Maintenance Company (Aviation), 937th Engineer Aviation Group, MacDill Air Force Base, Tampa, Florida, did on Coachman Avenue near Bayshore Boulevard, Tampa, Florida, on or about 21 January 1948, willfully and wrongfully in an indecent manner expose to public view his penis.

Specification 3: (Nolle Prosequi)

He pleaded not guilty to the Charge and Specifications. He was found guilty of Specification 1 "except the date '21 January 1948,' substituting therefor the date '20 January 1948'; of the excepted date, not guilty, of the substituted date, guilty," guilty of Specification 2, and guilty

of the Charge. The prosecution entered a nolle prosequi to Specification 3 during the trial. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the MacDill Air Force Base Acting Judge Advocate, dated 19 March 1948, with the following additional discussion relative to Specification 1, of which accused was found guilty, and which alleged that he did, on or about 20 January 1948, "willfully and wrongfully in an indecent manner expose to public view his penis, in front of the Academy of the Holy Names, Bayshore Boulevard, Tampa, Florida."

Miss Joan Burns (age 16), a student at the Academy of the Holy Names, testified as follows:

"Q I refer you back to in the vicinity of the 21st of January, 1948. Do you remember seeing this man at that time?
A Yes, I did.

Q Will you tell the court in your own words exactly what happened?
A The first night I saw him, we were out on a walk on the Bayshore, my girl friends and I, the junior boarders, and it was around 5 minutes to 6 and we were walking along the Bayshore and there happened to be this green - bluish green - 2-door Buick driving by, and we were just about half the way between the Bayshore as you turn over to go on to the other side of the Bayshore, when this green Buick parked on this little driveway to go on the other side of the Bayshore, and one of the girls noticed, and myself, that he had an Army uniform on and had bars of a first lieutenant. Well, he got out of his car, and he had a broom, a small broom, and he was brushing his car out, and he motioned for us girls to come over towards him, and we kept going the other way, so he went half way back to the Bayshore again and he came to another parking space and he was parked there and then we went in that night, and one of the girls came running over toward me and she says -

DEFENSE: Object.

LAW MEMBER: Objection sustained.

Q This part you didn't see. I want you to skip. Just tell what you actually saw yourself.
A Well, then, on Tuesday night we went for a walk and he was parked on the right-hand side of the Bayshore.

Q This was this same man?
A Yes.

Q The same automobile?
A The same Buick, yes, and he was brushing his car out and he exposed himself.

Q Now, Joan, I would like to have you explain to the court exactly how he was exposing himself.
A He had his pants open.

Q Did he at that time motion for you girls to come over?
A Yes.

DEFENSE: Leading question. Object.

PROSECUTION: I will withdraw the question." (R 10,11).

The question presented for consideration is whether the testimony of Miss Burns is sufficient to prove the offense alleged. As shown above, she stated "he exposed himself" and when she was asked to "explain to the court exactly how he was exposing himself," replied, "He had his pants open."

The term "Exposure of person" is defined in Bouvier's Law Dictionary (unabridged) (Rawle's Third Revision) Vol. I, p.1162, as "such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals." (Underscoring supplied).

Applying the above definition of the term "Exposure of person," to the words used by the witness, "he exposed himself" and considering her further statement in explanation that "he had his pants open," it is our opinion that the testimony was sufficient, under all the circumstances of this case to warrant a finding by the court that accused exposed himself as alleged in the Specification (CM 249211, Stone, 32 BR 56). It is also to be noted that accused was charged with and found guilty of an identical offense committed the day following this offense (Spec 2, Chg), which conduct on his part tends to show a habit or design to commit a series of like offenses (Underhill's Criminal Evidence, Fourth Edition, Sec 187, p.244).

4. Records of the Army show that accused is 25 years of age and married. He completed high school and a technical school course of four years. His civilian occupation is that of a machinist. He enlisted in the Army on 26 February 1944, was commissioned second lieutenant from the Officers' Candidate School, Fort Belvoir, Virginia, on 27 December 1944. He served overseas in the India-Burma Theater from 31 August 1945

to 26 June 1946 and in Greenland from 4 June 1947 to 9 November 1947. He has two efficiency ratings of "Excellent" and one of "Superior."

5. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial. 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. J. Hottenstein, Judge Advocate

J. W. Lynch, Judge Advocate

Joseph L. Brack, Judge Advocate

JAGH CM 329747 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 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 Quintin R. Stauffer (O-1118984), Corps of Engineers.

2. Upon trial by general court-martial this officer was found guilty of willfully and wrongfully in an indecent manner exposing to public view his penis on two occasions, in violation of Article of War 95 (Specs 1 and 2, Chg). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the MacDill Air Force Base Acting 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.

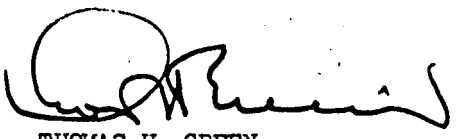
On or about 20 January 1948 in front of the Academy of the Holy Names, Bayshore Boulevard, Tampa, Florida, the accused deliberately exposed to public view his penis and repeated such act on the following day on Coachman Avenue, Tampa, Florida. The persons to whom the indecent exposure was made on 20 January 1948 were female students of the Academy, 17 years of age and under, and the person to whom the exposure was made on the following day was a colored woman.

The accused denied guilt and in an effort to establish an alibi offered testimony of witnesses as to his whereabouts at the time the offenses were alleged to have occurred but the court saw fit to disbelieve such testimony and accepted as true the testimony of witnesses for the prosecution as to identity.

4. The accused is 25 years of age and married. He completed high school and technical school course of four years. His civilian occupation is that of a machinist. He enlisted in the Army on 26 February 1944, was commissioned second lieutenant from the Officers' Candidate School, Fort Belvoir, Virginia, on 27 December 1944. He served overseas in the India-Burma Theater from 31 August 1945 to 26 June 1946 and in Greenland from 4 June 1947 to 9 November 1947. He has two efficiency ratings of "Excellent" and one of "Superior."

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

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



2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 111, 28 May 1948).

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

JAGN-CM 329800

U N I T E D S T A T E S	)	FIRST ARMY
v.	)	Trial by G.C.M., convened at Fort Jay, New York, 27 February 1948. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Staff Sergeant RICHARD SHEARER (16224212), 1267th Area Service Unit, 1st Army Signal Service Company.	)	

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 94th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Staff Sergeant Richard Shearer, 1267th Army Service Unit First Army Signal Service Company, did at New York, NY on or about 15 August 1947 wrongfully and unlawfully represent that one Charlene Fitzgerald was his lawful wedded wife and did thereby obtain hospitalization, medical treatment and supplies from the United States.

Specification 2: In that Staff Sergeant Richard Shearer, 1267th Army Service Unit First Army Signal Service

> Company, did at New York, NY on or about 15 August 1947 wrongfully and unlawfully represent that one Charlene Fitzgerald was his lawful wedded wife and did thereby attempt to obtain government family quarters at Fort Wadsworth for the aforesaid Charlene Fitzgerald and himself.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification, guilty of Charge II and both Specifications thereunder, 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 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, 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. Evidence for the prosecution.

On or about 15 August 1947 accused applied for and obtained hospitalization at the Staten Island Area Hospital for a woman represented by him to be his wife, "Charlene Shearer" (R. 13-31; Pros. Ex. 2, 3).

On 10 January 1948 accused submitted to his commanding officer a request for quarters on the post written in the following language:

> "Request that I, S/Sgt Richard F. Shearer, RA16224212, be granted immediate quarters on the post for compassionate reasons. My marital status is greatly strained due to the lack of quarters. I have been informed by mail this date, as per inclosed letter, that unless some immediate action is taken, divorce proceeding would be started.
>
> /s/ Richard F. Shearer
> /t/ Richard F. Shearer
> S/Sgt, Sig C"

(R. 40, 46; Pros. Ex. 7). Attached to this request was a six-page letter addressed to "Dearest Rick" and signed "Kitten" in which an appeal was made to accused to obtain quarters on the post (Pros. Ex. 7). Attached to this letter and request was an envelope postmarked 8 January 1948, addressed to "S/Sgt Richard F. Shearer," bearing return address "Mrs. R. F. Shearer, 308 Kentucky Ave, Tipton, Indiana." There is nothing in the letter to identify the writer as Charlene Fitzgerald,

and although accused submitted the request in person to his commanding officer he made no accompanying representation other than "that he was having trouble with his family affairs. His marital relations were strained" (R. 40). As a result of this request, quarters on the post were allotted to but never occupied by accused, because none were available (R. 48).

An application for dependency benefits dated 23 June 1947, signed by Richard F. Shearer naming Dorothy E. Shearer as wife and Brenda and Danny Whitten as step children was received in evidence. The date of this marriage was given as 28 May 1947 (R. 52; Pros. Ex. 9).

On 21 January 1948 agents of the CID interviewed accused. After being "advised of his rights," and having the 24th Article of War read to him, accused made a voluntary statement to the agents to the effect that "he had entered this woman in the hospital, that she wasn't his wife, she was his girl friend, and that he was legally married to Katherine Beaver in Long Beach, California, at the time his girl friend, Charlene Shearer or Charlene Fitzgerald, was placed in the hospital at Fort Jay" (R. 60, 74).

After being questioned by the CID agents accused signed two written statements. One of these, introduced as Prosecution's Exhibit 12 (R. 66), read in pertinent part as follows:

> "In the latter part of August 1947, Miss Charlene Fitzgerald, was entered in the Station Hospital, Fort Jay, where she received medical treatment.
>
> "Miss Fitzgerald entered the hospital under the guise of being my wife.
>
> "Miss Fitzgerald was in the hospital for approximately eight weeks.
>
> "I was transferred to the 1267, 4 August 1947, my fiancee Miss Fitzgerald who at the time was in Detroit, Michigan, preparing to come to New York and be married, but due to a sudden illness, this was impossible at the moment. We had decided to wait until she was well and in the meantime I would enter her in the hospital for treatment. Upon her release she had been ordered by the doctor to have rest and quiet which again put off the marriage. She is now at my home in Tipton, Indiana, waiting to return to New York to be married."

4. <u>Evidence for the defense.</u>

The testimony of one Horace C. Holmes, a practicing attorney of the State of Indiana, was stipulated, consisting of citation of a series of decisions by Indiana courts wherein they recognized the legality of common-law marriages in that State (R. 79; Def. Ex. A). The testimony of Thomas E. Bennett, step-father of accused, was stipulated, to the effect that in April, 1947, in the presence of witness and others in Detroit, Michigan, accused and Charlene Fitzgerald openly acknowledged themselves to be husband and wife, and that thereafter in July, 1947, accused and Charlene cohabited openly as man and wife in Tipton, Indiana (R. 85, 86). The testimony of Ethel R. Bennett, mother of accused, to the same effect was also stipulated (R. 84, 85). It was further stipulated by and between prosecution and defense that:

> "* * * on the 19th day of December, 1947, the accused, together with * * * Mrs. Charlene Shearer, went from Staten Island to Tipton, Indiana, to the home of the parents of the accused, and there remained with Mrs. Charlene Shearer at the home of his mother and step-father until he returned to his duty on the 29th of December 1947."

In addition to the stipulated testimony and facts above mentioned, the defense introduced into evidence the following documents:

> Envelope, with letter attached, postmarked 15 December 1947, Tipton, Indiana, addressed to "S/Sgt and Mrs. Richard Shearer, 1288 Bay St., Staten Island, N. Y." (R. 80; Def. Ex. C).
>
> Envelope, postmarked 26 August 1947, Elwood, Indiana, addressed to "Mrs. Charlene Shearer" (R. 81; Def. Ex. D).
>
> Envelope, with letter attached, postmarked 23 August 1947, Detroit, Michigan, addressed to "Mrs. Charlene Shearer" (R. 81; Def. Ex. E).
>
> Record of Account of Home Mercantile Company, 1828 Central Avenue, Indianapolis, Indiana, with "Charlene - Richard Shearer," dated 8 November 1947, showing payments made on and between the dates 8 November 1947 and 18 February 1948 (R. 81; Def. Ex. F).
>
> Decree of "total" divorce, entered 4 August 1947 in Muscogee Superior Court (Georgia) in the case of Dorothy W. Shearer v. Richard Francis Shearer, wherein it is recited: "* * * the defendant shall also have the right to remarry. * * * the defendant is not permitted to marry again for a period of thirty days from the date of this judgment and decree. * * *" (R. 89; Def. Ex. I).
>
> A "Judgment of Annulment of Void Marriage (Default)" entered 8 December 1947 in the Superior Court of the State of California, in the case of Catherine Beaver Shearer, Plaintiff, vs. Richard Francis Shearer, Defendant, wherein it is recited: "* * * the marriage heretofore entered into by and between plaintiff and defendant be and the

same is hereby declared to be void from the beginning, and is annuled * * *" (R. 97; Def. Ex. J).

Having been duly advised of his rights the accused elected to make an unsworn statement, through counsel, the pertinent part being substantially as follows: Accused and Charlene Shearer "decided to take each other as husband and wife in Detroit in April, 1947," and continued to live as such, openly and notoriously until one day, in the presence of two CID agents, accused was "hoodwinked into making a statement he should not have made" (R. 91). Accused did hold out "Lieutenant Fitzgerald" (Charlene) as his wife, because he felt that they were husband and wife. "In a drunken moment" accused married a woman with two children, but within forty-eight hours they decided to separate. He applied for an allotment for this woman and her children because she "was hounding him and wanted money," but no money was paid to her by the United States Government. This relationship was terminated by divorce rather than by annulment on the advice of a legal assistance officer in the Army that it was the most expeditious way to solve the situation. Accused wished the court to know that "his wife is a lady of refinement * * * and doesn't know anything about his relations with this woman which lasted a few days" (R. 92-94).

5. In rebuttal the prosecution introduced into evidence a second written statement of accused, the relevant part stating:

"I married Nancy Wasyliuski in July 1943. Divorce proceedings were started but due to my transfer I was not in Florida at the time the divorce was to become final. The attorney did not complete the proceedings. In the meantime I had married June Flechsig in Oct. 44. While overseas I was informed that I was still married to Nancy Wasyliuski. Through the legal assistance officer in Key West the annulment to Wasylieuski was completed in August 1945. I was informed by Junes Lawyer that I was single.

"In January 1947, I married Katherine Beaver. Upon returning to Detroit I went out with June and through a fluke was considered a common law marriage which was taken into court. The divorce was granted on 4 August 1947. The divorce to Katherine Beaver was to have been completed by Dec. 1947" (R. 96; Pros. Ex. 13).

6. By Specification 1 of Charge II it is alleged that accused did

"on or about 15 August 1947 wrongfully and unlawfully represent that one Charlene Fitzgerald was his lawfully wedded

wife and did thereby obtain hospitalization, medical treatment and supplies from the United States."

The exact respect in which the representation was believed by the accused to have been "wrongfully and unlawfully" made is not expressly alleged. However, it may reasonably be inferred from the allegations as set out that the gist of the offense intended to be stated is found in the implied allegation that such representation was false. In view of our ultimate holding we deem it unprofitable to explore further into the exact nature and extent of the offense here stated beyond the conclusion that one of its essential elements, even in its most innocuous form, if it is to be considered as an offense at all, is the falsity of the accused's alleged representation that Charlene Fitzgerald was his wife (CM 239085, Jones, 25 BR 43). We are thus initially presented with the question of whether or not there is sufficient legal evidence contained in the record of trial, in addition to accused's "confessions," to support the implied finding by the court that accused was not, on or about 15 August 1947, the husband of Charlene Fitzgerald.

Disregarding, for the moment, its character and binding effect, the evidence contained in the record of trial would appear to tend to establish accused's matrimonial adventures, or misadventures as the case may be, somewhat as hereinafter outlined:

a. In July 1943 accused purportedly married one Nancy Wasyliuski (Pros. Ex. 13). (It is of interest to note that in his Review of this case the Staff Judge Advocate expresses the opinion that this marriage was subsequent to an even prior marriage to some unnamed lady, which subsequent marriage was terminated by divorce in June 1944, but there is not the slightest evidence in the record to even infer such a prior marriage).

b. In October 1944 accused purportedly married one June Flechsig (Pros. Ex. 13).

c. In August 1945 the purported marriage to Nancy Wasyliuski was terminated by "annulment" (Pros. Ex. 13).

d. In January 1947 accused purportedly married one Katherine Beaver (Pros. Ex. 13).

e. At some time prior to 4 August 1947 but after his "returning to Detroit," accused "went out with June [Flechsig] and through a fluke was considered a common law marriage" (Pros. Ex. 13).

f. In April 1947 accused purportedly entered into a common-law marriage status with Charlene Fitzgerald (R. 84, 85, 91).

g. On 28 May 1947 accused purportedly married Dorothy Whitten (R. 93-94; Pros. Ex. 9).

h. On 4 August 1947 accused was divorced from June Flechsig (Pros. Ex. 13).

i. On 4 August 1947 accused was divorced from Dorothy Whitten (Def. Ex. I).

j. On 8 December 1947 accused's purported marriage to Catherine Beaver was annulled and declared void from its inception (Def. Ex. J).

Other than accused's confession (Pros. Ex.12) there is no direct evidence in the record that accused was not, on 15 August 1947, lawfully married to Charlene. Whether or not such fact is inferentially established is dependent upon a determination that the remaining evidence is sufficient to establish that a legal barrier thereto existed. With this in mind we propose to examine each of accused's purported marriages which have been in any manner brought to light by the evidence in order to determine whether any such legal barrier is thereby shown to exist.

Nancy Wasyliuski

Since the sole mention of this purported wife appears in the written statement of accused (Pros. Ex. 13) it is quite clear that if any portion of that statement respecting her matrimonial connection with accused is to be used against him, it must only be so applicable in the light of the balance of the pertinent remarks contained in the same statement which are not inconsistent with or controverted by any other testimony contained in the records (CM 319168, Poe, 68 BR166). Thus if we are to accept the fact that accused was once purportedly married to Nancy Wasyliuski we are bound to also accept as a fact that such purported marriage was terminated by annulment in August 1945. There is thus established no fact from which a legal barrier to a marriage between accused and Charlene Fitzgerald could be inferred as existing in August of 1947.

June Flechsig

Here again the only pertinent evidence is contained solely within the statement of accused (Pros. Ex. 13). If we are to accept as a fact the purported marriage of accused to June Flechsig either

in October of 1944, or by the "fluke" of some later date we are equally bound to accept the conclusion that such marriage or marriages, if not void, were terminated by divorce on 4 August 1947 and could not constitute a legal bar to a marriage at any time thereafter of accused to Charlene Fitzgerald.

Catherine Beaver

The California decree of annulment of this purported marriage (Def. Ex. J) bears the caption "Judgment of Annulment of Void Marriage" and declares the marriage to be "void from its beginning." The statutory basis for such a declaration and the effect thereof, distinguishing void and voidable marriages has been thoroughly discussed by the Supreme Court of California in pertinent part as follows:

> "* * * Under the provisions of the Civil Code, a clear distinction is drawn between void marriages and those which are merely voidable, or, as it might perhaps be better expressed, those which are capable of being annulled. * * * Section 80 permits either party to an incestuous or void marriage to proceed by action in the superior court to have the same so declared. * * *
>
> "A marriage prohibited as incestuous or illegal and declared to be 'void' or 'void from the beginning' is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material. The provision of section 80 that an incestuous, or void marriage may in an action to that end be declared void does not undertake to make such action the exclusive method of questioning the validity of the purported marriage. The judgment merely declares an existing fact - viz., that the marriage is void - and this fact may be shown even though it may not have been so adjudicated." (In re Gregorson's Estate, 116 Pac 62).

It is therefore evident, in spite of the declaration contained in accused's statement, that no marriage existed between accused and Catherine Beaver which could constitute a barrier to a valid marriage state between accused and Charlene Fitzgerald as of 15 August 1947.

Dorothy Whitten

From prosecution's exhibit 9 it appears that accused purportedly married Dorothy Whitten on 28 May 1947. The validity of this marriage is questionable by reason of record evidence tending to establish a prior and then existing common-law marriage status between accused and Charlene Fitzgerald. However, even if it be concluded that the Whitten marriage was legal in its inception, it was conclusively terminated by the Georgia

divorce decree entered 4 August 1947 (Def. Ex. I). That decree was "total" in scope and the thirty-day prohibition against remarriage contained therein had no extraterritorial effect and did not constitute any barrier to a lawful marriage between accused and Charlene Fitzgerald in any state except Georgia (Montgomery v. Gable, 7 SE (2d) 426, 61 Ga. App. 859).

Thus while we are not prepared to state the valid and lawful marriage of accused and Charlene Fitzgerald to be an established fact as of 15 August 1947 we are required to hold that there is not sufficient legal evidence in the record of trial aside from accused's confession (Pros. Ex. 12) from which the court could reasonably infer that they were in fact not married as of that date, and we are equally required to hold that the evidence, aside from accused's confession (Pros. Ex. 12), is not of the character and strength necessary to authorize consideration of such confession as a basis for supporting the court's findings (par. 114a, MCM, 1928).

7. By Specification 2 of Charge II it is alleged in essence that accused, on or about 10 January 1948, did "wrongfully and unlawfully represent that one Charlene Fitzgerald was his lawful wedded wife and did thereby attempt to obtain" government quarters for "Charlene Fitzgerald and himself." Again we must presume that the wrongful and unlawful nature of the representation was found in an inferred allegation that it was false. Although by no means conclusive we are of the opinion that there is, in the record, sufficient legal evidence from which it might reasonably be inferred that in requesting quarters accused represented Charlene as his wife. However, for the reasons hereinabove set out in paragraph 6 the record fails sufficiently to establish that accused was not actually married to Charlene on the date in question, and thus fails to sustain a finding that accused's alleged representation was in any manner false.

8. 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.

1948

JAGN-CM 329800 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, First Army, Governors Island, New York 4, New York.

1. In the case of Staff Sergeant Richard Shearer (16224212), 1267th Area Service Unit, 1st Army Signal Service Company, I concur in the holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated.

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

(CM 329800).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 329832

29 JUN 1948

UNITED STATES v. Private First Class WALTER A. SENCK (RA 32847650), Headquarters Company, 709th Military Police Service Battalion	HEADQUARTERS COMMAND EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 2 February 1948. Confinement for six (6) months and forfeiture of fifty dollars ($50) per month for a like period.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Walter A. Senck, Headquarters Company 709th Military Police Service Battalion, did, at Frankfurt, Germany, on or about 2130 hours 24 December 1947 through culpable negligence unlawfully kill Gertrud Mueller, a German civilian, by shooting her in the chest with a pistol.

He pleaded not guilty to the charge and its specification. He was found guilty of the charge and guilty of the specification except the words "through culpable negligence," substituting therefor, the words "without due caution or circumspection." Evidence of one previous conviction was introduced. He was sentenced to be confined at hard labor at such place as the reviewing authority might direct for six months and to forfeit fifty dollars ($50) of his pay per month for a like period. The reviewing authority approved the sentence, ordered it executed and designated the Post Guardhouse, Headquarters Command, European Command, Frankfurt-am-Main, Germany, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 27, Headquarters Command, European Command, APO 757, U.S. Army, 18 March 1948.

3. The evidence may be briefly summarized. At about 2130 hours on 24 December 1947 the accused, who was on duty as a military policeman, approached the entrance to the railroad station in Frankfurt-am-Main, Germany, where a large crowd of people were observing a demonstration of fireworks in celebration of Christmas Eve. A civilian named Kurt Gitschel was discharging a tube-like device similar to what is known as a Roman candle. The accused undertook to arrest Gitschel and he fled from the crowd. In an effort to prevent Gitschel's escape, the accused drew his pistol and appeared to fire a warning shot at the pavement nearby. The bullet ricocheted and entered the body of a German girl named Gertrud Mueller who was standing beside a taxicab talking to an American soldier. Miss Mueller was taken to a hospital where she died shortly thereafter from the result of the bullet wound (R 6,7,23,28,37). There was received in evidence as Prosecution Exhibit 1 a copy of Theater directive, Headquarters United States Forces European Theater, AG 474 GAP-AGO, dated 15 November 1946, containing regulations governing the use of firearms by military police and other law enforcement agencies in the United States occupied zones of Germany and Austria. Paragraph 3a prohibited the firing of warning shots under any circumstances. Paragraph 3(b) 2 authorized the use of firearms only when necessary to wound or kill in order to apprehend or prevent the escape of persons reasonably believed to have committed serious offenses under the Articles of War or felonies under the civil law. Paragraph 4(a) expressly prohibited the use of weapons against minor offenders "even when attempting to escape" (R 17).

The accused testified that as he attempted to chase the German civilian he "stumbled or tripped over something and the pistol did go off accidentally." He did not intend to injure anyone but pulled his gun to fire a warning shot (R 31,37).

4. The accused was arraigned upon a specification alleging that he did "through culpable negligence unlawfully kill Gertrud Mueller *** by shooting her *** with a pistol," in violation of Article of War 93. He was found guilty under this specification of having "without due caution or circumspection" unlawfully killed Gertrud Mueller by shooting her with a pistol, in violation of Article of War 93. The effect of the language substituted in the specification by the court is the only question requiring detailed consideration. Involuntary manslaughter, the offense pleaded, is defined in the Manual for Courts-Martial as

> "*** 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)"
>
> "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. ***" (par 149a, MCM, 1928).

Stated somewhat briefly, it will be observed that the offense may stem from at least two apparently distinct circumstances, viz, (1) while committing an inherently unlawful act, that is, an act which is malum per se and not merely malum prohibitum, and (2) by culpable negligence in performing a lawful act or in performing an unlawful act which is merely malum prohibitum. In the latter event, if there is a causal relation between the unlawful act and the homicide, the unlawful act is evidence of negligence but not conclusive evidence of culpable, or criminal, negligence (Commonwealth v. Hawkins, 157 Mass 551, 32 N.E. 862). In the instant case it appears that the original pleading not only contained the words "unlawfully kill" but alleged that the homicide was committed through culpable, that is, criminal, negligence in shooting the victim. In other words the involuntary manslaughter denounced was predicated on culpable negligence. The court, however, by exceptions and substitutions, found that the firing of the weapon was an act done without due caution or circumspection, which finding, when viewed in the light of the phraseology of the specification as originally drawn, amounts to a verdict that the lethal act was accompanied by a degree of carelessness less than culpable negligence, that, stated otherwise, the homicide resulted from an act of simple negligence on the part of accused.

As will be observed from the definition of involuntary manslaughter heretofore quoted from the Manual for Courts-Martial, where involuntary manslaughter is predicated on negligence, the negligence must be of a culpable or criminal degree and must be so found. The cases fully support this conclusion (CM 240043, Vislan, 25 BR 349,352; CM 264494, Elia, 4 BR (ETO) 315, 318). We are not unmindful that a charge and specification alleging merely that the accused did "unlawfully kill" a human being in violation of Article of War 93, containing only a brief description of the physical act of accused which caused the death, as "by shooting her with a pistol," has been held sufficient to denounce the offense of involuntary manslaughter, for in such a case it is considered that the pleader has intended to set forth the lowest degree of "unlawful" homicide known to the common law and denounced in Article of War 93, that is, involuntary manslaughter (CM 325046, Weller, 74 BR 63; CM 325564, Thompson, 74 BR 333). In the present case, however, the court limited the scope of the "unlawfulness" alleged to homicide committed by something less than culpable or criminal negligence. The offense found is, therefore, not involuntary manslaughter in violation of Article of War 93.

It remains to be determined whether there is a lesser included offense sustainable under the findings. In CM 252521, Groat, 34 BR 67, a case somewhat analogous to this case, the accused was charged with "negligently and unlawfully" killing a fellow soldier by striking him with an automobile "which he *** was then operating in a grossly negligent manner,"

in violation of Article of War 93. He was found guilty of the specification except the words "and unlawfully" and "in a grossly negligent manner" and not guilty of the charge but guilty of a violation of the 96th Article of War. The proof was that accused had been driving in a negligent manner, on a military post, at the time he ran into and killed the soldier and that the negligence was a proximate cause of the death. The Board of Review held that accused's "negligent killing of another soldier on a military post was a neglect to the prejudice of good order and military discipline" and an offense lesser to and included in the offense charged. In CM 293509, Coats, 8 BR (ETO) 39, the accused was charged with and found guilty of having "feloniously and unlawfully" killed a civilian woman "by negligently and recklessly" operating a truck so as to collide with the woman, thereby causing her death, in violation of Article of War 93. The reviewing authority approved only so much of the findings of guilty as involved a finding that accused so negligently operated the vehicle as to cause it to collide with the woman, in violation of Article of War 96. The Board held that the offense found, viz, simple negligence in operating a truck and causing it to strike the described person, was lesser to and included in the alleged involuntary manslaughter. It will be noted, however, that the action of the reviewing authority amounted to a finding that there was no causal relation between accused's negligence and the woman's death. In CM 318442, Tyndall, 67 BR 303, it was held that a careless and negligent discharge of a pistol resulting in death, in violation of Article of War 96, was lesser than and necessarily included in a charge of voluntary manslaughter wherein it was alleged that the offense occurred by shooting with a pistol. It would appear, and we so hold, that a charge of involuntary manslaughter alleged to have been committed by a culpably negligent shooting with a pistol, in violation of Article of War 93, includes a finding of guilty of an unlawful homicide accomplished by simple negligence in shooting with a pistol, in violation of Article of War 96, for simple negligence is obviously but a lesser breach of the duty to use "due caution and circumspection" than is culpable negligence (CM 320229, Porter, 69 BR 257, 259; CM 316182, DeMoss, 65 BR 263, 268; CM 327149, Endicott; CM 319823, Rhimes, 69 BR 123). We further hold that the negligent killing here shown was conduct of a nature to bring discredit upon the military service and constituted a violation of Article of War 96. In this sense, the negligent homicide was "unlawful".

The sentence imposed is not excessive (par 104c, MCM, 1928, p. 96).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty under the specification, legally sufficient to support only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of Article of War 96 and legally sufficient to support the sentence.

Celestin D. Silvera, Judge Advocate

Gilbert E. Stewart, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 329832 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 1 JUL 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724, 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Walter A. Senck (RA 32847650), Headquarters Company, 709th Military Police Service Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of the specification, with the substitution as found by the court, in violation of Article of War 96 and legally sufficient to support the sentence. I recommend that so much of the findings of guilty be vacated as involves findings other than findings of guilty of the specification, with the substitution as found by the court, in violation of the 96th Article of War, 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

(GCMO 133, 13 July 1948).

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

JAGN-CM 329843

U N I T E D S T A T E S	)	FIRST ARMY
v.	)	Trial by G.C.M., convened at Fort Jay, New York, 25 February 1948. Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.
General Prisoner RICHARD F. EGER (32812109), Fort Jay Work Project, Fort Jay, New York 4, New York.	)	

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 96th Article of War.

Specification 1: In that General Prisoner Richard F. Eger, Fort Jay Work Project, Branch United States Disciplinary Barracks, Fort Jay, New York, a prisoner on parole, did, at Fort Jay, New York, on or about 25 December 1947, break his parole by attempting to escape from Fort Jay, New York.

Specification 2: In that General Prisoner Richard F. Eger, Fort Jay Work Project, Branch United States Disciplinary Barracks, Fort Jay, New York, did, in the Orderly Room of the 1201st A.S.U. Medical Detachment, Fort Jay, New York, on or about 25 December 1947, wrongfully strike T/5 Edward J. Coppinger, a soldier on duty in that office, on the face with his fist.

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

Specification 1: In that General Prisoner Richard F. Eger, Fort Jay Work Project, Branch United States Disciplinary Barracks, Fort Jay, New York, did, in conjunction with General Prisoner John J. Murphy, Fort Jay Work Project, Branch United States Disciplinary Barracks, Fort Jay, New York, at Fort Jay, New York, on or about 25 December 1947, knowingly and wilfully apply to his own use and benefit a motor vehicle of value of about Nine Hundred Dollars ($900.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that General Prisoner Richard F. Eger, Fort Jay Work Project, Branch United States Disciplinary Barracks, Fort Jay, New York, did, in conjunction with General Prisoner John J. Murphy, Fort Jay Work Project, Branch United States Disciplinary Barracks, Fort Jay, New York, at Fort Jay, New York, on or about 25 December 1947, feloniously take, steal and carry away a uniform of value of about Thirty Dollars ($30.00), property of the United States, furnished and intended for the military service thereof.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications except Specification 1 of Charge II, as to which the court found accused "Guilty, except the words 'of value of about Nine Hundred Dollars ($900.00),' substituting therefor, respectively, the words 'of value of more than Fifty Dollars ($50.00),' of the excepted words not guilty, of the substituted words guilty." No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one 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 under Article of War 50½.

3. The Board of Review, in view of the sufficiency of the evidence with respect to all of the Specifications and Charges other than the larceny charged under Specification 2 of Charge II, will limit its consideration of the case to that offense only.

Private Walter C. Howell of the 1201st Medical Detachment, Fort Jay, New York, placed his Government issue uniform, consisting of an Eisenhower jacket, pants, shirt and tie, on his bed, between 6:30 and 7:00 p.m. on the evening of 25 December 1947, while he went to the latrine. Upon his return the clothes no longer were there (R. 102). Later the supply sergeant returned all of these clothes to him. Prior

to missing his uniform he had seen accused in the vicinity of his barracks (R. 103, 108), at which time accused was dressed in his brown uniform.

Technician Fifth Grade Everett E. Hightower, of the 1201st Medical Detachment, missed an overcoat and a pair of low quarter shoes, which had been issued to him, from his quarters on 25 December 1947, and when he returned from the theatre that evening some general prisoner's brown clothing were scattered on the floor of his room (R. 113). His overcoat and shoes were returned to him by the first sergeant three or four days later (R. 116).

Technician Fourth Grade Amelio J. Icangelo, 1201st Medical Detachment, missed a pair of low quarter shoes, which had been issued to him, from under his bed on 25 December 1947 (R. 117).

Accused, when taken into custody at the barge office, adjacent to the ferry at Fort Jay, on the evening of 25 December 1947, was dressed in "OD pants, shirt, tie and overcoat with chevrons, no collar insignia" (R. 23). At this time accused had on "high shoes like he has now" (R. 65). Parolees were issued high shoes (R. 66), but had no authority to wear a Class A Army uniform (R. 18); accused was required to wear the parolee uniform (R. 19). Neither the prosecution nor the defense produced any further evidence bearing on the offense charged under Specification 2 of Charge II.

4. Specification 2 of Charge II of which accused was found guilty alleges, in essence, that he did "feloniously take, steal and carry away a uniform * * * property of the United States, furnished and intended for the military service thereof." Direct evidence establishes that various items of United States Army issue uniform clothing were stolen, on the date alleged, from soldiers to whom they had been issued. There is no direct evidence that accused was the perpetrator of such theft, and the question to be determined is whether there is sufficient circumstantial evidence in the record by which the finding of the court may be legally sustained.

The evidence does establish that accused was observed near the scene of the larceny just prior to its occurrence, and that after it occurred he was found in possession of items of clothing similar in type and kind to the issue uniform clothing which was stolen. Taken alone the presence of accused near the scene of the offense and shortly prior to its commission can do no more than establish his opportunity to have committed it (CM 216004, Roberts et al, 11 BR 71). Similarly, taken alone, a limited showing that accused, an escaping parolee, was found on an Army post dressed in a "Class A" Army uniform can be said to establish no more than a suspicion that the items of uniform so found were the same ones proven to have been stolen. Construing all of the

evidence together and most strongly in favor of the prosecution it cannot be said to support more than a surmise as to the guilt of accused as alleged.

It is well established law that where, as in the instant case, the only competent evidence is circumstantial it must, in order to support conviction, be of such a nature as to exclude every reasonable hypothesis except that of accused's guilt (CM 323349, Henry (1947); 317430, Veronko (1947); CM 260828, Parker, 40 BR 34; CM 238485, Rideau, 26 BR 272). A conviction cannot be sustained on suspicion, surmise, or conjecture (CM 323349, Henry (1947); CM 317430, Veronko (1947); CM 274812, Tracy, 47 BR 330).

5. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 2 of Charge II and legally sufficient to support the findings of guilty of the remaining Specifications and Charges, and the sentence.

Edward J. Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springstead, Judge Advocate.

JAGN-CM 329843 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, First Army, Governors Island, New York 4, New York.

1. In the case of General Prisoner Richard F. Eger (32812109), Fort Jay Work Project, Fort Jay, New York 4, New York, I concur in the holding by the Board of Review and recommend that the finding of guilty of Specification 2 of Charge II be disapproved. Upon taking such action you will have authority to order the execution of the sentence.

2. In view of the fact that in the companion case of General Prisoner John J. Murphy accused was convicted of offenses similar to those of which accused Eger was legally convicted, and, in addition was legally convicted of larceny, but was sentenced to confinement for a period of only one year and three months, it is recommended that the term of confinement in Eger's case be reduced to a like term.

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 329843).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 329851

9 JUL 1948

UNITED STATES	)	1ST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Drake, Tokyo, Japan, 12-16 January 1948. Dismissal
	)	
First Lieutenant ERWIN J. FRANCO (0-1031240), Headquarters 1st Cavalry Brigade	)	

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

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

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

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

Specification: In that First Lieutenant Erwin J. Franco, Headquarters Troop, 1st Cavalry Brigade, 1st Cavalry Division, did, at Camp McGill, Nagai, Japan, between on or about 15 July 1946 and on or about 19 November 1947, knowingly and willfully misappropriate one one-quarter ton 4x4 truck, of the value of about $1050.00, property of the United States intended for the military service thereof.

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

Specification 1: In that First Lieutenant Erwin J. Franco, ***, did, at Camp McGill, Nagai, Japan, between on or about 15 July 1946 and on or about 19 November 1947, knowingly and willfully misappropriate one one-quarter ton 4x4 truck, of the value of about $1050.00, property of the United States intended for the military service thereof.

Specification 2: In that First Lieutenant Erwin J. Franco, ***, did, at Camp McGill, Nagai, Japan, on or about 18 November 1947, knowingly and willfully attempt to apply to his own use and benefit one one-quarter ton 4x4 truck, of the value of about $1050.00, property of the United States intended for the military service thereof, by obtaining, without proper authority, a set of license plates authorized

for use only on private vehicles.

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

Specification: In that First Lieutenant Erwin J. Franco, ***, did, at Camp McGill, Nagai, Japan, on or about 18 November 1947, knowingly and willfully attempt to apply to his own use and benefit one one-quarter ton 4x4 truck, of the value of about $1050.00, property of the United States intended for the military service thereof, by obtaining, without proper authority, a set of license plates authorized for use only on private vehicles.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of no previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and "pursuant to Article of War 50½" withheld "the order directing the execution of the sentence."

3. **Evidence**

On 14 September 1946 accused was assigned from the 4th Replacement Pool to the 1st Cavalry Brigade, 1st Cavalry Division, at Camp McGill. Camp McGill was an installation apparently under the control of the 1st Cavalry Brigade.

First Lieutenant Melvin G. Heumann, Commander of Headquarters Troop, 1st Cavalry Brigade, 1st Cavalry Division, from 15 July 1946 to 22 October 1946, testified that he personally took over the supervision of the motor pool of Headquarters Troop about 1 August 1946, at which time he saw accused driving a jeep with bumper markings 1C-1C. Later the markings on the vehicle were changed to "1C-1C AE 1." The vehicle was serviced in the Headquarters Troop motor pool, but it did not appear on any of the property records of that organization and therefore was not authorized to have the markings "1C-1C." When requested by Lieutenant Heumann to remove the bumper markings, accused told him that he did not have to worry about the vehicle as accused wrote his own trip tickets. This vehicle "looked the same" as any other jeep. It had a "USA number," which, according to accused's statement to Lieutenant Heumann, was "just a number I picked up." The vehicle was never used for any "unauthorized purposes" although it was not dispatched from Lieutenant Heumann's motor pool "as normal government vehicles are" (R 14-27,129).

Captain Berdell L. Freeman succeeded Lieutenant Heumann as commander of Headquarters Troop, 1st Cavalry Brigade, in October 1946. All of the 4x4, 1/4 ton motor vehicles assigned to his motor pool bore bumper markings "1C-1C, Hqs 1,2,3, etc. up to 29." Another 1/4 ton vehicle, however,

not assigned to his motor pool also bore bumper markings 1C-1C. This vehicle was distinguishable from the other 1/4 ton vehicles in his motor pool in that it had "metal, solid metal, gates," they were "approximately 18 inches long and 10 inches high at the largest part of the circle or half a circle" and to his knowledge was the only jeep with doors. In every other respect it had all the appearances of being an authorized Government jeep. This vehicle had never been in his motor pool and to his knowledge had never been dispatched therefrom. Although the vehicle was not assigned to his command he received a delinquency report on it in July or August 1947 because of the bumper markings "1C-1C." However, the use of the marking "1C-1C" was not restricted to Headquarters Troops only. He learned that accused was the driver of the vehicle and saw him driving it on many occasions subsequent to his receipt of the delinquency report (R 28-45).

Major John G. McClone, Post Engineer at Camp McGill, testified that the accused was detailed to his office about the latter part of October 1946 and was appointed assistant post engineer. At that time, Major McClone discussed with accused the shortage of transportation and accused said that he knew where he could get a jeep and Major McClone told him, "by all means to get it." The following day accused brought a jeep to the office. It had all the appearances of an ordinary government jeep except that the sides between the front seat and the cowl had been cut away and doors had been added. There was no other jeep so modified at Camp McGill. Major McClone always considered the jeep to be in his custody and under his control as organizational property, although he assigned it to accused to use for business purposes and for recreation, which latter use was authorized by the 1st Cavalry Division. The vehicle was driven by all personnel of the office. The vehicle was never used for any "unauthorized purposes." The bumper markings on the jeep described by Major McClone were "1C-1C AE" until about July 1947 when they were changed to "1C-1C RU30" because at about that time the office became known as the "post engineer" and had established its own motor pool. The vehicle in question was not put on any of the property records of the post engineer although it was serviced in the motor pool until about 1 November 1947. The property records were in very bad condition and there were other items of government property which did not appear on the records. The property officer for the post engineer testified that he would have entered the vehicle in question on the property records if he had had a little more time (R 21-26,38,52-60,71,74,111-128).

Major William M. Edwards, Ordnance Officer for the 1st Cavalry Division, testified that he had custody of records of all vehicles in the Division and that the vehicle in question did not appear on any of the property records of the Division until it was "turned in" on 20 November 1947 (R 46-48).

Army Regulations 35-6520; Technical Manual 38-403; Circular 57 (1946),

Eighth Army; Bulletin 57 (1946), 1st Cavalry Division; Bulletin 141 (1947), 1st Cavalry Division; and Bulletin 187 (1947), 1st Cavalry Division, were introduced into evidence by the prosecution as Prosecution Exhibits A-D, inclusive, and G and I, respectively. These all contained provisions concerning the custody, care and turning in of Government property which was unaccounted for by reason of not being on any property records (R 6-9, 137,154).

Major William M. Edwards was of the opinion that "unaccounted for" meant "all property that is found and is not on records of any kind," also that "Army Regulations are violated when the Ordnance Officer can prove certain property is property of the 1st Cavalry Division" or United States Army property and it has not been reported (R 11-14).

Major Raymond Allen, Assistant G-4 of the 1st Cavalry Division, in charge of transportation, testified that in his opinion -

> "*** A vehicle must be either on a TO and E property record or on a PC and S property record to obtain maintenance at Government expense. *** A vehicle that is unauthorized as to accountability is likewise unauthorized as to use, because no vehicle may be properly used in the Government service which is unauthorized either as TO and E or PC and S property. It must be accounted for. *** a vehicle properly accounted for on PC and S or TO and E may be loaned to another organization on memorandum receipt." (R 173-180)

Major McClone and the accused discussed turning in the vehicle in question, but they did not turn it in because it was "impracticable" inasmuch as his unit would have been deprived of transportation and furthermore it was not "feasible" from the standpoint of the paper work involved. When more vehicles were assigned to the post engineer in June or July 1947 it could have been turned in but it was still "impracticable as the paper work was too involved" (R 115-120).

Pursuant to a notice which was given to all units under the control of the 1st Cavalry Division, Major Allen conducted a "Showdown Inventory" of all divisional vehicles on 20 November 1947. The vehicle in question was not among the vehicles "inventoried" and was not in the R and U motor pool (R 173-180).

During the morning of 20 November 1947, Major McClone ordered accused to turn in the vehicle in question. Accordingly at about 4:00 p.m. of that day accused turned in the jeep to Lieutenant Robert R. Gray at the 27th Ordnance Company shop. Accused signed "the property turn in slip" in his own name (Pros Ex E). Lieutenant Gray verified the War Department number given on the "turn in slip" with the War Department number on the jeep and found them to be identical. Lieutenant Gray noticed

that there was a coat of fresh paint on the jeep and that the bumper markings were "pretty well gone" (R 48-51, 61-64, 99-105, 190-195).

On 18 November 1947, accused drove Major McClone to the Ikego ammunition dump in the jeep. Major McClone noticed that it had been "freshly painted" but that the War Department numbers on the hood were not covered up. He saw the vehicle again on the afternoon of 20 November 1947 parked in front of the hangar at the 27th Ordnance Company but did not recall paying any particular attention to it except to notice it had a "very good paint job." He did not notice it closely enough to tell wehther or not there were any War Department numbers on it at that time.

Two enlisted men, Sergeant Garrison Lee Davis, acting shop foreman, and Technician Fourth Grade Rice, painter, were at the 27th Ordnance Company shop on 20 November 1947 at about 4:00 p.m. when the jeep was brought in. The jeep had been "freshly painted" and was wet. The paint had to be rubbed off in order that the War Department numbers and the bumper markings might be seen. Two days later when the jeep was in the shop and the paint was still wet it had to be "washed down" before it could be repainted. Technician Fourth Grade Rice testified that the paint on the jeep was "OD" in color but that he had never seen any Army paint like it. It was "sort of waxy paint" and "sort of mud paint." He could not determine how long ago it had been painted. He did testify however that the paint could have been on the jeep for a month or more (R 184-190,192-194,195-199).

Major Meyer A. Edwards was the S-2 and S-3 of the 1st Cavalry Brigade and Captain Raymond E. Fleig was the provost marshal. The provost marshal's office operated under the control of the S-2. It was one of the functions of the provost marshal to issue license plates to military personnel for privately owned motor vehicles. Major Edwards had, in the absence of Captain Fleig, issued license plates on a few occasions. However, upon a strict interpretation of the existing directives, the Major had no authority to issue them. On 20 November 1947, early in the morning, accused requested Major Edwards to issue to him a set of license plates. Captain Fleig not being present Major Edwards issued a set of plates, "JAPOC 54-16" (Pros Ex F) to the accused. He also gave the accused a registration card with the signature of Captain Fleig stamped thereon. Accused made no statements to Major Edwards concerning his ownership of a private automobile nor did he say why he wanted the plates and Major Edwards did not question him in this respect. Later that same day Captain Fleig returned to his office and made an inventory of the plates. Upon finding license plates No. 54-16 missing but no file copy of the registration in his office, he reported the matter to Colonel McNabb, executive officer of the 1st Cavalry Brigade, who instructed Captain Fleig to make an investigation. On 21 November 1947, Captain Fleig questioned Major Edwards about the missing plates and Major Edwards told him they were in the cabinet. Accused had returned the plates to Major Edwards. Captain Fleig identified the plates, stating that when he found the plates in the cabinet they had scratches on the corners and that there was a slight

discoloration on the face of one of the plates. Captain Fleig testified that Master Sergeant Robert E. Barnett was the only one in the section authorized to issue civilian license plates but that Major Edwards occasionally issued license plates (R 75-92, 154-173, 208-210).

Master Sergeant Robert E. Barnett testified that his duty assignment was "brigade operations" and that his immediate superior was Major Edwards. He saw accused in the office on 18 November 1948 talking to Major Edwards. Although he did not see accused obtain any license plates he did see what appeared to be "JAPOC license plates" tucked in accused's jacket when he left the office. The witness had never issued any license plates to accused (R 168-173).

Circular 158, Headquarters 8th Army, 25 September 1947 (Pros Ex J) contained regulations governing the procedure and requirements for the registration of privately owned vehicles. It provided, among other things, that upon registration a bill of sale for military type vehicles or evidence of ownership for civilian type vehicles would be presented by the owner and that the area provost marshal will complete the "Registration of Motor Vehicles" form in triplicate.

Captain Fleig testified further that in his opinion Circular 158 above referred to was not complied with when the license plates 54-16 were issued to accused and consequently possession of the plates constituted an illegal act in that they were obtained without proper authority (R 163-168).

Lieutenant Heumann testified that sometime between July and October, 1946, accused had asked him for his license plates. Accused said he wanted them so he would not have to bother with trip tickets on "the vehicle." Lieutenant Heumann told him he would not be going home for at least a year and could not comply with his request any way because he was afraid of dealing with license plates. Accused said a story could be concocted to the effect that the plates had been lost and that he would be willing to corroborate Lieutenant Heumann's story to that effect (R 17-18).

Lieutenant Herbert A. Price testified that he knew accused and that he had always seen him driving a jeep with "special doors" and "USA numbers," but about 20 November 1947 he saw accused driving what appeared to him to be a civilian jeep because it had civilian license plates Number 54-16 and "no WD numbers showing on it." Lieutenant Price could not "recall" whether this latter jeep had doors on it or whether it had any distinguishing features other than those to which he had testified. His attention was particularly drawn to this vehicle because "I knew this ordnance inspection was coming up and I had heard various tales about <u>his jeep,</u> and I had never seen him drive <u>this one</u> with license numbers on it like that before." When asked if he had ever seen "that vehicle prior to that time without civilian plates" he answered, "I am

not certain sir." The reason he was so certain of the number on the license plates was because he had discussed the matter with Captain Fleig, First Lieutenant Kappa and Warrant Officer Hoffman. The witness admitted that he bore a grudge against accused because "I got a run-around on a piano deal" and accused's section had "clipped me $25 on a 104, and I was a little sore about it frankly." Lieutenant Price reported the incident to Lieutenant Colonel Gus A. Schattenberg, S-4 of the 1st Cavalry Brigade, the first thing the following morning. Captain Raymond E. Fleig testified that he could not definitely state that Lieutenant Price in relating the incident to him "had emphasized the word 'that' or 'the' jeep. He may have said 'a jeep.'" He further testified that Lieutenant Price "wasn't at the time [of the conversation], absolutely sure whether it [the first two numbers of the license] was 54 or 64 or what it might have been," but that he was sure of the last two digits of the license number (93-98, 199-202).

Accused made two statements as to the manner in which he had acquired the vehicle in question. He told Colonel Schattenberg, "I bought this jeep from a Navy Officer for $300.00" (R 65-71) and at another time he told Major McClone that an officer returning to the United States had left the jeep with him (R 118).

Lieutenant Gray testified that according to the Ordnance catalogue the price of a 1/4 ton 4x4 truck was $1051.00 (R 101).

Accused was advised of his rights as a witness and elected to remain silent (R 132).

4. Discussion

Charge I and its Specification and Specification 1 of Charge II

Accused was here found guilty of misappropriating a 1/4 ton 4x4 truck of the value of about $1050, property of the United States intended for the military service thereof, in violation of Articles of War 94 and 95.

The only question to be considered here is whether or not the evidence adduced was sufficient to prove accused guilty as charged beyond a reasonable doubt. In this type of case it is the function and duty of the Board of Review to give careful consideration to the weight of the evidence. In CM 320681, Watcke, 70 BR 125, the Board of Review said:

> "*** In cases examined by us before confirmation pursuant to the second paragraph of Article of War 50½, as is the case here, it is our right and duty to weigh the evidence as well as to pass upon the formal legal sufficiency of the record of trial. In weighing the evidence, we may arrive at a different conclusion than did the court and the reviewing authority, even

though their conclusions are, strictly speaking, legally justified by the evidence appearing in the record. Briefly stated, we are allowed in such cases, a difference of opinion. We, too, must be convinced of accused's guilt beyond a reasonable doubt (Dig Op JAG, 1912-1940, sec 408 (1); CM 259987, Loudon, 39 BR 109, 113; CM 243818, Smith, 28 BR 111,118)." (See also CM 327522, Rippey.)

The gravamen of the offense with which accused was here charged and of which he now stands convicted, is that he knowingly and willfully devoted a Government jeep to an unauthorized use or purpose (150i, MCM 1928). We are of the opinion that the evidence fails to establish, beyond a reasonable doubt, that he committed such an offense.

It appears that about the latter part of October 1946, when accused was assigned to the Area Engineer's office, later known as the Post Engineer's Office, at Camp McGill, he procured, with the concurrence of his commanding officer, a 1/4 ton 4x4 truck from an undetermined source. This vehicle was distinguished from other jeeps in that doors had been added to it. Accused's commanding officer, Major John G. McClone, assumed the custody and control of the jeep, as organizational property, and assigned it to accused. Accused drove the jeep in the performance of his military duties and for recreation purposes until 20 November 1947. The record does not show that he ever used the jeep for any "unauthorized purposes." Persons other than accused also drove the vehicle but only for "authorized purposes."

The theory of the prosecution in the instant case seems to have been that although the vehicle was used only for military purposes the fact that it did not appear on any property records and was not turned in "as soon as practicable" made such use unauthorized. Opinion evidence was introduced to the effect that if a vehicle did not appear on the property records of a military organization that the use of the vehicle was unauthorized. Assuming without deciding that the evidence may have established a failure of the accused to comply with directives having to do with the accountability of military vehicles, such failure, under the circumstances here disclosed, does not affect the character of the use to which the vehicle was in fact put. The instant case must however be distinguished from CM 238413, Finch, 1 BR (A-P) 169. There it was shown that the vehicle alleged to have been misappropriated had been regularly assigned to an organization other than the one to which the accused belonged. The misappropriation consisted of the accused's devoting the vehicle to the use of his organization, thereby wrongfully depriving the proper organization of the use of its vehicle. In the instant case there is no showing that the manner in which the jeep was acquired by the accused was unlawful or that he wrongfully deprived any organization of its use.

In finding accused guilty it is believed that the court may have been

overly influenced by the introduction in evidence of certain remarks made by accused and of certain activities on his part concerning the jeep, specifically, that he told a motor officer that he wrote his own trip tickets, that he had the jeep serviced in the motor pool of an organization which did not carry the vehicle on its property records, that he had informed one officer he had purchased the jeep from a Naval officer for $300.00, also that he had stated that an officer returning to the United States had left the jeep with him. When these seemingly inculpatory remarks and activities are closely examined and carefully weighed in the light of the other evidence in the record, having in mind particularly the testimony of accused's commanding officer, Major McClone, it becomes at once obvious that they have little if anything to do with the main point here at issue, to wit, whether accused had devoted the converted jeep to an unauthorized purpose between July, 1946, and November, 1947, as alleged. We believe that the circumstances noted above are as consistent with the theory that accused was, at the request of his superior officer, merely attempting to retain in his organization a jeep to be used for business purposes, and to thus solve a serious transportation problem which existed in his unit, as it is with the contrary theory that he had misappropriated the vehicle.

It also appears in the record of trial that accused, in early October, 1946, requested a brother officer to leave his civilian license plates with him when he left for home so that accused might use them on a vehicle to obviate the necessity of signing in and out or bothering with trip tickets. Accused did, more than a year later, obtain a set of license plates at the office of the provost marshal. There is fully as much reason to infer that accused desired the license plates to use on a privately owned vehicle as there is to conclude, from this evidence, that he intended to use them on the 1/4 ton 4x4 truck in question. Such activities on the part of accused do not in any event amount to proof of devoting the jeep in question to an unauthorized purpose for, at most, they can be considered only as acts in preparation for a misappropriation of the said jeep.

Accused was seen driving a jeep upon which no War Department numbers were displayed and to which were apparently attached the civilian license plates he had previously obtained from the provost marshal's office. An eyewitness to this event, Lieutenant Price, testified that he knew accused and had usually seen him driving a jeep with "special doors" and "USA numbers" but that he had never before seen accused drive the jeep with the license plates. Such testimony elicited from the only witness called in an apparent attempt to show that accused had attached the license plates to the jeep with doors, is, to say the least, considerably damaging to the Government's case. There was no evidence whatsoever tending to show that the vehicle to which the license plates were attached was a Government jeep.

The 1st Cavalry Division issued a directive to all units under its

command that a "showdown inventory" of all vehicles would be held on 20 November 1947, the purpose being to ascertain whether or not there were any vehicles of which the Division Headquarters had no record. Accused, pursuant to the order of his commanding officer, "turned in" the jeep to Ordnance on 20 November 1947, at which time it had a "fresh coat of paint" of "OD color." The paint was of such a type that it was impossible to tell when it had been applied. The evidence was conflicting as to whether or not the War Department numbers and bumper markings were covered by the paint. Although the vehicle which had been "turned in" by accused had been freshly painted and there was some evidence that the War Department numbers thereon had been covered by the paint, this seems to have little bearing on the question as to whether accused had misappropriated the vehicle, for there is no showing that accused caused the jeep to be painted and when accused turned it in, not only did he make no effort to conceal the identity of the vehicle, but informed the personnel of the shop that the jeep was assigned the War Department numbers with which it was in fact identified.

In conclusion, upon a careful review of this record of trial, it appears to us that the proof with respect to the specification here in question does not exclude every fair and reasonable hypothesis except that of accused's guilt. Even if it might be said that the evidence sufficiently revealed an intent on the part of accused to misappropriate the modified jeep, it yet failed to show, beyond a reasonable doubt, that he had in fact done so or that he had taken any steps toward the execution of such an intent of a nature which would subject him to a criminal penalty under the specifications here in question (CM 319744, Walker, 69 BR 95,100). We are of the opinion, therefore, that the findings of guilty of Charge I and its specification and of Specification 1 of Charge II should be set aside.

Specification 2 of Charge II and Charge III and its Specification

The accused was here found guilty under two specifications, one in violation of Article of War 95 and the other in violation of Article of War 96, of an attempt to apply to his own use and benefit one 1/4 ton 4x4 truck of the value of $1050, property of the United States intended for the military service thereof, by obtaining without proper authority a set of license plates authorized for use only on private vehicles.

The Board of Review is of the opinion that each specification is fatally defective for repugnancy. "Repugnancy" in legal terminology means "inconsistency."

It appears from an examination of the specifications that each alleges two separate and distinct acts of accused, consisting of an attempt to misapply a Government vehicle on the one hand and what might be considered to be a disorder to the prejudice of good order

and military discipline not amounting to an attempted misapplication on the other. It is to be noted that some acts amounting to a disorder might constitute an attempt at misapplication, but here the alleged act of obtaining the license plates could amount to no more than an act in mere preparation of a misapplication of a Government vehicle.

Winthrop, in laying down certain rules for framing the charge, says -

> "NOT TO BE REPUGNANT OR INCONSISTENT. That is to say, that the material portions of the Charge are not to be opposed in meaning or effect, or to contradict each other. This rule is repeated by all the principal authorities, civil and military. It is an important one, since a failure to observe it may result in nullifying the Charge, or at least the specification in which the repugnancy occurs." (Winthrop's Mil Law and Prec, 2d Ed, p 135.)

It has been held that an indictment must be direct and certain with respect to the offense charged. It must allege the facts which constitute the offense in such a manner as to enable the person charged to know what is intended. It was held in Lynch v. Commonwealth (248 Ky 210, 58 SW (2d) 408) and in Acree v. Commonwealth (243 Ky 216, 47 SW (2d) 1051) that "It is essential and required that both accusatory and descriptive parts of the indictment must name and describe the same offense," otherwise a motion to quash for repugnancy will stand.

In a Massachusetts case (Commonwealth v. Lawless, 101 Mass 32) the indictment charged that the defendant did forge and counterfeit a certain accountable receipt for money and other property and the receipt was then set out in full. The receipt did not acknowledge that anything had been received which had to be accounted for. The court in holding the indictment bad for repugnancy said -

> "This difference between the instrument and the name given to it constitutes a repugnance which is fatal to the indictment."

It follows that the specifications here in question are fatally defective and that the findings of guilty thereof are of no legal effect.

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.

Chester D. Gibson, Judge Advocate

Gilbert G. de Floyd, Judge Advocate

Harley A. Lamming, Judge Advocate

JAGK - CM 329851 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 14 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 First Lieutenant Erwin J. Franco (O-1031240), Headquarters 1st Cavalry Brigade.

2. Upon trial by general court-martial this officer was found guilty of misappropriating a 1/4 ton 4x4 truck, property of the United States intended for the military service thereof, in violation of Articles of War 94 and 95 (Chg I and its Spec and Spec 1 of Chg II) and of attempting to apply to his own use and benefit one 1/4 ton 4x4 truck, property of the United States intended for the military service thereof, "by obtaining, without proper authority, a set of license plates authorized for use only on private vehicles," in violation of Articles of War 95 and 96 (Spec of Chg III and Chg III and its spec). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and "pursuant to Article of War 50½" withheld "the order directing the execution of the sentence."

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

Accused was assigned about 14 September 1946 to the 1st Cavalry Brigade, 1st Cavalry Division, at Camp McGill, Japan. In the latter part of October, 1946, he was detailed to the office of the area engineer, later known as the office of the post engineer. Major John G. McClone, the area or post engineer, appointed accused as his assistant. Accused, with the concurrence of his commanding officer, procured a 1/4 ton 4x4 truck from an undetermined source. This vehicle was distinguished from other jeeps in that doors had been added to it. Major McClone assumed the custody and control of the jeep as organizational property and assigned it to accused. Accused drove it in the performance of his military duties and for recreational purposes until 20 November 1947. The evidence does not show that he ever used the jeep for any "unauthorized purposes." Persons other than accused also drove the vehicle but only for "authorized purposes." A directive of the 1st Cavalry Division was given to all units under its command that a "show down" inventory of all vehicles would be held on 20 November 1947 for the purpose of ascertaining whether or not there were any vehicles of which the Division Headquarters had no record. Pursuant

to the order of Major McClone accused "turned in" the jeep to Ordnance on 20 November 1947. At this time the jeep had what appeared to be a "fresh coat of paint" of "OD color" but the paint was of such a type that it was impossible to tell when it had been applied. The evidence was conflicting as to whether or not the War Department numbers and the bumper markings on the jeep were covered by the paint. Accused made no effort, however, to conceal the identity of the vehicle as he informed the Ordnance officer that the jeep was assigned the War Department numbers with which it was in fact identified.

The vehicle in question did not appear upon any of the property records of any military organization until 20 November 1947 when it was "turned in" to Ordnance. Major McClone testified that the vehicle in question was not turned in at an earlier date because it was "impracticable" inasmuch as his unit would have been deprived of transportation. The property officer for the post engineer testified that he would have entered the said jeep on his property records if he had had a little more time.

Although the source of the jeep was undetermined there was evidence that accused had made certain admissions to his brother officers to the effect that he had purchased the jeep from a Naval officer for $300, also that an officer returning to the United States had left the jeep with him. Accused also told the motor officer of Headquarters Troop, 1st Cavalry Brigade, in which motor pool he at one time had had the jeep serviced, that he did not have to worry about the vehicle as he wrote his own trip tickets. Accused also told the motor officer that the "USA number on the jeep was just a number I picked up."

In the early part of October, 1946, accused requested Lieutenant Heumann, Commanding Officer of Headquarters Troop, 1st Cavalry Brigade, that when he left for the United States he leave his civilian license plates for use of accused. Accused stated he would not then have to bother with signing in and out or bother with trip tickets. Lieutenant Heumann stated that he could not comply with the request and in any event that he would not be leaving for quite some time. About a year later and on or about 20 November 1947 accused did obtain a set of license plates, "JAPOC 54-16" for use on private vehicles from the provost marshal's office which, however, he returned to the office the following day.

About 20 November 1947 a Lieutenant Price saw accused driving a jeep to which were apparently attached the civilian license plates "JAPOC 54-16" previously obtained by accused from the provost marshal's office. He knew accused and had usually seen him driving a jeep with "special doors" and "USA numbers" but had never seen accused driving the jeep with the license plates. Lieutenant Price bore a grudge against accused because of some incidents involving the section where accused worked.

4. The Board of Review, after weighing the evidence with respect to Charge I and its specification and Specification 1 of Charge II, consistently with its duties under the second paragraph of Article of War 50½, has concluded that the proof was not such as to exclude every fair and reasonable hypothesis except that of accused's guilt. I agree with this conclusion. The evidence may have established a failure of accused to comply with directives dealing with steps necessary to be taken with respect to accountability of Government property, but such failure under the circumstances of the instant case does not amount to a misappropriation of the jeep in question. The admissions made by accused and his actions with respect to the modified jeep might be said to show an intent on the part of accused to misappropriate the jeep, but there was no showing in the record, beyond a reasonable doubt, that accused had in fact committed any act of misappropriation or that he had taken any steps toward the execution of such an intent to do so of a nature which would subject him to a criminal penalty under these specifications. After thorough consideration of the whole record of trial and upon careful weighing of the evidence, I am not convinced that the guilt of accused has been proved beyond a reasonable doubt. With respect to Specification 2 of Charge II and Charge III and its specification the Board of Review is of the opinion that each specification is fatally defective for repugnancy in that each specification alleges two acts of accused which are separate and distinct offenses, consisting of an attempt to misapply a Government vehicle on the one hand and what might be considered to be a disorder to the prejudice of good order and military discipline not amounting to an attempted misapplication on the other. The Board has concluded therefore that the findings of guilty under these specifications are of no legal effect. I also agree with this conclusion. Accordingly, I recommend that the findings and sentence be disapproved.

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

CM 329 851

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 145, 2 August 1948).

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

JAGK - CM 329922

9 JUN 1948

UNITED STATES v. Private JOHN L. BROWN (RA 38742949), 545 Transportation Truck Company, 8th Transportation Truck Battalion	HEADQUARTERS COMMAND EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 11 and 12 March 1948. Dishonorable discharge and confinement for life. Penitentiary

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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 John L. Brown did, at Frankfurt-Sachsenhausen, Germany on or about 14 February 1948, with malice aforethought, willfully, deliberately, feloniously, and unlawfully kill one Bernhard Herget, a human being by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence

The accused went to the home of Anna Straubinger and Anni Kettler at No. 37 Klappergasse, Frankfurt-Sachsenhausen, Germany, at about 7 p.m., 14 February 1948, for the purpose of taking them to an enlisted men's club (Nach Bonames). As the three were leaving the house they were accosted by two drunken German civilians, Heinrich Stumpf and Bernhard Herget. Stumpf took Miss Straubinger by the arm and asked her to go to his home to drink some wine. Herget took Miss Kettler by the arm. The accused protested the interference. Herget then grabbed accused and

threatened him with a bottle. At this time the two girls became frightened and ran "around the corner." They called to accused to come with them but he did not follow them. Shortly thereafter they heard the sound of a bottle breaking and a groan. They then returned to the scene where they found accused brushing off the leg of his trousers. He told them that he had fallen down. The women did not see anyone other than accused when they returned to the scene of the altercation. Accused and the girls then proceeded to the enlisted men's club (R 10-22).

Stumpf corroborated the testimony of the women, stating that he and Herget were drunk and that Herget threatened accused with a bottle. He and Herget then fled. He heard Herget fall so he stopped and found that Herget was lying on the ground. Stumpf and another German carried him into a neighboring house where it was discovered that Herget was wounded and bleeding. Herget died in the house shortly thereafter (R 22-26,51, 82).

Andreas Schanz who lived near Mrs. Straubinger observed accused and two German civilians involved in an argument on the corner opposite the Straubinger house. He saw one of the Germans make a move toward accused with a bottle and saw accused strike at them. The Germans then ran away and accused gave chase. When one of the Germans was opposite Schanz' window he half turned, throwing a bottle at accused, which broke at his feet. Accused continued the chase brandishing a knife as he ran. When accused was within about an arm's length of the German who had thrown the bottle he lunged at him with his knife, stabbing him. Shortly thereafter Schanz heard sharp cries of pain. Accused fell to the ground as a result of lunging at the German. He arose and cleaned off his knife and hands with a cloth and put the knife in a sheath or scabbard (R 30-37).

Mrs. Barbara Schanz also saw accused leap at the German and as he did so fall to the ground. When he arose she observed him with a knife in his hand waving it at the fleeing Germans, at the same time calling after them in apparently unfriendly terms (R 37-41).

Dr. Ferdinand Whiethold, a German doctor, performed an autopsy on the body of Herget and testified that the cause of death was a stab wound which perforated the left lung and cut the pulmonary artery (R 49-54,85, 86).

On the same night, 14 February 1948, after accused had been fully warned as to his rights under the 24th Article of War, he made a voluntary oral statement as follows:

> "He told me that sometime that afternoon he had arrived at the Klappergasse and went to visit a girl that he knew. Sometime that evening at approximately 1900 hours he was on the street in the company of two young ladies. Two Germans came up to him and a conversation took place. It became an argument, one of the

Germans took a wine bottle out of his pocket and struck him with it. He said that the wine bottle glanced off his shoulder and splintered on the street. I asked him if this blow had hurt him in any way and he said no, and I said are you still wearing the same clothes that you wore at that time, and he said yes. I said, 'Did you have your overcoat on?' He replied that he did. And I said, 'There is no mark on your overcoat is there, where the wine bottle struck you?' And he said, 'No, there isn't.' And I said, 'What did you do next?' And he said, 'Well, the two Germans started to run away and I ran after them, and while running I drew a knife from my pocket and I stabbed at one of the men.' I said, 'What was your intention when you stabbed at the man with your knife?' And he said, 'I intended to kill him.' I said, 'What happened after you stabbed at him?' 'The man fell down, I turned around, went back to where the two girls were and went away. I said, 'Where did you go?' 'I went to the E.M. Club with the two girls,' and there someone took him to an orderly room. I asked him approximately how far he had run from the place the wine bottle hit him until he had stabbed at the man, and he told me approximately ten to fifteen yards." (R 58-66, 76-82).

Accused subsequently made a written statement (Pros Ex P-3) substantially the same as the oral statement quoted above. He stated one of the Germans struck him with a bottle and he then stabbed him with a knife. He made no reference, however, as to his intent to kill the deceased. He further stated the Germans then ran away and one of them fell down but he did not know which one as he left immediately with the girls for the enlisted men's club. (R 66-71)

A knife and scabbard were taken from the possession of accused, which were admitted as Prosecution Exhibits P-2A and P-2B. He admitted that the knife was the weapon he used to stab the German. Mrs. Charlotte Ross, Criminal Investigation Division chemist, made a test of blood stains on the knife which she found to have been made by human blood (R 65-67,72,73).

After the rights of accused were explained to him he elected to remain silent. No evidence was introduced by the defense.

4. Discussion

Accused was found guilty of the murder of one Bernhard Herget by stabbing him with a knife. The killing of Bernhard Herget followed an altercation or dispute between accused and the deceased and another German civilian. The dispute was unquestionably initiated by the conduct of the Germans. The deceased, during the argument, drew a bottle from his pocket and threatened accused with it. The evidence is not clear as to whether deceased struck accused with the bottle or threw it at him, but in any event it is admitted

by accused that he was not injured or harmed. Deceased then fled from the scene of the dispute and was pursued by accused. He was fatally stabbed by accused in the course of his flight.

Murder is defined in the Manual for Courts-Martial, 1928, as "the unlawful killing of a human being with malice aforethought" (par 148a, MCM 1928). Malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled with an implied negation of any excuse or justification (Commonwealth v. Chance, 174 Mass 245, 252). Thus it has been held that where a deadly weapon is used in a manner likely to cause death and death actually results from such use, the law will presume malice from the act (CM 324519, Davis, 73 BR 251,263). In the instant case malice may be presumed from the very nature of accused's attack upon the deceased with a deadly weapon such as a knife. Also, accused admitted that he intended to kill the deceased when he stabbed him. Consequently, the only question before us is whether the killing of Bernhard Herget by accused was justifiable on the ground of self-defense, which would result in accused being guilty of no crime, or, if it was not, whether accused's malice was excusable because of the presence of provocative circumstances "which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offense," to palliate the criminality of the homicide, that is, from murder to voluntary manslaughter (CM 327731, Adams).

The fact that deceased was running away when he was stabbed by accused conclusively shows that accused was not acting in self-defense. Accused was, obviously, in no imminent danger of his life (CM 322487, Dinkins, 71 BR 185).

The attack upon deceased grew out of the actions of the Germans in accosting the accused and his girl friends. During the altercation which followed, deceased struck accused a glancing blow on the shoulder with a bottle, or threatened him with it, and then threw it at accused while being pursued by him. We cannot say that as a matter of law there existed adequate provocation for taking deceased's life and, accordingly, the findings of the court may not be disturbed upon appellate review. (CM 238138, Brewster, 24 BR 173; CM 247055, Mason, 30 BR 249; CM Dinkins, supra.)

5. For the foregoing reasons 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.

Judge Advocate

, Judge Advocate

, Judge Advocate

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

JAGH CM 329968

14 June 1948

UNITED STATES v. Private RALPH MOWELL, RA 14217911, and Private ROBERT O. OTTWELL, RA 18294918, both of 172d Station Hospital, APO 547.	IX CORPS Trial by G.C.M., convened at Sendai, Japan, 24, 25 February 1948. Dishonorable discharge and confinement for life. United States Penitentiary, McNeil Island, Washington.

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

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

2. In a joint trial the accused were tried upon the following Charges and Specifications:

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

Specification: In that Private Robert O. Ottwell, 172d Station Hospital, and Private Ralph Mowell, 172d Station Hospital, acting jointly and in pursuance of a common intent, did, at Sendai, Honshu, Japan, on or about 12 January 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hasebe, Niwazo, a human being, by striking him on the head with a club.

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

Specification: In that Private Robert O. Ottwell, 172d Station Hospital, and Private Ralph Mowell, 172d Station Hospital, acting jointly and in pursuance of a common intent, did, at Sendai, Honshu, Japan, on or about 12 January 1948, with intent to do him bodily harm, commit an assault upon Yagi, Yotaro, by striking him on the head and on the hand with a dangerous instrument, to wit, a club.

Each accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of one previous conviction was introduced as to each accused. 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 the term of his natural life. The reviewing authority approved the sentence as to each accused, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of evidence and law contained in the review of the IX Corps Judge Advocate, dated 24 March 1948, except as to that part thereof dealing with the admission in evidence of report of the neuropsychiatric examination of accused.

The question of mental responsibility of the accused was raised by the defense counsel after the prosecution had rested its case, when he stated:

> "The defense at this time would like to ask for a continuance so as to allow them to obtain the services of an expert witness which they deem necessary to their defense to have. This witness will be a psychiatrist from the 361st Station Hospital." (R 120).

Following the request of the defense counsel the prosecution stated:

> "The Prosecution, sir, would like to state that personally the prosecution asked the defense, prior to trial, if the defense wanted to have the accused exposed to examination for sanity. The defense at that time stated that they thought such examination was unnecessary. The prosecution then, on their own initiative, to preclude just such a possibility as has arisen at this time, requested that the accused be examined for sanity.
>
> "The accused were examined for sanity at the 361st Station Hospital. We do not have the psychiatrist at hand to date. We believe the testimony of the psychiatrist is not needed. We will introduce his testimony as an official document, and the findings thereof. * * *." (R 121)

and thereafter the following discussion took place:

> "LAW MEMBER: Where is the psychiatrist who made this report?
>
> PROSECUTION: The psychiatrist is located at the 361st Station Hospital and because of personnel conditions, it was felt he could not be spared.
>
> LAW MEMBER: Where is that?
>
> PROSECUTION: In Tokyo. The results of the psychiatric examination of the two accused are available to the court if the court so desires; if the court is in any way in doubt as to the ability of the two accused to distinguish right from

wrong at the time of the alleged offense, we have the result of the psychiatric examination for both of the accused.

LAW MEMBER: I would like to ask this question right here: Has the defense been advised of the fact that you have this material available?

PROSECUTION: The defense has been advised.

DEFENSE: The defense does not consider the material available to be of sufficient scope or sufficient depth to properly cover all the problems which are concerned in this trial. The accused were examined at the 361st Hospital in a sober condition, not under pressure, under conditions entirely dissimilar to those on the night the alleged incident took place.

LAW MEMBER: The court is at a loss to understand why, if they were examined under ideal conditions by a competent psychiatrist, why you would ask a continuance for still further examination by a psychiatrist.

DEFENSE: Because of the fact, sir, when the events we have been discussing here in court took place, these people were not under ideal conditions, nor does the report of the psychiatrist indicate what their analysis --

LAW MEMBER: The defense has examined this report and finds it lacking?

DEFENSE: Finds it lacking.

PROSECUTION: The defense refers to some unusual condition that he states the accused were under at the time of the commission of this crime. And the prosecution would merely like to point out that on several occasions lay witnesses were questioned as to the condition of the accused who on several occasions replied that they noticed nothing unusual about their condition, and it is a pure supposition on the part of the defense that there was anything unusual about their condition at the time.

PRESIDENT: The court will be cleared and closed." (R 121)

The motion for a continuance by the defense counsel was denied, and over his objection the report of Neuropsychiatric Examination of each accused was admitted in evidence (R 128,129; Pros Exs 21 and 22).

Since the conclusions reached by the medical officers, relative to the mental responsibility of the accused at the time of the commission of the alleged offenses, are neither acts, transactions, occurrences, events nor facts, their reports could not be admitted in evidence either as official writings (MCM 1928, par 117a) or as records made in regular course of business (28 USC 695). In CM 323197, Abney, 72 BR 149, and cases cited therein, the question here presented has been treated in considerable detail, and opinions reached that reports of the character stated above are not admissible under either of those two exceptions to the hearsay rule. In New York Life Insurance Co. v. Taylor, 147 F(2d) 297,303, a hospital record showing a diagnosis of a psychoneurotic state was excluded on the ground that such a diagnosis involved conjecture and opinion, a careful distinction being drawn, however, between this and less complex forms of diagnoses.

Notwithstanding the erroneous admission in evidence of the two reports in question, it is our opinion, under all the circumstances of the case, that the substantial rights of the accused were not thereby injuriously affected. The reasons advanced by the defense counsel in requesting a continuance in order that a psychiatrist from the 361st Station Hospital could be secured as a witness for the defense, were not, as is indicated above, well founded. Neither the testimony adduced at the trial nor statements made by the defense counsel in support of his request for a continuance are of such character as to raise a question with respect to the mental responsibility of the accused.

4. In addition to the treatment given the question in the review of the Corps Judge Advocate, it is felt that a more detailed discussion is necessary regarding the evidence tending to prove that the victim of accused's assault was in fact the same person who later died in a hospital in Sendai, Japan (Specification, Charge I).

The record of trial shows with sufficient clarity that the accused brutally assaulted a "rickshaw driver" at about 2230 hours on the night of 12 January 1948, in the city of Sendai, by striking him on and about the head with a policeman's club. The victim of their assault was examined by an Army medical officer at about 2320 hours on 12 January 1948. He estimated the age of the victim, a "quite short" man, to be forty-five or fifty years and found that he "had bad cuts on the head, under the eye, on the forehead, and on top of his head there was a very bad blow and it was very bloody. His head was badly swollen and his face was badly swollen. There was a pool of blood from the wounds and it poured over the clothing, especially from his head." (R 42) After the medical officer's examination the man was placed in an Army ambulance and taken to the University Hospital, Sendai, at about 2325 hours. The medical officer further testified that "The man was unconscious when I found him and he did not regain consciousness as long as I saw him" (R 43).

The testimony and reports of two Japanese doctors on duty at the University Hospital, show that on the night of 12 January 1948, at about

2400 hours, a Japanese man named Hasebe, Niwazo, forty-two years of age and about five feet three inches (160.5 cm.) in height was brought to the hospital. He was "smeared with blood," which came from several severe wounds on his head, face, and forehead. From their examination the doctors "knew that he would have no chance of living." At 1830 hours on 13 January 1948 Hasebe, Niwazo, died as a result of "cerebral lacerations and intracranial hemorrhage." The wounds causing his death were inflicted by "blunt forces, especially by blows with heavy weapon, not with a hard weapon as metal, not with cutting instrument" (R 45-52, Pros Exs 4 and 5).

Type "O" blood stains were found on accused Ottwell's trousers and jacket the day following the assault (R 59,116; Pros Ex 14). Hasebe, Niwazo, who was brought to the University Hospital at about 2400 hours 12 January 1948, in a critical condition due to severe head injuries and who died the following day as a result of these injuries, also had type "O" blood (R 51).

Although the rickshaw man assaulted by accused was not identified by name, it is, notwithstanding, in view of all the evidence adduced, the opinion of the Board that the victim of accused's assault and Hasebe, Niwazo, who died in the University Hospital on 13 January 1948, were one and the same individual. It is extremely unlikely that two persons of approximately the same age, "short" (5 ft. 3 inches in height), suffering with the same injuries and possessing the same type blood, were brought to the University Hospital, Sendai, at about 2400 hours on 12 January 1948.

5. The court was legally constituted and had jurisdiction of each accused and the offenses. No errors injuriously affecting the substantial rights of either 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 both the offense of murder and assault with a dangerous instrument with intent to do bodily harm, recognized as offenses of a civil nature and so punishable by penitentiary confinement by sections 273, 275 and 276, Criminal Code of the United States (18 U.S.C. 452,454,455).

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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

JAGK - CM 329971

9 JUN 1948

UNITED STATES v. Private EDWARD I. HALLETT (RA 42219143), 7745th Headquarters and Service Company	HEADQUARTERS COMMAND EUROPEAN COMMAND Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 25, 26 and 27 February 1948. Dishonorable discharge and confinement for life. Penitentiary.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Edward I Hallett, 7745th Headquarters and Service Company, did, at or near Hoechst/Main, Germany, on or about 18 October 1947, forcibly and feloniously, against her will, have carnal knowledge of Heidi Vierling.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of one previous conviction by summary court-martial was submitted. Three-fourths of the members present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the U.S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution

The events hereinafter described took place in the vicinity of Hoechst, Germany, on the evening of 18 October 1947. A U.S. Army Post Exchange was located in the residential area of Hoechst and at about 1730 hours on the evening in question the accused, in company with Private First Class William W. Murray and Mr. James J. Dolan, a maintenance employee at the Hoechst Motor Pool, went in a jeep to the post exchange where Murray and Dolan planned to procure their rations. The jeep was "marked 129" and had been borrowed from

the motor pool by Dolan. When the parties arrived at the post exchange it was agreed that the accused would remain in the jeep and wait until Dolan and Murray returned thereto. Dolan and Murray entered the post exchange, leaving the accused in the parked jeep, and when they returned about 15 minutes later the accused and the jeep were missing. They searched the area and finally walked up the street to Mr. Dolan's quarters where they waited for the accused to return with the vehicle. After approximately one hour the accused returned and when questioned by Murray and Dolan stated that he had to move from his original parking place and had become separated from them (R 17-18,24).

At about the time the jeep in question was parked, Heidi Vierling, a six-year old German girl with blonde hair who lived near the post exchange, was playing in the street with other German children including Ingeborg Schwinger, a 12-year old girl. Ingeborg testified that while they were playing "an American auto drove up and it stopped and Americans got out and went into the PX." One soldier remained in the jeep and then he "coaxed Kitty over there with his finger," saying, "Come here, I give you candy, in English." Then Heidi (Kitty) got into the jeep which "wanted to drive away." Ingeborg positively identified the accused in the court room as the soldier who had beckoned to Heidi to get into the jeep and had driven away with her. She also stated that she saw Heidi when she returned home after dark that evening and that Heidi was crying (R 29-34). On cross-examination Ingeborg stated that several days after the incident she was asked to "pick out" the soldier at the police station. She did not remember how many soldiers were present at this time. The witness stated further on cross-examination that on the day before the trial an American officer had told her where the man to be tried would sit in the court room but she asserted "I don't remember that anymore" (R 38).

Horst Schwinger, age 12, was playing with his sister, Ingeborg, and others near the post exchange on the evening of 18 October 1947. He testified substantially to the same facts as related by his sister except that he could not identify the accused as being the soldier who spirited Heidi away in the jeep (R 47).

Heidi Vierling was duly sworn and then questioned regarding her competency as a witness. She lived at "Hoechst, Luciusstrasse, 72" and had a brother, Ludwig, and a sister, Brigitte. She knew there was a God and that he did not like little girls who did not tell the truth. She asserted that if she did not tell the truth she would "get a spanking." Heidi stated that -

> "I was playing there at the P.X. with some children and then I went inside to see my mother and asked if I could play a little longer and she said yes, so I went over there and kept on playing with the children there, and then he drove up and asked me to go inside. And then I went inside and Brigitte also went inside and

then she started to cry and he put her outside again and he drove away quickly. And then he drove towards Sindlingen and he stopped, and then later he drove on again and then he pulled off my pants and then he hurt me with his finger. And then, after that was finished, we drove away again. And then we drove on and then he set me off down there by the gas station and then I walked home. And then I told it to my mother when I got home. That is all." (R 110)

In response to further questioning Heidi asserted that "he hit me and beat me" and that he "hurt" her "in the auto." "He didn't do anything" outside the jeep. When she got home there was blood on her legs and she was hurting "here below" but she did not know where the blood "came from." She told her mother what had happened to her (R 110,112).

The trial judge advocate requested Heidi to look around the court room to see if she could observe the soldier who had taken her away from the post exchange in the jeep. She looked at the persons in the court room and pointed to the accused (R 112).

On cross-examination Heidi testified as follows:

"Q. Do you remember talking to an officer in here the first day you came down here?
"A. Yes.
"Q. Did an officer tell you what to say when you came in here and sat in that chair?
"A. Yes.
"Q. How many times did he tell you, Heidi? Did he tell you three times, four times or five times?
"A. Yes.
"Q. Which one?
"A. Five times.
"Q. The first day you came down here you sat in the chair right where you are sitting now, didn't you?
"A. Yes.
"Q. Where did he tell you the soldier would be sitting?
"A. Here.

"DEFENSE (Maj. Jones): Let the record show that she pointed to the table at which the prosecution is now sitting." (R 115)

Upon being cross-interrogated further the witness stated that she was told on the morning of the trial that the accused would be "here" indicating the defense table (R 116).

Frau Emma Vierling testified that she was the mother of Heidi, Brigitte and Ludwig Vierling, and that she lived with her husband and children at Luciusstrasse 72, Hoechst, Germany. At about "five thirty and five forty-

five" on 18 October 1947, Heidi, who had been playing with the children in front of her house, disappeared and was not seen until about "seven-thirty and seven-forty-five." When she returned home Heidi appeared to have been crying, her underpants were missing and she was bleeding between the legs. Frau Vierling found both blood and mucus on her clothing. She questioned Heidi who stated to her as follows:

> "She told me that the soldier had lifted her out of the jeep and had laid her down in the meadow. She further stated that he lay on top of her and hurt her with his finger. And then she told me that she told him that she wanted to go home to take a bath - that I wanted to give her a bath - and then he had said no, she should stay there. And then she had cried - hollered - and then he had taken the small finger and stuck it down her throat. And then he had beaten her and then, for the reason that she hollered so much he put her in the jeep again then and drove her home - and had driven her home. Well then, he set her out - set her down outside the jeep and then she had gone home by herself." (R 128)

The witness asserted that the foregoing statement was made to her by Heidi immediately after she returned and that she thereupon took the child to an American doctor for examination. Three or four days later Heidi was examined again by a doctor and she was taken to a hospital (R 121-122).

First Lieutenant Charles E. Manthey, commanding officer of the Hoechst Dispensary, APO 757, identified and there was received in evidence as Prosecution Exhibit 1 a report of examination made on Heidi Vierling, dated 18 October 1947 and signed "Hays." The diagnosis was as follows:

> "Six year old female was examined, dried blood was on underclothing. Dried blood was present over pubic and perineal regions. Hymenal ring had been recently broken. No sperm or GC found" (R 61).

Lieutenant Manthey stated that he was the custodian of the records of which Prosecution Exhibit 1 was a part, that the handwriting on the exhibit was that of Captain Freeman Hays whom he had succeeded at the dispensary on 12 December 1947. Captain Hays had returned to the States (R 62).

Dr. Marie Clausert, a practicing physician of Frankfurt, Germany, testified that on 23 October 1947 she examined Heidi Vierling "externally" and found an inflamed condition in the upper inner legs and small tearings around the vaginal entry. There was a strong pus discharge from the vagina. She made a microscopic examination of the pus discharge which "definitely" established a "positive case" of gonorrhea (R 86-87).

Dr. Heinz Dietrich Zillman, a German physician of Frankfurt-am-Main, testified that on 24 October 1947 he found upon examination that Heidi Vierling was suffering from a positive case of gonorrhea and he explained to the court the drugs, including penicillin, which he had administered

to her (R 90).

The prosecution established by competent evidence that the blood found in the jeep, No. 129, shortly after the incident in question was the same type as that of Heidi Vierling; that a strand of hair found on the accused's fatigue clothes was similar to that of Heidi Vierling and that on Monday following the incident related, a pair of child's panties was found tucked under the seat of jeep No. 129 (R 40,91-108).

Mr. Ralph B. Trailkill, 52nd C.I.D., investigated the "Hallett case." After he had interviewed all the parties, including the German witnesses, he contacted the accused and advised him of his rights regarding self-incrimination. Upon being questioned the accused asserted that he had been in Belgium on furlough and was not in Hoechst on Saturday, 18 October 1947. Agent Trailkill then related to the accused some statements he had received from Private First Class Murray and Mr. Dolan. The accused then stated that he had probably returned from Belgium on Saturday instead of Sunday. He remembered going to the post exchange with Dolan and Murray to get rations and stated that while the other men were inside getting rations some Captain approached and told him that he was parked in a no-parking zone. He drove the jeep around the corner, got into the back seat and fell asleep. Later he went to Dolan's quarters and then visited a girl friend where he spent the night (R 66-76).

4. For the Defense

Mr. Marcus M. Russek, Administrative Officer, Post Guardhouse, Headquarters Command, testified that the accused had been a prisoner in the guardhouse since 22 October 1947 and that the reports of physical examination made on the accused the day after his admission and on 4 February 1948 showed "no disease found" (R 133-139, Def Ex 1).

First Lieutenant Robert V. Heitlinger, AMS, testified that he was the custodian of the medical records of the Second Medical General Dispensary, APO 757 (Frankfurt, Germany) and that there were no records at this dispensary indicating that the accused was or had been suffering from any disease. The witness stated however that there were "other places" where medical treatment could be had within the European Command (R 142).

Captain Albert J. Paquin, Second Medical Dispensary, was interrogated at length concerning the possible ways of transmitting gonorrhea between adults and children. He stated that the disease can be transmitted from one child to another through diapers or the finger tips of the nurse. An infected person might spread the disease by handling and caring for infants (R 143-146). On cross-examination, the witness was asked if he had a professional opinion, based on knowledge of Heidi's case, as to the cause of the disease. He replied that he had such an opinion but the court on objection thereto refused to allow the witness to state his opinion. In

response to further questioning Captain Paquin stated that a recent survey revealed that about 40 per cent of veneral cases among military personnel were being treated outside of the Army (R 148-149).

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

5. Certain procedural questions raised during the trial merit consideration. The defense counsel objected strenuously to the court's permitting the youthful witnesses to identify the accused in the court room, contending that a "rehearsal" had been conducted prior to trial and that an unnamed officer had instructed the witnesses as to the place where the accused would sit during the trial. This officer was referred to, during the trial, as having been "relieved." We note that by paragraph 2, Special Orders No. 4, Headquarters Command, European Command, dated 25 February 1948, which was the day the trial was commenced, the assistant trial judge advocate detailed by the order of 19 February 1948 appointing the court-martial was relieved and another officer was appointed in his place. The testimony of the infant witnesses indicates that such a rehearsal was conducted, that the witnesses were caused to view the court room and that they were shown the counsel table where it was indicated that the accused would be seated. Although we can see no objection to allowing expected witnesses, particularly children, to observe the court room and have explained to them generally the purpose of the proceedings, we condemn as did the Board of Review in CM 314258, English, 64 BR 73,93, any conduct on the part of prosecution or any one else which might tend to unfairly influence or instruct witnesses so as to cause them to draw conclusions or give testimony not wholly their own. And while there is not the slightest evidence of any coaching or suggestion at the trial of this case, as was shown to have occurred in the English case, supra, we think it highly improper that anyone should point out even before trial the place where the accused would be expected to sit, thereby unfairly influencing the identification of the accused by witnesses. But as we construe the testimony in the instant case we do not perceive that such irregularity resulted in prejudice to accused's substantial rights. In the first place the court was not required, in order to establish the identity of the accused as the culprit, to look to the testimony of the infant witnesses alone. Other and convincing proof established that he was the person who lured the victim from her playmates near the post exchange on the evening in question and took her to the scene of the offense.

The admission in evidence of Frau Vierling's account of what was reported to her by Heidi was challenged by the defense as being violative of the hearsay rule. It will be noted that the alleged statements were made by the child in response to questions put to her by her mother immediately upon her return to her mother and while she exhibited emotional tension resulting from the recent attack. In criminal trials for sex offenses the courts are unanimous in holding that it may be shown, not only by the testimony of the prosecuting witness, but also by other witnesses, that the prosecutrix made complaint of the outrage soon after its

commission (CM 218643, Bright, 12 BR 103, 112; CM 271731, Cooper, 46 BR 169,175). Such evidence "is not admitted as part of the res gestae, or as evidence of the truth of the things alleged, or solely for the purpose of disproving consent, but for the more general purpose *** of confirming the testimony of the ravished woman" (Commonwealth v. Cleary, 172 Mass 175, 51 N E 746). And the modern rule appears to be that the length of time intervening between the injury and the complaint will not of itself exclude proof of it, but the court will look into all the circumstances surrounding the facts and on these it may exercise its discretion as to the admission or rejection of the evidence (Higgins v. People, 58 N.Y. 377; Comm. v. Cleary, supra). Moreover, under the circumstances of the instant case, there is authority for admitting the mother's testimony as to what her child told her as substantive evidence upon the theory that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since the utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy" (Wigmore on Evidence, 2nd Ed., s. 1747). This theory was approved and applied in Beausoliel v. United States (107 Fed (2d) 292, 294) and in People v. Del Vermo (192 N Y 470, 484, 85 N E 690, 695). In Beausoliel v. United States, supra, a prosecution for assault upon a six year old child committed in the City of Washington, D. C., the Court of Appeals applied the so-called "spontaneous exclamation" exception to the hearsay rule and held admissible statements made by the child to her mother in response to questions concerning her physical condition shortly after the alleged assault which had been committed out of the mother's presence. We are of the opinion that the statements of Heidi to her mother were properly received in evidence.

We now consider the most important and a decisive aspect of the case. The accused was convicted of rape.

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent." (MCM 1928, par 149b, p 165.)

Carnal knowledge in rape, consists of penetration, however slight, of the sexual organ of the female by the sexual organ of the male. The expressions "carnal knowledge, intercourse or sexual commerce" have been uniformly held to be synonymous (8 LRA 297).

Heidi Vierling testified that the accused penetrated her with his finger and "beat" her. Her report to her mother was to the same effect. Although the accused's acts as shown by the evidence were most detestable and licentious, they did not constitute rape. In reaching its findings the court apparently inferred that the physical results of the assault,

the ruptured hymen and infection with gonorrhea, were conclusive evidence that a penetration of Heidi by way of accused's sexual organ had in fact been accomplished. But it is obvious from the evidence that both the physical injuries and the infection could have been accomplished by the accused by means other than by the insertion of his sexual organ into that of the victim. The inference, therefore, of sexual connection is not supported by evidence of any probative value rising to a greater degree than a mere possibility.

Among the lesser offenses which may be included in rape are assault with intent to commit rape, assault and battery, assault (aggravated or indecent) and an attempt to commit rape (MCM 1928, par 148b; CM 314071, Griggs, 64 BR 15,17). Inasmuch as there is no evidence in the record tending to show that the accused intended or attempted carnally to know the victim, as that term is hereinbefore defined, the record will not support a conviction of assault with intent to rape or of attempted rape. The evidence clearly shows however that the accused committed an aggravated and indecent assault upon Heidi in violation of Article of War 96, for which offense dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for not more than five years in a place other than a penitentiary is authorized (CM 314071, Griggs, supra).

6. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings as involves a finding of guilty of an aggravated and indecent assault at the time and place and upon the person alleged in violation of Article of War 96 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 in an institution other than a Federal penitentiary or reformatory for a period of five years.

Robert D. Silver, Judge Advocate

Gilbert E. Hoyt, Judge Advocate

Harley A. Lanning, Judge Advocate

JUN 21 1948

JAGK - CM 329971 1st Ind

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

TO: Commanding General, Frankfurt Military Post, APO 757, c/o Postmaster, New York, New York

1. In the case of Private Edward I. Hallett (RA 42219143), 7745th Headquarters and Service Company, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the findings as involves findings of guilty of an aggravated assault at the time and place and upon the person alleged in violation of Article of War 96, and upon approval of 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 five(5) years in a place other than a Federal penitentiary, correctional institution or reformatory, you will have authority to order the execution of the sentence.

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

(CM 329971).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General (221)
Washington 25, D.C.

28 MAY 1948

JAGH CM 329972

UNITED STATES v. Private MARCELLUS GRIFFIN (RA 14088232), Company "A", 97th Engineer General Service Battalion, APO 74.	PHILIPPINES-RYUKYUS COMMAND Trial by G.C.M., convened at APO 74, 22 January 1948. To be hanged by the neck until dead.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Marcellus Griffin, Company "A", 97th Engineer General Service Battalion, did, at Sta Cruz, Pampanga, Philippine Islands, on or about 23 November 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant William Dyer, a human being by stabbing him with a dagger.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions, two of which were by Summary Courts-Martial and one by Special Courts-Martial, was introduced. He was sentenced to be hanged by the neck until dead, all members present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the Prosecution.

On the night of 23 November 1947, a body, identified as that of Sergeant William Dyer, was brought to the dispensary at Camp Angeles

(R 7). The body was immediately examined by a medical officer who pronounced the body "Dead on Admission." Form No. 52b, Medical Department USA, an "Emergency Medical Tag," which was made out at the time of this examination, and which recited this pronouncement, was duly identified and admitted in evidence as Prosecution's Exhibit No. 1 (R 7-8). A photograph, identified as a photograph of the deceased, Sergeant Dyer, was admitted in evidence as Prosecution's Exhibit No. 2 (R 8). The body of the deceased Sergeant Dyer, was taken to the 20th Station Hospital where an autopsy was performed on it by a medical officer. The autopsy protocol executed by the medical officer was admitted in evidence as Prosecution's Exhibit 3. This exhibit recites, and the medical officer who performed the autopsy testified, that the cause of death of Sergeant Dyer was internal hemorrhage due to stab wound of the thorax and laceration of pulmonary vessels (R 9). A photograph, identified as a photograph of Sergeant William Dyer, was admitted in evidence as Prosecution's Exhibit 4 and was further identified by the medical officer who performed the autopsy, as the body upon which he performed the autopsy reported in Prosecution's Exhibit 3 (R 9-10).

Private First Class Dillon L. Keith, and Technician Fourth Grade James R. Harvey testified that on the night of 21 November 1947, two days prior to the alleged offense, Sergeant Dyer (deceased) was standing at a counter in a tavern drinking a "coke." He was intoxicated; he had taken one drink out of the "coke" bottle and then had set it back on the counter. At that time, the accused walked up to the counter, picked up the "coke" and drank it. Dyer asked the accused "What are you doing with my coke - that don't belong to you." Accused swore at Dyer and then Dyer said "You don't be cussing me" and then grabbed accused by the collar. Witness and another soldier intervened to quell the disorder and they took Dyer back to camp. As they were leaving, the accused said, "What's wrong with that man - is he crazy?", and witness Keith heard accused say, "That's alright, I'll be seeing him some day," or words to that effect (R 12-15).

Miss Linda E. Gonzalez, Miss Perla Osmena and Miss Catrena Beladad, prosecution witnesses, identified the accused and testified substantially as follows; on the night of 23 November 1947, they were with the accused in "Leona's Bar" sitting at a table and drinking gin and beer. Sergeant Dyer (deceased) came in and told accused, on three different occasions, "Don't look at my face, look at the table." The witness Gonzalez, fearing that trouble was in the offing, requested accused to take them (accused's female companions) home. They left the bar and walked about 60 or 70 yards down the road when Sergeant Dyer, who was following them, came up to talk to one of the girls. Accused spoke to the witness Gonzalez in Spanish, telling her that he did not want Sergeant Dyer to come with them. When Dyer heard accused speak in Spanish he told accused, "Hey, you are an American and I am an American - you better speak English so I can understand what you are talking about." Accused went over to

Dyer and told him that it was none of his (Dyer's) business whether he talked in English, Spanish or Tagalog and then struck Dyer with his right hand. Witness Gonzalez testified that after accused struck Dyer she looked at him (accused) and saw him holding a knife in his right hand, which, she estimated, was about four inches long. At no time did Sergeant Dyer strike the accused. After Dyer was stabbed, he staggered, made no sound, did not fall, stopped for a minute and then turned back to the bar. The accused ran away after the stabbing and the witnesses Gonzalez and Osmena saw accused about 20 minutes later at Osmena's house. He still had the knife with him and it had blood on it. Witness Gonzalez asked accused if he used the knife on Sergeant Dyer, and he replied, "yes" and "That he was afraid that he had killed him" /Dyer/ (R 23-36).

Private Dan E. Brown testified that on the night in question he saw Sergeant Dyer and the accused with his lady companions in Leona's Bar. He heard no words between accused and Dyer. Dyer left first and then the accused and girls left. The accused and the girls had overtaken Dyer "and then Griffin turns him around and hits him and I couldn't see whether there was a knife or not" (R 12). Witness did not see Dyer hit accused at any time. Dyer fell back with his hands up, then staggered back and collapsed near the door of the tavern with blood coming out of his nose and mouth. A bystander caught him and took him to the dispensary in a jeep (R 18).

Captain Charles W. Jagoe, Commanding Officer of the 48th Criminal Investigation Division, testified in pertinent part, that at about 2200 hours, 23 November 1947, he investigated the incident involving the deceased, Sergeant William Dyer, and that at about 2315 hours of the same date, the accused was apprehended and brought to the stockade office for interrogation. A strong smell of alcohol was detected on accused's breath. He was taken to the dispensary for a blood alcoholic test where the test was made but no medical opinion rendered as to accused's state of intoxication. The only opinion advanced by the medical officer was that the accused had been drinking. He based this opinion on the fact that there was an odor of alcohol on accused's breath. After duly advising accused of his rights against self-incrimination under the 24th Article of War, Captain Jagoe asked accused if he cared to make a statement that could help clear up the case under investigation. "The accused was only too willing to make a statement." A sworn statement was identified as the statement made and signed by the accused and was offered in evidence. The defense objected to the admission of accused's statement in evidence on the ground that the accused was drunk at the time of its making and that there was an alcoholic test taken of the man and it shows that he was drunk. The Law Member thereupon questioned Captain Jagoe and the following colloquy ensued:

"LM: Did you ask all of these questions of the accused?

WIT: Yes, sir. I did.

LM: Did he give coherent answers - talk in a sensible manner?

WIT: Yes, sir. He spoke coherently - however, his manner of speech was far different from the normal Negro and it would be very hard to detect, at the time how blurred his speech would be - he has a Negroid accent - however, he had an overpowering odour of a cheap type of alcohol about him from his breath. In my past experience with this man, that condition seemed to be normal.

LM: In your opinion, would you say that he was drunk?

WIT: I would not say he was drunk, but I would say he was slightly under the influence of intoxicating beverage.

LM: Would you state, again, what the Assistant Post Surgeon told you regarding his situation?

A. I believe his name was McGregor - if he thought that the man was drunk - the doctor went to a rather involved discussion as to how hard it was to actually state as to whether a person was actually intoxicated or not. He stated above all that he could not detect from seeing the man whether he was intoxicated or not - however, as a result of the analysis, he could tell more, explaining to me, at the time, that even that was not a sure system since a person, not used to much drink, after a few drinks can show a fairly high alcoholic content and be absolutely dead drunk, where a chronic alcoholic can have a high blood alcoholic content and still be fairly sober, stating at the time that it all depended on the constitution and the amount of resistance to alcohol that each individual had." (R 38-40).

Captain Michael A. Salomone, the Post Surgeon of Camp Angeles, was then called as a witness and with reference to an unsigned copy of the blood alcoholic test report in question, (which was not adduced in evidence but which was identified by the witness) he testified as follows:

"Questions by prosecution:

* * *

Q. I will show you this paper and ask you to identify it?

A. This is a laboratory report of a blood specimen, showing 2.3 miligrams per cc of blood.

Q. Is this the usual form to which they execute when a blood examination is called for?

A. Yes, sir.

Q. Would you consider that an official report if it were the original?
A. If it were signed by the laboratory officer.

Q. It would be an official report?
A. Yes, sir.

* * *

Q. As a medical man, will you tell the court what physical effect would a percentage of 2.3 miligrams per cc in the blood of an individual have?
A. I better clarify something - you cannot commit a man as drunk on a laboratory report no matter how high it is for two reasons - one is the fact that each one has a certain tolerance and a chronic alcoholic can have a high level and be in full possession of all his senses - whereas a person with a lower tolerance will tend to get intoxicated with a not so very high alcohol level - and the second thing is the possibility of a technical error in the laboratory - it is a technical laboratory test and subject to the error of the individual.

Q. I will ask you - if a person of 2.3 miligrams per cc of blood was to be determined and taking away any possibility of error committed by the examining individual, would a man of ordinary normal life be physically effected by a finding of 2.3 miligrams per cc of blood?
A. Yes, sir. He would - he would probably be intoxicated with 2.3 miligrams per cc of blood - and I say, outside of the fact that we must take it, 2.3 miligrams per cc of blood is stated in the Laboratory Manual of the United States Army as being a state of intoxication.

* * * EXAMINATION BY THE COURT

Questions by members of the court.

Q. If this report were handed to you, would you say from looking at that blood test that the man was definitely drunk?
A. No, sir." (R 40-41)

Accused's pre-trial statement was then admitted in evidence as Prosecution's Exhibit 6 (R 42). In this statement accused's recital of the events transpiring prior to the alleged offense corroborates substantially the testimony of Miss Gonzalez, Miss Osmena and Miss Beladad. But, with respect to the incident of stabbing Sergeant Dyer, it states in pertinent part:

"* * * We left the place and walked across the boardwalk and then went down the road about 200 yards. Then the fellow that I had the arguement with last night came up to us and hearing us speaking spanish said 'Don't speak no more spanish'. He

then swung at me. I had a knife in my pocket, in the right hand side pocket, the same knife that you have just showed me. I took the knife out and held it in my hand so when he swung at me I stabbed at him and I believe I struck him in the arm up by the shoulder. * * * I then took off to a friends house but nobody answered me so I went to my house. My wife was in the house next door and when she heard me in the house she came over to me and took me into Linda's house. I had the knife in my hand all the time. I went over to Linda's house and hid the knife under the floor near the wall. * * *."

Captain Jagoe further identified a knife as the knife found at the home of Miss Pearl Osmena on the night of the investigation of the incident, and as the knife shown to and identified by the accused during his interrogation "as being the knife he struck Sergeant Dyer with." This weapon was admitted in evidence, over objection by the defense, as Prosecution's Exhibit No. 7 (R 42).

W.D. AGO Form 8-81 (report of laboratory examination of a knife) reciting, "Reddish stains on blade gave positive test for blood. Stains were too old for typing or cross-matching of cells," was admitted in evidence, without objection, as Prosecution's Exhibit 8 (R 43).

b. For the Defense.

Private First Class Melvin McCoy corroborated the girls' testimony that the accused left the bar ahead of Dyer. The accused, after being advised of his rights, testified under oath that on Friday night (21 November 1947) he handed a bottle to Sergeant Dyer and Dyer slapped him and kicked him against the counter and picked him up by the collar; others pulled Dyer away from the accused; accused made no resistance because his "toes were just touching the ground" and Dyer was "a little larger" than accused (R 50). On 23 November 1947, accused, Linda, Perla, Catrena and Sergeant Doughty were sitting in the corner of the bar drinking beer when Dyer came in. After a while Dyer told the accused "Don't look at me - look at your table"; accused looked at his table all the time and he and the three women got up to go. They got outside in the middle of the road and the accused was talking with Linda when he heard Sergeant Dyer say "Don't speak that mess" or something like "I'll knock you down or break your neck"; accused looked around and Dyer was walking up to him so he struck at Dyer and hit him and ran; when he got back to the house, Linda saw the knife in his hand and he put it under the edge of the floor; he hit Dyer because he was afraid; Dyer didn't strike him but came up from behind; he had been fixing light fixtures with the knife and was taking it home from his girl friend's house (R 51,52). On examination by the court he testified (R 54):

"Q. When Sergeant Dyer approached you from the rear - when you first noticed him, did you make any effort to run away?
A. Yes, sir. I jumped behind Linda.

Q. And immediately stabbed him?
A. He was hitting at me when I jumped behind her - I jumped behind her and

Q. Did you attempt to run away - I mean before you hit him?
A. He was across from me - I jumped behind her and hit at him and kept going.

Q. Did you make any attempt to run away before striking him?
A. Yes, sir. I jumped behind her.

Q. Was there anything on the road to prevent you from running away?
A. No, sir. I run - I crossed the fence over there when I was running."

On further examination accused testified that Dyer had threatened him on the afternoon of 23 November 1947, but he did not see a weapon in Dyer's possession (R 55). He did not mean to kill Dyer (R 55).

4. The accused is charged and convicted of the murder of Sergeant William Dyer in violation of Article of War 92. Murder is defined in the Manual for Courts-Martial as the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. "Malice aforethought" is a state of mind preceding or co-existing with the act by which death is caused, and among others, may involve an intention to cause the death of, or grievous bodily harm to the person (except when death is inflicted in the heat of sudden passion, caused by adequate provocation) or, with the knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to the person killed, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or, by a wish that it may not be caused (Par 148a, MCM, 1928).

The evidence is undisputed that the accused killed Sergeant William Dyer at the time and place and in the manner alleged, without justification or excuse. This fact is amply established by the uncontradicted testimony of four eye witnesses who observed the commission of the deadly assault by the accused upon the alleged victim, as well as by the confession and testimony of the accused. That the killing was accompanied with malice aforethought, within the meaning of the foregoing definition, is reasonably inferable from all the circumstances surrounding the deliberate, brutal stabbing. It is manifest from the character of the weapon used, the vicious manner in which it was used, from the surreptitious manner in which accused carried and engaged the concealed dagger and his illogical excuse for carrying it on a social occasion. Moreover, malice

is presumed from the use of a deadly weapon (par 112a, MCM, 1928). Although a knife may not inherently be a deadly weapon it becomes one when so used that it is likely to cause death or serious bodily injury (CM 223574, Rowe, 14 BR 35; CM 274678, Ellis, 47 BR 289; Acers v. United States, 164 US 388, 41 L.Ed. 481).

While malice aforethought may exist when the act is unpremeditated (MCM, 1928, supra), the evidence supports an inference that the accused's criminal act was premeditated. This might reasonably be inferred from accused's feeling of hatred toward the deceased as expressed by him on several occasions and by his carrying a concealed weapon under circumstances pointing to preparation for the commission of a felony. The evidence shows that two nights prior to the alleged incident accused was involved in a disorder with the victim in connection with accused's appropriation of Dyer's coca cola. After a mild scuffle between them accused expressed the retaliatory remark, "That's alright, I'll be seeing him some day." Accused's hatred was further evidenced by his remark to one of his women companions just before the alleged incident as Dyer approached them when he told Linda that he did not want Sergeant Dyer to come with them and by his reproachful statement to Dyer made contemporaneously with the stabbing, to the effect, that it was none of his (Dyer's) business if he (accused) spoke to Linda in Spanish. Thus, the Board of Review concludes that all the basic elements of the alleged offense existed at the time of the commission of the act; that all the essential elements of the offense have been adequately established; and that the offense committed constitutes murder in violation of Article of War 92.

The record of trial indicates that at the time of accused's apprehension and confession of guilt, which occurred within approximately two hours after the commission of the alleged act, he appeared to have been drinking. Some evidence of a blood alcohol test was adduced to show that at this time accused had about 2.3 miligrams of alcohol per cc of blood and that normally such an alcohol content represents a state of intoxication. However, the record contains evidence adduced from a competent medical officer that such a showing is not conclusive proof of intoxication since a state of intoxication depends, in greater degree, upon the individual's physical tolerance to alcohol and upon the margin of possible technical error in the laboratory test. In the opinion of the apprehending officer and the medical officer who examined the blood alcohol report, the accused was not considered to be drunk. This opinion was based primarily on accused's reputation as a chronic alcoholic and upon accused's acts and conduct at the time of apprehension. While it may be conceded that accused had been drinking on the night in question and while his blood test and the testimony of the apprehending officer indicate that some alcohol was detected on his breath and in his system, no issue of drunkenness was raised at the trial as a defense, nor was any independent evidence of drunkenness adduced from any of the witnesses to the alleged

act to establish such fact. It was only urged by counsel that due to the lack of sobriety of accused the confession was not voluntary and that therefore the confession was not admissible in evidence. Intoxication, in itself, excepting such a degree of intoxication as would render him unconscious of what he was saying, is not sufficient to render a confession inadmissible. That fact goes only to its weight and is a matter for the consideration of the court (CM 228891, Robnett, 16 BR 363). In view of all the evidence before the court with respect to accused's conduct and behavior before and after the offense, the marked absence of any evidence of drunkenness in the testimony of the eye witnesses to the unlawful act and the ability of the accused to recount, with a corroborated degree of accuracy, all events which transpired and surrounded his actions, it is the opinion of the Board of Review that the court was justified in its ruling on the admissibility of accused's confession in evidence and that no error prejudicial to accused's rights was committed.

While there was some evidence of hatred, bitterness and resentment existing between the accused and deceased, such evidence is not of such caliber, recognized by law, to constitute adequate provocation which would reduce the offense to one of the forms of manslaughter. (CM 248793, Beyer et al., 50 BR 42; CM 255438, Hurse, 50 BR 116).

5. The accused is 34 years of age and enlisted at Camp Blanding, Florida, on 17 April 1946.

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

R. Hottenstein, Judge Advocate

J. W. Lynch, Judge Advocate

Joseph T. Brock, Judge Advocate

(230)

JAGH CM 329972 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 7 JUN 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Private Marcellus Griffin (RA 14088232), Company "A", 97th Engineer General Service Battalion.

2. Upon trial by general court-martial this soldier was found guilty of the murder of Sergeant William Dyer, in violation of Article of War 92. Evidence of three previous convictions, two of which were by summary court-martial and one by special court-martial, was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. In a letter dated 29 March 1948, addressed to The Judge Advocate General, and attached to the record of trial, the reviewing authority recommends that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life. Also attached to the record of trial is a letter dated 11 February 1948, addressed to the Commanding General, Philrycom, APO 707, submitted by the accused's defense counsel recommending clemency.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but since the homicide was the result of "bad blood" based on quarrels and of provocative conduct on the part of deceased, I recommend that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years, that the sentence as thus commuted be carried into execution and that a United States Penitentiary be designated as the place of confinement.

4. Inclosed is a draft of letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry the foregoing recommendations into effect, should they meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 129, 24 June 1948).

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

JAGK - CM 329973

15 JUN 1948

UNITED STATES	)	TWELFTH AIR FORCE
v.	)	Trial by G.C.M., convened at Biggs Field, Texas, 20 and 21 January 1948. Dismissal and total forfeitures
First Lieutenant JEAN F. JOLIN (O-2056606), 86th Bombardment Squadron, 47th Bombardment Group, Biggs Air Force Base, Texas	)	

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 Ninety-sixth Article of War.

Specification 1: In that 1st Lieutenant Jean F. Jolin, 86th Bombardment Squadron, 47th Bombardment Group (Light) NA, did, on or about 6 September 1947, wrongfully and unlawfully operate a motor vehicle upon the public streets of El Paso, Texas, at an excessive rate of speed; to-wit; 75 miles per hour.

Specification 2: In that 1st Lieutenant Jean F. Jolin, ***; did, on or about 1 October 1947 at El Paso, Texas, unlawfully operate a motor vehicle upon the public streets of El Paso, Texas, while under the influence of intoxicating liquor.

ADDITIONAL CHARGES

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

Specification 1: In that First Lieutenant Jean F. Jolin, ***, having received a lawful command from Major Lawson Clary, Jr., his superior officer, not to operate any motor vehicle on Biggs Field until so permitted by orders from Headquarters, 47th Bombardment Wing, Light, Biggs Field,

did at Biggs Field, on or about 15 November 1947, wilfully disobey the same.

Specification 2: In that First Lieutenant Jean F. Jolin, ***, did, on or about 15 November 1947 at Biggs Field, Texas, wrongfully operate a motor vehicle on Biggs Field, Texas, while under the influence of intoxicating liquor.

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

Specification: In that First Lieutenant Jean F. Jolin, ***, did, at Biggs Field, on or about 16 November 1947, with intent to deceive 1ST LT JOSEPH H. BRADLEY, Provost Marshal at Biggs Field, officially state to the said 1ST LT JOSEPH H. BRADLEY, that he (1ST LT JEAN F. JOLIN) was not driving a 1946 Buick sedanetta, Missouri state license 754-924 on Biggs Field on or about 15 November 1947, which statement was known by the said 1ST LT JEAN F. JOLIN to be untrue in that he was in fact driving a 1946 Buick sedanetta, Missouri state license 754-924 on Biggs Field on or about 15 November 1947.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service 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 Twelfth Air Force Staff Judge Advocate's review except as hereinafter noted.

4. With respect to the findings of guilty of Specification 1, Charge I (Add'l Charges) the evidence shows that although the accused, in an effort to return his guest to her home on the evening of 15 November 1947 and while somewhat intoxicated did operate his motor vehicle a short distance on the Biggs Field reservation, in violation of Major Clary's order, the circumstances do not indicate such a deliberate defiance of military authority as is generally embodied in the phrase "willfully disobey the same" (CM 223336, Wills, 49 BR 195, 198). The evidence however does support a finding that accused failed to obey the order in violation of Article of War 96.

With reference to the findings of guilty of Charge II (Add'l Charges) and its specification, the statement made by the accused to the provost marshal, "Why should I take the test when I was not driving the automobile?" although tending to deceive inasmuch as he had been driving the automobile, was voluntarily retracted by the accused a short time thereafter and under

more sober circumstances. It is obvious that such behavior would not tend to enhance the integrity of his official utterances but we cannot say that the statement in question, considered in the light of all the circumstances, was such an impeachment of accused's personal honor as to indelibly compromise his character and position as an officer. The evidence in this respect is legally sufficient to support a finding of guilty of the specification in violation of Article of War 96.

5. Records of the Department of the Army show that the accused is 23 years of age and unmarried. He completed high school and enlisted in the Air Corps as a private on 17 February 1943. His efficiency ratings are "Excellent." On 20 May 1944, after completing pre-flight and advanced courses in navigation he was appointed second lieutenant, Air Corps, AUS. He completed 15 combat missions (100 hours) over enemy territory in the European Theater. On 13 October 1944, he served as crew member of a B-24 (Liberator) bomber which departed from a base in Italy on a bombardment mission over Eastern Germany. After completing its run over the target the bomber sustained damage from enemy fire and descended in flames. The accused, together with other members of the crew, parachuted to land where he was held a prisoner of war until 29 April 1945. He has been awarded the Air Medal and Purple Heart.

6. The court was legally constituted and had jurisdiction over the person and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I (Add'l Charges) as involves a finding that at the time and place and under the circumstances alleged the accused failed to obey the described command of his superior officer; legally sufficient to support only so much of the findings of guilty of Charge II (Add'l Charges) and its specification as involves a finding of guilty of the specification in violation of Article of War 96; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Celestin A. Sibert, Judge Advocate

Gilbert Goldsborough, Judge Advocate

Harley A. Fleming, Judge Advocate

JAGK - CM 329973 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 28 JUN 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 Jean F. Jolin (0-2056606), 86th Bombardment Squadron, 47th Bombardment Group, Biggs Air Force Base, Texas.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully operating a motor vehicle upon the streets of El Paso, Texas, at an excessive rate of speed, to-wit, 75 miles per hour, and of operating a motor vehicle upon such streets while under the influence of intoxicating liquor in violation of the 96th Article of War (Chg I, Specs 1 and 2); of willfully disobeying a lawful order of his superior officer to not operate any motor vehicle on Biggs Field until permitted by further orders and of wrongfully operating a motor vehicle on Biggs Field while intoxicated also in violation of the 96th Article of War (Add'l Chg I, Specs 1 and 2); and of making a false official statement to First Lieutenant Joseph H. Bradley, Provost Marshal, Biggs Field, Texas, in violation of Article of War 95 (Add'l Chg II and its Spec.). 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 Twelfth Air Force Judge Advocate, which has been adopted in the accompanying opinion of the Board of Review as a statement of the evidence and the law in the case with the following exceptions. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I (Add'l Charges), as involves a finding that at the time and place and under the circumstances alleged the accused failed to obey the described command of his superior officer; legally sufficient to support only so much of the findings of guilty of Charge II (Add'l Charges) and its specification as involves a finding of guilty of the specification in violation of Article of War 96; legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

In the early morning of 6 September 1947, Radio Patrolmen James H. Parks and V. D. Hardin of the El Paso, Texas, police department, while cruising in the eastern suburbs of the city observed a black Buick

automobile travelling at a high rate of speed. They followed the vehicle on several streets as it travelled in the general direction of William Beaumont General Hospital and "clocked" its speed which they determined to be between 75 and 78 miles per hour. When the police officers brought the speeding Buick to a halt they found that the accused was the driver thereof. They took him in custody and after a hearing before civil authorities the accused paid a fine of $100 to the City of El Paso. On 1 October 1947 the aforementioned police officers again arrested the accused when they observed the Buick automobile he was driving to be "swaying over the road" near the Dyer Street Underpass in El Paso. They took him to the police headquarters where they caused a laboratory test to be made of specimens of his urine. The test revealed "365 milligrams per 100 cubic centimeters of alcohol in his urine" which is considered by the medical authorities as the "stuper" stage of intoxication with "marked decrease in response to stimuli, muscular incoordination, approaching paralysis." For this offense the accused, after a hearing by civil authorities, was fined $50 and costs which he paid. On 15 October 1947, Major Lawson Clary, Jr., accused's commanding officer, issued a written order to the accused forbidding him to operate a motor vehicle on Biggs Field, Texas, until so permitted by further orders. The accused acknowledged receipt of the order by indorsement thereon. On the evening of 15 November 1947, the accused attended a party at the Officers Club, Biggs Field. He became intoxicated and in this condition proceeded to drive his car in order to take his lady friend to her home. Near the gate of the field the car struck an enlisted soldier, also shown to have been in an intoxicated condition. The soldier suffered only minor injuries. The accused was taken into custody by military authorities. He had a distinct odor of alcohol on his breath and a blood alcohol test made at the station hospital showed a level of "1.9 milligrams per cc." The medical and other testimony tended to show that the accused was "mildly intoxicated". While he was being given the alcohol blood test the accused protested to Lieutenant Bradley, the provost marshal, saying, "Why should I take the test when I was not driving the automobile." Shortly thereafter, and while sober the accused voluntarily stated to Lieutenant Bradley that he was driving the automobile on the occasion in question. The accused elected to remain silent at the trial. Evidence introduced on his behalf tended to show that he had a good reputation as an officer and gentleman.

4. Records of the Department of the Army show that the accused is 23 years of age and unmarried. He completed high school and enlisted in the Air Corps as a private on 17 February 1943. His efficiency ratings are "Excellent." On 20 May 1944, after completing pre-flight and advanced courses in navigation he was appointed second lieutenant, Air Corps, AUS. He completed 15 combat missions (100 hours) over enemy territory in the European theater. On 13 October 1944, he served as crew member of a B-24 (Liberator) bomber which departed from a base in Italy on a bombardment

mission over Eastern Germany. After completing its run over the target the bomber sustained damage from enemy fire and descended in flames. The accused, together with other members of the crew parachuted to land and he was held a prisoner of war until 29 April 1945. He has been awarded the Air Medal and Purple Heart.

5. Attached to the record of trial is a letter to the appointing authority signed by the president and one other member of the court recommending clemency.

6. I recommend that only so much of the findings of guilty of Specification 1, Charge I (Add'l Charges), as involves a finding that at the time and place and under the circumstances alleged the accused failed to obey the described command of his superior officer, that only so much of the findings of guilty of Charge II (Add'l Charges) and its specification be approved as involves a finding of guilty of the specification in violation of Article of War 96; that the sentence be confirmed but in view of the accused's creditable record, including his service in combat, and all the circumstances of the case, I further recommend that the sentence be commuted to dismissal, a reprimand and forfeiture of $100 pay per month for six months, and that the sentence as thus modified be carried into execution but that execution of the dismissal be suspended.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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

JAGN-CM 330028

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, 15 and 17 December 1947. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private FRANK J. STOKES (15232835), 388th Transportation Truck Company.	)	

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 92nd Article of War.

Specification: In that Private Frank J. Stokes, 388th Transportation Truck Company, did, at Mannheim-Waldhof, Germany, on or about 13 September 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one German civilian, Fanny Ackermann, a human being by shooting her with a pistol, Belgian Automatic, Serial Number 40535.

Accused pleaded not guilty to the Charge and Specification. He was found guilty of the Specification "except the words 'with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation' and the words 'Belgian Automatic, Serial Number 40535,' substituting therefor the words 'unlawfully.' Of the excepted words, NOT GUILTY; of the substituted word, GUILTY," and of the Charge "NOT GUILTY but GUILTY of violation of the 93d Article of War." Evidence of four

previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated the 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 50½.

3. In view of the disposition which the Board is required to make of this case it is unnecessary to review the evidence other than to show the following proceedings:

"PRESIDENT: For purposes of clarification, I am going to restate the question.

Q Approximately how long after the shot was fired was Mrs. Ackermann put in the ambulance?
A Ten or fifteen minutes.

Q At that time, was Frank Stokes still present in the house?
A No.

Q At what time after the shooting did he leave the scene?
A He left when I was at the telephone; he did not come back.

Q Did Mrs Ackermann's actions indicate that Frank Stokes was an intruder in her house or did her actions indicate he was a regular visitor, or at least, known to Mrs. Ackermann? Did he act like an intruder in her house?
A I cannot say that.

Q I insist that the witness will give me an answer; she was present in the room. Were Mrs Ackermann's actions such as to indicate that this man was a stranger to her or well known to her?
A I cannot say that. I only know that they didn't know each other before. They were talking together in a friendly way and there were no arguments.

Q They were talking together in a friendly way? (To interpreter) Repeat the question and ask her if that is correct, that the whole atmosphere was a friendly atmosphere?
A Yes, there was no anger.

Q You stated already in your testimony that someone came to the window; who came to the window?

A A soldier - a colored soldier - I believe a friend, a comrade, of him.

Q And what happened?
A They were talking together and Frank then went to the door and got the pistol and held it high up in the air and then the other one left.

Q Were his gestures menacing? Toward the person at the window, I mean.
A I can't say that. I couldn't say whether they were menacing.

Q Did the person at the window attempt to insult Frank Stokes?
A I don't think so, but I don't understand English.

Q You can tell very well from people's manner whether their actions are hostile or friendly, or somewhere between hostile and friendly. Answer my question.
A He came to the window and they talked together and then Frank got the pistol and held it high up in the air and then the other one ran away.

Q Fantastic! I will repeat my question. Was the atmosphere between Frank Stokes and the man at the window hostile or friendly, or somewhere between hostility and friendship?
A I cannot say that. They didn't seem to be hostile - nor friendly - I don't know.

Q A man goes to a window, pulls a gun, and makes another man run away from the window and yet the action is not hostile?

DEFENSE: I object. I believe the president is assuming facts not in evidence.

LAW MEMBER: I am going to have to sustain the objection. Apparently the president is trying to get what she actually saw and inferred from the action but she is either unable to understand the question or she just doesn't know.

PROSECUTION: May it please the court, the prosecution feels that the witness has already stated that Frank Stokes held the pistol in the air and the man ran away. She doesn't know - she has stated she doesn't know - whether he was threatened or not, due to the fact that she doesn't understand the English language to that extent.

The law member then made an off-the-record statement.

DEFENSE: I object to that statement by the law member. I request that all this be included in the record, sir" (R. 14, 15).

The record does not contain further reference to the off the record statement.

In response to a request from The Judge Advocate General, that in order to insure the record of trial contains a full and correct statement of what occurred a certificate of correction be obtained, the reviewing authority advised that a certificate of correction disclosing the contents of the off the record statement made by the law member could not be supplied since the court reporter records do not contain the matter objected to by the defense, the law member is in the United States on emergency leave, and the defense counsel does not recall what statement was made by the law member to which defense counsel objected.

4. Article of War 33 provides in part, "Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it."

Respecting the contents of the record of trial it "will set forth a complete history of the proceedings had in open court in a case" (par. 85b, MCM, 1928).

Upon appellate review the accused is entitled to have his case considered precisely as defined in the cited provisions of the Articles of War and the Manual. Without a complete history of the proceedings had in open court the statutory review afforded under Article of War 50½ may not be accomplished. Denial of this right of review, without fault on his part, is error injuriously affecting the substantial rights of the accused, incapable of being cured by the remedial provisions of Article of War 37. In similar situations the Board of Review has held that the omission of an important portion of the record is fatal (CM 328619, Horton (1948); CM 227459, Wicklund, 15 BR 303; CM 192451, Hajek; CM 156085, Mayo; CM 156084, Alsup). State courts have so held (State v. McCarver, 20 S.W. (Mo.) 1058). In the instant case it is impossible to determine whether or not the statement of the law member, made in open court during the course of the trial, was of such injurious nature or of such importance as to constitute prejudicial error. Under these conditions it is not possible to afford the accused the fair statutory review

of his case required by Article of War 50½, and the findings and sentence must be disapproved.

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.

_____, Judge Advocate.

Frank C. Alfred, Judge Advocate

George S. Springston, Judge Advocate

JAGN-CM 330028 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 Frank J. Stokes (15232835), 388th Transportation Truck Company, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated.

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

(CM 330028).

1160

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.

11 MAY 1948

JAGQ - CM 330036

UNITED STATES v. Private ROBERT L. HOOD (AF 35407245), 2320th Engineer Aviation Company, Marianas Air Materiel Area (Provisional), APO 264, c/o Postmaster, San Francisco, California, attached Squadron R, 4000th Air Force Base Unit.	WRIGHT-PATTERSON AIR FORCE BASE Trial by G.C.M., convened at Dayton, Ohio, 26 March 1948. Dishonorable discharge (suspended) and confinement for eighteen (18) months. United States Disciplinary Barracks.

OPINION of 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 in the Office of The Judge Advocate General and there found legally insufficient to support the findings and 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Corporal Robert L. Hood, 2320th Engineer Aviation Company, Marianas Air Materiel Area (Provisional), attached Squadron R, 4000th Air Force Base Unit, did, at Marianas Air Materiel Area (Provisional), APO 264, c/o Postmaster, San Francisco, California, on or about 26 July 1947 desert the service of the United States and did remain absent in desertion until he was apprehended at Springfield, Ohio, on or about 2 January 1948.

He pleaded guilty to the specification "except the words 'desert' and 'in desertion', substituting therefor respectively the words 'absent himself without leave from' and 'without leave'", of the substituted words guilty

and not guilty to the Charge 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 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 eighteen months. The reviewing authority approved the sentence, ordered it executed but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 6, Headquarters Wright-Patterson Air Force Base, Dayton, Ohio, dated 9 April 1948.

3. As the Board of Review is of the opinion, for the reasons hereinafter stated, that the court-martial which tried accused was without jurisdiction the evidence need not be summarized.

4. The general court-martial in the instant case was appointed by the Commanding Officer, Wright-Patterson Air Force Base, Dayton, Ohio, by paragraph 7, Special Orders No. 47, dated 9 March 1948. The same authority executed the action sheet approving the sentence.

The question presented for determination by the Board of Review is whether the Commanding Officer, Wright-Patterson Air Force Base was empowered pursuant to Article of War 8 to appoint general courts-martial. The answer to this question requires consideration of certain general orders of various commands issued subsequent to 6 December 1945.

Army Air Forces Technical Base was established by General Orders No. 73, Headquarters Air Technical Service Command, dated 6 December 1945, which provides in pertinent part as follows:

> "III - 1. Effective 15 Dec 1945 the
> ARMY AIR FORCES TECHNICAL BASE
> DAYTON, OHIO
> is established, comprising the following-named installations:
>
> a. Wright Field, Dayton, Ohio
> b. Patterson Field, Ohio
> c. Clinton County Army Air Field, Wilmington, Ohio
> d. Dayton Army Air Field, Vandalia, Ohio

and such other installations as may hereafter be assigned."

"2. All base units and activities situated on said installations are placed under the command jurisdiction of the Commanding General, Army Air Forces Technical Base with the exception of 4020th AAF Base Unit (Hq ATSC) and those activities under the direct jurisdiction of Hq ATSC."

"3. Only such organizations will be maintained for the individual component installations as may be necessary for the successful accomplishment of their respective missions and for compliance with appropriate WD, AAF and ATSC directives."

The Commanding Officer, Army Air Forces Technical Base was granted authority to appoint general courts-martial by Section I, War Department General Orders No. 5, 10 January 1946. Thereafter, in March 1946, Clinton County Army Air Field, Wilmington, Ohio, and Dayton Army Air Field, Vandalia, Ohio (two of the four original installations comprising Army Air Forces Technical Base), were withdrawn from that command by competent orders and for reasons which are not pertinent to the question here involved.

Army Air Forces Technical Base, Dayton, Ohio, was redesignated on 9 December 1947, as Air Force Technical Base, Dayton, Ohio, pursuant to authority of the Department of the Army Circular No. 45 dated 14 November 1947. Thereafter, Department of the Air Force General Orders No. 2, dated 13 January 1948, merged into a single installation Wright Field and Patterson Field, the pertinent part of which order reads as follows:

"The Air Force installations located at Dayton, Ohio, designated as Wright Field and Patterson Field are merged into a single installation redesignated as Wright-Patterson Air Force Base (in honor of the Wright Brothers and in honor of 1st Lieutenant Frank Stuart Patterson)."

Subsequently, on 9 February 1948, purportedly pursuant to the authority of the above Departmental order, General Orders No. 9, Headquarters Air Materiel Command (a major command under the Department of the Air Force) was issued in the following form:

"The Air Force installations located at Dayton, Ohio, designated as Wright Field and Patterson Field, which were established by General Orders Number 73, ATSC, 6 December 1945, as Air Force Technical Base, are redesignated Wright-Patterson Air Force Base by authority of General Orders Number 2, Headquarters USAF, 13 January 1948."

The sole question for determination is the effect of the general orders set forth above. If such orders constituted merely a redesignation of "Army Air Forces Technical Base" (the only command involved authorized to appoint general courts-martial) as "Wright-Patterson Air Force Base" then it is evident that a mere change in the name of the command did not destroy or rescind such authority. If, however, the effect of such general orders was to merge only two of the four installations which originally comprised the command of Army Air Forces Technical Base and redesignate that "merged command" as "Wright-Patterson Air Force Base" then it is likewise apparent that this "merged command" would not have authority to appoint general courts-martial as neither of the installations involved in the merger had ever been authorized such authority. The answer to this question is of course one involving the proper interpretation of the pertinent general orders and the Board of Review is cognizant that where an ambiguity exists any reasonable inferences in favor of regularity should be presumed (CM 234711, Sandlin, 21 BR 131).

It is undisputed that at the time the grant of general court-martial jurisdiction was made to Army Air Forces Technical Base that command was comprised of four installations, no one of which was authorized to appoint general courts-martial. Therefore, when Department of the Air Force issued General Orders No. 2, dated 13 January 1948, merging "into a single installation", two of those four installations, viz., Wright Field and Patterson Field and redesignating the "merged command" as "Wright-Patterson Air Force Base" the commanding officer of the latter command had no greater authority in this respect then did the commands of Wright Field or Patterson Field prior to the merger and redesignation. Consequently, if any of the above orders actually had the effect of redesignating Air Force Technical Base (formerly Army Air Forces Technical Base) as "Wright-Patterson Air Force Base" it must of necessity be Air Materiel Command General Orders No. 9, dated 9 February 1948, as that is the only order in which that command is mentioned. The pertinent part of that order, however, states that the "Air Force installations * * * designated as Wright Field and Patterson Field, which were established * * * as Air Force Technical Base, are redesignated Wright-Patterson Air Force Base by authority of General Orders Number 2, Headquarters USAF, 13 January

1948." (Underscoring supplied). It is difficult to understand the necessity for the issuance of Air Materiel Command General Orders No. 9 in view of prior Department of the Air Force General Orders No. 2, as the only authority for the Air Materiel Command order is the prior order of the Department of the Air Force and it is so stated in the last phrase of the Air Materiel Command order. Hence, as the order of the Department of the Air Force created the merger of Wright Field and Patterson Field and redesignated the merged command as "Wright-Patterson Air Force Base" without any mention of or reference to "Air Force Technical Base" (the command which had general court-martial jurisdiction) it cannot be logically contended that the reference to "Air Force Technical Base" in the order of the Air Materiel Command could have the effect of redesignating Air Force Technical Base as "Wright-Patterson Air Force Base" when the only authority for the Air Materiel Command order, as expressly stated therein, was "General Orders Number 2, Headquarters USAF, 13 January 1948". To hold otherwise would violate the well established legal principle that an act done "pursuant" to a grant of authority cannot be valid if it exceeded the authority of the original grant of power. Further, even assuming the reference to Air Force Technical Base in the Materiel Command order is authorized it would be necessary to read the word "are" as "is" in order to interpret the language of that order to mean that the Air Force Technical Base was redesignated as Wright-Patterson Air Force Base, rather than Wright Field and Patterson Field being so redesignated.

The Board of Review is aware of the fact that the Commanding Officer of Air Force Technical Base might also be the commanding officer of other installations or commands such as Wright or Patterson Fields but such is of no consequence in view of the well established fact that the grant of authority to appoint courts-martial is made to a "position" or "command" and is not "personal" to any particular individual.

In view of the above, the Board of Review is constrained to hold that the general orders had the effect of redesignating the installations of Wright Field and Patterson Field as Wright-Patterson Air Force Base, rather than effecting the redesignation of Army Air Force Technical Base as "Wright-Patterson Air Force Base". Consequently, it must follow that the Commanding Officer of Wright-Patterson Air Force Base did not possess the authority to appoint a general court-martial for the trial of accused and that the court so appointed was without jurisdiction to try or sentence him.

In CM 330039, Williams, 6 May 1948, the Board of Review decided this precise question and reached the conclusion that the general orders above referred to did not have the effect of vesting general courts-martial jurisdiction in "Wright-Patterson Air Force Base".

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

W. H. Johnson Jr., Judge Advocate

William T. Baughn, Judge Advocate

E. B. Kane, Judge Advocate

JAGQ - CM 330036 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. MAY 1 3 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 725; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Robert L. Hood (AF 35407245), 2320th Engineer Aviation Company, Marianas Air Materiel Area (Provisional), APO 264, c/o Postmaster, San Francisco, California, attached Squadron R, 4000th Air Force Base Unit.

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 adjudged by the sentence in this case and that all rights, privileges and property of which the accused has been deprived by virtue of the findings of guilty and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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

JAGH CM 330044

30 APR 1948

UNITED STATES v. First Lieutenant SAMUEL A. WHITNEY (0-1281379), Air Force of the United States.	UNITED STATES AIR FORCES, PACIFIC AIR COMMAND Trial by G.C.M., convened at APO 953, 5 February 1948. Dismissal, total forfeitures and confinement for two (2) years.

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

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

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

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

Specification 1: In that First Lieutenant Samuel A. Whitney, Headquarters and Base Service Squadron, 556th Air Service Group, for the purpose of obtaining payment of a certain United States Government pay voucher, D.O. Vou. No. 2517, in the amount of two hundred and thirty-five dollars ($235.00), by causing it to be presented to himself, a Class "B" Agent Finance Officer at APO 959, an officer of the United States, duly authorized to pay such pay vouchers, did, at APO 959, on or about 14 October, 1947, forge the signature of First Lieutenant Frank E. Pullium upon the aforesaid pay voucher in words and figures as follows:

"I certify that the foregoing statement and account are true and correct; that payment therefor has not been received; and that payment to me as stated on the within pay voucher is not prohibited by any provisions of law limiting the availability of the appropriation(s) involved.
(Name signed) Frank E. Pulliam
Rank FRANK E. PULLIAM, 1st Lt., AC"

Specification 2: In that First Lieutenant Samuel A. Whitney, Headquarters and Base Services Squadron, 556th Air Service Group, for the purpose of obtaining payment of a certain United States Government pay voucher, D.O. Vou. No. 2516, in the amount of two hundred and thirty-five dollars ($235.00),

by causing it to be presented to himself, a Class "B" Agent Finance Officer at APO 959, an officer of the United States, duly authorized to pay such vouchers, did, at APO 959, on or about 14 October, 1947, forge the signature of First Lieutenant James H. Hackett upon the aforesaid pay voucher in words and figures as follows:

"I certify that the foregoing statement and account are true and correct; that payment therefor has not been received; and that payment to me as stated on the within pay voucher is not prohibited by any provisions of law limiting the availability of the appropriation(s) involved.
(Name signed) James A. Hackett
Rank JAMES A. HACKETT, 1st Lt., AC"

Specification 3: In that First Lieutenant Samuel A. Whitney, Headquarters and Base Services Squadron, 556th Air Service Group, being at the time a Class "B" Agent Finance Officer, did, at APO 959, on or about 14 October, 1947, feloniously embezzle by fraudulently converting to his own use United States currency of the value of four hundred and seventy dollars ($470.00), the property of the United States, furnished and intended for the military service thereof, intrusted to him, the said First Lieutenant Samuel A. Whitney, as Class "B" Agent Finance Officer, by Major Edward C. Hertweck, Finance Department, Disbursing Officer.

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

Specification: In that First Lieutenant Samuel A. Whitney, Headquarters and Base Services Squadron, 556th Air Service Group, did, at APO 959, on or about 15 October, 1947, with intent to deceive Major Edward C. Hertweck, Finance Department, Disbursing Officer at APO 957, officially report to the said Major Edward C. Hertweck that, on the aforesaid date, there was no balance chargeable to him, the said First Lieutenant Samuel A. Whitney, as Class "B" Agent Finance Officer for the said Major Edward C. Hertweck, which report was known to the said First Lieutenant Samuel A. Whitney to be untrue in that there was a balance chargeable to him as Class "B" Agent Finance Officer in the amount of four hundred and seventy dollars ($470.00).

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two (2) 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 evidence and the law contained in the review of the Pacific Air Command Judge Advocate, dated 26 March 1948.

4. The accused is 37 years of age, divorced, and the father of one child, who is now in the custody of accused's former wife. He earned his AB degree in business administration at Northwestern University in 1933. In civilian life he was employed variously as a clerk, cashier and auditor. On 5 May 1942 he was inducted in the Army and served as an enlisted man until 28 July 1943 when he was commissioned a Second Lieutenant, Army of the United States. From the date of his commission to 16 September 1943 he attended the Army Finance School, Duke University. On 8 August 1944 he was promoted to the rank of first lieutenant. His efficiency ratings of record are consistently "Excellent."

5. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95, and a sentence to dismissal, total forfeitures, and confinement at hard labor for two (2) years is authorized upon a conviction of a violation of Article of War 94.

D. H. Feinstein, Judge Advocate

On Leave, Judge Advocate

Joseph P. Brack, Judge Advocate

JAGH CM 330044 1st Ind

JAGO, Department of the Army, Washington 25, D.C. MAY 12 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 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 Samuel A. Whitney (0-1281379), Air Force of the United States.

2. Upon trial by general court-martial this officer was found guilty of forging two United States Government pay vouchers (Specifications 1 and 2, Chg I) and of embezzling $470, property of the United States (Spec 3, Chg I), in violation of Article of War 94; and of making a false official report, with intent to deceive (Spec, Chg II) in violation of Article of War 95. 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 two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On or about 14 October 1947, accused was Class "A" agent finance officer at Wheeler Field, Territory of Hawaii for the Finance Disbursing Officer, Major Hertweck, stationed at Schofield Barracks. Among his duties was the responsibility to make cash payments on such properly prepared vouchers as would from time to time be presented to him for payment. On 14 October 1947 a civilian employee at the Base Finance Office, Wheeler Field, was directed by accused to prepare two pay vouchers from information supplied by him. One of these vouchers was a partial payment in the amount of $235.00 in favor of "1st Lt. James A. Hackett." The other voucher, in the same amount, was a partial payment in favor of "1st Lt. Frank E. Pulliam." The accused signed the names of the respective officers to the vouchers, and reported them, together with other vouchers, to Major Hertweck as being properly paid. Accused testified that he caused the two vouchers in question to be made, that he signed the names of the respective officers to them, and reported them as properly paid vouchers to the parent disbursing office, all to cover a shortage chargeable to him. He further testified that he had converted to his personal use some of the funds which had been entrusted to him by Major Hertweck, and had executed the two vouchers in question in order to balance his account.

The two officers, in whose favor the vouchers were drawn, testified that they did not receive payment on the vouchers, that they did not sign the respective vouchers, nor did they authorize accused to affix their signatures thereto.

Accused is habitually a heavy drinker.

4. The accused is 37 years of age, divorced, and the father of one child, who is now in the custody of accused's former wife. He earned his AB degree in business administration at Northwestern University in 1933. In civilian life he was employed variously as a clerk, cashier and auditor. On 5 May 1942 he was inducted in the Army and served as an enlisted man until 28 July 1943 when he was commissioned a second lieutenant, Army of the United States. From the date of his commission to 16 September 1943 he attended the Army Finance School, Duke University. On 8 August 1944 he was promoted to the rank of first lieutenant. His efficiency ratings of record are consistently "Excellent."

5. I recommend that the sentence be confirmed and carried into execution. I further recommend that a United States Disciplinary Barracks be designated as the place of confinement.

6. Inclosed is a form of action designed to carry the 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

(GCMO 113, 1 June 1948).

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

19 APR 1948

JAGQ - CM 330078

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, 11 March 1948. Dishonorable discharge and total forfeitures.
Private First Class MILES N. OSTRANDER (RA 36587779), Assigned, 5012 Area Service Unit, Station Complement, Casual Detachment (Pipeline), Fort Sheridan, Illinois.	)	

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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Miles N. Ostrander, Assigned, 5012 Area Service Unit, Station Complement, Casual Detachment, (Pipeline), then Private First Class, 1612 Service Command Unit, Reception Center, Detachment B, did, at Fort Sheridan, Illinois, on or about 2 March 1946, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Sheridan, Illinois, on or about 14 January 1948.

Accused pleaded not guilty to the Charge and Specification and 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 of the Charge not guilty 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, 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 50½.

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.)

It will be noted that the inception of the unauthorized absence occurred on 2 March 1946 and that the accused was not arraigned until 11 March 1948, which is more than two years after the offense of absence without leave was committed.

This same question has been decided by the Board of Review recently in CM 329022, Mathews, 26 February 1948; 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 <u>may</u> advise the accused in open court of his right to plead the statute" (MCM, 1928, par. 78<u>a</u>), 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 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, CM 316772, Martinez and CM 329022 Mathews, 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.

W H Johnson Jr, Judge Advocate

Wilmot T. Baughn, Judge Advocate

W H Kane, Judge Advocate

JAGQ - CM 330078 1st Ind APR 23 1948

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

TO: Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Private First Class Miles N. Ostrander (RA 36587779), Assigned, 5012 Area Service Unit, Station Complement, Casual Detachment (Pipeline), Fort Sheridan, Illinois, I concur in the foregoing holding by the Board of Review 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 330078).

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

1 Incl
Record of Trial

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

20 APR 1948

JAGQ - CM 330082

UNITED STATES	)	FIRST ARMY
v.	)	Trial by G.C.M., convened at Fort Jay, New York, 11 March 1948. Dishonorable discharge and confinement for five (5) years. United States Disciplinary Barracks.
Private FRANK BOLAND, JR. (32031159), Company D, 66th Armored Regiment, Fort Benning, Georgia.	)	

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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Frank Boland, Jr., Headquarters and Headquarters Detachment, 1201st Area Service Unit, Fort Jay, New York, then a member of Company D, 66th Armored Regiment, Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about 12 January 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Palmyra, New York, on or about 10 February 1948.

Accused refused to plead to either the Specification or the Charge and the court properly directed a plea of not guilty to both the Specification and the Charge be entered for him. He was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence, but remitted five years of the confinement imposed, 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. The record of trial is legally sufficient to support the findings of guilty. The only question requiring consideration in this holding is whether the record of trial is legally sufficient to support the sentence as approved by the reviewing authority.

4. The offense of desertion in violation of Article of War 58 of which accused was found guilty was committed prior to the issuance of the Executive Order of 3 February 1942, which suspended the limitations upon certain punishments, including punishments for violations of Article of War 58, prescribed by the Table of Maximum Punishments set forth in paragraph 104c of the Manual for Courts-Martial. The suspension of limitations upon punishments effected by the Executive Order was, by the terms of the Order, made applicable only to offenses committed after the Order was issued (Executive Order No. 9048, Feb. 3, 1942). It follows that the limitations upon punishments prescribed by the Table of Maximum Punishments (par. 104c, MCM 1928) are applicable with respect to the offense of which accused was found guilty. The maximum punishment by confinement authorized by this table for the offense of desertion terminated by apprehension after more than six months' service is confinement at hard labor for two and one-half years.

This precise question was determined by the Board of Review in CM 221662, Knight, 13 BR 211; CM 229031, Heine, 17 BR 25.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two and one-half years in the place of confinement designated by the reviewing authority.

W H Johnson Jr, Judge Advocate

Wilma T. Baugh, Judge Advocate

G W Rave, Judge Advocate

NOV 26 1948

JAGQ - CM 330082 1st Ind

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

TO: Commanding General, First Army, Governors Island,
New York 4, New York

1. In the case of Private Frank Boland, Jr. (32031159), Company D, 66th Armored Regiment, Fort Benning, Georgia, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years and six months. Upon taking such action you will have authority to order execution of the sentence as modified.

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

(CM 330082).

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

1 Incl
Record of Trial

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

JAGN-CM 330132 | 4 May 1948

UNITED STATES v. Private ARTHUR L. TREASE (19281796), 16th Photographic Reconnaissance Squadron (Special) 55th Reconnaissance Group (Very Long Range).	MacDILL AIR FORCE BASE Trial by G.C.M., convened at Tampa, Florida, 11 March 1948. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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 61st Article of War.

Specification: In that Private Arthur L. Trease, 16th Photographic Reconnaissance Squadron (Special) 55th Reconnaissance Group (Very Long Range) Mapping, MacDill Air Force Base, Florida, did, without proper leave, absent himself from his organization and station at MacDill Air Force Base, Florida from about 1 January 1948 to about 14 January 1948.

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

Specification 1: In that Private Arthur L. Trease, 16th Photographic Reconnaissance Squadron (Special), 55th Reconnaissance Group (Very Long Range) Mapping, MacDill Air Force Base, Florida, did, at MacDill Air Force Base, Florida, on or about 23 December 1947, feloniously take, steal, and carry away one Ciroflex Camera, value about

$85.00, property of Private First Class Max J. Kazuba, 16th Photographic Reconnaissance Squadron (Special) 55th Reconnaissance Group (Very Long Range) Mapping, MacDill Air Force Base, Florida.

Specification 2: In that Private Arthur L. Trease, 16th Photographic Reconnaissance Squadron (Special), 55th Reconnaissance Group (Very Long Range) Mapping, MacDill Air Force Base, Florida, did, at MacDill Air Force Base, Florida, on or about 23 October 1947, feloniously take, steal, and carry away one man's Wittnauer 15 Jewel Wrist Watch, value about $10.00, property of Private First Class Max J. Kazuba, 16th Photographic Reconnaissance Squadron (Special) 55th Reconnaissance Group (Very Long Range) Mapping, MacDill Air Force Base, Florida.

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 three 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 under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification. The only questions to be determined are the legal sufficiency of the record of trial to support the findings of guilty of Charge II and its Specifications and to support the sentence. In view of the holding of the Board of Review, as hereinafter set out, it is deemed necessary to consider only that part of the evidence contained in the testimony of accused on direct examination, and upon cross-examination by the prosecution.

4. The record of trial shows that accused, after being informed of his rights relative to testifying in his own behalf, at his own request was sworn and testified on direct examination as follows:

"Questions by defense:

Q Are both your parents still living, Pvt. Trease?
A No, sir. My mother is the only one living now.

Q What happened to your father?
A He died when I was about two years old.

Q After he died did you live with your mother?
A No, sir. I lived with my grandparents then.

Q For how long?
A Until I was about fourteen years old.

Q Where did they live?
A On a farm in southern Utah.

Q Approximately how old were you when you went to live with your grandparents?
A About two years old.

Q Where did you go after you left your grandparents?
A I went to Nevada and worked in the mines?

Q With whom did you live there?
A No one. I got a room and made my own living.

Q How old are you at the present time?
A 17 years old.

Q When did you enlist in the Army?
A A year ago the third of March.

Q Why did you enlist in the Air Forces?
A Well, I wanted to learn aircraft mechanics. All my life I have liked mechanics and I figured I could come into the Air Forces and learn aircraft mechanics. I always wanted to learn that.

Q What have you been doing since you got into the Air Forces?
A I went through basic in San Antonio and ever since I was shipped here I have been working on the line as a mechanic.

Q When you lived with your grandparents on this farm, how close was it to the nearest town?
A Forty-five miles.

Q How did you feel toward them as far as your being able to do things was concerned?
A I never got much of a chance to go any place. I stayed home most of the time, never got to see much country - just stayed on the farm all the time" (R. 21, 22).

Thereafter, on cross-examination by the prosecution, the following took place:

"Questions by prosecution:

Q Pvt. Trease, what had you intended to do with these articles after you took them from Pfc. Kazuba?

DEFENSE: Objection. This was not a subject of direct examination.

LAW MEMBER: This man is a witness in his own behalf. The question is allowed.

A I figured on hocking them in town. The wrist watch I took in there - I was down town - I did not really have intentions of selling it. I was in the Club High Hat with another fellow and we wanted some beers. We went to a hock shop and it was closed, but a fellow opened up and I hocked it and told him I would be back in two or three days to get it, but I just never went back.

Q What about the other article?
A About the camera, it was just before Christmas and I was broke and I wanted to buy some things, so I hocked the camera" (R. 22).

5. The testimony of accused on direct examination consisted entirely of the story of his early home life, work history prior to his enlistment, and a statement of his purpose in enlisting in the Army. A greater latitude may be properly allowed in the cross-examination of an accused than in that of any other witness, and when he testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense, but his cross-examination must be confined to the offense or offenses concerning which he has testified on direct examination and to facts relevant to his credibility as a witness (CM 310072, Campbell, 61 BR 178; par. 121b, MCM, 1928). There is nothing in the direct testimony of accused concerning the offenses for which he was being tried. As to the questions asked him on cross-examination, which he was required by the court to answer, it certainly cannot be said that they were intended as an attack on his credibility as a witness. The first question asked by the prosecution positively assumed the guilt of accused and when the defense objection was overruled, accused was left only two alternatives. Either he must deny any knowledge of the articles to which counsel referred, and thus, if he were guilty, add the crime of perjury to his other alleged offenses, or he must virtually acknowledge guilt of the offenses alleged in the Specifications of Charge II. He chose the latter alternative and stated his intended disposition of the allegedly stolen articles, thus by implication virtually admitting the larceny. The question is therefore presented whether the substantial rights of the accused were violated when he was required to answer, over objection, the questions propounded by the prosecution.

It has been uniformly held that an accused may take the stand

for a limited purpose without being subject to examination on the merits of the case and that it is fatal error to refuse him that privilege (CM 275738, Kidder, 48 BR 145; CM 326450, Baez (1947)). This has been held to be true, even though the guilt of the accused is established by independent compelling evidence. It is not, therefore, deemed necessary for the purpose of this discussion to decide whether or not the findings of the court were influenced by the improper cross-examination. The rule is not based in any degree upon whether the evidence elicited from the accused is necessary to support the findings of guilty (CM 326450, Baez (1947)).

With respect to the right of an accused to remain silent relative to the merits of his case, the Board of Review, in the Baez case, made the following pertinent comments:

> "It cannot be denied that an accused has a right both under the Constitution of the United States and the provisions of the 24th Article of War to refrain from testifying regarding the merits of his case. This right was denied to the accused in the instant case and he was compelled to give testimony regarding his guilt or innocence when he had not voluntarily elected to do so. This amounted to a violation of his rights under the Constitution of the United States and the 24th Article of War and cannot be considered as falling within that class of nonprejudicial errors covered by the 37th Article of War. This constitutional guarantee can only be effectively enforced by excluding all evidence obtained in violation of accused's right against self incrimination. It must be remembered that accused in this case desired to exercise his right to testify concerning the manner in which his alleged confession was procured without subjecting himself to cross-examination on the merits. Any ruling of a court-martial which circumvented his right to so limit his testimony would jeopardize his constitutional guarantee against self incrimination, a right which the courts are under a solemn obligation to guard."

It is conceded that in the Baez case the accused took the stand and in the Kidder case accused offered to take the stand, in each instance, for the expressly limited purpose of testifying as to circumstances under which an alleged confession was procured, while in the instant case no limitation was expressed prior to the direct examination of accused and the scope of the cross-examination was therefore limited only by the character and extent of the direct examination.

The Board of Review is of the opinion, however, that such a distinction as would require a statement of limitation of examination is of no consequence. Only when an accused takes the witness stand and testifies in denial or explanation of any offense, may his cross-examination cover the whole subject of his guilt or innocence of any offense charged (par. 121b, MCM, 1928), and, as has been stated, invocation of the rule is not dependent upon a previous representation that the examination would be confined to a limited purpose, but in our view, must be determined solely upon the scope of the direct examination, without reference, however, to other rules touching credibility.

In the case of Grantello v. United States, 3 Fed. 2nd, 117 (C.C.A. 8th 1924), cited in the Baez and Kidder cases, the right of a person on trial for a criminal offense to refuse to testify relative to the issue of his guilt or innocence was, because of its paramount importance to an appropriate decision in the case, carefully reviewed. The defendant, called by his counsel as a witness, was sworn and testified that his name was "Frank Grantello," and gave no other testimony. The court held that accused by merely taking the stand and offering some testimony, not bearing on the merits of his case, did not waive his privilege of silence or subject himself to examination, and it was fatal error for the trial court to comment on his failure to testify on the merits. This decision, by the limitation therein contained, clearly defines the extent to which an accused may be compelled to testify, when he has not raised the issue of his guilt or innocence in any of his testimony. The legal right of an accused to remain silent upon the issue of his guilt is of such a vital and fundamental character, that no trial by court-martial in which this right is violated can be judicially deemed to have been a fair trial. It follows that the action of the court, in compelling accused to testify on the issue of his guilt, constituted substantial error which cannot be considered as falling within the class of non-prejudicial error covered by the 37th Article of War.

6. There was nothing in the testimony of accused either on direct or cross-examination concerning the offense of absence without leave, of which he was found guilty as alleged under the Specification of Charge I. It is therefore considered that the record of trial is legally sufficient to support the findings of guilty as to that offense, since the prejudicial error was confined to the two larcenies charged. The maximum penalty for absence without leave for thirteen days, the offense of which accused was convicted under the Specification of Charge I, is confinement at hard labor for 39 days and forfeiture of pay for 26 days, said forfeiture not to exceed two-thirds of accused's pay for any one month (par. 104b, MCM, 1928).

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

Charge II and its Specifications, legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for 39 days and forfeiture of 26 days pay, said forfeiture not to exceed two-thirds of his pay for any one month.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

JAGN-CM 330132 1st Ind May 6, 1948
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, MacDill Air Force Base, Tampa 8, Florida

1. In the case of Private Arthur L. Trease (19281796), 16th Photographic Reconnaissance Squadron (Special) 55thReconnaissance Group (Very Long Range), I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge II and its Specifications be disapproved, and that only so much of the sentence be approved as involves confinement at hard labor for 39 days and forfeiture of 26 days pay, said forfeiture not to exceed two-thirds of his pay for any one month. Upon taking such action you will have authority to order the execution of the sentence as modified.

2. Should you disapprove the entire sentence you would have authority to direct a rehearing.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 330132).

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.

1 JUN 1948

JAGQ - CM 330141

UNITED STATES v. Technician Fourth Grade WILLIAM R. SLATER (RA 11148046), 550th Transportation Service Company, APO 59.	KOREA BASE COMMAND Trial by G.C.M., convened at Headquarters, Korea Base Command, APO 901, 10 March 1948. Dishonorable discharge (suspended) and confinement for two (2) years. United States Disciplinary Barracks.

OPINION of 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 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 of Review 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 Technician Fourth Grade William R. Slater, 550th Transportation Service Company, APO 59, did, at Inch'on, Korea, APO 59, on or about 28 December 1947, knowingly and wilfully misappropriate tires of a value in excess of fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

The accused 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 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. The reviewing authority approved the sentence, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's

release from confinement, and designated Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 15, Headquarters Korea Base Command, APO 901, dated 30 March 1948.

3. Evidence for the Prosecution.

Sergeant Thomas A. Burton testified that on the night of 28 December 1947 at approximately 1900 or 1950 he saw accused taking some tires from truck number 17 at Camp Inch'on, Korea and when accused saw the Sergeant he fled. There was a tire and wheel on the tail gate of the truck. Burton then went to the club and when he returned the tire and wheel were gone. That afternoon about 4:00 o'clock he saw a tire on the back of truck number 17. He "thinks" there were two but he knows there was one. He did not see any tires removed from the company area and he did not see accused take any tires. He and two other Sergeants went to the Korean village to see if they could find any tires or tire tracks but could not find any (R 18-21).

Technician Fourth Grade Schanndorff testified that on the night of 28 December at about 1830 hours he saw accused rolling a tire out of the company area in the direction of an adjacent Korean village (R 12). It looked like a 2½ ton truck tire (R 14). Private Beckman testified that he drove truck number 17 on 28 December and that to the best of his knowledge there were no tires in the truck that day and that it had no spare tire (R 24). Captain McGrew testified that in the "early part" of December he took an inventory and approximately 30 tires were missing (R 11). Kwon Jung Nam, a Korean who worked for the Army, saw accused two days before Christmas 1947. On that day he observed accused place a tire "outside of the office" (R 25, 26). Accused rolled the tire on the road that leads to the Korean village. The road is inside the company area (R 28). That night he saw accused with about 1500 or 2000 yen (R 28).

Captain McGrew questioned accused about the loss of tires after receiving a report from Sergeants Burton and Schanndorff. Accused was not warned of his rights under the 24th Article of War but was not threatened in any way. Accused admitted that he had taken tires from the company (R 9) and sold them (R 29). He did not state on what date he had taken the tires, how many he had taken nor the size or type (R 29). It was stipulated that the price of "the" tire, tube and wheel "connected with this case" was $38.72.

Accused after being advised of his rights elected to remain silent.

4. The competent evidence shows that on the night of 28 December, Sergeant Burton saw accused taking a tire from truck number 17, that when Burton approached the truck accused ran and Burton noticed a tire on the tail gate of the truck. Sometime thereafter Burton returned to the truck and the tire was gone. This took place between 1900 and 1950 hours. At 1830 hours of the same evening Technician Fourth Grade Schanndorff saw accused rolling a tire out of the company area toward the Korean village. The testimony of Kwon Nam shows that two days prior to Christmas accused rolled a tire outside the mess hall toward the Korean village.

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 and it must be shown that it was of a spontaneous character or that accused at all times throughout such questioning, substantially understood his rights as set out by Article of War 24 (CM 318851, Stacy, 68 BR 53; CM 328351, Johnson, 13 February 1948). Since the confession in this case does not meet either of the above requirements it was error to admit it in evidence.

In view of Article of War 37 which provides that the proceedings of a court-martial shall not be held invalid nor the findings or sentence be disapproved on the ground of improper admission of evidence unless it shall appear that the error "has injuriously affected the substantial rights of the accused", it is necessary to determine whether the above is prejudicial within the contemplation of that article. In so doing, it is necessary for the Board of Review to determine whether the legal evidence of guilt appearing in the record, independent of the erroneously admitted confession, is relatively conclusive or inconclusive, or whether it may be said with reasonable certainty that the conviction would have resulted had such evidence been excluded (CM 316223, Evans, 71 BR 385; CM 329711, Tumang (15 April 1948)). It is obvious that evidence improperly admitted might affect the result in one case and not in another. It follows, therefore, that a conviction in one instance may be upheld because of quality and quantity of the evidence independent of that erroneously admitted (CM 237711, Fleischer, 24 BR 89, 99, 100), while in another case the admission of improper evidence by the prosecution would constitute substantial and prejudicial error and require setting aside the conviction (CM 211829, Parnell, 10 BR 133, 137; CM 316223, Evans, supra).

In applying the above principle to this present case, it is clear that the evidence of record tending to prove accused's guilt, aliunde the confession, is most unsatisfactory and inconclusive. It affirmatively appears from the record, considered in its entirety, that the erroneous reception in evidence of the confession of accused did affect the ultimate result in the case and the error committed was highly prejudicial to the substantial rights of the accused within the meaning of the 37th Article of War.

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

On Leave
_____, Judge Advocate

Wilmot V. Vaughn, Judge Advocate

A D Kane, Judge Advocate

JAGQ - CM 330141 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 8 JUN 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Technician Fourth Grade William R. Slater (RA 11148046), 550th Transportation Service Company, APO 59.

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 adjudged by the sentence in this case and that all rights, privileges and property of which the accused has been deprived by virtue of the findings of guilty and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 128, 23 June 1948).

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

JAGH CM 330147

10 May 1948

UNITED STATES v. First Lieutenant WILLIAM J. STEWART (AO-576409), Air Force of the United States.	UNITED STATES AIR FORCES IN EUROPE Trial by G.C.M., convened at Wiesbaden, Germany, 19 March 1948. Dismissal, total forfeitures and confinement for eighteen (18) months.

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 96th Article of War.

Specification: In that 1st Lieutenant William J. Stewart, Headquarters Command, United States Air Forces in Europe, APO 633, US Army, while Class VI Supply Officer at Bad Kissingen Air Base, did, at Bad Kissingen Air Base, APO 62, US Army, between the dates 10 October 1947 and 23 January 1948, wrongfully convert to his own use and purpose One Thousand Four Hundred and Eighty-eight Dollars and Seventy Cents ($1,488.70), which had been entrusted to him as said Class VI Supply Officer.

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 eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the United States Air Forces in Europe Judge Advocate, dated 9 April 1948, with the following additional comments relative to the admission in evidence of accused's testimony before a board of officers appointed under the provisions of Army Regulations 420-5, dated 20 May 1940.

The board met pursuant to the order appointing it, on 24-27 January 1948, for the purpose of investigating alleged shortages in the accounts

of the "Class VI Supply," Bad Kissingen Air Base. Among others, accused was called as a witness by the board and after having been duly warned of his rights admitted, in answers to questions asked him, his implication in the alleged shortages. The proceedings of the board (Pros Ex 3) was admitted in evidence over objection by the defense and that portion thereof comprising statements made by the accused was read to the court by the prosecution. The objection by defense to the introduction of the document was based not upon the grounds that accused's statements contained therein were involuntarily made but on the ground that he had been denied right of counsel by the board.

Whether accused was in fact denied right of counsel by the board and, if so, whether his testimony before the board was thus rendered inadmissible at the trial, are questions which need not be decided under the circumstances of this case. Whatever error may have been committed by the admission in evidence of Prosecution's Exhibit 3, was cured by accused's unsworn testimony at the trial, wherein he admitted substantially everything, relative to the alleged shortages, which he admitted in his pre-trial statements to the board conducting the investigation. (CM 273791, Gould, 47 BR 29 at p.74-75).

4. The accused is 33 years of age and married. Records of the Army show that he was graduated from Baylor Military Academy in 1933 and prior to entering the service was employed variously as a laborer, bookkeeper, county police and salesman. He served as an enlisted man in the Army from August 1942 until 3 March 1943 when he was commissioned a second lieutenant, Army of the United States. On 25 October 1943 he was promoted to the rank of first lieutenant. He entered upon foreign service in the European Theatre on 18 January 1946. On 21 November 1945 he was punished under Article of War 104, for failing to repay money borrowed from officers, civilians, and enlisted men. His efficiency ratings of record are uniformly "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, total forfeitures and confinement at hard labor for eighteen months is authorized upon conviction of a violation of Article of War 96.

D Lottenstein, Judge Advocate

J W Lynch, Judge Advocate

Joseph T Brach, Judge Advocate

JAGH CM 330147 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAY 18 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 William J. Stewart (AO-576409), Air Force of the United States.

2. Upon trial by general court-martial this officer was found guilty of wrongfully converting to his own use $1,488.70, which had been entrusted to him, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the United States Air Forces in Europe 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 and to warrant confirmation of the sentence. I concur in that opinion.

On 10 October 1947, accused was appointed, in addition to other duties, "Class VI Supply" (Liquor) Officer at the Bad Kissingen Air Base (Germany). His duties in this capacity consisted of procuring and distributing liquor for the Air Base and accounting for the funds received and expended in connection with the purchase and sale of the liquor. An audit of his accounts on 27 January 1948, disclosed a cash shortage of $1488.70. Accused admitted in his unsworn statement at the trial, that he converted some of the fund to his personal use during an "all night dice game" sometime between the 10th and 20th of November 1947. He further stated that he did not know the exact amount converted by him but considered himself responsible for the entire cash shortage.

4. The accused is 33 years of age and married. Records of the Army show that he was graduated from Baylor Military Academy in 1933 and prior to entering the service was employed variously as a laborer, bookkeeper, county police and salesman. He served as an enlisted man in the Army from August 1942 until 3 March 1943 when he was commissioned a second lieutenant, Army of the United States. On 25 October 1943 he was promoted to the rank of first lieutenant. He entered upon foreign

service in the European Theatre on 18 January 1946. On 21 November 1945 he was punished under Article of War 104, for failing to repay money borrowed from officers, civilians, and enlisted men. His efficiency ratings of record are uniformly "Excellent."

5. I recommend that the sentence be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

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

CM 330,147

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 114, 1 June 1948).

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

JAGN-CM 330185

U N I T E D S T A T E S	)	ZONE COMMAND AUSTRIA
v.	)	Trial by G.C.M., convened at Salzburg, Austria, 23 and 25 March 1948. Dishonorable discharge and confinement for eighteen (18) months. Disciplinary Barracks.
General Prisoner SHELBY D. EMBS.	)	

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 general prisoner 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 General Prisoner Shelby D. Embs (then Private, Company "H", 16th Infantry), did, at Camp Truscott, Austria, on or about 24 November 1947, feloniously take, steal and carry away sixteen (16) cartons of cigarettes, value about $12.80, one (1) Beacon camera value about $13.00 and one (1) pocket watch, value about $5.00, of a total value of about $30.80, the property of Private First Class Marvin G. Harris.

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

Specification: In that General Prisoner Shelby D. Embs, (then Private, Company "H", 16th Infantry), did, at Salzburg, Austria, on or about 25 November 1947, unlawfully carry concealed weapons, to-wit: One (1)

caliber 32 Beretta pistol, serial number 771186 and one (1) knife with a blade approximately 3½ inches in length.

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

Specification: In that General Prisoner Shelby D. Embs, (then Private, Company "H", 16th Infantry) did, without proper leave, absent himself from his organization and station at Camp Truscott, Austria, from about 21 November 1947, to about 25 November 1947.

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

Specification: In that General Prisoner Shelby D. Embs, (then Private, Company "H", 16th Infantry), having been duly placed in arrest at Camp Truscott, Austria, on or about 10 November 1947, did, at Camp Truscott, Austria, on or about 21 November 1947, break his said arrest before he was set at liberty by proper authority.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification of Charge II except the words "one (1) knife with a blade approximately 3½ inches in length," 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 eighteen months. The reviewing authority approved the sentence, designated the Branch, United States Disciplinary Barracks, Fort Knox, Kentucky, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty, except as to the value found in the Specification of Charge I. The only matters which require consideration are the legal sufficiency of the record of trial to support the findings of guilty of the Specification of Charge I as to value, and the legality of the sentence imposed.

4. The Specification of Charge I, of which accused was found guilty, alleges the larceny of sixteen cartons of cigarettes, value about $12.80, one Beacon camera, value about $13.00 and one pocket watch, value about $5.00, of a total value of about $30.80, the property of Private First Class Marvin G. Harris. The larceny of the articles by the accused at the time and place alleged was clearly proved by the evidence contained in the record of trial. The value of the cigarettes described in the Specification was established by stipulation as $12.80 as alleged. The sole evidence of value of the watch is contained in the testimony of Private First Class Harris that he "purchased it from a guy in Hof, Germany" for five dollars (R. 19, 21, 23). With respect to the value of the camera the only evidence presented is the testimony of Private First Class Thomas Bronikowski that

he paid $13.00 for it new in "Detroit, Lockman's Jewelry Store" during August 1947, that he had never used it, but it was in working condition, and that he left it with Private Harris as security for a loan of five dollars (R. 24, 25).

It is well established that, except as to distinctive articles of Government issue, or other chattels, which, because of their character have readily determinable value, the value of personal property to be considered in determining the authorized punishment for larceny is the worth of the property in the open market at the time and place of the offense (CM 323387, Learned et al (1947); CM 217051, Barton et al, 11 BR 193; TM 27-255, par. 100b). In order to establish value by the testimony of the owners of the property, it must appear that they are qualified as expert witnesses in that regard (CM 323387, Learned et al (1947)). There is nothing in the record of trial to indicate that either of these witnesses was thus qualified.

While it appears from the testimony of Private Bronikowski that the camera had been purchased new about four months prior to the larceny and had never been used, after its purchase and removal from the store it became a "second hand article." The value of such an article cannot be established by proof of its original cost (TM 27-255, par. 100b). The fact that the items in question were physically before the court does not cure the deficiency in proof since the market value of the items alleged is not of such fixed and common knowledge as to justify the Court in taking judicial notice of their value (CM 323640, Pamintuan (1947); CM 213952, Myer, 10 BR 296). Therefore, although under the provisions of paragraph 149g, MCM, 1928, the court might take judicial notice that the value of the watch and camera were of some value, it was not authorized to find a value which, added to the stipulated value of the cigarettes, would establish a value in excess of $20.00. It follows that so much of the findings as pertains to a total value of the stolen articles in excess of $20.00 cannot be sustained.

Larceny of property of a value of $20.00 or less will support a maximum sentence to confinement at hard labor for six months (par. 104c, MCM, 1928).

5. The maximum confinement at hard labor authorized for the offense of unlawfully carrying concealed weapons of which accused was found guilty under the Specification of Charge II is three months (par. 104c, MCM, 1928).

6. With respect to the offenses of which accused was found guilty under Charges III and IV, the record establishes that the absence without leave alleged in the Specification of Charge III was concurrent with and had its inception in the breach of arrest alleged in the Specification of Charge IV. The two offenses were but different aspects of the

same act. Where a sentence is imposed with reference to two or more offenses constituting different aspects of the same act or omission, so much thereof as exceeds the maximum authorized penalty for the most serious aspect of the act or omission is illegal (CM 325224, Hunt (1947); CM 313544, Carson, 5 Bull JAG 202). The maximum sentence to confinement authorized for the period of absence as alleged and proven is twelve days (par. 104c, MCM, 1928). The maximum sentence to confinement for breach of arrest as alleged and proven is three months (par. 104c, MCM, 1928). In this case the breach of arrest is the more important aspect of the act since it carries the heavier penalty, consequently the confinement that may be imposed for these two offenses may not exceed three months.

The maximum sentence that may be imposed against accused for all of the offenses of which he has been found guilty is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

7. For the reasons above stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as to value as finds a total value not in excess of $20.00, legally sufficient to support the findings of guilty of Charge I and of all other Charges and Specifications, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Edward Johnson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George B. Springston, Judge Advocate.

JAGN-CM 330185 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Zone Command Austria, APO 541, c/o Postmaster, New York, N. Y.

1. In the case of General Prisoner Shelby D. Embs, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of the Specification of Charge I as to value be approved as finds a total value in excess of $12.80 but not in excess of $20.00, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. Upon taking such action you will have authority to order the execution of the sentence.

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 330185).

1 Incl
Record of trial

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

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

JAGN-CM 330193

UNITED STATES v. Private ROY JEFFCOAT (18306472), 9201 Technical Service Unit, Transportation Corps, Military Police Detachment.	))))))))	NEW YORK PORT OF EMBARKATION Trial by G.C.M., convened at Brooklyn, New York, 23 June 1948. Dishonorable discharge and confinement for three (3) years. Federal Reformatory.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Roy Jeffcoat, 9201 TSU-TC, Military Police Detachment, Fort Hamilton, Brooklyn 9, New York, did, at Brooklyn, New York, on or about 13 February 1948, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Kenneth E. Lee, the sum of $120.00, lawful currency of the United States, one pocket watch value about $1.00, two certificates issued by the Central Bank of China, each in the amount of one thousand Customs Gold Units, of some value, and one wallet value one dollar, all the property of said Kenneth E. Lee.

Specification 2: In that Private Roy Jeffcoat, 9201 TSU-TC Military Police Detachment, Fort Hamilton,

Brooklyn 9, New York, did at, Brooklyn, New York, on or about 13 February 1948, with intent to commit a felony, viz, robbery, commit an assault upon Kenneth E. Lee, by willfully and feloniously striking the said Kenneth E. Lee on the head with a clenched fist.

Accused pleaded not guilty to, and was found guilty of, the Charge and its Specifications. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for a period of five years, but remitted two years of the confinement, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to sustain the findings. The only question presented is the legality of the sentence. In the first trial of this case the court imposed a sentence of five years, which was approved by the reviewing authority, who remitted three years thereof. On rehearing the court imposed a sentence of six years, and the reviewing authority approved five years but remitted only two years, leaving the term of confinement imposed at three years.

4. Article of War 40 provides that "No authority shall return a record of trial to any court-martial for reconsideration of * * * (d) The sentence originally imposed, with a view to increasing its severity." Paragraph 87b, MCM, 1928, provides that "Upon a rehearing no sentence in excess of or more severe than the original sentence shall be enforced" and "The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced."

A sentence announced by a court does not become final until the reviewing authority has acted thereon. When he has taken action the term of confinement imposed is fixed. Remission, under the quoted provision of the Manual, approves only the sentence as reduced. When the reviewing authority took appropriate action and then forwarded the case under Article of War 50½ the only sentence acted upon by the Board of Review and The Judge Advocate General was the final sentence as approved and modified by the reviewing authority. The provisions of Article of War 50½ and paragraph 87b, MCM, 1928, do not operate to confer upon the reviewing authority the power to order a rehearing in which a more severe sentence may be imposed. Forwarding the case for review under Article of War 50½ is equivalent to publication and the sentence finally fixed by the reviewing authority may not, whatever course the proceedings

thereafter take, be exceeded (See unpublished letter in CM 322479, Johnson, dated 16 Jan 1948 and CM 144170, Burke; CM 152122, Thomas; CM 161968, LaPoint; CM 234781, Krasieski; CM 248899, Simone). Under identical circumstances the Board of Review in CM 204405, Rose, 8 BR 6, 9, held:

> "The sentence as acted on by the Board of Review and The Judge Advocate General under the provisions of Article of War 50½ was a sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for six months, and in the opinion of the Board of Review this was the 'original sentence' in the case and no sentence in excess of or more severe than this can now be enforced."

The Articles of War and the provisions of the Manual give full support to the correctness of the ruling announced in the Rose case. We are in complete accord with the views therein expressed and accordingly are required to hold the sentence on rehearing in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years illegal and void.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence imposed as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years.

Thos. J. Lewis, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George B. Springston, Judge Advocate.

(294)

JUL 27 1948

JAGN-CM 330193 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, New York Port of Embarkation, Brooklyn, New York.

1. In the case of Private Roy Jeffcoat (18306472), 9201 Technical Service Unit, Transportation Corps, Military Police Detachment, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 330193).

1 Incl
Record of trial.

THOMAS H. GREEN
Major General
The Judge Advocate General

TCNYP 201 GAC-Jeffcoat, Roy (Enl) 2nd Ind. RNF/fh

Hq. New York Port of Embarkation, Brooklyn, New York, 29 July 1948.

TO: The Judge Advocate General, Department of the Army, Washington 25, D.C.

1. Complied with.

2. Inclosed are six copies of General Court-Martial Order No. 104, this headquarters, 28 July 1948.

FOR THE COMMANDING GENERAL:

WILLIAM J. FLYNN,
Lt. Colonel, JAGD,
Port Judge Advocate.

2 Incls:
Added
2 - GCMO #104 (6 copies)

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

JAGK - CM 330208

15 JUN 1948

UNITED STATES	FIRST ARMY
v.	Trial by G.C.M., convened at Schenectady General Distribution Depot, 2 March 1948. EACH: Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.
Technician Fifth Grade ROY D. INMAN (RA 19305974), and Private LAURENCE L. WANGELIN (RA 17216875), both of 504th PIR, 82nd Airborne Infantry Division.	

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

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

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

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

Specification: In that Private Laurence L. Wangelin, 504th PIR 82nd Airborne Infantry Division, did, at the Schenectady General Distribution Depot, on or about 15 December 1947, feloniously take, steal and carry away an electric drill, value about $25.00, the property of Charles Brodbeck.

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

Specification: In that T/5 Roy D. Inman, 504th PIR, 82nd Airborne Infantry Division and Private Laurence L. Wangelin, 504th PIR, 82nd Airborne Infantry Division, acting jointly and in pursuance of a common intent, did, at the Schenectady General Distribution Depot, on or about 22 November 1947, feloniously take, steal and carry away three electric drills of a value of about $9.50, $17.00 and $32.90 respectively, and two electric shears of a value of about $40.00 and $64.60 respectively, of a total value of about $164.00, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that T/5 Roy D. Inman, 504th PIR, 82nd Airborne Infantry Division, and Private Laurence L. Wangelin, 504th PIR, 82nd Airborne Infantry Division, acting jointly and in pursuance of a common intent, did, at the Schenectady General Distribution Depot on or about 16 December 1947, wrongfully and knowingly, sell one electric drill of a value of about $25.00, property of Charles Brodbeck.

Each accused pleaded not guilty to the charges and specifications upon which he was arraigned. Accused Wangelin was found guilty of the specification of Charge I, except the words "about $25.00" substituting therefor the words "over $20.00," and guilty of Charge I. Accused Wangelin and Inman were found guilty of Charge II and its specification, guilty of the specification of Charge III except the words "the" and "General Distribution Depot" and the words "about $25.00," substituting for the latter the words "over $20.00," and guilty of Charge III. No evidence of any previous conviction was introduced against either accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for a period of two years. As to each accused the reviewing authority approved the sentence, remitted one year of the confinement adjudged, and ordered the sentence as thus modified duly executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. He designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army might direct, as the place of confinement in each case. The result of trial was published in General Court-Martial Orders No. 61, Headquarters First Army, Governor's Island, New York 4, New York, dated 16 April 1948.

3. Evidence

An unsworn written pre-trial statement of each accused was received in evidence (R 27,28). In these statements, accused related that on or about 22 November 1947 they had taken three electric drills and two electric shears from the Post Engineers Utility Shops and had delivered the tools to a civilian guard named Turkett, placing them in the back of his car. They received $40 for this property (Pros Exs C and D). It appeared from evidence aliunde these statements that three electric drills and two electric shears, property of the United States furnished and intended for the military service, were found to be missing from the Post Engineers Utility Shops, Schenectady General Distribution Depot, on or about 24 November 1947 (R 45-47, 48-49, 50-52, 53-55, 59). Mr. Huel A. Turkett, formerly a civilian guard at the Depot, testified that neither accused had ever "offered" to sell to him three drills and two electric shears or any other type electric tool equipment. He had no "conversation" with either accused during the period 21 to 24 November. Neither accused placed any

equipment in his automobile on 22 November (R 33-36, 65).

In his pre-trial statement, accused Wangelin stated that about 15 December 1947 he approached accused Inman and asked him where he could "get rid of" a drill he had taken from "Building 1." Both accused went to Schenectady the next day where they disposed of the drill to "the Body and Fender man on Broadway," receiving therefor the sum of $20. Accused Inman, in his pre-trial statement, related that about 15 December 1947, Wangelin came to him and asked him if he could dispose of a drill. Inman first offered the drill to Turkett who would not pay a price acceptable to Wangelin. Both accused then took the drill to "the body and fender works" on Broadway in Schenectady where it was sold for $20 (Pros Exs C and D). It appeared from evidence aliunde the statements of accused that "between Friday night and Tuesday morning after Thanksgiving," 1947, an electric drill belonging to Charles Brodbeck, an employee of a contracting firm, was missing from the place where it had been left in "House 1, Unit 1." It had been used in construction work on the building, which was located in the Schenectady General Distribution Depot (R 6-10). This drill was purchased by Mr. George Valletta, a "body and fender man" with a place of business on Broadway, Schenectady, from "two soldiers" sometime after Thanksgiving but before Christmas. One soldier was "husky" and had curly hair. The other was "thin" and weighed about 150 pounds. Mr. Valletta had seen the husky soldier about three times and the thin one only once. Asked by the prosecution at the trial to "look around the court and see whether the accused are present," Mr. Valletta replied, "They aren't in this room." At this time accused were sitting among other soldiers in the rear of the court room. Later in the trial, when again urged to identify "the one or two persons," Mr. Valletta indicated accused Wangelin. Accused Wangelin was "the only one" Mr. Valletta could "identify." Mr. Valletta had made a pre-trial identification of accused Wangelin at the Depot. On this occasion accused Wangelin was in a room with two officers, was "stripped down to a T-shirt" and was the only enlisted man present (R 15-22).

The pre-trial statements of accused had been taken by Captain Martin H. Rodgers, Schenectady General Distribution Depot, who testified that he was one of the officers appointed by the Depot to investigate this case (R 25). Excerpts from the direct examination of Captain Rodgers, a witness for the prosecution, and comments of defense counsel thereon follow.

"Q. Will you describe that to the court?
A. That is the statement given me by Pvt Wangelin 14 January 1948. The statement was taken down by Mrs. Edna Martin after they had been advised of their rights under the 24th Article of War and warned that they were not required to make a statement. They had three choices; they could remain silent, could make an unsworn or a sworn statement. I explained to them if they did remain silent no comment would be made; if they made an unsworn statement they would not be put on the stand and questioned regarding it, and if they made a sworn

statement they could be put on the stand and examined by the Trial Judge Advocate."

"Q. Do you believe that, in view of the fact that you were a Captain and were in front of the accused he made that statement because you asked him to?

A. No, I do not believe being a Captain had any effect on him. He had previously made a statement to the FBI and I told him to tell the story given them in his own words if he so desired.

Defense objects: Captain Rodgers made a statement to the accused that the unsworn statement would not be used against them, and that is the manner in which the boys made the statement at all.

A. No, sir.

Defense: You just said so.

A. He was warned of his rights that it was strictly a voluntary statement. No pressure was brought to bear.

Defense: No. He said they would not be questioned on the stand."

"Q. You testified that you warned this man under the 24th Article of War. What, exactly, did you do?

A. Told them they were not required to make a statement if they did not desire to make one on the charges against them, the statement would be strictly voluntary and might and could be used against them if necessary. Second, they could make an unsworn statement in which they would not be called on the witness stand and cross-examined by the defense or TJA. Third, if they made a sworn statement they could be called to the stand and questioned by the TJA and court. They were warned. No pressure was brought to bear to make a statement that would incriminate them in any way."

"Q. Also in the same line, Captain Rodgers, I ask you to identify this.

A. This is a statement made by Inman in which he volunteered this information after he was warned of his rights under the 24th Article of War. This statement was taken 26 January and due to the fact that at the time of investigation he was at Fort Bragg there was a delay from the 14th to the 26th of January in getting him up here for investigation. The two soldiers were interviewed at the same time. I took the statement down from Inman and the statement was made to Mrs. Edna Martin who took it in shorthand, typed it, and it was verified by Inman and

> signed by him. He also was warned of his rights under the 24th Article of War, and he was not requested to make a statement unless he desired, and at the same time this statement was taken down I told him to read the statement over to see if that was right. There was a technical error in the statement originally and it was changed and the statement typed over on the 26th but they kept it the same as the old statement of the 14th. This is a confession by Inman made to me but taken by the stenographer, verified and signed by him" (R 25-28).

On cross-examination by defense counsel, Captain Rodgers stated that he had informed accused that "if they made a statement it would be a good idea to tell the truth, not to hold back any information." He did not read the 24th Article of War to accused but explained it to them (R 28).

Mrs. Edna Martin testified that she was present and took down the statement of each accused. Captain Rodgers had stated to accused that if they made a statement it could be used against them and had read "something" out of a book which Mrs. Martin thought contained the Articles of War. He "told them they could make a sworn or an unsworn statement, or they could remain silent. He told them he thought it would be best if they told the truth and made a clean breast of everything." The Captain showed accused an example of an unsworn statement. Accused asked Captain Rodgers a few questions about their rights but she was unable to recall what was said. In response to the question, "Would you say that Captain Rodgers tried to get the accused to make a clean breast of the story?" she replied, "Yes, he did" (R 30-33).

Each accused testified for the limited purpose of relating the circumstances under which their statements were made.

Accused Inman denied that Captain Rodgers explained the 24th Article of War to him, and stated that it was read and explained to him for the first time by the Assistant Defense Counsel. This was the first time Inman had clearly understood that Article. Captain Rodgers referred to the Manual for Courts-Martial only on the question of punishment. At Fort Bragg where accused had made a previous statement (not in evidence), a Major Martin had told accused that anything he said could be used against him, but Captain Rodgers said that an unsworn statement could not be used against him. Inman, therefore, made an unsworn statement to Captain Rodgers. He would have remained silent had he known that such a statement could be used against him (R 67-69).

Accused Wangelin testified that Captain Rodgers did not read the 24th Article of War but attempted to explain it. This explanation was not clear. Captain Rodgers told accused Wangelin that he should make a "clean breast" of everything and he showed accused some statements. The Captain said that an unsworn statement would not be used against him.

The first time accused Wangelin understood the meaning of the 24th Article of War was when Captain White, the Assistant Defense Counsel, read and explained it to him. Accused had made a previous statement (not in evidence) to the "F.B.I.", but was told that the statement could not be used in a military court. He would not have made the unsworn statement to Captain Rodgers had Article of War 24 been "properly explained" to him (R 71-73).

Neither accused testified in his own behalf at the trial (R 73).

4. Discussion

From a perusal of the above evidence it is obvious that if the pre-trial statements of accused, which amount to confessions, had been erroneously received and considered by the court there would remain not a scintilla of evidence tending to show that either accused had committed the offense made the subject of Charge II and its specification or that accused Inman had participated in the wrongful sale denounced in Charge III and its specification. Moreover, if the pre-trial statement of accused Wangelin was inadmissible, the remaining proof of his guilt of Charges I and III and their specifications would not, we believe, be of sufficient force to overcome the prejudicial effect of the erroneous reception in evidence of his confession. The identification of Wangelin as the culprit by Mr. Valletta was not only vacillatory in nature but was apparently based upon a pre-trial identification made under circumstances which could well have misled the identifying witness, for accused Wangelin was the only person offered to view at that time as the one who may have been the offender (CM 300644, Pheil, 4 BR (ETO) 91,104). We will, then, now look to the conditions under which the pre-trial statements of accused were obtained with a view to determining the admissibility of these statements.

Accused testified that Captain Rodgers had told them that unsworn pre-trial statements could not be used against them and that consequently they made unsworn pre-trial statements which they would not have done had they known that such statements would be introduced in evidence at the trial. Captain Rodgers denied this and insisted that he had simply informed accused that they could not be called to the witness stand and questioned concerning any unsworn pre-trial statements they might make. As between these varying versions of what happened prior to the making of the pre-trial statements we must accept that of Captain Rodgers as the correct one, for the court found against accused. But this does not end the matter. Apparently, Captain Rodgers was confused as to the distinction between the application of the right against self-incrimination out of court and the various testimonial rights afforded an accused in a court-martial trial. We need not dwell upon the question of the correctness of Captain Rodger's advice to accused concerning the use of sworn and unsworn pre-trial statements in court, it being sufficient to say that such advice contained elements of incongruity having a tendency to mislead. It would be, we think, most unreasonable to maintain that accused, who seemed to be unversed in the law, would not be warranted in placing upon such advice the construction they did, that is, that unsworn pre-trial statements would not prejudice them in any manner

should they be brought to trial. True, there is testimony to the effect that Captain Rodgers had also informed accused that if they made any statement it could be used against them. However, if the Captain did so inform them, this information considered along with his other advice would serve only to add to the confusion by way of giving them the impression that unsworn/prestrial statements could be used against an accused only out of court.

In CM 324725, Blakeley, 73 BR 307,319, the Board of Review had occasion to say:

"A confession may not be considered by the court as tending to establish the guilt of an accused if it appears that it was involuntarily made. The Manual for Courts-Martial, 1928, prescribes no hard and fast rules for determinining whether a confession was or was not voluntary and does not specifically require that any particular warning shall be given to an accused or a suspected person prior to receiving his admissions of guilt. In this respect, the Manual states:

> 'A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary or suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made. Thus, where all the available evidence as to the circumstances merely shows that an accused, a private, confessed to a friend, another private, the confession may be regarded as voluntary.
>
> 'The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior' (par. 114a, MCM, 1928, underscoring supplied).

"Consistently with these principles of law, as applied to human relationships somewhat peculiar to the military service, the Board of Review has generally held that where it appears that an accused has confessed upon being interrogated by one who is acting as his military superior, or as an agent of that superior, ***, the prosecution must establish, in order to overcome the implication of compulsion, that accused was cognizant of his right not to incriminate himself at the time he admitted his guilt. It is not necessary, in such a case, to show that the 24th Article of War had been read to accused, but it should appear that its substance was made known to him or that a reasonable basis existed for an inference that he was aware of its provisions or those of similar civil guarantees. Also where there is

an implication that accused may have been overreached, it is not sufficient that accused had merely been told that he need not speak unless such was his desire, it being most essential, even though no explicit threats or promises of immunity or clemency were employed, that he also knew that his words might be used against him, for lacking such knowledge it could not be considered that he was fully aware of the danger of incriminating himself (CM 274678, Ellis, 47 BR 271,283; CM 297985, Kirby, 16 BR (ETO) 353, 357; CM 298745, Souza, 16 BR (ETO) 361, 369)." (See also CM 318851, Stacy, 68 BR 53,55; CM Pheil, supra, p 96.)

Applying the foregoing principles to the case at bar, we must conclude that the pre-trial statements made to Captain Rodgers by these accused were erroneously admitted in evidence and that the findings of guilty and the sentence herein as to each accused should be set aside.

It will be noticed that it has not been necessary for us to pass upon the applicability to this case of the rule recently laid down by the Board of Review in CM 329162, Sliger, as follows:

"*** 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 accused and *** 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." (Underscoring supplied.)

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

(Dissent), Judge Advocate

Gilbert E. Asgoyl, Judge Advocate

Harley A. Lamming, Judge Advocate

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

JAGK - CM 330208

15 JUN 1948

UNITED STATES v. Technician Fifth Grade ROY D. INMAN (RA 19305974), and Private LAURENCE L. WANGELIN (RA 17216875), both of 504th PIR, 82nd Airborne Infantry Division	FIRST ARMY Trial by G.C.M., convened at Schenectady General Distribution Depot, 2 March 1948. EACH: Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks

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DISSENT
by
Lieutenant Colonel Chester D. Silvers, Judge Advocate

As appears from the summary of the evidence in the majority opinion, the evidence aliunde the pre-trial statements of the accused is sufficient to show that the offenses denounced had probably been committed. And I agree with the majority opinion that the findings that the accused committed the alleged offenses cannot be legally sustained if it be determined that the court erred in admitting their pre-trial statements. But I do not concur in the opinion that accused's pre-trial statements, which it will be assumed amounted to confessions, were erroneously admitted in evidence. It is clear from the testimony of all the witnesses that no force, abuse or coercion was in any manner practiced upon either accused prior to receiving their statements. It is equally obvious that no promise of reward was held out. Further, and with particular respect to the status of the parties, none of the statements of the investigating officer to the accused bear any of the earmarks of being in the nature of a military order. Captain Rodgers testified that he informed the accused that he had been appointed investigating officer in the case, that he explained to them their rights under the 24th Article of War and made known to them the nature of the charges and the name of the accuser. Although set forth in the majority opinion the following testimony of Captain Rodgers on direct examination is considered as being of such vital import as to justify reiterating here.

"Q. You testified that you warned this man under the 24th Article of War. What, exactly, did you do?

"A. Told them they were not required to make a statement if they did not desire to make one on the charges against them, the statement would be strictly voluntary and might and could be used against them if necessary. Second, they could make

an unsworn statement in which they would not be called on the witness stand and cross-examined by the defense or TJA. Third, if they made a sworn statement they could be called to the stand and questioned by the TJA and court. They were warned. No pressure was brought to bear to make a statement that would incriminate them in any way.

"Q. Did you read the 24th Article of War?
"A. I explained it to them." (R 27)

And on cross-examination the witness stated -

"A. I told them if they did make a statement it would be a good idea to tell the truth, not to hold back any information." (R 28)

It will be readily observed that Captain Rodgers informed the accused that they were not required to make a statement, that if they did it must be on their own volition and might and could be used against them. Conceding that his subsequent statements related to an entirely different situation, viz, the rights of an accused before a court-martial, and that they were, in part at least, inaccurate, I cannot subscribe to any reasoning which concludes that the latter statements vitiated the effect of the former whereby either accused was "compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him" within the purview of Article of War 24. And the investigating officer's admonition that, if they did make a statement it would be a good idea to tell the truth, would not vitiate their confessions (Fitter v. United States, 258 Fed 566, 567; Wigmore on Evidence, 3rd Ed, Vol 3, sec 832). The testimony of Mrs. Martin, summarized in the majority opinion tends most strongly to corroborate that of Captain Rodgers.

A more detailed recital of the testimony of the accused respecting the manner in which their statements were procured is felt justified. The accused Inman, on direct examination denied that Captain Rodgers had explained to him the provisions of Article of War 24, asserting that "he said he would like to have us make a statement and it would be best to make a statement and he could send a report to the trial" (R 67). The witness stated further that the first time Article of War 24 had been read and explained to him was when Captain White, the Assistant Defense Counsel, interviewed him (R 67). The following excerpts from the testimony of this accused on cross-examination are quoted from the record:

"Q. Before you made this statement was anything said to you by the pre-trial Investigating Officer, or was anything ever said to you about any statements you might make, that they would be used against you?
"A. At Fort Bragg, Major Martin said anything I might say could be used against us.

* * *

"Q. In other words, Captain Rodgers did ask you a specific question, whether or not you knew or someone had told you the fact that, according to Article of War 24, any remarks you, the accused, might make could be used against you?

"A. Yes, I believe he did say that.

* * *

"Q. Did he tell you that an unsworn statement could not be used against you?

"A. Yes.

* * *

"Q. This Major Martin, did you make an unsworn statement to him, and when?

"A. I would say the 22nd of December.

"Q. When did you make your statement before Captain Rodgers?

"A. I would say around 20 January." (R 69)

From the foregoing it will be observed that the accused, although asserting that Captain Rodgers told him that an unsworn statement would not be used against him, testified that within less than a month prior thereto Major Martin, with reference to the charges herein, told him that <u>any</u> statement he made could be used against him. He had thereafter made an unsworn statement to the major. If therefore the accused made an unsworn statement to the major after being specifically advised that <u>anything</u> he said could be used against him at the trial, I am of the opinion that the court could reasonably conclude that the use that could be made of his statement was of very minor importance as affecting the voluntary nature of his utterances.

On his direct examination the accused Wangelin testified as follows:

"Q. Did he ever explain it? [24th AW]

"A. He explained it but it wasn't clear. He said if you make an unsworn statement it won't be used against you. I did not know at the time what would be best, so I asked him and he said I should make an unsworn statement." (R 71)

The witness also asserted that the first time he heard of Article of War 24 was when Captain White, the Assistant Defense Counsel, explained it to him (R 71). On cross-examination Private Wangelin testified as follows:

"Q. What I am trying to get clear in my mind is why you made the statement as complete as you did initially, why you co-operated so freely, knowing that what you specifically stated in those statements could be used against you?

"A. We made the same statement as we had made to the police." (R 72)

It is true that both accused testified that they had never understood their rights under Article of War 24 until explained to them by the

Assistant Defense Counsel, but the court was not required to accept such conclusions as fact, or if accepted, to determine as a matter of law that such circumstance, without more, would operate to vitiate the confessions.

> "For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than to negative any promise or inducement held out by the person to whom the confession was made" (Hopt v. Utah, 110 US 574, 587).

Conceding that in military practice caution must be interposed to the end that confessions be not received where obtained under military compulsion, what was said in CM 324725, Blakeley, 73 BR 307, 313, and the cases therein cited should not be construed as meaning that the law implies compulsion where there is a discrepancy in rank favorable to the party receiving the confession. The quoted provision of the Manual merely asserts that such a situation will ordinarily be regarded as requiring further inquiry into the circumstances. And that is exactly what the court did in this case. It inquired at length into the circumstances and having so inquired, determined that upon all the evidence the statements of the accused were of a voluntary nature. It has been often stated that voluntary confessions are among the most effectual proof known to the law. The court's decision as to the voluntary character of confessions should not be disturbed on appellate review except in cases where there is no reasonable basis in the evidence for its action. I find ample evidence in this case, including the reasonable inferences to be drawn therefrom sufficient to support the court's conclusions.

For the reasons stated, I am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

Robert T. Dillon Judge Advocate

JUN 2

JAGK - CM 330208 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Technician Fifth Grade Roy D. Inman (RA 19305974) and Private Laurence L. Wangelin (RA 17216875), both of 504th PIR, 82nd Airborne Infantry Division.

2. Upon joint trial by general court-martial the accused were found guilty of the larceny of three electric drills of the value of about $9.50, $17.00 and $32.90, respectively, and two electric shears of the value of about $40.00 and $64.60, respectively, of a total value of $164.00, property of the United States furnished and intended for the military service in violation of Article of War 94 (Charge II and its spec); and of the wrongful sale of one electric drill of the value of over $20.00, property of Charles Brodbeck, in violation of Article of War 96 (Charge III and its spec). The accused Wangelin was also found guilty of the larceny of an electric drill of the value of over $20.00, property of Charles Brodbeck, in violation of Article of War 93 (Charge I and its spec). 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 at such place as the reviewing authority might direct for two years. The reviewing authority in each case approved the sentence but remitted one year of the confinement adjudged and ordered the sentence as thus modified duly executed but suspended the execution of the dishonorable discharge until the soldier's release from confinement. He designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement in each case. The result of trial was published by General Court-Martial Orders No. 61, Headquarters First Army, Governors Island, New York 4, New York, dated 16 April 1948.

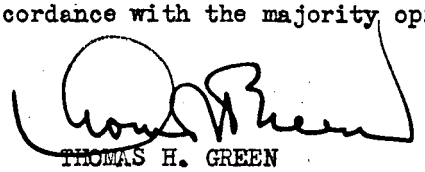
3. All the members of the Board of Review are of the opinion that by competent evidence the prosecution sufficiently established the corpus delicti of the offenses charged. In order to show that the accused were the persons who committed the offenses the prosecution relied on the pre-trial admissions or confessions of accused in the form of signed unsworn statements to the investigating officer. The record contains detailed evidence as to the circumstances under which these statements were given. It is clear that no force, abuse or coercion was exerted upon the accused and that no promises of reward were held out in order to procure the confessions. Captain Rodgers, the investigating officer, told them that they were not required to make any statement and that any statement they might make was required to be of a voluntary nature

and might and could be used against them. He also told them that if they made unsworn statements they could not be called to the witness stand and cross-examined, but if they made sworn statements they could be called to the stand and questioned by the trial judge advocate and the court. Further, Captain Rodgers adjured them to tell the truth if they elected to make statements. The accused contended that they understood that an unsworn statement could not be used against them. One of the accused testified on cross-examination that he had previously been told by a major that any statement he might make could be used against him and that he had made an unsworn statement at that time.

Two members of the Board of Review are of the opinion that it was not shown that the pre-trial statements of the accused were voluntary, that they were erroneously admitted and that the findings and sentence should not be sustained. In a dissenting opinion the remaining member of the Board expresses the opinion that the record contains adequate, competent evidence upon which the court could determine that the confessions were of a voluntary nature and therefore admissible in evidence against the accused, and that the record of trial is legally sufficient to support the findings and sentence.

For the reasons expressed in the dissent, I am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Drft Form Action A
3. Drft Form Action B

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

JAGK - CM 330224

29 SEP 1948

UNITED STATES	HEADQUARTERS 6TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at APO 6, Unit 4, 16 February 1948. Confinement at hard labor for six months (suspended) and forfeiture of $50.00 per month for a like period.
Private DAVID A. McGUIRE (RA 15205259), Battery B, 1st Field Artillery Battalion	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private (then Sergeant) David A. McGuire, Battery B, 1st Field Artillery Battalion, APO 6 Unit 4, did, at APO 6 Unit 4, on or about 1 December 1947, wrongfully agree and conspire with Private First Class Leon H. Lawhorne to fraudulently obtain an amount of money in excess of twenty dollars ($20.00), which money constituted funds of the Central Exchange, which taking was fraudulent and was then known by the said Private (then Sergeant) David A. McGuire and Private First Class Leon H. Lawhorne to be fraudulent.

Specification 2: In that Private (then Sergeant) David A. McGuire, ***, did, at APO 6 Unit 4, on or about 25 November 1947, wrongfully conspire with Technician Fourth Grade Joseph Basic, Jr., Private First Class Leon H. Lawhorne, and Technician Fifth Grade Frederick E. Barr, with the intent to wrongfully conceal the true status of the accounts of Sub Exchange 360-1, 1st Field Artillery Battalion by contributing money thereto to cover shortages which he knew existed in the said accounts of the said exchange, to the prejudice of good order and military discipline.

The accused pleaded not guilty to and was found guilty of the charge and both specifications. He was sentenced to be confined at hard labor at

such place as the reviewing authority might direct for six months and to forfeit $50.00 per month for a like period. The reviewing authority approved the sentence and ordered it duly executed but, "in view of the laxity exercised in the supervision of the Sub-Post Exchange, as well as the unorthodox methods in the operation thereof," suspended the execution thereof, insofar as it related to confinement at hard labor. The result of trial was promulgated by General Court-Martial Orders No. 12, Headquarters 6th Infantry Division, APO 6, 31 March 1948.

3. The evidence shows that in November 1947 Technician Fourth Grade Joseph Basic, Jr., was the manager of the First Field Artillery Sub-Exchange, 360-1, Camp Chinhae, Korea, and that the accused was his understudy preparing to take over the exchange upon Basic's impending departure for the United States. Technician Fifth Grade Barr and Private First Class Lawhorne were also employees of the exchange. On 25 November 1947 Basic discovered that there was a shortage of about $200.00 or $240.00 in the accounts of the sub-exchange (R 7,10,19). At a meeting of the employees which was held in the exchange Basic reported the shortage stating that if it were reflected in the monthly inventory an investigation would ensue and he would be delayed in going home. Basic suggested that the employees advance money sufficient to cover the shortage. Lawhorne testified that he understood the proposition to be an "investment made to the exchange and when the inventory was completed the management said I would get my money back" (R 15,16). Technician Fifth Grade Barr testified that:

> "Sgt Basic took us aside and asked us to put the money in. He said he wanted to go home, it was the only way. He asked us to loan some money to make up the shortage ....
>
> "TJA: Contribute?
>
> "A. He didn't exactly use the word. I know he promised one man definitely that he would give the money back" (underscoring supplied) (R 11).

The accused does not appear to have been present at the beginning of the discussion but arrived shortly thereafter. In pursuance of the agreement, Basic advanced about $60.00, Lawhorne - $47.00, the accused - $20.00, and Barr - $10.00. The November inventory, taken shortly thereafter, did not reveal any shortage (R 10-11). Lawhorne testified further that he got his money back in "early December" by taking it out of the cash register in the presence of the accused and "it was counted again." At this time Basic had gone and the accused was the ranking "NCO" in charge of the "PX" (R 15-18). The December inventory revealed a shortage of "Right around $250.00" (R 19). The record does not specifically show whether the parties, other than Technician Fifth Grade Lawhorne, recouped the money they loaned the "PX". The accused testified concerning a "slush fund" that had allegedly been maintained by certain officers to cover "PX" shortages. He also stated that Lieutenant Dodd, who had become "PX" officer the latter part of November, promised Basic that he would send him the amount of his contribution.

4. Without weighing the evidence but construing it in the light of ordinary human relations, it is obvious that the conspiracy entered into involved, as Lawhorne and Barr expressed it, an agreement to advance or loan personal funds to the sub-exchange immediately prior to the monthly inventory, thereby concealing an actual shortage, and to withdraw from the exchange the amount advanced, after the inventory had been reported. We think such a conspiracy to have been unlawful in that the object thereof was prejudicial to good order and military discipline. The object had a tendency to shield mismanagement if not criminal conduct in the operation of the exchange. It matters not whether the shortage had been caused by the criminal conduct or willful neglect of any of the participants in the conspiracy. The evil of the device or ruse lay in the fact that it concealed from the authorities charged with supervisory duties over the exchange the true status of its accounts. The withdrawal of the amount advanced, after the inventory had been completed, appears to have been fully contemplated by the original conspiracy of 25 November 1947 and there is no evidence in the record of any further conspiracy between the accused and Lawhorne.

The offenses charged in the two specifications are but different aspects of the same conspiracy, the object being to conceal a shortage in the post exchange accounts. Neither the offense of conspiracy to conceal a shortage in accounts nor any closely related offense is listed in the Table of Maximum Punishments (MCM 1928, par 104c). In the absence of an allegation of an overt act in furtherance of such a conspiracy, and, we think, neither of the specifications in this case properly allege an overt act, there seems to be no Federal statute which would necessarily operate to fix the maximum punishment therefor (see CM 319095, Fischer, 69 BR 1,5; 18 USC 88). It follows that the conspiracy of which accused stands guilty is punishable at the discretion of the court (AW 96; CM 277017, Winters, 51 BR 79,83). The punishment herein adjudged does not appear to be excessive.

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

Christian Gilbert, Judge Advocate

Gilbert E. Stoppard, Judge Advocate

(Dissent), Judge Advocate

(312)

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

JAGK - CM 330224

29 SEP 1948

UNITED STATES v. Private DAVID A. McGUIRE (RA 15205259), Battery B, 1st Field Artillery Battalion	HEADQUARTERS 6TH INFANTRY DIVISION Trial by G.C.M., convened at APO 6, Unit 4, 16 February 1948. Confinement at hard labor for six months (suspended) and forfeiture of $50.00 per month for a like period.

DISSENT
by
LANNING, Judge Advocate

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1. I am unable to agree with the majority holding as to the facts and law. The evidence is therefore set out and discussed more fully here.

2. The evidence discloses that accused was selected by his battalion commander to "understudy" Sergeant Joseph Basic, Jr. with a view to replacing him as post exchange manager of sub-exchange 360-1, First Field Artillery, 6th Division Artillery, when Sergeant Basic returned to the United States. Accused assumed his new duties about 1 November 1947 (R 27,29,30). At this time First Lieutenant Doyle L. Davidson was the post exchange officer (R 51,52). Accused had no particular qualifications based upon either his civilian or military experience for his newly assigned position (R 41,47,48).

The regular monthly inventory of the sub-exchange taken on 25 November 1947 disclosed a shortage of cash of from about $200.00 to $240.00. This information came to the attention of Sergeant Basic (R 8,9,10). On the same day and directly after the evening meal, Sergeant Basic, Technician Fifth Grade Frederick E. Barr, Technician Fifth Grade Donald J. Badger and Private First Class Leon H. Lawhorne were all gathered in the warehouse of the post exchange. At this gathering Sergeant Basic asserted "he had not been able to locate the shortage and said we ought to have a little get-together and find some way to get together so he [Basic] could go home." Sergeant Basic suggested that since they were all friends that they each contribute a sum of money to reduce the shortage to an amount within the allowable one percent. Sergeant Basic was about to be returned to the United States and he did not want to be delayed by an investigation. Although accused joined the group after the discussion was concluded he was informed of the shortage and that they had agreed to contribute. He thereupon contributed $20, Private First Class Lawhorne, $47;

Technician Fifth Grade Barr, $10; and Sergeant Basic, $60. There was some evidence by those present that the money was an "investment" or a "loan." Corporal Barr, one of the alleged co-conspirators, testified that Sergeant Basic asked them to put money in so he (Basic) could go home. Sergeant Basic did not use the word "contribute," but "he promised one man definitely that he would give the money back." Corporal Badger testified he saw them all put money on the table except Lawhorne. Private First Class Lawhorne, one of the alleged co-conspirators, testified that he considered that he put his money in purely as an "investment." "The management" (Sgt Basic) told Lawhorne that he would get his money back. Private Lawhorne further testified that accused was present when he put his money in under that "consideration." Private First Class Lawhorne also testified that he as one of the assistant managers at the post exchange had access to the cash register and that early in December 1947 in the presence of accused he (Lawhorne) reimbursed himself by taking sufficient funds from the cash register because "it was suggested I get my money back." Accused in a pre-trial statement to an investigating officer admitted that he contributed money to the post exchange for the purpose of bringing the shortage within one percent. He also stated that Private First Class Lawhorne reimbursed himself from post exchange funds after the 25 November inventory (R 6-21).

Lieutenant Davidson, the post exchange officer at the time of the inventory, questioned Sergeant Basic the day following the inventory as to whether or not he had found any errors or discrepancies in the inventory, and was told that there was a shortage in cash and that "some of the boys had made it up and that was the word to me" (R 51,52).

Accused testified that Lieutenant Dodd, who replaced Lieutenant Davidson, told Sergeant Basic that he (Dodd) would send him (Basic) the money he had put into the exchange (R 54,55).

Lieutenant Dodd testified that when he assumed his duties as post exchange officer on 28 November 1947 everything was clear but that there had been a shortage of about $240.00 (R 52,53).

First Lieutenant Charles A. Blair had the custody of all the records of all the post exchanges under control of the 6th Division Artillery, including Sub-Exchange 360-1. He testified that there was no investigation of Sub-Exchange 360-1 after the 25 November inventory because the shortage was only $5.00 (R 23).

There was evidence that not only the post exchange here involved but other exchanges in the area operated "slush funds" for the purpose of taking care of any shortages that might occur in the monthly inventories. Lieutenant Blair said he had knowledge of many exchanges where shortages were made up and that he accepted the reconciliations of shortages on the basis "that the exchange is charged and accountable for so much merchandise" (R 34,35).

The court was requested to take judicial notice of USAFIK Circular 34 and it was handed to the court for that purpose but no copy was appended to the record. Lieutenant Blair read paragraph 24-6 of the circular to the court which is as follows:

> "If discrepancies exist between the total inventory figure and the daily accountability record, the discrepancies will be reconciled. If reconciliation is not possible, the Inventory Officer will note the amount of the discrepancy in the proper space in the heading of the inventory sheet, i.e., 'Overage or shortage unreconciled _____'". (R 35)

3. Specification 1 of the charge alleges that accused wrongfully agreed and conspired with Private First Class Lawhorne to fraudulently obtain an amount of money in excess of twenty dollars, which money constituted funds of the Central Exchange, which taking was fraudulent and was known to the conspirators to be fraudulent in violation of Article of War 96.

Accused is charged in Specification 2 of the charge with wrongfully conspiring with three other enlisted men to wrongfully conceal the true status of the accounts of Sub-Exchange 360-1 by contributing money thereto to cover shortages which he knew existed in the said accounts of the exchange to the prejudice of good order and military discipline in violation of Article of War 96.

Each of the specifications of the charge allege an act of a nature prejudicial to good order and military discipline in violation of Article of War 96, the gist of which is a wrongful conspiracy to fraudulently obtain money from the exchange (Spec 1) and to wrongfully conceal the true status of the accounts of the exchange (Spec 2). The problem presented is whether or not the substantive offense of conspiracy has been proven against accused. A criminal conspiracy at common law has been defined as a combination of two or more persons to do an unlawful act or to effect an unlawful object by any means, or to do a lawful act or to effect a lawful object by unlawful means or in an unlawful manner (CM 320681, Watcke, 70 BR 125).

Specification 2 of the charge will first be considered. The evidence shows that an inventory was taken on 25 November 1947 and that thereafter Sergeant Basic, the manager of the post exchange, by reason of the inventory discovered that there was a shortage of cash amounting to from $200.00 to $240.00. Sergeant Basic was on orders to return to the United States shortly and therefore he was interested in making up the shortage in order that he would not be delayed, for an investigation to locate the shortage or the reason therefor could extend over a long period of time. Consequently, directly after the evening meal on 25 November 1947 Sergeant Basic, Technician Fifth Grade Barr, and Private First Class Lawhorne,

the alleged co-conspirators, and another soldier, Technician Fifth Grade Badger, gathered in the post exchange warehouse (subsequently they were joined by the accused), and they all put in sums of money varying in amounts. It is thus clear that an agreement was reached by accused and the alleged co-conspirators, but was the object of such agreement one to wrongfully conceal the true status of the accounts of the exchange? The proof shows that an inventory had already been taken when the agreement was reached and the money contributed. There is no direct showing by whom the inventory was made, but it is referred to by many of the witnesses in a manner from which it may be inferred that it was an official inventory. This being true, a contribution of money by the alleged conspirators after the inventory was made could not very well conceal anything which the inventory disclosed from the officers responsible for taking the inventory. It is also shown by the evidence that the post exchange officer who was one of the officers responsible for the taking of inventories (par 20c(6), AR 210-65, 12 June 1945) and the incumbent post exchange officer both had knowledge that the inventory revealed a shortage. Therefore, nothing was concealed from them. The evidence also discloses that Lieutenant Blair, the exchange officer who had charge of all the post exchanges under the 6th Division Artillery, had knowledge that shortages in inventories were frequently reconciled by the shortage having been made up and he accepted such reconciliations. It is also to be noted that paragraph 24-6, USAFIK Circular 34, which was in effect at the time of the alleged offense, not only permits reconciliations of discrepancies in the inventory to be made, but also states that reconciliation will be made and if that is not possible then the overage or shortage will be noted in the proper space provided on the inventory. As Lieutenant Blair stated, the word "reconciliation" means "to adjust, settle, to reconcile differences" (Webster's New International Dictionary, 2d Ed) but the manner of adjusting is a "matter of interpretation." I believe that the contributions made were a lawful and logical means of reconciling the shortage which existed, in the absence of a showing that they were made to cover up any criminal act, willful neglect or mismanagement.

It having been shown that the persons responsible for taking the inventory had knowledge of the shortage or should have known of it before the alleged conspirators reached their agreement and it having been shown that reconciliations of discrepancies in the inventory were not only sanctioned but directed, it follows that the object of the alleged conspiracy was not to wrongfully conceal as set forth in Specification 2 of the charge but was merely to adjust a difference appearing in the inventory.

Another view may be taken of the evidence presented before the court. The object paramount in the minds of the alleged co-conspirators was to make it possible for the post exchange manager, Sergeant Basic, to leave for the United States pursuant to the orders he had either received or anticipated receiving. The shortage disclosed by the inventory appeared to Basic as an obstacle to his being shipped home,

consequently he convinced the alleged co-conspirators that they should dip into their own pockets and put in enough money so that the shortage on the inventory would be reduced to within the one percent latitude allowed. There is no evidence to show they were harboring any intent to conceal any wrong or criminal offense by so doing. There are many ways, too numerous to mention, that could have caused the shortage without any wrongdoing whatsoever on the part of the employees of the exchange or those charged with responsibility for operation of the exchange. Conceding, however, for the moment, that the alleged conspirators intended the natural consequences of their acts, that is, a concealment of the shortage in the inventory, it still remained necessary to establish that such intent to conceal was wrongful. This was done only by showing circumstances from which the inference was supposed to be drawn that such intent was wrongful. I fail to understand how one can arrive at the conclusion that the intent on the part of the alleged conspirators was to wrongfully conceal, merely because they agreed to put in their own cash and their fulfillment of such agreement by actually doing so. The majority holding in arriving at the conclusion that accused and the alleged co-conspirators harbored an intent to wrongfully conceal assumes that they were covering up at least a mismanagement of the post exchange if not some criminal offense. There is nothing in the record to indicate that either was the fact. The conclusion that the intent to wrongfully conceal by the alleged co-conspirators by the majority holding is based also upon the inference that they intended to perpetrate a fraud because they intended to retake the money from the post exchange which they had put in, following the approval of the inventory. Such inference is based upon testimony that the money was put in as a loan or investment and upon Lawhorne's taking of money from the cash register in the presence of accused after the inventory had apparently been forwarded to higher headquarters. Such inference is unreasonable because Lawhorne was the only alleged conspirator who testified the money was a loan or investment. He also testified he took the money from the cash register because he was told he would get his money back. The only logical inference which can be drawn from such testimony is that he was acting purely on his own initiative. Acquiescence in Lawhorne's taking of the money from the cash drawer by accused in and of itself is no indication that Lawhorne's action was the result of a preconceived plan or conspiracy by accused and the alleged co-conspirators.

It should be also borne in mind that accused had been working at the post exchange at the time of the alleged conspiracy, only a matter of about three weeks. He had had no previous experience concerning post exchange operations and had been given no instructions by any one other than Basic, the ring leader of the alleged conspiracy. He did not join the conference of his fellow workers until after the agreement to put in money had been arrived at. When told by Basic of their decision to contribute, he did so. There is no evidence that would indicate he entertained an intent to wrongfully conceal anything. It is difficult to believe that one with accused's background, lack of previous training and lack of "on the job instructions"

could possibly have the specific intent attributed to him by Specification 2 of the Charge.

It was essential to support a finding of guilty of this specification to establish that the object of the conspiracy was to wrongfully conceal because it was specifically alleged. Having failed in that respect the finding of guilty of Specification 2 of the charge must be set aside and therefore it becomes unnecessary to consider any of the other elements of proof necessary to establish a conspiracy (CM 266734, Murphy, 43 BR 303; CM 324095, Driscoll, 73 BR 33).

It now becomes necessary to consider Specification 1 of the charge. It has been held that conspiracy may be proven by an overt act, but whether such proof is sufficient will depend upon whether or not the act is of such character as to be clearly referrable to a prearrangement or conspiracy of the actors (CM 301983, Young, 19 BR (ETO) 105). In the instant case there is no direct proof of any agreement between Lawhorne and accused to defraud the Central Exchange, nor that accused aided Lawhorne in any way to obtain money from the exchange, nor that such taking was fraudulent nor that accused knew it to be fraudulent. Thus the finding of the court must rest upon inferences drawn from the circumstances which were proven and it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for such inferences (CM 212505, Tipton, 10 BR 244). The only proof in the record of trial that could possibly be considered as a basis for a finding of guilty of Specification 1 of the charge is that Lawhorne testified that he took sufficient money from the post exchange cash register in the presence of accused to reimburse himself for the money he put in. Lawhorne further stated that he was employed there, that he had access to the cash register and that he took the money because Sergeant Basic had previously told him that he (Basic) would pay him (Lawhorne) back. Although accused was present when Basic made such statement it negatives any agreement or any concert of action between Lawhorne and accused. It is clear from Lawhorne's own testimony that he acted entirely upon his own because he was bound and determined to obtain the return of his money. The mere proof of the presence of accused when Basic promised to pay the money back to Lawhorne and accused's presence at the time the money was taken is not sufficient to show any agreement or conspiracy on the part of accused with Lawhorne (CM 312356, Preater, 62 BR 135).

When the evidence is considered as a whole the most that can be said is that it raises only a suspicion, surmise or conjecture that accused agreed and conspired with Lawhorne to fraudulently obtain money from the exchange. Such evidence is not of the weight and character necessary to support the finding of guilty of Specification 1 of the charge (CM 324095, Driscoll, 73 BR 33, and cases there cited).

4. For the reasons stated, I believe that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Harley A. Lamming, Judge Advocate

(318)

JAGK - CM 330224 1st Ind

JAGO, Dept. of the Army, Board of Review No. 2, 30 September 1948

TO: The Judge Advocate General

For his information.

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

Noted.
For TJAG
1 Oct 48

Walker

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

4 MAY 1948

JAGQ - CM 330238

UNITED STATES v. Privates First Class OREN G. PURSLEY (RA 44119079), DELBERT D. KETCHAM (RA 36771930) and CECIL F. WEEKLEY (RA 15204670), all of Company C, 793rd Military Police Service Battalion.	FIRST U. S. INFANTRY DIVISION Trial by G.C.M., convened at Bamberg, Germany, 17 February 1948. All: Dishonorable discharge. Pursley and Ketcham: Confinement for six (6) months. Weekley: Confinement for one (1) year. 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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

(As to Weekley and Ketcham)
Specification 1: In that Private first class Cecil F. Weekley and Private first class Delbert D. Ketcham both of Company "C" Detachment, 793rd Military Police Service Battalion acting jointly and in pursuance of a common intent, did at Bamberg, Germany, on or about 26 November 1947 feloniously take, steal and carry away 2000.00 Reichsmark, of some value, the property of Soldan Katz.

(As to Weekley and Pursley)
Specification 2: In that Private first class Cecil F. Weekley and Private first class Oren G. Pursley both of Company "C" Detachment, 793rd Military Police Service Battalion acting jointly and in pursuance of a common intent, did at Bamberg, Germany, on or about 28 November 1947 take, steal and carry away about 2600.00 Reichsmark, of some value, the property of Leberbaum Gerson.

Each accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous conditions was introduced. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved only so much of the sentence as to accused Weekley as provides for dishonorable discharge, total forfeitures and confinement at hard labor for one year and only so much of the sentences as to accused Ketcham and Pursley as provides for dishonorable discharge, total forfeitures and confinement at hard labor for six months, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement as to each accused, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

Soldan Katz, Lebovits Antol and another Jewish displaced person known as "Little Sammy" were proceeding from the Munich railway station to their home at approximately 1900 hours on the night of 26 November 1947 when they were approached by two men dressed as American soldiers riding in a jeep (R 7, 9). The two men asked the three displaced persons where they were going and requested to see their passes. After the displaced persons exhibited their passes, one of the two occupants of the vehicle searched Soldan Katz and found approximately seven thousand (7,000) Reichsmarks in his trouser's pocket (R 7-8, 13, 14). The two other displaced persons were then told to leave and Katz was ordered to enter the vehicle (R 7, 12, 13, 15). As the jeep was being driven slowly away from the scene, Katz was advised that if he would leave the money, he would be permitted to go home (R 7). When Katz refused he was told that he would be put in jail. To this threat Katz replied that it did not make any difference as that was all the money he had (R 7). Thereafter, the driver stopped the vehicle and informed Katz that he would not take him to jail if Katz would leave him four thousand (4,000) Reichsmarks. Upon Katz' refusal to give them anything, he was told that he would be put in jail in Nurnberg rather than in Bamberg. Later, Katz was asked for two thousand Reichsmarks. When he refused this time, the driver stated "Good, you come to Nurnberg" and drove on to Nurnbergstrasse (R 7). Katz then became frightened and offered one thousand marks which was accepted. After this amount had been taken by one of the two, the remainder of the money was returned to Katz. The latter was then driven to his camp and released. The lights of an American truck were shining on the jeep as it stopped near one of the camp gates and Katz was thus able to see the numbers "793d" and "57" on the 4 x 4 vehicle. Of the original amount of seven thousand marks, Katz discovered that he had only five thousand when he arrived home (R 7, 8, 9, 15).

At approximately 1900 hours on 28 November 1947 Gerson Lebenbaum and Benzion Projekt, displaced persons, were returning from a moving picture when a jeep approached them and stopped. The two occupants of the vehicle, who were subsequently identified at the trial as two of the three accused (R 18), searched them. One of the accused took a wallet containing approximately twenty-six hundred marks from Lebenbaum and handed it to the other, who was the driver of the vehicle. When Lebenbaum protested, the accused who took the billfold, struck him in the face (R 18-21, 24). Thereafter, the empty wallet was returned to Lebenbaum and the vehicle was driven quickly from the scene (R 19, 21, 23).

A report of each larceny was made to Lieutenant Colonel Ernest L. Booch, Assistant Provost Marshal, Nurnberg Military Post, on 29 November 1947. Based on the description and markings on the vehicle involved, as noted by one of the victimized displaced persons, Colonel Booch sent for accused Pursley and Weekley to whom a similarly marked vehicle had been assigned on 28 November 1947 (R 25, 26, 30). After advising them of their rights under Article of War 24, Colonel Booch asked them if they had stopped a Jew in the vicinity of the Apollo Theater on the evenings in question to check his papers and if they had removed any marks or other property from his person. When both accused voiced an emphatic denial, the aforementioned officer apprised them of the seriousness of the offense and stated:

> "*** If you did, take it and return it, but if I find you are lying, or find you men were guilty, I will see that charges are preferred against you. ***" (R 26).

Upon cross-examination, in clarification of this statement, Colonel Booch testified:

> "I said to both men, 'This is serious. If you are involved in it be man enough to say so; get the money, return it to the Jews and <u>we will forget it</u>.' I said also, 'If I find out, and I am going to check further, and if I find out you men are lying to me, I will see that charges are preferred against you.'" (R 29) (Underscoring supplied).

According to Colonel Booch, both accused Pursley and Weekley thereafter "*** on their word of honor, stated that they were not guilty ***" and were accordingly released (R 25, 26).

Several days later the displaced Jews again appeared at the Provost Marshal's office. Pursley and Weekley were called to the office once more and questioned. Both persisted in their denial of guilt. Subsequently their rights under Article of War 24 were again explained to them and according to Colonel Booch, each accused finally admitted his guilt and the money was returned.

In response to a question propounded by the court as to whether accused Pursley or Weekley took advantage of his promise of immunity, Lieutenant Colonel Booch stated that they had not taken advantage of the offer because both persisted in making denials even when questioned the second time (R 29, 30).

Captain Harvey N. Higgins, Company C, 793rd Military Police Battalion, a witness for the prosecution, testified that he was present in the office of Colonel Booch on 1 December 1947 when the three accused were called in for questioning. His account of what transpired corresponded to that of Colonel Booch in all material respects but he did make clear that all three accused were present when Colonel Booch promised immunity, viz:

"Q. Capt. Higgins, you stated you were present during the interrogation of the <u>three</u> accused by Col. Booch?
A. I was.

Q. During the course of that interrogation were there any statements made indicating a promise of no prosecution providing restitution was made?
A. There was not. Col. Booch made the remark if they owned up to it he would see they got a light sentence." (R 32).

The three accused, who had been advised of their rights as witnesses by counsel, elected to remain silent (R 33).

4. The competent evidence adduced of record independent of the confession of each of the accused tends to establish that two larcenies were perpetrated. Insofar as relates to the identity of those criminally accountable, however, such evidence is limited to the uncorroborated identification of two accused by the victim of the second larceny admittedly made during darkness with the aid of lights located thirty (30) to forty (40) yards distant (R 18, 19, 22). There is no competent evidence, exclusive of the accuseds' confessions as to the identity of those responsible for the larceny charged in Specification 1. While the victim of this offense noted the numbers on the vehicle the perpetrators were driving, none of the accused is connected with the operation of that vehicle except through hearsay testimony. Thus, it is clear that the legal sufficiency of the record to support Specification 1 of the Charge is wholly dependent upon the oral confessions of accused Weekley and Ketcham and dependent to a material degree upon the oral statements of Weekley and Pursley to support Specification 2 of the Charge.

It is undisputed from the testimony of prosecution witnesses that the confessions of the three accused were not made until <u>after</u> a military

superior of high rank had promised "light sentences" or absolute immunity. It is a basic principle, expressly required in our system of military jurisprudence that a confession is generally to be received with caution; that a confession must be shown to be voluntary; that the fact a confession was made to a military superior or his agent or representative "*** will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior"; that facts indicating "*** a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is .... evidence that the confession was involuntary" (par. 114a, MCM, 1928, pp. 115, 116); and that the burden of proving the voluntary character of a confession rests upon the prosecution (CM 233543, McFarland, 20 BR 15, 22). Considered in the light of these principles, the facts and circumstances in the present case manifestly show that any statement or confession made by accused to Lieutenant Colonel Booch could not be held voluntary in view of the promises he concededly made. In final analysis, the question presented for determination by the Board of Review in connection with the admissibility of the confessions is whether the accused were aware that the disqualifying promises of immunity had been revoked or otherwise nullified prior to the time they admitted their criminal complicity in the acts charged.

With respect to very analagous situations, distinguishable only by the fact that a first confession had actually been obtained immediately following the improper inducement, it has been uniformly decided that a presumption that the influence of the prior improper inducement continues, and that it is incumbent upon the prosecution to rebut such presumption by clear and convincing testimony.

> "*** The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made. ***" (Wharton's Crim. Evid., Vol. 2, sec. 601, pp. 998-1002).

> "Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made . * * *

> The evidence to rebut the presumption * * * must be presented by the prosecution * * *. The evidence to rebut the presumption must be clear and convincing * * *" (Evid. from American Jurisprudence, Civil and Criminal, sec. 487, pp. 424-425).

In CM 258076, McDonald and MacCrimmon, 4 BR (ETO) 357, the Board of Review in deciding this question stated:

> "The question presented is whether the prosecution's evidence was sufficiently 'clear and convincing' to rebut the presumption that 'the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible.'"

Similarly, in the present case, the conclusion is inescapable that once an improper inducement to make a confession has been shown to exist, the prosecution must rebut, by clear and convincing evidence, the presumption that such improper inducement continued. In the present case this requirement must be viewed even more critically since the same officer who made the inducement later obtained the confessions which were admitted in evidence. This factor alone distinguishes the present case from precedents such as CM 240949, Monsalve, 2 BR (ETO) 119, and Lyons v. Oklahoma, 322 U.S. 596.

The promises of immunity or of benefit in the instant case were not expressly retracted and therefore revocation is wholly dependent upon inferences based upon the facts adduced. These are limited to a statement made by Lieutenant Colonel Booch subsequent to the inducement to the effect that charges would be preferred if he found the accused were untruthful, the fact that accused first made a complete denial of everything, and that Lieutenant Colonel Booch was required to summon the accused to him at the time of the second interrogation when they confessed. Even the possible effect of the factor last mentioned is nullified as a matter of record by evidence elicited from Captain Harvey N. Higgins. The testimony of this witness for the prosecution showed that promises of light sentences were made to the three accused during the second interrogation at which time the confessions were actually made (R 31-33). It is thus manifest that there is not sufficient evidence of record to show that the taint of the improper inducement had been removed, and is wholly inadequate to meet the requirement that it be clear and convincing. Accordingly, the receipt in evidence of the oral confessions of the three accused constituted error.

In view of Article of War 37 which provides that the proceedings of a court-martial shall not be held invalid nor the findings or sentence be disapproved on the ground of improper admission of evidence unless it shall appear that the error "has injuriously affected the substantial rights of the accused", it is necessary to determine whether the above is prejudicial within the contemplation of that article. In so doing, it is necessary for the Board of Review to determine whether the legal evidence of guilt appearing in the record, independent of the erroneously admitted confessions, is relatively conclusive or inconclusive, or whether it may be said with reasonable certainty that the conviction would have resulted had such evidence been excluded (CM 316223, Evans, 71 BR 385; CM 329711, Tumang (15 April 1948)). It is obvious that evidence improperly admitted might effect the result in one case and not in another. It follows, therefore, that a conviction in one instance may be upheld because of quality and quantity of the evidence independent of that erroneously admitted (CM 237711, Fleischer, 24 BR 89, 99, 100), while in another case the admission of improper evidence by the prosecution would constitute substantial and prejudicial error and require setting aside the conviction (CM 211829, Parnell, 10 BR 133, 137; CM 316223, Evans, supra).

In applying the above principle to the present case, it becomes clear that the evidence of record tending to prove accuseds' guilt, except for the confessions, is most unsatisfactory and inconclusive. That such was the case may be said to explain the great lengths to which Lieutenant Colonel Booch went in obtaining the confession of each accused and in taking no steps toward prosecution until guilt was admitted by each. The record is devoid of any evidence linking any of the three accused with Specification 1 of the Charge. The accused Weekley and Pursley are linked with the offense charged in Specification 2 only by the uncorroborated identification of these two accused by a displaced person made after nightfall with the aid of lights located thirty to forty yards distant. It is indeed doubtful if such identification would be sufficient to convince beyond a reasonable doubt in any case. It is obvious that it would not be sufficient as a matter of law when considered in the light of evidence erroneously admitted which directly corroborated and substantiated such identification. Consequently, it does affirmatively appear from the record, considered in its entirety, that the erroneous reception in evidence of the statement of each of the three accused did affect the ultimate result in the case and the error committed as to each accused was therefore highly prejudicial to his substantial rights within the meaning of the 37th Article of War.

5. 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 as to each accused.

W H Johnson Jr, Judge Advocate

Wilmot T. Vaughn, Judge Advocate

A. D. Kane, Judge Advocate

JAGQ - CM 330238 1st Ind

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

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

1. In the case of Privates First Class Oren G. Pursely (RA 44119079), Delbert D. Ketcham (RA 36771930) and Cecil F. Weekley (RA 15204670), all of Company C, 793rd Military Police Service Battalion, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence as to each accused be 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 330238).

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

1 Incl
Record of Trial

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

14 MAY 1948

JAGQ - CM 330265

UNITED STATES v. First Lieutenant ROBERT S. BECKER (O-776860), 2012th Labor Supervision Company, 831st Engineer Aviation Battalion, Rhein/Main Air Base, Frankfurt, Germany, APO 57, US Army.	)	UNITED STATES AIR FORCES IN EUROPE Trial by G.C.M., convened at Wiesbaden, Germany, 5, 8, 10, 11, and 12 March 1948. Dismissal and confinement for three (3) years.

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

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

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

Specification 1: In that 1st Lieutenant Robert S. Becker, 2012th Labor Supervision Company (Aviation), did, at Rhein/Main Air Base, Frankfurt, Germany, on or about 15 January 1947, wrongfully and unlawfully, being an officer of the United States Army, sell to Corporal Francis Whitehead, Jr, an enlisted man of the United States Army, two bottles of whiskey at the price of $20.00 per bottle, or a total of $40.00.

Specification 2: In that 1st Lieutenant Robert S. Becker, 2012th Labor Supervision Company (Aviation), did, at Rhein/Main Air Base, Frankfurt, Germany, on or about 27 March 1947, with intent to defraud, cause to be falsely made a certain letter in the following words and figures, to-wit:

HEADQUARTERS G-II-5
831st ENGINEER AVIATION BATTALION
APO 57 US ARMY

AG 300,4 28 March 1947
SUBJECT: Orders
TO : Sgt. Mark L. O'Connor, RA 15073810 B Co, 831st Engr Avn Bn
Pfc Charles M. Gebhardt RA 33585950 A Co, 831st Engr Avn Bn

1. Enlisted men named above will proceed on or about this date from Frankfurt, Germany by rail and/or POC to Valls, Holland, for approx three (3) days for the purpose of receiving 605 bottles of spirits belonging to the 831st Engr Avn Bn Officers' Club, and return to this station.

2. The Transportation Corps will furnish necessary rail transportation if available. Cost of transportation within Germany is chargeable to A 2170425-G.

3. Cost of transportation outside of Germany and Austria and POC T within Germany and Austria will be borne by the individuals concerned.

4. No per diem authorized nor reimbursement for transportation costs advanced by the individuals.

5. The travel authorized herein has been cleared in compliance with Par 11, Sec I, Cir 41, Hq USFET, 29 Mar 46.

6. Outside of the occupied zones, US Army messing, billeting and other facilities are not authorized and will not be provided by any commander, and further, the bearer of this order will not request any commander to provide such.

7. Within the occupied zones, US Army messing, billeting and other facilities will be provided only after prior individual arrangements have been made, and then only at the discretion of the commander providing the facilities.

8. Auth: AR 600-115; Sec 1 and 11, Cir 162, Hq USFET, 4 Nov 46; Par 2, Sec II, Cir 120, Hq USFET, 28 Aug 46.

BY ORDER OF LIEUTENANT COLONEL GLISCH:

s/ Clarence E. Howell
Official Seal 831st Engr Avn Bn(Stamp) t/ CLARENCE E. HOWELL
Captain, Air Corps
Adjutant

OFFICIAL

which said letter was a writing of a public nature which might operate to the prejudice of another.

Specification 3: In that 1st Lieutenant Robert S. Becker, 2012th Labor Supervision Company (Aviation), did, at Rhein/Main Air Base, Frankfurt, Germany, on or about 27 March 1947, with intent to defraud, cause to be falsely made a certain certificate in the following words and figures, to-wit:

HEADQUARTERS
831ST ENGINEER AVIATION BATTALION
APO 57 US Army

28 March 1947

SUBJECT: Certificate
TO : Export Control Officer H.Q. Mil Gov. RB. Aachen C.C.G.(B.E.)

I certify that six hundred five (605) bottles of spirits as follows:

600 Bottles Philadelphia Whiskey
2 Bottles Chastenet Vermouth
3 Bottles Paul Ruinart Champagne

being retained by the English Frontier Control at Valls, Holland, are the legal property of the 831st Engineer Aviation Battalion Officers' Club, purchased on Contract Number DL 203045 on 24 March 1947.

Request the above named spirits be released to the bearer of this certificate.

s/ Harry S. Glisch
t/ HARRY S. GLISCH
Lt Col CE
Commanding, 831st
Engr Avn Bn
APO 57 US Army
Frankfurt, Germany

Official Seal 831st Engr Avn Bn (Stamp)

OFFICIAL:

which said certificate was a writing of a public nature which might operate to the prejudice of another.

Specification 4: In that 1st Lieutenant Robert S. Becker, 2012th Labor Supervision Company (Aviation), did, at Rhein/Main Air Base, Frankfurt, Germany, on or about 14 October 1947, with intent to deceive Agent Claude L. Martin, Criminal Investigation Division, United States Army, officially state to the said Agent Claude L. Martin that he, 1st Lieutenant Robert S. Becker, had never seen before 14 October 1947 three certain documents, to-wit, two copies of letter orders AG 300.4 dated 28 March 1947, addressed to Sergeant Mark L. O'Connor and Private first class Charles M. Gebhardt, authorizing travel to Vaals, Holland, and one copy of a certificate dated 28 March 1947 addressed to the Export Control Officer, Military Government, Aachen, Germany, which statement was known by the said 1st Lieutenant Robert S. Becker to be untrue, in that he had previously seen the certain three documents on or about 28 March 1947.

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

Specification 1: In that 1st Lieutenant Robert S. Becker, 2012th Labor Supervision Company (Aviation), did, at Rhein/Main Air Base,

Frankfurt, Germany, on or about 15 January 1947, wrongfully and unlawfully, being an officer of the United States Army, sell to Corporal Francis Whitehead, Jr., an enlisted man of the United States Army, two bottles of whiskey at the price of $20.00 per bottle, or a total of $40.00.

Specification 2: In that 1st Lieutenant Robert S. Becker, 2012th Labor Supervision Company (Aviation), did, at Rhein/Main Air Base, Frankfurt, Germany, from about 1 December 1946 to about 1 May 1947, wrongfully and unlawfully engage in business and business transactions, to-wit, the buying and selling of whiskey, in violation of USFET Circular 140 1946 and Army Regulation 600-10, and the provisions thereof.

Specification 3: Same as Specification 2 of Charge I.

Specification 4: Same as Specification 3 of Charge I.

Specification 5: Same as Specification 4 of Charge I.

Specification 6: (Finding of not guilty).

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

Specification 1: In that 1st Lieutenant Robert S. Becker, 2012th Labor Supervision Company (Aviation), did, at Rhein/Main Air Base, Frankfurt, Germany, on or about 28 March 1947, wrongfully and unlawfully utter a certain false letter in the following words and figures, to wit:

(Same document as set forth in Specification 2 of Charge I).

which said letter was a writing of a public nature which might operate to the prejudice of another.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 6 of Charge II and Specification 2 of the Additional Charge and guilty of all other Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three (3) years. The reviewing authority approved the sentence, 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 48.

3. Evidence for the Prosecution.

Accused was assigned as mess officer of the 831st Engineer Aviation Battalion, APO 57, Rhein/Main, from December 1946 until May 1947, and occupied an office near the mess hall (R 45, 204, 206).

In January 1947, Corporal Francis G. Whitehead, second cook, who was under the accused's supervision, talked with accused in the mess office regarding the purchase of whiskey. According to Corporal Whitehead, he asked accused if he had any whiskey and when accused answered that he did, asked the Corporal what kind he wanted, the Corporal told him that it did not make any difference, accused sold him two-fifth size bottles of "Philadelphia" whiskey for forty dollars ($40.00). Corporal Whitehead paid accused with four ten-dollar bills in scrip currency. Delivery of the whiskey was made by accused either from his desk or from behind it. In addition to the desk in the seven by twelve foot mess office Corporal Whitehead observed a wall locker approximately four and one-half feet high which contained a wood box resembling a whiskey case (R 45-51).

Several days before Christmas, 1946, Private Peter Bokanovich, who was first cook and later mess sergeant, went to the organization mess office and asked accused if he had any whiskey to which the latter responded "Yes, if you got the money, I've got the whiskey" (R 52). Upon being assured by Private Bokanovich that he had the money, accused obtained two bottles of "Philadelphia" whiskey from the wall locker in the office and gave them to Private Bokanovich in return for forty dollars ($40.00) in scrip notes of ten dollar denominations (R 51, 52, 53). Approximately one week later, Private Bokanovich purchased five more bottles of Philadelphia and Schenley whiskey from accused in the mess office for one hundred dollars ($100.00) in scrip currency in denominations of five and ten dollars (R 54, 55).

Private First Class Everett H. Yates, a cook and at one time the chief baker in the mess under accused's supervision, testified that he first purchased whiskey from accused in November 1946 (R 75). He purchased thirty to thirty-five bottles of whiskey from accused, including case lots on two separate occasions, during the period 1 December 1946 to 1 May 1947, at prices ranging from one hundred twenty dollars ($120.00) per case of twelve bottles to fifteen or twenty dollars for a single bottle (R 57, 58, 59, 62, 75, 76). On 24 December 1946, Private Yates purchased two bottles

of Philadelphia whiskey from accused for twenty dollars per bottle. Accused obtained this whiskey from the wall cabinet in the mess office. Yates paid accused a total of three hundred fifty to four hundred dollars for whiskey. On 12 or 13 March 1947, accused approached him in the mess hall and asked him if he needed a little whiskey to celebrate his birthday (R 58). When he told accused he had no money, the latter agreed to wait until "pay day" and sold Yates a case of whiskey for one hundred and forty dollars ($140.00). Accused obtained this whiskey from the officers barracks and delivered it to Yates by passing it through a window in the enlisted barracks about thirty minutes later (R 60, 62). On several other occasions Yates made nightly visits to accused's home in New Isenberg and purchased whiskey (R 60, 61, 63). Accused asked this witness several different times if he needed "a bottle" (R 62, 63). He still owes accused approximately four hundred dollars ($400.00) notwithstanding accused's efforts to collect this amount by repeated demands (R 61) and even by calling on him at the home of his "girl friend" one night at which time accused collected eighty dollars ($80.00) (R 61, 63).

The court took judicial notice of Circular No. 140, USFET, 26 September 1946, and Army Regulations 600-10, 8 July 1944, which contain prohibitions against persons subject to military law engaging in business or other enumerated activities (R 44).

About 13 or 14 March 1947, accused gave Master Sergeant Lawrence E. Tinker, Sergeant Major of the 831st Aviation Battalion, three hundred dollars in scrip. Sergeant Tinker was to use this money to purchase whiskey for accused while on a three-day pass in Brussels, Belgium. Accompanied by a Sergeant Hall of the same organization, Sergeant Tinker proceeded to Brussels in accused's vehicle (R 88, 89, 90). In Brussels, Sergeants Tinker and Hall purchased fifty cases of whiskey from the H. J. Bridges Company. Seven cases of this whiskey, or eighty-four bottles, "Philadelphia" brand, were purchased for accused (R 91). While this cargo was being transported from Brussels to Rhein/Main, the whiskey was confiscated and held by the British Customs officials at Vaals, Holland, because the orders of Sergeant Tinker were "insufficient" (R 89, 90; Pros. Exs. 2, 3). The sergeants then proceeded from Vaals, Holland, to the 831st Battalion Area where they communicated with accused relative to the confiscation. Following a discussion between accused and Sergeant Tinker, wherein it was decided that Major Douglas J. Campbell, Commanding Officer of the 831st Battalion, would probably not approve the necessary orders to have the whiskey released, Sergeant Tinker left several sheets of white bond and carbon paper, 8½ x 10½ size, on accused's desk in the mess office (R 91, 92). This paper was blank except for the mark of the official battalion stamp which had been placed in the lower left-hand

corner of the blank paper (R 92, 93; Pros. Exs. 2 and 3). As a result of a conversation with accused, Sergeant Tinker "... jotted how orders would normally be cut ..." and, in the presence of accused, handed the paper to Ilse Dieringer, a German stenographer, sometimes employed in the mess office who was known as "Susy" (R 94). At accused's direction, she typed letter orders addressed to Sergeant Mark L. O'Connor and Private First Class Charles M. Gebhardt of accused's organization (Pros. Ex. 2) and a certificate addressed to the Export Control Officer H.Q. Mil Gov. RB. Aachen C.C.G. (B.E.) (Pros. Ex. 3). She testified that accused, Captain Kirby, Sergeants Tinker, Hall and O'Connor and Private First Class Gebhardt were present in the office at the time the orders were typed (R 109). Prosecution's Exhibit 2 was typed for the signature of Clarence E. Howell, Captain, Air Corps, Adjutant, "By order of Lt. Colonel Glisch" (R 109), and Prosecution's Exhibit 3 for the signature of the officer last named (R 110). Although both instruments were typed on or about 28 March 1947, it was shown and stipulated that First Lieutenant Raymond M. McCarthey relieved Captain Howell as Battalion Adjutant of the 831st Engineer Aviation Battalion on 19 March 1947, that Major Douglas J. Campbell relieved Lieutenant Colonel Harry S. Glisch as Commanding Officer of the same organization on 14 December 1946 and that Major Campbell continued in command through 1 May 1947 (R 68, 69; Pros. Ex. 1). During the time Miss Dieringer was typing the orders, she was told that she could make no mistakes since there could be no corrections on the paper (R 111).

Following the typing of the purported orders, Sergeant Mark L. O'Connor, then a member of accused's organization, observed accused sign Captain Howell's name and Lieutenant Colonel Glisch's name to Prosecution Exhibits 2 and 3. Thereafter accused handed the "orders" (Pros. Ex. 2) and the "certificate" (Pros. Ex. 3) to Sergeant O'Connor who had previously been asked by accused if he wanted a three-day pass (R 130). Accused also gave O'Connor the certificate of registration for his jeep and instructed him to proceed to the Border Control in Holland for the purpose of picking up some whiskey (R 131). Accompanied by Gebhardt, whom accused had also assisted in obtaining a pass, Sergeant O'Connor proceeded to Vaals, Holland (R 117, 118, 119, 131). Arriving at the Border Control at 2100 or 2200 hours that night, Sergeant O'Connor "handed them the certificate and they started lugging whiskey on the trailer" (R 131). He remembers signing his name to the certificate but does not recall if the words "Received from the British Frontier Control Service, Aachen. Post 'WHIP' Vaalserquartier, Germany, 29 March 1947" were printed immediately above his signature at that time (R 131; Pros. Ex. 3). With approximately fifty cases of Philadelphia brand whiskey in a trailer pulled by accused's jeep, O'Connor and Gebhardt made the return trip with

but several minor delays. These two soldiers drank several "loose" bottles of the Philadelphia brand whiskey on the return trip (R 122, 124, 132, 133). The two arrived at accused's quarters with their cargo at about 0930 hours 30 March 1947 and they were having breakfast there when Sergeants Tinker and Hall arrived (R 121, 122, 133).

At accused's direction, the trailer, which contained the whiskey, was uncoupled and left in the garage. Thirty-three of the fifty cases of whiskey originally purchased were unloaded from the trailer. Sergeants Tinker and Hall took twenty-three cases for distribution to the men for whom the purchases had been made and left ten (10) cases with accused. Of the fifty cases originally purchased, Sergeant Tinker had purchased only seven (7) cases for accused at a price of approximately four dollars ($4.00) per bottle (R 89, 90, 96, 102, 104, 105).

Sergeant O'Connor testified that he had made a prior trip to Antwerp, Belgium around the eighth of March in a "'46 Chevvy" for the purpose of obtaining whiskey for accused. On that occasion he had procured twenty-eight cases of Philadelphia brand whiskey which were delivered to accused's home (R 133, 134). From December of 1946 until April of 1947, he had sold whiskey to other enlisted men for accused for fifteen or twenty dollars per bottle and had observed several persons in accused's office obtaining whiskey (R 134, 135, 137). In the words of this noncommissioned officer "...if we had anybody that wanted to purchase whiskey I would just go over and get it for them and the lieutenant would open up the cupboard and get it for me. I would generally take the money and take the whiskey out and give to the soldier" (R 135). O'Connor finally went to the Air Inspector and reported the matter because he was released from the mess hall and "... From the time Lieutenant Becker took over there, why, it just seemed like I had to sell whiskey for him to hold my job and I was getting sick of it .... Different fellows had spent all of their money every month for whiskey and I just didn't want no more of it" (R 140).

Sergeant Johnny L. Hawkins was present on New Year's Eve 1946 when Sergeant O'Connor counted out over five hundred dollars for the accused. This money represented the proceeds from the sale of two or three cases of whiskey to negro soldiers at a camp at Zeppelinheim. He accompanied O'Connor and picked up the whiskey at the home of a civilian post exchange employee in Kelsterbach and transported it in accused's Government jeep (R 225, 226, 229, 230). Captain Freddy H. Fouche and First Lieutenant Donald G. Leech, rebuttal witnesses, testified that in general accused's character was considered "poor" or "questionable" (R 227-234).

Two voluntary written statements were taken from accused on 8 September 1947 and 14 October 1947 by Agent Claude L. Martin of the

31st CID (R 160-166; Pros. Exs. 4, 5). The second statement (Pros. Ex. 5) contains the following question and accused's answer thereto:

> "Q. Have you ever seen the documents mentioned in question No.49 of this statement [the orders introduced as Prosecution's Exhibit 2 and the certificate of ownership introduced as Prosecution's Exhibit 3], before this date, 14 October 1947?
> A. No."

In addition according to Agent Martin a search of accused's quarters was made during the investigation and forty-eight (48) bottles of whiskey including some Philadelphia brand, and nine (9) bottles of Verschnit wine were found (R 165).

From September 1946 until about 14 December 1946, individual sales of whiskey to individual club members were made periodically. The amount never exceeded eight bottles for each officer. "Philadelphia Bourbon" according to Captain Bormann, club president, sold for approximately two dollars and thirty cents ($2.30) to three dollars ($3.00) per bottle. Trips were made to Belgium for the purpose of purchasing intoxicants and were considered authorized prior to receipt of notification of USFET Circular No. 132 in December of 1946 (R 70-74).

4. Evidence for the Defense.

Numerous members of the military service testified that in their opinion Sergeant O'Connor's character was poor and that they would not believe him under oath or both. These individuals, all of whom were members of the 831st Engineer Aviation Battalion included Sergeants Piccolo (R 183, 184) and Whitehair (R 184, 185); Corporal Ghiz (R 186, 187); Private First Class Burton (R 188, 189); Private Proctor (R 189-191); Master Sergeant Tinker (R 191-195); First Lieutenant Camilli (R 193, 194); Captain Honadle (R 196, 197); Master Sergeant Niewodowski (R 199); First Lieutenant Brunner (R 200); First Lieutenant Marker (R 201); Sergeant Anderson (R 203, 204); Staff Sergeant Andraychik (R 204, 205); and Master Sergeant Crow (R 206, 207). Corporal Ghiz also testified that he would not believe Private First Class Yates under oath (R 187) and that during the period he worked for accused, he did not see accused sell whiskey to anyone (R 191-192). First Lieutenant Camilli and Captain Honadle also testified as to accused's good character (R 193, 194, 196, 197), and Staff Sergeant Andraychik and Master Sergeant Crow stated that they worked under accused from December 1946 to April 1947 and during this time did not see him sell whiskey to anyone (R 204-207).

Seven letters from other officers attesting to accused's good character by stipulation were read into the record (R 208-210).

After having been advised of his rights as a witness accused elected to testify relative to Specification 1 of Charge I, Specification 1 of Charge II, involving the alleged sale of whiskey to Corporal Whitehead and Specification 2 of Charge II wherein he was charged with unlawfully engaging in business (R 211). He testified that he had not sold whiskey to Whitehead, O'Connor, Yates or Bokanovich or other enlisted men of the 831st Engineer Aviation Battalion, but that he had given whiskey to soldiers in the mess line at Christmas time (1946). Further that he loaned Yates five hundred dollars, as evidenced by a written memorandum (Def. Ex. A), but there was no interest charged (R 211, 212). He had also loaned money to other enlisted men and to officers. Accused purchased four to six cases of whiskey in Belgium for his personal use through the Battalion S-4. He requested Sergeant Tinker to bring him whiskey and approximately thirty-three cases were brought to his home on the morning of 30 March 1947. He was at a loss to understand why O'Connor and Gebhardt brought this whiskey to his home. A "few cases" of this whiskey were left with him by Sergeants Tinker and Hall, "perhaps three or four". In all, he purchased around seventy-two bottles of whiskey between 1 December 1946 and 1 May 1947, mostly for parties in his home. Sergeant O'Connor's friendship seemed to terminate when the latter "smashed" accused's jeep around 10 April 1947 (R 211-223). Accused also testified in rebuttal that he was in the 831st Post Exchange taking inventory, from lunchtime on 31 December 1946 until approximately 0200 hours the following morning. He was not in the mess office at all on 31 December 1946 (R 235, 236).

5. The defense entered a plea in bar of trial predicated upon the premise that accused had been denied his constitutional rights because the investigating officer examined a witness not in the presence of accused and over his objection during the pre-trial investigation conducted pursuant to Article of War 70. It was admitted that accused and his counsel were offered ample opportunity to cross-examine the witness in question after her statement was taken by the investigating officer and prior to the trial of this case. It is clear from these circumstances shown by the record of trial that the procedure followed during the investigation constituted compliance with the requirements of Article of War 70 and that the ruling of the court was therefore proper (CM 227239, Wyatt, 15 BR 217, 255; CM 237030, Nelson, 23 BR 231, 248).

6. Specifications 1 of Charges I and II allege respectively that on or about 15 January 1947 accused, an officer, wrongfully and unlawfully sold to Corporal Francis Whitehead, an enlisted man, two bottles of whiskey at a price of twenty dollars ($20.00) per bottle in violation of Articles of War 95 and 96. The evidence adduced of record shows beyond a reasonable doubt the sale of the intoxicants by accused to this enlisted subordinate, who was under his command, at a grossly exorbitant and unconscionable price, six or seven times the cost to the officer. Obviously, profiteering of this character by a military superior, especially within his own command, constitutes conduct both unbecoming an officer and a gentleman and prejudicial to the military service (CM 322498, Trumpf (9 Oct 1947)).

Specifications 2 and 3 of Charge I and Specifications 3 and 4 of Charge II allege that accused on or about 28 March 1947, caused to be falsely made certain letter orders and a certain certificate of ownership in violation of Articles of War 95 and 96. The evidence in support of these offenses shows clearly that accused was instrumental in obtaining military correspondence paper, blank except for the official seal of the battalion affixed in the lower left-hand corner, upon which in his presence, the orders and the certificate were typed by a German clerk. Thereafter, according to the only direct testimony adduced, accused unlawfully and without authority forged thereto the signatures of his Battalion Adjutant and Commanding Officer who were no longer with the organization. Clearly, his participation in these offenses is sufficient in each instance to support the charge of actual forgery of the instruments within the meaning of Title 18, Section 550, United States Code. It necessarily follows that he is criminally responsible of the lesser charge of causing the forgeries to be made in violation of the 95th and the 96th Articles of War. The pattern of the transactions throughout the record is all too complete to exculpate accused from accountability. Accused even admitted that the whiskey obtained from the British Frontier Control, subsequent to the dates of the fraudulent letter orders and certificate of ownership and unquestionably as a result thereof, was delivered to his home on Sunday morning, 30 March 1947 for some reason he was unable to explain (R 218).

Specification 4 of Charge I and Specification 5 of Charge II, charge accused with making a false official statement in writing to an agent of the Criminal Investigation Division on or about 14 October 1947. In support thereof, the testimony of numerous witnesses clearly shows that accused was a participant in the actual making of these spurious documents. During the course of an official military investigation, after being advised of his rights against self-incrimination, accused unequivocally denied having seen the orders or the certificate prior to that day.

This denial of an official character over accused's own signature is sufficient to convince beyond any doubt that his falsification was knowingly made. It is basic that such conduct violates both Articles of War 95 and 96 (Pars. 151 and 152, MCM, 1928, pp. 186-188).

It is not legally objectionable to charge the identical acts as a violation of Article of War 95 and Article of War 96 or some other applicable article (Par. 151, MCM 1928, p. 186; CM 252773, Jonas, 34 BR 189).

Specification 2 of Charge II alleging that accused engaged in business and business transactions in violation of USFET Circular 140, 1946, and Army Regulations 600-10 during the period 1 December 1946 to 1 May 1947 is fully supported by evidence of a clear and convincing character. The obvious intent of both of these two consistent directives was to prevent just such a course of conduct as was engaged in by accused. Indeed it is difficult to determine the highly prejudicial effect of accused's business transactions, for personal profit and gain, upon the organization in which he occupied a position of leadership and trust. During the period of time alleged, the record shows clearly that accused obtained for the purpose of sale and sold to members of his own command as well as others at a highly inflated and exorbitant price, intoxicating liquors. His actions, in addition to being a flagrant violation of the express terms of the two directives, brand this commissioned officer both as a common "bootlegger" and as a "black-marketeer". There is no question but that he was chargeable with full knowledge of these two prohibitions, promulgated by competent authority, and subject to the punitive provisions and consequences thereof (CM 325541, Morgan, 17 Feb. 1948).

Specification 1 of the Additional Charge alleges the wrongful and unlawful uttering of the letter orders dated 28 March 1947, addressed to Sergeant O'Connor and Private First Class Gebhardt, in violation of Article of War 96. As heretofore considered, there is no question but that the orders were forged and fraudulent. However, there is an additional consideration in connection with this offense, viz., that of physically uttering or passing the instrument as true and genuine with fraudulent intent. The record contains a substantial conflict as to whether Private First Class Gebhardt was present during the fraudulent execution of the document and was not in fact a principal to the forgery itself or whether he was innocent and unaware of any wrongdoing in connection therewith at the time Sergeant O'Connor delivered the orders to him while the two were en route to Vaals, Holland. It is unnecessary

to determine this factual conflict, however, or to conjecture as to the court's conclusion with respect thereto, in view of the evidence that the orders were given to Sergeant O'Connor and Private First Class Gebhardt for the purpose of being used or put in circulation. In this connection it has been consistently held, that whether or not the receiver of the forged document knew of its false character, delivery to him nonetheless constituted uttering if the passing to him was with the intent that such be put in circulation (United States v. Nelson, 135 Federal Cases No. 15,861; State v. Patterson, 116 Missouri 505; Section 910, Wharton's Criminal Law, Vol. 2, Twelfth Edition). Both the orders and the certificate of ownership obviously were made for the express purpose of being shown to whomever the exigencies of the mission might require in order to obtain the liquor. It must have been reasonably foreseen at the time of their making and delivery to Sergeant O'Connor and Private First Class Gebhardt that they would show the documents to the officials of friendly foreign governments engaged in the performance of official duties.

7. Department of the Army and Air Force records show that accused is twenty-nine years of age, married, and has two children. He entered the military service from Chicago, Illinois, 20 February 1943. Subsequently, he served as a Private at Sheppard Field and Denver University and as an Air Corps Cadet at Santa Ana, California, Las Vegas, Nevada, and Kirtland Field. He was commissioned a Second Lieutenant, Army of the United States, Air Corps (Bombardier) 29 April 1944, promoted to First Lieutenant, 20 December 1945 and to Captain in the Officers Reserve Corps, 24 July 1947. His efficiency reports include one rating of "Satisfactory", two ratings of "Excellent", one rating of "Superior" and four ratings of "Unknown". Before entering the service he was employed as a salesman of beverages and tobacco and as a service station attendant. He represents that he reads, speaks, and comprehends Latin and Jewish.

8. The court was legally constituted. 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 and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.

W. H. Johnson, Judge Advocate

Wilmot V. Vaughn, Judge Advocate

[illegible], Judge Advocate

JAGQ - CM 330265 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. MAY 18 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. Becker (O-776860), 2012th Labor Supervision Company, 831st Engineer Aviation Battalion, Rhein/Main Air Base, Frankfurt, Germany, APO 57, US Army.

2. Upon trial by general court-martial in Germany this officer was found guilty of wrongfully selling two bottles of whiskey to an enlisted man for forty dollars (Specs. 1 of Charges I and II); causing to be forged letter orders and a certificate of ownership (Specs. 2 and 3 of Charge I and Specs. 3 and 4 of Charge II); making a false official statement in writing to an agent of the Criminal Investigation Division (Spec. 4 of Charge I and Spec. 5 of Charge II); unlawfully engaging in business contrary to competent military orders and Army Regulations (Spec. 2 of Charge II); and uttering a forged instrument (Spec. 1 of the Additional Charge), all in violation of Articles of War 95 and 96. He was sentenced to be dismissed the serfice, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three (3) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Accused, while stationed with the 831st Engineer Aviation Battalion at Rhein/Main, Germany, obtained and sold a large amount of whiskey to numerous enlisted men under his command and in other organizations for the sum of from fifteen ($15.00) to twenty ($20.00) dollars per bottle or from one hundred twenty ($120.00) to one hundred forty ($140.00) dollars per case, during the period 1 December 1946 to 1 May 1947. Both a theatre directive and Army Regulations prohibited members of the military service from engaging in trade or business under the circumstances shown. Whiskey of the brand usually sold by accused normally cost military personnel from two dollars and thirty cents ($2.30) to four dollars ($4.00)

per bottle. On or about 28 March 1947 accused forged or caused to be forged letter orders addressed to two enlisted men and a certificate of ownership of the whiskey, for the purpose of obtaining liquor held in Holland by officials of the English Frontier Control. The orders and certificate were given to these enlisted men who drove to Holland and obtained the whiskey from the English Customs Officials. Although it is clear that accused had a German stenographer type the orders and the certificate, and it stands undisputed in the record that accused without authority signed the names of two officers thereon, he denied during an official investigation by an agent of the Criminal Investigation Division having seen either document prior to 14 October 1947.

4. Department of the Army and Air Force records show that accused is twenty-nine years of age, married, and has two children. He entered the military service from Chicago, Illinois, 20 February 1943. Subsequently, he served as a Private at Sheppard Field and Denver University and as an Air Corps Cadet at Santa Ana, California, Las Vegas, Nevada, and Kirtland Field. He was commissioned a Second Lieutenant, Army of the United States, Air Corps (Bombardier) 29 April 1944, promoted to First Lieutenant, 20 December 1945 and to Captain in the Officers Reserve Corps, 24 July 1947. His efficiency reports include one rating of "Satisfactory", two ratings of "Excellent", one rating of "Superior" and four ratings of "Unknown". Before entering the service he was employed as a salesman of beverages and tobacco and as a service station attendant. He represents that he reads, speaks, and comprehends Latin and Jewish.

5. In view of the fact that accused's numerous sales of intoxicants to enlisted men, both within and without his command amounted to very objectionable "black-market" transactions, and in view of the serious offenses of forgery and uttering a forged instrument, I recommend that the sentence 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 into effect the foregoing recommendation, should it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 119, 4 June 1948).

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

JAGK - CM 330282

28 JUN 1948

UNITED STATES v. Second Lieutenant KENNETH E. DODGE (0-1342059), Infantry, Company F, 11th Infantry, Fort Jackson, South Carolina	FORT JACKSON, SOUTH CAROLINA Trial by G.C.M., convened at Fort Jackson, South Carolina, 1 April 1948. Dismissal, total forfeitures and confinement for three (3) years.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that 2nd Lieutenant Kenneth E. Dodge, 11th Infantry, then of Headquarters 5th Infantry Division, did, without proper leave, absent himself from his organization at Fort Jackson, South Carolina, from about 30 December 1947, to about 22 February 1948.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: In that 2nd Lieutenant Kenneth E. Dodge, ***, did, at Columbus, Georgia, on or about 24 December 1947, with intent to defraud, wrongfully and unlawfully make and utter to Technical Sergeant Raymond H. Turner, a certain check, in words and figures as follows, to wit:

THE SOUTH CAROLINA NATIONAL BANK

Columbia, S.C. 24 December 19 47 No._____

Pay to the
Order of Sgt Raymond Turner $25 00/100

Twenty five and ---------- 00/100 Dollars

/s/ Kenneth E Dodge
2d Lt 01342059

For Kenneth E Dodge

,he, the said 2nd Lieutenant Kenneth E. Dodge, then well knowing that he did not have and not intending that he should have any account with the South Carolina National Bank, Columbia, South Carolina for the payment of said check.

Specification 4: In that 2nd Lieutenant Kenneth E. Dodge, ***, did at New York, New York on or about 1 January 1948, with intent to defraud, wrongfully and unlawfully make and utter to the Pennsylvania Hotel, a certain check, in words and figures as follows, to wit:

THE SOUTH CAROLINA NATIONAL BANK

Columbia, S.C. 1 January 19 48 No. _____

Pay to the
Order of Pennsylvania Hotel $100 00/100

One Hundred and 00/100 ---------- Dollars

For Closed

/s/ Kenneth E Dodge
2d Lt 01342059

, and by means thereof, did fraudulently obtain from the Pennsylvania Hotel one hundred dollars ($100.00) in cash, he the said 2nd Lieutenant Kenneth E. Dodge, then well knowing that he did not have and not intending that he should have any account with The South Carolina National Bank, Columbia, South Carolina, for the payment of said check.

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

Specification: In that 2nd Lieutenant Kenneth E. Dodge, ***, did, at Fort Benning, Georgia, on or about 8 November 1947, unlawfully marry, take and have for his wife one Mary Hancock, he the said 2nd Lieutenant Kenneth E. Dodge then having a lawful and living wife, to wit: Aida Ortiz Dodge.

Accused pleaded guilty to Charge I and its specification and not guilty to all other charges and specifications. He was found not guilty of Specifications 1 and 2 of Charge II and guilty of all other specifications and of all charges. No evidence of any previous conviction was

introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Extract copies of the morning reports of Headquarters, 5th Infantry Division, Fort Jackson, South Carolina, were received in evidence without objection by the defense. From these morning reports it appeared that accused had gone absent without leave on 30 December 1947, that he was apprehended in Puerto Rico on 22 February 1948 and that he was returned "to duty" on 29 February 1948. Major Arnold E. Rice, Headquarters, 5th Infantry Division, had given accused verbal permission to be absent from his station for the period from 0001 hours on 27 December to 2400 hours on 29 December 1947. Accused "never did" return from his pass. About 20 or 21 February 1948, Major Rice received a letter from accused which had been written in Puerto Rico. Mary Willie Hancock, who had gone through a marriage ceremony with accused, had visited New York with accused shortly after Christmas, 1947, and on 5 January 1948 had returned with him to the apartment in Columbia, South Carolina, where they resided together. Accused left the apartment on the morning of 6 January 1948, "when he was supposed to go to work." This was the "last time" Mary had seen accused, for he "disappeared" on that date (R 6-8, 30-32; Pros Exs 1 and 2).

Sometime before Christmas, 1947, accused asked Technical Sergeant Raymond H. Turner to take him to Columbus, Georgia. Accused told the Sergeant that he would pay the "expenses." Accused, while at his mother-in-law's home in Columbus "had no money" and was unable to borrow any from his mother-in-law so he wrote out a check for $25 and gave it to the Sergeant along with "four dollars extra for expenses," saying, "Here is your money," and stating that it would cover "expenses." The Sergeant had to borrow money from his girl friend "to get back on." The check was introduced in evidence without objection as Prosecution Exhibit 5. It was dated 24 December 1947, drawn on the South Carolina National Bank of Columbia, South Carolina, in the amount of $25, made payable to Sergeant Raymond Turner and bears accused's signature as maker. Accused, at the time he gave the check to the Sergeant, said nothing "about the account being closed" nor did he ask the Sergeant "to hold the check." Accused said the Sergeant could get the check cashed "back here in South Carolina." Sergeant Turner "attempted" to cash the check at "the bank" but was told by a Mr. Lafitte that the account was closed. The Sergeant received $25 for the check in March 1948 from "Lt. Dodge, with Colonel Benjamin" (R 14-16; Pros Ex 5).

While accused and Mary Willie Hancock were in New York City

shortly after Christmas, 1947, they stayed one night at the Pennsylvania Hotel. Accused told Mary that he "was going to establish credit in New York where he could get some checks cashed." Later, "he showed up with the money" but Mary did not know where he had received it. A photostatic copy of a check purportedly signed by accused, drawn upon the South Carolina National Bank in the amount of $100, dated 1 January 1948, and made payable to the Pennsylvania Hotel was accepted in evidence without objection by the defense as Prosecution Exhibit 8. Across the face of the check appear several stamped notations "Account Closed" and the stamped seal of the South Carolina National Bank. Written correspondence between First Lieutenant Nathaniel W. Morrisette, Assistant Staff Judge Advocate, Fort Jackson, South Carolina, and the Pennsylvania Hotel was introduced in evidence without objection by the defense. From this correspondence it appeared that on 16 March 1948 the Hotel received $100 from accused "in payment of his returned check for like amount" and that "the original check corresponds to the photostatic copy." Lieutenant Morrisette had received the photostatic copy of the check from "the C.I.D. agents in New York" (R 17-19; Pros Exs 6,7 and 8).

Mr. J. L. Lafitte, manager of the Fort Jackson Branch of the South Carolina National Bank, identified "an original sheet" from the ledger of the South Carolina National Bank showing the state of accused's account with the bank. This sheet was received in evidence without objection by the defense as Prosecution Exhibit 18. It appeared from this exhibit that on 18 November 1947 accused's balance was $57.50, on 21 November it was $66.82, on 22 November $218.82, on 26 November $130.82 and on 28 November $13.82. Thereafter, because of the payment of a $10 check on 9 December 1947 and the collection of numerous fifty cent service charges for "checks not honored," accused's account steadily depreciated until, on 17 December, a balance of only thirty-two cents remained. On 26 December, this amount was applied by the bank against a fifty cent service charge. The last deposit shown on the ledger was one in the amount of $252.00 made on 22 November 1947. The ledger did not show

> "a couple of checks - one he took up which would not be shown on there. One other that was presented at the bank after the account had been closed and was not accepted."

The check which had not been accepted had been presented to Mr. Lafitte in person by a Sergeant. It was in the amount of $25. The stamped notation "Account Closed" on the $100 check dated 1 January 1948, made payable to the Pennsylvania Hotel, was placed thereon by the bank's bookkeeping department. This was "the normal procedure when a check is not honored." Mr. Lafitte did not notify accused that his account had been closed out for lack of funds. It was not "the usual procedure" to notify depositors when their accounts were closed for this reason. About the latter part of November or the first part of December, Mr. Lafitte "called"

accused and told him that a $50 check had been presented to the bank and that there were not sufficient funds to meet it. Accused "came over and took that check up and paid it." Mr. Lafitte identified the signature card of accused which was received in evidence without objection by the defense as Prosecution Exhibit 17. Accused had signed the signature card in the presence of Mr. Lafitte (R 37-42, Pros Exs 17 and 18).

Captain Vern R. Ploger, Deputy Finance Officer, Fort Jackson, South Carolina, identified several "Memorandum" or retain copies of certain pay and allowance accounts of accused. These copies were obtained from the files of the finance office. Without objection by the defense, these copies were received in evidence as Prosecution Exhibits 11, 12, 13 and 14 (R 21,22). According to these vouchers, accused received a cash payment of $315.86 on 31 October 1947 (Pros Ex 11 - pay and allowances for month of October), a cash payment of $140 on 14 November 1947 (Pros Ex 12 - partial payment for month of November), and a cash payment of $78.46 on 10 December 1947 (Pros Ex 14 - pay and allowances for month of November less partial payment). Prosecution Exhibit 13 is a memorandum copy of the pay and allowance account of accused for the month of November 1947, from which it appears that on 4 December a Government check in the amount of $174.46 was made out to be placed to the credit of accused with the South Carolina National Bank, Columbia, South Carolina. This voucher bears a notation to the effect that the check was cancelled on 31 December 1947. On Prosecution Exhibits 11 and 12 one Aida Ortiz Dodge, 1209 Ribot, Santurce, P.R., is listed as accused's wife. These vouchers are dated 31 October 1947 and 13 November 1947, respectively. On Prosecution Exhibit 13, which is dated 4 December 1947, Mrs. Mary Hancock Dodge, 5902 Colonial Drive, Columbia, South Carolina, is listed as accused's wife. On Prosecution Exhibit 14, dated 10 December 1947, the columns indicating the existence of dependents are left blank and accused did not claim a rental allowance as he had on previous vouchers. On none of these vouchers did it appear that accused claimed to have any children.

Lieutenant Colonel Clarence C. Neely, Fiscal Director, Fort Jackson, South Carolina, while checking vouchers in the Officers' Pay Section, noticed that on accused's voucher for the month of November there was listed as accused's wife "a different name than the preceding month, and from that which was carried in the files" of his office. Colonel Neely thereupon "reclaimed" the Government check for $174.46, which had been made out in reliance upon this voucher, from the South Carolina National Bank. He did not notify accused that his pay had been "stopped" but turned the case over to the Inspector General. The check could have arrived at the bank at any time within four days after December 4 (R 32-35). Lieutenant Colonel George G. Boram, Inspector General, 5th Infantry Division, questioned accused on 8 December 1947 "with reference to a bad check," after explaining to him the provisions of Article of War 24. Colonel Boram mentioned to accused the "disparity of names on

the vouchers" and told him that his pay had been stopped, "that the check had been stopped, in so many words" and that he would be on a non-pay status until such time as the matter of dependency was cleared up. Accused told the Colonel that he had married Aida Ortiz on 1 January 1942 in Puerto Rico and that his marriage had been dissolved by divorce in Puerto Rico on 17 October 1947. He had not received official notification of the divorce nor had he seen a copy of the decree. On 1 September 1947, he married Mary Hancock Dodge. Accused was recalled for questioning on 9 December 1947 and this time stated that he did not have a divorce from Aida Ortiz and that he had married Mary Hancock on 8 November at Fort Benning, Georgia. Colonel Boram pointed out to accused that on the preceding day accused had been informed of his right not to incriminate himself and then asked accused if he realized that his statement concerning his second marriage was "very incriminating." Upon receiving an affirmative answer, the Colonel asked accused if he wished to withdraw his statement. Accused replied that he did not, further stating, "Well, you'd find out anyway, I guess" (R 25-28, 35-36).

Mary Willie Hancock testified that she went through a marriage ceremony with accused on 8 November 1947. She had "a church wedding" at Fort Benning. Thereafter, for about two months, they lived together as man and wife. A certified copy of a certificate of marriage taken from the records of the Ordinary's Office, Muscogee County, Georgia, was admitted in evidence without objection by the defense as Prosecution Exhibit 15. From this certificate it appeared that accused and Mary Willie Hancock were "duly joined in Matrimony" on 8 November 1947. Accused had told Mary that he had been married before, "to a 'Dorothy' from Texas - an iceskater from Texas." Accused had never informed her about Aida and she knew nothing of Aida "until all this" (R 29,30; Pros Ex 15). A certified copy of a certificate of marriage taken from the files of the "Bureau of Registry and Demographic Statistics" of the Health Department of Puerto Rico was received in evidence without objection by the defense as Prosecution Exhibit 10 (Translation - Pros Ex 16). In this certificate it was recorded that on 1 January 1942 accused and Aida Ortiz Santos were married in Santurce, Puerto Rico (R 20,36,37; Pros Ex 16).

Evidence for the Defense

Accused, having been informed of his rights as a witness, elected to testify under oath in his own behalf. He stated that in 1946 he was sergeant major of a signal battalion in Puerto Rico. He and his wife were "not getting along - hardly living together." Sometime in the fall of that year he returned to the United States to attend the Officer Candidate School at Fort Benning. He graduated in June, 1947, received his commission, and obtained fifteen days leave. While on leave, he went to Puerto Rico "to see if he could straighten up things."

Since he had two children he "wanted to get along." The attempted reconciliation was unsuccessful, however, and he returned to the United States at the end of his leave. In August, 1947, while stationed at Fort Benning, he received word from his wife that she "was going to get a divorce." Accused went to the Trial Judge Advocate of the Student Training Regiment at Fort Benning with his problem and was informed that for his "protection," he had better "fill out the separation papers so she can't get everything you've got." Accused accordingly sent his wife "the separation papers" but he "never got them back - never heard from her after that." Since he "didn't hear anything about it," he assumed he was divorced and married Miss Hancock. He thought he was divorced, in August, from his wife in Puerto Rico because, "Maybe I wanted to. I assumed I was and wanted to be." He continued to list Aida Ortiz as his wife on his pay vouchers even after he believed he was divorced for the purpose of "helping maintain the children - figured she was still a dependent as well as the children." He had listed the children as dependents on his pay voucher "Right on top of the voucher - 'Dependents other than Wife.'" Divorces are granted in Puerto Rico "just like in any other place *** in the Federal District Court down there." "It has been known to take only three days" to get a divorce in Puerto Rico. Accused "got" a divorce in Puerto Rico for his brother-in-law when he "got rid of his wife." He did not believe the circumstance that he had not received back "the separation papers" from his wife or that he had not received a letter from her would give him "the right" to assume he was divorced. He "now" knew that before one can assume to have been divorced he must have received "documentary evidence from a court of competent jurisdiction." Accused began to doubt that he was divorced from Aida because of

> "Correspondence with my mother and my sister - everybody else - she was still corresponding with my wife. Still does, as far as I know. My first wife gave no indication that we were divorced. I have never received anything since August from her saying I was. I knew if I wasn't that I was in a lot of hot water."

When he was questioned by the Inspector General he was "'het' up, because I wasn't too sure" but when he "went back there the next day" he told the Inspector General he did not have a divorce. Desiring to "straighten out" his personal affairs in Puerto Rico he applied for Christmas leave but it was refused. He went to New York to see his aunt to get money enough to go to Puerto Rico but was unsuccessful. When he returned from New York he "just took off and left, which I shouldn't have done." He went to Puerto Rico and saw his wife Aida. The divorce was "put into the court." After this had been accomplished, accused wrote his commanding officer asking where "to turn in." While awaiting a reply, he was "picked up" by the military police. Accused thought he "should have a decree by now" but had not received it as of the day of trial.

At the time he gave the check to Sergeant Turner he had not been notified that his account had been closed. He had made no deposit in the bank after "that shown on the bank statement." He received a "$74" cash payment in December. He did not deposit this amount in the South Carolina National Bank but did use part of it to take up a $50 check Mr. Lafitte had told him about. Accused thought he would be paid for the month of December "on the same status as for November," that is, "on the status of a single officer, second pay grade, $220." Consequently, before he left for New York he made out a voucher for his December pay and "requested" thereon that the money be deposited in the South Carolina National Bank. This voucher was never submitted, however, for when he "came back" he found it was still in his desk drawer "-signed." He did not report to Fort Jackson after returning from New York but went directly from his home to Puerto Rico. He had intended to come back to the Post to "process" his pay voucher, but decided not to because he did not know how he "was going to get out of here." "The normal procedure" followed in submitting a pay voucher "is that they bring it around - you sign it and they would pick it up again." On the first of January, he gave the Pennsylvania Hotel in New York a check for $100. Because of the voucher for his December pay, he thought there would be sufficient funds in the drawee bank by the time the check "was in." He knew, at the time he wrote the check, that he had no funds in the bank to cover it. During the "first fifteen days" of December, 1947, he wrote about five checks. These checks came to a total value of "the neighborhood of One Hundred Fifty and Two Hundred Dollars." During the whole of the month of December he wrote about ten checks having a total value of about $400. He had about $300 at that time and, if his check had "come through from Finance, it would have been more than that." "For just a period of two months," he had maintained a checking account in the 4th National Bank of Columbus, Georgia. During the investigation by Colonel Benjamin, accused repaid all the checks he could. He intended to pay everyone else to whom he owed money "in the very near future" (R 42-51).

By stipulation between the prosecution, defense counsel and accused, an affidavit of Aida Ortiz, dated 16 March 1948, was received in evidence as Defense Exhibit 1 "as being correct" (R 42). In her affidavit Aida stated that

> "*** on last August, 1947, she was married to KENNETH E. DODGE, second lieutenant in the United States Army and she wrote him that she was taking the necessary steps to get a divorce from him; that she made him believed that she has already got the decree of divorce - when the truth is that the case had not been settled and the same is set for to be held on next friday the 19th. of this month. ***"

Appended to the record of trial are testimonials as to accused's good character and excellent service from four officers with whom he served at various times during his military career.

4. Discussion

Charge I and its Specification

Under this charge and specification, accused pleaded guilty to and was found guilty of having, without proper leave, absented himself from his organization from about 30 December 1947 to about 22 February 1948. The evidence presented at the trial established that accused had in fact committed this offense and the court's findings of guilty were warranted by the proof as well as by accused's plea. The reasons which impelled him to leave his post of duty may, of course, be considered only by way of extenuation of the punishment adjudged.

Charge II and Specifications 3 and 4 thereof

Under Specification 3 of Charge II accused was found guilty of having, on or about 24 December 1947, with intent to defraud, wrongfully and unlawfully made and uttered to Technical Sergeant Raymond H. Turner a check in the amount of $25 drawn on the South Carolina National Bank, then well knowing that he did not have and not intending that he should have any account with the drawee bank for the payment of said check. Under Specification 4 of Charge II, he was found guilty of having, on or about 1 January 1948, with intent to defraud, wrongfully and unlawfully made and uttered to the Pennsylvania Hotel a check in the amount of $100 drawn on the South Carolina National Bank, by means whereof he fraudulently obtained from the Pennsylvania Hotel $100 in cash, then well knowing, with respect to this check also, that he did not have and not intending that he should have any account with the drawee bank for the payment of such check. Each specification was laid under the 95th Article of War.

There can be no doubt that on 24 December 1947 accused made and uttered to Sergeant Turner a check in the amount of $25 drawn on the South Carolina National Bank and that on 1 January 1948 he made and uttered to the Pennsylvania Hotel a check in the amount of $100 drawn on the same bank. Accused claims that he was not aware that his account was closed at the time he gave the $25 check to Sergeant Turner. As a matter of fact, according to the records of the bank, his account was not closed until 26 December 1947 but from and after 28 November he had not had sufficient funds in the bank to meet a $25 check. Although accused is charged with not having and not intending that he should have any account with which to meet the Sergeant's check, we think no fatal variance lies in proof of insufficient funds to meet the check. Moreover, in this respect, no question of even a lesser included offense is raised, for the essence of the intent to defraud charged in cases of this class is that accused obtained something of value for a worthless check and that at the time the exchange was effected he knew, actually or constructively, that the check was worthless or that it would be worthless upon prompt presentment for payment. Clearly, a check

drawn upon an insufficient account is as worthless as a check drawn upon a nonexistent account or upon an "account" in which there are no funds (CM 307125, Keller, 60 BR 335, 345; CM 320578, Himes, 70 BR 31,37). Accused's account with the South Carolina National Bank was wholly depleted and, consequently, closed at the time he gave the $100 check to the Pennsylvania Hotel on 1 January 1948.

It has been often held, following a showing that an accused's account was, as a result of his own acts, in fact insufficient at the time he issued a check against it or upon prompt presentment of such check, that

> "*** in the absence of adequate explanation or countervailing proof, the inference of fact is fully justified, from common human experience, that the accused knew that his account was insufficient and did not intend that it should be sufficient. If there be evidence of extenuation or excuse the accused is the person to furnish it. This rule is well established, often stated in the language that the accused, under such circumstances, is 'chargeable' with knowledge of the condition of his own account" (CM Keller, supra, p. 343, and cases there cited).

Accused appears to have relied, as an excuse for having drawn the checks here in question on a bank in which he had insufficient funds, upon the circumstance that his pay account for the month of November had become involved to the point where he was temporarily placed on a non-pay status and upon his assertion that his December pay account, which he claimed was to be paid into the drawee bank, was never collected because of an inadvertent failure to forward through financial channels the voucher left in the desk drawer. In this respect it may be noted that accused admitted he had made no deposits after 22 November, that he was told by the Inspector General on 8 December that his November pay check had been stopped, that he was informed by Mr. Lafitte about the latter part of November or the first part of December, ... that his account was insufficient to meet a $50 check which he had drawn, that it was necessary for him to use part of the $78.40 drawn from the Finance Office on 10 December to take up a worthless check in the amount of $50 and that his check writing activities for the month of December were considerably in excess of his means. Also, upon all the evidence, the court was clearly warranted in refusing to believe his assertion that he had executed a voucher for his December pay, whereby payment was to be made by a check to be deposited in the South Carolina National Bank, with intent to cover the checks uttered to Sergeant Turner and the Pennsylvania Hotel.

We would certainly agree with the findings of the court, implicit in its verdict, that accused intended to defraud, as alleged, at the time he issued the two worthless checks, if, in addition to the proof discussed above, it had been shown that accused received something of

value for each check. We think it was sufficiently established, by fair inference from the testimony of Mary Willie Hancock concerning accused's quest for money in New York, that accused obtained $100 in cash, as alleged, for the $100 check given to the Pennsylvania Hotel. However, the $25 check was apparently given to Sergeant Turner in consideration of expense moneys which the Sergeant had advanced on the journey to Columbus, Georgia. Sergeant Turner had obviously already paid these expenses at the time he received the check from accused and consequently he gave up nothing in reliance upon accused's check. He was not, then, defrauded out of the expense money by means of the check. This being so, accused cannot legally be convicted of having intended to defraud Sergeant Turner even though it was not alleged in the particular specification in question that accused "fraudulently obtained" anything of value by means of the $25 check. (CM 321734, Creighton, 70 BR 355,359, 35 CJS, p 662,and cases there collected; compare CM 329503, Frith, where accused was charged with an intent to "deceive" under similar circumstances.) The case of the Turner check is, of course, to be distinguished from cases in which the recipient of a worthless check which is given in consideration of an existing debt has even so changed his legal position for the worse, as where a valueless check is given to pay a hotel bill, in which event it may be said that the innkeeper has relinquished his innkeeper's lien in reliance upon the check (see 35 CJS, p 670). We are of the opinion, therefore, that only so much of the finding of guilty of Specification 3 of Charge II should be approved as involves a finding that accused did, at the time and place alleged, wrongfully and unlawfully make and utter the described check to Technical Sergeant Raymond H. Turner, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of said check, in violation of the 96th Article of War. We find no reason to disturb the court's findings of guilty of Charge II and Specification 4 thereunder.

Certain evidence questions merit discussion.

Apparently in order to show that accused's account was closed at the time Sergeant Turner presented his check for payment, the prosecution elicited from the Sergeant testimony to the effect that the bank manager told him the account was closed. This, of course, was hearsay and supplied no proof whatsoever that the account was in fact closed at such time. However, it was shown by other evidence that accused's account was closed at the time Sergeant Turner presented his check for payment, although the account was not closed, but was insufficient, at the time the check was uttered.

Again, in an attempt to show that accused gave a $100 check to the Pennsylvania Hotel and that such check was dishonored upon presentment, the prosecution offered in evidence certain written correspondence between the Assistant Staff Judge Advocate at Fort Jackson and the Pennsylvania

Hotel with respect to a photostatic copy of a check in the amount of $100 made payable to the Hotel and purportedly signed by accused, from which correspondence it appeared that on 16 March 1948 the Hotel had received $100 from accused "in payment of his returned check for like amount" and that "the original check corresponds to the photostatic copy." This correspondence was received in evidence without objection by the defense. We know of no exception to the hearsay rule which would warrant the reception in evidence, against an accused, of correspondence of this type. If it was considered at the trial that this correspondence came within the terms of the Federal business entry statute (28 USC 695), we must disagree with such a conclusion. It has been repeatedly held that the business entry statute does not make admissible writings or records made solely with a view to prosecution or other legal action during the course of an investigation into alleged unlawful or improper conduct (Palmer v. Hoffman, 318 US 109, New York Life Insurance Company v. Taylor, 147 F (2d) 297; CM 323197, Abney, 72 BR 149,158; CM 328121, Wilson). Furthermore, the failure of defense counsel to object to the admission of this correspondence did not give the hearsay recitals therein substantive or other effect against accused (CM 325056, Balucanag, 74 BR 67,73).

The photostatic copy of the $100 check payable to the Pennsylvania Hotel was, however, properly received in evidence quite without reference to the identifying correspondence. In the first place, accused admitted the authenticity of his signature thereon by failing to object to the acceptance of the photostat in evidence and, secondly, the court could have found that the signature was in fact accused's by comparison with other signatures proved to have been his, such as that on his bank signature card (CM 324725, Blakeley, 73 BR 307,324). The stamped notations "Account Closed" on the photostat were properly before the court as evidence that accused's account was in fact closed at the time the $100 check was presented for payment, for these notations were identified by the manager of the drawee bank as entries made by its bookkeeping department in the regular course of banking business (28 USC 695; United States v. Manton, 107 F (2d) 834).

We believe, however, that none of the improperly admitted evidence noted above adversely affected the substantial rights of accused.

Charge III and its Specification

Under this charge and its specification accused was found guilty of the crime of bigamy, as that offense is known to military law, in violation of Article of War 96. It clearly appears from the record of trial that accused married Aida Ortiz Santos on 1 January 1942, that he went through a marriage ceremony with Mary Willie Hancock on 8 November 1947 and that on this latter date Aida Ortiz was alive and was

not divorced from accused. Accused as a defense to these inculpatory circumstances, claims that he thought he was divorced from Aida Ortiz when he "married" Mary Willie.

In CM 328250, Lunde, the Board of Review had occasion to say,

> "In military jurisprudence, it is a violation of Article of War 96 *** 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.
>
> * * *
>
> "Under our decisions, a bigamous marriage entered into in good faith upon a reasonable and non-negligent belief that a prior marriage had ceased to exist is not an offense."

In the Lunde case, accused's wife had obtained a decree of divorce nisi from him and he remarried in a state other than that in which the divorce had been granted before the decree became absolute. However, before remarrying accused had requested and obtained from his attorney of record in the divorce proceedings an interpretation of the legal effect of a decree nisi in the particular jurisdiction where the divorce had been granted. The attorney, in his advice to accused, stated that one having a decree of divorce nisi could lawfully remarry although his divorce had not become final if he was or became a bona fide resident of another state. Although there was a serious question as to the accuracy of this advice, it did not appear from the evidence that accused had acted in other than good faith in relying upon his lawyer's interpretation and in believing himself a bona fide resident of the state in which he had remarried. Consequently, the Board of Review held the record of trial legally insufficient to support the findings of guilty of bigamy.

In the instant case, accused's belief in his divorced status, if in fact he did entertain such a belief, was based upon having sent "separation papers" to his wife in Puerto Rico and having received no word from her thereafter to the effect that he had not been divorced. Even if we were to assume that the "separation papers" had to do with a petition for a divorce a vinculo matrimonii as distinguished from a divorce a mensa et thoro and that the wife's affidavit, accepted by the prosecution "as correct," to the effect that she made accused believe "that she has already got the decree of divorce" might be interpreted to mean that she had led him to believe he was divorced before he remarried, we still would be unable to say, as a matter of law, that accused's act of remarriage while having a lawful wife living was done under such an aura of good faith as to absolve him from criminality. Before one can remarry, without censure of the criminal law, in the

belief that a former marriage of his has been dissolved, he must have made diligent inquiry as to the truth of the matters upon which he relies (CM 272642, Bailey, 46 BR 343,347). This, accused in the case at bar did not do. His state of mind with respect to his marital status at the time he purported to marry Mary Willie is best indicated by his own testimony under oath at the trial in which he stated that he thought he was divorced from Aida Ortiz because, "Maybe I wanted to. I assumed I was and I wanted to be." The wish was rather obviously father to the thought with this accused and we are not inclined to disagree with the court's findings of guilty of Charge III and its specification.

5. Records of the Department of the Army reveal that accused is 27 years of age, is married and has two dependents other than his wife. He is a high school graduate and in civilian life was a shipping clerk in a steel mill. From 31 May 1940 to 17 October 1945, he served as an enlisted man, rising to the grade of first sergeant. From the latter date until 10 April 1946 he was a member of the Enlisted Reserve Corps in an inactive status. On 10 April 1946, he again entered upon active military duty as an enlisted man and served as sergeant major of a Signal Service Battalion. On 26 June 1947, upon graduation from the Officer Candidate Course of The Infantry School, Fort Benning, Georgia, he was commissioned and appointed a second lieutenant in the Army of the United States. He served outside the continental limits of the United States from 28 June 1940 to 1 August 1943, from 27 October 1943 to 10 October 1945 and from 10 April 1946 to 7 November 1946. He is authorized to wear the American Defense Service Medal with one star, the American Campaign Medal, the African, European, Middle Eastern Campaign Medal with two stars, the Victory Medal and the Army of Occupation of Germany Medal.

6. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support only so much of the finding of guilty of Specification 3, Charge II, as involves a finding that accused did, at the time and place alleged, wrongfully and unlawfully make and utter the described check to Technical Sergeant Raymond H. Turner, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of said check, in violation of the 96th Article of War, legally sufficient to support the findings of guilty of Charge II and Specification 4 thereunder and of Charge III and its specification, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and is authorized upon conviction of an officer of a violation of Article of War 96.

Chester T. Silvers, Judge Advocate

Gilbert S. Schmidt, Judge Advocate

Harley A. Lanning, Judge Advocate

AGK - CM 330282 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 1 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 Second Lieutenant Kenneth E. Dodge (O-1342059), Infantry, Company F, 11th Infantry, Fort Jackson, South Carolina.

2. Upon trial by general court-martial, this officer was found guilty of having absented himself from his organization without proper leave from about 30 December 1947 to about 22 February 1948, in violation of Article of War 61 (Charge I and its Spec), of having on or about 24 December 1947, with intent to defraud, wrongfully and unlawfully made and uttered to Technical Sergeant Raymond H. Turner a check in the amount of $25 then well knowing that he did not have and not intending that he should have any account in the drawee bank for the payment of said check, in violation of Article of War 95 (Spec 3, Charge II), of having on or about 1 January 1948, with intent to defraud, wrongfully and unlawfully made and uttered to the Pennsylvania Hotel a check in the amount of $100 then well knowing that he did not have and not intending that he should have any account in the drawee bank for the payment of said check, whereby he fraudulently obtained $100 in cash from the Pennsylvania Hotel, in violation of Article of War 95 (Spec 4, Charge II) and of having on 8 November 1947 unlawfully married Mary Hancock while then having a lawful and living wife, Aida Ortiz Dodge, in violation of Article of War 96 (Charge III and its Spec). No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support only so much of the finding of guilty of Specification 3, Charge II, as involves a finding that accused did, at the time and place alleged, wrongfully and unlawfully make and utter the described check to Technical Sergeant Raymond H. Turner, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of said check, in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and Specification 4 thereunder and of Charge III and its specification

and legally sufficient to support the sentence and to warrant confirmation thereof.

On 1 January 1942, accused married Aida Ortiz Santos in Santurce, Puerto Rico. Sometime in the fall of 1946, he returned to the United States where he attended Officer Candidate School. After graduation in June 1947, he went back to Puerto Rico on leave to attempt a reconciliation with his wife, with whom he had not been "getting along," but was unsuccessful. He wanted to "get along" with his wife because he had two children. In August 1947, while stationed at Fort Benning, he received word from his wife that she "was going to get a divorce." He went to a trial judge advocate of the Student Training Regiment at Fort Benning for advice and was informed that for his "protection," he had better "fill out the separation papers so she can't get everything you've got." Accused accordingly sent his wife "the separation papers" but he "never got them back - never heard from her after that." Since he had not heard from her, he assumed he was divorced. He thought he was divorced because, "Maybe I wanted to. I assumed I was and wanted to be." He married Mary Willie Hancock in a church wedding at Fort Benning on 8 November 1947.

On accused's pay voucher for his November 1947 pay Mary Hancock Dodge was listed as accused's wife, whereas on earlier vouchers Aida Ortiz Dodge was named as his wife. When this circumstance came to the attention of the Fiscal Director of Fort Jackson, South Carolina, where accused was stationed at the time, he "reclaimed" from the South Carolina National Bank the Government check in the amount of $174.46 which had been made out in reliance upon accused's November pay voucher. Accused was notified of this stoppage of his pay on 8 December 1947. On 28 November 1947, accused's balance in the South Carolina National Bank was $13.82. Thereafter, because of the payment of a $10 check on 9 December 1947 and the collection of numerous 50 cent service charges for "checks not honored," accused's account steadily dwindled until, on 17 December, a balance of only 32 cents remained. On 26 December, this amount was applied by the bank against a 50 cent service charge and accused's account was closed. Accused was not notified that his account was closed. When he received a cash payment of $78.46 from the Finance Office on 10 December, he "took up" a $50 check held by the South Carolina National Bank, but made no deposit. Accused testified in his own behalf at the trial. He stated that he thought he would be paid for the month of December "on the same status as for November," that is, "on the status of a single officer, second pay grade, $220." He stated that before he went to New York shortly after Christmas, he made out a pay voucher for his December pay and requested thereon that the money be deposited in the South Carolina National Bank. This voucher, he claims, was left in his desk drawer and was never submitted, for when he returned to his home in Columbia, South Carolina, from New York, he went directly to Puerto Rico without reporting to Fort Jackson. During the month of December, 1947, he wrote about ten checks amounting to a total value of about $400.

Sometime before Christmas, 1947, accused asked Technical Sergeant Raymond H. Turner to take him to Columbus, Georgia. Accused told the Sergeant that he would pay the expenses of the trip. While at his mother-in-law's home in Columbus, on 24 December, accused "had no money" so he wrote out a check for twenty-five dollars drawn on the South Carolina National Bank and gave it and four dollars to the Sergeant for "expenses." The Sergeant had to borrow money from his girl friend "to get back on." After Christmas, accused and Mary Hancock went to New York City where they stayed one night in the Pennsylvania Hotel. Accused told Mary that he "was going to establish credit in New York where he could get some checks cashed." Later, "he showed up with the money." On 1 January 1948 accused had given the Pennsylvania Hotel a check for $100 drawn on the South Carolina National Bank. Accused's account with the South Carolina National Bank had been closed before these checks were presented for payment and accordingly both were dishonored.

Accused testified that because of correspondence with his mother and sister, who, in turn, were corresponding with Aida Ortiz, accused began to doubt that he was, in fact, divorced, for in her letters Aida Ortiz "gave no indication that we were divorced." Accused applied for Christmas leave so that he might go to Puerto Rico but the leave was refused. Accused's commanding officer gave him verbal permission to be absent from 0001 hours on 27 December 1947 to 2400 hours on 29 December. At the expiration of this period, accused did not return to his organization and about 20 February 1948 his commanding officer received a letter from him written in Puerto Rico. Accused testified that without obtaining leave, he went to Puerto Rico, which he "shouldn't have done." There he saw to it that the divorce action was "put into court." He had not received the decree as of the date of trial but was momentarily expecting to receive it. After accused had completed his personal business in Puerto Rico, he wrote his commanding officer at Fort Jackson asking where "to turn in." On 22 February 1948, while awaiting a reply, he was "picked up" by the military police.

4. Accused is 27 years of age, is married and has two dependents other than his wife. He is a high school graduate and in civilian life was a shipping clerk in a steel mill. From 31 May 1940 to 17 October 1945, he served as an enlisted man, rising to the grade of first sergeant. From the latter date until 10 April 1946 he was a member of the Enlisted Reserve Corps in an inactive status. On 10 April 1946, he again entered upon active military duty as an enlisted man and served as sergeant major of a Signal Service Battalion. On 26 June 1947, upon graduation from the Officer Candidate Course of The Infantry School, Fort Benning, Georgia, he was commissioned and appointed a second lieutenant in the Army of the United States. He served outside the continental limits of the United States from 28 June 1940 to 1 August 1943, from 27 October 1943 to 10 October 1945 and from 10 April 1946 to 7 November 1946. He

is authorized to wear the American Defense Service Medal with one star, the American Campaign Medal, the African, European, Middle Eastern Campaign Medal with two stars, the Victory Medal and the Army of Occupation of Germany Medal. Appended to the record of trial are testimonials as to accused's good character and excellent service from four officers with whom he served at various times during his military career.

It appears from the Staff Judge Advocate's review that accused was given a neuropsychiatric examination on 12 March 1948 which indicated that accused "presents a neuropsychiatric pattern, characterized by 'impulsiveness, poor judgment, an acting out of his emotional problems, and short term values, all of which have become more pronounced since his return from overseas.' He is able to distinguish right from wrong but he frequently behaves in a 'self-destructive' manner even though he knows better."

5. Since, as pointed out by the Board of Review in its opinion, Sergeant Turner had not worsened his legal position in reliance upon the $25 check given him by accused in consideration of expenses the Sergeant had already incurred, and since accused did, in fact, have an account, although insufficient, at the time the check was uttered, I recommend that only so much of the finding of guilty of Specification 3 of Charge II be approved as involves a finding that accused did, at the time and place alleged, wrongfully and unlawfully make and utter the described check to Technical Sergeant Raymond H. Turner, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of said check, in violation of Article of War 96. I also recommend that the sentence be confirmed but, in view of accused's previous satisfactory service and all the circumstances of the case, that the period of confinement be reduced to two (2) years and that the sentence as thus modified be 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 into effect the foregoing recommendation should it meet with your approval.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 135, 13 July 1948).

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

4 MAY 1948

JAGQ - CM 330299

UNITED STATES v. Private First Class THOMAS J. FICKAS (39760500), 45th Air Supply Squadron, Erding Air Depot.	)	AMERICAN GRAVES REGISTRATION COMMAND EUROPEAN AREA Trial by G.C.M., convened at Paris, France, 10-12 March 1948. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW 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 92nd Article of War.

Specification: In that Private First Class Thomas J. Fickas, 45th Air Supply Squadron, Erding Air Depot, did, at Paris, France, on or about 7 February 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Leon Neid, a human being, by shooting him with a pistol.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. The 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 the term of his natural life. The reviewing authority approved the sentence, designated United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence in the staff judge advocate's review.

4. The evidence shows that accused and his companion accosted the deceased on a public street in Paris, France and when deceased attempted to escape by walking across the street a struggle ensued and accused drew a pistol from his jacket. While deceased was extracting himself from the grip of accused's companion the latter fell and deceased walked away from him. Accused then came towards deceased, pointed the pistol at him, injected a cartridge in the chamber and fired one shot which struck the victim in the chest causing his death a few hours later.

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

The evidence clearly establishes that accused at the time and place alleged used a deadly weapon in a manner likely to and which did in fact cause the death of a French civilian. The actions of accused in injecting a live shell into the chamber of his pistol; pointing the gun at the victim for a period of thirty to forty-five seconds before discharging the weapon with the fatal result that a human being was killed certainly manifests a reckless disregard of human life if not an actual intent to kill or to cause grievous bodily harm.

While the evidence tending to prove the "degree" of intoxication of accused is conflicting, there can be no doubt but that he had been drinking. This fact is shown by his actions in assaulting a complete stranger, his staggering walk and the direct testimony as to the amount of cognac which he had consumed during the afternoon of the day in question. The alcohol blood test showed a "level of 0.5" which indicates that accused was only "mildly to moderately" intoxicated but as several hours had elapsed between the killing and the time the blood was drawn from the arm of accused the finding is of little value in determining the condition of accused at the time of the shooting. The question of accused's degree of intoxication is one of fact for the court to determine from all the evidence in the case and the Board of Review is of the opinion that there is sufficient competent evidence in the record of trial to support the findings of guilty by the court which negative the fact that accused was so intoxicated that he was not legally responsible for his actions. In this regard the evidence is uncontradicted that immediately after the shot was fired accused fled from the scene, disposed

of the weapon by throwing it in a doorway and made a strenuous attempt to escape the four French policemen who pursued him and eventually effected his apprehension.

While it clearly appears that accused's actions were impulsive and may have been caused in some degree by the "scuffle" between deceased and accused's companion there can be no doubt but that accused and his companion were the aggressors in the affair having accosted deceased on a public street and threatened him with the pistol just prior to the shooting. Such evidence negatives any inference that the shooting was in self-defense or that there was sufficient provocation shown which would reduce the offense to one of voluntary manslaughter.

The only other question presented by the record of trial which requires comment by the Board of Review is the ruling of the law member which denied the defense counsel's motion for a continuance (R 71). Defense counsel requested a continuance until Private Simms (accused's companion on the night in question) had been tried by court-martial for the offenses of unlawful possession of a concealed weapon and assault and battery upon the deceased in this case. It was admitted that Private Simms was available to the defense as a witness but that if he were called to testify in this case he would claim his rights against self-incrimination under the 24th Article of War and refuse to testify on the ground that any evidence he might give in the case might tend to incriminate him. The defense counsel did not contend that Simms was a "material" witness nor was it shown in any degree what facts accused expected to prove by him. The only inference as to the testimony Simms might give is found in the following statement of defense counsel which constituted the basis for his motion:

> "*** Simms was the only American that the evidence shows was present at any time during this alleged affair, and certainly his testimony would be material as to just what happened on the occasion. The court should be interested in getting that testimony so they could have, as we might say, both sides of the case. ***" (R 69).

While it is recognized that the defense in military law is not held to rigid procedural requirements in making offers of proof, nevertheless in motions for continuances the granting of which is in the sound discretion of the court, sufficient evidence must appear in the record of trial to show that the expected testimony of the witness would be of material advantage to accused (CM 231539, Casarella, 18 BR 241, 246-247; CM 228507, Noon, 16 BR 191, 199).

In view of the fact that the defense contended Simms' testimony was material simply because he was present at the time of the shooting the Board of Review has considered the record in its entirety to determine whether his testimony would have in fact been material or merely corroborative and cumulative only. In this connection the record shows that there were several eyewitnesses to the affair from the time of the initial assault upon deceased until the fatal shot was fired. Further, the evidence is overwhelming to the effect that Simms was grossly intoxicated and was lying prone on the street where he had fallen at the time accused shot the victim. Under these circumstances the Board of Review is of the opinion that any testimony of Simms' would have been at best only cumulative and consequently it was not an abuse of the court's discretion to deny defense's motion for a continuance and no substantial right of accused was adversely affected thereby. In CM 275715, Burleigh, 48 BR 137, accused moved for a continuance on the ground that "one of the chief witnesses, Lt. Colonel Eshelman" was in the hospital and that another witness, a waiter, "who was believed to have been present" when the offense was committed could not be located. Colonel Eshelman's deposition was available. In holding that the motion for a continuance was properly denied the Board of Review stated:

> "*** There was no claim of surprise by the defense and, in view of the extensive testimony of several witnesses who were near the scene of the incident when it occurred, it is reasonable to assume that any testimony that might have been obtained from the absent witness would have been corroborative and cumulative only. Defense counsel did not go so far as to assert that the waiter had actually been present when the alleged incident occurred, nor is that fact shown by the testimony of any of the witnesses who testified. Under the circumstances, it was not an abuse of the court's discretion to deny defense's motion for a continuance and no substantial right of accused was adversely affected thereby." (P. 141).

5. A neuropsychiatric examination of accused on 27 February 1947, resulted in findings that at the time of the alleged offense and at the time of the examination accused was "able to distinguish right from wrong and able to cooperate in his own defense".

6. The charge sheet shows accused to be 20 years of age. He enlisted in the Regular Army 21 January 1946 for three years, after completing prior service from 24 October 1945 to 20 January 1946. The only evidence of any previous conviction by court-martial during accused's entire service is his post-trial admission of a summary court-martial conviction for speeding.

7. The court was legally constituted and had jurisdiction of the accused and of the offense. No errors injuriously affecting his substantial rights were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Sections 452 and 454, Title 18 of the United States Code.

W H Johnson Jr, Judge Advocate

[illegible], Judge Advocate

A D Kane, Judge Advocate

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