OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 79

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 79

including

CM 330310 - CM 330998

JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington: 1948

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

JAGN-CM 330310

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, 2 April 1948. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private CHESSO RUCKER, JR. (16250156), Detachment #3, 1262a Area Service Unit, Fort Dix, New Jersey.	)	

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 Chesso Rucker, Jr., otherwise known as Chesso Rucker, Detachment #3, 1262 Area Service Unit, Fort Dix, New Jersey, then of Company B, 101st Training Battalion, 5th Training Regiment, 1262 Area Service Unit, Replacement Training Center, Fort Dix, New Jersey, did at Fort Dix, New Jersey on or about 30 April 1947, desert the service of the United States, was apprehended by civil authorities at Anderson, South Carolina, and did remain absent in desertion until said civil authorities delivered him to military authorities of Greenville, Army Air Base, Greenville, South Carolina on or about 2 December 1947.

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.

3a. Evidence for the prosecution.

Extract copy of the morning report of Company B, 101st Training Battalion, 5th Training Regiment, 1262 ASU, RTC, Fort Dix, New Jersey, offered and received in evidence (R. 6; Pros. Ex. 1) contained the following entries:

"M/R 30 April 47

Rucker Chesso Jr RA 16250156 Pvt
Dy to AWOL 0600

/s/ James A Abron Jr
JAMES A ABRON JR
1st Lt Inf

M/R 8 May 47

Rucker Chesso RA 16250156 Pvt
AWOL to sk LD Ypsilanti State Hosp
Ypsilanti Mich eff 5 May 47

/s/ James A Abron Jr
JAMES A ABRON JR
1st Lt Inf"

Prosecution's Exhibit 2, offered and received in evidence (R. 6, 7), stipulated that accused was apprehended on 2 December 1947 at Anderson, South Carolina.

b. Evidence for the defense.

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

4. Accused has been charged with and found guilty of desertion. The morning report entries disclose that on 30 April 1947 accused went from duty to absent without leave. Five days later, 5 May 1947, he was removed from the status of absent without leave to that of sick in line of duty at Ypsilanti State Hospital, Ypsilanti, Michigan. Army Regulations (160b, AR 40-1025, 12 Dec. 1944) provide for the responsibility and disposition of an Army patient, including his discharge from the

civilian hospital, and for the manner in which the patient will be carried on Army records. The record of trial is silent as to the ultimate disposition of this patient, hence we are compelled to conclude compliance with the Army Regulation cited was not observed and, insofar as the official records were concerned, accused's status was continued as sick in line of duty in a civilian hospital. In the exercise of its statutory obligations the Board is bound by the principle that the legal sufficiency of each record of trial must rest solely upon the facts disclosed in the record (CM 267032, Edwards, 43 BR 333, 338; CM 210985, Bonner et al, 9 BR 383, 395). The stipulation reciting an apprehension of accused at Anderson, South Carolina, on 2 December 1947, while inconsistent with the last morning report entry, is of no assistance in determining the issue here presented. Upon the record as it stands the only offense proven against the accused is an absence without leave for five days, for which a maximum punishment of confinement at hard labor for fifteen days and forfeiture of pay not to exceed 10 days may be imposed.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as finds accused guilty of absence without leave for five days, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for fifteen days and forfeiture of pay not to exceed ten days.

_____, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springstee, Judge Advocate.

(4)

JAGN CM 330310 1st Ind

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

TO: Commanding General, 9th Infantry Division, Fort Dix, N. J.

1. In the case of Private Chesso Rucker, Jr. (16250156), Detachment #3, 1262d Area Service Unit, Fort Dix, New Jersey, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the findings of guilty of the Specification and the Charge be approved as finds that at the place alleged, on or about 30 April 1947, accused did absent himself without leave and did remain absent without leave until 5 May 1947, in violation of Article of War 61, and that only so much of the sentence be approved as involves confinement at hard labor for fifteen days and forfeiture of two-thirds pay for a like period. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 330310).

1 Incl
R/T

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

RECEIVED
11 MAY 1948
Courts-Martial Branch
Fort Dix, N. J.

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

JAGN-CM 330356

U N I T E D S T A T E S	)	MacDILL AIR FORCE BASE
v.	)	Trial by G.C.M., convened at MacDill Air Force Base, Florida, 9 April 1948. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private LAWRENCE E. STOCKTON (18291329), Air Installations Squadron C, 307th Airdrome Group.	)	

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 Lawrence E Stockton, Air Installations Squadron C, 307th Airdrome Group, then of 2d Utilities Squadron, 1st Combat Airdrome Group (Provisional), did, without proper leave, absent himself from his station at MacDill Air Force Base, Florida, from about 6 June 1947 to about 14 July 1947.

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

Specification: In that Private Lawrence E Stockton, Air Installations Squadron C, 307th Airdrome Group, then of 2d Utilities Squadron, 1st Combat Airdrome Group (Provisional), having been duly placed in confinement in the Psychopathic Ward, Station Hospital, Red River Arsenal, Texarkana, Texas, on or about 15 July

1947, did, at Red River Arsenal, on or about 16 July 1947, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Lawrence E Stockton, Air Installations Squadron C, 307th Airdrome Group, then of 2d Utilities Squadron, 1st Combat Airdrome Group (Provisional), did, at Red River Arsenal, Texarkana, Texas, on or about 16 July 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Barksdale Field, Louisiana, on or about 24 October 1947.

Accused pleaded to Charge I and its Specification, guilty; to Charge II and its Specification, not guilty; to the Specification of Charge III, guilty, except the words "desert the service of the United States" and "in desertion," substituting therefor, respectively, the words "absent himself without proper leave" and "without leave," of the excepted words, not guilty, of the substituted words, guilty; and to Charge III not guilty but guilty of a violation of the 61st Article of War. He was found guilty of all Charges and Specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated The Area Service Unit 3441, 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. The only question to be considered here is whether the record of trial is legally sufficient to support the sentence. The record establishes that the desertion alleged in the Specification of Charge III was concurrent with and had its inception in the escape from confinement alleged in the Specification of Charge II. The two offenses were but different aspects of the same act. Where a sentence is imposed with reference to two or more offenses constituting but 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, 63 BR 150, 5 Bull JAG 202).

The maximum punishment for the offense of desertion as alleged and proven is dishonorable discharge, total forfeitures, and confinement at hard labor for two and one-half years (par. 104c, MCM, 1928). The maximum authorized punishment for the offense of escape from confinement as alleged and proven is dishonorable discharge, total forfeitures,

and confinement at hard labor for one year (par. 104c, MCM, 1928). In this case the desertion is the more important aspect of the act since it carries the heavier penalty.

4. The authorized maximum sentence to confinement, without substitution, for an absence without leave for thirty-eight days, the offense of which accused was found guilty under the Specification of Charge I, is three months and twenty-four days (par. 104c, MCM, 1928). Therefore, the maximum sentence that may be imposed against accused for all the offenses of which he was found guilty is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years, nine months and twenty-four days.

5. 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 involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years, nine months and twenty-four days.

Edward I. Johnson, Judge Advocate.

Frank C. Allred, Judge Advocate.

George S. Springston, Judge Advocate.

JAGN-CM 330356 1st Ind
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 Lawrence E. Stockton (18291329), Air Installations Squadron C, 307th Airdrome Group, 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, nine months and twenty-four days. Upon taking such action you will have authority to order the execution of the sentence.

2. It is noted that in your action you have designated as the place of confinement, "The Area Service Unit 3441, Branch, United States Disciplinary Barracks, Camp Gordon, Georgia." The Office of The Adjutant General, Correction Branch, advises that the words "The Area Service Unit 3441" as so used should be omitted in such designation. It is recommended that appropriate corrective action be taken in your corrective action prior to publication of the General Court-Martial Orders.

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 330356).

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.

(9)

JAGH CM 330388

31 August 1948

UNITED STATES v. Private JOHN M. LISTON, RA 18305666, Company "A", 519th Military Police Battalion, APO 503.	EIGHTH ARMY Trial by G.C.M., convened at APO 343, 25 March, 1 April 1948. Dishonorable discharge (suspended) and confinement for two (2) years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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

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

CHARGE I: Violation of the 84th Article of War.

Specification: In that Private John M Liston, Company A 519th Military Police Battalion, APO 503, did, at Camp McGill (Nagai) Honshu, Japan, on or about 30 December 1947, wrongfully dispose of, by giving to Satoru Mitsuhashi, one (1) Pistol of the value of about $38.00, issued for use in the Military Service of the United States.

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

Specification: In that Private John M Liston, Company A, 519th Military Police Battalion, APO 503, did, at Yokohama, Honshu, Japan, on or about 31 December 1947, in an affidavit, make under oath, a statement in substance as follows: "I had nothing to do with the loss of a .45 Calibre pistol from Company A Guard House, and I don't know where it is or what happened to it", which statement he did not then believe to be true.

The accused pleaded not guilty to, and was found guilty of, both Charges and the Specification under each. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence and ordered it duly executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated The United States Disciplinary Barracks, Fort Leavenworth, Kansas, or 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. 54, Headquarters, Eighth Army, APO 343, dated 20 April 1948.

3. Evidence for the prosecution.

On 22 December 1947 Private Wilkinson, a member of the 519th Military Police battalion guard, was issued a .45 calibre automatic pistol, Model 1911A, Serial Number 1803962, and about 2230 hours the same day someone took the pistol from his bed (R 8,10,12; Pros Ex 2a). On 30 December 1947, the accused and three other soldiers visited a Japanese National, Satoru Mitsuhashi, at a ration breakdown warehouse located at Camp McGill. Mitsuhashi was employed by the Kashimagumi Company which in turn was employed by the occupation forces. Accused gave a pistol to one of his soldier companions who could speak Japanese. The Japanese speaking soldier then gave the pistol to Satoru. Satoru gave the pistol back to the Japanese speaking soldier because it was loaded. Satoru testified that the Japanese speaking soldier unloaded the pistol. Another witness testified that the pistol was unloaded by accused and that he handed it back to Satoru. The Japanese speaking soldier said to Satoru in Japanese:

> "I want you to keep this pistol for me until next day or following day and I will be back to pick this up." (Underscoring supplied).

Satoru also testified that:

> "They forced me to keep it overnight for them. * * * They said to me that I will be back tomorrow afternoon or forenoon to pick this up so I want you to keep it until noon. * * * Since I refused to take it, I refused several times and even I waved my hand and motioned that I didn't want to take it but they left this pistol with me and I think they forced me to receive this pistol."

Satoru testified that the accused did not ask him to take care of the pistol for him but that the Japanese speaking soldier asked him to keep

it for the accused (R 27,28,29,37,38). Approximately two hours later the Provost Marshal of the First Cavalry Brigade, stationed at Camp McGill, acting on a report that a Japanese had been given a .45 pistol to "dispose of", found the weapon in the possession of Satoru (R 15,16). This pistol was found to be the one stolen from Private Wilkinson on 22 December 1947 (R 11, Pros Ex 2a). The value of this pistol was $38.00 (R 41).

On 31 December 1947, after being advised as to his rights under the 24th Article of War, the accused made the following statement in affidavit form: "I had nothing to do with the loss of a .45 calibre pistol from Company A Guard House, and I don't know where it is or what happened to it." Lieutenant Stone, Headquarters, Yokohama Provost Marshal Office, APO 503, testified that he administered the oath and subscribed his name to the affidavit as Summary Court Officer, in the presence of R. H. Lorenz, Special Agent, CID (R 20,22,23,24; Pros Ex 4).

4. Evidence for the defense.

After being advised of his rights by both the court and counsel, the accused elected to remain silent (R 41).

5. The evidence thus shows that on 30 December 1947 at a warehouse located at Camp McGill, Japan, accused who was then in possession of the pistol described in the Specification of Charge I, handed it to a companion, a Japanese speaking soldier, who in turn handed it to Satoru Mitsuhashi, a Japanese National. At the time, Mitsuhashi was instructed to keep the pistol until accused should pick it up the following day. It was stipulated that the value of the pistol was $38.00. Viewing the evidence in the light most favorable to accused, accused entrusted for safekeeping to a national of a defeated enemy nation a pistol issued for use in the military service, of the value alleged.

The Specification of Charge I alleges that accused wrongfully disposed of by giving to Satoru Mitsuhashi a pistol issued for use in the military service of the United States. In connection with the pleading and proof pertaining thereto, two questions arise. On the facts as shown by the evidence, has the offense of wrongful disposition been committed and if this be answered in the affirmative has the offense been properly alleged?

Any act by a person in possession or custody of property which divests that person of his custody or possession would in principle be a disposition of the property. This rule, however, is not without exception (Reynolds v. State, 73 Ala 3; CM 324352, Gaddis, 73 BR 181,187-189). We believe, in principle, that the entrusting of property to another for safekeeping is a disposition of the property so entrusted. We do not believe, however, that every entrustment or bailing of government property for the purpose of safekeeping is a wrongful disposition of the property involved. Otherwise we would in effect be holding that the checking of

luggage containing items of issue property in a railroad station or other kindred acts would be a wrongful disposition of the property involved. Circumstances, such as are shown in the instant case, are, on the other hand, permissive of the finding of the contrary conclusion by the court before which the issue is tried. Thus it is shown that at a United States Army encampment located in a defeated enemy country accused entrusted an item of issue property to a national of that country, whose authority, if any, to receive the property was not shown. In view of the place of the transaction, necessity could not be pleaded as a defense for the act of entrusting the pistol to a Japanese National. It must be presumed that at a military encampment there would be proper repositories for the safekeeping of government property. Indeed, the failure of accused to seek such a repository is an indication that his purpose with reference to his ultimate disposition of the pistol was not in the interest of the government. Accused's act in entrusting the pistol to the Japanese National, under the circumstances shown by the record of trial, was such as to render proper the determination by the court that a wrongful disposition was committed.

We likewise conclude that the manner of disposition, as shown by the record, was properly pleaded in the Specification of Charge I. It is alleged that the wrongful disposition was accomplished "by giving to Satoru Mitsuhashi." The verb "to give" has not become a word of art and may not be construed solely as "to make a gift." Thus it has been held that under an indictment for giving spiritous liquors to a minor and the evidence showed a furnishing of or supplying the liquor, the act proven was sufficiently alleged in the indictment (Com v. Davis, 75 Ky (12 Bush) 240). The word "give" sufficiently distinguishes the factual situation of this case from other factual situations representative of other types of wrongful disposition, i.e., wrongful disposition by pledge, abandonment, destruction, etc. "To give" has been defined as "To deliver or transfer (to another something that is taken by him); * * * To commit, intrust; as to give a letter to a postman. * * *" (Webster's New International Dictionary, Second Edition, unabridged). While various shades of meaning are attached to the word "give" where the word is used to show a disposition of property, one concomitant seems to be a relinquishment of custody or possession of the property by one person to another. This is the situation found in the record and hence it was correctly alleged in the Specification of Charge I. We are of the opinion that the findings of guilty of the Specification of Charge I and of Charge I are sustained by the record of trial.

6. Specification of Charge II.

The necessary elements of proof to establish false swearing as alleged in this Specification are:

"(a) That accused was sworn in a proceeding or made an oath to an affidavit;

(b) that such oath was administered by a person having authority to do so;
(c) that the testimony given or the matter in the affidavit was false, as alleged; and
(d) the facts and circumstances indicating that such false testimony or affidavit was willfully and corruptly given or made." (Par 152c, MCM 1928, p.191, False Swearing).

From the evidence in the case it is readily ascertainable that the prosecution wholly failed to prove that the "matter in the affidavit" was false as alleged, or the facts and circumstances indicating that the sworn statement was willfully and corruptly made.

The prosecution merely proved that on 22 December 1947 a .45 calibre pistol was taken from the bed of Private Wilkinson and that on 30 December 1947 this pistol was in the possession of the accused. The record of trial is silent as to when this pistol came into accused's possession and it is likewise silent as to the circumstances surrounding his acquisition of the weapon. During the eight days between 22 December 1947 and 30 December 1947 it was possible for the pistol to have changed hands many times.

There is nothing in the record of trial to show that the accused knew that a pistol was missing from Company A Guard House. Further, the evidence fails to show that the accused knew that the pistol which was in his possession on 30 December 1947 was the one which was missing from the Guard House on 22 December 1947.

There is, therefore, a total lack of evidence in the record of trial to show (1) that the statement made by accused was in fact false, and (2) that the accused knew that the statement was false.

It is well established law that where 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, 72 BR 213; CM 317430, Veronko (1947); CM 260828, Parker, 40 BR 34; CM 238485, Rideau, 24 BR 272). A conviction cannot be sustained on suspicion, surmise, or conjecture (CM 323349, Henry, supra; CM 317430, Veronko, supra; CM 274812, Tracy, 47 BR 330; CM 329843, Eger).

7. 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 of Charge I and its Specification, legally insufficient to

support the findings of guilty of Charge II and its Specification and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for one year.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SE 2

JAGH CM 330388 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 John M. Liston, RA 18305666, Company "A", 519th Military Police Battalion, APO 503.

2. 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 insufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. I concur in the opinion of the Board of Review and recommend that the findings of guilty of Charge II and its Specification, and that so much of the sentence pertaining to confinement as is in excess of confinement at hard labor for one year be vacated; and that all rights, privileges and property of which the accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(G.C.M.O. 177, 11 Oct. 1948).

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

)17)

30 JUN 1948

JAGH CM 330403

U N I T E D S T A T E S	)	HEADQUARTERS, THIRTEENTH AIR FORCE
v.	)	Trial by G.C.M., convened at Clark Field Air Base, APO 719, 4 March 1948. Dishonorable discharge (suspended), and confinement for three (3) years. The United States Disciplinary Barracks, Camp Cooke, California.
Technical Sergeant JEWELL N. CRAIN, AF 36355197, 1129th Military Police Company (Aviation), APO 74.	)	

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Technical Sergeant Jewell M. Crain, 1129th Military Police Company (Aviation) APO 74, did, at Angeles, Pampanga, on or about 23 January 1948, with intent to do him bodily harm, commit an assault upon 1st Lieutenant Donald C. Long Junior, by kicking him on and about the head with a dangerous weapon, to wit: His shoes.

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 at such place as the reviewing authority may direct for three years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated The United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial was published by General Court-Martial Orders No. 12, Headquarters, Thirteenth Air

Force, Clark Air Force Base, APO 719, dated 2 April 1948.

3. In the opinion of the Board of Review, the record of trial is legally sufficient to support only so much of the findings as find the accused guilty of assault with intent to do bodily harm. The only matter requiring discussion concerns the sufficiency of the evidence to support that part of the findings as finds that the assault in question was committed "with a dangerous weapon, to wit: His shoes.", and as concerns the legality of the sentence.

4. Evidence for the prosecution.

First Lieutenant Donald C. Long, the alleged victim, testified in pertinent part, that at about 9:30 p.m. of the night in question, he was in the Star Bar at Angeles (Pampanga, Philippine Islands). He was sitting alone at a table drinking a can of beer and eating a sandwich when the accused, (a member of the military police, but on this occasion not wearing an MP brassard) came up to his table and said, "Lieutenant, you are out of place in here." Witness replied, "I don't think so." Accused said, "You are an officer. Officers don't come in here." Witness then inquired where officers went and the accused said, "Come with me out in the alley and I will show you." He followed accused outside through the rear door. When they were a few steps past the door, accused turned and swung at the witness striking him on the nose. The next thing he remembered was that he "woke up" on the ground and the accused was kicking him in the face. When asked

"Q. How many blows, to your recollection, did he strike with his foot?", he replied,
"A. To my recollection I only felt two with his feet."

Concerning his injuries, he testified, "* * * I had two scrapes on the forehead above each eye; the left side of my face was scraped; my nose was fractured and my teeth chipped. Also, I had cuts on the inside of my mouth." He also had two bruises, black and blue marks, on his body -- one on the left side of the chest and one on his right shoulder. He did not strike any blows at the accused at any time, that he showed no temper and that the assault was "absolutely unprovoked." (R 6-9).

Technical Sergeant Melville C. Morse testified, in pertinent part, that he was in the Star Bar when the accused spoke to Lieutenant Long at the latter's table. Shortly after Long and accused walked out of the bar, he followed them. When he got outside the rear door of the bar, he saw Long lying on the ground and the accused kicking him in the face. In this connection he testified as follows:

"Q. How many blows did you see the accused strike that time?
A. Twice, sir.

Q. With what did he strike?
A. I would say the first time with both feet and the second time with the right foot." (R 16)
(The witness demonstrated the kicks, which, for the record were described by the law member as "* * * by jumping up with both feet and then by kicking with the right foot." (R 18).)

Then asked:

"Q. What part of the body did Sergeant Crain's [accused] feet land when he jumped on Lieutenant Long with both feet?" he replied
"A. In the face, sir." (R 23).

Private Samuel Garcia testified, in pertinent part, that on the night in question he was in the Star Bar and when he heard accused call to Lieutenant Long, "Come out, Lieutenant, I am alone.", he followed them out of the bar and saw the accused kick Long in the face once. The Lieutenant was lying on the ground and offered no resistance (R 25-28).

Mr. Ricardo Gomez, a civilian, testified that he saw the accused walk out of the Star Bar and later on a Lieutenant walked out. There was no argument at all. The accused began to hit the officer two times in the face. When the Lieutenant was knocked down, Sergeant Crain began to step over his face and kick the Lieutenant several times (R 33).

First Lieutenant H. V. Jordan, a medical officer, testified that at about 2300 hours, 23 January 1948, Lieutenant Long was brought in to the 20th Station Hospital by ambulance and he treated Long for face injuries. Long's injuries were confined mostly to his face. He had a large, swollen, bleeding nose which was "probably" fractured and contusions and abrasions on his forehead and face. His lips were swollen and there were teeth marks on his lower lip. The injuries were of a type which could be caused by a fist or by falling down (R 30-32).

5. Evidence for the defense.

Sergeant Albert L. Hutto testified that he was the first man to get outside the bar door. He saw someone lying on the ground. Accused stepped over the man and ran down the alley (R 42).

Mr. Jess W. Claflin was standing near the Star Bar and saw accused come out, followed by another man. Accused turned around and the other man swung at accused. Accused then "was throwing blows one way and the other for a few moments" and the other man fell down. Accused then started toward the rear of the Star Bar and then went "down the alley

in a hurry taking off." He did not see accused kick Long and was sure accused did not kick him (R 47). The man struck at accused first, but Claflin was not sure if the blow hit accused or not (R 44-47).

Sergeant Floyd L. Setzer, 1129th Military Police Company was a traffic sergeant on duty in Angeles. When he arrived at the scene of the incident, he found Lieutenant Long lying on the ground bleeding. He telephoned for an ambulance. He believes Long was unconscious. Sergeant Setzer first saw accused in the alley, but after he telephoned for an ambulance, he saw that accused had come back to the bar and was standing near Long. Setzer observed that the lieutenant's nose was cut and was bleeding. At first glance Long appeared as though he was seriously injured, but, on looking closer, Setzer decided he was not and testified that he "certainly wouldn't" say the Lieutenant had been seriously injured (R 50).

6. The accused was charged and convicted of committing an assault upon Lieutenant Long, with intent to do bodily harm, "by kicking him on and about the head with a dangerous weapon to wit: His shoes."

The evidence shows conclusively that the accused assaulted Lieutenant Long by striking him on the nose with his fist and by kicking him twice in the face with his feet. However, the amount of force used by the accused in each kick was not shown or proven. Under these circumstances it becomes necessary to inquire whether, in legal contemplation, the manner in which accused employed his feet in the assault warrants the conclusion that the assault was committed with a dangerous weapon, i.e., with "His shoes."

A dangerous weapon, instrument or thing is defined as one which is "likely to produce death or great bodily harm" (MCM, 1928, par 149m) Any weapon, which, when used in the ordinary and usual manner contemplated by its design or construction, is likely to produce death or great bodily harm is, per se, a dangerous weapon. Thus, if a loaded firearm is used as a firearm in making an assault, the assault is committed with a dangerous weapon, regardless of the result of the assault. But a large number of things may be used as weapons, which are not dangerous per se. If their ordinary and customary use would not be likely to inflict death or great bodily harm then they cannot be said to be dangerous weapons. If such things are alleged to have been used as a dangerous weapon, it is necessary to prove that the particular instrument was used in a manner likely to produce death or great bodily harm.

In CM 236547, Killian, 23 BR 51 at p.53, where the alleged instrument used was a chair, the Board of Review stated:

> "The intent to do great bodily harm may be inferred from the nature of the weapon or the manner in which the weapon or other thing is used or from the seriousness of the resulting

injury. If the assailant uses a knife, a loaded firearm, or some other weapon dangerous per se, in such a manner as to show an intent to injure another, the inference is clear that he intends great bodily harm with a dangerous weapon. The seriousness of the resulting injury is not a determining factor. * * * Even in such a case there must be shown at least an attempt to actually harm the intended victim with the weapon employed. * * * Where, however, something other than a dangerous weapon per se is used, then it must be shown that the object used was used in such a manner as to be a dangerous weapon. This is best shown by the seriousness of the injury." (Underscoring supplied)

Ordinarily an assault by kicking with feet encased in ordinary shoes cannot be classed as an assault with a dangerous weapon per se, nor indeed as an assault with intent to do bodily harm since it does not necessarily follow that death or great bodily harm is normally a natural consequence of such an assault. Very few cases have been found involving the use of shoes as assault weapons. However, it has been held that ordinary shoes are not deadly weapons within the meaning of the law of aggravated assault (Warren v. State (Ark), 114 SW 705 (1908); Wilson v. State (Ark), 258 SW 972 (1924); 33 ALR 1186 (Annot.)). "Deadly" is not, of course, exactly synonymous with "dangerous". With respect to shoes being "dangerous weapons," the better rule is expressed in the following excerpt from the case of Smith v. State (Oklahoma), 159 Pacific 2d 279, at page 281:

"Under the law, a pair of shoes such as worn by the defendant are not a dangerous weapon per se. There can be no question but that by their manner of use they might under certain circumstances become dangerous weapons; as for instance, where the evidence revealed that they were used to stomp one to death or to inflict great bodily injury." (Underscoring supplied).

In the instant case there was no evidence as to the type of shoes accused was wearing or that he was in fact wearing shoes. Apparently he was in uniform, since the witnesses, who had not previously known accused, identified him as a technical sergeant. While it may be assumed that he wore some kind of shoes, the type of his footwear cannot be inferred from the evidence especially where the particular kind of shoes alleged as dangerous weapons is an essential element of proof.

The injuries suffered by the victim in this case merely consisted of contusions and abrasions. The most serious injury sustained was a bloody and possibly a fractured nose. It is indicated that Long was first struck a blow to the nose delivered by accused's fist. Apparently

this blow was sufficiently severe to knock the victim down and render him insensible for some moments. All the injuries were, in the opinion of the medical officer, such as might have been caused by the blow of a fist or by the fall to the ground. Thus, it does not appear that the injuries were directly attributed to accused's use of his shoes or that the injuries were of such a serious nature as to give rise to the presumption that they were caused by "a dangerous weapon" within the meaning of that term as defined, supra.

There is, therefore, no evidence that the shoes, in themselves, were particularly dangerous, or that sufficient force was used that could produce great bodily harm. There is no evidence that any bodily harm, greater than that which could be caused by the blow of a bare fist, was inflicted. A bare fist is not a dangerous weapon (CM 238970, Hendley, 25 BR 4). The extent of the injuries shown by the evidence, coupled with the fact that some of them were apparently inflicted after the victim was knocked down and lay helpless on the ground, is sufficient from which the court could infer that the accused entertained an intent to inflict bodily harm upon his victim. But it is clear that where, as in this case, the only proof that the alleged instrument was dangerous depends upon an inference from the nature of the injuries inflicted, those injuries must be of such magnitude as would support no other theory but that they were inflicted by a dangerous weapon, instrument or other thing. Nothing less would support such an inference so as to permit a finding of guilty beyond a reasonable doubt (MCM, 1928, par 78, p.63).

> "* * * If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference * * *." (CM 212505, Tipton, 10 BR 244).

In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of assault with intent to do bodily harm, but is not sufficient to support the findings of guilty of the additional allegation that such assault was committed with a dangerous weapon.

7. The maximum punishment authorized for an assault with intent to do bodily harm is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year (MCM, 1928, par 104c, Table of Maximum Punishments).

8. 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 findings of guilty as involve a finding that accused did, at the time and place alleged, commit an assault upon the person alleged with intent to do bodily harm, 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.

On Leave, Judge Advocate

Geo Lynch, Judge Advocate

Joseph T. Busick, Judge Advocate

JAGH CM 339403 1st Ind

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

TO: The Secretary of the Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Technical Sergeant Jewell N. Crain, AF 36355197, 1129th Military Police Company (Aviation), APO 74.

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 as involve a finding that accused did, at the time and place alleged, commit an assault upon the person alleged with intent to do bodily harm, 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. I concur in that opinion and for the reasons stated therein recommend that so much of the findings of guilty of the Specification of the Charge, as involves findings of guilty of the words "with a dangerous weapon, to wit: His shoes." be vacated; that so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year be vacated; and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings and that portion of the sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 134, 13 July 1948).

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

JAGN-CM 330405

U N I T E D S T A T E S	)	MacDILL AIR FORCE BASE
	)	
v.	)	Trial by G.C.M., convened at Tampa, Florida, 19 March 1948. Dishonorable discharge and confinement for nine (9) months and fifteen (15) days. Disciplinary Barracks.
Private HILTON S. SNELLINGS (13238942), 7th Geodetic Control Squadron, 55th Reconnaissance Group (Very Long Range) Mapping.	)	

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.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: (Disapproved by Reviewing Authority).

FIRST ADDITIONAL CHARGE: Violation of the 65th Article of War.

Specification: In that Private Hilton Scott Snellings, 7th Geodetic Control Squadron, 55th Reconnaissance Group

(Very Long Range) Mapping, MacDill Field, Florida, having received a lawful order from Master Sergeant Wendell James McMillan, Squadron "B", 307th Airdrome Group, MacDill Field, Florida, a noncommissioned officer who was then in the execution of his office, to fall in and continue drilling, did at MacDill Field, Florida, on or about 4 December 1947, wilfully disobey the same.

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

Specification: In that Private Hilton Scott Snellings, 7th Geodetic Control Squadron, 55th Reconnaissance Group (Very Long Range), Mapping, MacDill Air Force Base, Tampa, Florida, did, without proper leave, absent himself from his organization and Station at MacDill Air Force Base, Tampa, Florida, from about 1 February 1948 to about 26 February 1948.

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

Specification: In that Private Hilton Scott Snellings, 7th Geodetic Control Squadron, 55th Reconnaissance Group (Very Long Range), Mapping, MacDill Air Force Base, Tampa, Florida, having been restricted to the limits of the squadron area of the 7th Geodetic Control Squadron, 55th Reconnaissance Group (Very Long Range) Mapping, MacDill Air Force Base, Tampa, Florida, did at MacDill Air Force Base, Tampa, Florida, on or about 1 February 1948 break said restriction by going to Tampa, Florida.

Accused pleaded not guilty to Charges I and II and their Specifications, not guilty to the First Additional Charge and its Specification and guilty to Second Additional Charges I and II and their Specifications. He was found guilty of all Charges and Specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eleven years, nine months and fifteen days. The reviewing authority disapproved the findings of guilty of the Specification of Charge I and Charge I and of Specifications 1 and 2 of Charge II and Charge II, approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for nine months and fifteen days, 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 as approved. The only question to be considered here is whether the record of trial is legally sufficient to support the sentence. The

record establishes that the absence without leave alleged in the Specification of Charge I of the Second Additional Charges had its inception concurrently with the breach of restriction alleged in the Specification of Charge II of the Second Additional Charges. The two offenses were but different aspects of the same act. Where a sentence is imposed with reference to two or more offenses constituting but different aspects of the same act or omission, so much thereof as exceeds the maximum penalty for the more serious aspect of the act or omission is illegal (CM 325224, Hunt (1947); CM 313544, Carson, 63 BR 150, 5 Bull JAG 202).

The authorized maximum sentence to confinement, without substitution, for an absence without leave of twenty-five days as alleged and proven is seventy-five days (par. 104c, MCM, 1928). The authorized maximum sentence to confinement, without substitution, for breach of restriction as alleged and proven is one month (par. 104c, MCM, 1928). In this case the absence without leave is the more important aspect of the act since it carries the heavier penalty, and the confinement which may be imposed for these two offenses may not exceed two months and fifteen days.

4. The maximum sentence to confinement authorized for the offense of willful disobedience of the lawful order of a noncommissioned officer in the execution of his office of which accused was found guilty under the Specification of the First Additional Charge is six months (par. 104c, MCM, 1928). Therefore, the maximum sentence that may be legally imposed against accused for all the offenses of which he has been found guilty, as approved by the reviewing authority, is confinement at hard labor for eight months and fifteen days, and in addition thereto dishonorable discharge and forfeiture of all pay and allowances due or to become due (Sec. B, par. 104c, MCM, 1928).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty as approved by the reviewing authority but 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 eight months and fifteen days.

Edward S. Robinson, Judge Advocate.

Frank C. Allard, Judge Advocate.

George B. Springston, Judge Advocate.

JAGN-CM 330405 1st Ind
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 Hilton S. Snellings (13238942), 7th Geodetic Control Squadron, 55th Reconnaissance Group (Very Long Range) Mapping, 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 eight months and fifteen days. 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 330405).

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.

27 MAY 1948

JAGQ - CM 330426

UNITED STATES v. First Lieutenant WILLIAM N. HILL (0-1175159), Battery C, 674th Parachute Field Artillery Battalion.	11TH AIRBORNE DIVISION Trial by G.C.M., convened at APO 468, Unit 2, 26-27 March and 6 April 1948. Dismissal and confinement for one (1) year.

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 61st Article of War.

Specification: In that William N. Hill, 1st Lt, Battery "C", 674th Parachute Field Artillery Battalion, did, without proper leave, absent himself from his command at APO 468 Unit 2, from about 15 December 1947 to about 9 January 1948.

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

Specification 1: In that First Lieutenant William N. Hill, Battery "C", 674th Parachute Field Artillery Battalion, did, at Camp Younghans, Honshu, Japan, on or about 31 August 1947, feloniously embezzle by fraudulently converting to his own use funds of the value of eighteen hundred dollars ($1800.00), the property of the Enlisted Men's Club, 674th Parachute Field Artillery Battalion, entrusted to him by the said Club.

Specification 2: In that First Lieutenant William N. Hill, Battery "C", 674th Parachute Field Artillery Battalion, did, at Camp Younghans, Honshu, Japan, on or about 30 September 1947, feloniously embezzle by fraudulently converting to his

own use funds of the value of two hundred dollars ($200.00), the property of the Enlisted Men's Club, 674th Parachute Field Artillery Battalion, entrusted to him by the said Club.

Accused 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 one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

The accused was appointed custodian of the Enlisted Men's Club Fund, 674th Parachute Field Artillery Battalion, effective 1 March 1947 (R 14; Pros. Ex. 5). His appointment as custodian remained in effect until he was relieved by Captain Alfred H. Albaugh, on 5 December 1947, by paragraph 9, Special Orders No. 135 of the above battalion dated 17 December 1947 (R 14, 26; Pros. Ex. 6). When the fund was taken over by Captain Albaugh the transfer certificate showed the assets to be four thousand seven hundred ninety-five dollars and forty cents ($4,795.40) of which amount two thousand two hundred and twenty-nine dollars and forty-six cents ($2,229.46) was shown as "cash in Bank" (R 15; Pros. Ex. 18). Captain Albaugh took exception to $2000 of the amount shown to be in the bank for the reason that the bank statement disclosed that such sum was written thereon in ink and was not certified by the bank as being on deposit (Pros. Ex. 18).

The funds of the Enlisted Men's Club were maintained in the Tokyo Branch, National City Bank of New York from 12 November 1946 until the time of trial (Pros. Ex. 7). Bank records show that on 7 August 1947 the "cash in bank" was reduced to $429.46 and on 11 September 1947, further reduced to $229.46 by the payment of a check in the amount of $200.00. The records further reflected that the bank balance remained at that figure until 23 December 1947 (Pros. Exs. 7, 8, 15, 16, 17). Although approximately three thousand five hundred dollars ($3,500.00) "changed hands" between the club steward and accused between 1 March and 31 August 1947, only one deposit was made while accused was custodian of the fund. This was in the amount of four hundred dollars ($400.00) and was made on 26 May 1947 (R 20; Pros. Exs. 7, 8). On 31 August 1947, over his own signature, accused certified that there was $2229.46 in the bank or $1800.00 in excess of the actual balance. On 30 September 1947 by certifying that the same amount last mentioned was still on deposit in the bank, accused increased the variance

between that represented as deposited and that actually on deposit by an additional $200.00. This was caused by the payment of the check in the amount of $200.00 on 11 September 1947 (R 22, 23; Pros. Exs. 7, 8, 10, 12, 15).

The shortage in the account was concealed on the bank statement for the months of September, October and November through the use of the words "Deposit in Bank" and the figures "2000.00" and "$2229.00" written in ink over accused's signature and certification upon the face thereof (R 22, 24, 26; Pros. Exs. 15-17, incl.).

Accused, while serving as Executive Officer of Battery C, 674th Parachute Field Artillery Battalion, was ordered to Tokyo, Japan, on 13 December 1947 as officer in charge of military personnel and their dependents to witness a football game (R 7-9; Pros. Ex. 2). Although directed to return to his proper station following the game, accused failed to do so and, having no authority to be absent from his battery, was entered on the morning report of his organization as absent without leave on 15 December 1947 (R 9, 10; Pros. Exs. 2, 3). On 9 January 1948, accused was located and apprehended in the Tokyo Electric Hotel by a battalion officer acting pursuant to instructions given him by the Commanding Officer of the 674th Parachute Field Artillery Battalion (R 11, 12). Subsequently, the officer who apprehended accused returned him to his organization (R 12).

Following the preferring of charges against accused, the latter caused to be deposited $1000.00 on 14 February 1948 and $850.00 on 15 March 1948 in the Tokyo Branch, National City Bank, to the credit of the club fund (R 27, 28; Pros. Ex. 19).

4. Evidence for the Defense.

The defense introduced additional records kept by accused and the steward of the club showing the clubs' profit and loss for the period during which accused was custodian. These records were purported to be authenticated as to the amount of money received and thus indicative, at least to accused's battalion commander, of the absence of an intent permanently to defraud the fund (R 34-37).

The "Officers Classification Form 66" of accused introduced by the defense showed that accused had been awarded the Silver Star, Bronze Star Medal with Oak Leaf Cluster, Distinguished Unit Badge, Purple Heart, as well as other American and Foreign honors in recognition of combat service (R 37, 38; Def. Ex. 1). Accused's Silver Star citation for gallantry in action published in General Orders No. 13, Headquarters 82nd Airborne Division, 30 January 1945, was also introduced (Def. Ex. 3).

After having been advised of his rights as a witness accused elected to remain silent (R 38).

5. The competent evidence shows beyond any reasonable doubt that accused was absent without leave from his organization from about 15 December 1947 until 9 January 1948, in violation of Article of War 61, and that he feloniously embezzled, by converting to his own use, while serving as fund custodian, the sums of $1800.00 and $200.00 at the time, place and of the ownership alleged, in violation of Article of War 93.

The only question presented by the record of trial concerns the effect of the following action of the court and prosecution during the proceedings:

> "PROSECUTION: (After showing document to defense) The prosecution offers in evidence the stipulation that two deposits of $1000 and $850 were made on 14 February 1948 and on 15 March 1948, respectively, by First Lieutenant Hill as Prosecution Exhibit 19, to be attached to the record of trial.
>
> "COURT: Why doesn't Lieutenant Hill testify to this?
>
> "PROSECUTION: The accused declines to testify. The stipulation was made to eliminate hearsay evidence as a material witness is not present on the post to identify the person who deposited the $1000 in the bank. Bank deposit slips will not give evidence as to who made the deposits, merely that they were made.
>
> "COURT: The court accepts the stipulation signed by the TJA, the defense counsel and the accused, in evidence as Prosecution Exhibit 19, to be attached to the record of trial." (R 27).

Clearly the court's inquiry as to why accused did not testify was unwarranted and the prosecution's response was likewise improper. It is basic that an accused may not be required to testify unless he so elects and that it is error for the prosecution or the court to comment upon his failure to testify at any stage of the court-martial proceedings (Par. 77, MCM, 1928, p. 62; CM 273830, Nuttmann, 8 BR (E.T.O.) 111). Concerning a somewhat similar instance in the case above cited, and the possible prejudicial effect of such error, the Board of Review stated:

"It is manifest that serious error resulted from the conduct and remarks of the trial judge advocate. The problem, however, for solution is whether such error was prejudicial to the substantial rights of the accused.

"It is the general rule in the trial of criminal cases in the Federal civil courts that improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal of the judgment of conviction unless the court has been requested to instruct the jury to disregard them and has refused to do so, or unless the remarks are obviously prejudicial to the rights of the accused (16 C.J., sec. 2269, p.915; 23 C.J.S., sec. 1115, p. 598; United States v. Socony-Vacuum Oil Co. 310 U.S. 150, 243, 84 L.Ed., 1129, 1178; Dunlop v. United States 165 U.S. 486, 498, 41 L.Ed., 799, 803; Diggs v. United States 220 Fed. 545, 242 U.S. 470, 61 L.Ed., 442; United States v. Wexler 79 Fed. (2nd) 526, 529; Jarvis et al v. United States 90 Fed. (2nd) 243, 246). Courts-martial are judges both of law and facts (Winthrop's Military Law & Precedents - Reprint - p. 54) and consequently there is no procedure equivalent to that of the civil courts with respect to purging the trial from the effects of improper remarks or argument of the trial judge advocate.

"It is the duty of the Board of Review to determine whether or not a record of trial is legally sufficient to support the findings and sentence and whether or not errors of law have been committed at the trial injuriously affecting the substantial rights of the accused (AW 50½, par. 3). This duty is synchronized with the further mandate of Congress which directs that

> 'The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case * * * for any error as to any matter of pleading or <u>procedure</u> unless in the opinion of the reviewing or confirming authority, <u>after an examination of the entire proceedings</u>, it shall appear that the error complained of has <u>injuriously affected the substantial rights of an accused</u>' (AW 37) (Underscoring supplied).

In view of the foregoing it follows that it is within the authority of the Board of Review to consider the effect upon the rights of an accused of improper remarks or misconduct by a trial judge advocate occurring during the course of trials ***"

The Board in the same opinion, after noting the close resemblance between Article of War 37 and section 269 of the Judicial Code (40 Stat. 1181; 28 USCA 391), referred to as the "harmless error statute", further stated:

> "With particular reference as to the circumstances and conditions under which improper remarks or argument of a prosecutor will require a reversal of judgment of conviction the courts have said:
>
> > 'It is true that by section 269 of the Judicial Code, as amended, 28 U.S.C. § 391 (28 U.S.C.A. § 391), <u>not every technical error, defect, or exception which does not affect the substantial rights of the parties is ground for reversal, and if upon examination of the entire record substantial prejudice does not appear, the error, if it exists, must be regarded as harmless.</u> * * * The inquiry, however, must always be as to whether in view of the whole record the impression conveyed to the minds of the jurors by irrelevant and prejudicial matter is such that the court may fairly say that it has not been successfully eradicated by the rulings of the trial judge, his admonition to counsel, and his instruction to the jurors to disregard it. Sometimes a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow * * *. At other times transgressions may be so slight that if promptly corrected and their repetition avoided the court may not say that the jury was prejudiced, though often the mere cumulative effect of a course of improper conduct compels reversal. * * *'(Pierce v. U.S., 86 Fed.(2nd) 949)".

Considering the error in the instant case in the light of these concepts, the Board of Review is impressed with the good faith of both the court and prosecution in connection with their unfortunate inquiry and discussion, and with the fact that the stipulation referred to was also material to the defense, insofar as related to the issue of mitigation. In the latter connection, the evidentiary value of the stipulation to the Government's case was only cumulative in character in view of uncontradicted and undisputed testimony previously adduced showing accused's falsification of records and establishing beyond doubt every element of the offenses charged.

Mindful of the purpose and the clear intent of Congress behind the enactment of Article of War 37, as well as the above counterpart for the

Federal courts, and giving judicial effect thereto, it becomes necessary for the Board of Review to determine in the instant case whether the erroneous inquiry of the court and response of the prosecution injuriously affected the substantial rights of the accused when considered in the light of all the evidence in the record. In this connection, the Board must determine 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 evidence on behalf of accused. It is obvious that in one case an error or particularly an accumulation thereof might affect the ultimate result because of the unsatisfactory character of the evidence, whereas in another case the evidence would be so conclusive as to nullify errors committed during the trial which were not of jurisdictional nature. It follows, therefore, that a conviction in one instance may be upheld because of the quality and quantity of the evidence independent of that relating to any error, while in another case the error would be of such consequence as to require setting aside the conviction when considered in the light of evidence less conclusive (CM 211829 Parnell, 10 BR 133, 137; CM 237711, Fleischer, 24 BR 89, 99, 100; CM 316223 Evans, 71 BR 385; CM 329711 Tumang (15 April 1948); CM 330238 Pursley, et al., 4 May 1948).

In applying the above principle to the present case, it is clear that the evidence of record in support of accused's offense of absence without leave is not only uncontradicted but is of such conclusive character as to preclude any doubt of accused's guilt. As to the evidence in support of the two offenses of embezzlement, the proof adduced by the prosecution is contradicted only with respect to the element of fraudulent intent. The fact that accused was entrusted with the Enlisted Men's Club fund and that he converted or appropriated the amount of $1800.00 in the month of August and $200.00 in the month of September from the fund's bank deposits is established by competent documentary evidence and not disputed. To offset the proof of criminal intent in the two defalcations, which included concealment of the shortage through the employment of false bank and financial statements over accused's own signature during a three months period, the defense offered additional records of the Enlisted Men's Club which showed that the daily accounts of the club had not been falsified as to sales and expenditures. It was the defense's contention that if accused had intended permanently to deprive the fund of the money, he would have made or caused to have been made, false entries in these records also. Since it is clear that these records were kept jointly by the club steward and accused and consequently the falsification thereof would have been detected almost at the time of inception, the Board of Review is inclined to reject as untenable such

contention. This is especially true since there is undisputed competent evidence showing patant falsifications chargeable to accused on records in which such false entries could and did remain undetected for a three months period. The facts are clear that accused appropriated and converted without authority large sums of money from the club fund and that the shortages were concealed until he was relieved as custodian. These facts alone point unmistakably to accused's guilty knowledge and clearly manifest a fraudulent and unlawful purpose and intent. Evidence relating to accused's restitution of a substantial portion of the money was therefore not material to the prosecution's case and accordingly the inquiry of the court and remarks of the trial judge advocate had no material effect upon the substantial rights of accused.

The Board of Review is of the opinion that the evidence proves beyond any reasonable doubt the guilt of accused of each offense charged and that there were no errors committed which require that the conviction be set aside.

6. Records of the Department of the Army show that accused is thirty-nine years of age and married. He graduated from high school in 1928 and studied Industrial Engineering in college for two years. He enlisted in the Regular Army for service in the Field Artillery, 24 August 1940, and attained the rank of Staff Sergeant. On 24 December 1942, following his graduation from Officer Candidate School, he was appointed Second Lieutenant, Field Artillery, Army of the United States and he was promoted to First Lieutenant, 8 July 1944. His service since 27 May 1943 has been with either Glider or Parachute Field Artillery. He has been awarded the Silver Star, Purple Heart with Oak Leaf Cluster, Distinguished Unit Badge, European Theatre Ribbon with Bronze Arrowhead and Six Bronze Campaign Stars. He was relieved from active duty, 22 November 1945 and recalled on 29 July 1946. As a result of directing a non-commissioned officer to place a loaded pistol in his desk on 10 May 1947, in violation of orders, which indirectly caused an enlisted man to be wounded, accused was reprimanded and fined fifty dollars ($50.00) under Article of War 104. His efficiency reports for commissioned service include one rating of "Satisfactory", one of "Very Satisfactory", eight ratings of "Excellent", and two ratings of "Superior". Prior to entering the military service, accused was employed for two (2) years by the General Electric Corporation as a chief inspector and for three (3) years by the Qy-Weld Acetylene Corporation of Newark, New Jersey as Assistant Production Manager.

7. 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 authorized upon conviction of a violation of Articles of War 61 and 93.

W. H. Johnson Jr., Judge Advocate

Wilmer T. Baughn, Judge Advocate

A. H. Kane, Judge Advocate

JAGQ - CM 330426 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 9 JUN 1949

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant William N. Hill (0-1175159), Battery C, 674th Parachute Field Artillery Battalion.

2. Upon trial by general court-martial in Japan, this officer was found guilty of absence without leave from his organization from 15 December 1947 to 9 January 1948, in violation of Article of War 61, and of feloniously embezzling one thousand eight hundred dollars ($1800.00) and two hundred dollars ($200.00), on or about 31 August 1947 and 30 September 1947, respectively, while custodian of the Enlisted Men's Club fund, 674th Parachute Field Artillery Battalion, in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. Accused, while assigned to the 674th Parachute Field Artillery Battalion in Japan, was custodian of the Enlisted Men's Club fund from 1 March 1947 to 5 December 1947. While custodian he feloniously embezzled the amount of one thousand eight hundred dollars ($1,800.00) during the month of August and the amount of two hundred dollars ($200.00) during the month of September. In concealing each of these defalcations for several months, accused falsified the financial statement of the club fund and bank statement of the Tokyo Branch, National City Bank of New York. The shortage was discovered when accused was relieved as custodian. Accused subsequently made restitution to the club fund in the amount of one thousand eight hundred fifty dollars ($1,850) deposited during the months of February and March 1948.

5. Department of the Army records show that accused is thirty-nine years of age and married. He was graduated from high school in 1928 and

studied Industrial Engineering in college for two years. Prior to entering the military service, accused was employed for two (2) years by the General Electric Corporation as a chief inspector and for three (3) years by the Qy-Weld Acetylene Corporation of Newark, New Jersey as Assistant Production Manager. He enlisted in the Regular Army for service in the Field Artillery, 24 August 1940, and attained the rank of Staff Sergeant. On 24 December 1942, following his graduation from Officer Candidate School, he was appointed Second Lieutenant, Field Artillery, Army of the United States, and he was promoted to First Lieutenant, 8 July 1944. His service since 27 May 1943 has been with either Glider or Parachute Field Artillery. He has been awarded the Silver Star, Purple Heart with Oak Leaf Cluster, Distinguished Unit Badge, European Theatre Ribbon with Bronze Arrowhead and Six Bronze Campaign Stars. He was relieved from active duty 22 November 1945 and recalled on 29 July 1946. As a result of directing a noncommissioned officer to place a loaded pistol in his desk on 10 May 1947, in violation of orders, which indirectly caused an enlisted man to be wounded, accused was reprimanded and fined fifty dollars ($50.00) under Article of War 104. His efficiency reports for commissioned service include one rating of "Satisfactory", one of "Very Satisfactory", eight ratings of "Excellent", and two ratings of "Superior".

6. 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.

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

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

(GCMO 132. 6 July 1948).

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

6 May 1948

JAGQ - CM 330438

UNITED STATES	)	BREMERHAVEN PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Bremerhaven, Germany, 14 April 1948. Confinement for one (1) year. Federal Reformatory, Chillicothe, Ohio.
	)	
General Prisoner RUFUS C. McAFEE	)	
	)	

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

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

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

CHARGE: Violation of the 69th Article of War.

Specification: In that General Prisoner, Rufus C. McAfee, having been duly placed in confinement in the Prison Ward, 319th Station Hospital, Bremerhaven, Germany, on or about 5 November 1947, did at 319th Station Hospital, Bremerhaven, Germany, on or about 2200, 3 April 1948, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous convictions was introduced. He was sentenced to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence, designated 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 only question presented by the record is whether confinement in a Federal reformatory is authorized for the offense of which accused was convicted.

4. The offense of escape from confinement is not an offense of a civil nature punishable by penitentiary confinement for more than one year under Article of War 42 and consequently as confinement in a Federal reformatory is governed by the same considerations as confinement in a penitentiary, confinement in a Federal reformatory is not authorized for the offense alleged in the specification (CM 326408, Sells, 6 Nov. 1947).

The fact that accused is already under a sentence of a previous court-martial wherein a Federal reformatory was designated as the place of confinement does not authorize the designation of a Federal reformatory in the execution of a subsequent sentence (par. 399 (5) Dig. Ops. JAG 1912-40).

Accordingly, the Board of Review is of the opinion that confinement in a Federal reformatory is not authorized by Article of War 42 for the offense of which accused was found guilty in the instant case.

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 confinement at hard labor for one year in a place other than a penitentiary, Federal reformatory or correctional institution.

Signed, Judge Advocate

Signed, Judge Advocate

Signed, Judge Advocate

a true copy

ROBERT E. BYRNE
Capt JAGD

JAGQ - CM 330438 1st Ind May 7, 1948

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

TO: Commanding Officer, Bremerhaven Port of Embarkation,
APO 69, c/o Postmaster, New York, New York

1. In the case of General Prisoner Rufus C. McAfee, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution 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 of this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 330438).

/s/ Hubert D. Hoover
/t/ HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

1 Incl
Record of Trial

a true copy

ROBERT E. BYRNE
Capt JAGD

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

10 MAY 1948

JAGQ - CM 330452

UNITED STATES	)	FORT JACKSON, SOUTH CAROLINA
v	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, 19 April 1948. Dishonorable discharge and confinement for five (5) years. United States Disciplinary Barracks.
Private JAMES L. BROWN (RA 13240605), Headquarters and Headquarters Company, Detachment No. III, Fifth Infantry Division.	)	

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

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

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

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

Specification 1: In that Private James L. Brown, Headquarters and Headquarters Company, Detachment No. III, 5th Infantry Division, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 14 February 1948, unlawfully enter Branch No. 53, Fort Jackson Laundry and Cleaners, with intent to commit a criminal offense therein, to wit, larceny.

Specification 2: In that Private James L. Brown, Headquarters and Headquarters Company, Detachment No. III, 5th Infantry Division, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about 14 February 1948, feloniously take, steal and carry away Forty-three Dollars and Thirty-two Cents ($43.32), lawful money of the United States, the property of the Fort Jackson Laundry and Cleaners.

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

Specification: In that Private James L. Brown, Headquarters and Headquarters Company, Detachment No. III, 5th Infantry Division, having been duly placed in confinement in Post Stockade, Fort Jackson, South Carolina, on or about 18 February 1948, did, at Fort Jackson, South Carolina, on or about 12 March 1948, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be 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 the sentence, designated Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence. (Specification of the Additional Charge - Escape from Confinement).

On 18 February 1948, accused was duly confined in the Post Stockade, Fort Jackson, South Carolina. On 11 March 1948, while on a work detail under armed guard accused escaped from confinement by assaulting the guard, knocking the rifle from the latter's hands and tying the guard's hands and feet (R 15; Ex. 2). Accused was returned to the Post Stockade, 12 March 1948, by civilian authorities (R 17).

Inasmuch as the Board of Review holds that there was prejudicial error committed at the trial which affects the findings of guilty of Specifications 1 and 2 of the Original Charge and the Original Charge, the evidence with reference to those specifications need not be summarized.

4. The record of trial shows that after proving the corpus delicti of the offenses of larceny and housebreaking (Specs. 1 and 2, Original Charge), prosecution introduced a detailed confession of accused in which he admitted his guilt as to all elements of these two offenses. The confession was admitted over objection by the defense as to its voluntary character and was received in evidence de benne esse subject to being withdrawn if the defense evidence showed that it was involuntary (R 13). The only evidence connecting accused with these two offenses was the confession itself and the findings of guilty for these offenses must be predicated thereon.

When the prosecution rested its case defense counsel stated that he had explained to accused his rights as a witness and that accused desired to testify "confining his testimony to that relating to the voluntariness of the confession only". Thereupon the prosecution objected "on the grounds that if he is sworn in, he will be subject to cross-examination". The defense then stated that "accused still desires to take the stand as a witness in his own behalf, giving limited testimony as relates to the voluntariness of the confession" (R 18). The accused was then sworn and testified in substance:

> "*** CID Agent Hoff *** told me if I made a sworn statement, saying I did it, that it would make it a lot easier on me, whatever kind of court I got. He told me I could go down and see Mrs. Miller, and talk to Mrs. Miller before I made the sworn statement. He said I could go down and talk with her and straighten the thing out - repay her. After I made the sworn statement, they returned me to the Stockade and confined me." (R 18).

Thereupon, the cross-examination of accused by the prosecution proceeded as follows:

> "Q. Private Brown, you testified that Agent Hoff told you you could go down and straighten something out with Mrs. Miller.
> A. Yes, sir.
>
> "Q. What was the purpose of this straightening out?
> A. I .....
>
> DEFENSE: The defense objects. That does not bear upon the voluntariness of the confession. The accused has taken the stand to testify only ..... to testify regarding the voluntariness of the confession, as to promises or threats made.
>
> LAW MEMBER: Overruled.
>
> PRESIDENT: The cross-examination of any witness is limited to the field of the direct examination, and other evidence brought out by the witness. Since that element was presented by this witness, it is subject to cross examination.
>
> "Q. I repeat my question. What was the purpose of this straightening out?
> A. About the money, sir.

"Q. What money?
A. The money she said was missing.

"Q. Why should you have to go see her about it?
A. I was accused of the charge, sir.

"Q. What were you supposed to do?
A. I was trying to repay the money - how much - the amount that was gone.

DEFENSE: The defense objects to that question, as it bears directly on the charge...The charge, as specified, and not upon the voluntariness of the confession.

PROSECUTION: The accused is still being questioned on the statement he has made.

LAW MEMBER: Objection overruled.

"Q. In other words, Private Brown, for some reason, you felt obligated to go down there and straighten something out?
A. Yes, sir.

"Q. Why did you feel obligated?
A. Because I was charged with it.

"Q. Because you were 'charged with it'. No other reason? Not because you actually took it .....because you were charged with it?

DEFENSE: The defense objects to the question because that question is a ....., leading question, and bears directly on the charge as specified on the charge sheet.

LAW MEMBER: Sustained.

PRESIDENT: May I inject? Whereas leading questions are permissible on cross-examination, it is intended to expedite the procedure - to direct the attention of the accused to a specific element, and must not be used to put words into the mouth of the witness.

"Q. In other words, Brown, you, for some humanitarian reason, felt you had to go down and to straighten something out - must give out for no other reason at all but .....
A. I didn't want to get tried for something I didn't do.

"Q. You would rather pay the money, rather than be tried for it?
A. Yes, sir. Get it cleared up." (R 19-20).

It has been uniformly held by the Board of Review that an accused has the right to testify for a limited purpose without being subject to examination regarding the merits of the case and to refuse him such privilege constitutes fatal error (CM 275738, Kidder, 48 BR 145; Grantello v. United States, 3 Fed. 2d 117 (CCA) 8th 1924).

While it is true that accused mentioned the fact that the agent told him he might talk to Mrs. Miller (victim of the theft) and "straighten the thing out - repay her" it is obvious that such testimony was given strictly for the purpose of showing promises made by the agent which induced the confession and which would tend to show its involuntary character. Such testimony was proper and entirely consistent with accused's previous declaration that he was taking the witness stand for the announced limited purpose. It did not under any circumstances "open up" the merits of the case so as to allow the questions thereon as were subsequently propounded by the trial judge advocate. For instance, the trial judge advocate asked the accused why "you felt obligated to go down there and straighten something out" and that "you, for some humanitarian reason, felt you had to go down and to straighten something out" which questions clearly required that accused admit and explain very damaging circumstances regarding the merits of the offenses with which he was charged. In short, the trial judge advocate subjected accused to examination on the merits of the offenses to which accused had purportedly confessed. It must be conceded, therefore, that the examination of accused on the merits of the case when he had taken the stand for a limited purpose only was highly improper and constituted serious error.

This precise question was decided in CM 326450, Baez, 13 November 1947, wherein the Board of Review held:

"It has been held fatal error for the prosecution to call upon an accused to testify (CM 312517, Kosydar, et al. (9 Oct. 1946); CM 317428, Satterwhite, et al. (19 Feb. 1947)). While these cases may be distinguished from CM 273817, Johnson, et al, 6 BR (ETO) 291; CM 246543, Bishop, et al, 2 BR (NATO-MTO) 9) in which contrary results were reached, it is considered that the principles set forth in the Johnson and Bishop cases, supra, are not controlling and should no longer be followed. It is recognized that in these cases the accused was called to the stand by the prosecution while in the instant case he voluntarily took the witness stand at his own request to testify for a limited purpose and was thereafter subjected to examination on the merits of the case over objection by the defense.

"The Board of Review is of the opinion however that such a distinction is of no consequence. It cannot be denied that an accused has a right both under the Constitution of the United States and the provisions of the 24th Article of War to refrain from testifying regarding the merits of his case. This right was denied to the accused in the instant case and he was compelled to give testimony regarding his guilt or innocence when he had not voluntarily elected to do so. This amounted to a violation of his rights under the Constitution of the United States and the 24th Article of War and cannot be considered as falling within that class of nonprejudicial errors covered by the 37th Article of War. This constitutional guarantee can only be effectively enforced by excluding all evidence obtained in violation of accused's right against self incrimination. It must be remembered that accused in this case desired to exercise his right to testify concerning the manner in which his alleged confession was procured without subjecting himself to cross-examination on the merits. Any ruling of a court-martial which circumvented his right to so limit his testimony would jeopardize his constitutional guarantee against self incrimination, a right which the courts are under a solemn obligation to guard. ***"

Since the actions of the trial judge advocate and the rulings of the court denied to accused the right to limit his testimony to facts showing the manner in which his confession was procured without being compelled to testify regarding his guilt or innocence, his fundamental right against self-incrimination as distinguished from a mere error of procedure was violated. That such error was highly prejudicial to the accused's substantial rights in violation of the 37th Article of War as to those offenses to which accused was forced to testify can no longer be doubted in view of the Baez case, supra.

As competent evidence outside of accused's confession clearly establishes the guilt of accused as to the Additional Charge and the Specification thereof (escape from confinement), and the confession of accused did not relate in any way to this offense, the record of trial is legally sufficient to support the findings of guilty of that specification and charge. The maximum punishment permissible for this offense is dishonorable discharge, total forfeitures and confinement at hard labor for one year (par. 104c, MCM 1928)

5. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Original Charge and the two Specifications thereunder, legally sufficient

to support the findings of guilty of the Additional Charge and its Specification, 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.

W H Johnson Jr, Judge Advocate

_____, Judge Advocate

A B Kane, Judge Advocate

MAY 1 - 1945

JAGQ - CM 330452 1st Ind

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

TO: Commanding General, Fort Jackson, South Carolina

1. In the case of Private James L. Brown (RA 13240605), Headquarters and Headquarters Company, Detachment No. III, Fifth Infantry Division, attention is invited to the foregoing holding by the Board of Review which holding is hereby approved. It is recommended that the findings of guilty of the Original Charge and Specifications 1 and 2 thereunder be disapproved and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 330452).

THOMAS H. GREEN
Major General
The Judge Advocate General

FT. JACKSON, S. C.
RECEIVED

1 Incl
Record of Trial

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

JAGH CM 330456 | 16 July 1948

U N I T E D S T A T E S v. First Lieutenant JOHN G. MAXEY, JR., (038311), Infantry, 7748 Dependents Housing Detachment, APO 800.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Stuttgart, Germany, 10 March 1948. Dismissal, total forfeitures and confinement for one (1) year.

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

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

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

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

Specification 1: (Finding of not guilty)

Specification 2: In that First Lieutenant John G. Maxey, Jr., did, at Frankfurt, Germany, on or about 8 January 1948, with intent to do him bodily harm, commit an assault upon Private Otto Jackson by pointing at him a dangerous weapon, to wit, a pistol.

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

Specification: (Nolle Prosequi).

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

Specification 1: In that First Lieutenant John G. Maxey, Jr., did, at Frankfurt, Germany, on or about 8 January 1948, wrongfully and unlawfully carry an unauthorized weapon, to wit, a Walther automatic pistol, this in violation of letter Headquarters USFET, File AG 474. PMG-AGO, dated 9 October 1946.

Specification 2: In that First Lieutenant John G. Maxey, Jr., did, at or near Frankfurt, Germany, on or about 8 January 1948, wrongfully commit an assault on Marie Anker, by then and there restraining her in his automobile, forcibly and against her will.

He pleaded not guilty to all Charges and Specifications; was found not guilty of Specification 1 of Charge I, but guilty of Charge I and of Specification 2 thereunder, of Charge III and Specifications 1 and 2 thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the United States Constabulary Judge Advocate, dated 8 April 1948.

4. Records of the Department of the Army show that the accused is now 28 years of age and unmarried. He attended Lynchburg College and George Washington University, and is a graduate of Strayer Business College. From 1941-1944 he was an employee of the State Department (United States Government) handling secret codes and Spanish-English translations for the American Ambassador at Quito, Ecuador. He was inducted at Fort George G. Meade, Maryland, on 10 April 1944. He was graduated from the Officers' Candidate Course, the Infantry School, Fort Benning, Georgia, and commissioned a Second Lieutenant of Infantry (AUS) on 19 June 1945. He was commissioned in the same grade in the Regular Army on 1 September 1946, and promoted to First Lieutenant on 22 March 1947. Adjectival ratings on his efficiency reports of record vary from "Very Satisfactory" to "Superior."

5. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year is authorized upon conviction of violations of the 93rd and 96th Articles of War.

_____, Judge Advocate

_____, Judge Advocate

(On temporary duty), Judge Advocate

JAGH - CM 330456 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John G. Maxey, Jr. (O-38311), Infantry, 7748 Dependents Housing Detachment, APO 800.

2. Upon trial by general court-martial, this officer was found guilty of committing an assault with intent to do bodily harm with a pistol in violation of the 93rd Article of War (Specification 2 of Charge I); of wrongfully and unlawfully carrying an unauthorized weapon in violation of existing directives, and of an assault on a woman by restraining her from leaving his automobile, both in violation of the 96th Article of War (Specifications 1 and 2 of Charge III). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the review of the United States Constabulary Judge Advocate, dated 8 April 1948, which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and law in this case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

Accused is charged with committing an assault under the 96th Article of War upon Miss Marie Anker, research analyst, Historical Division "EUCOM" by restraining her in his automobile, forcibly and against her will. Accused "picked her up" in his personally owned Pontiac Sedan about 1740 hours 8 January 1948, as she was walking home from her place of employment in Frankfurt, Germany. He "gave her a lift" to her home a short distance away, where he stopped the car. She opened the door and as she was about to get out, he urged her to go with him to the Casino that evening, presumably to dine and dance, prior to his taking the train at 2100 hours. When she refused he asked if he could "come up and help me cook dinner or something" which she also refused. Thereupon, he again tried to induce her to go with him to the Casino and again meeting with a refusal, he engaged her in further conversation, then "reached over and pulled the door shut" and drove away at a fast rate of speed. Miss Anker asked accused to let her out of the car, but he paid

no attention to her. He drove through "the compound gate without stopping to show our identification," then started speeding "driving very recklessly and drove over a safety zone narrowly missing a pedestrian." Miss Anker again pleaded with him to let her out, but accused refused, stating "he was going to take me for a ride." She became frightened as he drove faster and "seemed to have no control over the car." She screamed for help and opened the door of the car so that "passers-by would hear me better." As she continued to scream, "the German in back /accused's driver who was sitting in the back seat while accused was driving/ held me by the shoulders and told me not to jump out of the car," and the accused "turned the car radio very loud and he sang and it was very difficult for me to make myself heard." The accused narrowly missed striking a weapons carrier, being driven by two colored soldiers in the same direction as the accused's car. Miss Anker again opened the car door and screamed to attract the attention of the colored soldiers. The street became narrower, and, upon coming to a deadend, the accused failed to make the sharp turn to the right and his car crashed into a stone wall. Miss Anker's head struck and shattered the windshield, causing her substantial injuries.

Accused was charged under the 96th Article of War with carrying an unauthorized weapon, to wit: a Walther Automatic Pistol, in violation of letter, Headquarters USFET, File AG 474, PMG-AGO, dated 9 October 1946. A pistol answering to this description, a "P.P.K. Cal. 7.65 mm Walther Pistol, serial number 237103K" was found by Criminal Investigation Division agents in the pocket of an overcoat belonging to the accused, who had retired in a lower berth of the train that was about to leave the Frankfurt railroad depot for Bremen, at 2120 hours, 8 January 1948.

Accused was also charged under the 93rd Article of War with committing an assault with intent to do him bodily harm, upon Private Otto Jackson, by pointing at him a dangerous weapon, to wit: a pistol. Jackson, accompanied by Staff Sergeant Hart, was driving a 3/4 ton truck on Eckenheimerlandstrasse, Frankfurt, Germany, at about 1745 hours, when a civilian sedan traveling at a high rate of speed, passed him - "the door was open and there was a woman screaming when it passed me." He heard a crash and with Hart went to see what had happened. Hart got out and went to telephone for an ambulance, leaving Jackson sitting in the truck. Accused walked up to the truck and "asks me to take him to the hospital and I told him to wait till Sergeant Hart gets back . . . and he was fumbling around in his bosom and he took out a gun and he fired a shot in the direction Sergeant Hart went and then pointed the gun towards me and told me to get out. I got out of the vehicle and he taken the vehicle and drove off."

The accused took the stand and testifying in his own behalf, admitted he stopped his car, opened the door and offered to "give a lift" to a young lady who was standing on the corner. After she entered the car, they had a general conversation as they were riding along, until they

came to a point where she said, "This is my house." Accused asked her "if she would like to go to EUCOM Casino and have dinner and then perhaps dance after dinner" as he had about three hours before taking his train for Bremerhaven. He closed the door of the car and drove out through the compound gate. "I was driving fast I imagine . . . I was in a happy mood, singing and the radio was playing. From the moment I left . . . I don't remember that the girl was even in the car . . . I don't remember any conversation at all that took place . . . I had drunk approximately three-quarters of a bottle of liquor . . . I continued down that street. I don't remember how far it was, only I came to what seemed to me a dead-end. I remember it rising up in front of me and the next thing I remember I came to with my head upon the steering wheel . . . I didn't know how long I had been unconscious . . . something kept telling me to get to the station, don't miss the train . . . I took a couple of watches . . . and this pistol . . . from the front compartment . . . There were lots of German people around there, they were talking. I was slightly dazed and I don't remember exactly what happened.. . I went around to the right side of the truck and as I was getting into it . . . these people were crowding and they were talking . . . they confused me and excited me and I yelled: 'Get out of the way' and I pulled out the pistol . . . and fired one shot straight up into the air . . . Everybody scattered and I didn't see a soul after that . . . There was nobody in the truck . . . I wanted to get to the station. . . I got under the steering wheel, turned the truck around and proceeded. . . . to the station . . . went to my compartment, undressed, and was just getting ready to get into a berth and four Agents from the CID came and placed me under arrest."

4. The accused is 28 years of age and unmarried. He attended Lynchburg College and George Washington University, and is a graduate of Strayer Business College. From 1941-1944 he was an employee of the State Department (United States Government) handling secret codes and Spanish-English translations for the American Ambassador at Quito, Ecuador. He was inducted at Fort George G. Meade, Maryland, on 10 April 1944. He was graduated from the Officers' Candidate Course, the Infantry School, Fort Benning, Georgia, and commissioned a Second Lieutenant of Infantry (AUS) on 19 June 1945. He was commissioned in the same grade in the Regular Army on 1 September 1946, and promoted to First Lieutenant on 22 March 1947. Adjectival ratings on his efficiency reports of record vary from "Very Satisfactory" to "Superior."

5. 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 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 155, 26 Aug 1948).

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

JAGK - CM 330490

29 JUN 1948

UNITED STATES v. Second Lieutenant THOMAS B. OVEREND (O-2025291), Headquarters, 26th Infantry (RCT).	FIRST U.S. INFANTRY DIVISION Trial by G.C.M., convened at Nurnberg, Germany, 17 December 1947. Dismissal, total forfeitures and confinement for two (2) years. Disciplinary Barracks.

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

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

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

CHARGE I: Violation of Article of War 93.

Specification: In that 2nd Lieutenant Thomas B. Overend, Hq 26th Infantry (RCT), did at Bamberg, Germany, on or about 10 October 1947, feloniously embezzle by fraudulently converting to his own use Military Payment Certificates of the value of $1397.80, the property of the Melody Mansion Enlisted Men's Club, 26th Infantry, entrusted to him by the said Melody Mansion Enlisted Men's Club as custodian of the fund for the Melody Mansion Enlisted Men's Club.

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

Specification 1: In that 2nd Lieutenant Thomas B. Overend, Hq 26th Infantry (RCT), did at Bamberg, Germany on or about 17 October 1947 with intent to deceive Major Russell R. Blair, officially report to the said Major Russell R. Blair that "two council books belonging to the Melody Mansion Enlisted Men's Club Fund and annexes B" for the months of June, July, August and September 1947 for said fund had been lost in moving from Grafenwohr to Bamberg and that he did not know where the two council books and annexes B for the Melody Mansion Enlisted Men's Club fund for June, July, August and

September 1947 were located and further that he could not produce said council books and annexes B for the Melody Mansion Enlisted Men's Club fund for the months of June, July, August and September 1947" which report was known by the said 2nd Lieutenant Thomas B.Overend to be untrue.

Specification 2: In that 2nd Lieutenant Thomas B.Overend, Hq 26th Infantry (RCT), did at Bamberg, Germany, on or about 17 October 1947 with intent to deceive Colonel Maurice C. Bigelow, officially report to the said Colonel Maurice C. Bigelow that "he had lost the council books of the Melody Mansion Enlisted Men's Club and the vouchers belonging thereto, during the period of his custodianship and that he was unable to produce the said council books and vouchers pertaining to the said Melody Mansion Enlisted Men's Club" which report was then known by the said 2nd Lieutenant Thomas B. Overend to be untrue.

CHARGE III: Violation of the 61st Article of War.
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

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

Specification: (Finding of Not Guilty).

Accused pleaded not guilty to all charges and specifications. He was found guilty of Charges I and II and their specifications and not guilty of Charges III and IV and their specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence, designated the Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

Accused was custodian of the Melody Mansion Enlisted Men's Club fund, 26th Infantry (RCT) at Grafenwohr, Germany, from about 16 June 1947 to about 6 October 1947. On the latter date, Lieutenant Constantine B. Demitriades, who had previously been appointed custodian of the fund to succeed accused, took charge of the club property with the exception of the cash (R 7, 16, 18, 30, 48).

When accused attempted to transfer the property of the Melody Mansion Enlisted Men's Club to Lieutenant Demitriades "prior to the end of September" it was discovered that a cash shortage existed. Upon the request of accused, Colonel Bigelow, commanding officer of the 26th Infantry (RCT), appointed a board of officers to make an investigation of the fund. Major Russell Blair was named as president of the board of officers. The club was closed on 25 September 1947 for the purpose of the investigation. Major Blair submitted a report of the board of officers to Colonel Bigelow showing a shortage of cash in the fund and that there was actually in accused's possession on 26 September 1947 the sum of $1118.50, belonging to the fund. The appointing authority, not being satisfied with the report, ordered the board to continue its investigation. The 26th Infantry (RCT) then being in the process of moving from Grafenwohr to Bamberg, Germany, the board of officers did not meet again to continue its investigation until early October 1947. At this meeting the board did not have before it the council books and Annexes B which were examined at the previous meeting. Major Blair testified that the board found from the figures available, an actual cash shortage of four hundred and ninety-six dollars. Accused submitted a statement in his own handwriting to Major Blair explaining why the council books and Annexes B for June, July, August and September were not available to the board. This statement was read to the court without any objection being interposed by the defense and the statement was attached to the record of trial as Prosecution Exhibit 5. It reads as follows:

"On the morning of October 8, 1947 while still in Grafenwohr, Ger I had one half of Melody Mansion Em. Club records in my Val pack & not having room enough in my Val pack I put the council book & all the annex B's for June, July, August & Sept & vouchers from August & September in a musette bag I told the drive to make sure the Val pack & musette bag & my radio stay in the jeep, the rest of the equipment would go on a truck. The convoy left about 0715 & I was to bring up 6 jeeps & 2 trailers about 1 hour later. This I did & when I got here I couldn't locate the musette bag. One M/Sgt now in Lonhofter School told me he had seen the bag about 2300 the same night; about 5 days later another Sgt left the vouchers. I have contacted this Sgt & he told me he couldn't find the Annex B's & Council books. I have made every effort possible to locate them fast. As of now I have looked personnely in the S-4 Warehouse over in Service Company Supply room, Regt. Hq Supply room, even in the Gym.

Thomas B. Overend
2nd Lt Inf." (R 8, 17, 24-28,30, 32, 43.)

On 17 October 1947, Colonel Bigelow called accused in to his office and in answer to questions concerning the whereabouts of the council book,

vouchers and money, accused stated that he had lost them in moving from Grafenwohr to Bamberg and that he did not know where they were, although he had searched everywhere (R 9, 19, 20).

Lieutenant Colonel Westray E. Wilson, executive officer of the 26th Infantry (RCT), received a report on 17 October 1947 that accused had been sent to the hospital as the result of a suicide note found in his quarters. On the following morning he sent Lieutenant William Bridges to accused's quarters to secure accused's personal effects and "if, by chance, there were any papers or vouchers connected with the Melody Mansion fund; if so, to bring those to me." Lieutenant Bridges was accompanied to accused's quarters on 18 October 1947 by a Lieutenant Phillips (R 18, 20).

By deposition which was accepted in evidence (Pros. Ex. 6) and read to the court Lieutenant Bridges testified that on 17 October 1947 he was ordered by Colonel Bigelow to take accused to the hospital. On the way they stopped at the accused's room in Bamberg, Germany and at the request of accused, Lieutenant Bridges took the council books, pertaining to the Melody Mansion Enlisted Men's Club, to his room for safekeeping. The following day, 18 October 1947, Lieutenant Bridges again went to accused's room pursuant to the order of Lieutenant Colonel Wilson and there found the annexes "B" to the council books. He delivered to Lieutenant Colonel Wilson the council books of the Melody Mansion Enlisted Men's Club together with Annexes "B" (Pros. Ex. 3).

When accused returned from the hospital on 15 November 1947 Lieutenant Colonel Wilson asked him if he knew the council books and vouchers had been found and if he knew where they had been found. In reply accused said, "I presume in my room. That is where they were" (R 23).

First Lieutenant Constantine B. Demitriades, 26th Infantry (RCT), testified that he was notified of his appointment as custodian of the Melody Mansion Enlisted Men's Club fund about 25 September 1947 and that he officially assumed his duties as such custodian about 6 October 1947 at Grafenwohr, Germany. He subsequently signed a certificate dated 6 October 1947 (Pros. Ex. 4) that he had received from accused, his predecessor in office, the stock of bottled goods, beer and Coca-Cola valued at $4,948.58 and that he had not received any part of the money of the fund amounting to $1397.80. The accused had also signed a certificate (Pros. Ex. 4) that he had turned over the bottled goods, beer and Coca-Cola to Lieutenant Demitriades, but that he had turned over no cash to him. The latter part of September 1947 accused had requested Lieutenant Demitriades to take over the cash on hand and to allow him to make up the difference in bottled goods. Lieutenant Demitriades refused the offer as the board of officers had not yet authorized a transfer of the fund (R 29-32).

Major W. H. Switzer testified that he audited the council books for the Melody Mansion Enlisted Men's Club fund for the month of August 1947. He actually counted the cash on hand at the end of August, which amounted to $2123.20 (R 39-40).

The council book for the Melody Mansion Enlisted Men's Club fund was admitted in evidence without objection as Prosecution Exhibit 6 which showed the balance of cash on hand as of 25 September 1947 to be $1397.80. The balance is certified to by accused as custodian but it does not appear on the council book that the account was audited (R 40).

For the Defense

Major W. H. Switzer testified as a character witness for accused. The Major stated that he had closely observed accused's performance of duties and had received favorable reports concerning him. He would rate accused on efficiency "VG," on initiative "low" and on sincerity to duty "high" (R 36, 37).

Defense read a letter to the court written by Charles F. Carter, Jr., First Lieutenant, 26th Infantry, stating that he would rate the accused as "Excellent" (Def. Ex. B) (R 37).

Defense also introduced in evidence as Defense Exhibit E the following letter written by accused found in his room on 17 October 1947, the same day he was taken to the hospital.

"15 October 1947.

"To whom it may concern:

This day I have been A.W.O.L. for one day and I really dont know when I shall return but if everything works out the way I want it to I'll never return. There is a reason for me doing this but I know that I know I'm doing wrong but here is the reason.

About three weeks ago while I was out one night I had the club Funds in my pocket and something happened to it because when I got home it was gone. I dont know weather it was stoolen or what happened to it but I know that you people wont believe me so this is the way I'm going to do it as you know I love the life of a soldier and to be a branded man I couldn't stand so I'm going to leave for a while and as soon as I can I'm going to repay the money and then I'm going to take my own life and if I'm going to be picked up by the M.P.'s I'll kill myself before they take me. Where I'm going I dont know but it will not be a large town and I'm going this road all myself. I have tryed to borrow

the money and haven't been able to do so yet and one thing I have never did was steal and I'm not going to start now.

By the time that you get this letter I'll probably be along ways from here and also if I cant find any way to get the money I'll take my own life.

Sincerely Yours.

THOMAS B OVEREND
2nd Lt. Inf"

Accused's rights as a witness were explained to him and he elected to testify under oath in his own behalf.

Accused testified he offered to pay the money in the fund over to Lieutenant Demitriades who refused to accept it because there was a shortage of "eight dollars". Accused had offered to make up the shortage with three bottles of Scotch. Shortly thereafter and on or about 24 September 1947 accused took the matter up with Colonel Bigelow who ordered a board of officers to investigate the club fund. Before the investigation was completed the unit was ordered to move from Grafenwohr to Bamberg. On or about 7 October 1947 the unit prepared to move to Bamberg. Accused turned in the safe, in which he kept the club funds, to the Quartermaster. He put the money amounting to about $1400 in ten-dollar script in a large brown envelope and placed the envelope in the inside pocket of his "ET" jacket. In the evening of 7 October 1947, while he was supervising the loading of a truck, he removed his jacket and laid it on the ground or on a box next to the truck. When the loading was completed he put his jacket on and went to the club and thence to his quarters where he first discovered the money was missing. He retraced his steps in search of the envelope but he could not find it.

Accused later told Colonel Bigelow and Major Blair that he had lost the council books because he "was stalling for time to make up the money." Although he attempted to obtain money to reimburse the fund for the loss he was never able to do so and consequently he never did repay the money belonging to the club fund.

4. Discussion

The court found accused guilty of embezzlement of Military Payment Certificates of the value of $1397.80, the property of the Melody Mansion Enlisted Men's Club. The accused was custodian of the fund and as such was charged with the responsibility of transferring the property of the fund to his successor in office. The fund consisted of bottled goods, beer,

Coca-Cola and cash. It appeared from the council book that there was $1397.80 cash in the club fund at the time the club was closed on 25 September 1947. Accused failed to account for or to pay to his successor any part of this cash.

The Board of Review in CM 320308, Harnack, 69 BR 323, at page 329 stated:

> "There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with proof of exculpatory circumstances then falls upon the steward and his explanatory evidence, when balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined, in the first instance at least, by the court. Here the court, by its findings of guilty of embezzlement resolved this question against accused and the reviewing authority did not, nor do we, find any reason to disturb such findings. (CM 276435, Meyer, 48 BR 331, 338; CM 301840, Clarke, 24 BR (ETO) 203, 210; CM 262750, Splain, 4 BR (ETO) 197, 204.)".

Apparently the explanation offered by the accused as to the manner in which the cash of the fund was lost did not, in the minds of the triers of fact, overcome the legal presumption of accused's guilt. We have seen no reason, in this record of trial, why we should disturb their verdict.

The court also found accused guilty of two specifications alleging respectively that he made two false official reports, one to Major Russell R. Blair and one to Colonel Maurice C. Bigelow, concerning the loss of the council books, Annexes B and vouchers for the Melody Mansion Enlisted Men's Club Fund. The evidence conclusively shows that accused made the statements substantially as alleged to each of the officers named, well knowing the statements to be false and with an intent to deceive each of the officers to whom the statements were made. It is obvious that such false statements made under the circumstances here shown constituted conduct unbecoming an officer and gentleman in violation of Article of War 95 and rendered him "morally unworthy to remain a member of the honorable profession of arms. (Winthrop)" (par 151, MCM, 1928).

5. Records of the Department of the Army show that accused is 30 years of age, is married and has two children. He attended vocational high school for two years. In civilian life he was employed by a manufacturing concern where he supervised and inspected equipment being packed

for shipment. He enlisted on or about 6 August 1942 and was awarded the Bronze Star and Silver Star Medals for action in Germany. He was given a direct appointment in the field as an officer and was commissioned a second lieutenant on 11 May 1945. He was relieved from active duty on 4 December 1945 and entered upon extended active duty as a reserve officer on 20 September 1946. His efficiency reports have all been "excellent."

6. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of an officer of a violation of Article of War 96.

Chester D. Silver, Judge Advocate

Gilbert S. Ackroyd, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 330490 1st Ind

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

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 Thomas B. Overend (O-2025291), Headquarters, 26th Infantry (RCT).

2. Upon trial by general court-martial this officer was found guilty of the embezzlement of $1397.80, property of the Melody Mansion Enlisted Men's Club (Spec, Chg I), in violation of Article of War 93, of having made a false official report to Major Russell R. Blair that he had lost the council books and Annexes B of the Melody Mansion Enlisted Men's Club fund, that he did not know where they were located and that he could not produce them (Spec 1, Chg II), and of having made a false official report to Colonel Maurice C. Bigelow that he had lost the council books and vouchers of the Melody Mansion Enlisted Men's Club and was unable to produce them (Spec 2, Chg II), in violation of Article of War 95. 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 two years. The reviewing authority approved the sentence, designated the Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement, and forwarded the record of trial for action under Article of War 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 as approved by the reviewing authority and to warrant confirmation of the sentence.

Accused was custodian of the Melody Mansion Enlisted Men's Club Fund, 26th Infantry (RCT), at Grafenwohr, Germany, from about 16 June 1947 to about 6 October 1947. On the latter date, Lieutenant Constantine B. Demitriades assumed custody of the fund pursuant to his appointment as custodian, sometime previously, by Colonel Maurice C. Bigelow, the commanding officer of the 26th Infantry (RCT). The fund consisted of "bottled goods, beer and Coca-Cola" and cash. Accused offered to transfer the fund to Lieutenant Demitriades sometime in the latter part of September 1947 but Lieutenant Demitriades would not accept it because there was a cash shortage. On or about 6 October 1947, however, Lieutenant Demitriades did accept the "bottle goods, beer and Coca-Cola" only. He never received any part of the cash and no offer to pay the cash to him was made on 6 October or subsequent thereto. Accused claimed he lost the cash belonging to the fund during the evening of 7 October 1947 while supervising

the loading of a truck. In the latter part of September 1947 a board of officers had been appointed to investigate the fund. A report was made by the board of officers wherein it was shown that a shortage of cash in the fund did exist. The appointing authority not being satisfied with the report ordered the board to continue with their investigation. The 26th Infantry (RCT) then being in the process of moving from Grafenwohr, Germany, to Bamberg, Germany, the board of officers did not meet again to continue their investigation until early October 1947 after the movement was completed. At this meeting they did not have before them as they did at the earlier meeting the council books and Annexes "B". A request was made of accused for the council books and vouchers. In response to such request he stated at different times to both Colonel Maurice C. Bigelow, his commanding officer, and Major Russell R. Blair, president of the board of officers, that the council books, Annexes "B" and vouchers were lost in the move from Grafenwohr to Bamberg and that he did not know where they were and could not produce them. The council books, Annexes "B" and vouchers were later found in his quarters where accused admitted they had been all the time. He testified that he made such statements concerning the council books, Annexes "B", and vouchers in order to give him time to obtain money to reimburse the fund for the cash he had lost when the unit moved to Bamberg. The cash which should have been in the fund as of 25 September 1947 when the club was ordered closed during the investigation and audit by the board of officers was established by the evidence to be $1397.80.

4. Records of the Department of the Army show that accused is 30 years of age, married, and has two children. He attended vocational high school for two years. In civilian life he was employed by a manufacturing concern where he supervised and inspected equipment being packed for shipment. He enlisted on or about 6 August 1942 and was awarded the Bronze Star Medal and the Silver Star in Germany. He was given a battlefield commission as a second lieutenant in 1945. He was relieved from active duty on 4 December 1945 and entered upon extended active duty as a reserve officer on 20 September 1946. His efficiency reports have all been "Excellent."

5. 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 c arry into execution the foregoing recommendation, should it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 140, 14 July 1948).

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

20 MAY 1948

JAGQ - CM 330506

UNITED STATES	)	2D ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 2 April 1948. Dismissal and confinement for six (6) years.
First Lieutenant JACK FORSYTHE (0-1686531), Company C, 73d Engineer Combat Battalion.	)	

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 94th Article of War.

Specification 1: In that First Lieutenant Jack Forsythe, CE, for the purpose of obtaining approval, allowance, and payment of a claim against the United States, by presenting to J. R. Berrios, Lieutenant Colonel, FD, Finance Officer at APO 846, c/o Postmaster, Miami, Florida, an officer of the United States duly authorized to approve, pay and allow such claims, did, at APO 846, c/o Postmaster, Miami, Florida, on or about 5 November 1947, make and use a certain writing, to wit: WD Form 336, Pay and Allowance Account Voucher, which said voucher, as he the said First Lieutenant Jack Forsythe, then knew, contained a statement that he was due base and longevity pay, foreign service pay, subsistence allowance and rental allowance for the period 1 October 1947, to 31 October 1947 inclusive, and that the only deductions which should be made from the above mentioned credits was a Class N Allotment in the amount of $6.65, effective October 1947, and advance premiums, the total Class N deductions aggregating $19.95, which statement was false and fraudulent in that it failed to show a deduction of $275.00 partial payment received by the said First Lieutenant Jack Forsythe on 29 October 1947, from J. N. Breen, Major, FD, Disbursing Officer

Waller Field, Trinidad, British West Indies, and in that adequate family quarters were assigned to the said First Lieutenant Jack Forsythe at Waller Field, Trinidad, British West Indies, and that the said adequate family quarters were terminated on 4 November 1947, and which statement was then known by the said First Lieutenant Jack Forsythe to be false and fraudulent.

Specification 2: In that First Lieutenant Jack Forsythe, for the purpose of obtaining approval, allowance, and payment of claim against the United States, by presenting to H. C. Oakes, Major, AC, Finance Officer at Williams Field, Arizona, an officer of the United States duly authorized to approve, pay and allow such claims, did, at Williams Field, Arizona, on or about 4 December 1947, make and use a certain writing, to wit: WD Form 336, Pay and Allowance Account Voucher, which said pay and allowance account voucher, as he, the said First Lieutenant Jack Forsythe, then knew, contained a statement that he was due base and longevity pay for the period 1 October 1947, to 30 November 1947, foreign service pay for the period 1 October 1947, to 6 November 1947, subsistence allowance for the period 1 October 1947, to 30 November 1947, and that there should be deducted from the above mentioned credits partial payments aggregating $550.00 which he received as follows: $200.00 on 17 November 1947, from the Finance Officer at Williams Field; $350.00 which he received on 24 November 1947 from the Finance Officer at Williams Field, Arizona, and Class N Allotments for the months of October and November 1947, at the rate of $6.65 per month aggregating $13.30, which statement was false and fraudulent in that the said First Lieutenant Jack Forsythe failed to deduct partial payment in the amount of $275.00 which he received on 29 October 1947 from J. M.Breen, Major, FD, Finance Officer at Waller Field, Trinidad, British West Indies, and claimed that he was due base and longevity pay, foreign service pay, subsistence allowance and rental allowance for the period 1 October 1947, to 31 October 1947, which had been previously paid to him on or about 5 November 1947, by J. R. Berrios, Lieutenant Colonel, FD, Finance Officer at APO 846, c/o Postmaster, Miami, Florida, on Voucher No. 7938, and that he did claim that there was due him rental allowance for the period 1 October 1947, to 30 November 1947, although adequate family quarters were assigned to him at Waller Field, Trinidad, British West Indies, and were not terminated until 4 November 1947, and was then known by the said First Lieutenant Jack Forsythe to be false and fraudulent.

Specification 3: In that First Lieutenant Jack Forsythe, for the purpose of obtaining approval, allowance, and payment of claim against the United States, by presenting to B. F. Hillman, Lieutenant Colonel, FD, Finance Officer at Camp Hood, Texas, an officer of the United States duly authorized to approve, pay and allow such claims, did, at Camp Hood, Texas, on or about 5 January 1948, make and use a certain writing, to wit: AD Form 336, Pay and Allowance Account Voucher, with supporting certificate thereto, which said Pay and Allowance Account Voucher, and supporting certificate thereto, as he, the said First Lieutenant Jack Forsythe, then knew, contained a statement that he was due base and longevity pay, subsistence allowance and rental allowance for the period 1 November 1947, to 31 December 1947, that there should be deducted from the above credits a partial payment which he received on 16 December 1947, in the amount of $150.00, and Class N Allotments for the months of November and December 1947, at the rate of $6.65 per month aggregating $13.30, that he was last paid to include 31 October 1947, by the Finance Officer at Waller Field, British West Indies, and that he had not previously signed a pay voucher covering the period stated on the above mentioned voucher or any portion thereof, and that if such voucher was presented to another Disbursing Officer, it was withdrawn personally by him and had been destroyed, and that he received or requested a partial payment in the amount of $150.00 on 16 December 1947, which statement was false and fraudulent in that the said First Lieutenant Jack Forsythe did receive payment for base and longevity pay, subsistence allowance, and rental allowance for the period 1 November to 30 November 1947, from H. C. Oakes, Major, AC, Finance Officer at Williams Field, Arizona, on or about 4 December 1947, on Voucher No. 2702, and that he did receive a partial payment in the amount of $175.00 on 16 December 1947, from H. C. Oakes, Major, AC, Finance Officer at Williams Field, Arizona, on Voucher No. 3058, and that adequate family quarters were assigned to him and that the said adequate family quarters were terminated on 4 November 1947, and which statement was then known by the said First Lieutenant Jack Forsythe to be false and fraudulent.

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

Specification 1: Same as Specification 1, Charge I.

Specification 2: Same as Specification 2, Charge I.

Specification 3: Same as Specification 3, Charge I.

Accused 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 ten (10) years. The reviewing authority approved the sentence, reduced the period of confinement to six (6) years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

The accused, a commissioned officer (R 6; Pros. Ex. 1), was assigned quarters number 413, Waller Field, Trinidad, British West Indies, from 11 July 1947 until 4 November 1947 (R 11, 12, 27; Pros. Exs. 4, 5). He executed War Department Form No. 35 signature card at Camp Hood, Texas, on or about 5 January 1948 (R 6-8; Pros. Ex. 2), and also signed a letter in the presence of other officers at the same station (R 9, 10; Pros. Ex. 3).

True photostatic copies of official pay and allowance vouchers bearing signatures identified as those of accused (R 14, 16, 17, 18, 19, 20, 21, 22) were received in evidence. These were duly certified to by the official custodian of the original vouchers, all showed accused as a First Lieutenant in the second pay period, having completed seven (7) years service on 8 or 9 October 1947, and further showed Mrs. Doris Forsythe, Phoenix, Arizona, as his dependent wife. Accused's signature, "Jack Forsythe", appeared twice on each voucher immediately after the statement:

> "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 voucher is not prohibited by any provisions of law limiting the availability of appropriation(s) involved",

and the second time under "Signature of Payee" indicating receipt of cash payment of the amount shown thereon (R 14-17, 19, 20, 22; Pros. Exs. 6, 7, 8, 9, 10, 11, 13). Following is a summary of additional data extracted from each voucher:

Place	Finance Officer	Period	Deductions	Date Paid	Net Amount
Waller Field Trinidad, BWI	J.M.Breen Maj.,F.D.	Partial pay	None	29 Oct 47	$275.00 (R.14;P.E.6)
APO 846 Miami (Puerto Rico)	J.R.Berrios Lt.Col.F.D.	1 to 31 Oct 47	Insurance $19.95	5 Nov 47	$338.45 (R.15,16;P.E.7)
Williams Field Arizona	H.C. Oakes Maj.,A.C. Finance Officer	Partial Payment	None	17 Nov 47	$200.00 (R.17;P.E.8)

(Cont'd from page 4)

Place	Finance Officer	Period	Deductions	Date Paid	Net Amount
Williams Field Arizona	H.C. Oakes	Partial Payment	None	24 Nov 47	$350.00 (R.17;P.E.9)
Williams Field Arizona	H.C. Oakes	1 Oct 47 to 30 Nov 47 Foreign Svc, 1 Oct to 6 Nov 47	Partial Pay 550.00 Insurance, $13.30	4 Dec 47	$136.10 (R.19,20;P.E.10)
Williams Field Arizona	H.C. Oakes	Partial Pay, Dec 1947	None	16 Dec 47	$175.00 (R.20;P.E.11)
Camp Hood, Texas	B.F.Hillman Lt.Col.F.D.	Nov.47-31 Dec 47	Partial Pay, $150.00 Insurance, $13.30	5 Jan 48	$512.10 (R.22;P.E.13)

A certificate bearing accused's signature accomplished in connection with the above payment at Camp Hood shows that he claimed to have been last paid to include 31 October 1947, subject only to a partial payment in the amount of one hundred fifty dollars ($150.00) on 16 December 1947 (R 21; Pros. Ex. 12).

As a result of the above claims for pay and allowances submitted over accused's signature, he was "over-paid" in the amount of one thousand eighty dollars and forty cents ($1080.40) for the period 1 October 1947 to 31 December 1947, inclusive (R 23, 27; Pros. Ex. 14). In computing the amount actually due accused during this period, appropriate allowance was made for overseas service (R 18, 26, 27).

4. Evidence for the Defense.

Lieutenant Colonel James L. Lake, Jr., a witness for the prosecution recalled as a witness for the defense, testified that he had given accused three days leave on 28, 29, and 30 January 1948, for the purpose of taking care of family matters in Arizona. Accused returned from this trip of his own volition (R 29, 30). Following the finding of discrepancies in accused's pay accounts, his orders to Fort Knox for the purpose of attending a service school were cancelled. Thereafter, Colonel Lake recommended approval of accused's resignation and "understood" that the Commanding General of Camp Hood did likewise (R 30). In examining accused's records, Colonel Lake found that accused had a battlefield commission and had been wounded in action for which he was awarded the Purple Heart (R 31).

After having been advised of his rights by counsel, accused elected to remain silent (R 31).

5. The specifications of which accused was found guilty in each instance allege the making and use of a Pay and Allowance Account Voucher (W.D. Form 336) knowing same to contain a statement or statements which were false and fraudulent. The proof required to support these charges, whether in violation of Article of War 94 or 95, is:

> ".... (a) That the accused made or used or procured or advised the making or use of a certain writing or other paper, as alleged; (b) that certain statements in such writing or other papers were false or fraudulent, as alleged; (c) that the accused knew this; (d) the facts and circumstances indicating that the act of the accused was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as specified, and (e) the amount involved, as alleged." (Par. 150d, MCM, 1928, pp. 182, 183).

Specifications 1 of Charges I and II allege that accused knowingly failed to show on his pay and allowance voucher for October 1947 a partial payment deduction in the amount of two hundred seventy-five dollars ($275.00) and a deduction of seventy-five dollars ($75.00) for quarters furnished by the Government. Competent documentary evidence standing undisputed in the record clearly shows that accused was paid in cash the sum of two hundred seventy-five dollars ($275.00) on 29 October 1947 (R 14; Pros. Ex. 6), and that quarters number 413Q were assigned to accused from 11 July 1947 until 4 November 1947 (Pros. Exs. 4, 5). In addition to testimony showing that this assignment had reference to "family" quarters, adequate in character, the court should be considered as having taken judicial notice of paragraphs 40, 41, Army Regulations 210-10, 6 May 1947, more particularly pafagraphs 40b(3) and 41(b) thereof. Prosecution's exhibit number seven (7) discloses that neither the deductions for the partial pay nor the quarters were made on the voucher certified by accused as correct for the period 1 October 1947 to 31 October 1947, inclusive, and further, that accused received on 5 November 1947, full payment in cash, without consideration of these deductions. From these facts alone, without considering other evidence, including that relating to accused's course of conduct over an extended period of time, the court was fully justified in inferring the required fraudulent intent.

Specifications 2 of Charges I and II charge accused with having made and used a false writing in connection with a claim for pay for the period 1 October 1947 to 30 November 1947 submitted at a different military station. In considering the evidence adduced in support of these offenses,

the Board is impressed with the seemingly patent character of this fraud, and the fact that almost any conceivable explanation in connection with this voucher would seem highly unreasonable. This stems from the fact the period for which this voucher was submitted duplicated approximately half of a period for which accused had been paid only one month earlier, and both were for base and longevity pay as well as allowances. While an officer might conceivably through heedlessness or mistake err with respect to an item such as an allowance for quarters or the period against which a partial payment was chargeable it does not follow that he would be similarly unmindful as to the very basis of his monthly remuneration. Evidence equally clear and convincing establishes the other necessary elements of these offenses, viz., that he presented the vouchers and received the amounts shown thereon.

Specifications 3 of Charges I and II alleging the making and using of a false writing in connection with a claim against the Government are clearly supported by competent documentary evidence undisputed in the record. With respect to this evidence as well as the documentary evidence in support of the other specifications the only question concerns the handwriting comparisons.

From a factual standpoint it is uncontradicted that Lieutenant Colonel Burleigh F. Hillman, Finance Department, testified as to the similarity of handwriting, had fifteen years experience in banking and commercial affairs prior to entering the military service and six years as finance officer in the Army (R 10, 11). He declined to style himself as an "expert" in the comparison of handwriting but only as "above average". His qualifications were ample to permit the court to conclude that he was sufficiently qualified to render an opinion and to give his testimony such weight as considered appropriate. In this connection it has been uniformly held that the question of the qualifications of an expert witness is one for the court's determination (CM 255438, Hurse, 50 BR 107, 117).

> "Bank officials and other persons whose business it is to examine signatures may qualify as experts in the identification of handwriting by a comparison of specimens. The qualification of such expert must be shown by the party producing him, and the determination of his skill is a question addressed to the trial judge. This qualification depends upon knowledge, experience with the subject, and capacity to form an opinion. The extent of the qualification does not affect the competency, but goes to the weight of the testimony." (Sec. 964, Wharton's Criminal Evid., Vol. 2, Eleventh Edition, p. 1700).

In any event, with known signatures of accused properly admitted in evidence, it was well within the province of the court to compare these with the signatures on the vouchers in question, also properly before the court, and thus arrive at its own conclusions (par. 116b, MCM 1928, p. 120; CM 324725, Blakeley, 73 BR 307, 324).

Thus, as to all offenses of which accused has been found guilty, it is manifest from the record that the requisite elements of proof have been fully satisfied. By first signing the voucher prepared for his signature, accused actually made the writing alleged. Until his signature was affixed in each instance, there was in fact no completed writing, which could cause the amount recited to be tendered in payment of the voucher. The second element of proof, namely, that such writings were false and fraudulent, is fully met through a computation of the amount claimed in each case against that established as due. In each of the three vouchers described in the specifications, there was clearly a false amount claimed in addition to the amount to which accused was actually entitled. Insofar as involves the element of accused's false and fraudulent knowledge or intent, his course of conduct in certifying as owing and in receiving over one thousand dollars more than the amount due him, or approximately twice the total sum of that to which he was legally entitled during a brief period of three months, forecloses any doubt as to his false and fraudulent knowledge. The receipt of these payments by accused for his own benefit only evidenced consummation of his intent in making the vouchers and serves to remove any doubt as to his fraudulent design. Further, these offenses were of such similar character and so proximate in point of time as to be susceptible of being considered together with respect to the issue of criminal intent, motive, and guilty knowledge (par. 112b, MCM 1928, p.112). For reasons equally well founded in logic, his repeated execution of false writings, and the use thereof, makes it clear that the purpose in each instance was to obtain payment of a false claim against the United States. The amount of the fraudulent claim, as recited in each specification, is established by adequate documentary proof.

There is no legal objection to accused's being charged with identical acts in violation of several different Articles of War, if both are applicable, and there is likewise no objection to corresponding findings of guilty (par. 151, MCM 1928, p. 186, CM 252773, Jonas, 34 BR 189; CM 260202, Miller, 39 BR 181; CM 330265, Becker (May 1948)). As stated in CM 260202, Miller, supra:

> "Article of War 95 under which this Specification is laid 'includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and

a gentleman; thus an officer who embezzles military property violates both this and the preceding Article' (M.C.M., 1928, par. 151)."

In the instant case the acts of accused, on the basis of both the pleading and the proof, clearly violate Articles of War 94 and 95. The Board of Review is of the opinion that the evidence proves beyond any reasonable doubt the guilt of accused as to each offense charged.

6. Department of the Army records show that accused is 29 years of age, married and has one child. He resided in Arkansas at the time of his enlistment in the Regular Army on 9 October 1940. Following his training in the United States where he attained the rank of Sergeant, accused went overseas on 29 May 1943. There he joined the First Cavalry Division. While serving with this organization in combat, he was discharged to accept a commission in the grade of Second Lieutenant, in the Army of the United States on 2 January 1945. He was wounded in action in the Philippine Islands on 10 March 1945 and promoted to First Lieutenant while serving with the same organization, 6 July 1945. He was relieved from active duty, 15 February 1946, and recalled on 4 November 1946. His efficiency reports include two ratings of "excellent" and one rating of "unknown". Before entering the service he was employed by the Houston Texas Construction Company and during the time he was not on extended active duty in 1946, he was employed with the Light and Power Company of Phoenix, Arizona.

7. 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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94 and mandatory upon conviction of a violation of Article of War 95.

W. H. Johnson Jr., Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

C. B. Mauer, Judge Advocate.

JAGQ - CM 330506 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 Jack Forsythe (0-1686531), Company C, 73d Engineer Combat Battalion.

2. Upon trial by general court-martial at Camp Hood, Texas, this officer was found guilty of making and using a false writing in connection with a claim against the Government by executing a fraudulent pay voucher on 5 November 1947, at APO 846, c/o Postmaster, Miami, Florida (Specs. 1 of Charges I and II), making and using a false writing, namely a fraudulent pay voucher, on 4 December 1947 at Williams Field, Arizona (Specs. 2 of Charges I and II), and making and using a false writing in connection with a claim against the Government, also in the form of a fraudulent pay voucher, on 5 January 1948, at Camp Hood, Texas (Specs. 3, Charges I and II), in violation of Articles of War 94 and 95. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten (10) years. The reviewing authority approved the sentence but reduced the period of confinement to six years, and forwarded the record of trial for action under Article of War 48.

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

4. Accused, while stationed in the Antilles Department, signed a pay voucher on which he failed to make required deductions for quarters which were furnished to him by the Government and for a partial payment which he had received earlier in the month. The amount of the voucher, $338.45, was received in cash by accused on 5 November 1947. Accused also signed a pay voucher and received payment in cash therefor about 4 December 1947, at Williams Field, Arizona. This voucher was fraudulent in that it covered approximately one-half of the same period as the first voucher in so far as it related to base and longevity pay, and did not contain other required deductions. On 5 January 1948, at Camp Hood, Texas, accused executed and received payment as a result of another false and fraudulent pay voucher in an amount substantially in excess of that which was due him. For the period 1 October to 31 December 1947, accused received approximately $1,080.40 in excess of the pay and allowances to which he was legally

entitled. It is clear from the evidence that accused executed these vouchers and received the overpayments with fraudulent intent at the three different military stations during a period of three months and thus knowingly defrauded the Government as alleged.

5. Department of the Army records show that accused is 29 years of age, married and has one child. He resided in Arkansas at the time of his enlistment in the Regular Army on 9 October 1940. Following his training in the United States, where he attained the rank of Sergeant, accused served in the First Cavalry Division. While serving with that organization in combat, he was discharged to accept a commission in the grade of Second Lieutenant, in the Army of the United States on 2 January 1945. He was wounded in action in the Philippine Islands on 10 March 1945 and promoted to First Lieutenant while serving with the same organization, 6 July 1945. He was relieved from active duty, 15 February 1946, and recalled on 4 November 1946. His efficiency reports include two ratings of "excellent" and one rating of "unknown". Before entering the service he was employed by the Houston Texas Construction Company and, during the time he was not on extended active duty in 1946, he was employed with the Light and Power Company of Phoenix, Arizona.

6. I recommend that the sentence be confirmed but in view of accused's excellent combat record, including a battlefield promotion and his award of the Purple Heart, his family hardship as disclosed by the allied papers, and the fact that restitution in the amount of $405.45 has been made, that the period of confinement be reduced to three (3) years. As thus modified I recommend the sentence be carried into execution, and that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 125 , 23 June 1948).

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

JAGN-CM 330551

UNITED STATES v. Private First Class DANIEL CATALANO, JR. (11154393), Headquarters & Headquarters Squadron, 20th Air Force.	))))))))	TWENTIETH AIR FORCE Trial by G.C.M., convened at APO 234, 22 March 1948. Dishonorable discharge and confinement for one (1) year and six (6) months. 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 96th Article of War.

Specification: In that Private First Class Daniel Catalano, Jr., Headquarters and Headquarters Squadron, Twentieth Air Force, did, at Army Post Office 234, on or about 16 November 1947, wrongfully take and use without authority a certain automobile, to wit, truck, one-quarter ton, 4 x 4, United States Air Force Number 20767334, property of the United States.

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

Specification: In that Private First Class Daniel Catalano, Jr., Headquarters and Headquarters Squadron, Twentieth Air Force, did, without proper leave, absent himself from his proper station at Headquarters, Twentieth Air Force, Army Post Office 234, care of Postmaster,

San Francisco, California, from about 12 December 1947 to about 24 December 1947.

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

Specification: In that Private First Class Daniel Catalano, Jr. Headquarters and Headquarters Squadron, Twentieth Air Force, did, at Apra Harbor, Guam, Marianas Islands, on or about 12 December 1947, wrongfully and unlawfully secrete himself by stowing away aboard the Steamship Pan American Victory, in violation of Section 469, Title 18, United States Code.

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

Specification: In that Private First Class Daniel Catalano, Jr., Headquarters and Headquarters Squadron, Twentieth Air Force, having received a lawful order from Lieutenant Colonel John McCorkle to "report to me in my office at 0730, 20 February 1948," the said Lieutenant Colonel John McCorkle being in the execution of his office, did, at Army Post Office 234, on or about 20 February 1948, fail to obey the same.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty. The only question to be determined is the legal sufficiency of the record to support the sentence. The offenses set out in Charge I, Charge II and Additional Charge II together authorize a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eleven months and six days (par. 104c, MCM, 1928). Thus it becomes necessary only to establish the proper legal interpretation to be accorded the language of the Specification of Additional Charge I, and to thereafter determine the punishment authorized for a violation of such an offense as is therein alleged. The summary of evidence will be limited to the scope of such discussion.

4. The facts appear to be that on or about 11 December 1947, at Guam, accused boarded without authority, and secreted himself aboard, the "SS Pan American Victory." His presence was discovered shortly thereafter but after the vessel had put to sea (R. 23, 27, 32; Pros. Ex. 6).

5. The Specification under Additional Charge I alleges in substance that accused did "wrongfully and unlawfully secrete himself by stowing away aboard the steamship Pan American Victory, in violation of Section 469, Title 18, United States Code." The Statute thus referred to provides as follows:

"Section 469. Stowing away on vessels; penalty

"Any person, without the consent of the owner, charterer, or master of any vessel and with intent to obtain, without paying therefor, transportation on such vessel to any place, within or without the United States, who shall board, enter, or secrete himself aboard such vessel, and shall be thereon at the time of departure of said vessel from a port, harbor, wharf, or other place within the jurisdiction of the United States, including the Canal Zone, or who, with such intent, having boarded, entered, or secreted himself aboard such vessel in any place within or without the jurisdiction of the United States, shall remain aboard any such vessel after such vessel has left such place and who shall be thereon at any place within the jurisdiction of the United States, including the Canal Zone, shall be guilty of a misdemeanor and shall be liable to a fine not exceeding $500 or imprisonment for a period not exceeding one year, or both, in the discretion of the court. June 11, 1940, c. 326, section 1, 54 Stat. 306, as amended Apr. 4, 1944, c. 162, 58 Stat. 188."

Although a stowaway has been broadly defined as one who steals his passage (Bouvier's Law Dictionary, p. 3156), the gravamen of the offense described in Section 469 of Title 18, United States Code, is the intent not to pay for passage, in other words an intent to defraud. The specific intent to avoid payment is made an essential element of the offense by the express terms of the statute. Therefore it, together with every other element of the offense, must be specially pleaded and proved. Winthrop Military Law and Precedents, 2d Ed., p. 142; CM 217681, Walker, 11 BR 313, 315; Miller on Criminal Law, p. 60, 64, and cases cited; par. 29, MCM, 1928.

Since such a fraudulent intent is not directly alleged in the Specification here in question we must determine whether such allegation may be supplied by the reference in the Specification to the code section wherein it is set out as an element of the offense denounced. The law appears to be well settled that every element of the offense must be pleaded and that charging that the act described is in violation of a particular

statute adds nothing to the indictment. Keck v. United States, 172 U.S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505; United States v. Boasberg, 283 Fed. 305, 312. An indictment must set out facts and not the law. United States v. Nixon, 235 U. S. 231, 236.

We are thus forced to the conclusion that the Specification in question does not in appropriate terms plead the offense denounced by the Code provision cited therein.

We must also consider whether, despite the failure to plead the element of intent, the defense was fairly apprised of that issue. The record is silent on the element of intent and barren of any direct evidence on that point. The evidence in the record as a whole permits of only a mere inference that accused may have intended to obtain passage without payment. The prosecution only introduced proof that accused secreted himself on the vessel, the defense made no point of the failure to plead or prove intent to defraud, and it does not affirmatively appear from the record that the court considered intent as an essential element of the offense of which they found accused guilty. Under these circumstances we are unable to hold as a matter of law that the defective pleading in question as to a statutory offense may be cured under the provisions of Article of War 37 so as to authorize punishment of accused for the statutory offense.

However, the Charge is laid under the 96th Article of War and it is an uncontroverted fact that accused boarded the vessel without authority and secreted himself until after it had sailed. Conduct of that nature is unquestionably a disorder under circumstances bringing discredit upon the military service. The authorized maximum sentence to confinement, without substitution, for disorderly conduct under such circumstances as to bring discredit upon the military service in violation of the 96th Article of War is four months (par. 104c, MCM, 1928).

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification of Additional Charge I as involves a finding that accused did at the place and time alleged wrongfully and unlawfully secrete himself by stowing away aboard the steamship Pan American Victory, to the discredit of the military service; legally sufficient to support 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, three months, and six days.

Edward T. Johnson, Judge Advocate.

Frank C. Alford, Judge Advocate.

George B. Springston, Judge Advocate.

JUL 2 1945

JAGN-CM 330551 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Twentieth Air Force, APO 234, c/o Postmaster, San Francisco, California.

1. In the case of Private First Class Daniel Catalano, Jr. (11154393), Headquarters & Headquarters Squadron, 20th Air Force, I concur in the foregoing holding by the Board of Review and recommend that only so much of the finding of guilty of the Specification, Additional Charge I, be approved as involves a finding that accused did at the place and time alleged wrongfully and unlawfully secrete himself by stowing away aboard the steamship Pan American Victory, to the discredit of the military service 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, three months and six days. 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 330551).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

1381

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

8 JUL 1948

JAGH CM 330560

U N I T E D S T A T E S	)	UNITED STATES AIR FORCES IN EUROPE
v.	)	Trial by G.C.M., convened at Erding, Germany, 11, 12 February 1948. Dismissal, reprimand, restricted to the limits of his station for three (3) months, and to forfeit one hundred dollars $100.00) per month for ten (10) months.
Captain OSCAR S. DOBLER, AO 571478, 45th Air Repair Squadron, Erding Air Depot, United States Air Forces in Europe.	)	

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 85th Article of War.

Specification: In that Captain Oscar S. Dobler, 45th Air Repair Squadron, Erding Air Depot, Erding, Germany, was at Erding Germany on or about 31 December 1947 found drunk while on duty as Officer of the Day.

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

Specification: (Finding of not guilty)

He pleaded not guilty to each Charge and Specification, was found guilty of Charge I and its Specification, and found not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to forfeit one hundred ($100.00) dollars per month for twelve (12) months, to be restricted to the limits of his station for three (3) months, and to be reprimanded. The reviewing authority, noting the court's failure to impose the mandatory sentence of dismissal,

returned the record of trial to the trial judge advocate, with instructions to reconvene the court, vacate the previous sentence, and adjudge the mandatory sentence required by law and such other punishment as the court may deem appropriate. The court revoked its former sentence upon reconvening and then sentenced the accused to be dismissed the service, to be reprimanded, to be restricted to the limits of his station for three (3) months and to forfeit one hundred ($100.00) dollars per month for ten (10) 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 Force in Europe Judge Advocate, dated 21 April 1948.

4. The accused is 32 years of age and single. Records of the Department of the Army show that he attended Massachusetts Institute of Technology for four years majoring in civil engineering but was not graduated. His civilian occupation was that of bookkeeper. He enlisted in the Regular Army in the Corps of Engineers on 15 April 1940, served in Hawaii from 29 June 1940 until 15 September 1942. He attended Army Air Force Officers' Candidate School at Miami Beach, Florida, and was appointed a Second Lieutenant, Air Corps, Army of the United States on 20 January 1943. He was promoted to the rank of First Lieutenant on 26 July 1943 and to Captain on 22 March 1944. He served in the Military Intelligence Service, Prisoner of War Branch as German and Japanese Prisoner of War Interrogator, from 24 January 1943 to 23 March 1945. He served with the 90th Station Complement and the 9th Air Force in Germany until 22 June 1945, in the Zone of the Interior until 14 July 1946, and a second tour of duty in the European Theater beginning 15 July 1946, during which tour this incident occurred. His AAF Officer Qualification Record shows that his efficiency ratings vary from "Very Satisfactory" to "Superior." He is authorized to wear the Asiatic-Pacific Theater Ribbon with Bronze Service Star for Pearl Harbor, The European-African Middle East Ribbon with Bronze Service Star for the Rhineland Campaign, the American Defense Ribbon, American Theater Ribbon, and World War II Victory Ribbon.

5. There is attached to the record of trial a recommendation for clemency dated 9 March 1948 signed by four of the five members of the court, including the president and law member, together with the trial judge advocate, wherein it is stated in part:

> "a. While evidence at the time of trial established the guilt of the accused within the meaning of Article of War 85, it did not indicate that the accused was grossly drunk prior to the time he was purportedly relieved from duty, and the court did not feel in the original hearing that the offense as proved justified a sentence of dismissal.

"b. At the time of his original hearing the court acted on the belief that the offense was not committed in time of war and that dismissal was not mandatory."

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 during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of a violation of Article of War 85 where the offense is committed in time of war.

C. Fortenstein, Judge Advocate.

J. W. Lynch, Judge Advocate

(On temporary duty), Judge Advocate

JAGH CM 330560 1st Ind

JAGO, Department 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 Captain Oscar S. Dobler, AO 571478, 45th Air Repair Squadron, Erding Air Depot, United States Air Forces in Europe.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty in violation of Article of War 85. No evidence of previous convictions was introduced. He was sentenced to forfeit one hundred ($100.00) dollars per month for twelve months, to be restricted to the limits of his station for three months, and to be reprimanded. The reviewing authority returned the record of trial to the trial judge advocate with instructions to reconvene the court, vacate the previous sentence, and adjudge the mandatory sentence required by law and such other punishment as the court may deem appropriate. Thereupon the court reconvened, revoked its former sentence and sentenced the accused to be dismissed the service, to be reprimanded, to be restricted to the limits of his station for three months and to forfeit one hundred ($100.00) dollars per month for ten (10) 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.

The accused was properly detailed as officer of the day at Erding Air Depot, Erding, Germany, and entered upon his duties as such at 1145 hours on 31 December 1947. Between the hours of 2130 and 2230 on New Year's Eve he was seen to be drinking some liquid that looked like coca-cola while on an inspection tour of "the NCO Club." At about 2330 hours the assistant provost marshal ordered the military police to bring accused to the former's office, at which time he was believed to be drunk and the assistant provost marshal relieved him as officer of the day. An analysis of the blood sample taken from the accused shortly after midnight, showed that he had a blood alcohol concentration of 2.5 milligrams of alcohol per cubic centimeter, with an interpretation of "definitely under the influence of alcohol."

4. The accused is 32 years of age and single. Records of the Department of the Army show that he attended Massachusetts Institute of Technology for four years majoring in civil engineering but was not graduated. His civilian occupation was that of bookkeeper. He enlisted in the Regular Army in the Corps of Engineers on 15 April 1940, served in Hawaii from 29 June 1940 until 15 September 1942. He attended Army Air Force Officers' Candidate School at Miami Beach, Florida, and was appointed a Second Lieutenant, Air Corps, Army of the United States on 20 January 1943. He was promoted to the rank of First Lieutenant on 26 July 1943 and to Captain on 22 March 1944. He served in the Military Intelligence Service, Prisoner of War Branch as German and Japanese Prisoner of War Interrogator, from 24 January 1943 to 23 March 1945. He served with the 90th Station Complement and the 9th Air Force in Germany until 22 June 1945, in the Zone of the Interior until 14 July 1946, and a second tour of duty in the European Theater beginning 15 July 1946, during which tour this incident occurred. His AAF Officer Qualification Record shows that his efficiency ratings vary from "Very satisfactory" to "Superior." He is authorized to wear the Asiatic-Pacific Theater Ribbon with Bronze Service Star for Pearl Harbor, The European-African Middle East Ribbon with Bronze Service Star for the Rhineland Campaign, the American Defense Ribbon, American Theater Ribbon, and World War II Victory Ribbon.

5. There is attached to the record of trial a recommendation for clemency dated 9 March 1948 signed by four of the five members of the court and by the trial judge advocate, wherein it is stated in part:

> "a. While evidence at the time of trial established the guilt of the accused within the meaning of Article of War 85, it did not indicate that the accused was grossly drunk prior to the time he was purportedly relieved from duty, and the court did not feel in the original hearing that the offense as proved justified a sentence of dismissal.
>
> "b. At the time of the original hearing the court acted on the belief that the offense was not committed in time of war and that dismissal was not mandatory."

6. In view of all the circumstances in the case, including the nature of the sentence originally imposed by the court, the accused's record of service and the recommendation for clemency by members of the court and the trial judge advocate, I recommend that the sentence be confirmed, but commuted to a reprimand and forfeiture of fifty ($50.00) dollars of accused's pay per month for six months, and that as thus commuted the sentence be carried into execution.

7. Inclosed is a form of action designed to carry the above 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 143, 2 Aug. 1948).-

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

26 MAY 1948

JAGQ - CM 330595

UNITED STATES v. Private EUGENE H. DOWNEY (RA 18004478), Casual Detachment, 6006 Army Service Unit (Post Operating Company), Fort Lewis, Washington.	)	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 29 March 1948. Dishonorable discharge and confinement for three (3) years. 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 Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Eugene H. Downey, Casual Detachment, 6006 Army Service Unit, (Post Operating Company), Fort Lewis, Washington, then in Casual Company 73, 4th Section, Fort Lawton Staging Area, Fort Lawton, Washington, did, at Fort Lawton, Washington, on or about 11 June 1945 desert the service of the United States, and did remain absent in desertion until he was apprehended at Goldendale, Washington, on or about 6 February 1948.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. There was evidence of one previous conviction. 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 fifteen years. The reviewing authority approved the sentence but reduced the period of confinement to three years, designated Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only evidence showing the initial absence of accused was an extract copy of a morning report which the Board of Review for reasons

hereinafter stated, holds to have been erroneously admitted in evidence. For that reason the other evidence need not be summarized.

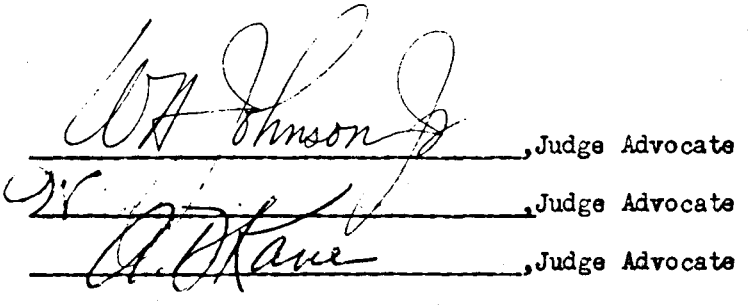
The extract copy of the morning report introduced over defense objection shows accused from duty to absent without leave on 11 June 1945 and is authenticated by W. H. Dickerson, CWO, USA, "Assistant" Military Personnel officer, Fort Lawton Staging Area, Fort Lawton, Washington as "official custodian of the morning reports of said command". The defense challenged the authority of this officer to authenticate the extract copy of the morning report.

Under existing regulations (AR 345-400, 3 Jan. 1945) the commanding officer of the reporting unit, the unit personnel officer and the Adjutant General are each the official custodian of the original morning reports in a command, unit, or branch of the Army and as such are authorized to authenticate an extract copy thereof (SPJGJ 1944/3281, 4 April 1944, 3 Bull JAG 96).

If the officer purporting to authenticate "as custodian" the extract copy of the morning report is not disclosed in the authenticating certificate to be one of the custodians specifically authorized by Army Regulations it then becomes necessary that competent evidence outside the authenticating certificate be introduced to show that such officer did in fact have custody of the morning report (CM 312008 Armstrong, 61 BR 319). In the instant case the warrant officer authenticating the extract copy of the morning report was not an authorized custodian thereof as determined by Army Regulations and there was no evidence aliunde the certificate that he was in fact custodian. Consequently the extract copy of the morning report authenticated by him as "Assistant" Military Personnel officer was inadmissible. Nor can this error be corrected by application of the Federal "shop-book" statute (28 U.S.C. 695). That statute authorizes the reception in evidence of any writing or record "if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record * * *" (underscoring supplied). Since, as heretofore pointed out, the "Assistant Military Personnel Officer" is not an authorized custodian of the morning report and is therefore not authorized to authenticate extract copies thereof such an authentication could not have been one made in the regular course of business and consequently the entry was inadmissible under the "shop-book" statute.

There being no other proof that accused absented himself without proper leave from his organization the prosecution failed to prove one of the essential elements of the offense of desertion (par. 130, MCM, 1928).

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



_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1 June 1948

JAGQ - CM 330595 1st Ind

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

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington

1. In the case of Private Eugene H. Downey (RA 18004478), Casual Detachment, 6006 Army Service Unit (Post Operating Company), Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be disapproved. Upon taking such action you will have authority to authorize a rehearing.

2. When copies of the publishedorder 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 330595).

/s/ Thomas H. Green
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 330607

UNITED STATES v. Private EDWARD J. STERN (16206119), Assigned 5012 Area Service Unit, Station Complement, Casual Detachment (Pipeline Army).	)	FIFTH ARMY Trial by G.C.M., convened at Fort Sheridan, Illinois, 25 March 1948. Dishonorable discharge and confinement for three (3) years and three (3) months. 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 58th Article of War.

Specification 1: In that Private Edward J. Stern, Assigned, 5012 Area Service Unit, Station Complement, Casual Detachment, (Pipeline Army), then Private, 5012 Area Service Unit, Station Complement, Detachment X, #1, did, at Fort Sheridan, Illinois, on or about 12 July 1947, desert the service of the United States and did remain absent in desertion until he surrendered himself to Fort Sheridan, Illinois, on or about 30 November 1947.

Specification 2: In that Private Edward J. Stern, Assigned, 5012 Area Service Unit, Station Complement, Casual Detachment, (Pipeline Army), then Private, 5012 Area Service Unit, Station Complement, Casual Detachment, (Pipeline), did, at Fort Sheridan, Illinois, on or

about 3 December 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 23 February 1948.

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

Specification: In that Private Edward J. Stern, Assigned, 5012 Area Service Unit, Station Complement, Casual Detachment, (Pipeline) Army), then Private, 5012 Area Service Unit, Station Complement, Casual Detachment, (Pipeline), having been duly placed in arrest and confined to the area of Casual Detachment, 5012 Area Service Unit, on or about 2 December 1947, did, at Fort Sheridan, Illinois, on or about 3 December 1947, break his said arrest before he was set at liberty by proper authority.

The accused pleaded guilty to Specification 1 "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"; guilty to Specification 2 "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"; not guilty of Charge I but guilty of a violation of the 61st Article of War; and not guilty of Charge II and its Specification. He was found guilty of all Specifications and Charges and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four years. The reviewing authority approved "only so much of the finding of guilty of Specification 2, Charge I, as finds the accused guilty of deserting the service of the United States at Fort Sheridan, Illinois on or about 3 December 1947 and of remaining absent in desertion until terminated in a manner not shown at Fort Sheridan, Illinois on or about 23 February 1948"; 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 and three months"; designated the Branch United States Disciplinary Barracks, Milwaukee, Wisconsin, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty as approved. The only question to be considered is whether the record of trial is legally sufficient to support the sentence.

4. It is clearly established by the evidence in the record of trial that the desertion alleged in Specification 2 of Charge I was concurrent with and had its inception in the breach of arrest alleged in the Specification of Charge II. The two offenses were but different aspects of

the same act. Where a sentence is imposed with reference to two or more offenses constituting but 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 330356, Stockton (1948); CM 313544, Carson, 63 BR 150, 5 Bull JAG 202).

The maximum authorized punishment for the offense of desertion alleged in Specification 2 of Charge I of which accused has been found guilty as approved by the reviewing authority, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years (par. 104c, MCM, 1928). The maximum authorized punishment for the offense of breach of arrest as alleged in the Specification of Charge II and of which accused has been found guilty is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period (par. 104c, MCM, 1928). In this case the desertion is the more serious aspect of the act since it carries the heavier penalty.

5. The maximum authorized punishment for the desertion alleged in Specification 1 of Charge I of which accused 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 and one-half years (par. 104c, MCM, 1928).

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 involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years.

Edward D. Lawrence, Judge Advocate.

Frank C. Alford, Judge Advocate.

George S. Springston, Judge Advocate.

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

(101)

14 MAY 1948

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JAGQ - CM 330608

UNITED STATES v. Private WILLIAM M. RUSSELL (RA 37613657), 7801 Station Complement Unit.	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Wetzlar, Germany, 5 March 1948. 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 Charges and Specifications:

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

Specification: In that Pfc William M. Russell, RA 37 613 657, did at Huenfeld, Germany, on or about 31 October 1947 with intent to do her bodily harm, commit an assault upon Irmgard Lorenz, by pointing at her with a dangerous weapon, to-wit, a pistol.

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

Specification 1: In that Pfc William M. Russell RA 37 613 657, did at Huenfeld, Germany, on or about 31 October 1947 commit an assault upon Irmgard Lorenz, by striking her about the body with his hands.

Specification 2: (Finding of not guilty).

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

Specification 1: In that Private First Class William M. Russell, 7801 Station Complement, did at Wetzlar, Germany on or about

15 December 1947, commit an assault upon Kurt Fichte, German National, by willfully and feloniously striking the said Kurt Fichte in the face with his fist.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and the Specification thereof, guilty of Specification 1 of Charge II and of Charge II, guilty of Specification 1 of the Additional Charge and the Additional Charge and not guilty of the remaining Specifications. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence, reduced the period of confinement to one year, designated Branch United States Disciplinary Barracks, Fort Hancock, New Jersey as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the Prosecution.

On or about 31 October 1947 accused visited the home of Irmgard Lorenz in Huenfeld, Germany. After going upstairs with Miss Lorenz he became noisy and when she asked him to quiet down he struck her. He accused her of "going out" with another man and when she denied this he "beat or struck" her again. He asked her for a cigarette and when she told him she had none he struck her again. She then went to the corner of the room crying and accused told her "to get up, that he would shoot me and he drawed his pistol and pushed the magazine in". Miss Lorenz arose and asked accused to remember she had a child who didn't have a father whereupon accused "put his pistol back". She couldn't say "for sure, any more" how accused pointed the pistol and a direct question by the trial judge advocate, "Did he point the pistol toward you?" was objected to by defense counsel and the objection was sustained (R 8, 9). She did not see him "fumbling around the pistol", nor see him put the magazine in the gun she only "heard it" (R 10). Miss Hanni Laetsch was in Miss Lorenz's apartment on 31 October and saw accused "beat" Miss Lorenz (R 11).

Police officer Kurt Fritche, testified that on 15 December 1947, accused without provocation struck him in the face with his fist (R 12, 13).

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

4. The competent evidence clearly establishes that accused unlawfully committed an assault and battery on Miss Lorenz and on Police Officer Fritche, on the dates and in the manner alleged in the Specifications.

Accused was charged in the Specification of Charge I with the offense of committing an assault with intent to do bodily harm upon Miss Lorenz "by pointing at her with a dangerous weapon, to-wit, a pistol".

The only witness to this offense was the victim herself and the record of trial has been examined in vain to find any evidence that accused "pointed at" Miss Lorenz with the pistol as charged. The question asked by the trial judge advocate as to "how" accused pointed the pistol at her was a conclusion on his part and is totally unsupported by the evidence of record. Further, in answering this question Miss Lorenz stated "she couldn't say for sure any more". Later she denied that she saw accused "fumbling with the pistol" or putting the magazine in it although she "heard" it.

The proof required to sustain a charge of assault with intent to do bodily harm with a dangerous weapon is set forth in paragraph 149m, Manual for Courts-Martial, 1928, as follows:

> "Proof-(a) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and (b) the facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm."

Since the evidence failed to disclose an assault "by pointing at her with a dangerous weapon, to-wit, a pistol" neither of the two elements of the offense set forth above were proved and the fact that accused "threatened" to kill Miss Lorenz and that he drew a weapon cannot supply the essential proof that in furtherance of this threat he committed the overt act alleged to constitute the assault. In CM 231675, Johnson, 18 BR 269, at 272, the Board of Review stated:

> "Preparation, a mere threat of violence and a purpose, however, fully indicated, to inflict a violent personal injury upon another, are not sufficient to constitute an assault. There must be an offer or an attempt or the unequivocal appearance of an attempt to commit such an injury, the commencement of some act which, if not prevented, would,

in its apparent course, result in a battery. A menace of violence is not enough, for until the execution of the violence has actually begun, there can be no assault. (1. Wharton's Criminal Law, 12th Ed. 1087; 4 Am. Jur. 133; 5 C.J. 716; State v. Milsaps, 82 N.C. 549; State v. Painter, 67 Mo. 84; Merritt v. Commonwealth, 180 S.E. (Va.) 395; State v. Huber, 148 P. (Nev.) 562)."

The Board of Review therefore holds that the record is legally insufficient to sustain the findings of guilty of the Specification of Charge I and Charge I.

5. For the reasons stated above the Board of Review holds that the evidence is legally insufficient to support the findings of guilty of Charge I and the Specification thereof; legally sufficient to support the findings of guilty of Specification 1 of Charge II and Charge II and Specification 1 of the Additional Charge and the Additional Charge and legally sufficient to support the sentence.

W. H. Johnson Jr., Judge Advocate

[illegible], Judge Advocate

[illegible], Judge Advocate

MAY 25 1949

JAGQ - CM 330608 1st Ind

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

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

1. In the case of Private William M. Russell (RA 37613657), 7801 Station Complement Unit, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of the Specification of Charge I and Charge I be disapproved. 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 330608).

/3/ Thomas H. Green

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 330619

U N I T E D S T A T E S	)	MacDILL AIR FORCE BASE
	)	
v.	)	Trial by G.C.M., convened at
	)	Tampa, Florida, 15 April 1948.
Private JOHN "P" PETTWAY,	)	Dishonorable discharge and con-
Jr. (14273641), Maintenance	)	finement for three (3) years and
Squadron, 307th Maintenance	)	eleven (11) months. Disciplinary
and Supply Group.	)	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 John "P" Pettway, Jr., Maintenance Squadron, 307th Maintenance & Supply Group, MacDill Air Force Base, Florida, did without proper leave, absent himself from his organization at MacDill Air Force Base from about 2 January 1948 to about 21 February 1948.

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

Specification: In that Private John "P" Pettway, Jr., Maintenance Squadron, 307th Maintenance & Supply Group, MacDill Air Force Base, Florida, having been duly placed in confinement in the Base Stockade, MacDill Air Force Base, Florida, did on or about 22 February 1948 escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private John "P" Pettway, Jr., Maintenance Squadron, 307th Maintenance & Supply Group, MacDill Air Force Base, Florida, did, at MacDill Air Force Base, Florida, on or about 22 February 1948 desert the service of the United States and did remain in desertion until he was apprehended at Loris, South Carolina, on or about 1 March 1948.

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 and eleven months. The reviewing authority approved the sentence, designated the Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty. The only question to be considered here is whether the record of trial is legally sufficient to support the sentence. The record establishes that the desertion alleged in the Specification of Charge III was concurrent with and had its inception in the escape from confinement alleged in the Specification of Charge II. The two offenses were but different aspects of the same act. Where a sentence is imposed with reference to two or more offenses constituting but 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 330356, Stockton (1948); CM 313544, Carson, 63 BR 150, 5 Bull JAG 202).

The maximum punishment for the offense of desertion as alleged and proven is dishonorable discharge, total forfeitures and confinement at hard labor for two and one-half years (par. 104c, MCM, 1928). The maximum authorized punishment for the offense of escape from confinement as alleged and proven is dishonorable discharge, total forfeitures and confinement at hard labor for one year (par. 104c, MCM, 1928). In this case the desertion is the more important aspect of the act since it carries the heavier penalty.

4. The authorized maximum sentence to confinement, without substitution, for an absence without leave for fifty days, the offense of which accused was found guilty under the Specification of Charge I, is five months (par. 104c, MCM, 1928). Therefore, the maximum sentence that may be imposed against accused for all the offenses of which he was found guilty is dishonorable discharge, forfeiture of

all pay and allowances due or to become due and confinement at hard labor for two years and eleven months.

5. 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 involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years and eleven months.

_____, Judge Advocate.

_____, Judge Advocate.

_____ Judge Advocate.

JAN 25

JAGN-CM 330619 1st Ind
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 John "P" Pettway, Jr. (14273641), Maintenance Squadron, 307th Maintenance and Supply Group, 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 eleven 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 330619).

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 330658

13 October 1948

UNITED STATES v. Sergeant O. B. BROWN (RA 34639224) and Technician Fourth Grade ROBERT REESE (RA 34480799), both of 418th Quartermaster Bakery Detachment, 20th Infantry Regiment, APO 6, Unit 2	6TH INFANTRY DIVISION Trial by G.C.M., convened at APO 6, Unit 2, 29 January 1948. BROWN: Forfeiture of $45.53 pay per month for six (6) months and confinement for a like period. Stockade. REESE: Dishonorable discharge (suspended), total forfeitures and confinement for two (2) years. Disciplinary Barracks.

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

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1. The record of trial in the case of the soldiers named above, having been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings of guilty and the sentence as to the accused Reese 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 at common trial upon the following charges and specifications:

As to the accused Brown:

CHARGE I: Violation of the 93rd Article of War

Specification 1: Finding of guilty disapproved by reviewing authority.

Specification 2. Nolle prosequi.

Specification 3: In that Sergeant O.B. (I.O.), Brown, 418th Quartermaster Bakery Detachment, Twentieth Infantry Regiment, APO 6-2, did, at APO 6-2, on or about 3 December 1947, with intent to do him bodily harm, commit an assault upon An Bong O, by willfully and feloniously striking the said An Bong O in the face and body with his fist.

Specification 4: Nolle prosequi.

CHARGE II: Finding of guilty disapproved by reviewing authority.

Specification: Finding of guilty disapproved by reviewing authority.

As to the accused Reese:

CHARGE: Violation of the 93rd Article of War

Specification 1: In that Technician Fourth Grade Robert Reese, 418th Quartermaster Bakery Detachment, Twentieth Infantry Regiment, APO 6-2, did, at APO 6-2, on or about 3 December 1947, with intent to do him bodily harm, commit an assault upon An Bong O, by assaulting him with a dangerous weapon, to wit, a knife.

Specification 2: Nolle prosequi.

Specification 3: Finding of guilty disapproved by reviewing authority.

Each accused pleaded not guilty to all charges and specifications upon which he was arraigned. The accused Brown was found guilty of Specifications 1 and 3, Charge I and Charge I, and guilty of Charge II and the specification thereunder. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority disapproved the findings of guilty as to Specification 1, Charge I, and Charge II and its specification and approved only so much of the finding of guilty of Specification 3, Charge I and Charge I as finds that the accused did at APO 6-2 on or about 3 December 1947 wrongfully strike An, Bong O, on the face and body with his fist in violation of Article of War 96. He approved and ordered executed only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of $45.33 of his pay per month for six months. The 6th Infantry Division Stockade 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. 20, Headquarters 6th Infantry Division, APO 6, 27 April 1948.

The accused Reese was found guilty of Specification 1 except the words "to wit a knife" and guilty of Specification 3 except the words "commit the crime of sodomy by feloniously and against the order of nature, have carnal knowledge per os with Lee, Young Un, a human being," substituting therefor respectively, the words "with intent to commit a felony, sodomy, commit an assault upon Lee, Young Un, a human being." No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority disapproved the finding of guilty of Specification 3 and approved and ordered executed only so much of the sentence as provides for

dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years, suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army might direct as the place of confinement. The result of trial was published in General Court-Martial Orders No. 21, Headquarters 6th Infantry Division, APO 6, 27 April 1948.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as approved with respect to the accused Brown.

4. Evidence

Lee, Young Un, a Korean employed at the Quartermaster laundry, Camp Sykes, Korea, testified that at about 10 p.m., 3 December 1947, as he and his friend, An, Bong O, were passing by the bakery at Camp Sykes, accused Reese called to them and took them to a room in the bakery. Other soldiers were in the room but he could not identify them. Reese then took Lee outside of the building, grabbed him by the collar and tried to force his head toward the fly of his (Reese's) pants. Lee broke away and ran back into the laundry (R 6-16).

An, Bong O, corroborated Lee's testimony concerning their entrance into the bakery and stated that he attempted to follow Lee when Reese took him outside but Sergeant William F. Flood who was also in the room prevented him from doing so. An also stated that when Reese returned to the room he (Reese) threatened him with a pistol. Reese and Sergeant Flood then took him outside the building where a struggle ensued and the soldiers struck him on the cheek causing his mouth to bleed. He was not assaulted with any weapon other than the pistol referred to (R 28-33).

Sergeant William F. Flood, 418th Quartermaster Bakery Detachment, Camp Sykes, testified that accused Reese brought the two Koreans, Lee, Young Un and An, Bong O, to his room in the bakery at about 10:30 or 11:00 p.m., 3 December 1947. Accused Brown was also present in the room. The Koreans were asked if they had any women and when they replied in the negative Reese took Lee outside and Brown held An by the collar but did not strike him. When Reese returned to the room about 15 or 20 minutes later he had a knife in his hands and waved it about 12 inches in front of An's face while Brown shook An with his left hand, at the same time keeping his right hand "balled up." Accused Brown later produced a .45 caliber pistol and pointed it at An, Bong O (R 21-28).

Technician Third Grade Charles I. Phillips, 508th Quartermaster Laundry Detachment, Camp Sykes, was in the laundry office at about 10:50 p.m., 3 December 1947, when Lee, Young Un, ran into the laundry

in a very excited manner, looking white of face and with his "clothes spotty." About five minutes later he saw accused Brown outside the office window struggling with and striking An, Bong O (R 17-21).

A .45 caliber pistol was accepted in evidence as Prosecution Exhibit 1. Accused Brown admitted that he threw the pistol into a latrine where the record shows that it was later found (R 35-37).

Each of the accused remained silent.

5. Discussion as to accused Reese only

The specification upon which accused Reese was tried alleged that accused Reese with intent to do bodily harm committed an assault upon An, Bong O, by assaulting him with a dangerous weapon, to wit, a knife, in violation of Article of War 93. The court, however, in finding accused Reese guilty of the specification of the charge excepted the words "to wit, a knife."

It is an accepted rule of judicial practice and procedure that a court-martial may make findings by exceptions and substitutions where such findings do not change the nature or the identity of the offense charged in the specification. In other words, a court-martial may convict an accused only of the offense of which he is charged or of a lesser offence necessarily included therein, it cannot convict an accused of an offense separate and distinct from that alleged. (par 78c, MCM 1928)

Although the evidence adduced was conflicting, it does in fact disclose that accused on the evening of 3 December 1947 at the time and place alleged committed two separate assaults upon An, Bong O, the first of which was with a knife and the second with a pistol. In effect, the court-martial by exceptions found accused Reese not guilty of assault with intent to do bodily harm with a knife but guilty of assault with intent to do bodily harm with some other dangerous weapon, apparently having in mind the assault with the pistol.

Under the above rule and in accordance with the evidence here presented, the court could have found accused guilty either of the offense charged or of a lesser offense necessarily included therein. The court, however, by its findings changed the identity of the offense, as the assault of which accused now stands convicted is separate and distinct from the assault alleged and therefore not a lesser offense necessarily included therein. Such action on the part of the court is illegal (CM 293414, Yacavone, 2 BR (CBI-IBT) 275; CM 325620, Paul, 74 BR 363). It necessarily follows that the findings as to accused Reese cannot be sustained.

6. For the reasons stated, the Board of Review holds the record of trial as to accused Reese legally insufficient to support the findings

of guilty of Specification 1 of the charge and the charge and the sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

(116)

JAGK - CM 330658 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 22 OCT 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 Sergeant O. B. Brown (RA 34639224) and Technician Fourth Grade Robert Reese (RA 34480799), both of 418th Quartermaster Bakery Detachment, 20th Infantry Regiment, APO 6, Unit 2.

2. I concur in the opinion of the Board of Review that the record of trial as to accused Reese is legally insufficient to support the findings of guilty of the Charge and Specification 1 thereof and the sentence, and for the reasons stated therein recommend that the findings and sentence as to Reese be vacated, and that all rights, privileges and property of which he 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 the recommendation hereinabove made, 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 189, 10 Nov. 1948).

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

(117)

14 JUN 1948

JAGQ - CM 330669

UNITED STATES v. Private DONALD A. NOELL (RA 19212674), USAF, Assigned Squadron M, 401st Air Force Base Unit, Hamilton Air Force Base, Hamilton Field, California.	FOURTH AIR FORCE Trial by G.C.M., convened at Hamilton Field, California, 21 April 1948. Dishonorable discharge and confinement for one (1) year. 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 submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 69th Article of War.

Specification: In that Private Donald A. Noell, USAF, Assigned Squadron M, 401st AF Base Unit, Hamilton Air Force Base, Hamilton Field, California, having been duly placed in confinement in the Post Guardhouse, Hamilton Air Force Base, Hamilton Field, California on or about 13 November 1947, did at Hamilton Air Force Base, Hamilton Field, California on or about 16 February 1948, escape from said confinement before he was set at liberty by proper authority.

He pleaded 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 may direct for one year. The reviewing authority approved the sentence and ordered it executed, designating the

Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 25, Headquarters Fourth Air Force, Hamilton Field, California, dated 10 May 1948.

3. Evidence for the Prosecution. Notwithstanding accused's plea of guilty, the prosecution introduced evidence showing that accused was legally confined in the Post Guardhouse, Hamilton Air Forces Base on 13 November 1947 (R. 7; Pros. Ex. 1), and that he remained in confinement there as a garrison prisoner in a parolee status (R. 7, 8; Pros. Ex. 6). As a parolee, accused signed a pledge and was "given the privilege of working without the necessity of /an/ armed guard being over him. As such he can come and go almost as he pleases. He checks in at the guardhouse at certain times ...." (R. 8). While serving in this parolee status on 16 February 1948, accused failed to report to the guardhouse for the 12:45 P.M. roll call, as required (R. 12). A search was made for accused but he was not found (R. 10-12). His release from confinement had not been authorized by competent authority (R. 9). Accused was reconfined in the Post Guardhouse, Hamilton Field, on 4 March 1948 (Pros. Ex. 3).

4. Evidence for the Defense. Accused testified that he and one Private McFadden left Hamilton Field by climbing a fence near the Post Engineers, and thereafter proceeded to Lima, Ohio. There the F.B.I. apprehended accused and found his parole card in his possession (R. 16, 17).

5. The evidence adduced by both the prosecution and the defense establishes that accused was a parolee and not under guard or physical restraint at the time of his unauthorized departure from Hamilton Field. Since ".... confinement imports some physical restraint" (par. 139a, MCM, 1928), and manifestly none existed, it is clear that accused's plea of guilty to the offense of escape from confinement was improvidently entered (CM 276435, Meyer, 48 BR 340). Accordingly, considering accused's plea as one of not guilty, it follows that there is no proof of the element of physical restraint, required for conviction of the offense charged (par. 139a, MCM, 1928). The fact that accused was on his honor not to leave Hamilton Field was a moral restraint only and insufficient to satisfy the requirements of proof of an escape from confinement in violation of Article of War 69 (CM 244521, Humphrey, 28 BR 337, 339). Although the evidence shows that accused was guilty of breach of parole, in violation of the 96th Article of War (par. 139a, MCM, 1928, p. 154), he cannot be punished for this offense since breach of parole is not a lesser included offense to that of escape from confinement (CM 201493, Smith, 5 BR 155, and cases therein cited).

6. 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

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 330669 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Donald A. Noell (RA 19212674), USAF, Assigned Squadron M, 401st Air Force Base Unit, Hamilton Air Force Base, Hamilton Field, California.

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 126, 23 June 1948).

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

JAGK - CM 330683

7 JUL 1948

UNITED STATES	)	1ST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Drake (Tokyo), Japan, 11, 16 and 17 March 1948. Dismissal
	)	
First Lieutenant EDWARD C. SNYDER (0-1019541), Headquarters 2d Cavalry Brigade	)	

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

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

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Edward C. Snyder, 2d Cavalry Brigade, did, on or about November, 1947, at Ross Hall, "The First Three Graders' Club", Tokyo, Japan, wrongfully dance with Kiyoko Ogawa, a female Japanese national, in violation of orders forbidding Japanese nationals at said club, in the presence of enlisted men.

Specification 2: In that First Lieutenant Edward C. Snyder, ***, did, at Tokyo, Japan, on or about 8 December 1947, with intent to deceive Warrant Officer Junior Grade Adolphus D. Reed, who was then and there Officer of the Day, officially state to the said Warrant Officer Reed that an unknown female Japanese national was his secretary, which statement was known by the said Lieutenant Snyder to be untrue, in that said female Japanese national was not his secretary or otherwise employed or supervised by him.

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

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

Specification 2: In that First Lieutenant Edward C. Snyder, ***, did at Tokyo, Japan, at divers times between March, 1947, and December, 1947, sell or cause to be sold to Alice Ishigami, a Japanese national, about forty (40) cartons of cigarettes, which said cigarettes were of American origin, intended for sale to American personnel or other specifically authorized personnel, in violation of Circular No. 26, General Headquarters, Far East Command, 10 March 1947.

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its specification, guilty of Charge II and its specifications and of Charge III and Specification 1 thereof, and guilty of Specification 2 of Charge III "except for the words 'forty (40)', substituting therefor 'fifteen (15)'". No evidence of any previous conviction was introduced. He was sentenced to be "dismissed from the service." The reviewing authority disapproved the finding of guilty of Specification 1 of Charge III, approved only so much of the finding of guilty of Specification 1 of Charge II as involved a finding that "at the time and place alleged the accused did wrongfully dance with a female Japanese national in the presence of enlisted men in violation of the 96th Article of War," approved the sentence, and "pursuant to the Article of War 50½" withheld "the order directing the execution of the sentence."

3. Evidence

Sometime in the month of November 1947, accused danced with Ogawa Kiyoko, a Japanese national, at the First Three Graders' Club of the 7th Cavalry. The club was commonly called "Ross Hall." On or about 22 November, an enlisted man, Technician Third Grade Robert W. Moss, observed accused dancing at the club with a girl who appeared to be Japanese. The by-laws of Ross Hall, received in evidence as Prosecution Exhibit C, provided that "all Oriental Nationals" would be denied guest privileges. The by-laws were read to the members of the club every three months but were not "published" on the bulletin board. They were kept in the quarters of Staff Sergeant William K. Eustice, who acted as club manager. The club manager, on one occasion in the month of November, saw accused seated at a booth in the club with a Japanese girl. Since the manager understood the girl was a Nisei, he did not request her to leave (R 14-19; Pros Ex C).

Between 10:00 and 11:00 p.m. on 8 December 1947, Warrant Officer Adolphus D. Reed, who was then Officer of the Day of the 7th Cavalry Regiment, went to the post exchange warehouse area of the 7th Cavalry Regiment in response to a telephone call from the Sergeant of the Guard. The warehouse area was located "in the S-4 area of the 7th Cavalry Regiment." There he saw accused in a jeep. Accused was accompanied by a woman who "looked Japanese." When Warrant Officer Reed asked accused what he was doing in the area, accused replied that "it was his normal working place." Upon being further interrogated by the Warrant Officer

as to his authority "for having a lady in the area," accused stated that he needed no specific authority, for the woman "was his stenographer from the S-4 office." Accused, at this time, was Post Exchange Officer of the 2nd Cavalry Brigade and was "custodian of that warehouse." According to the Warrant Officer, however, accused had no right to be in the area "at the time he was there" (R 19-21). Corporal John K. O'Brien, 8th Cavalry Regiment, worked in the 8th Cavalry Regiment Post Exchange Office in December, 1947. Accused was the Post Exchange Officer of the 8th Cavalry Regiment. There was neither a secretary nor a stenographer "in the office." When asked on direct examination whether accused had a secretary, the Corporal replied, "Not that I know of, sir" (R 36-37).

Between March and September "or maybe October," 1947, Alice Ishigami, a resident of Tokyo, Japan, had bought about 15 cartons of cigarettes from the 8th Cavalry Regiment Post Exchange. The cigarettes were of the Lucky Strike, Camel and Philip Morris brands. Accused was Post Exchange Officer of that exchange and Alice had visited it several times "with the Red Cross girls to get ice cream." The first time she bought cigarettes from the Post Exchange she received permission to do so from accused. Thereafter, when she could not go there herself, she purchased her cigarettes by telephone. Sometimes "the girl assistant" and sometimes "the GI in charge" would answer the telephone. She bought the cigarettes with "American currency" which she obtained by trading yen with "the GIs." Alice never had "a PX card" nor did she ever "present one." She told accused that she was "British" or "British born." When asked on cross-examination where she was employed "in March, 1947," she replied that she was employed by the 8th Cavalry Regiment Red Cross. She told her employers that she was British born and that she had married a Japanese when she "first came here as an interpreter" in 1935. In March 1947 she thought she was a British National, for her husband had died and she was under the impression that she had regained her British citizenship. It was not until "after this trouble" that she went to the British Embassy and found that she was still a Japanese National (R 24-29,67-68).

Circular Number 26, General Headquarters, Far East Command, dated 10 March 1947, was received in evidence without objection by the defense as Prosecution Exhibit E (R 30). Inter alia, the circular prohibited "American personnel" from

> "Trading in American goods with other than American personnel or authorized personnel" (par 5a).

Paragraph 5c of the circular provided:

> "Nothing herein shall be construed to prevent the trading by American personnel with other American personnel or authorized personnel at a price or consideration not at a profit."

"To trade" was defined as including "to sell" (par 4e) and the phrase

"American personnel" was defined as follows (par 4a):

> "'American personnel.' All persons of whatever nationality who are subject to military law as defined in Article of War 2."

The effective date of the circular was 12 March 1947 (Pros Ex E).

Over objection by the defense, a pre-trial statement of accused was admitted in evidence as Prosecution Exhibit F after a showing of its voluntary nature (R 39-46). In this statement, accused related that about August, 1946, he was appointed Post Exchange Officer of the 8th Cavalry Regiment and that about October 1947 he also became Post Exchange Officer of the 2nd Cavalry Brigade. Pertinent extracts from the pre-trial statement follow:

> "I have frequented the 1st Three Graders Club down at the 7th Cavalry Regiment. I knew several of the Sergeants down there and have been invited there. After work I often drop by the Club for a drink. I have purchased many chit books at the Club. When working late at the Post Exchange Warehouse at the 7th Cavalry, I often buy sandwiches from the club for the soldiers and the Japanese girls who are working with me. One night while working late I took Kyoko over to the club to get some sandwiches. While waiting for the sandwiches, we danced one dance. On another occasion there, I danced with the Japanese girl who manages the band. I have frequently taken my friends to this club. I didn't think there was anything wrong with it.
>
> * * * *
>
> "I know Alice Ishigami and her son. A friend of Alice's does dressmaking work for my wife. I have sold cigarettes from the Post Exchange to Alice for the regular price. ***
>
> "On Monday, 8 December, I worked at the PX warehouse during the afternoon; came back for supper, visited my wife at the 49th Hospital; from there I went to the Empire House; and, while on the way from the Empire House to the 7th Cavalry, I picked up a Japanese girl friend of mine on the Ginza and took her to the PX warehouse with me. The soldiers and one Japanese girl were just finishing work when I arrived. They departed and the girl and I remained to be sure the fire was out. We danced to the radio in the office. We were accosted by the sentry, the Sgt of the guard, and the officer of the day. I told them that this girl was my secretary, although she was not. I told them that to keep her and me out of trouble. I knew that she should not be there at that time of night."

Accused, having been informed of his rights as a witness, elected to testify under oath in his own behalf. On the night of 27 November 1947, he entered Ross Hall "to get a drink and see some of the boys." Sergeant Booth, Sergeant Eustice, Sergeant Goodwin and several others

were present at the time. After a few drinks, Sergeant Booth suggested that accused "stick around awhile" but accused informed the Sergeant that he could not stay since he had a girl in his jeep whom he was taking home. The Sergeant then told accused to bring the girl into the club and accused did so. The girl was Ogawa Kiyoko. Accused was not "asked to have the girl leave." At one time, Sergeant Booth and some other sergeants sat in the same booth with accused and Ogawa (R 65-66).

Sergeant William K. Eustice testified that on the evening of 27 November he saw accused in the First Three Graders' Club. Accused was seated with "a Japanese girl" and "one or more" members of the club. One of these members was Sergeant Booth (R 58). Sergeant Booth testified that he did not remember whether he had been in the First Three Graders' Club on 27 November. He had never invited accused to the club although he had seen accused on the premises "two or three times." He had never seen accused in the club "with a girl." This testimony was elicited from Sergeant Booth before accused had given his testimony on the witness stand (R 58-60).

4. Discussion

Specification 1, Charge II

Under this specification, accused stands convicted of having wrongfully danced with a female Japanese national in the presence of enlisted men at the First Three Graders' Club in Tokyo, Japan, in violation of the 96th Article of War. We know of no law, regulation or directive of a public nature which makes the act of dancing with a female Japanese national wrongful nor do we believe there is any justification for a holding that such an act, even when done in occupied Japan by an officer in the presence of enlisted men, is wrongful per se in the sense that the reputation or decorum of the military service would necessarily suffer thereby. The Government's theory seems to have been that accused's terpsichorean adventure was wrongful because the by-laws of the First Three Graders' Club denied entrance to "Oriental Nationals." In this respect, however, not only is there no direct evidence in the record of trial that accused had actual notice of this provision of the club by-laws, but no proof was adduced tending to show that the bar against attendance of oriental nationals was so notorious as to fasten upon accused even a constructive knowledge of it (CM 308766, Lattimer, 4 BR (A-P), 139,145; compare CM 307372, Manly, 61 BR 79,82, and CM 319858, Correlle, 69 BR 183,203,204). Consequently, we hold that the finding of guilty under this specification may not be sustained.

Charge II and Specification 2 thereof

Accused was found guilty under this charge and specification of a violation of the 95th Article of War in that he did, with intent to deceive, officially state to Warrant Officer Reed that an unknown Japanese national was his secretary, which statement accused knew to be untrue in that the said female Japanese national was not his secretary or otherwise

employed or supervised by him. There can be no doubt that accused did officially state to Warrant Officer Reed that the seemingly Japanese woman seated in his jeep in the warehouse area was "his stenographer." The issue of accused's guilt of this specification, however, hinges upon whether this statement was sufficiently shown to have been false. Accused's pre-trial statement contains an admission that the woman was "a Japanese girl friend" of his whom he had "picked up" on the Ginza and that she was not his "secretary" although he had told the Officer of the Day that she was "to keep her and me out of trouble." An accused, however, cannot be legally convicted upon his uncorroborated confession or verbal admission. There must be adduced, by way of corroboration of accused's inculpatory pre-trial statement, substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde such confession or admission that the particular offense in question had probably been committed (CM 325377, Sipalay, 74 BR 169,172; CM 325056, Balucanag, 74 BR 67, 69,73). We must inquire, then, whether this record of trial contains substantial evidence, additive to accused's pre-trial utterance, to the effect that the woman in accused's jeep was not his secretary, or stenographer. Stated otherwise, does such evidence raise a probability, as distinguished from a possibility, that she was not his amanuensis? We think it does not. True, Corporal O'Brien testified that there was neither a secretary nor a stenographer "in the office" of the 8th Cavalry Regiment Post Exchange and that accused had no secretary that he knew of. However, the Corporal's knowledge of accused's official affairs appears to have been limited to accused's activities as Post Exchange Officer of the 8th Cavalry Regiment Post Exchange. It will be noticed that at the time accused made the allegedly false statement, he was also Post Exchange Officer of the 2nd Cavalry Brigade. There is a void in the proof as to the composition of the staff, if any, which aided him in the latter capacity. His official statement to Warrant Officer Reed was that the woman was "his stenographer from the S-4 office." It was not shown that accused's post exchange operations were not connected with an S-4 office nor did it appear, aliunde his pre-trial admission, that the woman found with him in the warehouse area was probably not his stenographer from such an office. It follows, therefore, that the findings of guilty of Specification 2 of Charge II and of the Charge must be set aside for lack of sufficient evidence to sustain them.

Charge III and Specification 2 thereof

Under this charge and specification, accused was found guilty of violation of Article of War 96 in that between March and December, 1947, he sold or caused to be sold to Alice Ishigami, a Japanese national, about 15 cartons of American cigarettes in violation of Circular 26 of the Far East Command. Accused was Post Exchange Officer of the 8th Cavalry Regiment Post Exchange and gave Alice Ishigami permission to purchase cigarettes from that exchange. Pursuant to this permission, she bought about 15 cartons of American cigarettes between March and September,

"or maybe October," 1947. Circular 26 forbade the sale, by "American personnel," of American goods to "other than American personnel or authorized personnel" (underscoring supplied). The circular defined the term "American personnel" as including "all persons of whatever nationality who are subject to military law as defined in Article of War 2" (underscoring supplied).

Alice testified, in reference to a question as to where she was employed "in March, 1947," that she was employed by the 8th Cavalry Regiment Red Cross. This testimony stands uncontradicted in the record of trial. Because of the absence of a showing as to when such employment was terminated, if it was terminated, we cannot assume that Alice was not employed by the Red Cross at the time she bought the cigarettes from the 8th Cavalry Regiment Post Exchange (par 112a, MCM 1928). Since it appeared that Alice was a resident of Tokyo, it may be considered that she was not "accompanying" the armies of the United States without the territorial jurisdiction of the United States so as to be subject to the Articles of War for this reason (AW 2(d); CM 329933, Miquiabas, Memorandum). However, if she was employed by a Red Cross unit attached to the 8th Cavalry Regiment she was clearly "serving with" the armies of the United States without the territorial jurisdiction and was accordingly subject to military law under Article of War 2(d) while so employed (OP JAG (1917), Vol 1, p 278; CM Miquiabas, supra; see also Geneva (Red Cross) Convention of 1929, Art 10, TM 27-251, p 135). Alice, then, so long as she maintained her status as a Red Cross employee, was a person coming within the definition of "American personnel" found in Circular 26 and a sale to her of American cigarettes, while she was employed by the 8th Cavalry Regiment Red Cross, would not have been prohibited by the circular. We conclude, therefore, that as a matter of law the evidence adduced with respect to the specification here in question is as consistent with accused's innocence thereof as it is with his guilt and that the findings of guilty of such specification and the charge under which it is laid must be reversed. We have noted that Alice Ishigami had no "PX card" but as to this we deem it sufficient to say that accused was not charged herein with a violation of whatever regulation or directive there might be restricting the sale of post exchange items to persons holding post exchange cards.

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

Robert B. Silvers, Judge Advocate

Gilbert G. Ackroyd, Judge Advocate

Harley A. Lamming, Judge Advocate

JAGK - CM 330683 1st Ind

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

TO: Commanding General, 1st Cavalry Division, APO 201, c/o Postmaster, San Francisco, California

1. In the case of First Lieutenant Edward C. Snyder (O-1019541), Headquarters 2d Cavalry Brigade, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

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

(CM 330683).

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.

3 JUN 1948

JAGQ - CM 330684

UNITED STATES	)	NINTH AIR FORCE
v.	)	Trial by G.C.M., convened at Austin, Texas, 25 March 1948. Dismissal and confinement for one (1) year.
Captain ORLAND WAGES (AO 560443), Headquarters and Headquarters Squadron, 313th Airdrome Group.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Orland Wages, Headquarters Squadron, 313th Airdrome Group, did, at Bergstrom Air Force Base, Austin, Texas, on or about 16 July 1947, feloniously take, steal and carry away: one (1) silver teapot, one (1) silver coffee pot, one (1) silver cream pitcher, one (1) silver sugar bowl and one (1) silver tray, comprising in all one (1) five-piece Sheffield Silver Tea Service of a total value of about $588.00, the property of Bergstrom Air Force Base Officers' Mess.

Accused pleaded not guilty to the Charge and Specification and was found guilty of the Charge and of the Specification "except the figures $588.00, substituting therefor the figures $558.00, of the excepted figures not guilty, of the substituted figures guilty". No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

During the period May through July 1947, accused was the officer in charge of the officers mess and club at Bergstrom Field, Austin, Texas (R 24).

In his capacity as club officer he purchased a six piece "solid silver" tea service from Mrs. Harper for $588.00 (R 16-18). Accused paid for the silver service with a check drawn on club funds (Pros. Ex. 3; R 29).

On or about 1 July 1947, accused was transferred with his organization to McChord Field, Washington (R 25). After his departure the Board of Governors of the Bergstrom Field Officers' Club inventoried the club property and found that a tea service was missing (R 26) whereupon Colonel Daniel, Chairman of the Board of Governors, wrote a letter to accused asking him if he knew where the tea service was presently located (R 27). As the result of accused's reply thereto a further search of the officers' mess and interrogation of the club members and their wives failed to locate the tea service and the matter was then referred to the commanding officer of the field for further action (R 28).

On 13 January 1948, Major Ramsey, legal officer at McChord Field, interviewed accused concerning the missing tea service and accused advised him that as far as he knew the service was in the storage room at Bergstrom Field Officers Club (R 62). As Major Ramsey was entering his car after terminating the interview with accused the latter said "Major, I might as well tell you, I got the tea set" (R 64). Major Ramsey then asked accused if he would be willing to make a statement and when accused informed him that he would they rode to Major Ramsey's office where the 24th Article of War was read and explained to accused (R 66). Accused then made a written statement to the effect that he had purchased a solid silver tea set consisting of six pieces from Mrs. Harper for the Bergstrom Field Officers Club and the set was listed on the books of the club in the "party expense" account; that on the date of the last bingo party at the club, the set was "marked off" the books (R 69); that as he was about to be transferred and since the Board of Governors had not authorized the purchase of the set he felt he would be asked to pay for it (R 70); that two or three days before leaving Bergstrom Field at about 2200 hours he noticed that the door to the storeroom of the club where the tea service was kept was open, so he decided to exchange a "silver plated" tea set which belonged to him personally for the solid silver set which belonged to the club. The exchange was consummated and he took five pieces of the solid silver set from the storeroom of the club, packed it in his trunk and carried the set with him when he left for McChord Field (R 70). Thereafter he delivered the solid silver set to a Mrs. Sanders in Lubbock, Texas, with instructions to sell the same for him. He admitted receiving the letter from Colonel Daniel regarding the missing set and that he replied to this inquiry stating that the set

had been kept in the club but denied any knowledge of its present location (R 71). Accused further stated that he intended to send the proceeds from the sale of the tea service less the value of the set he had substituted therefor to the Bergstrom Officers Club with an explanation of the entire circumstances (R 71). Accused further stated to the investigating officer that he had received a check in the amount of $400 from Mrs. Sanders which sum represented the proceeds from the sale of the tea set but that he had returned the check to her (R 80). An agent of the Criminal Investigation Division obtained the silver service from Mrs. Harvey, who had purchased it from Mrs. Sanders; it was introduced in evidence as Prosecution Exhibit 1 (R 83) and identified by Mrs. Harper as the tea service which she had sold to accused on 4 May 1947, and which was paid for by a check drawn on the funds of the Bergstrom Officers Club. Mrs. Harper further testified that the present value of the set would be in excess of the amount for which it sold on 4 May 1947, and that in any event it would be far in excess of $50 (R 13). She further testified that the value of the "odd dish" which was not taken by accused would be about $30.00 (R 11, 12, 21).

4. Evidence for the defense.

Mr. Rex Jackson, Assistant to the Dean of Admissions, University of Texas, Mr. R. Mayo King, proprietor of the Kings Record Shop, Austin, Texas, Mr. Frank J. Damelio, civilian steward, Officers Club, Bergstrom Air Force Base, Mr. Leon Stone, Credit Manager, Austin National Bank, Austin, Texas, Captain G. A. Northington, Fiscal Officer, Bergstrom Air Force Base, Major E. H. Haufman, Finance Officer, Bergstrom Air Force Base, Major Joseph B. Ramsey, Wing Legal Officer, McChord Air Force Base and James E. Duke, Jr., Colonel, USAF, Retired, former Commanding Officer of Bergstrom Air Force Base, all testified that they were well acquainted with accused; that his general reputation was good and that he was an efficient officer (R 102-120).

After being duly advised of his rights as a witness accused elected to remain silent (R 133-134).

5. The evidence is clear and uncontradicted that accused in his capacity as club officer purchased a solid silver tea service consisting of six pieces with club funds and that the service was entered on the books of the club and used by that organization at social functions. Thereafter, accused immediately prior to being transferred from Bergstrom Field entered the storeroom of the club where the tea service was kept, exchanged a "silver plated" service of his own for the solid silver service which belonged to the club, carried the club property to his

barracks, packed the same in his trunk, and took it with him to his new station. Further, when the inventory showed that a tea service was missing and he was asked to assist in locating it he denied any knowledge of its present location and it was not until a formal investigation was instituted at McChord Field that he finally admitted possession of the property. There is no question but that every element of the offense of larceny of the silver service by accused was proved beyond all reasonable doubt. In fact accused admits the taking and carrying away of the property and his only defense was that he intended to repay the club "the difference" between the value of the set which he had taken and the one he had left in its place. The court was fully justified in disbelieving the contention of the defense in view of accused's actions in denying knowledge of the location of the club property and in directing its sale by a third party.

The contention of defense counsel that accused could not be found guilty of larceny inasmuch as he was the "officer in charge" of the officers club and as such had "possession" as distinguished from mere "custody" of the club property is without merit (CM 318296, Mayer, 67 BR 211, and cases therein cited).

The action of the court in refusing to receive the written confession of accused in evidence and in allowing the party who obtained the confession to refresh his memory from the statement and testify as to what accused told him at the time of taking the confession was error (CM 293448, Yancy, 15 BR (ETO) 225). The written confession, when shown to be voluntary and made after accused's rights under the 24th Article of War were explained to him should have been received in evidence. However, the failure of defense to object to such oral evidence constituted a waiver of the objection (CM 246548, Maxwell, 2 BR (ETO) 270; Par. 116a, MCM 1928)

6. Department of the Army and Air Force records show that accused is 32 years of age and presently single. He attended Texas Technological College for 3½ years where he majored in English. He enlisted in the Army, 22 November 1940, and was commissioned a Second Lieutenant, Army of the United States, 24 June 1942, following his graduation from Officer Candidate School, Army Air Force Technical Training Command, Miami Beach, Florida. He was promoted to First Lieutenant, Air Corps on 22 February 1943, to First Lieutenant, Army of the United States, 17 December 1943, to Captain, Air Corps, 1 June 1944, and to Captain, Army of the United States, 1 August 1944. On 13 November 1947, he was commissioned a Major in the Officers Reserve Corps. His efficiency reports include four ratings of "Excellent" and two ratings of "Superior", in addition to one rating of "Unknown". His military decorations and citations include the American

Defense, American Theatre, European Theatre and World War II Victory medals and a personal commendation from General Eaker. Prior to entering the military service, and while attending college, accused served as a part time stock and floor clerk and as an assistant cook in Lubbock, Texas, from September 1936 until September 1940.

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

On Leave
_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 330684 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 11 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 Captain Orland Wages (AO 560443), Headquarters and Headquarters Squadron, 313th Airdrome Group.

2. Upon trial by general court-martial this officer was found guilty of larceny of five pieces of a six-piece silver Sheffield tea service of a value of about $558.00, property of the Bergstrom Air Force Base Officers' Mess, in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

4. Accused, while serving as officer in charge of the Officers' Mess and Officers' Club at Bergstrom Field, Texas, purchased a six-piece "solid silver" tea service from an antique dealer on 5 May 1947, for $588.00 and paid for the service with a check drawn on the Officers' Club account. Following accused's transfer from Bergstrom Field to McChord Field, Washington, in July of 1947, the Board of Governors of the Officers' Club discovered during an inventory that the tea service was missing. The Chairman of the Board wrote to accused about 11 August 1947, inquiring about the missing tea set. As a result of accused's answer thereto, a thorough search was made of the Officers' Mess facilities, and many of the club members and their wives were interrogated, in an effort to locate the service. When these efforts proved fruitless, the matter was turned over to the C.I.D. While being interviewed by the legal officer at McChord Field on or about 13 January 1948, accused first insisted that to the best of his knowledge the tea set was in the storage room in the Bergstrom Field Club. Before the interview had ended, however, accused stated, "Major, I might as well tell you, I got the tea set". Accused thereafter stated that he exchanged a "silver plated" tea set which belonged to him personally for the solid silver set and then

left the solid silver set with a Mrs. Sanders in Lubbock, Texas, for the purpose of having it sold. Accused further stated he had received a check in the amount of $400 from Mrs. Sanders but that he had returned the check to her. He stated that he intended to reimburse the club. The tea service was subsequently recovered from a Mrs. Harvey of Lubbock, Texas, who had purchased it from Mrs. Sanders. The complete tea set consisting of six pieces was of a value of at least $588.00 and the five items taken by accused were of a value of approximately $558.00.

For the defense, numerous civilian and military witnesses testified that the accused enjoyed a good reputation and was an efficient officer. Accused elected to remain silent.

5. Department of the Army and Air Force records show that accused is 32 years of age and presently single. He attended Texas Technological College for 3½ years where he majored in English. He enlisted in the Army on 22 November 1940, and was commissioned a Second Lieutenant, Army of the United States on 24 June 1942, following his graduation from Officer Candidate School. He was promoted to First Lieutenant, Air Corps, on 22 February 1943, to First Lieutenant, Army of the United States, 17 December 1943, to Captain, Air Corps, 1 June 1944, and to Captain, Army of the United States, 1 August 1944. On 13 November 1947, he was commissioned a Major in the Officers Reserve Corps. His efficiency reports include four ratings of "Excellent" and two ratings of "Superior", in addition to one rating of "Unknown". His military decorations and citations include the American Defense, American Theatre, European Theatre and World War II Victory medals and a personal commendation from General Eaker. Prior to entering the military service, and while attending college, accused served as a part time stock and floor clerk and as an assistant cook in Lubbock, Texas, from September 1936 until September 1940.

6. 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.

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

(GCMO 124, 23 June 1948)

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

JAGQ - CM 330698

10 JUN 1948

UNITED STATES)
v.)
Captain ELMER E. BRYAN (0-1796227), CMP, 1100-4 Detachment, Atlantic Division, Air Transport Command, Presque Isle Air Force Base, Presque Isle, Maine.)

ATLANTIC DIVISION
AIR TRANSPORT COMMAND

Trial by G.C.M., convened at Westover Air Force Base, Massachusetts, 19-22 April 1948. Dismissal and confinement for one (1) year and eight (8) months.

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. In a common trial with Staff Sergeants Woodrow W. Tatman and Alfred T. Parter, accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 83rd Article of War.

Specification: In that Captain Elmer E. Bryan, 1100-4 Detachment, Atlantic Division, Air Transport Command, did, at or near Van Buren, Maine, on or about 11 November 1947, through neglect suffer a certain motor vehicle, to wit, staff car sedan Number 119300, military property belonging to the United States, to be damaged in the approximate amount of $330.00 on a public highway between Presque Isle, Maine, and Van Buren, Maine, by permitting the mentioned vehicle to be wrongfully driven by Staff Sergeant Woodrow W. Tatman at an excessive rate of speed, as a consequence of which the vehicle went out of control and turned over.

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

Specification: In that, Captain Elmer E. Bryan, 1100-4 Detachment, Atlantic Division, Air Transport Command, did, at Presque Isle, Maine, on or about 14 November 1947, with intent to deceive the Commarding Officer of the Presque Isle Detachment 1100-4 (also known as 1100-4PR Detachment),

officially report to the said Commanding Officer purported details pertaining to the questioning by Staff Sergeant Alfred T. Barter of two suspects and their movements in connection with the identity of the occupants of staff car sedan Number 119800 at the time it was damaged on 11 November 1947, and pertaining to the questioning by Staff Sergeant Alfred T. Barter of Sergeant Scott who answered thereto that he, Sergeant Scott, returned to Presque Isle Air Force Base with the mentioned staff car, which report was known by the said Captain Elmer E. Bryan to be untrue in that at the time of the mentioned questioning the said Captain Elmer E. Bryan knew that the two suspects in question had no connection with the accident and knew that Sergeant Scott did not return to the base with the mentioned staff car.

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

Specification 1: In that, Captain Elmer E. Bryan, 1100-4 Detachment, Atlantic Division, Air Transport Command, did, at Presque Isle, Maine, on or about 11 November 1947, wrongfully take and use without proper authority, for his own personal benefit or pleasure, a certain motor vehicle, to wit, staff car sedan Number 119800, property of the United States of a value in excess of $50.00.

Specification 2: In that, Captain Elmer E. Bryan, 1100-4 Detachment, Atlantic Division, Air Transport Command, being at that time the immediate Commanding Officer, did, at Presque Isle, Maine, on or about 11 November 1947, wrongfully and in violation of Army Regulations fail to make a report of an accident to a certain motor vehicle, to wit, staff car sedan Number 119800, property of the United States, to the prejudice of good order and military discipline.

Specification 3: In that, Captain Elmer E. Bryan, 1100-4, Detachment, Atlantic Division, Air Transport Command, did, at Presque Isle, Maine, on or about 12 January 1948, in his testimony before a Board of Officers, duly appointed pursuant to paragraph 13, Special Orders Number 6, Headquarters, Atlantic Division, Air Transport Command, dated 9 January 1948, make under oath statements in substance as follows: That he did not know who damaged a certain staff car Number 119800 in an accident on 11 November 1947, and that his first knowledge of the accident was on 12 November 1947 at 0755, which statements were known by the said Captain Elmer E. Bryan to be untrue in that he was an occupant at the time that the mentioned vehicle turned over and was damaged as a result thereof and in-

that he had knowledge on 11 November 1947 of the facts of the accident.

He pleaded not guilty to and was found guilty of all Charges and Specifications. 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, remitted four months of the confinement at hard labor imposed and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Captain Elmer E. Bryan, the accused herein, was the Provost Marshal at Presque Isle Air Force Base, Presque Isle, Maine (R 16) and Staff Sergeant Woodrow W. Tatman, also an accused at this common trial, was the Police and Prison Sergeant of the same Air Force installation (Pros. Ex. 12). At about 0800 on 11 November 1947 an Army staff car with bumper number USA 5 and registration number 119800 was dispatched to Captain Bryan in his capacity as Provost Marshal (R 13, 84; Pros. Ex. 1). Sergeant Malcolm M. Scott, Desk Sergeant in the Provost Marshal's Section, drove this vehicle to the Northeastland Hotel, Presque Isle, Maine, in the early evening of 11 November 1947, to investigate a reported disturbance. The car was in good condition (R 16, 17). Sergeant Scott found no disturbance at the hotel and seeing accused and Sergeant Tatman there, he inquired and learned that they were aware of no disturbance. Sergeant Tatman asked Scott if he had the staff car. When Scott replied that he did and that it was parked in the rear of the hotel, Tatman told Scott to leave the vehicle and return to the base in a taxicab (R 18). Scott replied that he had a date and that he would walk back. During this conversation accused was in the group. Scott walked to his girl friend's house and did not return the staff car to the base (R 19).

According to Mr. Roland R. Gagne, a civilian, he met accused and Sergeant Tatman on the night of 11 November 1947 in Presque Isle. Together with another civilian and three girls, Mr. Gagne, Sergeant Tatman and accused started to a dance at Van Buren, Maine, in an Army sedan, described as a 1940 or 1941 Mercury or Ford. Accused, Tatman and one of the girls occupied the front seat while Mr. Gagne, the other civilian and the other two girls rode in the rear seat. Sergeant Tatman was driving the vehicle.

According to the civilians in the car it was dark at the time, the road was wet or icy, and the vehicle was proceeding "pretty fast" or "about fifty (50) miles an hour". The maximum speed limit in the State of Maine was shown to be forty-five (45) miles per hour (Pros. Ex. 7).

Before reaching Van Buren and while the vehicle was being driven in this manner by Sergeant Tatman, the sedan skidded on a curve and turned over, finally coming to rest in a potato field (R 130-131; Pros. Exs. 3, 4, 5). After the sedan was righted the party returned to Presque Isle. Following the incident accused told Mrs. Janet Turner "to keep her mouth shut" and "not to say anything about the incident" (Pros. Ex. 3), and both accused and Sergeant Tatman mentioned to Miss Gloria Daigle, another passenger, that it would be best not to mention anything about the accident (Pros. Ex. 5). At Presque Isle everyone left the car except Mr. Gagne and Sergeant Tatman. The latter parked the sedan on a side street and the two went to the Northeastland Hotel. Approximately an hour later Gagne obtained permission from Sergeant Tatman and drove the vehicle to Caribou, Maine and parked it behind the hotel where he stayed (R 132-133). The sedan was discovered on the following morning by Police Officer John E. Doak, parked on Hershell Street in Caribou (Pros. Ex. 7). The windows were broken and the top was "caved in". Another police officer reported the discovery of the automobile to Presque Isle Air Base (Pros. Ex. 7).

Army authorities viewed the vehicle bearing bumper No. 5 and registration No. 119800 on 12 November 1947 in Caribou. The top of the vehicle was smashed, it had one flat tire, both rear fenders were bent in against the body, the right front fender was smashed and the windshield and other glass on the sedan was broken (R 83-88; Pros. Exs. 11 and 14). Captain George J. Ather, the Base Ordnance Officer, estimated the damages to the vehicle as $330.58 (R 83 to 88; Pros. Ex. 14).

At approximately 0030 12 November 1947, Sergeant Tatman returned to the Air Base in a taxicab and accused similarly arrived by taxicab at about 0130 (R 20, 21). Sergeant Malcolm M. Scott, who had delivered the vehicle to Sergeant Tatman and accused earlier that evening, was on duty as gate guard when Sergeant Tatman arrived. He asked Sergeant Tatman about the staff car and the latter stated he would let him know about it. Ten or fifteen minutes later Tatman called Scott on the telephone and said: "We rolled the staff car over. I will talk to you about it in the morning". About 0800 hours that morning, Sergeant Tatman requested of Sergeant Scott that he make a statement to the effect that Scott parked the vehicle in front of the Provost Marshal's office at the Air Base at approximately 2100 following his investigation of the disturbance at the Northeastland Hotel. Accused was present during this conversation and Sergeant Scott made the statement as requested. Sergeant Tatman and accused said following Scott's writing of the statement, "That will be good. Stick to the story and they will get nothing on us. Stick to the story and that will get us out of it". Later the same day, in the presence of Sergeant Tatman and accused, Sergeant Scott signed the statement (R 21-23; Pros. Ex. 2).

The statement was subsequently made a part of a "Provost Marshal's Investigative Report" bearing the date 14 November 1947, approved and forwarded by accused as Officer-in-Charge of the Provost Marshal's Section (R 53; Pros. Ex. 11). On 12 January 1948 this report or a copy thereof, with Sergeant Scott's statement as an inclosure, was submitted by accused to a Board of Officers appointed to investigate the damage. Additionally, it was stated on the report itself that copies were sent to the Commanding Officer, Ordnance Officer and Provost Marshal files. Official reports from accused normally were received by the Base Adjutant (R 89). The Provost Marshal's Investigative Report of the incident, signed by accused, recited that Sergeant Scott and two suspects in the case had been questioned and concluded with the phrase, "Status of case: Pending".

Captain Keith Swisher, the Base Adjutant, did not receive the required report of accident on Standard Form No. 26, involving staff car No. 119800 in compliance with paragraph 25, AR 850-15, 1 August 1945, of which regulation the court took judicial notice (R 89). He did on 12 January 1948, however, receive a ground safety report which would normally come from the Provost Marshal's Office. In searching for the driver's report of accident, Captain Swisher found the ground safety report. He compared the signature of accused on the ground safety report with the signature of accused on the Provost Marshal Investigative Report (Pros. Ex. 11) and testified that in his opinion they were the same. The two exhibits were then examined by the court (R 91) for comparison of the signatures, and the ground safety report was introduced in evidence (R 96; Pros. Ex. 15). This report dated 12 January 1948 and signed by accused states with respect to the accident on 11 November 1947, involving staff car No. 119800:

> "This Station does not have any particulars surrounding this accident as Staff Car was found in town of Caribou which is approximately 15 miles from the Air Base. Car was assigned to Provost Marshal Section.
> Investigation of subject accident not completed."

While a witness under oath on 12 January 1948, before a Board of Officers regularly convened to investigate and determine responsibility for the accident to Government vehicle 119800 on 11 November 1947 (Pros. Ex. 8), accused, after being advised of his rights under Article of War 24, testified under oath as follows:

> "Q. Capt. Bryan, at what time were you first acquainted with the fact that this car had been in an accident?
> A. About 7:55 on the morning of the 12th of November, or somewhere around that time, Sgt. Barter called."

"Q. Who do you think turned the car over?
A. Well, I wish I knew.

"Q. Do you think that it was someone in the Military Police Section?
A. It's possible. It could have been. The car wasn't locked." (Pros. Ex. 10).

4. Evidence for the Defense.

After being advised of his rights, accused elected to remain silent.

5. Specification and Charge I; Specification 1, Charge III.

Accused was charged in the Specification and Charge I with suffering through neglect a Government staff car to be damaged on or about 11 November 1947, by permitting the vehicle to be wrongfully driven by Sergeant Tatman at an excessive rate of speed, as a consequence of which the vehicle went out of control and overturned. In Specification 1 of Charge III, he is charged with wrongfully taking and using the vehicle in question on the same date for his own personal benefit or pleasure. Viewing the competent evidence chronologically it is clear that the vehicle was dispatched to the accused on 11 November 1947 as Provost Marshal for "Base Duties" (Pros. Ex. 1). Thereafter, on the evening in question, Sergeant Tatman ordered Sergeant Scott to leave the staff car at the Northeastland Hotel. Accused was present when this order was given. Subsequently, Sergeant Tatman, accused and five civilians used the vehicle to go to a dance at Van Buren, Maine. In this connection, paragraph 28c, AR 850-15, 1 August 1945, provides:

"Motor vehicles will be used only for official business including the special uses listed in paragraph 29."

The only evidence of record showed that this vehicle was dispatched for "Base Duties" and not for any of the "special uses" mentioned in paragraph 29 of the cited regulation. Accused, a military police officer of long standing, is charged with knowledge of the Army Regulation, supra, and the evidence clearly establishes a wrongful use as alleged (CM 267639, Tressler, 44 BR 27). The evidence further showed that it was a dark night, that the roadway was either wet or icy, and that the car was being driven "about fifty (50) miles per hour" or exceedingly fast under these circumstances. As previously stated, the maximum speed limit in the State of Maine, for even the most favorable of driving conditions, was forty-five (45) miles per hour. Undoubtedly, as a result of the speed at which the vehicle was travelling, considered in the light of the poor road conditions, the darkness and the

overcrowding of the car, the vehicle skidded, failed to negotiate a curve and overturned.

The 83rd Article of War provides in pertinent part, that:

> "Any person subject to military law who *** through neglect, suffers to be *** damaged, *** any military property belonging to the United States shall *** suffer such punishment as a court-martial may direct."

Neglect is defined as follows:

> "To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carlesssness or imprudence, but simply an omission to do or perform some work duty or act." (Bouviers Law Dictionary, Unabridged, Rawles Third Revision, Vol. 2, p. 2312). (Underscoring supplied).

With reference to Article of War 83, the above definition has been determined applicable in military tribunals (CM (ETO) 393 Caton 1 BR (ETO) 325).

In paragraph 143, Manual for Courts-Martial, 1928, it is stated that "the *** neglectful sufferance specified by the Article may consist in *** permitting it to be *** injured by other persons".

As the senior and only commissioned officer present in the vehicle at the time of the incident, accused was clearly chargeable with the vehicle's safe operation and with protecting this public property from damage through negligence or through the commission of an unlawful act. The fact that the vehicle was dispatched to accused and was being operated by a subordinate member of his own command only serves to magnify and crystallize his legal responsibility. It was accused's duty, especially under all of the circumstances shown, to see that the staff car was properly driven, through the exercise of sufficient supervisory control. By failing to perform that duty and thus permitting the vehicle to be damaged by the negligent driving of Sergeant Tatman, accused clearly became chargeable with a violation of the above Article of War (CM (ETO) 393 Caton, supra).

It was properly established by the evidence that the amount of damage to the vehicle was $330.58.

Specification 2, Charge III.

Accused was charged in this specification with wrongfully failing to make a report of the accident to the staff car on or about 11 November 1947 as required by Army Regulations.

Paragraph 25, AR 850-15, 1 August 1945, of which the court took judicial notice provides in pertinent part:

> "25. Accidents. Action to be taken in case of an accident will be as follows:
>
> a. By driver
>
> (1) In case of injury to person or damage to property the driver of a vehicle will *** at the scene of the accident fill out Standard Form 26 and deliver it to his commanding officer as soon as possible after the accident. *** In any event, if he has knowledge of the accident, the immediate Commanding Officer has the responsibility for submission of a report within 48 hours after the accident occurs". (Underscoring supplied).

Captain Swisher, the Base Adjutant, testified that in the normal course of business he received these reports and that no accident report was ever made by either Tatman, who was the driver, or by accused, as required by the foregoing Army Regulation. The only report ever received in his office was a "Ground Safety Report" submitted on 12 January 1948 (Pros. Ex. 15). The evidence shows beyond any reasonable doubt that accused wrongfully failed to make the report of accident required by Army Regulations as charged in this specification. In view of the subterfuge resorted to by accused and Sergeant Tatman for several months to conceal their part in the incident, as well as the actual identity of the driver, it could not reasonably be contended that the record presents any conflict as to whether the report was ever submitted much less within the time required by the regulation.

Specification and Charge II.

In this Charge and Specification it is alleged that accused on or about 14 November 1947, with intent to deceive his commanding officer, made a false official report with respect to the accident to the staff car in violation of Article of War 95.

A "Provost Marshal Investigative Report" undoubtedly signed by accused as officer in charge, Provost Marshal Investigation Section, was

received in evidence (Pros. Ex. 11). This report dated 14 November 1947 showed on its face that a copy thereof was furnished to the Commanding Officer and the Base Adjutant testified that the report was kept in his office safe. Additionally, Lieutenant Devlin, Recorder of a Board of Officers appointed to investigate the accident, testified that accused gave him the report, or a copy thereof at the time accused was being questioned by the Board (R 49, 50; Pros. Ex. 10). The evidence showed that the report contained a statement by Sergeant Scott which was false and which accused knew to be false for the reason that he was present when Sergeant Tatman told Scott to leave the car at the Northeastland Hotel. Also, later that evening, accused was in the car with Tatman and the civilians on the trip to Van Buren when the vehicle was damaged. The evidence clearly indicated additionally, that accused was present on the following morning when Tatman asked Scott to make the false statement, and later that same day when Scott signed the false statement. This being true, accused also well knew that the two soldiers allegedly being investigated as possible suspects in the taking of the car could not have had anything to do with the wrongful taking. In reporting the details of the questioning of these suspects and of Sergeant Scott to the Commanding Officer, it is manifest that he did so with intent to deceive the Commanding Officer by withholding from him the true facts with respect to the accident. Such conduct was clearly unbecoming an officer and a gentleman and violative of Article of War 95. This is true notwithstanding the fact that the investigation was actually made by Sergeant Barter, a subordinate. When accused approved and forwarded the report as officer in charge, Provost Marshal Investigation Section, he consented to and acknowledged the facts to which he subscribed (CM 320478, Vance, 71 BR 430).

The only question for consideration by the Board of Review with respect to this Charge and Specification is whether the proof sustains the allegation that accused made the report in question. Prosecution's Exhibit 2, the false statement made by Sergeant Scott and witnessed by accused, was in evidence and Scott could identify accused's signature as a witness (R 23). Using this document as a proved signature of accused, the prosecution asked Lieutenant Devlin to compare the alleged signature of accused on the Provost Marshal Investigative Report with the proved signature. Lieutenant Devlin testified that they appeared to have been made by the same person (R 52). Thereafter the prosecution submitted Prosecution's Exhibits 2 and 11 to the court for a comparison of the signatures. After the court had examined the two exhibits (R 52), Prosecution's Exhibit 11, the "Provost Marshal Investigative Report" dated 14 November 1947, was received in evidence (R 53). While the testimony of Lieutenant Devlin had little or no evidentiary value, he not having qualified as a handwriting expert or as one having prior knowledge of the signature of accused, the court was authorized to make

its own comparison of the proved signature appearing on Prosecution's Exhibit 2 with the signature appearing on Prosecution's Exhibit 11 and conclude as fact that the accused signed the Provost Marshal Investigative Report (Pros. Ex. 11) (28 USC; In re Goldberry, 91 Fed. 2d 996; CM 320478, Vance, supra; CM 248919, Christ, 31 BR 385). This is corroborated by the fact that the accused was the Base Provost Marshal at all times relevant, that he submitted the report, or a copy thereof to the Board of Officers investigating the accident, that in the normal course of procedure the Base Provost Marshal would submit such reports to the Base Adjutant, and that the report was retained in the safe of the Base Adjutant (R 134). Delivery of such a report to the Base Adjutant is in effect delivery to the Base Commander (CM 224049 Burnham, 14 BR 48).

Specification 3, Charge III.

The accused in this specification is charged with making false statements under oath to a Board of Officers duly convened at Presque Isle, Maine on or about 12 January 1948. The evidence establishes that the Board was duly convened by competent authority, that accused, after being warned of his rights, was sworn and testified in substance that he did not know who damaged the staff car and that his first knowledge of the accident was on 12 November 1947 at 0755. Repetition of the evidence heretofore outlined is unnecessary to show conclusively that these statements by accused were false, that accused knew them to be false and that they were given deliberately by him with intent to deceive, fully realizing that it was in the course of an official investigation ordered by his commanding general. This is substantiated by the "Ground Safety Report" (Pros. Ex. 15), submitted by accused on the same day on which he testified before the Board of Officers. In this report accused disclaimed any knowledge of the accident involving the staff car and stated it was still under investigation. Knowingly making a false official statement is an offense long recognized as a violation of the 95th Article of War (CM 232346, Staples, 19 BR 64) and a fortiori is a violation of the 96th Article of War.

6. Department of the Army records show that accused is 29 years of age, married and has one child. He completed two and one-half years of high school before entering the Army. He enlisted in the Army on 10 February 1937 at Williamsport, Pennsylvania, and was discharged on 9 February 1940. During this enlistment he was promoted to Private First Class. He reenlisted at New York City, New York, on 10 June 1940 and served until 5 November 1942 attaining the grade of Sergeant. He was discharged on 5 November 1942 to accept a commission as Second Lieutenant

Corps of Military Police, Army of the United States. He was promoted to First Lieutenant on 5 June 1943 and to Captain on 15 May 1944. He was commissioned a Major, Corps of Military Police (Reserve) on 23 July 1947. He served twenty-five months in the European Theater of Operations and is entitled to wear an American Defense Medal with star, Good Conduct Medal, the European and American Theater Ribbons and the Victory Medal. He has no previous convictions by courts-martial either as an enlisted man or officer. He was reprimanded under the provisions of Article of War 104 on 1 October 1946 by the Commanding Officer, 1377th AAF Base Unit, Westover Field, Massachusetts, for failing to properly safeguard prisoners thereby permitting two prisoners to escape. His efficiency reports include six ratings of "excellent", two ratings of "very satisfactory" and one rating of "unknown".

7. 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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 83 and 96 and mandatory upon conviction of a violation of Article of War 95.

On Leave, Judge Advocate

Wilmot T. Brayton, Judge Advocate

A. D. Rane, Judge Advocate

JAGQ - CM 330698 1st Ind JUN 17 1948

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Elmer E. Bryan (0-1796227), CMP, 1100-4, Detachment, Atlantic Division, Air Transport Command, Presque Isle Air Force Base, Presque Isle, Maine.

2. In a common trial with Staff Sergeants Woodrow W. Tatman and Alfred T. Barter this officer was found guilty by general court-martial of suffering through neglect a military vehicle to be damaged in the amount of $330.00, on or about 11 November 1947, in violation of Article of War 83; of making a false official report to his commanding officer with intent to deceive, on or about 14 November 1947, in violation of Article of War 95; of wrongfully taking and using without proper authority for his own personal benefit and pleasure, an Army vehicle of a value in excess of $50.00, on or about 11 November 1947, of wrongfully failing to make a report of a motor vehicle accident as required by Army Regulations, on or about 11 November 1947, and of wrongfully and knowingly making a false statement under oath to a Board of Officers, on or about 12 January 1948, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two (2) years. The reviewing authority approved the sentence but reduced the period of confinement to one (1) year and eight (8) months, 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 approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

4. Accused, the Provost Marshal of the Presque Isle Air Force Base, Presque Isle, Maine, and Sergeant Tatman, procured an Army sedan from a Sergeant Scott, one of accused's subordinates in the town of Presque Isle. The vehicle was dispatched to accused as Provost Marshal for "Base Duties". While enroute to a dance in Van Buren, Maine, this vehicle skidded on a curve and overturned, causing it to be damaged in the amount of approximately $330.00. There were five civilians in the car in addition to accused and Sergeant Tatman, who was driving. The sedan was traveling at a speed of approximately fifty (50) miles per hour on a wet or icy highway at the time of the accident and it was dark. The use of the vehicle for

the purpose of attending the dance was unauthorized. After the vehicle was righted, it was driven to Presque Isle. Later, one of the civilians drove it to Caribou, Maine, where it was discovered by the local police. Accused and Sergeant Tatman returned individually to the Air Base by taxicab on the morning of 12 November. Sergeant Scott who had delivered the sedan to Tatman and accused earlier the preceding evening was asked by Sergeant Tatman in the presence of accused to say that he had returned the vehicle to the Air Base and parked it in front of the Provost Marshal's office. He subsequently signed a false statement to that effect in the presence of accused. This statement was forwarded by accused on or about 14 November 1947 to the Base Commander as an inclosure to the Provost Marshal's Investigative Report. The same report recited that there were two suspects being questioned for the purpose of determining who was responsible for damaging the vehicle, and concluded with the phrase: "Status of Case: Pending". No report of the accident was made by either Sergeant Tatman or accused on Standard Form No. 26, as required by paragraph 25, AR 850-15, 1 August 1945. Accused appeared before a Board of Officers convened on or about 12 January 1948, to determine responsibility for damage to the vehicle. As a witness before this Board, and while testifying under oath, accused stated that he knew nothing of the accident until approximately 7:55 on the morning of 12 November 1947 when Sergeant Barter told him of it, and also that he wished he knew who overturned the vehicle.

After being advised of his rights, accused elected to remain silent.

5. Department of the Army records show that accused is 29 years of age, married and has one child. He completed two and one-half years of high school before entering the Army. He enlisted in the Army on 10 February 1937 at Williamsport, Pennsylvania, and was discharged on 9 February 1940. During this enlistment he was promoted to Private First Class. He reenlisted at New York City, New York, on 10 June 1940 and served until 5 November 1942, attaining the grade of Sergeant. He was discharged on 5 November 1942 to accept a commission as Second Lieutenant, Corps of Military Police, Army of the United States. He was promoted to First Lieutenant on 5 June 1943 and to Captain on 15 May 1944. He was commissioned a Major, Corps of Military Police (Reserve) on 23 July 1947. He served twenty-five months in the European Theater of Operations and is entitled to wear an American Defense Medal with star, Good Conduct Medal, the European and American Theater Ribbons and the Victory Medal. He has no previous convictions either as an enlisted man or officer. He was reprimanded under the provisions of Article of War 104 on 1 October 1946 by the Commanding Officer, 1377th AAF Base Unit, Westover Field, Massachusetts, for failing to properly safeguard prisoners thereby permitting two prisoners to escape. His efficiency reports include six

ratings of "excellent", two ratings of "very satisfactory" and one rating of "unknown".

6. Staff Sergeant Barter was tried for making a false official report to his Commanding Officer relative to the accident and with falsely testifying under oath before the Board of Officers convened to investigate the accident. He was acquitted. Staff Sergeant Tatman was tried for damaging the vehicle in violation of Article of War 83 and for unauthorized use of the vehicle, false swearing before the Board of Officers and failing to report the accident. He was found not guilty of unauthorized use of the vehicle but guilty of the other Specifications and the Charges. 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 but remitted six months of the confinement and suspended the execution of the dishonorable discharge until the soldier's release from confinement. The record of trial in the case of this soldier has been examined in this office and found legally sufficient to support the findings and sentence.

7. I recommend that the sentence be confirmed but in view of the nature of the offenses and all of the circumstances in the case, I recommend that the period of confinement be reduced to one year, and that the sentence, as thus modified, be carried into execution. I also recommend that a Branch, United States Disciplinary Barracks, be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 123, 23 June 1948).

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

JAGH CM 330733 — 20 August 1948

UNITED STATES v. First Lieutenant JOHN B. MORAN, 0-1799650, Company A, 382d Military Police Service Battalion.	BREMERHAVEN PORT OF EMBARKATION Trial by G.C.M., convened at Bremerhaven, Germany, 19,21, 22 April 1948. Dismissal.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant John B. Moran, Company A, 382d Military Police Service Battalion, did, at Bremerhaven, Germany, on or about 23 February 1948, feloniously take, steal, and carry away three (3) automobile tires, of a value of about thirty dollars ($30.00), three (3) automobile tire tubes, of a value of about fifteen dollars ($15.00), and three (3) automobile wheels, of a value of about fifteen dollars ($15.00), of an aggregate value of about sixty dollars ($60.00), the property of Christ Dimitriades.

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. The reviewing authority approved only so much of the findings of guilty pertaining to value as involved a finding as to each item charged and in the aggregate of the items charged of some value less than twenty ($20.00) dollars, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The evidence in support of the findings of guilty is summarized as follows:

Accused is in the military service and a member of Company A, 382d Military Police Service Battalion, Bremerhaven, Germany (Pros Ex 6; R 29, 40). On 10 February 1948 a 1938 model Opel automobile was taken from Christ Dimitriades by Lieutenant Lester W. Blevins and the automobile was impounded in the impounding lot of the 382d Military Police Service Battalion, Bremerhaven, Germany (R 7,8,9,10).

Records of the military police impounding lot show that on 10 February 1948 a 1938 Opel car impounded by Lieutenant Blevins had license No. E-4301 (R 9,10; Pros Ex 1; R 11). Dimitriades' car was released to him on 6 March 1948 (R 8). On 10 March Technician Fifth Grade Cecil F. Borst purchased from Dimitriades a green two-door Opel sedan the previous license number of which was E-4301. Borst identified Prosecution Exhibit 4 as a picture of the automobile which he had purchased from Dimitriades (Pros Ex 4; R 13).

On 23 February 1948 accused had his car, an Opel, towed to the impounding lot (R 14). He spoke with Technician Fifth Grade Warren T. Deyo, dispatcher for the 382d Military Police Motor Pool, and informed him that he was going to get some tires from a green Opel in the impounding lot. Deyo asked accused if he had permission to take the tires and accused responded that he had Lieutenant Oliver's permission (R 18). Accused enlisted the help of some German civilians and had them remove three tires and tubes from the green Opel in the impounding lot (R 22,24, 25). Prosecution Exhibit 4 was identified as a picture of the vehicle from which the tires were removed (R 18,22,25). The green Opel was at the time the only car in the impounding lot (R 18). The wheels and tires were placed in accused's car which was then towed away to a German garage. Technician Fifth Grade Frank D'Ambrosio who had towed accused's car to the impounding lot and then to the German garage testified that only two tires and wheels were taken from the Dimitriades car. He further testified that the tires were taken off the wheels of the Dimitriades car and mounted on the wheels of accused's car. Subsequently D'Ambrosio saw the tires from accused's car in the back of the Dimitriades car (R 15).

On 19 March 1948 James F. Walsh, Agent, CID, interviewed accused and obtained a statement from him. Prior to taking the statement Walsh advised accused of his rights under the 24th Article of War. The statement which was signed by accused was admitted in evidence without objection as Prosecution Exhibit 6 (R 29). The statement contained the following:

> "A few weeks ago I entered the 382nd MP Sv Bn Motor pool and removed three tires from an Opel and replaced them with tires of my own. I did this because I wanted to make a trip and assumed that I could return the tires when I had gotten tires of my own that would be the proper size. Subsequent to this someone had stripped the car and I hesitated to return the tires as they too had been reported as stolen. About a week ago I returned the tires

I had borrowed. No one gave me permission to take the tires." (Pros Ex 6)

On 25 March 1948 upon being shown three tires and tubes by Walsh accused made the following statement:

"The tires shown to me this date, in the evidence room of CID, by Agents WALSH and BOLICH, resemble those that I returned to the Motor Pool, Impounding Lot, by throwing them over the fence near the impounded cars." (Pros Ex 8, R 30).

Upon cross-examination Walsh testified as follows concerning the language of the second statement:

"Q. Mr. Walsh, did you suggest some of the language in this statement?
A. No, I explained to him why I wanted the statement.

Q. You did not suggest any of the embellishment of this thing, did you?
A. What do you mean?

Q. I refer specifically to the last sentence about throwing the tires over the fence. Did you say that?
A. Yes.

Q. Throwing them over the fence was your idea?
A. Yes, it was my idea originally." (R 30)

b. Evidence for the defense.

Lieutenant Gilbert C. Oliver testified that he was motor officer of the 382d Military Police Battalion, Bremerhaven, Germany, and that as such he had supervision of the impounding lot maintained by the battalion. At sometime prior to 23 February accused had informed him that he was looking for some 16" tires. Accused stated that his own tires were not in good condition and he was contemplating a number of trips to Bremen. Lieutenant Oliver told accused that there was a car in the impounding lot with the proper size tires and accused asked for them. Lieutenant Oliver tried to contact Dimitriades, the owner of the car, to see if he would lend the tires to accused. Since he could not locate Dimitriades, Lieutenant Oliver "took it upon himself" to lend the tires to accused. Later, on the day upon which he borrowed the tires from the Dimitriades car, accused replaced them with the tires from his own car (R 32). Two or three weeks after the exchange of tires the Dimitriades car was stripped (R 32). Accused returned the borrowed tires (R 33).

On cross-examination Lieutenant Oliver admitted that he knew of no authority for his action in lending the tires to accused (R 33,34,35). He also stated that he had informed accused that the car from which the tires were borrowed was impounded (R 33). He denied that he was present when accused took the tires but admitted that prior to trial he had stated that he was present at that time (R 35,36). He claimed, however, that he "saw the tires brought back" and "placed on Christ Dimitriades' Opel" and subsequently "saw them lying along the side by the Opel," more than a month prior to trial (R 36). On examination by the court Lieutenant Oliver testified that similar tires had been sold by the "EES shop" in Bremerhaven (R 38).

Accused after being apprised of his rights elected to testify in his own behalf. He testified that he owned an Opel automobile which was equipped with 17" tires on 16" rims. This situation caused accused much trouble on his frequent trips to Bremen. He arranged with Lieutenant Oliver to borrow tires from the Opel in the impounding lot until such time as he could have some 17" rims made for his own tires (R 41). Lieutenant Oliver's permission to borrow the tires was on condition that accused put his tires on the impounded Opel until the borrowed tires were returned (R 42). Concerning his return of the borrowed tires accused testified:

> "* * in the meantime, the vehicle, that is the impounded vehicle had been stripped and a great list of articles and equipment had been reported stolen, so I, having three tires and knowing they had been reported stolen returned these tires to the Impounding Lot. My two tires were on the impounded Opel and according to the photograph they still are." (R 42)

He identified Defense Exhibit A as a photograph of the impounded Opel and identified one of the tires appearing on the Opel as a tire which had originally belonged to him (R 42). He admitted that in his pretrial statement he had stated that no one had given him permission to take the tires but claimed he had so stated in order to keep Lieutenant Oliver out of trouble (R 43).

Upon cross-examination he admitted taking the tires, tubes, and wheels. He stated that he returned them but disavowed throwing them over the fence into the impounding lot as was stated in his pretrial statement and attributed this language to the CID agent (R 44). He did not think that Lieutenant Oliver was at the motor pool at the time he took the tires (R 46). He admitted that he had no right to take impounded property (R 46).

4. The evidence thus shows that at the time and place alleged accused took three tires, tubes and wheels from an automobile which was

the property of one Christ Dimitriades and which had been impounded in the motor pool of the 382d Military Police Service Battalion. At the time, accused claimed he had permission from Lieutenant Oliver, the officer in charge of the motor pool, to take the tires. Later, tires from accused's automobile were observed upon the Dimitriades car. Subsequently the Dimitriades car was stripped and it was reported that its tires among items of its equipment had been stolen. Accused then returned the tires to the impounding lot and according to one of his pretrial statements the return was accomplished by throwing the tires over the fence of the impounding lot. By inference a return in such manner is, to say the least, surreptitious. The force of accused's admission in this respect was considerably weakened by the admission of the interrogating CID Agent that the statement "about throwing the tires over the fence" was his idea originally.

As a defense accused claimed that the taking was for a temporary use and that he intended to return the property which he took. He further testified that he had the permission of Lieutenant Oliver, the officer in charge of the motor pool where the Dimitriades car was impounded, to borrow the tires. This testimony was corroborated by Lieutenant Oliver. In a pretrial statement accused declared that he did not have permission from anyone to take the tires. In his testimony accused explained the inconsistency by stating that he did not wish to cause Lieutenant Oliver any trouble. In any event his claim of permission was not of later contrivance inasmuch as it was asserted at the time of taking the tires.

"Larceny is the taking and carrying away, by trespass of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein (Clark)" (Par 149g, MCM 1928). If either element of trespass or intent is absent there is no larceny.

In this case the owner alleged had a general property interest in the property involved and the United States Government by virtue of its actual possession had a special property interest. Lieutenant Oliver, the officer in charge of the motor pool, had a bare custody. "Where an officer in charge of a motor pool to which gasoline had been issued was convicted of the larceny of the gasoline, the Board of Review has stated:

> "But accused did not have possession of such property in contemplation of the law, he had only a custody limited to the care and lawful operation of the pool. His custody or control of the property in the pool was subject to the order and control of his superior officer. It follows that the taking and selling by accused and his confederates constituted larceny thereof" (CM 318296, Mayer, 67 BR 211, and authorities cited therein, CM 325484, Dallmann, 74 BR 253).

Under these circumstances Lieutenant Oliver's consent would not in itself render a finding of guilty of larceny ineffectual.

> "Where the taker has the consent of a servant or other custodian of the property to the taking, the question whether the consent prevents the taking from being larceny depends on the authority of the custodian to give such consent on behalf of the owner. The consent of a custodian who has authority of the possessor to pass the possession is sufficient to prevent a taking from being larceny, but, where the goods are in the mere custody of a servant or other person who is not actually or apparently authorized to pass the possession, his consent to a taking will not prevent the taking from being larceny, especially if the custodian colludes with the taker in the theft." (52 CJS 815)

Every taking and carrying away even without claim of right does not constitute larceny. Thus it is stated:

> "In addition to the taking and carrying away of property by trespass, there must be an intent permanently to deprive the owner of his property therein, * * *." (Par 149g, MCM 1928)

In this case the main issue presented is whether there was the intent to deprive the owner permanently of his property. Where, as in this case, the intent was expressly denied, its existence must be inferred from the circumstances. The circumstances showing the intent in this case are wrongful taking, the use for a period of at least two or three weeks, and after it was reported that the Dimitriades car was stripped, a surreptitious return of the property. We believe that such circumstances afford a substantial basis to support an inference that there was an intent to deprive the owner permanently of his property. On the other hand the circumstance that the taking was open and without concealment "is very unusual, and * * * is a 'pregnant' circumstance in favor of the nonexistence of the felonious intent." (State v. Powell, 103 NC 424, 9 SE 627, 42 RA 291). As a matter of law, however, an open taking may be a felonious taking (State v. Albert, 107 Or 179, 242 p.1116), and an open taking may be evidence of a reckless disregard of the circumstances (32 Am Jur 899). In this case, we believe that the subsequent substitution of his own tires by accused could be considered by the court to be a stratagem to conceal the original taking, instead of the contention by the defense that the substitution was part of accused's arrangement for taking the tires from the Dimitriades car.

In weighing the evidence in this case as we are empowered so to do (CM 328279, McLeod), we feel that full weight may be assigned to the defense's contention that accused had permission of Lieutenant Oliver to

take the property involved without disturbing the approved findings of guilty. As we have hereinbefore stated such permission was without legal effect to negative a taking by trespass. In weighing the circumstances with respect to the required felonious intent we see no reason to disturb the findings of the court. The approved findings of guilty are supported by the record of trial.

5. Records of the Army show that accused is 44 years of age and unmarried. He completed high school and attended the Heald Engineering School for two years. He was employed by the Pacific Telephone and Telegraph Company for over twenty-two years. He had enlisted service in the Army from his enlistment on 21 September 1942 until he was commissioned a second lieutenant on 11 May 1945. He was promoted to first lieutenant on 28 March 1947. He has had foreign service in the European Theater since 15 August 1946. His efficiency ratings of record are "Excellent" and "Superior."

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 trial. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as modified by the reviewing authority, and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of a violation of Article of War 93.

_____, Judge Advocate

C. O. Wolfe, Judge Advocate

_____, Judge Advocate

JAGF CM 330733 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John B. Moran (0-1799650), Company A, 382d Military Police Service Battalion, APO 69.

2. Upon trial by general court-martial accused was found guilty of a specification alleging that on or about 23 February 1948, at Bremerhaven, Germany, he did feloniously take, steal and carry away three automobile tires, of a value of about $30, three automobile tire tubes, of a value of about $15, and three automobile wheels, of a value of about $15, of an aggregate value of about $60, the property of Christ Dimitriades, in violation of Article of War 93. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty as to value as involved a finding as to each item charged and in the aggregate of the items charged of some value less than $20, approved the sentence and forwarded the record of trial pursuant to Article of War 48.

The record of trial has been examined by the Board of Review. The Board is of the opinion that the record is legally sufficient to support the findings of guilty as modified by the reviewing authority and the sentence and to warrant confirmation of the sentence. I do not concur in part with the Board's opinion and for the reasons hereinafter stated am of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as modified by the reviewing authority as involves findings that the accused did, at the time and place alleged, wrongfully take and carry away the property alleged, of the value alleged, in violation of Article of War 96.

3. The evidence for the prosecution shows, in substance, that on 10 February 1948 military police impounded an Opel automobile, the property of Christ Dimitriades, and parked it in a military police impounding lot at Bremerhaven, Germany. On 23 February 1948 the accused caused his Opel automobile to be towed to the impounding lot. After telling a non-commissioned officer on duty at the lot that he had received permission from the officer in charge of the lot, Lieutenant Oliver, to get some tires from the impounded vehicle, with the assistance of two German civilians and the enlisted driver of the towing jeep, he removed two or three tires and wheels from the Opel automobile and placed them on his own automobile. On 6 March 1948 the impounded vehicle was

The record of trial has been examined by the Board of Review. The Board is of the opinion that the record is legally sufficient to support the findings of guilty as modified by the reviewing authority and the sentence and to warrant confirmation of the sentence. I do not concur in part with the Board's opinion and for the reasons hereinafter stated am of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as modified by the reviewing aurhotiy as involves findings that the accused did, at the time and place alleged, wrongfully take and carry away the property alleged, of the value alleged, wrongfully take and carry away the property alleged, of the value, alleged, in violation of the 96 Article of War.

The evidence for the prosecution shows, in substance, that on 10 February 1948 military police impunded an Opel automobile, the property of Christ Dimitriades, and parked it in a military police impunding lot at Bremerhaven, Germany. On 23 February 1948 the accused caused his Opel automobile to be towed to the impunding lot. After telling a non-commissioned officer on duty at the lot that he had received permission from the officer in charge of the lot, Lieutenant Oliver, to get some tires from the impunded vehicle, with the assistance of two German civilians and the enlisted driver of the towing jeep, he removed two or three tires and wheels from the Opel automobile and placed them on his own automobile. On 6 March 1948 the impounded vehicle was released to Mr. Dimitriades and it was then ascertained that it had been stripped of certain parts, including four tires and tubes. Mr. Dimitriades did not give the accused permisson to remove the tires. On 19 March 1948 the accused made a pretirla statement to the effect that he removed three tires from the Dimitriades automobile and replaced them with tires from his automobile; that he did this because he wanted to make a trip and assumed that the could return to the tires when he obtained tires of his own that would be of proper size; that he returned the tires after he learned that the vehicle had been stripped and the tires reported as solen; that he was not given permission to take the tires. On 25 March 1948 accused further stated that he threw the tires over the fence of the mpounding lot. However, the C.I.D agent to whom the statement was made admitted that this statement was his "idea originally." Other evidence for the prosecution indicates that the tires were returned to the impounding lot.

First Lieutenant Gilbert C. Oliver, a witness for the defense, testified that ht ewas supervisor of the impounding lot. Accused told him that he was looking for tires as he expected to make a trip and his were not in good condition. Lieutenant Oliver told accused about the tires on the Dimitriades automobile, accused asked forrthem, and in order to obtain permission for the accused to borrow the tires. He was unable to locate Mr. Dimitriades, but, after discussing with the accused what compensation should be givne Dimitriades, he "took it upon (himself) to permit Lieutenant Moran to borrow the tires." Accused placed his own tires on the Dimitriades automobile and, after iwas stripped returnd the tires he had taken. The wihness states that he did not have authority to loan the tires.

released to Mr. Dimitriades and it was then ascertained that it had been stripped of certain parts, including four tires and tubes. Mr. Dimitriades did not give the accused permission to remove the tires. On 19 March 1948 the accused made a pretrial statement to the effect that he removed three tires from the Dimitriades automobile and replaced them with tires from his automobile; that he did this because he wanted to make a trip and assumed that he could return the tires when he obtained tires of his own that would be of proper size; that he returned the tires after he learned that the vehicle had been stripped and the tires reported as stolen; that he was not given permission to take the tires. On 25 March 1948 accused further stated that he threw the tires over the fence of the impounding lot. However, the C.I.D. agent to whom the statement was made admitted that this statement was his "idea originally." Other evidence for the prosecution indicates that the tires were returned to the impounding lot.

First Lieutenant Gilbert C. Oliver, a witness for the defense, testified that he was supervisor of the impounding lot. Accused told him that he was looking for tires as he expected to make a trip and his were not in good condition. Lieutenant Oliver told accused about the tires on the Dimitriades automobile, accused asked for them, and the witness tried unsuccessfully to get in touch with Mr. Dimitriades in order to obtain permission for the accused to borrow the tires. He was unable to locate Mr. Dimitriades, but, after discussing with the accused what compensation should be given Dimitriades, he "took it upon [himself] to permit Lieutenant Moran to borrow the tires." Accused placed his own tires on the Dimitriades automobile and, after it was stripped, returned the tires he had taken. The witness stated that he did not have authority to loan the tires.

The accused testified that he had been having trouble operating his vehicle because his tires and wheels were of different size, that he made arrangements to have certain work done to correct this defect, and that, with Lieutenant Oliver's permission, he borrowed the tires, tubes and rims from the Dimitriades vehicle pending completion of the work. He left his own tires on the Dimitriades vehicle. He took the tires into the impounding lot when he returned them and did not throw them over the fence. His pretrial statement that he did not have permission to take the tires was made because he thought it would keep Lieutenant Oliver out of trouble.

It was stipulated that a named German mechanic would testify, if present, that on 23 February 1948 he agreed to manufacture two 16-inch Opel automobile rims for the accused, which work was to be completed on or about 6 March 1948.

4. Larceny, as defined in the Manual for Courts-Martial (par 149g), is the taking and carrying away, by trespass, of personal property which

the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. The Board of Review is of the opinion, and I agree, that there is in this case ample evidence showing the taking and carrying away by trespass of the property of another. I do not agree, however, with the view of the Board that the evidence proves, beyond a reasonable doubt, that such taking and carrying away was with an intent permanently to deprive the owner of his property. As stated in the Manual, supra, the existence of such intent must in most cases be inferred from the circumstances. "Thus, if a person secretly takes property, hides it, and denies that he knows anything about it, the intent to steal may well be inferred; but if he takes it openly, and returns it, this would tend to show an innocent purpose."

It is my view that convincing and uncontradicted evidence introduced by the defense in this case shows that the property was taken for only a temporary use. I perceive no substantial reason for disbelieving Lieutenant Oliver's testimony with respect to his discussion with the accused as to trying to obtain Mr. Dimitriades' permission to use the tires and compensating him for their use. This is, I believe, wholly inconsistent with an intent to steal. The fact that Lieutenant Oliver wrongfully took it upon himself to give permission when the owner could not be located does not overcome the inference of good faith on the part of accused. Further, the fact that the taking, according to the evidence of both the prosecution and defense, was open and in the presence and with the assistance of at least four other persons, three of whom were on duty or attendants at the impounding lot or nearby installations, strongly militates against any felonious intent on the part of accused. Finally, the fact that the tires were returned, albeit perhaps surreptitiously and after they were missed, lends some credence to the accused's claim that the taking was with an intent to return.

Even when considered in its aspects most unfavorable to the accused, this case, I believe, falls well within the tenor of numerous opinions of the Boards of Review of this office in which evidence of a wrongful taking and temporary use of property is regarded, in the absence of other circumstances, as insufficient proof of the felonious intent requisite to larceny (CM 193315, Rosborough, and CM 194359, Sadler, sec. 451 (40), Dig Op JAG, 1912-40; CM 197795, Hathaway, 3 BR 153; CM 206350, McAdams, et al, 8 BR 269).

On weighing the evidence in this case, it is my conclusion that the animo furandi or felonious intent requisite to larceny is not proved beyond a reasonable doubt. It is my opinion, however, that the evidence supports findings of guilty of wrongfully taking and carrying away the property in question, in violation of Article of War 96.

5. The accused is 44 years of age and unmarried. He completed high school and attended the Heald Engineering School for two years. He was employed by the Pacific Telephone and Telegraph Company for over 22 years. He had enlisted service in the Army from 21 September 1942 until he was commissioned a second lieutenant on 11 May 1945. He was promoted to first lieutenant on 28 March 1947. He has had foreign service in the European Theater since 15 August 1946. His efficiency ratings of record are "Excellent" and "Superior."

6. In view of accused's previous excellent record and all the circumstances of the case, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $100 of pay per month for three months, and that the sentence as thus modified be carried into execution.

7. Inclosed herewith are two forms of action prepared for your signature. Draft A will accomplish approval of the findings in part and confirmation and commutation of the sentence in accordance with my views. Draft B will accomplish confirmation and execution of the sentence in accordance with the views of 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 173, 8 Oct. 1948)/

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

JAGK - CM 330750

9 JUN 1948

UNITED STATES v. Captain JOHN W. PILGRIM (0-1113887), 502nd Engineer Utilities Company	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Wetzler, Germany, 19 February 1948. Dismissal

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Captain JOHN W. PILGRIM, 502nd Engineer Utilities Company, did at Giessen, Germany on or about 9 January 1948, with intent to deceive superior officers, officially certify to his final examination in Military Law and Justice given by the European Command as follows:

"I hereby certify that in taking this examination I have used no texts except those authorized in paragraph 2 above, and that I have neither received nor given unauthorized assistance of any kind.

Date: 9 Jan 1948 Signature: John W. Pilgrim
JOHN W. PILGRIM Capt. C.E. 502 Engr. Util. Co.
Name, typed or printed Grade and Branch Organization or Staff Division"

which certification was known by the said Captain JOHN W. PILGRIM to be untrue, in that the said Captain JOHN W. PILGRIM copied the examination answers from the examination paper of 1st Lt. WILLIAM J. DONLEY, 502nd Engineer Utilities Company.

He pleaded not guilty to the Charge and its specifications. He was found not guilty of Specification 1 of the Charge, guilty of Specification 2 of

the Charge "except the word 'copied', substituting in lieu thereof the words 'wrongfully used' and 'in preparing his examination paper'", and guilty of the Charge. 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. Discussion

Accused was arraigned upon a specification alleging that, with intent to deceive, he had falsely certified to having received no unauthorized assistance in a certain written examination in that he had "copied the examination answers from the examination paper" of another. He was found guilty, under this specification, of having, with intent to deceive, falsely certified as to the matter of receiving unauthorized assistance in that he had "wrongfully used the examination answers from the examination paper" of such other person "in preparing his examination paper." The question is immediately presented as to whether the offense found retains the identity of, or is necessarily lesser to and included in, the offense for which accused was arraigned and tried (par 78c, MCM 1928).

In CM 323728, Wester, 72 BR 383, 384, the Board of Review had occasion to say:

> "*** Charged with having committed a felonious assault upon Private Morris, accused was found guilty of having been disorderly in a public place under such circumstances as to bring discredit upon the military service. Although it may be said that every assault is a breach of the peace and thus a disorder, it certainly does not follow that every disorder involves an assault. Hence, under the specification as redrafted by the court, even if we exclude therefrom the words 'in a public place,' accused may have been found guilty of some disorder not necessarily extending to or included in an assault.
>
> "From this case may be derived the rule that the particular offense found in order to be properly considered a lesser included offense of that charged must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not contained in such offense. It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM, 1928, par. 78c).
>
> "Moreover, the redrafted specification herein is not worded in such a way that the Board of Review may cut down the offense

there found to one which would be necessarily included in the felonious assault charged, for, since we may not resort to the proof for this purpose but must stay within the terms of the specification, we have no means of determining the type or kind of disorder of which the court may have intended to find accused guilty (CM 316182, DeMoss, dissent, 1st Ind.; see for converse of this proposition, CM 316193, Holstein). ***"

In the instant case, it is obvious that "copying" the examination paper of another may be one, but not the exclusive, manner of "wrongfully using" it. Under the specification as redrafted by the court in its finding of guilty, we have no means of knowing which particular method of wrongfully using the examination paper was meant to be denounced as the falsum in accused's certification. Since the Government, by its pleadings, had limited itself to a denunciation of but one of these methods, to wit, "copying," as branding accused's certification with the stamp of falsity, the findings of guilty of the substituted specification and the sentence based thereon are illegal and of no effect.

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

Chester E. Gilbert, Judge Advocate

Gilbert G. Ackroyd, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 330750 1st Ind

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

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

1. In the case of Captain John W. Pilgrim (O-1113887), 502nd Engineer Utilities Company, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved.

2. The true test as to whether an offense found is included in that charged is that it is included only if it was necessary in proving the offense charged to prove all elements of the offense found (CM 316917, Morrison, 1st Ind, 66 BR 111,115, 6 Bul JAG 12). Applying this test, the case must fall for it was not necessary in proving that accused copied another officer's paper to prove the many different ways in which the paper may have been wrongfully used other than by copying it.

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

(CM 330750).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH CM 330751

9 JUL 1948

UNITED STATES v. Private RICHARD G. WOGAN, RA 35036030, 7818 Station Complement Unit, APO 175.	)	UNITED STATES CONSTABULARY Trial by G.C.M., convened at Darmstadt, Germany, 30 January 1948. Dishonorable discharge (suspended) and confinement for three (3) months. United States Disciplinary Barracks, Fort Hancock, New Jersey.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Richard G. Wogan, 7818 Station Complement Unit, did, at Bad Nauheim, Germany on or about 27 February 1947 desert the service of the United States and did remain absent in desertion until he was apprehended at Lorsch, Germany, on or about 14 August 1947.

Specification 2: In that Private Richard G. Wogan, 7818 Station Complement Unit, did, at Darmstadt, Germany, on or about 16 September 1947 desert the service of the United States and did remain absent in desertion until he was apprehended at Limburg, Germany, on or about 7 November 1947.

He pleaded not guilty to the Specifications of the Charge, not guilty to the Charge "but guilty of a violation of Article of War 61." He was found guilty of Specification 1 of the Charge, except the words "desert the service of the United States and did remain absent in desertion until he was apprehended at Lorsch, Germany," substituting therefor the words "without proper leave absent himself from his unit from about

27 February 1947 to about 14 August 1947," of the excepted words not guilty, of the substituted words guilty; guilty of Specification 2 of the Charge, except the words "desert the service of the United States and did remain absent in desertion until he was apprehended at Limburg, Germany," substituting therefor the words "without proper leave absent himself from his unit from about 16 September 1947 to about 7 November 1947," of the excepted words not guilty, of the substituted words guilty; and not guilty of the Charge but guilty of a violation of the 61st Article of War. 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 six months. The reviewing authority approved the sentence, but remitted three months of the confinement imposed. As thus modified he ordered the sentence duly 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 Hancock, New Jersey, 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. 201, Headquarters, United States Constabulary, APO 46, dated 8 May 1948.

3. The record of trial is legally sufficient to support the findings of guilty of Specification 2 and of the Charge. For purposes of this opinion it is sufficient to state that no competent evidence was introduced to prove the allegations of Specification 1 or to support the findings of guilty thereof. The only evidence offered in support of Specification 1 was a copy of a special order dated 24 February 1947 transferring accused from the 7800 Station Complement Unit, APO 807, to the 7749 Staging Area as a casual pending return to the United States, together with a copy of a page of accused's service record showing his departure from the 7800 Station Complement Unit on 27 February 1947 in accordance with this order (Pros Ex 1), and a stipulation that First Lieutenant De Primo, C Troop, 27th Constabulary Squadron, would, if present, testify that in late July or early August (year not stated) accused was brought to Lorsch having been "caught" in the vicinity of Coblenz in the French Zone.

4. The question presented for consideration is whether the pleas of accused, under the circumstances of this case, may be considered as pleas of guilty to the lesser included offenses of absent without leave. The question must be answered in the negative.

Accused pleaded not guilty to the Specifications of the Charge, not guilty to the Charge but guilty of a violation of Article of War 61. The law member explained to accused the meaning of his plea of guilty in the following terms:

"Private Wogan, you have pleaded guilty to the charge under the 61st Article of War. By doing so you have admitted guilt of the offense of absence without leave. Your plea subjects

you to a finding of guilty of this Specification and Charge by the court, in which event you may be sentenced by the court to the following maximum punishment: A dishonorable discharge, forfeiture of all pay and allowances due or to become due, and six months confinement at hard labor." (R.6)

Following the explanation the defense indicated that accused wished his plea of guilty to stand. It is clear that the pleas of accused intrinsically constitute pleas of not guilty to the Charge and Specifications. Thus it is stated in par 70, MCM, 1928: "Should an accused enter a contradictory plea such as guilty without criminality or guilty to a charge after pleading not guilty to all specifications thereunder, such contradictory plea will be regarded as a plea of not guilty." (Underscoring supplied) Whether accused's ambiguous plea was corrected by his reiteration of the plea following the explanation of the Law Member in which the plea of guilty to the Charge was treated as a plea of guilty to so much of the Specifications as alleged absence without leave, need not be decided. The defense motion for findings of not guilty of the Specifications of the Charge, and the Charge, made when the prosecution rested, was totally inconsistent with a plea of guilty and for that reason the trial should have proceeded as if accused had pleaded not guilty to the Charge and the Specifications thereunder. It may be seen, therefore, that the prosecution had the burden of proving beyond a reasonable doubt by relevant evidence that accused committed the offense under consideration. This the prosecution failed to do. For the reasons stated the Board of Review is of the opinion that the finding of guilty of Specification 1 of the Charge is not supported by the record of trial.

5. The period of absence alleged and proved under Specification 2 was from 16 September 1947 to 7 November 1947, a period of only 52 days, Such a period of absence authorizes confinement for 156 days and forfeiture of accused's pay for 104 days and does not authorize a dishonorable discharge (MCM, 1928, par 104c, Table of Maximum Punishments).

6. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 1 of the Charge and legally sufficient to support only so much of the sentence, as approved, as provides for confinement at hard labor for three months and forfeiture of two-thirds of accused's pay per month for five months and six days.

J. H. Hottenstein, Judge Advocate

J. W. Lynch, Judge Advocate

(On temporary duty), Judge Advocate

JAGH CM 330751 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 20 JUL 1948

TO: The Secretary of the Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat 724; 10 USC 1522), is the record of trial in the case of Private Richard G. Wogan, RA 35036030, 7818 Station Complement Unit, APO 175.

2. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 1 of the Charge, and legally sufficient to support only so much of the sentence as approved by the reviewing authority as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for five months and six days. I concur in the opinion of the Board of Review and recommend that the findings of guilty of Specification 1 of the Charge and so much of the sentence as is in excess of confinement at hard labor for three months and forfeiture of two-thirds pay per month for five months be vacated and that all rights, privileges, and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 147, 2 Aug. 1948).

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

JAGK - CM 330803

10 SEP 1948

UNITED STATES v. RALPH BERECHID, U.S. Department of the Army Civilian Employee, B-300114, U. S. Air Forces in Europe, APO 633, U.S. Army	UNITED STATES AIR FORCES IN EUROPE Trial by G.C.M., convened at Wiesbaden, Germany, 13-14 April 1948. Confinement at hard labor for one and one-half ($1\frac{1}{2}$) years, to pay to the United States a fine of five thousand dollars ($5,000.00), and to be further confined at hard labor until said fine is paid, but for not more than one (1) year. Disciplinary Barracks

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

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1. The record of trial in the case of the Department of the Army 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 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 Ralph Berechid, Department of Army Civilian Employee, Headquarters Command, United States Air Forces in Europe, APO 633, Wiesbaden, Germany, a person serving with the armies of the United States without the territorial jurisdiction of the United States, did at Wasserbillig, Grand Duchy of Luxembourg on or about 22 November 1947, wrongfully and unlawfully fail to declare to customs officials of the Grand Duchy of Luxembourg certain dutiable goods, to wit: "229 Kilograms of Silver Bullion and Plates, 151 Kilograms of Silverware and five (5) Gold Wrist Watches."

Specification 2: In that Ralph Berechid, Department of Army Civilian Employee, Headquarters Command, United States Air Forces in Europe, APO 633, Wiesbaden, Germany, a person

> serving with the armies of the United States without the territorial jurisdiction of the United States, did at Wasserbillig, Grand Duchy of Luxembourg, on or about 22 November 1947, wrongfully and unlawfully attempt to import into the Grand Duchy of Luxembourg certain dutiable goods, to wit: "229 Kilograms of Silver Bullion and Plates, 151 Kilograms of Silverware and five (5) Gold Wrist Watches."

He refused to plead to the charge and specifications and the court entered a plea of not guilty on his behalf. He was found guilty of the charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor at such place as the reviewing authority might direct for one and one-half years and to pay the United States a fine of $5000.00 and to be further confined at hard labor until said fine is paid but not more than one year in addition to the one and one-half years previously adjudged. The reviewing authority approved the sentence and ordered it executed and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 83, Headquarters United States Air Forces in Europe, APO 633, 6 May 1948.

3. Only that part of the evidence pertaining to the manner of proving the law of Luxembourg will be here summarized.

The trial judge advocate read into the record the deposition of Adolphe Kennen, Director of Customs for the Grand Duchy of Luxembourg. The defense strenuously objected to the questions and answers as read, part of which were stricken and part of which were allowed to stand. The defense also objected to the deposition in its entirety but so much of the deposition as had not been stricken was nevertheless accepted in evidence as Prosecution Exhibit 11. The bases of the objections by the defense were that foreign law was not made an issue in the case as it was not pleaded in the specifications, that the witness was not qualified as an expert on the law of Luxembourg and finally that the parol testimony was not the best evidence.

The deposition of the witness as accepted was to the effect that deponent had served the Grand Duchy of Luxembourg as Director of Customs since 1932 except for the period 1941 to 1944. He testified that he was "conversant with all the legislation concerning the importation of goods," including silver and watches. Since the formation of an economic union between Luxembourg and Belgium in 1921 "the Belgian legislation" had been applied without any change as far as the principle thereof was concerned. The witness stated that all imported merchandise, particularly silver bullion, plates and watches had to be declared, but that the penalties varied under the customs law. The penalty was ten times the amount of the duty including confiscation of the merchandise. Failure to declare articles and attempting to illegally import them was, in the opinion of

the witness, one and the same thing (R 75-108).

The prosecution offered in evidence a "Grand-ducal decree of November 4, 1944, submitting to Government license all imports and exports of materials and merchandise, bearing the seal the 'Direction Des Douanes, Luxembourg'" together with an English translation thereof. Acceptance in evidence of the Grand-ducal decree was refused by the law member upon objection of the defense for the reason that it had not been properly authenticated in accordance with the provisions of 28 U.S.C. 695e (R 82-84).

The deposition of Max Jones, Chief of the Bureau of Licenses for the Grand Duchy of Luxembourg, was read by the prosecution. Part of the deposition was accepted in evidence over the objection of the defense. The witness testified that he had served in his present capacity since 1938. All licenses for export and import had to be issued through his office. There was no record that accused had ever applied for or had been issued any license for importation of silver by his office. He could not state whether or not accused had ever applied for a license to import any commodity as they did not keep records in detail.

4. Discussion

Specification 1 alleges that accused wrongfully and unlawfully failed to declare to the customs officials of the Grand Duchy of Luxembourg certain dutiable goods consisting of silver bullion, silverware and watches. Specification 2 alleges that accused wrongfully and unlawfully attempted to import into Luxembourg the same described dutiable goods, both in violation of Article of War 96. Each specification indicates that the act alleged was wrongful and unlawful in that it was in violation of the customs laws of Luxembourg although it was not so alleged. It was upon that theory that the trial judge advocate proceeded in the presentation of the case before the court. The deposition of the Director of Customs for the Grand Duchy of Luxembourg was the only evidence offered by the prosecution to prove the law of Luxembourg except the Grand-ducal decree, which was rejected. All of the questions and answers of the deponent, Kennen, pertaining to the law of Luxembourg were vigorously objected to by the defense upon the ground that such parol evidence was not the best evidence.

It has been consistently held by the courts of the United States that they will not take judicial notice of the laws of a foreign country designed to regulate its own affairs whether written or unwritten, but that such laws must be pleaded and proved the same as any other fact. (The New York, 175 US 187, 196; Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 445; U.S. ex Rel Jelic v. District Director of Immigration, 106 F. 2d 14,20; Rowan et al v. Comm'r of Internal Revenue, 120 F. 2d, 515). The mode of proof of foreign law differs depending on whether it

is written or unwritten law which is to be proven. It is reasonable to infer from the deponent's reference to "legislation" that the law of Luxembourg applicable to the case at hand was written law. Although there is a conflict of authority as to whether the written or statutory law of a foreign country may be proven by parol evidence, the Federal courts are in accord that parol evidence may not be used for that purpose. Also the general rule in most state courts is that, in the absence of statutory authority to the contrary, foreign law must be pleaded and proved by the best evidence available (22 C.J., p 1001; 59 C.J., p 1210; 20 Am. Jur., p 371,372). The defense having objected to the parol evidence to prove the law of Luxembourg the prosecution had no other alternative than to comply with the best evidence rule. An offer in evidence of an official publication or a duly authenticated copy of the statutes of the foreign country involved would have met the requirements of the best evidence rule (28 U.S.C. 695e, Rule 44). The law as to the authentication of foreign statute books, etc., purporting to be official publications of the foreign country concerned, is not clear. Although there is no doubt but that they may be authenticated as are other foreign official records, the courts have consistently received them in evidence upon much less proof of authenticity than is required in the case of other official documents and sometimes merely upon the ground that they purport to be official publications (Wigmore on Evidence, 3rd Ed., sec. 1684, 3(b); 10 R.C.L., sec. 320; 59 C.J., p. 1215; Nashua Svgs. Bk. v. Anglo Am. Land, etc. Co., 189 U.S. 221; Hecla Powder Co. v. Signa Iron Co., 157 N.Y. 327, 52 N.E. 650).

If the statutory law or regulations concerning the customs laws of Luxembourg had been properly before the court it is clear that parol evidence of a duly qualified expert would have been admissible to explain or interpret them (22 C.J., p. 1001; 59 C.J., p. 1210). In the instant case, however, the written foreign law not having been proven in accordance with the best evidence rule the parol evidence was not admissible. It follows therefore that there was no showing by competent evidence that accused committed any wrongful or unlawful act.

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. Silver, Judge Advocate

Gilbert G. Schwyd, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 330803 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 17 SEP 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 Ralph Berechid, U.S. Department of the Army Civilian Employee, B-300114, Headquarters Command, United States Air Forces in Europe, APO 633, U.S. Army.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 172, 7 Oct. 1948).

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

JAGN-CM 330852

UNITED STATES v. Privates ERNEST M. CRAWFORD (16202320), 519th Transportation Car Company, and JAMES E. MARZETTE (14185837), 544th Transportation Truck Company, both of 24th Transportation Truck Battalion, Transportation Corps.	)	FRANKFURT MILITARY POST Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 29-30 April 1948. Crawford: Dishonorable discharge and confinement for ten (10) years. Marzette: Dishonorable discharge and confinement for five (5) years. Both: Federal Reformatory.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Ernest M. Crawford, 519th Transportation Car Company, and Private James E. Marzette, 544th Transportation Truck Company, then Private, 519th Transportation Car Company acting jointly and in pursuance of a common intent, did at Frankfurt, Germany, on or about 4 March 1948, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Georg Potsch, a German national, an Opel Olympia sedan of a value of more than fifty dollars, the property of the said Georg Potsch.

Specification 2: In that Private Ernest M. Crawford, 519th Transportation Car Company, and Private James E. Marzette, 544th Transportation Truck Company, then Private, 519th Transportation Car Company acting jointly and in pursuance of a common intent, did at Offenbach-Frankfurt/Main, Germany, on or about 5 March 1948, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Georg Janke, a German national, an Opel Olympia sedan of a value of more than fifty dollars, the property of the said Georg Janke.

Each of the accused pleaded not guilty to the Charge and the Specifications thereunder. Each of the accused was found guilty of the Charge and 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 ten years. As to accused Crawford the reviewing authority approved the sentence and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement. As to accused Marzette, the reviewing authority disapproved the finding of guilty of Specification 1 of the Charge, approved the sentence but reduced the period of confinement to five years and 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. As to accused Crawford, the Board of Review holds the record of trial legally sufficient to support the finding of guilty and to support the sentence, as approved by the reviewing authority. The only question to be determined is the legal sufficiency of the record of trial to support a finding of guilty as to accused Marzette under Specification 2 of the Charge.

4. The evidence for the prosecution as to accused Marzette under Specification 2 shows that the victim, Georg Janke, German national, could not identify either accused but he testified that he was a taxi driver and that about 2130 hours on 5 March 1948 he took three colored soldiers into his cab (R. 15) [presumably in Frankfurt] and at their request drove them to Offenbach [a small village near Frankfurt]. He stopped at a house on Senefelderstrasse where the colored soldiers entered and remained for ten minutes. He was then directed by the same soldiers to take them back to Frankfurt. On the way, a stop was made whereupon the soldiers beat Janke severely and took his billfold, house keys and other articles. When he regained strength he went for help (R. 16). He testified further that when he "woke up" his taxi cab was gone. The incident occurred about 10:30 p.m. (R. 17). Miss Erni Rosenberger, German national, testified that she knows Anita Mertens who lives at Senefelderstrasse 15. About 9:30 p.m. she saw a taxi parked by Anita Mertens' house. One soldier and a taxi driver were sitting in the cab and another soldier "just returned." Thereupon two soldiers entered the house (R. 19). Anita Mertens, German national, identified Marzette and testified that she lives at

Senefelderstrasse 15 and that on 5 March 1948 she had occasion to see the accused Marzette (R. 37). He and a companion visited her about 9:30 p.m. Marzette told her he could stay only a few minutes and that a taxi was waiting for him. He stayed about fifteen minutes. She identified the companion as the co-accused Crawford (R. 38).

The prosecution introduced into evidence two pre-trial statements of the accused Marzette dated 10 March and 11 March 1948. CID Agent Joseph Knight identified the statements of 10 March and 11 March 1948 and testified that Marzette had been warned of his rights under the 24th Article of War before he signed them (R. 24, 27, 28). The court, over the objection of the defense, received the statements in evidence (R. 27, 29; Pros. Ex. 1, 2).

5. The only evidence for the defense is the testimony on his own behalf by the accused Marzette. He testified as follows:

"Defense (Lt Johnson):

Q Marzette, will you state to the court the circumstances surrounding the statement you made to Agents Knight and Faherty?
A I will, sir. On 10 March I was in my battalion, 24th Truck Battalion ----

PROSECUTION: If it please the court, the prosecution objects to any statement with reference to preliminaries of a statement which has already been received in evidence as being immaterial and irrelevant.

LAW MEMBER: Objection sustained.

Q Marzette, will you state to the court whether or not the statement that you made to Agents Knight and Faherty on 10 March 1948 is the truth or not the truth?
A It is the truth.

Q Then will you state to the court whether or not the statement that you made to agents Knight and Faherty, of the 52nd CID on 11 March 1948 is true or not true?
A It is not true, sir.

Q And will you state to the court why this statement is not true?
A Our battalion commander told me that if I had information concerning these men - or if I was involved in anything and had information that these men could use and didn't give it to them, he say - would it be all right to use the exact words?

Q Yes, use the same words that they used to you.

A He say if I don't give him that information that he would fuck me up himself, and if I wasn't involved in anything, that he would help me.

Q Marzette, before giving this statement to Agents Knight and Faherty were any promises made to you?
A The CID told me - Mr. Knight told me that he had the goods against me and if I told him the information that they wanted, the truth, that he would get the court to go light on me and I told him that I didn't know anything and he said that he would get the court to go light on me if I told him - gave him the information that he wanted.

Q Now, Marzette, did Agents Knight or Faherty tell you what you should say?
A They wrote the - made the statement out and asked me to sign it.

Q Were you warned of any particular rights at this time?

PROSECUTION: If it please the court, the prosecution objects as to whether or not he was warned of any rights as being irrelevant and immaterial.

LAW MEMBER: Sustained.

DEFENSE (Lt Johnson): No further questions.

PROSECUTION: No questions.

PRESIDENT: Questions by the court?

EXAMINATION BY THE COURT

Law Member:

Q Marzette, you say this statement on the 11th is not true?
A No, sir.

Q Then you say that you were not at 15 Senefelder Strasse on the 5th of March about 2100 hours?
A I was there around 2000 hours, sir.

Q Then the testimony of Miss Mertins here is not the truth, is it?
A Right, sir. Or I was - the statement I made on the face,

sir, is true. The one I made on the 10th is true. The statement I made on the 11th is not true, sir" (R. 42, 43). (181)

6. The question presented for consideration is the prejudicial effect, if any, of the refusal of the law member to permit testimony of the accused Marzette concerning the circumstances and conditions under which the pre-trial statements were obtained.

It is unnecessary for us to here decide whether the pre-trial statements of accused Marzette are confessions, or merely "admissions against interest" respecting certain events related to the offenses charged. If the statements are considered to be confessions then they must be subjected to the strict rules governing the admission of such documents into evidence (par. 114a, MCM, 1928). If they are considered to be "admissions against interest" they fall within the rule that, although normally admissible in evidence without any showing that they were voluntarily made, nevertheless:

> "Should it, however, be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement" (par. 114b, MCM, 1928).

It thus becomes apparent that irrespective of whether the pre-trial statements be considered as confessions or admissions any evidence which might indicate they were obtained under circumstances tending to show that accused may have been induced to falsely make them was clearly admissible, as pertinent to a material issue of fact. In this case we need not resort to speculation to determine the nature of the testimony accused desired to introduce. That matter is clarified in at least two particulars by the record of trial. In the first such instance the prosecution introduced that question into the trial as a material issue of fact, answerable by the accused if he so desired, through the testimony of CID Agent Knight that accused was duly warned of his rights under Article of War 24 prior to the making of any statements (R. 24). In the second instance the accused Marzette testified that at least one of his statements was preceded by threats voiced by his battalion commander (R. 42, which testimony stands uncontradicted in the record), and by promises of leniency extended to him by CID agents (R. 43). The materiality of such questions of fact in the light of the rule above set out is too obvious to require further comment.

The right of the accused to testify in his own behalf to such a material issue of fact is clearly and positively established by Title 28, United States Code, Section 632, in which the following language is used:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in * * * courts martial * * *, the person so charged shall, at his own request but not otherwise, be a competent witness * * * (Mar. 16, 1878, Ch. 37, 20 Stat. 30)."

The Supreme Court of the United States denied certiorari in the case of Wolfson v. United States (101 Fed. 430, 436, 41 CCA 422,

certiorari denied, 21 Sup. Ct. 919, 18 U. S. 637, 45 L. Ed. 710), wherein the court held that "the purpose of this section (28 USC 632) was to make defendants competent witnesses, but reserving to them the right to refrain from testifying without prejudice, and when any defendant chooses to testify he may do so." This rule is also stated in paragraph 120d, Manual for Courts-Martial, 1928. Therefore the accused should have been permitted to testify as to the means by which these admissions were obtained.

Although the defense had previously been accorded full latitude in cross-examining the CID agents at the time the statements were offered in evidence by the prosecution, and although the accused gave some testimony about the circumstances surrounding the taking of the statements (R. 42, 43), it cannot be said or conjectured that he gave all the testimony on the subject that he desired in view of the unwarranted restrictions imposed upon him by the court. He was denied the right to testify to material facts, concerning which he was, at his own request, a competent witness. We are thus forced to the conclusion that the rulings of the law member, refusing to permit testimony of the accused Marzette concerning the conditions and circumstances under which the pre-trial statements were taken, were prejudicial errors injuriously affecting his substantial rights and thus, as to accused Marzette, the proceedings of the court cannot be validated and cured under the provisions of Article of War 37.

7. As to accused Crawford, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and the Specifications thereunder and to support the sentence. As to accused Marzette the Board of Review, for the reasons above stated, holds the record of trial legally insufficient to support the findings of guilty of the Charge and of Specification 2 thereunder, and legally insufficient to support the sentence.

Edward T. Johnson, Judge Advocate.

SICK IN HOSPITAL, Judge Advocate.

George S. Springston, Judge Advocate.

JUL 2 1948

JAGN-CM 330852 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Frankfurt Military Post, APO 757, c/o Postmaster, New York, N. Y.

1. In the case of Privates Ernest M. Crawford (16202320), 519th Transportation Car Company, and James E. Marzette (14185837), 544th Transportation Truck Company, both of 24th Transportation Truck Battalion, Transportation Corps, I concur in the foregoing holding by the Board of Review and recommend that as to accused Marzette the findings of guilty of the Charge and Specification 2 thereunder and the sentence, be vacated. Upon taking such action you will have authority to order the execution of the sentence as to accused Crawford.

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 330852).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGN-CM 330899

UNITED STATES v. Private First Class CONRADO GARCIA (10344236), Company F, 44th Infantry (PS).	)))))))	RYUKYUS COMMAND Trial by G.C.M., convened at APO 331, 29 March and 9 April 1948. Dishonorable discharge and confinement for one (1) year. PHILRYCOM Stockade.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Conrado Garcia, "F" Company, 44th Infantry (Philippine Scouts) did, at Tengan, Okinawa, APO 331, on or about 16 February 1948, feloniously take, steal, and carry away a ladies "Benrus" wristwatch, value about $47.00, the property of Corporal Gabriel Gatchalian, "F" Company, 44th Infantry (Philippine Scouts).

He pleaded not guilty to and was found guilty of the Charge and Specification, 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 one year. The reviewing authority approved the sentence, designated the PHILRYCOM Stockade, Provost Marshal Section, APO 707 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 of the property described in the Specification of the Charge. The only matters requiring consideration, therefore, are the legal sufficiency of the record of trial to support the findings of guilty of the Specification of the Charge as to value, and the legality of the sentence. For this reason, only so much of the evidence in the record of trial as is pertinent to value will be summarized.

4. The Specification of which accused was found guilty alleges the larceny on or about 16 February 1948 of a Benrus wrist watch, value about $47.50, the property of Corporal Gabriel Gatchalian. A lady's "Benrus" wrist watch was introduced in evidence (R. 8; Pros. Ex. B), and identified by Corporal Gatchalian as a watch he purchased from the "Rykom PX," "last November" (R. 7, 8). After purchasing the watch Corporal Gatchalian placed it in his locker for safety, awaiting an opportunity to take or send it "home" to his sister. He prepared it for mailing on 15 February 1948 (R. 9, 10). The sole evidence of value in the record of trial is the testimony of the owner that he paid "more than $46.00" for it at the time of purchase (R. 12), and a "cash sale receipt" dated 16 November 1947, listing "1 Watch 46.28," which was identified by Corporal Gatchalian as the receipt for the watch which the saleswoman gave him at the time of the purchase (R. 7; Pros. Ex. A).

5. 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 330185, Embs (1948); CM 217051, Barton et al, 11 BR 193; TM 27-255, par. 100b). In order to establish value by the testimony of the owner of the property it must appear that he is qualified as an expert in that regard (CM 323378, Learned et al, 72 BR 227). There is nothing in the record of trial to indicate that the owner in this case was thus qualified.

While the testimony of Corporal Gatchalian indicates that the watch had been purchased new about three months prior to the larceny and had been kept in his locker, the record fails to show the care given it during the interim or its condition at the time it was stolen. After its purchase and removal from the store it became a "second hand article" (CM 330185, Embs (1948)), and the value of such an article cannot be established by proof of the original cost (TM 27-255, par. 100b). The fact that the watch was physically in evidence before the court does not cure the deficiency in proof. The market value of such an article is not a matter of fixed and common knowledge of which the court would be justified in taking judicial notice, and to permit the members of the court, by inspection alone, to find such value would be to attribute to them technical and expert trade knowledge which it cannot be

legally assumed they possessed (CM 324747, Van Dyne et al, 73 BR 354; CM 213952, Myer, 10 BR 296). Therefore, although under the provisions of paragraph 149g, Manual for Courts-Martial, 1928, the court might take judicial notice that the watch was of some value, it was not authorized to find a value in excess of $20.00. It follows that so much of the finding of value of the stolen article as exceeds $20.00 cannot be sustained.

The maximum confinement authorized by paragraph 104c, Manual for Courts-Martial, 1928, for the offense of larceny of property of a value of $20.00 or less is six months.

6. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as to value as finds a value not in excess of $20.00; legally sufficient to support the findings of guilty of the Charge; and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

Edward T. Hanson, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George H. Springston, Judge Advocate.

CM 330899

JAGN-CM 330899 1st Ind

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

TO: Commanding General, Ryukyus Command, APO 331, c/o Postmaster, San Francisco, California.

1. In the case of Private First Class Conrado Garcia (10344236), Company F, 44th Infantry (PS), I concur in the holding of the Board of Review and recommend that only so much of the finding of guilty of the Specification as to value be approved as finds some value not in excess of $20.00, and that only so much of the sentence be approved as involve dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Upon taking such action you will have authority to order 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 330899).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH CM 330930

15 JUN 1948

UNITED STATES

v.

Captain JAMES H. VAN OVER, (O-580487), Headquarters and Headquarters Squadron, 1103d Air Force Base Unit (AT), 3d Air Transport Group (Provisional), Atlantic Division, Air Transport Command, Brookley Air Force Base, Mobile, Alabama, formerly of 738th Army Air Forces Base Unit (108th AACS), Miami Army Air Field, Miami, Florida.

ATLANTIC DIVISION
AIR TRANSPORT COMMAND

Trial by G.C.M., convened at Brookley Air Force Base, Mobile, Alabama, 6 and 7 April 1948. Dismissal, total forfeitures, and confinement for one (1) and one half ($\frac{1}{2}$) years.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain James H. Van Over, Headquarters and Headquarters Squadron, 1103d Air Force Base Unit (AT), 3d Air Transport Group (Provisional), Atlantic Division, Air Transport Command, Brookley Air Force Base, Mobile, Alabama, formerly of 738th Army Air Forces Base Unit (108th AACS), Miami Army Air Field, Miami, Florida, did, at Miami, Florida, on or about 18 August 1947, feloniously take, steal, and carry away one (1) fifty-cent (.50) slot machine, Serial Number 507088, value about three hundred and thirty-eight dollars ($338.00) and one hundred and sixty dollars ($160.00), lawful money of the United States, of a total value about four hundred and ninety-eight dollars ($498.00), the property of the Miami AAF Officers' Club.

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

Specification: In that Captain James H. Van Over, Headquarters and Headquarters Squadron, 1103d Air Force Base Unit (AT),

3d Air Transport Group (Provisional), Atlantic Division, Air Transport Command, Brookley Air Force Base, Mobile, Alabama, formerly of 738th Army Air Forces Base Unit (108th AACS), Miami Army Air Field, Miami, Florida, did at Miami, Florida, on or about 28 October 1946, wrongfully borrow the sum of $950.00 from an enlisted man, to wit, Staff Sergeant Gerald R. Bryant, 738th Air Force Base Unit, (108th AACS Squadron), Miami Army Air Field, Miami, Florida.

Accused pleaded not guilty to all Charges and Specifications, but during the course of the trial (R 121), accused withdrew his plea of not guilty to the Additional Charge and Specification "relative to Article of War 95 and pleaded guilty to the Specification under that Charge of Article of War 96 instead of 95." Accused was found guilty of the original Charge and Specification; and of the Specification of the Additional Charge, but "Of the Additional Charge; Guilty, except the words 95th Article of War, substituting therefor respectively the words 96th Article of War, of the excepted words Not Guilty, of the substituted words, Guilty." No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three and one-half years. The reviewing authority approved the sentence, but reduced the period of confinement to one and one-half years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

At about 8:00 a.m. on the morning of Tuesday, 19 August 1947, at Miami Army Air Field, Miami, Florida, the club officer of the officers' club while making a routine inspection of the premises of the club discovered that a slot machine was missing (R 12). He, as club officer, had custody and control of the machine and had given no one permission to take or move the machine (R 13). It was a "fifty-cent black cherry type machine" (R 12). The machine had cost the club $338.00 when purchased less than two months previously (R 16). On the previous evening as late as 10:00 p.m. the jack pot had been full and when full held between $64 to $68 (R 18,25). Accused was present at the club when the club officer left (R 25). The slot machine, in addition to the jack pot, contained a coin tube and a coin box (R 19). It was the habit of the club officer when in need of change, to open the slot machines and take out coins from the coin box and replace the same with currency and checks (R 19). On the Saturday night, preceding the day when the machine was taken, the club officer had opened this machine and made such an exchange from the coin box. At that time there was about $100 in the coin box (R 20,21,31). The coin tube was also full (R 21) and it held about $60 to $66 (R 21). The last time the club officer had taken any money from ("robbed") the machine was the preceding Thursday, and he did not take any from it on Friday, Saturday, Sunday or Monday (R 22). It was a practice

of the club officer to refill the jack pot with sufficient coins to fill the face of the same whenever a jack pot had been hit. It was a duty of the bartender to keep a record of such refilling (R 23). Between the preceding Thursday and the time that the machine was missing the jack pot had not been hit (R 23) and he had not refilled the face of the jack pot (R 24). This machine had hit the jack pot on four occasions in amounts from $65 to $66 (R 23) and the last time was three weeks previously (R 30). Accused in partnership with another officer had hit the jack pot on the machine on two occasions (R 30). There was no record of the club showing that the jack pot had been hit between the time the club officer left the club at 10:00 p.m. on the night of Monday, 18 August 1947, and the time of the closing of the bar at 11:00 p.m., although it could have been hit after that time (R 30). When change was extracted from the coin box of this machine by the club officer on Saturday night, it was replaced with $20 bills (R 32-33). The bachelor officer quarters and the officers' club were in the same building which resulted in the building being always open (R 24). The slot machine was not secured except for the lock on the machine itself (R 247).

Accused lived at the bachelor quarters in the club building and had a government vehicle assigned to him for his own use (R 27,47,48). On the evening of Monday, 18 August 1947, accused had been at the club drinking beer and playing cards and had lost money (R 14,15). The card game ended around 10:00 p.m. and accused and his friends were at the bar when the club officer left (R 28).

Sometime shortly after midnight on the night of 18 August 1947, the non-commissioned officer in charge of the Airways Communications Station located about five miles from the Base (R 37) who slept in the transmitter station, was awakened by accused, his commanding officer, when the latter came in the transmitter building (R 38). Accused's clothes were in an untidy condition and he appeared to have been drinking (R 38). There was a large bulge in accused's left pocket about the size of three packs of cigarettes (R 39). Accused was also seen by a civilian employee on duty at the radio station (R 52). Later the civilian heard accused's car start and "heard him drive off" (R 53). He stated accused was "pretty tight" (R 53).

A bartender of the St. Moritz Hotel in Miami testified that on a Monday night 19 August 1947 (but it could have been on 12 August as he was not sure of the date but he knew it was a Monday night) accused arrived at his bar after midnight, stated he had "just hit a jack pot," and cashed $15.00 worth of half dollars (R 55, Pros Ex 5). He purchased drinks in the amount of about $7.00. At that time accused wore no necktie, his uniform was dirty, and he was unshaven (R 55).

On the following morning, Tuesday, 19 August 1947, the non-commissioned officer at the Airways Communications Station went into the diesel "shack"

(R 39) where he discovered some bits of glass, a small rivet-like object and a tire tool (which did not belong there) on the floor (R 40-41). He called the Chief of the Civilian Guards at the base who picked up these objects (R 40). They were turned over to the Provost Marshal (R 57) who delivered them to a CID Agent (R 58). The glass and rivet were admitted in evidence (R 103, Pros Ex 3) and identified by a civilian slot machine repairman as part of a slot machine (R 63, Pros Ex 6).

On 19 August 1947 a CID agent of the 14th Air Force questioned accused within the hearing of the Base Provost Marshal who was, however, concealed in an adjoining room, and accused after being advised of his rights under Article of War 24 made a voluntary confession (R 65). After making the confession orally it was transcribed and the accused then went to Headquarters where the unsigned statement was given to him. He went into the staff conference room alone and after reading it over said it was all right and signed it (R 66). The confession was admitted in evidence (R 101, Pros Ex 7).

In accused's confession he admitted that on the night of 18 August 1947, after midnight when his friends had left, he took the fifty cent slot machine from its place in the officers' club, placed it in the staff car assigned to him, and drove to the Airways Communications Station Transmitter Station. He carried the slot machine to the diesel "shack" and broke it open with a steel instrument, and after picking up the money and cleaning the room, he put the broken machine back in the staff car. After "cleaning up" in the latrine, he got in the staff car and drove to Miami Beach. On the way he threw the three parts of the machine into the canal at different places, and then continued to the St. Moritz Hotel where he bought drinks for the house and cashed some half-dollars for bills, telling the bartender he had "hit a couple of 50¢ jack pots."

The non-commissioned officer in charge of the Airways Communications Station Radio Facilities testified that during the month of October 1946, accused, his superior officer, borrowed from him $950.00, of which $150 had been repaid (R 37,41,42). On 19 August 1947 accused gave the non-commissioned officer a receipt for the balance of the loan (R 42,43; Pros Ex 4).

4. Evidence for the defense.

Mr. Hubert S. Van Landingham, a student at Florida State University, was called as a witness for the defense. He testified that prior to leaving the club at about 1:00 a.m. on 19 August 1947, he and accused had been playing the slot machines but neither had hit a jack pot, and they quit playing when they ran out of change (R 116). Witness and accused then turned out the lights and left, each walking to his own car (R 109,110). At the time he bade accused good-bye accused was drunk (R 108). He also testified that he and accused consumed the greater

portion of two one-fifth bottles of whiskey during the evening (R 109).

Major Gerald A. Long, Medical Corps, Brooklyn Air Force Base, testified as an expert as to various effects of alcohol, one of which being that a person who drinks to excess may partially forget his actions during the period he is under the influence of it (R 117).

Accused having been advised of his rights as a witness in his own behalf (R 77,121) testified under oath. Accused first denied having made the statements testified to by the CID agent and stated that before he signed the written confession the CID agent told him that if he would sign it and make restitution, the case most likely would not come to "a head," and that he could "make amends and make payment for the price of the missing slot machine by signing the statement" (R 80). On cross-examination he admitted that he had never offered to make restitution (R 81). On redirect examination he testified that he was drunk on the night in question and did not remember what had happened. He testified that the last he remembered at the club was leaving with his friend and turning out the lights (R 124); that the next thing he recalled was washing his hands and face; and next "the ruffle of water," and then stopping at the St. Moritz Bar (R 124). He knew nothing about the disappearance of the slot machine when he was informed about it by the club officer the next day, and later told the CID agent the facts that were in his memory (R 124). The CID agent filled in all the remaining details of his confession and he was dumfounded when told that he had taken the slot machine. He further testified that he did not remember what occurred on the night before but did not want to hide anything (R 125) and stated to the CID agent "I guess I took it, I didn't say slot machine" (R 125). He did not remember taking the machine (R 126) and never intended to steal it (R 127). When asked by defense counsel whether he had ever been court-martialed, accused replied "I was in a court in Panama once before, but I wasn't court martialed. I wasn't guilty and was not convicted." (R 133)

5. Prosecution's rebuttal.

The prosecution recalled the CID agent who testified that the confession of accused was positive, unequivocal, and that he added nothing to it other than what accused told him (R 134) and the answers to questions had not been suggested to accused (R 135).

6.a. Specification of the Charge. Accused was charged with feloniously taking, stealing and carrying away one slot machine value about $338 and $160 lawful money of the United States, the property of the Miami Army Airfield Officers' Club. The fact that a slot machine containing money was taken from the club, where it was in the custody of the club officer, and carried away without proper authority, was shown by the testimony of the club officer and the confession of accused. The felonious intent is shown by the circumstances of the wrongful taking, the acts of accused

in destroying the machine and appropriating the money, found therein, to his own use. While the testimony of accused and some witnesses showed that accused had been drinking, the court had ample evidence upon which to conclude that he knew what he was doing. There was for the court's consideration the fact that accused drove his staff car five miles to the Radio Station, broke open the machine in the diesel "shack," "cleaned up" in the latrine, and then drove to Miami Beach; that on the way he threw the machine in three parts into the canal, then went to the St. Moritz Bar where he exchanged half dollars and explained the unusually large number of them by stating he had "hit a couple of 50¢ jack pots."

The only evidence of the value of the slot machine was the testimony of the club officer that the club had paid $338.00 for it less than two months previously. No evidence was offered as to its value at the time of the taking.

In CM 330185, Embs, where a question as to the value of property allegedly stolen arose, the Board stated:

> "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). * * *."

Since, however, the slot machine had been recently purchased at a cost of $338.00 and was at the time it was removed from the club apparently in working condition, the court was authorized to find that it had some value less than $20 (par 149g, MCM, 1928, p.173). It follows that so much of the findings as pertain to the value of the slot machine as is in excess of $20 cannot be sustained.

In addition to the slot machine there was evidence of cash contents which were also taken. In regard to the coin box alone, the club officer

testified that there was about $100 in it two days before the theft when he exchanged paper money for coins and there had been a "large play" between the date this exchange was made and the date the machine was taken. Since no coins play out of the coin box, and the proceeds had not subsequently been collected, such sum, or more, was bound to be present. Further, the testimony of the club officer showed that as late as 10:00 p.m. of the night in question the jack pot contained about $60. Also, a witness for the defense testified that he and accused played the machines until they "ran out of change" and then turning out the lights in the club, they left. When they left the jack pot was still intact. According to the confession of accused it was immediately after this that he returned and took the machine. There is adequate proof, therefore, that the jack pot contained approximately $60 when the machine was removed from the club. In addition to the amounts contained in the coin box and jack pot it fairly can be inferred from all the evidence that about $60 was in the coin tube. From the foregoing it is clearly shown that the total value of the property (slot machine and coins contained therein) taken by accused was of some value in excess of $50.

Since the Table of Maximum Punishments is not applicable to officers, the value of the property stolen is not material to support the sentence (CM 267247, Bewley, 43 BR 362). The question of value, however, is material in respect to the place of confinement authorized. Penitentiary confinement is not authorized unless property worth more than fifty dollars was stolen (18 USC 466).

b. Specification of the Additional Charge. The offense here alleged is that the accused did wrongfully borrow $950 from an enlisted man. The fact that such sum was borrowed by accused from the enlisted man (a soldier under his command) specified was proved by the evidence and admitted by accused in his plea of guilty. He borrowed the $950 in October 1946 and still owed $800 of the debt at the date of trial. The court's finding of guilty was proper and was supported by the evidence (Dig Op JAG 1912-1940, Sec 453(5)).

7. Prior to accused's plea to the general issue the defense counsel entered a plea in bar of trial to the Charge and the Specification thereunder (larceny). The ground for this plea was that under the statutes of the State of Florida, where the offense occurred, the right of property did not exist in any person, association or corporation "in and to" a slot machine. Consequently, it was argued that accused could not be guilty of larceny since there was no trespass.

Without determining the applicability of the Florida laws to offenses committed at the Miami Army Air Field, Miami, Florida, we are of the opinion that the court's action in overruling the plea in bar was proper. At pages 985 and 986, Volume 32, American Jurisprudence, it is stated that:

"A thing may be the subject of larceny although it is unlawful for any person having such a thing to sell or otherwise dispose of it, or to use it for certain purposes, and even though it is unlawfully possessed at the time of the taking because kept or used for illegal purposes or because possession thereof is expressly prohibited by law. The authorities are in substantial agreement that such facts do not affect the character of the article as property which may be the subject of larceny. Thus, a pistol or other dangerous weapon which cannot be legally sold or carried, gambling paraphernalia, the possession of which is prohibited, and intoxicating liquors, outlawed or made contraband by statute, are all property to an extent sufficient to satisfy the requisites for the subjects of larceny. Moreover, the fact that the possessor of such an article has no enforceable property rights therein does not require a contrary rule. The article may be the subject of larceny notwithstanding express statutes to the effect that no property rights shall exist in such articles illegally possessed, since the purpose of such statutes is to limit the civil rights of the possessor, not the criminal liability of others.* * *."

In the case of People v. Odenwald et al., 285 Pac (Calif) 406, where accused were charged with burglary involving the intent to steal intoxicating liquors possessed contrary to the National Prohibition Act, it was stated:

"* * * The National Prohibition Act (Barnes' Fed. Code, 1921, Supp.) provides by section 8352 (27 USCA ¶ 39) as follows: 'It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, <u>and no property rights shall exist in any such liquor or property</u>.'

"'The first contention on the appeal is that the court erred in submitting to the jury the question of the larceny of the intoxicating liquors; the argument being that intoxicating liquors, since they are contraband under both the state law and the National Prohibition Act, have no value, and are not, therefore, a subject of larceny. * * * The state punishes the wrongful taking of personal property belonging to or in the possession of another because of the offense against the majesty of its laws, and because of the inherent wickedness and criminality of the act, as well as because of the wrong done to the individual whose property is taken. Stated in another way, the state punishes larceny because it is larceny, and, that the guilty may not escape, it will treat any form of personal property having actual value as having value for the purposes of larceny, notwithstanding it may be unlawful for the possessor to have it in possession. Furthermore, the

declaration of outlawry against intoxicating liquors and the declaration that there are no property rights therein is for the purpose of discouraging its possession, not for the purpose of encouraging larceny, and it is not the policy of the law, nor conducive to good morals or good government, to allow the laws directed against one offense to become a shield against the punishment of another!"

8. Records of the Army show that accused is 29 years of age, married and the father of one child. A prior marriage was terminated by divorce. He completed three and one-half years of high school leaving school to enlist in the Army. He had enlisted service from May 1937 until June 1943 when he was commissioned Second Lieutenant. He was promoted subsequently to First Lieutenant and Captain. His efficiency ratings of record are as follows: "Superior" 1, "Excellent" 5, and "Very Satisfactory" 1. He had foreign service in British Guiana and Ecuador from October 1943 until May 1946.

Although at the trial accused denied that he had ever been convicted by courts-martial the records of the Office of the Judge Advocate General indicate that he was convicted by General Court-Martial in August 1945 for the unauthorized use of a government vehicle and fraternizing with enlisted men. He was sentenced to be reprimanded and to forfeit Fifty Dollars of his pay.

The law member of the court which tried accused in this case submitted a letter requesting that accused be afforded an opportunity for rehabilitation in view of his prior honorable service and the circumstances surrounding the offenses of which he was convicted.

9. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves a finding that the accused did at the time and place alleged, feloniously take, steal and carry away the property described in the Specification, of a total value in excess of fifty dollars, property of the Miami AAF Officers' Club; legally sufficient to support the findings of guilty of the Additional Charge and its Specification, and the sentence as approved by the reviewing authority and to warrant confirmation thereof. A sentence to dismissal, total forfeitures and confinement at hard labor for eighteen

months is authorized upon conviction of a violation of the 93rd or the 96th Articles of War.

A. J. Hottenstein, Judge Advocate

J. W. Lynch, Judge Advocate

(On leave), Judge Advocate

JAGH CM 330930 1st Ind

JAGO, Department 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 Captain James H. Van Over, (0-580487), Headquarters and Headquarters Squadron, 1103d Air Force Base Unit (AT), 3d Air Transport Group (Provisional), Atlantic Division, Air Transport Command, Brookley Air Force Base, Mobile, Alabama, formerly of 738th Army Air Forces Base Unit (108th AACS), Miami Army Air Field, Miami, Florida.

2. Upon trial by general court-martial this officer was found guilty of the larceny of a slot machine and its monetary contents of a total value of $498.00, in violation of Article of War 93, and of borrowing $950.00 from an enlisted man in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three and one-half years. The reviewing authority approved the sentence but remitted two years of 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 accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of the Charge relating to value as involves a finding of value in excess of fifty ($50.00) dollars; legally sufficient to support the sentence as modified by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

Accused was on duty at Miami Army Air Field from October 1946 through August 1947. In October 1946 accused borrowed $950.00 from Staff Sergeant Gerald R. Bryant, a subordinate of accused. Of the amount borrowed accused had repaid $150.00 at the time of trial.

On the evening of 18 August 1947 accused was present at the Officers' Club, Miami Army Air Field. After the club had closed accused returned and took a fifty cent slot machine which had been purchased two months earlier for $338.00. Accused broke the machine and took the monetary contents thereof which were estimated to amount to at least $160.00. Subsequently while driving to Miami Beach he disposed of the broken pieces of the slot machine by throwing them into a canal.

4. Records of the Army show that accused is 29 years of age, married and the father of one child. A prior marriage was terminated by divorce. He completed three and one-half years of high school leaving school to enlist in the Army. He had enlisted service from May 1937 until June 1943 when he was commissioned Second Lieutenant. He was promoted subsequently to First Lieutenant and Captain. His efficiency ratings of record are as follows: "Superior" 1, "Excellent" 5, and "Very Satisfactory" 1. He had foreign service in British Guiana and Ecuador from October 1943 until May 1946.

Although at the trial accused denied that he had ever been convicted by courts-martial the records of my office indicate that he was convicted by General Court-Martial in August 1945 for the unauthorized use of a government vehicle and fraternizing with enlisted men. He was sentenced to be reprimanded and to forfeit Fifty Dollars of his pay.

The law member of the court which tried accused in this case submitted a letter requesting that accused be afforded an opportunity for rehabilitation in view of his prior honorable service and the circumstances surrounding the offenses of which he was convicted.

5. I recommend that only so much of the finding of guilty of the Specification of the Charge pertaining to value as finds value in excess of $50.00 be approved. I further recommend that the sentence as modified by the reviewing authority be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

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 137, 13 July 1948).

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

JACK - CM 330963

23 AUGUST 1948

UNITED STATES	EIGHTH ARMY
v.	Trial by G.C.M., convened at APO 343, 7 and 24 February, 22,23,24,25,26,29,30 and 31 March and 2,7,8,9,12,13 and 15 April 1948. To be hanged by the neck until dead
Private STRATMAN ARMISTEAD (RA 34413381), Headquarters and Headquarters Detachment (Pipeline), 14th Replacement Battalion, Fourth Replacement Depot	

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

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

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

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

Specification 1: In that Private Stratman Armistead, Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot, APO 703, did, at Ebina, Honshu, Japan, on or about 26 October 1947, with malice aforethought, willfully, deliberately, feloniously, and unlawfully, and with premeditation, kill one Haru Fujisawa, a human being, by striking her on the head with a dangerous thing, to wit: a hammer.

Specification 2: In that Private Stratman Armistead, ***, did, at Ebina, Honshu, Japan, on or about 26 October 1947, with malice aforethought, willfully, deliberately, feloniously, and unlawfully, and with premeditation, kill one Kenji Haneishi, a human being, by striking him on the head with a dangerous thing, to wit: a hammer.

Specification 3: In that Private Stratman Armistead, ***, did, at Ebina, Honshu, Japan, on or about 26 October 1947, with malice aforethought, willfully, deliberately, feloniously, and unlawfully, and with premeditation, kill one Yasuhiko Haneishi, a human being, by striking him on the head with a dangerous thing, to wit: a hammer.

Specification 4: In that Private Stratman Armistead, ***, did, at Ebina, Honshu, Japan, on or about 26 October 1947, with

malice aforethought, willfully, deliberately, feloniously, and unlawfully, and with premeditation, kill one Masae Yamamoto, a human being, by striking her on the head with a dangerous thing, to wit: a hammer.

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

Specification 1: In that Private Stratman Armistead, ***, did, at Ebina, Honshu, Japan, on or about 26 October 1947, with intent to do her bodily harm, commit an assault upon Katsu Yamamoto, by striking her on the head with a dangerous thing, to wit: a hammer.

Specification 2: In that Private Stratman Armistead, ***, did, at Ebina, Honshu, Japan, on or about 26 October 1947, with intent to do him bodily harm, commit an assault upon Takehisa Yamamoto, by striking him on the head with a dangerous thing, to wit: a hammer.

Specification 3: In that Private Stratman Armistead, ***, did, at Ebina, Honshu, Japan, on or about 26 October 1947, with intent to do her bodily harm, commit an assault upon Aki Haneishi, by striking her on the head with a dangerous thing, to wit: a hammer.

Specification 4: In that Private Stratman Armistead, ***, did, at Ebina, Honshu, Japan, on or about 26 October 1947, feloniously take, steal and carry away one (1) watch, of a value of about six ($6.00) dollars, the property of Mitsu Fujisawa.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of three previous convictions was considered. All the members present at the time the vote was taken concurring, the accused was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Major Joseph C. Crosby, Headquarters 4th Replacement Depot, identified the accused in court as Private Stratman Armistead and stated that in compliance with orders from the Depot Commander he had investigated the charges against the accused (R 23).

Mr. Yukimasa Kiryu, a Japanese national residing in the village of Ebina-machi, Japan, at Nakashinden, No. 753, identified the accused as the colored soldier whom he saw near the Ebina railway station at about "10:30

until 11 o'clock" on the morning of 25 October 1947. The accused was carrying a box about one foot square which was wrapped in white cloth, and made some gestures to the witness indicating that he desired to buy some Sake. The witness accompanied the accused to a shop where the latter purchased a bottle of whiskey, after which the witness, the accused, the shopkeeper's daughter and "the lady" drank about two-thirds of the whiskey from the bottle (R 28). On cross-examination the witness stated that the box which the accused was carrying appeared to be very light and wrapped in white paper. The witness had also seen the accused on 6 November 1947 at the Kaga police station and on 10 December at the "Army Officers School" at Zama. At the police station the accused was standing in a line of five soldiers, each of whom had a number. The witness pointed out Number 3 as being the accused. He had also identified the accused on 10 December 1947 (R 29-31).

Yasuko Komatsu, the daughter of a shopkeeper in Ebina, testified that the accused, in company with a Japanese man, visited her place on the morning of 25 October 1947 and purchased a bottle of whiskey from her mother. The accused was carrying a white package. He left the store at about noontime and returned about 3 o'clock p.m. with "Tamichan" (Tamiko Akaike), a girl of the neighborhood, who requested another bottle of whiskey for the accused. None of the parties appeared to be drunk. At about 0130 hours that night the witness heard cries for help coming from the direction of "Tamichan's" house (R 33-41).

Tamiko Akaike identified the accused as a soldier she met at the home of Yasuko Komatsu about noon on 25 October 1947. At the request of the accused Tamiko took him to her home. He was carrying a white package which contained a towel, shirts, trousers and other items which he told Tamiko he desired to sell. Tamiko was in the business of accepting money from soldiers for illicit relations but she became fearful of accused and, in an effort to evade him, induced him to go with her to the railroad station where she met some white soldiers. The accused told her that if she went with the white soldiers he would "break /her/ head with this bottle." They returned to Tamiko's home at about 6:00 p.m. and the accused struck her four or five times and made her get in bed with him. Subsequently he fell asleep and Tamiko ran away. She returned to her house later that night with a Japanese friend and found that the accused had gone away taking all of her clothing from her trunk. At about 11:30 o'clock p.m. he returned and Tamiko stated that she left the house and summoned the aid of another soldier. They returned and the soldier told the accused that "its 5 minutes after one and this colored soldier left my house without his uniform" (R 42-45). On cross-examination the witness testified that she entertained soldiers for pay but did not desire the company of the accused. In the presence of a "staff sergeant from Zama" she had repaid the accused 500 yen which he had given to her when he first came to her home. The accused told her that he was absent without leave. She told the accused to hurry away because the white soldiers would be angry

with her. Tamiko stated that she met a soldier named Roy Mason that night and that Mason went away with her sister. Staff Sergeant Loney was the soldier who told the accused to hurry back to camp, stating that "its already fifteen minutes to one." She had requested Loney to stay with her the remainder of the night inasmuch as she was afraid of the accused. Tamiko found her clothes in a field shortly after the accused had left her house (R 45-65).

Without objection the following prosecution exhibits were received for identification only: 1-A, 1-B, 1-C, 1-D, 2-A, 2-B, 2-C, 2-D, 3-A, 3-B, 3-C, 4-A, 4-B, 4-C, 5,6,7,8,9,10,11-A,11-B, 12, 13-A,13-B, 14-A, 14-B,14-C,15-A to G, inclusive (R 20-23). Prosecution Exhibits 5, 6, and 7 were identified by Staff Sergeant Masao Kato as being sketches he had made of various houses in the town of Ebina, showing the position of various persons reported to have been therein on the night of 25-26 October 1947, including certain persons alleged to have been killed. Prosecution Exhibit 12, a rough map of Ebina made by Sergeant Kato, was received in evidence by consent of the parties (R 65-68).

Mitsu Fujisawa, Ebina-machi, Kokubu 3261, testified that at about "2:30 a.m. on the 26th" of October 1947, the four members of her family, "father, mother, and elder sister and I" were sleeping in the same bed when suddenly she felt something cold on her body. She aroused her sister, Haru Fujisawa, and turned on the light. She then saw "a lone colored person was sitting at the head of my sister." Mitsu Fujisawa viewed the personnel in the court room and pointed to the accused as being the person she referred to as being near her sister Haru's head. She identified Prosecution Exhibits 5 and 16 as being true representations of the exterior and interior of her home and showing the position of all the persons referred to by her on the occasion in question. These exhibits were received in evidence without objection (R 75). Mitsu stated that upon seeing the accused in the family bedroom she was amazed and exclaimed, "Please excuse us" and the accused replied, "Go ahead and sleep." She and her sister got back in bed. She later noticed that the front door was open. The accused got up and closed the door and came back to the bed. She observed that he had something like a hammer in his hand. He struck at her with the hammer but she fled from the room by way of a window which she indicated on the diagram (Pros Ex 5). Mitsu ran into a garden yelling "murder" and summoned the aid of the Section Police Chief Iida, who returned with her to the house. She found that her sister Haru was "hurt" on the left side of her head and that the drawers to a cabinet were standing open. Section Chief Iida secured "Mr. Sakomoto" to render medical aid to Haru Fujisawa. While the girl Haru was being treated she lost consciousness and was taken to the Sagamihara Hospital where she died at "about 3:00 p.m. on the 26th." The witness identified Prosecution Exhibit 1-A as a picture of her sister, Haru, and showing the position in which she was sleeping on the night she was assaulted (R 73-79).

At this point in the proceedings the defense counsel stated that

there were several negro soldiers in the court room, one or two of whom he might desire to call as witnesses. He requested permission that such persons be allowed to remain in court inasmuch as the identity of the accused was the only major issue at the trial. At the opening of the trial the court had ruled that all expected witnesses remain outside the court room and the law member had stated that counsel for both sides would be held responsible for compliance with the rule. After some discussion the court refused to relax the rule and defense counsel pointed out "Mr. Shannon and Mr. Cochran" who were caused to withdraw from the court room (R 79-81).

Mitsu Fujisawa resumed the stand as a witness for the prosecution and was asked to identify Prosecution Exhibits 20-A and 20-B. She stated that "these are watches." She had seen only one of them before, the one which was marked Exhibit 20-A. She asserted that Prosecution Exhibit 20-A was her watch which she had owned for twelve or thirteen years. This watch "went out of her possession" and was found to be missing from her room after the "visit" of the accused on the night of 26 October 1947. She had left it in a needle box at about 9:30 when she retired and when she had returned to the room immediately after the accused had been there, she observed that the watch was missing. She had never given the watch to anyone or disposed of it in any manner (R 81-83). On cross-examination, the witness was requested to describe the hammer previously mentioned. She indicated that it was about 12 or 14 inches long with a circular head about an inch and one-half in diameter. The handle was of unpainted wood and dirty. The witness stated that she did not remember telling Major Crosby at the investigation that "I did not notice it" (the hammer). She was positive that she answered that "he /the accused/ had a weapon." The witness recalled that a few days after the incident the accused had been brought to her home by the Criminal Investigation Division and she had identified him at that time (R 83-88). The witness stated on further cross-examination that she was present with her mother at the 4th Replacement Depot on 10 December 1947, when Agent Dent had "pointed out" the accused as being the colored soldier in question, but at that time her mother could not identify him (R 89). She fixed the time that the accused was in her bedroom at "2:30" because she happened to look at the watch on one of the neighbors gathered at her house when she returned and found her sister injured and her watch missing. The watch had been bought by her father and mother and belonged to Haru at one time, but Haru never wore it and Mitsu used it as her own. She thought it was a Japanese watch. In response to the question, "As a matter of fact you would be surprised, wouldn't you, if I told you that the watch that you have identified is a Swiss watch and not a Japanese watch?" the witness replied, "I would" (R 91).

The prosecution introduced as a witness Dr. Yasuo Fujii of Yokohama, Japan, who was qualified as a practicing physician of many years experience,

and who was also the chief coroner of the district which included Ebina. He identified Prosecution Exhibits 1-A and 1-B as photographs of the corpse of Haru Fujisawa, upon which he had conducted an autopsy on 27 October 1947. Exhibit 1-B depicted the injury to the victim's head. Dr. Fujii also identified Prosecution Exhibit 1-D as the actual skull of the victim showing the nature of the injury received. The witness had prepared the skull for instructional purposes in the medical school. Death had resulted from hemorrhage occurring immediately beneath the "indentation" in the skull. The wound appeared to have been accomplished by use of a "hard, heavy and a blunt instrument." It must have been round, something like a hammer, because the indentation in the skull was in the shape of a half moon. Dr. Fujii estimated that death had occurred between "4 or 5 o'clock" on 26 October 1947. The photographer who took the pictures identified the same and, over the objection of defense counsel, Prosecution Exhibits 1-A, 1-B and 1-D were received in evidence (R 94-99, 105-106).

The witness Mitsu Fujisawa was recalled to the stand for further cross-examination and stated that the accused was the only colored soldier in her house on the night in question. After the incident she had been taken to Yokohama by the military police. The accused was present and handcuffed. After this incident she was requested to "pick him out of a group of colored soldiers." She had told the officers that she experienced difficulty in "telling colored soldiers apart" (R 103).

Miyoko Niwa, Ebina-machi, Kokubu 3245, testified that "a little after two o'clock on the morning of the 26th" Haru Fujisawa came to her house. Blood was "streaming down" from her head upon a white blouse that she was wearing. Haru stayed at the witness' home for about 15 or 20 minutes and about two minutes after she left a soldier, whom she identified in the court room as the accused, entered her house. He was wearing a short coat which was "pulled in at the waist" and was carrying a "whitish looking package." The witness asserted that she was so afraid she only spoke one word, "hello" and the accused replied, "hello" (R 108-110). On cross-examination Miyoko admitted that at various times she had lived with one or more colored soldiers, but "on the 25th and 26th he was not there." Subsequent to the 26th she had identified the accused as "No. 3" in a line-up of colored soldiers at the Kaga-cho Police Station. No one had assisted her in identifying the accused. She was asked by counsel, "Didn't you have difficulty at that time because of the fact that there were several colored men who were taller than Pvt Armistead?" to which she replied, "No, I did not have any difficulty" (R 112). At the time the accused came to her house he had the package under his left armpit and his right hand was in his right coat pocket. She did not know whether he was armed with any kind of a weapon. The light was burning in her house but it was not very bright. She did not notice any scar on accused's face (R 115).

Mrs. Aki Haneishi was brought into court and testified from a wheelchair. She stated that in October 1947 she lived with her husband, Kenji

Haneishi, and children, Tatsuo, Yasuhiko and Kazuhide, in the town of Ebina, Kokubu, 1944. She remembered the festival held in Ebina on 25 October and had made a monetary donation thereto. She identified Prosecution Exhibit 6 as a sketch showing the floor plan of her home and Prosecution Exhibit 17 as a photograph thereof. These exhibits were received in evidence without objection (R 118-119). By consent of the parties the witness was permitted to indicate on the sketch (Pros Ex 6) the relative position of the members of her family whom she testified were sleeping on mats in the same room of her house on the night of 25 October 1947. As indicated on the exhibit, four members of the family were sleeping on two mats which were joined together. Aki was at the extreme left, Kenji, her husband, was at the extreme right, and between them were their two children, Kazuhide and Yasuhiko. (Their son, Tatsuo, was away from home on this night.) In the early morning hours the witness stated, "I think it was a little after 4 o'clock *** I woke up because something heavy was on my legs." She then sat up and saw a colored soldier on his knees at the foot of her bed. He said to her, "Pom Pom." Aki was frightened and turned toward her children and husband who were sleeping to her right. She then noticed that her husband, Kenji, and her son, Yasuhiko, each "had been struck in the head and blood was streaming from their heads." Immediately back of her and near the head position on her mat she observed a hammer which she tried to conceal by pushing it under her pillow. Aki stated, "After that I have no recollection whatsoever." She was wheeled about the court room and to a place where seven colored soldiers were sitting, but was too ill to complete her testimony and court was adjourned until the following day (R 116-122). When court reconvened on 25 March 1948 Aki Haneishi resumed the witness stand, was reminded of her oath, and the trial judge advocate stated to her, "We are going to show you everybody in the court room and we want you to tell us if you can identify anyone as being the person you saw in your home in the early morning hours of October 26, 1947." One of the monitors wheeled the witness around the court room and the record shows that she pointed to a negro soldier, one of the spectators, and made some statement in Japanese which was not interpreted. The prosecution thereupon stated that he understood that the negro soldier pointed to was a witness for the defense. The defense insisted that the spectator be allowed to remain in court, but refused to state that he did not intend to call such person as a witness. The prosecution thereupon argued to the court that when the witness pointed to the spectator, who appears to have been seated to the left of the accused, defense counsel sat in front of the accused so as to shield him from the witness' view. The court directed that the name of the spectator be ascertained and that he be permitted to remain in court until the identification evidence was completed at which time he would retire from the room. As shown by his "dog tags" the spectator was "Pfc Willie E Shannon, 18075004." The witness was again asked if she could identify in the court room the person she saw in her home in the early morning of 26 October 1947.

She was again wheeled about the court room and stated that she could not be positive but believed that she had seen two persons who were sitting at the defense table near the accused. These persons appeared to be Private First Class Willie E. Shannon and Staff Sergeant John A. Wescott. She did not identify the accused. The witness was then shown Prosecution Exhibit 9 and stated that it was a hammer of similar length and looked like the one she saw near her pillow on the morning of 26 October 1947. She identified Prosecution Exhibit 8 as being a hoe handle which "we had in our home." She recognized the hoe handle by the "worn spot on the squarer end." It was "stood up against a bicycle trailer in our home." Prosecution Exhibit 10 was identified by the witness as being a belt which she had made from the end of a kimono. This exhibit appeared to consist of narrow strips of printed cloth laced and sewn together (R 122-130). On cross-examination Mrs. Haneishi stated that "There is no mistake in that the soldier is colored. However, I cannot say that I recognize the person, and I cannot be sure of him." She stated that the lights in her home were not good and that on the night in question her son, Tatsuo, had gone to another house to study. The witness was excused and counsel stipulated that if she were recalled she would testify that on 25 October 1947 she saw Prosecution Exhibit 8 (the hoe handle) tied to a bicycle trailer on the inside porch of her home (R 131).

Tatsuo Haneishi, Ebina-machi, Kokubu, No. 1944, testified that Prosecution Exhibit 8 was a discarded hoe handle which had been left on the dirt floor of his house. He identified Prosecution Exhibit 10 as containing a piece of cloth he had seen in his home, Prosecution Exhibits 2-A, 2-B and 2-C as being photographs of his father (Kenji Haneishi), and 3-A, 3-B, and 3-C as being photographs of his younger brother (Yasuhiko Haneishi). He saw both his father and brother on 25 October 1947. On the "next" morning each had injuries to his head and they were both moaning. On the following morning his brother "was not moaning any more" (R 132-133). On cross-examination Tatsuo stated that he could not say positively that Prosecution Exhibit 8 was the hoe handle which was in his home prior to 26 October 1947 but considering its size, shape, color and decayed condition he believed that it was the identical handle. On the night of 25-26 October he had spent the night "in a house in front of ours" (R 134).

Seichi Murakami, the photographer who previously testified, was recalled and again identified a roll of film (Pros Ex 21) which included the negatives of pictures he had taken at the Haneishi home at about 10:30 a.m. on 26 October 1947. Prosecution Exhibits 2-A, 2-B, 2-C, 3-A, 3-B, and 3-C were developed from those negatives. No one had been allowed to tamper with the films or pictures and the witness had no knowledge of the circumstances surrounding the death of the parties shown (R 135-139).

Dr. Yasuo Fujii, the coroner who had previously testified, was

recalled and stated that Prosecution Exhibits 2-A, 2-B and 2-C were pictures of the dead body of Kenji Haneishi. He had performed an autopsy on this body at about 3 o'clock p.m. on 26 October 1947. He concluded that death had occurred at about 7 or 8 o'clock in the morning of the same day and resulted from a "head injury which caused a skull bone to be broken and the brain crushed." Dr. Fujii identified Prosecution Exhibit 2-D as the skull or cap of Kenji Haneishi. He had removed the skull bone to use it as evidence. The witness explained to the court the nature of the wound and stated that it was caused by a blunt instrument such as a hammer (R 139-141). On motion of the prosecution the court received Prosecution Exhibits 2-A, 2-B, and 2-C in evidence. The court also received Prosecution Exhibit 2-D (skull cap) for identification. The defense objected to the admission of all the exhibits, particularly Prosecution Exhibits 2-D (skull cap of Kenji Haneishi) contending that such procedure was indecent, scandalous and calculated to inflame the court. He moved for a mistrial which was overruled (R 142). Continuing his testimony, Dr. Fujii identified Prosecution Exhibits 3-A, 3-B and 3-C as photographs of the dead body of Yasuhiko Haneishi taken at the time he had performed the autopsy thereon on 26 October 1947. He also identified Prosecution Exhibit 3-D as the skull bone or cap of Yasuhiko. The witness began the autopsy at about noon on 26 October 1947 and completed his work at 4:30 p.m. He assumed the body had been dead about 12 hours prior to the time he performed the autopsy. Death was caused by a blow on the head with a blunt instrument "resembling a hammer." Dr. Fujii stated that during his lengthy medical career he had performed over 1300 autopsies. His testimony was based entirely on the results of his past experience. On motion of the prosecution the court received in evidence Prosecution Exhibits 3-A, 3-B, 3-C and 3-D. The defense objected and again moved for a mistrial which was overruled (R 145-148). On cross-examination the witness was asked "Your opinion about the type of instrument is a guess, isn't it?" Dr. Fujii replied, "It is a supposition that comes from experience." He was "practically" positive that the injury was caused by a hammer. He had performed autopsies on other so-called "hammer murders" (R 148). It was also brought out on cross-examination of this witness that the pictures, Exhibits 2-A and 3-A, were taken of the respective bodies while they lay on the mats in their house and before they had been moved. The photographs, Exhibits 2-B, 2-C, 3-B and 3-C, were taken after he had moved the bodies himself so as to show the injuries (R 149). On being interrogated by the court, Dr. Fujii stated that the skulls, Exhibits 2-D and 3-D, were in the condition "today" as when he removed them from the bodies. It would have been "almost impossible" for such injuries to have resulted from a "fall" or to have been self-inflicted. A fall or impact with a moving object would have produced other symptoms on the body such as contusions and abrasions. The autopsies performed on the three bodies (Haru Fujisawa, Kenji Haneishi and Yasuhiko Haneishi) revealed injuries only to the heads of the victims. In preparing the skull caps for evidence he had merely applied caustic soda to them in order to remove the "blood that may have been in or on the bone and the oil that it contains"

(R 150).

The prosecution called as its next witness Mrs. Katsu Yamamoto, who testified that during October 1947 she resided at No. 846 in the town of Ebina, Kokubu, with her 11-year old son, Takehisa, her eight-year old daughter, Masae, and her four-year old son, Tsutomo. Masae had died on 26 October 1947. Mrs. Yamamoto stated that at about 4 o'clock in the morning of 26 October while she was sleeping in her home with her children she was awakened and observed a colored soldier "on his knees in front of me." She testified that "This colored soldier asked me about twice if my father was there." She replied that he was there. The soldier was tying a hammer on a wooden shaft about three feet long. The witness identified Prosecution Exhibit 19 as being a photograph of the hammer which she "distinctly saw being tied on." The witness further identified Prosecution Exhibit 7 as being a sketch of the interior of her home showing the sleeping position of herself and children on the night in question; Prosecution Exhibit 8 as being the wooden shaft or "hoe handle" which the soldier was tying to the hammer; Prosecution Exhibit 9 as being the actual hammer; Prosecution Exhibit 10 as being the cloth or rag being used to tie the objects together, and Prosecution Exhibits 18-A and 18-B as being photographs of her home. After observing the soldier tying the shaft to the hammer, Mrs. Yamamoto stated that she was injured and "remembered nothing." She did recall however that when she and the children had retired for the night the electric light bulb in the room had been covered with black cloth, but when she was awakened the cloth had been removed (R 152-161). The record shows that, due to her physical injuries Mrs. Yamamoto had difficulty in seeing. She was wheeled about the court room and requested to point out, if she could, the colored soldier whom she saw in her room tying the hammer to the shaft. Five colored soldiers were seated at the defense table including the accused, who was the "second colored person from the right." After viewing the spectators Mrs. Yamamoto was wheeled near the defense table where she stated, "It appears to me that I recognize a person at this table and I have seen him before." She then pointed to the accused, stating, "The second colored soldier from the right" (R 162-164). In response to a question by the law member, Mrs. Yamamoto stated that after 26 October 1947 she was hospitalized for an injury to her head "just to the rear of my left ear and slightly above." She had experienced constant dizziness and was unable to see most of the time but her vision had improved (R 168).

Takehisa Yamamoto, age 11, was examined on voir dire, stated that "I will tell the truth," and was sworn as a witness for the prosecution. His home was in Ebina and his mother was named Katsu Yamamoto. He had a younger brother living but his sister, Masae Yamamoto, had "passed away on the 26th of October." Takehisa stated that at about 4 o'clock on the morning of 26 October 1947 when he got out of bed to go to the toilet he saw a colored soldier in the room where he and the members of his family were sleeping. He was requested to look around the room and

see if he could identify the soldier to whom he referred. The witness left the witness' stand and viewed the spectators to the left and rear of the court room, then approached the defense table where he pointed out the accused among the soldiers who were there seated. He asserted that when he woke up the accused was talking to his mother and "tying" something together. He saw the accused strike her with something like a hammer. Takehisa attempted to hide under the cover but the accused pulled it off and struck him on the head. He tried to ward off the blows by placing his hands over his head and as a result some bones had been broken in his hand. He had been "operated upon." Takehisa saw his mother after she had been struck and "she was spewing from the mouth and she was on the floor." He took a quick look at his sister and "she appeared to be dead. She appeared as if she were sleeping. However, I only took just a quick look at her so I couldn't tell." He then ran out of the house to get help. The witness identified Prosecution Exhibit 4-A as a photograph of the body of his sister, Masae (R 171-176). On cross-examination defense counsel interrogated Takehisa at length concerning the identity of the soldier whom he saw in his home on the night in question. The witness stated that some people came to his home with an automobile and took him to the hospital where there were a lot of soldiers lined up. Each soldier held a number and he was asked to look at the men and if he recognized the person who was in his home to return to the interpreter and give the number of this soldier. He was not told to pick out any particular number. Prior to this occasion and while he was hospitalized he had identified the accused in person and by his picture (R 177-183). Under further and extended cross-examination, Takehisa was caused to repeat in detail the events concerning which he had previously testified. He stated that prior to the time the accused struck his mother "the word pom-pom was used," however he was not "too sure." The accused was facing his mother and talked to her about three or four minutes. While the witness was in the hospital a colored civilian had brought the accused into his room and said, "Is this the person?" but he did not say, "Kono hito desho," which being interpreted means, "Isn't it this person?" The witness had stated, "It is this person (R 204). When he saw the accused in the morning of 26 October he appeared to be dressed in "uniform like the court members are wearing" (R 209).

Seichi Murakami, the photographer who previously appeared as a witness, was recalled and identified Prosecution Exhibit 4-A as a photograph of Masae Yamamoto "as she was" in her home on the morning of 26 October 1947. Prosecution Exhibit 4-B portrayed the injury to her head. These pictures were taken at the Yamamoto home "around noon" on 26 October (R 212). Dr. Yasuo Fujii was recalled and identified Prosecution Exhibit 4-A as a photograph of the corpse of Masae Yamamoto. He was present when the picture was taken. He also identified Prosecution Exhibit 4-B as a photograph of the head injury of Masae. He had merely moved the head so that the injury would face the camera. These exhibits were received in evidence over objection (R 213-215). The witness stated that

he had performed an autopsy on the body of Masae in the afternoon of 26 October. He was of the opinion that death had occurred around 7 o'clock in the morning. Dr. Fujii identified Prosecution Exhibit 4-C as the "skull cap of Masae Yamamoto." He stated that "Due to an injury to the rear of her head, the skull bones were broken into very small fragments and from that injury the brains underneath that portion had been smashed in and indented, and the cause of death was that." The witness was of the opinion that "considering the injury to the outer skin and the indentation to the skull bone, they both show that the type of instrument used was something resembling a hammer." Over objection of the defense, Prosecution Exhibit 4-C was admitted in evidence (R 216-217). On examination by the court the witness stated that in his opinion it would have been impossible for the injury to have been self-inflicted or resulted from accident.

Benjamin A. Williams, Special Agent and Chief of the Identification Section of the Yokohama Criminal Investigation Division, identified Prosecution Exhibit 8 as a "stick to which a hammer was tied by pieces of rags and fine pieces of wire, which was pulled out of a well at the home of Yamamoto, the scene of the third suspected homicide in Ebina, on the 26th of October 1947." Prosecution Exhibit 9 was the hammer which was tied to the stick. He was present when these objects were removed from the well by some Japanese who were assisting him in the investigation. Prosecution Exhibit 19 was a photograph he had made shortly after the stick and hammer were removed from the well. The witness identified his initials "BW" which he stated he had scratched on the handle of the hammer at that time. Mr. Williams identified Prosecution Exhibit 10 as the "strings and copper colored wire which bound the stick to the hammer." The well referred to was about three or four feet from the door sill of the Yamamoto home and the witness had disassembled the hammer and stick and allowed them to dry in an effort to get fingerprints. The defense objected to the admission of Prosecution Exhibits 8,9, and 10 in evidence contending that there was no proof showing that these exhibits "collectively or separately are the same that were used by the certain colored soldier on the night in question." After argument by counsel, and a review of prior testimony in the case the exhibits were received by the court for the purpose of establishing that "collectively they compose the weapon found at the scene" (R 229). Seichi Murakima was recalled and identified Prosecution Exhibit 19 as "a picture of a hammer which I took in front of the Yamamoto house." The court received this exhibit "to indicate how Prosecution Exhibits 8, 9 and 10 now in evidence appeared the morning of 26 October, shortly after they were removed from the well" (R 231).

Dr. Kiyoaki Nagai testified that he was a surgeon employed at the National Sagamihara Hospital. He was acquainted with Mrs. Katsu Yamamoto and stated that on 27 October "last year" she was admitted to

his hospital. By referring to his daily records, he stated that when admitted Mrs. Yamamoto was suffering from an injury about three centimeters in length in the upper left region of her head. She was unconscious. He had made an X-Ray of her skull on 29 October 1947. The witness identified Prosecution Exhibits 11-A and 11-B as these X-Ray pictures. It was his "impression" that the victim had been struck with something which resembled a hammer and stated that "unless a great deal of power were used, such a circular hole would not be made in the skull." The injury was what is generally described as a fractured skull. Without objection one of the pictures was introduced as Prosecution Exhibit 11-A (R 236-237). The witness had been treating Mrs. Yamamoto for 126 days and stated that the injury had caused the patient to have a partial loss of memory, had affected her eye nerves, and rendered it difficult for her to walk. On cross-examination the surgeon stated that he had no knowledge of her condition prior to 25 October 1947 (R 238).

Dr. Nagazumi Nagai, another physician employed at the Sagamihara Hospital, stated that he saw Takehisa Yamamoto at the hospital on 26 October 1947 and began treating him two days later. The patient was confined 32 days and was treated for injuries to his head and broken bones in his left hand. He had applied splints to the hand but the results were unsatisfactory, and on 14 November 1947 he resorted to surgery on the hand. The surgeon "could only tell that he had been struck with a hard and blunt instrument." It could have been a hammer (R 240-249).

Dr. Kazuhidi Sakamoto, another qualified physician of the National Sagamihara Hospital, testified that he "met" Aki Haneishi when she arrived at the hospital on 26 October 1947. The patient was in a comatose condition and had a flesh injury about eight centimeters in length and two centimeters in width on her left cheek, a deep injury to the rear of her left ear and a small wound to the left upper ear lobe. She was confined in the hospital 28 days. The doctor was shown Prosecution Exhibit 9 (claw hammer) and he stated that the claws of such an instrument could have caused the described injuries, most likely by a downward stroke, which the witness illustrated by a diagram he made for the court. The patient regained consciousness two or three days after her admission to the hospital but her memory was greatly impaired. On cross-examination, the witness asserted that if the wound had been caused by a sharp instrument the wound would have been different - in this case the edges of the wound were ragged. The witness refused to express an opinion as to the position of the parties when the weapon or instrument was used, but he illustrated the probable path of the weapon in effecting the injury (R 247-255).

Prior to leaving the witness stand Criminal Investigation Division Agent Dent identified Prosecution Exhibit 20-A as being a watch which he had taken from Yoichi Hamao, a 16-year old Japanese boy residing in the "neighbor village of Fuchu." He stated that "Pvt Armistead took us to the place." The watch had a V-shaped crack or scratch in the crystal and had been in the witness' personal possession until he handed it to

the trial judge advocate (R 232).

Kikue Hamao (referred to in the record as Mrs. Hamao) testified that she lived in the municipality of Tokyo, at Kita-Tama-Gun, Tamamura, Tori-Koremasa, No. 1667. At some time near the last of October or the first of November 1947 a colored soldier visited her home at "around 7 o'clock in the evening and stayed until around 10 o'clock." She identified the accused as being the person to whom she referred. The accused had requested food which she gave to him and when he stayed "so long" she became frightened and told him to say "sayonara" and depart. He thereupon took out a watch and asked her to buy it for 300 yen. In order to get him to leave she bought the watch. During the time he was in her home the accused sat in the hallway watching the rear door which was open while Mrs. Hamao and her family sat on mats in the room. The witness identified Prosecution Exhibit 20-A as the watch she purchased from the accused on the evening in question (R 255-259). On cross-examination counsel displayed two watches to the witness and placed one in each of her hands. He then asked her to state which watch she purchased from the accused. She asserted emphatically that the one she held in her left hand (Prosecution Exhibit 20-A was the watch which she bought. She thought it was a Japanese watch but did not know its trade name. The watch would not fit her wrist and she took the "chain off" and put a leather strap on it (R 260-262). The prosecution moved that Prosecution Exhibit 20-A be received in evidence. The defense objected and the court heard arguments on the question of identity and ownership of the watch but did not rule on the admissibility of the watch.

The prosecution rested and the defense moved for a finding of not guilty on all charges and specifications, contending that the prosecution had failed to sustain the burden of proof. Extended arguments were made by both sides (R 263-271). The law member ruled that subject to objection by any member the motion of the defense for a finding of not guilty was overruled as to the charges and all specifications except Specification 4 of Charge II, with respect to which the motion was granted. Two members objected. The court was opened and the President announced that action on the motion for a finding of not guilty as to Specification 4, Charge II, would be deferred and he directed that the trial judge advocate reopen the case with particular reference to this specification. The defense objected to such procedure and moved for a mistrial. The motion was overruled and the court adjourned on 31 March to meet on 2 April 1948. The court reconvened on 2 April and the prosecution called Mrs. Saki Fujisawa as a witness. She stated that she lived in Kukubu, Koza-Gun, town of Ebina. On the night of 25-26 October of last year a colored soldier of the occupation came to her house. She could not identify the soldier in the court room. The lights in her home were out and her daughter Haru asked if she should turn on the lights. When the lights were turned on the soldier was sitting by Haru's pillow with his back to her (the witness) and she did not see his face. Mitsu, another daughter, went out the window. The soldier made motions with his hands

"indicating us to go back to bed." He had something in his hands which the witness indicated was about 12 or 14 inches in length. The trial judge advocate presented to the witness a written statement which she admitted she had signed and asked that she refresh her memory. The defense objected and the law member sustained the objection. She stated that the colored soldier told her to go back to sleep. She lay down and heard Haru say, "Don't do that to me." Then she said, "Somebody please come." The witness also called for help and then the colored soldier went out of the window and Mitsu came back. Blood was on Haru's neck and it was decided to take her to the hospital. This occurred about 2 o'clock in the morning and at about 3 o'clock Haru went to see the doctor. The "whole family" had purchased a wrist watch which Mitsu and Haru had been wearing but as it was night they "took it off." The watch had been in the family 12 or 13 years. The witness was shown Prosecution Exhibit 20-A and stated, "I believe this is the watch that we had in our house." The defense objected strenuously to such expressions as "I think" and "I believe." The prosecution retorted that such expressions in the Japanese language were positive statements of fact to the same extent as they are in the English language. The witness was asked if she had ever seen that watch before. She replied, "This watch was taken from us and after awhile it was brought back. *** It was taken on that night." The defense objected to the answer as not being responsive to the question. The law member sustained the objection and ordered the remark stricken (R 276-285). On cross-examination the witness testified that she was sure that her younger daughter, Mitsu, was wearing the watch on 25 October, but she did not know the make of the watch (R 288,290).

Mitsu Fujisawa was recalled by the prosecution and stated that she knew a person by the name of Arai whom she had met when she worked at the Tax Representative's office. It had frequently been necessary to have her watch (Pros Ex 20-A) repaired and Mr. Arai had accommodated her by taking it to the jeweler (R 302). On cross-examination counsel exhibited two watches to the witness, referred to as Prosecution Exhibit A and Defense Exhibit A. He had changed the bands thereto. The witness was cross-examined at length but she held fast to her identification of Prosecution Exhibit 20-A as her watch and explained certain characteristics of the watch which enabled her to identify it. The watch was thereupon admitted in evidence (R 307-314).

Seizo Sawamura, a watch repairman of Yokosuka, identified Prosecution Exhibit 20-A as a watch Mr. Aria, his close friend, had on occasion brought to him for repair. He explained the distinguishing characteristics of the watch which caused him to remember it. The movement was Swiss and the case was Japanese. On cross-examination he explained further that the watch was a size 8, was about 15 or 20 years old, and had a stainless steel bracelet. He had replaced the lens and mainspring after "June of last year" but "it wasn't winter" (R 315-320).

Takeya Arai, City of Yokohama, stated that he had known Mitsu Fujisawa for about two years, having met her at the tax bureau. He identified Prosecution Exhibit 20-A as the watch worn by Mitsu Fujisawa and which, at her request, he had taken to the watchmaker, Seizo Sawamura, on two occasions for repair. The watch had a lot of marks around the edge making it readily identifiable. On cross-examination counsel handed the witness "Defense Exhibit A," another watch, and Arai stated it was similar to the watch he took to the jeweler. On redirect examination he stated that Prosecution Exhibit 20-A was the watch he had taken to the jeweler (R 321-324).

The court closed and denied the motion of the defense for a finding of not guilty as to each charge and specification (R 325).

4. For the Defense

Major Joseph C. Crosby, the investigating officer in this case, was called by the defense and identified the stenographic copies of statements of the expected witnesses, which statements were taken by him and the Criminal Investigation Division prior to trial. The prosecution objected to any reference to the matter contained in the documents but the objection was overruled. By reference to the stenographic notes the witness testified as follows:

> "Q. Now, did you ask Mitsu Fujisawa the following question and receive the following answer: 'Did he have in his possession a weapon of any description?' Answer, 'I did not notice it.'
>
> "A. That question I asked but I could not identify the witness at the present time. I could not identify Mitsu Fujisawa because I only had her at the one investigation and ---
>
> "Q. We are not asking you to identify the witness, Major, we are asking you to state whether the record accurately shows that that answer was given as recorded.
>
> "A. Those questions I asked, those answers I received through the interpreter." (R 297)

Private First Class Roy R. Mason, 4th Replacement Depot, stated that he was in Ebina-machi on the night of 25 October 1947 and saw the accused at the house of the Japanese girl named Tamiko. He left the accused at her house "between 9 and 9:15." Mason stated that he passed Tamiko's house about 30 minutes later and the accused was not there (R 326).

Staff Sergeant Charles W. Loney, 4th Replacement Depot, was at the Ebina railroad station "between ten and 10:30" on the night of 25 October 1947, at which time a girl named Tamiko approached him. He went with her to her home where he found the accused sleeping on the floor. He aroused the accused and he "took right off." The accused returned a few minutes later and got some money from the girl and he did not see him again that night. The accused was dressed in "OD's and field jacket."

Loney had stayed at Tamiko's house the remainder of the night (R 327-330).

Asaji Seki testified that he resided "in the City of Yokohama, Nishi-Ku, Sengencho, 2-80 Kawasaki." He identified the accused and stated that he remembered seeing the accused at the entrance to his home "between 2330 and 2400 hours" on 25 October 1947. The witness stated that "It appeared to me as if he was saying something, but as I do not understand any English I was unable to understand him, so I just pointed in another direction and asked him to go someplace else." The witness had mentioned the incident to his next door neighbor, Kaku Yoshida, and returned to bed (R 330). On cross-examination Mr. Seki asserted that he fixed the date of the incident, 25 October 1947, by looking at Mr. Yoshida's attendance record. On that day Mr. Yoshida, who worked for the Occupation Forces, did not go to work (25 Oct 1947 appears to be Saturday) (R 332). On further cross-examination, Mr. Seki stated that "At the time I did not know anything about this incident, and just awhile back when the defense attorney came to me in order to recall my memory, I was shown this attendance record. *** When the defense attorney came to my home and showed me the attendance record, I found out then that it was the 25th" (R 335). The witness stated further that his recollection was not distinct. He lived near the Central Station in Yokohama (R 339). Kaku Yoshida testified that he lived at Sengencho, 2-80, Yokohama, and worked for a company "run by the occupation forces." He stated that he knew the accused but would not know whether he was in the military service of the United States. On the night of 25 October 1947 he heard Mr. Seki, his neighbor, talking to someone outside his house. Seki shouted that "it was a colored soldier." This occurred between 2330 and 2400 hours. The witness had conferred with the defense counsel on two occasions and showed him his attendance card. He knew the accused by seeing him go in and out of the court room (R 343-345). On cross-examination Yoshida stated that he was not absent from work on Saturdays previous to the incident about which he had testified. Sunday was his day off from work. A member of the court asked the witness to look at his work "slip" and state whether it showed that he worked on the 25th. He stated, "I went to work on the 25th" (R 347).

Toshio Enoura, a shipbuilder living at "Yokohama, Nishi-Ku, Sengen-cho, 2-81", pointed to the accused in the court room and stated that he had seen accused at his house at "around 0030 hours" on the night of 25 October which was the night before Sunday. The accused had come to his house and said, "Konbanwa, konbanwa." The witness did not understand what he meant. The accused stayed until about 0300 hours but Enoura did not remember anything else that was said during the time accused was at his house. The accused was dressed as he appeared in the court room. Miss Okozaki, a neighbor, who could talk English, came over to the witness' house and after conversing with the accused stated that he (accused) desired to remain at Enoura's house for the night, but Enoura stated that it was too late. Enoura's wife, a child, and sister were at the house (R 350-360).

Hatsue Enoura, wife of Toshio Enoura, corroborated her husband's testimony concerning the accused's visit to her home. She fixed the date as being about 8 or 9 days prior to 3 November, Emperor Mieji's birthday, but she was not sure of the date (R 360-363).

Fumito Ito, Yokohama, Nishi-Ku, Sengen-cho, 2-105, identified the accused in the court room and stated that he was in her home on some date "past the middle of October." It was before Emperor Mieji's birthday which was on the 3rd of November. Hatsue Enoura was the witness' sister (R 364-368).

Fumie Okazaki, Yokohama, Nishi-Ku, Sengen-cho, 2-105, stated that she had seen the accused at the Enoura home about one month after the "typhoon Kathleen" and one month before Thanksgiving. At about 0300 hours Mr. Enoura had come to her house and stated that a colored soldier was at their house. He asked the witness to go over and find out "what business he had." She went to the Enoura house and talked to the accused in English. He wanted a girl and asked the witness to tell Mr. and Mrs. Enoura that he wanted to sleep with Mrs. Enoura. Mrs. Okazaki stated that "I endeavored to humor the soldier and I sang some children's songs and I told him children's stories" (R 368-373).

The accused, at his own request and after he had been advised of his rights by the president of the court, elected to be sworn as a witness in his behalf. He stated that he entered the armed services of the United States on 16 September 1942 and had reenlisted on 19 January 1946. He had served in New Guinea, the Philippines and Okinawa, and had been awarded the Good Conduct Medal, Asiatic Pacific ribbon, 2 battle stars, American Theater and Occupation ribbons. On 26 July 1946 he had been sent to Japan and was assigned to the 1955th Engineers (Utility) but after a few months he tried to get a transfer out of the outfit. The new "CO" told him to "get the hell out of here." At another time the commanding officer said, "The earliest transfer you will get will be back to the States or to the stockade or some place" (R 374). Action had been taken on 18 October 1947 to return him to the United States. He was in the Air Force Stockade at Johnson Field and on 22 October was transferred to Tachikawa (Fourth Replacement Depot). Accused stated that "I spent two nights there, which was on Thursday and Friday night, and Saturday morning I taken off. First I asked for a pass." Friday was the 24th. The sergeant did not get him a pass so he got a Class A pass from another soldier. On Saturday morning, October 25th, he went to Zama and caught a train for Ebina, arriving there about 9 o'clock. He got some whiskey and met a Japanese girl named Tamiko who spoke English. Tamiko asked him to go with her to her home. They went to her home and got into bed for about 30 minutes. Three white soldiers came to the house and talked to Tamiko. One of them came in and saw the bed clothing disarranged. He appeared to be angry and left. The

accused and Tamiko went out and got some more whiskey. He stayed at her house until some time in the afternoon. The accused stated that he and Tamiko took just one small drink each from the second bottle of whiskey he purchased and they then went to the railroad station. They bought some fruit on the way. At the station they met some white soldiers and he gave them several drinks from his bottle. They drank all the liquor except about "two swallows." Tamiko wanted to leave with one of the soldiers but the accused decided that he would not go to Atsugi as he had intended and told Tamiko to return with him to her house. He then told Tamiko that he wanted to spend the night with her. She agreed and requested payment in advance. He paid her 500 yen. This occurred "around 5 o'clock" but he had paid her before they went to the station. They went to bed again and remained for about one and one-half hours. Later Private Mason came and stated that he had been "going with this girl Tamiko for about eight months, so she left with him." Accused stayed at the house and talked with her sister. After Mason left a Japanese boy came after Tamiko's clothes but the accused would not let him have them. Accused stated that "Sgt Loney came in and woke me up, told me that her sister wanted to go to bed, to get up off the bed and go back to camp or someplace, and I got up and left." He thought that this occurred at "around 10 o'clock or 10:30, something like that." He got up, dressed, went to the station and caught a train for Yokohama which he was told was "one stop" away. It took about one hour to get to Yokohama. He wanted a place to spend the rest of the night and talked to some Japanese persons including "the first guy who got on the stand" (Mr. Seki). After getting a couple of glasses of water he went to another house, knocked on the door and said, "Konbanwa." A man came to the door, then got his wife who took accused "to a girl that could understand English." He talked to this girl (Fumie Okazaki) and she told him that the other woman was married, "So I told her to tell the lady to go back and I tried to get to spend the night with her." She declined, saying, "This is the first time you met me, I couldn't do that, not tonight." He went back to the house of "the man and his wife and his sister and little baby" (Enoura family) (R 373-383). It was "around 3 o'clock or 3:30 in the morning." In response to the question, "That would be the morning of Oct 26th?" the accused replied, "Yes sir" (R 384). The accused stated that he had not been in Ebina since leaving there on the night of 25 October except on some date in December when Major Crosby took him to the town during the investigation. On Sunday night, 26 October 1947, he had spent the night at several Japanese houses on the road to Hachioji. He did not remember the names of the people. At about 6 o'clock on Monday morning he arrived at Hachioji. The accused stated that he was absent without leave from the "25th until about the 2nd or 3rd." Until Thursday he was in the Shinjuku area and he was "picked up" Monday morning in the Takatsu area. The following questions and answers thereto are quoted from the record:

"Q. Were you aware at the time you were picked up by the MP's that you were being charged with murder?

"A. No, sir.

"Q. Did you, Pvt Armistead, during the night of Oct 25 or during the morning of Oct 26 attack any person or persons with a hammer or any other instrument or weapon?
"A. No, sir." (R 387)

The accused was asked to examine Prosecution Exhibit 20-A and state whether he had seen the watch prior to the trial. He stated that the exhibit was a watch he had purchased in January 1947 from a Japanese boy for two packages of cigarettes. When he was arrested he was wearing a wrist watch. Mr. Dent of the Criminal Investigation Division stated to him, "One of those girls down in Ebina says that's her watch, the watch belongs to her." Accused replied:

"I says 'No', I says 'a Japanese girl give me that watch. She worked at Yokota'. He says 'Can you prove it?', and I says 'Yes, I can'. He says 'How can you prove it?', and I says 'You go to Yokota and check with the MP's that give me the names'. I says 'You can check. The slip show I had two watches, this and another'. He says 'Where's the other?', and I says 'I sold it while I was A.W.O.L.'. He says 'Can you take me to the place where you sold it?', and I says 'Yes!. The next day I take him to the place.
"Q And is that the woman who testified here that you brought the watch to her, that you sold it to?
"A Yes." (R 389)

On cross-examination the accused stated that when he arrived in Ebina on 25 October he was carrying a "bag" containing some clothes. The bag was the same color as the field jacket which he was wearing (R 391). The witness testified shortly thereafter as follows:

"Q What did you say the color of your package was?
"A I said the cloth is the color of a field jacket.
"Q Was the cloth wrapped in paper?
"A. Yes, sir.
"Q What color was the paper?
"A White paper." (R 392)

With respect to the watch (Pros Ex 20-A) the accused stated that he was barracks' orderly and a boy working on the pipeline wanted to trade the watch to him for a carton of cigarettes. He asserted that "I only gave him three packs." The accused identified the watch by the band which he had purchased from a Japanese jeweler "at about 4 stops out of Shinjukn called Shimo-Takaido." He sold this watch in Fuchu on Tuesday while he was absent without leave. The accused asserted that he "left" on Saturday, was "gone" about eight days and was "picked up" on Monday (R 395). The accused stated that he was arrested by about twenty Japanese policemen "at the Takatsu area." The arrest was described by

the accused as follows:

"A I walks up to the station that morning in a -- I was on my way to the station. I didn't get to the station. Three Japanese polices tried to arrest me. He walks up to me and he said something about the MP's. He was speaking Japanese; I didn't understand him. He caught holt of my arm and I swung loose from him. And they went on away. So I walks up to the station. I started to get on the train. I decided I wouldn't, and I just walked around in the little town. About an hour later, about 15 or 20 Japanese polices ganged me.

"Q When you walked to the station, where were you going?

"A Just walking around." (R 397)

On being questioned by the court the accused stated that he was confined in the Johnson Field Stockade from 2 June to 23 October. He had appeared before a "369 board" and was "going back to the States." The Criminal Investigation Division had placed him in a hospital after he was taken in custody. The accused stated that when he got to Ebina he procured some paper and wrapped his package of clothes "to keep the MP's from thinking I had some clothes, black market or something" (R 398). He had the watch (Pros Ex 20-A) in his pocket when he went to Ebina and the band on it had been purchased from a jeweler for 28 yen. Asked if the watch would run the accused replied,

"A Pretty good. This watch was wound up tight when I left Zama on the 25th and this watch started to running--I discovered it started to running on Tuesday night when I was at this lady's house to testify that I sold it to her." (R 406)

On further cross-examination the accused was asked the following question:

"Pvt Armistead, I now ask you if you have ever at any time been convicted, before any court, of the crime of assault with a dangerous weapon?"

The defense objected strenuously to the question. Argument was made and authorities quoted to the court. The court overruled the objection and the accused stated, "For five and a half years I have been in the Army and I have never been convicted of no kind of a crime." The prosecution repeated the original question and the accused replied, "Civilian life?" The prosecution stated, "Any time." The accused replied, "Yes, I have in civilian life been confined once for fighting" (R 413). The court questioned the accused further with respect to the watch (Pros Ex 20-A). He asserted that "the lady" wanted to buy the watch he was wearing on his arm but he did not desire to sell it because it had been given to him by

a Japanese girl. He told her that he had one in his pocket that he might sell. Accused thereupon produced this watch (Pros Ex 20-A),which he had purchased for three packages of cigarettes, and sold it to her for 300 yen. Cigarettes were worth 100 yen per package. He stated, "I wanted to get the same thing I had given for it." This was on Tuesday about the 28th of October and he had spent about two hours in the woman's house. The watch had been in his possession continuously from January to October 1947. He did not know the name of it but it was a Swiss make. The accused stated that he spent two or three hours at the Enoura house and had Miss Okazaki sing a "couple of songs." He was trying to get her to spend the night with him. He first offered her 500 yen and "went up to 3000 before I left." He showed her a pass but told her that it was not his pass (R 415-422). The court questioned the accused in detail concerning the various places he had visited during the period 25 October and 3 November and there was received in evidence as Defense Exhibit B a map of the Tokyo-Yokohama area (R 424).

Sergeant Cornelius B. Cochran, 710 MP Company, stated that in December 1947, before Christmas, he and three other soldiers, including the accused, were placed in a line before "Mrs. Yamamoto" at a hospital, and that "in selecting the person Mrs. Yamamoto thought was the accused, she selected me" (R 426).

Private First Class Willie E. Shannon, Detachment B, Tokyo Quartermaster Depot, testified that on 24 February he was at the home of "Mrs. Haneishi" and that the following occurred: "Well, we walked in the house there and she was asked was I the accused. I believe she said yes I was" (R 427). He went to two other Japanese homes where the ladies pointed him out as the accused, but these ladies other than Mrs. Haneishi did not appear in court. In response to questions by the court Private Shannon stated that the defense counsel (Mr. Roberts) took him to the home of Mrs. Haneishi on the occasion in question and that no other negro soldier was present (R 428).

Mr. Masao Yamamoto, Nugata Prefecture, Minami Kambara-gun, Mitsuke-cho, Nika, testified that from June 1946 until October 1947 he worked in a jewelry shop near Shimo-Takaido Station and that at about 1900 hours on an evening in February or March 1947 the accused brought a No. 8 lady's round watch with a woman's narrow bracelet to his shop for repair. The glass was broken and there was something wrong with the hands. He was of the opinion that Prosecution Exhibit 20-A was the watch to which he referred. He could not say definitely that the band appearing on Prosecution Exhibit A was the same band that was on the watch when he repaired it. It was however the same type of stainless steel band of post-war manufacture and which cost about 20 yen at that time. The price "now" was about 80 or 100 yen (R 435). Mr. Misio Ishio, A Tokyo "watch man" stated that in

February or March 1947 the accused visited his shop two or three times and purchased a watch band similar to that appearing on Prosecution Exhibit 20-A. The accused had also bought a leather band, at which time he had a lady's watch with him and the witness was sure that he had applied the leather band to that watch (R 437). On cross-examination the witness stated that he had a recollection of selling the accused a watch band "but as it was some time ago and as I am not too bright, I cannot recall it too well." He did not know the name of the wholesaler from whom he procured the bands - but he stated that he had reason to believe that the band was black. It was large enough to reach around the interpreter's wrist but the witness did not apply the band to the accused's wrist, he merely applied it to the watch. Upon being asked if he remembered the old band that was on the watch Mr. Ishi stated, "I do not remember seeing the watch at that time so I do not know anything about it" (R 441).

Defense counsel stated to the court that he desired to produce evidence through his monitor, Mr. Zeger, that the witness, Takehisa Yamamoto, had, prior to trial, made a statement to Zeger which was inconsistent with certain testimony Takehisa had given. The prosecution objected, but the court overruled the objection with the qualification that defense counsel lay the proper foundation for such evidence as set out in the Manual for Courts-Martial. Counsel thereupon read from the testimony of Takehisa appearing on page 181 of the record as follows:

> "Q. Do you remember telling him that the interpreter told you to pick out No. 2 at the gate?
>
> "A. I did not. (He only asked me what number did I pick out and I told him I picked out No. 2).

Mr. Steve Zeger was sworn and stated that he was an interpreter for the occupation and was working for Mr. Roberts, lawyer for the war crime trials. He had talked to the boy, Takehisa Yamamoto, on "the 25th, it was a Thursday." He described the conversation as follows:

> "Q Now, can you tell us, without referring to the memorandum, just what the conversation was that you had with the boy?
>
> "A I asked him a few questions first not concerning the incident, just a talk with him and later when I asked him where he had seen this soldier before, he told me that a colored soldier was brought to him when he was still in bed at the Sagamihara Hospital. That the soldier was accompanied by a colored man, civilian in a blue suit and that there were M.P.'s there and that one of them had told him that this was the man that was arrested.
>
> "Q Now, did you ask him something about what happened at the gate when the accused was identified by him?
>
> "A Yes, he told me that he was shown several colored soldiers at the gate of the hospital and that an interpreter had told him

No. 2 would be the one to point out. I asked him who had told that to the interpreter and he said, 'I don't know who told the interpreter that, the interpreter told me that.'

"DEF: No further questions.

"LM: Cross examination?

CROSS EXAMINATION

"Questions by prosecution:

"Q Mr. Zeger, did you ask him or tell him that somebody told him No 2 was the one to pick out?

"A I asked him." (R 446)

In response to a question by the court Mr. Zeger stated that he was not a member of the occupation forces.

5. Rebuttal

Fumie Okazaki, previously a witness for the defense, was called by the prosecution in rebuttal. She stated that she was a teacher in the American school and was off duty on Saturdays and Sundays. She recalled that she had taught school on the day immediately before and following the accused's visit to her house. On cross-examination by the defense, she asserted that "that day was Thursday." She went to school the following day, which was Friday and while at school Mrs. Enoura took some eggs to her mother and thanked her (R 450-51). With respect to her prior testimony the witness testified as follows:

"Q Why couldn't you remember it the last time you were on the stand?

"A That was because the defense attorney told me that they knew what he did on Wednesday, Thursday and Friday and told me that I did not go to school the next day, and he also told me that I was probably mistaken. And then there's another point.

"LM: Continue.

"The witness continued, in Japanese.

"LM: Can we have that much, please?

"A (Continuing) And then last week, as we had some question in our mind, we asked this defense counsel up to when this colored soldier was in jail, and we were told that he was in there until the 24th.

"LM: Does the witness desire to make any further clarification? I didn't mean to stop her on this why question. Does she have anything further to say in answer to that question?

"A (Continuing) At first I was told by the defense counsel that they knew the whereabouts of this colored soldier on Wednesday, Thursday and Friday, and then later we were told that this colored soldier was in jail until the 24th, and after that it occurred to me that it was a Thursday on which he came.

"Q Weren't you told that the colored soldier was in jail until the 23rd and did not leave Zama until the morning of the 25th?

"A No, I was not told that. I was told by this interpreter here that he was in jail until the 24th." (R 453-454)

The witness pointed out the accused as "that person" she saw in the Enoura home on the night in question (R 456).

Mr. Toshio Enoura, who had testified for the defense, was also recalled by the prosecution in rebuttal. He was asked to tell the court the date the accused was in his home. The defense objected but the objection was overruled. Mr. Enoura stated, "It was the evening of the 23rd." He remembered, "Because it was the day before my day off." The 24th was "Friday." The witness stated that in his previous testimony he had made a mistake as to his day off. On cross-examination the witness stated, "It is not that I think: I know it was the 23rd," and again, "What I said previous to now was a mistake." Mr. Enoura stated that he had talked to the prosecution subsequent to his prior testimony but that he had no fear (R 456-459).

Mr. Cleo Fukushima, interpreter for the Yokohama Criminal Investigation Division, testified that prior to trial he, Mr. Dent and Detective Nishyima took four negro soldiers, one of which was the accused, to the hospital for identification purposes. Mr. Dent gave each of the soldiers a number from one to four and lined them up near a driveway. He then caused the boy, Takehisa Yamamoto, and Mrs. Haneishi to pass separately in view of the soldiers and return to the jeep where he was sitting and "tell me the number." On cross-examination the witness stated that he was the only interpreter present (R 460-463). Mrs. Aki Haneishi was recalled to the stand and testified that sometime in February some American in civilian clothes brought a colored soldier to her home. Private First Class Willie Shannon was brought into the court room and she stated that he was the colored soldier to whom she referred. She stated that she did not identify him as the colored soldier who was in her home on the evening of the 25th or the early morning of the 26th of October 1947. She stated further that she had never positively identified any colored soldier as being the person in question (R 464-467). By agreement of the parties there was received in evidence as Prosecution Exhibit 22 a certified extract copy of the morning report of Headquarters and Headquarters Detachment, 14th Replacement Battalion, 4th Replacement Depot, with entries as follows:

"26 Oct 47
Armstead Stratman RA 34413881 Pvt MOS 383
Dy to AWOL 0600 Hrs
/S/ MYRON P HOFFMAN
1st Lt CE
31 Oct 47
CORRECTION: (26 Oct 47)
Armstead Stratman RA 34413881 Pvt MOS 383

SHOULD BE:
Armistead Stratman RA 34413881 Pvt MOS 383

/S/ MYRON P HOFFMAN
1st Lt CE
3 Nov 47
Armistead Stratman RA 34413881 Pvt MOS 383
AWOL to Conf in hands of CID Yokohama Japan 0700 Hrs

/S/ MYRON P HOFFMAN
1st Lt CE"

Mrs. Haruno Komatsu testified that she lived in "Ebina." She identified the accused in the court room and stated that he came to her "store" at about 0930 hours on 25 October and purchased some Sake. He stayed until about 1130 hours when she "had Tami-chan take him out." At about "1 o'clock that night" the accused appeared at the window of the room where the witness was sleeping and asked if Tami-chan "was here." She turned on the light to show him that the girl was not in the room and he left. She did not see him any more. On cross-examination Mrs. Komatsu stated that she was "quite old" and did not remember telling defense counsel that she was not sure "what time it was." She remembered that the festival occurred on 25 October. Her children had attended the festival but she remained at home. When the soldier returned to her house, her children had returned and were asleep. She "glanced up at the clock and it seemed to me that it was a little after 1" (R 470-477).

No further evidence was presented and after both sides had rested counsel made extensive closing arguments (R 478-514).

6. Discussion

a. Admissibility of certain evidence

Counsel for the accused objected vigorously to the admission in evidence of the skull caps or cranial bones of the Japanese girl, Haru Fujisawa (Pros Ex 1-C), the man, Kenji Haneishi (Pros Ex 2-D), the boy, Yasuhiko Haneishi (Pros Ex 3-D) and the girl, Maeae Yamamoto (Pros Ex 4-A). It was contended that the exhibition of these portions of the dead bodies in court had a tendency to inflame the members thereof and was otherwise illegal and prejudicial to the accused's rights. But in cases of this type, it is the general rule of law that parts of the deceased, such as the skull or jaw bone, may be admitted in evidence to illustrate the nature of the wound received, to identify the assailant or the instrument used, or to illustrate any other material issue of which such evidence is capable (Wharton's Criminal Evidence, 11th Ed., Vol 2, p 1289; Abshire v. Com, 215 Ky 734, 286 S W 1049; Thrawley v. State, 153 Ind.

375, 55 N E 95). Each skull was properly identified and it was shown by the coroner and surgeon that in each case it truly portrayed the wound causing death. These portions of the bodies of the deceased were of the highest probative value as being illustrative of what they were offered to prove, viz., the nature of the wounds inflicted, the type of instrument used, and the probability, considering all the evidence, that the same instrument inflicted the injury to the skull of each of the victims, and that it was wielded by one and the same person. We are therefore of the opinion that such evidence was vitally material to the case and that no error resulted in their admission for the purposes shown. The same principles of law apply with equal force to the defense objection to the admission in evidence of the photographs portraying the bodies of the victims as they were found on the mats in their homes.

Objection was made to the admission of Prosecution Exhibits 8, 9, and 10, being respectively the wooden hoe handle, claw hammer, and pieces of cloth which bound the hammer and extension handle together. It was contended that the proof failed to show that these exhibits constituted the weapon "used by a certain colored soldier" to perpetrate the alleged crimes. But the question raised by counsel was one of fact for the determination of the court upon the evidence presented and it appears most conclusively that the prosecution laid the proper foundation for the introduction of these exhibits in evidence. The testimony of both the lay and expert witnesses tended to show most decisively that the instrument used in causing the deaths of the four persons and the injuries to the three victims who lived, was a hammer similar to that found in the Yamamoto well which was received in evidence.

While accused was on the stand as a witness in his own behalf the prosecution elicited from him an admission that in civilian life he had been convicted of an offense in the same category as an assault with a dangerous weapon. Counsel for accused contended that this matter was beyond the scope of proper cross-examination and highly improper. But an accused person who takes the stand as a witness becomes subject to cross-examination like any other witness, subject only to the requirement that such cross-examination be limited to questions of credibility and matters having a bearing upon the offense or offenses about which he has testified. Accused's acknowledgment, therefore, that he had previously been convicted of the crime of assault with a dangerous weapon was admissible as affecting his credibility as a witness. Having admitted the fact, no further proof was necessary (MCM, 1928, pars 121b, p 127; 124b, p 133; CM 235380, Bane, 21 BR 385).

The action of the court in requiring the prosecution, after it had closed, to reopen its case and introduce further proof with regard to the identity and ownership of the watch (Pros Ex 20-A), was permissible and within the limits of the court's sound discretion. The motion for a mistrial in this regard was properly overruled (MCM, 1928, par 71d).

b. Evidence relating to the respective charges and specifications

Specification 1 of Charge I and Specification 4 of Charge II allege respectively the murder of Haru Fujisawa and the larceny of a watch, the property of her sister, Mitsu Fujisawa. The Fujisawa family lived in the town of Ebina, Japan. Numerous witnesses saw the accused in this town at various times during the day and night of 25 October 1947. The accused admitted that on the date in question he was in Ebina from about 0930 to about 2230 hours, at which time the harlot, Tomiko Akaiki, succeeded in getting him to leave her house. His threats and vicious manner toward her caused her to fear for her life and to summon aid. He was carrying a package with a white covering. Mitsu Fujisawa positively identified him as being the colored soldier who at about 0230 hours on the night of 25 October entered her bedroom where she, her sister Haru, and other members of her family were sleeping. He was carrying a weapon similar to a hammer. She fled from the room as he attempted to get in bed with her sister Haru. Haru's mother, sleeping nearby, heard Haru cry for help. Mitsu returned to her room, found her watch to be missing and Haru to be bleeding from a wound on the head which the evidence showed could have been the result of a blow with a hammer. Miyoko Niwa, a neighbor of the Fujisawa family, saw Haru at her home shortly after the injury and observed the blood flowing from her head. Some 15 minutes thereafter the accused, whom she positively identified, appeared at her (Miyoko's) house carrying a "whitish" package and with one hand concealed in his jacket pocket. The death of Haru on the same day, as a result of a blow to her head with an instrument similar to a hammer, was adequately proven. The watch, identified by Mitsu as her property, and which was found to be missing, was shown to have been sold by the accused to Kikue Hamao during the latter part of October or the first of November. The accused admitted that on 28 October he sold Mrs. Hamao a watch but claimed that the watch he sold her was one he had purchased from a Japanese boy for two (subsequently three) packages of cigarettes nearly a year prior to the sale to Mrs. Hamao. It is significant that after the accused was taken into custody and Agent Dent had told him that a girl in Ebina claimed "that's her watch" (referring to one the accused had on his arm), the accused, in denying that the watch on his arm and another he had owned, belonged to the girl in Ebina, led Dent to the home of Mrs. Hamao where Dent procured the watch which belonged to Miss Fujisawa (Pros Ex 20-A).

Specifications 2 and 3 of Charge I and Specification 3 of Charge II allege the murder of Kenji Haneishi, the murder of Yasuhiko Haneishi (son of Kenji) and the assault with intent to do bodily harm upon Aki Haneishi (wife of Kenji). The death of Kenji and Yasuhiko Haneishi as a result of violent injuries to the skull of each on the night of 25-26 October 1948 was conclusively proven. The members of the Haneishi family, except the son Yasuhiko, were sleeping in one room when at about 0400 hours on the morning of 26 October 1947 a colored soldier was observed by Aki to be kneeling near her and using expressions suggestive of sexual relations.

Near her head she noticed a hammer which she tried to dispose of by hiding it under her pillow. She was frightened and noticed that blood was flowing from the head of her husband, Kenji, and her son, Yasuhiko. Something happened to her and she had no recollection thereafter. Medical testimony showed that she had been brought to the hospital on 26 October 1948 and that she was in a comatose state. She had injuries about the face and the rear of her left ear which were probably caused by a blunt instrument such as a claw hammer. Aki could not positively identify any person as being the assailant to whom she referred but she was sure that such person was a colored soldier. Both she and her son, Tatsuo, identified Prosecution Exhibit 8 as being a discarded hoe handle and Prosecution Exhibit 10 as being some rags or cloth from a kimono, each of which were personal property in her home prior to 26 October 1948.

Specification 4 of Charge I and Specifications 1 and 2 of Charge II. These specifications allege respectively the murder of the girl Masae Yamamoto, assault with intent to do bodily harm upon the woman, Katsu Yamamoto, and upon the boy, Takehisa Yamamoto. The evidence shows that at about 0400 hours on the morning of 26 October 1947 a colored soldier, whom Takehisa Yamamoto positively identified as the accused, entered the bedroom of the Yamamoto home and made advances upon Mrs. Katsu Yamamoto which the witnesses understood to be of a sexual nature. He was observed to be tying a wooden handle on what appeared to be a hammer. Takehisa saw the accused strike his mother, Katsu, with the hammer. He hid under the bed covers but the accused removed the cover and struck at his head. The boy shielded his head with his hands and received serious injuries to his head and broken bones in his left hand. Takehisa noticed that his sister appeared to be dead or sleeping. He fled from the house. Shortly thereafter it was found that Masae had suffered a blow to her skull which caused her death within the period of not more than three hours. Mrs. Katsu Yamamoto could not more positively identify the accused as her assailant than to say that it appeared that she had seen him prior to the trial. However, the testimony of her son is most convincing. On the witness stand for almost two days, and subjected to the most thorough cross-examination, the boy Takehisa positively asserted that the accused, whom he pointed out among other colored soldiers similarly dressed, was the person he saw tying the handle to the hammer and who struck him and his mother with the instrument. Mrs. Yamamoto's inability to positively identify the accused could have resulted from her impaired physical condition including the near loss of her eyesight and memory. It will be recalled that the cloth which bound the hammer and the handle (described as a hoe handle) were objects identified by Tatsuo Haneishi and other witnesses as belonging in the Haneishi home. These objects, including the hammer, were found on the day following the crimes in the well of the Yamamoto home.

c. Identity of the accused

In his closing argument before the court counsel for the accused

contended that although the evidence disclosed the most brutal and vicious crimes, it did not show beyond a reasonable doubt that the accused was the culprit who committed them. Able counsel for the accused has orally argued this question before us and filed a brief which we have carefully considered. Throughout the trial the defense attempted to cast doubt upon the identification of the accused and introduced witnesses whose testimony in chief tended to establish an alibi. It is observed that those witnesses who were introduced by the defense for the purpose of showing that on the night of the alleged crimes the accused was at another place or other places, on rebuttal, completely repudiated their prior testimony respecting the time and day when they had seen the accused at their homes. These witnesses fully explained to the satisfaction of the court the reason they had testified erroneously on their original examination to the effect that they had seen the accused near their homes on the night of 25-26 October 1947. We agree with the court that their testimony in rebuttal completely negatived the alibi that their testimony in chief tended to establish. The "reasonable doubt" contemplated by the law does not embrace fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony. The rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty (MCM, 1928, par 78a, pp 62,63). The accused admitted that he was absent without leave and in the village of Ebina until about 2330 hours on the night of these crimes. The testimony of Tamiko and the other Japanese witnesses who saw him tends to indicate a vicious and lustful state of mind on his part. At about 0100 hours accused appeared at the bedroom window of Haruno Komatsu and asked if Tamiko was there. Mitsu Fujisawa saw him in her room at about 0230 hours on the morning of 26 October 1947. He had a hammer and advanced upon her sister, Haru. A neighbor woman, Miyoko Miwa, saw the accused in her home shortly thereafter.

The record shows that at about 0400 hours on the same night a colored soldier (not positively identified in court) appeared at the Haneishi home. The soldier struck Aki Haneishi on the head with an object similar to a hammer. Aki's husband, Kenji, and her son, Yasuhiko, each received blows to their heads with an instrument similar to a hammer and from which injuries they died on the same day. Shortly thereafter a colored soldier, positively identified as being the accused, was seen in the Yamamoto home tying a shaft onto the handle of a hammer. The rag used as a string and the wooden shaft were shown to have come from the Haneishi home. Takehisa Yamamoto saw the accused assault his mother, Katsu, with the hammer and was himself struck on the head by the accused. All of the victims herein lived in close proximity to each other in the village of Ebina. The

death-dealing injuries of the four victims described in the specifications to Charge I were shown to have been of a similar nature and probably caused by the same instrument. We conclude that the court's finding that all the injuries were caused by the same person and by use of the same instrument, and that the assailant was in each case the accused, is amply sustained by the evidence and the reasonable inferences to be drawn therefrom.

d. Other matters

Other questions raised have been carefully considered. We deem it unnecessary in this opinion to set forth in detail the legal requirements sufficient to constitute murder, or assault with intent to commit bodily harm. The brutality of the unprovoked attacks as described by the evidence shows unmistakably that such vicious conduct flowed from an evil heart without regard to social duty and that he was bent on mischief, whether that mischief was the ravishment of the Japanese women or the theft of their property, or both. The law presumes malice from such cruel and deliberate acts manifesting an utter disregard for human life (Comm v. Webster, 5 Cush. 296, 52 Am Dec 711; 40 C J S, Sec 44, p 905, sec 79b, pp 943-944).

It appears that the accused was provided with counsel, an experienced lawyer who aggressively defended his case. It is contended that the accused requested counsel in November 1947 shortly after he was taken in custody for investigation, but that none was provided him until January 1948. The record shows that charges were preferred on 4 December 1947, that the investigation was completed on 20 December, special defense counsel was provided sometime in January 1948, and trial was commenced on 7 February and completed on 15 April 1948. Counsel argues that from November 1947 until sometime in January the accused did not have benefit of counsel and has been deprived of his rights to what is called "due process under the 14th Amendment to the Constitution of the United States." Without conceding or discussing the applicability of the 14th Amendment to trials by general court-martial it is recognized that the accused is entitled to a fair and impartial trial under the military law. It is our understanding of the law that, "to those in the military and naval service of the United States, compliance with the military law is due process" (Reaves v. Arnsworth, 219 U S 296, 304; In re Wrublewski, 71 Fed Supp 143,144, 166 Fed 243). The record shows that the defense was afforded every reasonable opportunity to prepare its case and no contention to the contrary was made at the trial. In our opinion the accused received a fair and impartial trial in conformity with the law and was proven guilty of the charges and specifications beyond any reasonable doubt.

No question as to the accused's mental responsibility has been raised. However, due to the seriousness of the charges a board of medical officers was appointed to examine him prior to trial (1 Dec 1947). The board found

the accused to be so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right. The board also found that he was fully capable of participating in the conduct of his defense.

7. The charge sheet shows that the accused is 32 years old, that he served in the Air Corps from 16 September 1942 to 18 January 1946, and enlisted in the Regular Army on 19 January 1946 for three years. On 16 October 1947 a board of officers recommended that he be discharged under the provisions of AR 615-368.

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

Celestin D. Silvers, Judge Advocate

Gilbert E. Schroyer, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 330963 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Stratman Armistead (RA 34413881), Headquarters and Headquarters Detachment, 14th Replacement Battalion, Fourth Replacement Depot.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution under the direction of and at a time and place to be designated by the Commander in Chief, Far East Command.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 193, 22 Nov. 1948).

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

JAGH CM 330993

31 August 1948

UNITED STATES v. First Lieutenant ELLSWORTH A. RANGUETTE, AO 510931, 39th Troop Carrier Squadron, 317th Troop Carrier Group, APO 704.	))))))))	FIFTH AIR FORCE Trial by G.C.M., convened at Johnson Air Force Base, APO 994, 6,10,13,17 and 18 February 1948. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specifications 1: In that 1st Lt Ellsworth A. Ranguette, 39th Troop Carrier Squadron, Tachikawa Air Base, did, at Hachioji, Japan, in conjunction with Technical Sergeant James E. Brown, 13th Air Repair Squadron, 13th Air Depot, on or about 2 January 1948, wrongfully and unlawfully sell to Isamu Senuma, a Japanese national, 42 bed sheets, each of the value of $1.38, for a total value of about $57.96, said sheets having been issued for use in the military service of the United States.

Specification 2: In that 1st Lt Ellsworth A. Ranguette, 39th Troop Carrier Squadron, Tachikawa Air Base, did, at Hachioji, Japan, on or about 2 January 1948, wrongfully enter an off-limits establishment, to wit: the Tachibana Tea House, in violation of standing orders.

Specification 3: In that 1st Lt Ellsworth A. Ranguette, 39th Troop Carrier Squadron, Tachikawa Air Base, did, at Hachioji, Japan, on or about 3 January 1948, wrongfully enter an off-limits establishment, to wit: the Tachibana Tea House, in violation of standing orders.

He pleaded not guilty to, but was found guilty of the Charge and its specifications. No evidence of previous convictions was introduced. He

was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the Fifth Air Force Judge Advocate, dated 11 May 1948, with the following additional comment pertaining to the law governing the determination of the issues presented by the findings of guilty of Specification 1 of the Charge.

4. The evidence pertaining to Specification 1 of the Charge shows that on 2 January 1948, between 2000 and 2100 hours, at the Yamato Hotel, Hachioji, Japan, accused together with his co-accused, Technical Sergeant James E. Brown, non-commissioned officer in charge of supplies in the warehouse maintained by the 992nd Air Materiel Squadron, and who had his quarters in the warehouse, sold 42 sheets to Isamu Senuma, the proprietor of the hotel. Between 2230 and 2300 hours the same evening the hotel was raided by the military police and 41 sheets were recovered. Although Senuma was not called upon to identify the 41 sheets seized by the military police as being sheets sold to him by accused it is a fair inference from the record of trial that they were. Forty of the seized sheets were entered in evidence. Captain William H. Saxton, Brown's superior officer and officer in charge of the warehouse testified that an inventory had shown a large shortage of sheets from the warehouse. He was unable to state, however, whether the shortage was a "paper" shortage or a physical shortage. There was evidence showing that one of the sheets seized by the military police upon examination by experts was found to be manufactured by the Kanegafuchi Company. Sheets supplied to the warehouse in which accused Brown was employed were furnished by the Kanegafuchi Company. The evidence also tended to show that the total output of the Kanegafuchi Company was furnished to the occupation forces. It would appear that based upon the testimony concerning one sheet, the court could determine by comparison that all the sheets in evidence were of the same origin. The court could determine, therefore, that the sheets in evidence were of a type and kind furnished for the military service.

The defense in addition to offering evidence tending to show that the sheets were of other than Kanegafuchi manufacture attempted to set up an alibi. Two prosecution witnesses, Japanese females, testified that they were in accused's company in the town of Hachioji from 1900 hours up to and including the time of the sale. The accused testified that at the time covered by the prosecution's witnesses, including the time of the sale, he was at the Tachikawa Airbase.

Partial corroboration for this alibi was given up to 2000 hours and possibly to 2030 hours, by various patrons of the non-commissioned

officers' club at the airbase. There was other evidence, however, that the two accused had been invited to the home of a Sergeant Curcoe for dinner and it was expected that they would arrive between 1800 and 2000 hours. In fact they did not arrive until approximately 2300 hours. It must be concluded from the findings of the court that the court disbelieved the alibi set up by the defense.

It may thus be seen that the two accused at the time and place alleged sold 42 sheets which the evidence shows were of the type and kind furnished for the military service and to a supply of which the accused Brown had access in the course of his official duties. The record also shows from the testimony of the accused Ranguette that he was at the warehouse on the day in question waiting for his co-accused Brown to finish his day's work. Under the rule enunciated in CM 307147, Klingensmith, 1st Ind., 60 BR 379, and CM 319591, Pogue, 68 BR 385,399, this evidence is sufficient to show that the property involved was property of the United States without showing that such property was missing from the government installation involved.

In this case, however, the court in addition to the circumstantial evidence which we find sufficient to sustain the finding of guilty of Specification 1 of the Charge had for its consideration other matter which was probably more pursuasive of its result. As has been noted the court in finding accused guilty of necessity, disbelieved the alibi which the defense attempted to prove, otherwise the court would perforce have acquitted accused of the offense charged in this Specification.

Reconstruction of the situation shows the following: Accused was charged with the wrongful sale of sheets issued in the military service. There are two possible lines of defense as to the merits, either that the accused did not sell the sheets, or that they were not government property and he had a right to sell them. Under this situation the accused testified falsely, as the court must have believed, when he stated as a witness under oath that he did not sell the sheets. From his false testimony the court would naturally infer that the lie was resorted to because the property involved was in fact government property. Thus it has been stated:

> "It has always been understood -- the inference, indeed, is one of the simplest in human experience -- that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the

fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." (Vol 1, Section 278, Wigmore on Evidence, Second Edition) (Underscoring supplied)

This rule has been applied to cases where the falsity of accused's testimony must be concluded from conflict between his testimony and the testimony offered or circumstances shown by the prosecution (Lindsey v. United States, 264 F 94-96; Shama v. United States, 94 F 2d 1,4).

The Shama case presents a striking parallel to the instant case in the principles involved. Accused was charged with a violation of the White Slave Act. The evidence showed that accused was a hotel proprietor in Sioux City, Iowa, and that in connection therewith he ran two beer parlors in which girl entertainers were employed. In a conversation with one Coots, a carnival worker, accused mentioned that he needed more entertainers. Coots suggested a girl in Kansas. Accused had his bartender write the girl, and followed up the letter by having Coots wire the girl, accused paying for the wire. Upon receipt of a wire from her stating that she would come, accused had railroad transportation furnished her. Upon her arrival the terms of her employment were agreed upon. The woman was to work as a prostitute. On this evidence the defense contended that there was no evidence that accused's purpose in having the woman come to Sioux City was to have her engage in prostitution on her arrival.

Accused took the stand in his own behalf and testified that Coots had sent for the woman to dance in the carnival and that he (accused) had loaned Coots the money for the ticket and had been repaid. Coots found out that he did not need another dancer in the carnival and after the woman's arrival asked accused to give the woman a job.

In connection with accused's testimony the court commented as follows:

"In the present case it is contended that there is a reasonable explanation for the interstate journey other than the intent that the woman engage in prostitution in Sioux City. Shama took the witness stand and testified that Coots had sent for the woman to come to Sioux City and dance in the carnival. Shama had loaned Coots the money for the ticket, and had been repaid. Then Coots found that he did not need another dancer in his carnival, and, after the woman's arrival, asked Shama to give her a job. This testimony is in direct conflict with the government's evidence, which,

on this appeal, as pointed out, must be taken in its most favorable aspect. The only hypothesis of innocence consistent with the government's evidence is that Shama changed his intent during the time that elapsed between the morning when he procured the transportation and the following day when the woman arrived. Such a change of purpose may reasonably be inferred when the parties are traveling together; but here Shama in his testimony said nothing that would support such a theory in his case. There is no hypothesis of innocence which is consistent both with the government's evidence, taken in its most favorable aspect, and also with the story which Shama declares to be true. In order to have reached its verdict, the jury must have believed that Shama's story was wholly false. If appellant fabricated his story, that is a further fact which is inconsistent with innocence. Wilson v. United States, 162 U.S. 613, 621, 16 S.Ct. 895, 40 L.Ed. 1090." (Shama v. United States, supra)

In Lindsey v. United States, supra, the court stated:

"Falsification by the defendant also gave rise to a presumption of guilt to be weighed by the court." (See also Seeman v. United States (96 Fed 732,733).

The principle involved may also be invoked against the prosecution (United States. v. Graham, 102 F 2d 436,442,443).

We conclude that from all the competent evidence of record, including the false testimony of accused, the findings of guilty of the offense under consideration were warranted.

5. Records of the Department of the Army show that the accused is a high school graduate, 39 years of age, married and has one child. He was commissioned a second lieutenant (AUS) on 15 January 1943, entered upon active duty on 21 January 1943, and was promoted to first lieutenant on 13 October 1943. In civilian life he was employed as a civilian pilot. He had no prior enlisted or commissioned service. He is authorized to wear the European and Mediterranean Campaign medal, the American Theater ribbon, the World War II medal and Army of Occupation ribbon. He served in the European Theater prior to his present tour in Japan. His efficiency ratings range between "Very Satisfactory" and "Superior."

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed 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. A sentence to dismissal and total forfeitures is authorized upon conviction of a violation of the 96th Article of War.

_____, Judge Advocate

(Dissent)_____, Judge Advocate

_____, Judge Advocate

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

JAGH CM 330993

9 SEP 1948

UNITED STATES	)	FIFTH AIR FORCE
v.	)	Trial by G.C.M., convened at Johnson Air Force Base, APO 994, 6,10,13,17 and 18 February 1948. Dismissal and total forfeitures.
First Lieutenant ELLSWORTH A. RANGUETTE, AO 510931, 39th Troop Carrier Squadron, 317th Troop Carrier Group, APO 704.	)	

DISSENTING OPINION BY
WOLFE, Judge Advocate

I do not concur in the holding that the evidence is legally sufficient to sustain the findings of guilty of Specification 1, Charge I. Under this Specification, the accused, First Lieutenant Ranguette, was charged with wrongfully selling 42 bed sheets which had been issued for use in the military service of the United States. The evidence for the prosecution was sufficient to establish that this accused acting in conjunction with the accused, Technical Sergeant James M. Brown, did sell 42 sheets to Isamu Senuma at the time and place alleged. Both Lieutenant Ranguette and Sergeant Brown denied making such sale.

In order to establish the offense charged it was necessary for the prosecution to prove, in addition to actual sale of the sheets, that such property belonged to the United States and that it was issued for use in the military service thereof, and that the act was wrongfully and knowingly done. Proof of issue for use in the military service is necessary to establish the corpus delicti (Par 150i, MCM 1928; CM 254940, Holden, 36 BR 1,3). Since no prosecution witness testified that either accused took the sheets from the possession of the United States or that the sheets were issued for use in the military service or were property of the United States, the prosecution had to rely upon circumstantial evidence to establish the ownership and taking of the property. Conviction by courts-martial may not be based on conjecture and if any part of the finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference.

> "The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence

of record legally sufficient to support the findings of guilty (AW 50½). If any part of the finding rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 152797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206522, Young; CM 207591, Nash, et al.) The following has been quoted with approval, by the Board of Review (CM 197408, McCrimon; CM 206522, Young; CM 207591, Nash, et al.):

> 'We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens (Buntain v. State, 15 Tex. Appeals, 490)' (CM 212505, Tipton)" (CM 223336, Grice, 1 Bull JAG 159,162).

"If inferences are relied upon to establish guilt, they must point to guilt so clearly that any other conclusion would be inconsistent therewith. This is true regardless of how suspicious the circumstances may be." (Sec 883, p.1522, Wharton's Criminal Evidence, 11th Ed)

"When circumstantial evidence alone is relied upon, the facts and circumstances must form a complete chain, and point directly and unerringly to the accused's guilt. In other words, they must be of a conclusive character. Mere suspicions, probabilities, or suppositions do not warrant a conviction. The circumstances must be sufficient to show guilt beyond a reasonable doubt." (Sec 922, p.1604, Wharton's Criminal Evidence, 11th Ed).

Since neither accused confessed to the offense charged the rule applicable to circumstantial evidence is that stated in CM 204963, Nunn, where accused was charged with wrongful disposition of government property under Article of War 84:

> "Before a confession is admissible there must be established by other evidence of record proof of the corpus delicti, which, in the instant case, is proof that the property in question was missing under circumstances indicating a probable wrongful disposition. Such evidence of proof of corpus delicti need not be established beyond a reasonable doubt, but if it reasonably

tends to corroborate and fortify the truth of the confession it is deemed sufficient. In cases wherein a confession is not involved, however, proof of the corpus delicti must be established beyond a reasonable doubt."

The guilt of the accused must be established beyond a reasonable doubt.

"In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof. --.

"The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty. -----.

"The rule as to reasonable doubt extends to every element of the offense.---.

"A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inference from them." (Par 78a, MCM 1928) (Underscoring supplied)

Using the foregoing general principles of law as a guide, it will be necessary to examine all the evidence in this case in order to determine if the prosecution has established its case with that degree of certainty required by law.

Prosecution Evidence

The prosecution established that on the night of 2 January 1948 between 2000 and 2100 hours (R 9,52) the two accused accompanied by two Japanese girls drove in a jeep to the Yamoto Hotel in Hachioji, Japan. They had three or four paper-wrapped string-tied bundles containing 42 sheets (R 14,15). There was no testimony as to the number of sheets in each package at the time. There was no testimony as to how these sheets came into possession of the two accused. The sheets were sold to Isamu Senuma, the proprietor of the hotel, for fifty four thousand six hundred yen, twenty thousand of which was paid in cash, the balance to be paid on 7 January 1948. The accused and girls then left the hotel.

At about 2230 or 2300 hours on the same day the military police went to the Yamoto Hotel and searched the premises. They went to the hotel

because they had received information that government property was being sold there (R 21). Among other items they found a batch of loose sheets (number not shown) not wrapped or tied, in a closet of one room and a batch of sheets in another room which were in a bundle covered with paper and tied with a piece of cord (R 18,23). There was a total of 41 sheets in both batches (R 19). Forty of these sheets were identified by the military police and introduced into evidence as Prosecution Exhibit 1 (R 19). There was no identification of the sheets on the trial with reference to which room in the hotel the sheets introduced into evidence came from or which were from the wrapped batch or which were the loose untied sheets. This fact is important in view of the indiscriminate selection of one of these sheets to serve as a basis of comparison with other sheets later in the trial. The record is silent as to whether these sheets had any markings on them identifying them as United States Army property, but from the remarks of counsel (R 86) it can be inferred no such markings appeared on the sheets. The sheets were not sent forward with the record of trial although physical examination would reveal the presence of markings. It was stipulated that the size of these sheets (Pros Ex 1) varied from 81½ to 84 inches in width (R 85). The paper wrapping of the one batch of sheets seized by the military police was identified by the military police and introduced as Prosecution Exhibit 2 (R 20). Senuma did not identify this wrapping paper as the same as that which the sheets were wrapped but did testify that it was similar to the paper in which the sheets were wrapped when he purchased them (R 10).

Neither Senuma nor any other witness testified that the sheets seized at the hotel by the military police were the same sheets sold by the accused to Senuma. While being questioned concerning the sale of the sheets Senuma did testify:

"Q. Were the bundles of sheets tied with anything?
A. Yes, it was tied with a cord.

Q. Is this cord similar to the cord with which the sheets were tied?
A. I cannot tell you whether that is the same or not because when he left the material, I didn't have much time to look at it because the M.P.'s from Tachikawa came right away and took it away." (R 10)

The question inquired only as to cord. It can be presumed the answer referred only to cord. While it is possible it may have referred to sheets, it is also just as possible it referred to the cord only. Any doubt in this respect is a reasonable doubt and must be resolved in favor of accused.

"The finding of one fact inconsistent with the guilt of the accused may be sufficient to create a reasonable doubt of his guilt. If the circumstances established are dependent one upon another, each must be consistent only with the theory of guilt in order that a conviction may stand ---.

"A reasonable doubt must be resolved in favor of the accused where a fact or circumstance is susceptible of two interpretations." (Sec 922, p.1610,1611, Wharton's Criminal Evidence, 11th Ed)

If it could be assumed that the witness was vaguely referring to one of the four batches of sheets which he purchased from accused in wrapped bundles, it is obvious that such testimony did not refer to the unwrapped sheets which the military police subsequently seized in a separate room in the hotel. This becomes important in view of the attempt by the prosecution to establish the source of these sheets through testimony of experts by comparing one of them with Prosecution Exhibit 4A. In order to complete the chain of circumstantial evidence the prosecution must show that the sheets seized were properly identified as the same sheets sold to Senuma and that the sheets examined by subsequent expert witnesses were the same sheets that were sold to Senuma.

Sergeant Walsh, a prosecution witness, recalled by the defense testified:

"A. I brought the owner of the hotel and the articles back to the Provost Marshal's Office at JAMA.

Q. Did you hold an interrogation at that time?
A. Yes, sir; I did.

Q. Sergeant, at that time did the hotel owner state how he came in possession of those sheets?
A. Yes, sir; he did.

Q. What did he say at that time?
A. He said two girls, Japanese girls, and two American soldiers brought them to his hotel.

Q. Two Americans?
A. Yes, sir.

Q. Did he know the girls at that time?
A. No, sir.

Law Member: Mr. Defense Counsel, it is the wish of this court to give you every latitude and leeway in conducting the defense phase of this case, however hearsay evidence and evidence of this nature is completely inadmissible.

Defense: If it pleases the court, there was an investigation, official investigation, that went on here. The Sergeant said he conducted this investigation and through that, the defense counsel wants to show how the identity of the two accused was established and I believe it is material to the issue as to the identity of who the accused were.

Law Member: That is correct, although there is a proper way of getting that evidence in and this clearly is hearsay. The question is phrased in hearsay and asking for a hearsay answer." (R 108,109)

It is to be noted that the above testimony does not name either of the accused in this case as being the persons who sold the sheets that were seized by the military police. The law member correctly held that the evidence was hearsay. As such it was not competent to establish guilt. Therefore, even though elicited by defense, the above evidence being hearsay must be excluded in determining whether the sheets seized were in fact the same sheets sold.

This witness was further cross-examined by defense counsel as follows:

"Q. Sergeant, you stated at the time you interrogated the hotel owner he did not know the name of the accused; is that correct?
A. Yes, sir; that is correct.

Q. How did he identify either of the two accused?
A. He was shown the accused and he identified them then.

Q. Will you explain to the court just how this identification took place?
A. When he identified Lieutenant Ranguette, he was sitting in a chair and we brought Senuma in and asked him if that was the man and he said, yes.

Q. Did you point to Lieutenant Ranguette at that time?
A. Yes, sir.

Q. Did he know immediately that that was one of the Americans who did sell him the sheets?
A. He didn't know until Lieutenant Ranguette put his hat on.

Q. How did he identify -- strike that. Was there a line-up held when Lieutenant Ranguette was identified by this hotel owner?
A. No, sir.

Q. How did the hotel owner identify the accused Brown?
A. He identified him the same way as Lieutenant Ranguette was identified.

Q. Was there a line-up for Sergeant Brown?
A. No, sir.

Q. In your identification of Sergeant Brown, did you ask him if that was the man who sold you the sheets; is that correct?
A. Yes, sir, or words to that effect.

Q. And you pointed to Sergeant Brown at that time; is that correct, Sergeant?
A. Yes, sir." (R 109,110).

It is to be noted that the above testimony deals only with identification of the accused as the two persons who sold the sheets--not as to whether the sheets seized by the military police were the same sheets sold by accused. While the above testimony as to extra-judicial identification was hearsay, it appears that the witness Senuma had previously identified the two accused in court as being the same persons who sold him sheets. Therefore the evidence was admissible (CM 291957, Williams, 18 BR (ETO) 7,11). However, any testimony that Senuma told the military police that the sheets seized were the same sheets sold to him by accused would be hearsay and if admitted by the court it would be material prejudicial error, since the principal link in prosecution's case was proof that the sheets seized were the same as those sold. The witness Senuma was present as a witness and could have testified concerning this matter. However, since the evidence was hearsay, it must be disregarded in determining the sufficiency of the evidence to sustain the findings of the court.

In order to further prove the source of the sheets sold by the accused the prosecution called as a witness one Kitayama, manager of the sewing department of the Kanegafuchi Company who produced in court a sheet made by his company (Pros Ex 4-A) together with a piece of wrapping paper used by his company (Pros Ex 4-B). The sheet had a 1½ inch border sewed on it. He testified that the dimensions of single sheets made by his company were 72 by 108 inches before sewing (R 33). The court refused to act as an expert in comparing this sheet (Pros Ex 4A) with the sheets introduced as Prosecution Exhibit 1 (R 33).

The witness further testified that:

"Q. Who does your company make sheets for?
A. For the General Headquarters and for the Government." (R 28) ("Government" as used in this answer clearly refers to the Japanese government.)

On cross-examination he testified:

"Q. Where are your sheets transported? Where are they sent?
A. That I don't know because that is another department". (R 35)

"Q. Then, are you definitely sure no other company makes sheets?
A. I don't know.

Q. Are you in a position to know if all the sheets you make go to the Armed Forces?
A. I am in position to know that all the sheets are going to the Occupational Forces.

Q. You testified previously to the fact that all the sheets did go to the Armed Forces. Do you know that all the sheets do reach the Armed Forces?
A. I heard that from the -- what do you call that -- the Trade Department.

Q. Will you give the answer to that again?
A. That is out of my department so I cannot tell you that." (R 35)

"Q. I will rephrase that. Are you in a position to be absolutely sure all the sheets your company manufactures reach the Armed Forces.
A. I believe that the sheets are reaching the Armed Forces because there has been no complaint or claim that the sheets are missing from the Trade Department and, also, if there were any missing, they would notify me.

Q. That is the only way then you do know there is no sheets missing from the report from the Trade Commission; is that correct?
A. The Trade Department in his company.

Q. Trade Department?
A. I don't know of any other methods of checking whether they are reaching the Armed Forces or not.

Q. He doesn't know then whether they are all reaching the Occupational Forces or not?
A. By other methods.

Q. That is the only method he knows they are reaching the Armed Forces?
A. That is the only method." (R 36)

This witness further testified that he was able to identify sheets made by his company only by the sewing, starching and folding (R 32, 36,37). [The folds of his sheet (Pros Ex 4A) did not appear to be the same as the 40 sheets introduced in evidence (R 36), but the sewing in the corner was similar (R 37). The sheets of his company had 12 stitches to an inch (R 37)]. He did not know how other companies made sheets since he had not seen any of them (R 37).

This witness thus established that the Kanegafuchi Company also makes sheets for General Headquarters and the Japanese government. This testimony was corroborated by the defense witness, William M. Tyndall (R 116,117). The conclusion that all sheets sent to the Armed Forces (which Armed Forces-whether of the United States, England or Australia-not appearing) was based on hearsay reports from the trade department of his company. This is not evidence which can be considered in determining the sufficiency of the evidence to sustain the findings.

> "Hearsay is not evidence. By this rule is meant simply that a fact cannot be proved by showing that somebody stated that it was a fact." (Par 113, MCM 1928)

The failure of defense to object is immaterial. (CM 272197, Dezan, 46 BR 269; CM 254940, Holden, 36 BR 1,2; CM 244486, Gamble, 28 BR 301,306; CM 1042 (ETO), Gollette, 3 BR (ETO 301).

Since this witness testified sheets also went to the Japanese government even though the sheet from the Kanegafuchi Company was identical with one of those found at the Yamoto Hotel it does not follow that the Yamoto Hotel sheet belonged to the United States. It could have been the property of the Japanese government. Identity of sheets did not raise an inference of title in the United States.

Prosecution witness, Captain William H. Saxton, testified that he was the officer in charge of dependent housing furniture and supplies, including sheets, at Tachikawa and that accused, Brown, had been the senior non-commissioned officer in charge of these supplies in the warehouse where these supplies were stored (R 40). The sheets were issued by the 8th Army to the Base Accountable Officer who in turn issued sheets to witness on memorandum receipts (R 40). When accused first took over his duties no inventory was made of the property on hand but about 15 January 1948 an inventory was made which he stated showed a shortage of 1024 double sheets and a shortage of 135 single sheets (R 40,42).

With respect to the source of the sheets, he testified:

> "Q. Is the Kanegafuchi the only company you get sheets from?
> A. To my knowledge -- frankly I don't know. * *." (R 40)

This witness further testified that:

"Q. * *, why did you take this inventory?
A. I took this inventory immediately after Lieutenant DePalma and Colonel Deering requested it be taken and I had planned on it anyhow when I found out what had happened and to my knowledge, it was the only one taken then or up to that time or since.

Q. Before you took over and when you did, was there a complete inventory taken?
A. No.

* * *

Q. Is there complete stock records?
A. No, sir; they were incomplete. The only stock records available are those charged to me from Eighth Army and those by the Base Accountable Office." (R 42,43)

"Q. You have stated your records were not accurate, to your belief?
A. Yes, sir.

Q. In other words, there is some question in your mind concerning the number of sheets that are missing from the warehouse?
A. Yes, sir." (R 45)

"Q. * *. Can you definitely state whether there has been an actual loss -- physical loss of sheets or if, in your opinion, there is merely a mix-up in the records?
A. I feel there is a mix-up in the records. There has always been a confusion there and I think other people will bear me out. * *." (R 45)

"Q. In answering the court's question, I want to make sure you understood. Do you mean the entire works on paper you believe is due to a paper mix-up, the loss, and it is not possible a physical loss and not just a mix-up on paper?
A. Well, the only way I can explain the shortage in the number of double sheets that qualifies some of the number, if I may say this, I feel some double sheets have been issued as single sheets and the dependents have never brought it to our attention and consequently are using double sheets on single beds.

Q. Is there any way you can actually tell whether it wasn't physical or it was?
A. No." (R 46)

"Q. You are charged with a shortage of over a thousand sheets, the doubles and singles. Is there anyway you can tell that

shortage is a result of a mix-up in your records?

A. No, sir; there is no definite way. May I? I ran across some old reports of survey that had a few sheets on them. Now whether there is more of these statements of collections for shortages is not known. There has been no turn-in sheets in the Base Accountability but I am now digging in old files to see. I am trying to get this backlog of papers and records straightened out and I am hoping to bring out some definite figure.

Q. Do you have stock record cards for sheets?

A. Not at present." (R 47,48)

The above testimony does not indicate how the inventory was made or how the witness arrived at the conclusion that there was a shortage based on an inventory. If he had no stock record cards, took no inventory when he took over the stock, and did not have turn-in slips or reports of surveys it is obviously impossible to take a correct inventory. At the most his testimony was a guess. This witness himself was unwilling to state there was an actual shortage. Conclusions or opinions are not evidence. Testimony which is without foundation of substantial evidence upon which to base a conclusion of witness is incompetent (Sec 395 (23), Dig Ops JAG 1912-40; Sec 112b, MCM 1928, Opinion Evidence; CM 285682, Morgan, 10 BR (ETO) 341,344; CM 220886, Wright, 13 BR 95,97).

> "The value of testimony given by a witness on direct examination may be entirely nullified by his admissions on cross-examination and where a witness testified to certain facts on direct examination, his denial, on cross-examination, of knowledge of such facts, operates as a withdrawal of his direct testimony" (Sec 700, p.619, Notes 44 and 45, 70 CJ)

Even though such evidence was introduced without objection by the defense it cannot support a finding of guilty (CM 318467, Johnson, 67 BR 325,328, 6 Bull JAG 121).

The evidence of this witness does not establish a shortage of government sheets and cannot be the basis of an inference that accused wrongfully had government sheets. As stated above, convictions by courts-martial may not be based on conjecture. If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference.

Prosecution witness, Captain Ben H. Whitten, QMC, Chief of the Procurement Section, Eighth Army quartermaster (R 48) testified that

the Kanegafuchi Textile Company was the sole source of sheets for procurement demands for dependent housing for the Army (R 49) and that they furnished single sheets 72 by 108 and double sheets 84 by 108 (R 49). He further testified:

> "Q. In the case of double sheets, are they manufactured for anyone else other than dependents or dependent housing?
> A. To the best of my knowledge, no." (R 49)

The above testimony does not imply that all double sheets made by the textile mills immediately become the property of the Army. The source of title by the Army is further clarified by his testimony to the effect that the procedure for obtaining sheets for the Army was for the using agency to submit to Eighth Army Quartermaster an estimate of its requirements, which request was acted on by Eighth Army and then submitted to Military Government Headquarters which agency in turn published a procurement demand on the Japanese government (R 49).

He further testified that the Japanese government supplied the material for the sheets and made an allocation of raw materials to the factory when a demand was made on the Japanese government for sheets (R 50). This testimony was corroborated and further clarified by the testimony of defense witness, Tyndall, of the Textile Division, Economic and Scientific Section, GHQ, Supreme Commander of the Allied Forces, whose testimony will be discussed subsequently.

This witness further testified that the Kanegafuchi Textile Company was not the only company in Japan which made sheets similar in size to those purchased by the Army (R 49). This contradicts the testimony of prosecution witness, Hisao, in this respect. Therefore, even if this witness were qualified to testify that all double sheets were manufactured for the Army, it does not follow as a correct inference that the Army got all double sheets so manufactured, so as to raise an inference that any double size sheet must be the property of the Army. The undisputed testimony of defense witness, Tyndall, established that all sheets did not go to the Army, and the uncontradicted evidence set out in defense Exhibit B conclusively established that all sheets did not go to the Army. However, this witness did not purport to testify as to a fact, even if a possible inference can be raised in favor of the prosecution. Such being the case, such testimony cannot be used as the basis of such inference.

> "As a general rule, the testimony of a witness must be limited to the facts of which he has personal knowledge--." (Sec 944, p.1658, Wharton's Criminal Evidence, 11th Ed)

> "An affidavit of defense stating certain facts to be to the best of his knowledge and belief of affiant does not mean affiant's personal knowledge." (First Nat. Bank of Clarion v. Gregg, 79 Pa (29 P.F. Smith) 384,387)

The prosecution in a further attempt to establish the source of the sheets found at the Yamoto Hotel called as an expert witness, Kikuchi Hisao, an employee of the Nisshimbo Company who, after testifying that the Nisshimbo Company made raw cotton into thread and then wove the thread into cloth and that all such cloth was then sent to the Kanegafuchi Company where it was made into sheets (R 70,72), testified:

"Q. Mr. Kikuchi, for whom is the material made by your company?
A. By the order -- we had an order to make those by the GHQ.

Q. Did you make the cloth of those sheets for anyone else besides the Armed Forces?
A. No." (R 73)

"Prosecution: This man has worked up to the managership in the Weaving Department of the Nisshimbo Company. The Nisshimbo Company is that company that gives all their material to the Kanega Company which is the one making sheets. * *." (R 72)

The above testimony does not indicate that sheets made by the Nisshimbo Company became the property of the United States. The fact that the sheets were made subject to order by General Headquarters, does not support an inference that General Headquarters released all such sheets to the United States Army. As stated above, the uncontradicted testimony shows otherwise. However, the testimony of this witness is not clear, in itself, as to where the sheets went after they left his factory. It is impossible to reconcile the testimony of this witness first that the cloth was made for the Kanegafuchi Company, and next that it was made for General Headquarters and finally that it was made for the Armed Forces (What Armed Forces--whether American, British or Australian--not being indicated). The witness is apparently testifying from hearsay when he says that the sheets went to General Headquarters and also to the Armed Forces. It is probable that the witness by referring to General Headquarters meant General Headquarters, Supreme Commander for the Allied Powers, which is a joint allied command. Property subject to disposition orders by General Headquarters did not become property of the United States but could be released by General Headquarters for civilian or military use. Such military use could include any of the Allied Forces. That such was actually the case, is demonstrated by Defense Exhibit B, paragraphs 3, 4 and 6 where orders for sheets for Eighth Army were terminated and the property was released in part for Japanese consumption.

The prosecution further sought to prove by this witness, as an expert, that the sheets seized at the hotel were identical with the sheets made by the Nisshimbo Company. The witness testified that he could tell sheets made by the Nisshimbo Company from sheets made by

other companies by a count of the warp and woof, by the size of the thread, and by the width of the completed sheet (R 71,72,74). He stated that bleached sheets of his company had 64 threads per inch in the warp (vertical line) and 53 threads per inch in the woof. Witness examined one of the sheets from Prosecution Exhibit 1 (one of sheets found in the Yamoto Hotel) and stated that it was made by his company. The sheet was 84 inches wide (R 78). Five factors were used by the witness in arriving at his conclusion, to wit, length and breadth of sheet, size of thread, andnumber of threads in the warp and woof. He found 53 threads per inch in the woof and 64 threads per inch in the warp. The size of the thread was the same as used by his company. This witness further testified that ten other companies made thread and weaved cloth in Japan:

"Q. Is it possible any one of these other ten companies could weave the same number of threads in the woof and in the warp that your company has?
A. Yes, they can. That is the same number.

* * *

Q. Mr. Kikuchi, you stated before that you could tell sheets made by your company from those of any other company. * * How can you make that statement if other companies have the same amount of threads in the woof and the warp?
A. Well, the reason I can tell the difference, is other companies make -- put in the same number of threads per inch. I can tell by the material of my company because there is no other company that can make cloth of this width." (R 77)

It is thus apparent that the only real basis of identification was in the width of the sheet. Hisao further testified:

"Q. Is it possible that other companies make the same sheeting that you do?
A. They don't make the same kind of sheets because the other companies havn't the machinery to make the ninety-one inch sheet like we have." (R 72)

"Q. You have stated that there were ten plants making thread and that they were also engaged in weaving; is that correct?
A. Yes.

Q. How many of these ten companies have looms that are capable of turning out material that is * * * Eighty-four inches in width?
A. The Kanegafuchi has.

Q. Do any of the other companies havc?
A. No.

Q. How many of these ten companies have looms capable of turning out cloth that is seventy-two inches in width?
A. Seventy-two inches? The Kanega is about the only one. About the others, I don't know." (R 79,80)

There was no prosecution evidence as to whether any Japanese companies had looms capable of turning out sheets 81½ inches. The sheets introduced as prosecution Exhibit 1 varied in size from 81½ inches to 84 inches in width. Unless the prosecution established that no other company in Japan could weave sheets 81½ inches in width, the testimony of this witness can pertain only to the 84 inch sheets. The witness himself although giving a conclusion as an expert could be required to state his reasons for such conclusion and if such reasons did not support the conclusion his conclusion has no probative force or effect. The testimony of this witness therefore does not exclude the possibility that 81½ inch sheets could have been made elsewhere and for agencies other than the Armed Forces. As noted above the evidence does not indicate how many of the sheets found at the Yamoto Hotel were 81½ inches wide and how many were 84 inches wide.

The testimony of this witness that no other companies in Japan had looms capable of weaving cloth 84 inches in width was positively contradicted by the testimony of prosecution witness, Captain Whitten (noted above), and of defense witness, Tyndall, who testified that at least four large Japanese mills were capable of making sheets 84 inches in width (R 117). The testimony of Mr. Tyndall, although a defense witness, was credible in every respect and it was a part of his official duties as a representative of the allied military forces to know such facts. Testimony of such witness under such circumstances where the country is under military occupation cannot be discounted by a vague and uncertain statement of an employee of a Japanese mill whose testimony in this respect was undoubtedly based on hearsay. Such Japanese witness will not be presumed to know more of the workings of military occupation and the operation of mills shown to be subject to control by military occupational authorities than an authorized representative of the military government would know.

"Testimony consisting of mere legal conclusions or utterly destitute of reasonable precision is insufficient; and a verdict cannot be based on evidence --- is inherently unbelievable, is contrary to reason --- and is contrary to common knowledge and experience ---." (Sec 1042, 32 CJS, p.1126)

"The right to the submission of an issue of fact depending on the credibility of a witness does not exist where the undisputed circumstances show that the story told by the witness cannot be true, or where it is so improbable, absured and contradictory, that it should be deemed a nullity by the court. ---.

"So the testimony may be incredible as a matter of law where it is inherently improbable and is impeached by physical facts, or is in contradiction of matters of common knowledge." (Sec 334, 64 CJ, p.357)

It should be further noted that this witness examined only one of the sheets of Prosecution Exhibit 1, and hence his conclusion is limited to that sheet. Because he may have found one sheet identical it does not follow that all sheets in Prosecution Exhibit 1 would have been of the same weave or size as was the one about which the witness testified.

It is further to be noted that the evidence does not show from what batch of sheets in Prosecution Exhibit 1, this sheet was taken. This is important in view of the fact that two batches of sheets were seized by the military police in the Yamoto Hotel. These batches were in separate rooms when seized and only one batch was wrapped. If we conclude that the batch which was wrapped was the only batch sufficiently identified as the one sold by accused to Isamu Senuma, it was necessary to establish that the sheet examined by the witness was from this wrapped batch in order to complete the chain of circumstantial evidence. If it came from the unwrapped batch, an essential link is missing in the chain of evidence, namely that there is no evidence this is one of the same sheets sold by accused to Senuma.

Prosecution further called as an expert witness Julia M. Hornsby who had made a comparative analysis of one of the sheets allegedly found at the Yamoto Hotel (Pros Ex 1) and the sheet from the Kanegafuchi Company (Pros Ex 4A), and concluded that the sheets were from the same origin (R 82).

By thread count she found each sheet to contain 124 threads per square inch (R 81). It is to be noted in this connection her estimate of the number of threads per square inch and that of prosecution witness Hisao who testified that the sheets made by Nisshimbo Company for the Kanegafuchi Company had 64 threads per inch in the warp and 53 threads per inch in the woof. This would make only 117 threads per square inch.

This witness further testified that the area of the sheet from Prosecution Exhibit 1 was 100.25 inches by 93 inches and Exhibit 4A had an area of 103.5 inches by 94.25 inches. This in itself shows no identical weave. This also is at variance with testimony of prosecution witness Hisao who based his identification principally on width of sheets. The sheet from Prosecution Exhibit 1 examined by him and on which his comparison was based was 84 inches wide and he testified that his company wove 91 inch wide cloth (R 72) or 84 inch wide cloth (R 77). If the findings of prosecution witness Hisao are correct, it is apparent that the sheet examined by Hornsby did not come from the looms of the Nisshimbo Company. There is a further contradiction of testimony in

that witness Hornsby stated that the sheet from Prosecution Exhibit 1 was 100.25 inches by 93.25 inches which is in conflict with uncontroverted evidence that sheets in Prosecution Exhibit 1 were in varying sizes from 84 to 81½ inches in width (R 147). Double sheets issued by the Army were 84 by 108 inches (R 49). While it is understandable that sheets may shrink in washing, they do not become larger and an increase from 84 inches to 93.25 or 100.25 is not conceivable. The only conclusion to be drawn is that Prosecution Exhibit 1 were not all sheets of the same size or make and hence any attempt to trace the source of all by comparing one sheet out of the lot is not tenable. Certainly the sheet compared (Pros Ex 1) did not come from the looms of the Nisshimbo Company if prosecution witness Hisao is to be believed.

This witness further testified with reference to the comparison of the sheets:

"Q. Continue please.
A. At this point, we looked at the craftsmanship of the sheets. We counted the stitches in the hems per four inches per hem. The reason for using four inches, the variation is so slight, it would take more than one inch to bring it out. The top hem of Exhibit #1 is fifty-six stitches per four inches. The bottom on Exhibit #1 is sixty-one threads per square inch.

Q. Is that per square inch or linear inch?
A. I am sorry, per four inches.

Q. That is linear inches? Would you repeat those last counts on the hems, please, for us?
A. Exhibit #1 would be fifty-six stitches per four inches. Exhibit #1 -- that was the top. Exhibit #1, the bottom, had sixty-one stitches per four inches. Exhibit #4A, top, fifty stitches per four inches; bottom forty-six stitches per four inches. After this we checked the diameter of the threads. The warp of Exhibit #1 was found to be .45 millimeter. The filler of Exhibit #1 .25 millimeter. Exhibit #4A, the warp, .45 millimeter, the filler .25 millimeter. This was followed by a check for ultra-violet fluorescence. Under ultra-violet light, many things have characertistics peculiar to them. Ultra-violet light analyses are often good in that you can detect differences very readily, for instance, sulphates will give a fluorescence of light blue. Chlorides will give a yellow fluorescence. The fluorescence was found to be the same and there is no photograph on that. That is according to the human eye. That is about the data that we have on that." (R 82)

It is to be noted that the stitches in the hems are not similar. The size of the thread seems similar but this is of little significance,

in the absence of a showing that only one company in Japan used this size thread. The fluorescence comparison was not shown to be relevant. Comparison of fingerprints is acceptable in view of the generally recognized fact that experience has demonstrated that no two prints are the same. There was no testimony in this case showing same to be true with reference to the fluorescence test. The witness stated it was valuable to detect the presence of elements such as sulphates. This does not establish that another piece of cloth with sulphate content would not respond the same. The conclusion of the witness that the sheets were from the same origin (R 82) was a conclusion which must be based on proved facts. In view of all the testimony as noted above such conclusion is not tenable in this case.

This witness further testified that a fluorescence test on Prosecution Exhibit 4B (wrapping paper) established it was different material from Prosecution Exhibit 2 (R 82). No prosecution witness was able to identify the paper as being identical. Hence the wrapping paper ceases to be an issue of fact as a chain in the circumstantial evidence.

What has heretofore been stated with reference to the testimony of prosecution witness Hisao applies to the testimony of this witness. She examined only one of the sheets from Prosecution Exhibit 1 and hence her conclusions are limited to that sheet. It does not follow that the same conclusion applied to each of the other sheets. Again it does not appear from what batch of sheets in Prosecution Exhibit 1 this sheet was taken so as to identify it as one of the sheets accused sold. As noted above, if it comes from the unwrapped batch seized at the Yamoto Hotel there is absolutely no evidence to show it was one of the sheets left there by accused.

Defense Evidence.

William M. Tyndall, a witness for defense, qualified as an expert in weaving of cotton textiles and testified that he was a textile specialist in weaving on duty with the textile division, Economic and Scientific Section, General Headquarters, Supreme Commander of Allied Forces. He stated he had personally visited various spinning and weaving mills in Japan and that he had seen wide looms 100 or over 100 inches which were operable in the Tojo Cotton Spinning Company, the Yamada Mill, the Kanegafuchi Spinning Company, the Yadoti Mill and the Nisshin Toyama factory (R 114). He further testified that at least four of the big ten Japanese companies were capable of making sheets 84 inches wide (R 117). This witness described the tests he would use to determine if two pieces of cloth were similar.

"Q. Mr. Tyndall, if the construction of two pieces of material is the same, does this mean the two pieces of cloth came from the same mill?
A. No, it doesn't." (R 115)

"Q. With your visits to the various spinning mills and weaving mills and your knowledge of the cotton industry here in Japan, what is the possibility of two companies, different companies, weaving a piece of material that would be basically of the same construction?
A. That is being carried on right now.

Q. Would you repeat that answer, please?
A. Most mills are producing the same construction today in Japan" (R 116).

This witness further testified that the diameter of thread would vary and that in order to determine the mean diameter of thread it would be necessary to take a whole bobbin. Threads taken from a square inch of cloth would not be sufficient to make an accurate test (R 118).

He testified further that bed sheets were being made by four of the big ten spinning and weaving companies for the Eighth Army and the Foreign Trade Hotels (R 116). The Foreign Trade Hotels were run by the Japanese government (R 117), and that the owner of the sheets made by Japanese companies and sent to Japanese Foreign Trade Hotels was the Japanese Board of Trade (R 117). After the Japanese surrender all cotton brought to Japan was turned over to the Japanese government and released by it through the Board of Trade upon approval by the Allied Military authorities. Forty per cent of the imported cotton was to be released for Japanese consumption (R 117). He further testified:

"Q. Are any of these sheets of eighty-four inch breadth turned into domestic use for the Japanese?
A. The raw cotton is turned over to the Japanese for them to manufacture the cloth. You asked if the looms were turned over?

Q. No, I am asking about the sheets.
A. Well, the raw cotton is turned over to them for the Board of Trade, I mean the Textile Bureau to find what their home consumption needs are and they us, in quarterly reporters, what they plan touse their raw cotton share for." (R 118)

Defense further called as a witness, Captain Albert S. Rathofer, Assistant Branch Chief of the Liaison Branch, Textile Division, Economic and Scientific Section, General Headquarters, SCAP. His duties was to supervise Japanese implementation of SCAP regulations. He also received official reports from the Japanese indicating losses of State-owned, Japanese owned textiles. These reports referred to cotton (R 119). In one case the loss of 150 rolls with approximately 45 yards per roll was reported (R 120). Reports of theft were received in Kanegafuchi and Nisshin Companies.

Defense also introduced as Defense Exhibit B a memorandum dated 19 December 1947 issued by the General Headquarters, Supreme Commander for the Allied Powers for the Board of Trade, Ministry of Commerce and Industry, Tokyo (R 113). The Board of Trade was directed to transfer title by sale of 1957 bales of cotton to various Japanese spinning companies in accordance with stated allocation direction which included 807 bales to the Nisshin Mill, and other bales to the Kanebo Mill. Part of the bales of cotton released constituted raw cotton originally released for production of bed sheets, manufacture of which was later terminated by cancellation of the order by the 8th Army. Paragraphs 4 and 7 provided:

"4. By recent order from the 8th Army to supply additional bed sheets and pillow cases to meet occupation requirements and to furnish Foreign Trade Hotels, the Japanese Government is permitted to furnish such requirements by raw cotton released for domestic production under this memorandum."

"7. A total of 1,991,975 yarn bales (796,790 lbs.) will be manufactured from the 1,957 bales of raw cotton. These yarns will be used to produce bed sheets and pillow cases as follows:

Use	Yarn Pounds
Old 8th Army Orders	531,000
New 8th Army Orders	239,292
Foreign Trade Hotels	14,374
Reserve Uses	12,124
TOTAL	796,790 lbs."

Although the above witness was a defense witness the court could not arbitrarily reject the testimony of such witness. The court or jury

"* * have no right arbitrarily to reject the testimony of a witness unless they believe that such witness knowingly and willfully swore falsely to a material fact * *." (Sec 2291, p.931, 16 C.J.)

"Juries may not arbitrarily and capriciously disregard testimony of witness not only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case, and, if they do, and render a verdict contrary thereto, it is against law, unless it appears that some essential part of the evidence is inherently improbable. * *." (Sec 880, p.1520, Wharton's Criminal Evidence, 11th Ed)

Testimony given by the two prosecution witnesses was such as pertained to functions of their office and there was no reason to doubt

the correctness of their testimony. As stated above, any vague, uncertain, or hearsay declarations made by prosecution Japanese witnesses who obviously would not be familiar with facts solely within the official knowledge of the Allied Military Government Headquarters cannot be regarded as raising an issue of fact which might serve as the basis of an inference by the court that the accused wrongfully sold United States government sheets.

There was no question raised as to the authenticity of the Memorandum issued by General Headquarters (Def Ex B) and its contents must be taken as uncontradicted evidence in this case.

Both accused gave sworn testimony on their own behalf. Each denied making the sale of the sheets and each denied being in an off-limits area.

Comment.

Based upon the foregoing resume of the evidence, I do not believe that the corpus delicti was established, to wit, that the property sold by the accused was property of the United States issued for use in the military service. No witness identified the sheets as property of the United States, nor did any witness testify that the sheets had ever been in the possession of the United States.

In order to show that the sheets were property of the United States, prosecution sought to show that there was a shortage of sheets at the United States Army warehouse at Tachikawa, Japan, from which it was argued that the sheets sold by accused came from this warehouse and hence were government property. As noted above, the testimony of Captain Saxton was not sufficient to legally establish such shortage. The inventory was not in fact a true inventory based on actual records or knowledge. The accused, Lieutenant Ranguette, was not in charge of the warehouse. The fact that he met his co-accused, Brown, on one occasion at the warehouse and that his co-accused did have access to sheets does not establish the basis for an inference that accused, Ranguette, had access to the sheets as intimated by the majority holding of the Board of Review. If Brown's access to the sheets is argued as an inference against accused, Ranguette, it should be noted that the court acquitted Brown of stealing sheets from the warehouse and that Ranguette was never even charged with larceny of sheets from the warehouse. The sheets were ordinary white sheets and were not peculiar to the military service. Prosecution did not establish that sheets could not be obtained from the United States similar to those sold by accused nor was there a showing that sheets similar to those sold by accused were unavailable to civilians. As a matter of common knowledge sheets similar in size can be purchased in the United States and sent to Japan. The evidence further shows that such sheets were available to the Japanese government which owned and operated the Foreign Trade Hotels.

Proof of ownership in the United States and proof of issue for use in the military service was a necessary ingredient of the offense and unless this was shown the corpus delicti was not established. An examination of cases similar to the present case demonstrate that the proof of the corpus delicti was insufficient.

In the case of CM 210763, Pelletier, 9 BR 351, accused was charged with the wrongful sale of one hospital bed, property of the United States, furnished and intended for the military service. The court, in holding that the evidence was insufficient to sustain the findings of guilty, stated:

> "It appears from the foregoing summary of the evidence that the beds found were not identified as Government property, though similar in appearance thereto, and that no loss of hospital beds by the Government was established by the evidence adduced at the trial. * * The proof of the corpus delicti, in the instant case is not only purely presumptive but is not strong and cogent. On the contrary, it is extremely doubtful. There was no confession received in evidence. Moreover, the accused denied his guilt by both his pleas to the general issue and his unsworn testimony."

In the case of CM 120937, Sec 395 (9), Dig Ops JAG 1912-40, where accused was charged with stealing a pistol, property of the United States, the Board of Review, in holding the evidence insufficient to sustain the findings of guilty, said:

> "Accused was charged with stealing a pistol, property of the United States, from a sentry. The evidence was that a pistol was missed, and a pistol was taken from the accused, but it was never identified as the one lost. There is nothing to show where or how the accused came into possession of it, nor does it definitely appear that the pistol actually belonged to the Government. The probabilities are obvious, but mere probabilities do not suffice. The evidence must be such as to exclude any fair and rational hypothesis save that of guilt."

Prosecution relies upon the principal of law stated in paragraph 150i, MCM 1928, to sustain the findings of the court:

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

In considering the applicability of the foregoing rule of evidence it is to be noted that the property must be of a "type and kind" issued for use in the military service, and that there must be other "proved" circumstances. In the present case although sheets were issued for use in the military service, they were also available for purchase in the United States, and available to the Japanese government. They did not have characteristics peculiar to the military service, such as guns, insignia for clothing, and uniforms made for military use. The sheets in question were not intended primarily for use by military personnel, but were for use in dependent housing. It is doubted therefore that the property was of the type and kind issued for use in the military service within the intent of the foregoing rule. However, assuming that they were, the other proved circumstances did not warrant the inference of government ownership. Mere possession of similar property is not a sufficient circumstance to warrant such inference. There was no adequate proof of a shortage of property. Nor was the proof sufficient to show that the United States Government owned all such sheets in Japan.

The foregoing rule has been considered in a number ofcases. In CM 211261, Sedlak, 10 BR 53, it was held that:

> "The required proof of corpus delictae aliunde the confession is not supplied by mere proof of shortage of property issued to accused charged with wrongfully giving away property issued under A.W. 84."

In CM 255114, Caracappa, the accused was charged under the 94th Article of War with stealing government property, to wit, 10 undershirts, 2 tent poles, 1 shelter half, 2 QM collar insignia, and other property alleged to have been the property of the United States, furnished and intended for the military service. The evidence showed that about 6:00 p.m. on 5 October 1943 Private Stephen, a military policeman, stopped a private car in which accused was a passenger as it approached the gate leading from the Base General Depot, San Bernardino, California. In the trunk of the car he found a box belonging to accused containing the articles alleged to have been stolen. There were no markings which would indicate that any of the articles were Government property, except a knife which had "US" on it. There was testimony that most of the articles could be purchased either "downtown or at the PX." Accused, in a pretrial statement, stated that he had gotten the property from an officer in the 533d Quartermaster. The Board of Review held the evidence insufficient to sustain the findings of guilty.

> "There was no proof in the record that any Government property was missing at the time and place, or that the accused had committed any act of trespass. There was not only a complete lack of proof of the corpus delicti but also of any of the elements essential to establish the commission of the larceny." (36 BR 35,37)

In CM 215881, Madrid, the accused was charged under Article of War 93 with larceny of a shirt, property of the United States government duly issued to Corporal Edward Bowen, Troop C, 12th Cavalry for use in the military service. The evidence showed that accused stole from Corporal Bowen a shirt which Corporal Bowen testified he had for about three years. The shirt was introduced into evidence. The last four figures of Corporal Bowen's serial number 2-8-1-3 was marked on the shirt. The Board of Review held the evidence insufficient to sustain the findings of guilty.

> "There is no evidence in the record that the shirt was the property of the United States, or had been issued for use in the military service as charged. The fact that the shirt was of the type used in the military service does not justify an inference that it was government property, for it is a matter of common knowledge that uniform articles of this kind may be privately purchased and personally owned by soldiers. The failure to prove the ownership of the shirt, as charged was fatal to the conviction (CM 192952, Scoles)." (11 BR 65,67)

In CM 207591, Nash, Morris, the accused was charged with stealing 25 gallons of gasoline, property of the United States. In holding the evidence insufficient to sustain the findings of guilty the Board of Review (McNeil, Cresson and Hoover) said:

> "There were many incriminating circumstances. However no shortage of government gas at any time was proved. Other circumstances in the case suggestive of wrongdoing by accused were shown, i.e., the fact that accused were, at night, probably leaving the post by an unfrequented road with the gasoline when arrested, the fact that the gasoline had been cached at a place (whether on or off the military reservation is not clearly proved) in the general neighborhood of the reservation, and the fact that they had in their possession a hose which might have been used to siphon gasoline. One of the accused, also, made inconsistent statements containing admissions that the gasoline was obtained from a tractor and from a CCC truck. But neither these circumstances nor the statement were of any substantial probative value to show that the gasoline was military property issued or intended for the military service. The circumstances raise a suspicion of wrongful possession by accused of gasoline obtained from some source, but throw no appreciable light upon the particular source from which it was obtained. The admissions by Nash (whether they or any of them were admissible against Morris is not decided) carrying implications of government ownership of gasoline, and tending to establish larceny thereof in violation of the 94th

Article of War, were not corroborated by the evidence upon the issue of ownership, and are not, in themselves or in conjunction with the other evidence sufficient to establish the offense charged or any one lesser included offense." (8 BR 359,362).

In CM 208895, Zerkel, accused was charged under Article of War 94 with larceny of 391 pounds of oats, property of the United States, furnished and intended for the military service thereof. In holding the evidence legally insufficient to sustain the conviction the Board of Review (Cresson, Krimbill and Hoover) said:

"It is proved that on the date alleged, accused was in possession of and sold two sacks of oats, which were of the type and kind issued at Fort Clark and of the type and kind sold commercially in that locality. Accused stated that the oats were given him by two soldiers in B Troop (at what place does not appear), and that upon receiving them he took them to the place of sale and disposed of them. There is no direct evidence or admission of a shortage or theft of the oats at Fort Clark, that accused had access to sacked government owned oats, that he took the oats from Fort Clark, or that the oats, if in fact given to accused as he claims or if obtained otherwise, belonged to the government. The only scintilla of evidence from which it might be inferred that the oats were government property wrongfully taken from Fort Clark was the similarity in type of the oats shown to have been in the possession of accused to oats regularly issued at Fort Clark."

The Board then cites paragraph 150i, MCM, as to circumstantial proof and proceeds:

"In many cases, evidence of similarity is, because of the special peculiarities, markings, etc., of the property, strongly evidential of government ownership when considered with other corroborative circumstances. Examples may be firearms, blankets, clothing, or other accouterments, found in the possession of accused persons within or in the immediate vicinity of military posts. But in cases such as the instant case one in which the property in the hands of accused has no characteristics peculiar to government ownership or characteristics distinguishing it from the other property to be had in local markets, the mere fact that it is of the same type and kind as that issued by the government is not, in the opinion of the Board of Review, sufficient basis, standing alone, for a reasonable inference of government ownership or of theft from the government (CM 197408, McCrimon; CM 207591, Nash."

"To be true, possession by a soldier in a town near a government post of oats of the type issued at the post raises a suspicion that the oats are government property, taken from the post, but mere suspicion and conjecture do not satisfy the established requirements of legal proof." (CM 208895, Zerkel, 9 BR 59,61,62)

In the case of CM 203511, Wedmore, accused was charged with wrongfully selling about 100 pounds of white lead of the value of about $8.50, property of the United States furnished and intended for the military service thereof and also with the larceny of this lead. The Board of Review held the evidence sufficient to establish ownership as alleged but The Judge Advocate General did not concur in such holding. The evidence established that the accused was on duty as the "post painter" at Fort Baker, and that he had access to the paint shop which had from five to ten 100-pound cans of white paint belonging to the Government of the type and kind which could be purchased on the open market. On the day of the alleged larceny the accused was seen leaving Fort Baker with another soldier in a sedan. Later he sold a 100-pound can of white lead of the same type and kind as that belonging to the Government and kept in the paint shop. The Quartermaster Officer from Fort Baker was unable to state that a can of white lead was missing from the paint shop and could not identify the white lead in the courtroom as the property of the United States. No stock record cards were keep of supplies in the paint shop by the Quartermaster. In holding the evidence insufficient to establish ownership The Judge Advocate General said:

"In order to sustain a finding of guilty of the specification alleging the wrongful sale of the white lead, it is necessary that it be established by competent proof that the can of white lead was in fact the property of the United States furnished and intended for the military service thereof" (p.225)

"In the case under consideration there was no confession, and the rule, namely, that where there is a confession the corpus delicti need not be established beyond a reasonable doubt, by proof aliunde, but that some corroborative proof of the corpus delicti is necessary in addition to the confession, relied upon and invoked in those cases, has no application here." (p.227)

"The court had and the reviewing authority must be satisfied of the guilt of an accused beyond a reasonable doubt." (p.227) (7 BR 221)

The Board of Review cites CM 307147, Klingensmith, and CM 319951, Pogue, in support of its contention that the circumstantial evidence was sufficient to establish that the sheets were property of the United States.

It is to be noted that the Board of Review in the Klingensmith case, held that the evidence was insufficient to show ownership. However, General Green, the present Judge Advocate General, disagreed. The Judge Advocate General apparently placed great stress on the stipulation that the items were "of a type and kind, furnished and intended for, and issued for use in the military service of the United States." As a result of said stipulation and the fact that accused had been a supply clerk and thus had direct access to the property and other special facts he concluded ownership of the United States was established. Such is not the situation here. There was no stipulation nor was accused in charge of the warehouse containing sheets.

In CM 327060, Graulau, 7 Bull JAG 34, a subsequent case, accused was found guilty of unlawfully selling a khaki shirt, certain other articles of clothing and a blanket issued for use in the military service of the United States, in violation of Article of War 84. In his pretrial statement admitting the sale, accused described the khaki shirt as "a new Army khaki shirt." The defense refused to stipulate that the articles of clothing which were identified at the trial as the articles of clothing sold by accused were similar to the type clothing issued in the military service, and asserted that similar items were sold by commercial stores. A prosecution witness testified that all the articles were of the type issued for use in the military service and described the blanket as being "apparently a Model 1934, wool, blanket, heavy issued for use of troops." It was held (General Green, the present Judge Advocate General concurring) that the evidence was not sufficient to establish that the property was property of the United States issued for use in the military service, within the provisions of the rule of law above cited from paragraph 150i, MCM 1928. Numerous authorities are cited, including CM 319591, (68 BR 385,399) wherein it was held:

> "Proof that accused had applied to his own use or to other apparently unauthorized purpose certain property of a type and kind generally furnished and intended for the military service even though such property might bear manufacturer's markings indicating that it had been made under Government contract for ultimate use in the military service is insufficient to support a conviction of misappropriation in violation of the 94th Article of War unless such proof is accompanied by further evidence that the property in question had been unlawfully obtained from military custody or that items similar to such property were not sold on a legitimate open market in the locality where the offense was alleged to have been committed or by other showing, by fair inference or accused's own admission, that such property was in fact military property."

In the second case cited by the Board, CM 319951, Pogue, it appears that the property included in Charge II had imprinted thereon a notification to the effect that it was the property of the United States, and

it was further established that the property was of such nature that ownership other than governmental would be most unusual (see 68 BR at p.14). This with other facts was held sufficient to establish government ownership. Such is not the case here. The sheets had no markings on them to indicate governmental ownership and such sheets were available for use by the Japanese government.

In CM 300230, Lynch, 16 BR (ETO) 271, the accused was charged with wrongfully and knowingly selling ten cartons of cigarettes and five cartons of chocolate bars, property of the United States, intended for the military service thereof, to French civilians. In holding that the proof was insufficient to sustain the findings of guilty the Board stated (p.275):

> "In the instant case there is no evidence of a shortage or theft of cigarettes and chocolate from any army installation nor evidence that Bielaski had access to government supplies of this type. The record does not indicate that the property involved had characteristics peculiar to government ownership (e.g., that the cigarettes had tax-free labels), and the distinct possibility remains that the cigarettes and chocolate were his personal property received in packages from the United States or from other legitimate sources.
>
> "The Board of Review is of the opinion that the facts are not sufficiently conclusive to exclude all fair and rational inference except the one that the cigarettes and chocolate were 'property of the United States intended for the military service thereof.' (CM 208895, Zerkel, 9 BR 59 (1938); CM 207591, Nash et al, 8 B.R. 359 (1937); CM 197408, McCrimon, 3 BR 111 (1932); CM 255114, Caracappa, 36 B.R. 35 (1944); Cf: CM 248197, Thompson, 31 B.R. 179 (1944). Proof of ownership of the property in the United States being a vital element of the offenses of wrongful sale or disposal of government property in violation of the 94th Article of War (MCM, 1928, par 150i, p.185), the record is legally insufficient to support the findings of guilty of Charge I and the specifications thereunder against accused Bielaski."

It is material to note that the sheets alleged to have been sold by the accused and found at the Yamoto Hotel had no markings on them indicating that they were property of the United States as required by Army Regulations 850-5 which provides:

> "1. General.--The purpose of these regulations is to prescribe a uniform system of permanent markings for military supplies, equipment, and vehicles. The markings herein prescribed are intended to provide a convenient means, consistent with security, of identifying military property of the War Department, and of

associating such property with the individual and/or organization authorized to use it, or to which it is originally assigned. All War Department property will be marked according to prescribed methods outlined in these regulations, whether it is being used by officers or enlisted personnel."

"36. Miscellaneous movable public property. a. All movable public property for which special marking is not herein specifically prescribed should, if practicable, be branded or stamped with the letters 'U.S.' before being used."

The evidence shows that sheets were procured from the Japanese government by General Headquarters on requisition initiated by the warehouse at Tachikawa through the Base Section and Eighth Army. In this process of issue there should have been some markings placed on the sheets. In the absence of any such markings there is certainly no indicia of ownership on the sheets from which any presumption of United States ownership can be presumed. On the contrary it would be logical to assume the sheets were never issued for use in the military service.

It is further material to note that the accused Brown was charged with larceny of 42 bed sheets. Under the evidence in this case, if the accused Brown took the sheets he must have taken them from the warehouse of Captain Saxton. However, he was acquitted of the charge of larceny, thus lending credence to the conclusion that even the court-martial was not satisfied that the sheets came from the government warehouse as contended by the prosecution. While such finding is not conclusive on the question of wrongful sale, it is indicative of the fact that the evidence was insufficient to establish that there was a shortage of sheets from the warehouse which was an essential link in the chain of circumstantial evidence which the prosecution was required to establish.

It is further to be noted that in attempting to identify the sheets seized at the Yamoto Hotel, the prosecution had a witness from the Kanegafuchi Company bring a sheet from the mills of that company for the purpose of comparing it with one of the sheets seized at the hotel. It is difficult to conceive why the prosecution took this round-about method of proof. Since it was the prosecution's contention that the sheets sold by accused came from the United States Army warehouse at Tachikawa, and since Captain Saxton who was in charge of that warehouse was a prosecution witness, and since it further appeared that sheets were part of the supplies kept in that warehouse at the time of the trial, it should have been a simple matter for the prosecution to have had Captain Saxton produce one of the sheets from that warehouse for comparison with the sheets allegedly sold by the accused at the Yamoto Hotel. The apparent reason for this not being done was that prosecution must have known that such a comparison would have shown no similarity

between the sheets. This could be reasonably inferred from the failure of prosecution to produce evidence which was within its control.

> "It is a well established rule that where relevant evidence which would properly be part of a case is within the control of the party whose interest it would be to naturally produce it, and he fails to do so, without satisfactory explanation the jury may draw an inference that such evidence would be unfavorable to him." (Sec 183, p.189, 20 American Jur.)

Since prosecution did not rebut this inference, it is felt that such inference can be considered by the Board of Review.

The prosecution, as an independent circumstance, further sought to prove that the sheets were government property by showing that the sheets seized at the Yamoto Hotel were identical with sheets made by the Kanegafuchi Company for the United States Government. As pointed out above the evidence of prosecution witnesses did not sustain such contention. Initially the prosecution failed to establish that the sheets sold by accused were the same sheets seized by the military police at the hotel. However, if it be assumed that the sheets seized were properly identified as the sheets sold by accused, it was not shown that they were identical with sheets made by the Kanegafuchi Company. The evidence has been set out above and will not be restated here. All sheets made by one company having many branch mills (R 118) and using many bales of cotton and thread spun in different places cannot as a matter of common knowledge be identical in texture or chemical content. To reach a conclusion that under such conditions the texture, weave, and chemical contents of all such sheets is identical is to impose an extreme burden on the credulity of any person. As noted above the testimony of prosecution witnesses, Hisao and Hornsby, was inconsistent and conflicting in this respect. The testimony of expert witnesses for the defense, whose credibility cannot be doubted, certainly casts a reasonable doubt upon the conclusions reached by prosecution witnesses. Attention is invited to the testimony of the witness, Tyndall, the textile specialist in weaving, on duty with the Textile Division, Economic and Scientific Section, General Headquarters, Supreme Commander of Allied Forces, in this connection. Such testimony cannot be disregarded.

The prosecution did not establish beyond a reasonable doubt that the sheets seized at the Yamoto Hotel were identical with those made by the Kanegafuchi Company. A general similarity in weave does not necessarily warrant the conclusion of identity of source. The burden was on the prosecution to establish each link in its chain of circumstantial evidence beyond a reasonable doubt. As stated above, when circumstantial evidence is relied upon the facts and circumstances must form a complete chain and the evidence establishing each link must be of a conclusive character.

Mere probabilities or suppositions are not sufficient to establish guilt. Therefore, mere vague conclusions that the cloth was identical based upon inconclusive premises is not sufficient to sustain a finding of guilty. The witnesses Kitayama, Hisao, and Hornsby at the most established that there was a close similarity between the sheets of the Kanegafuchi Company and one of the sheets found in the Yamoto Hotel.

But if it be further assumed that the sheets were shown to be identical, the evidence was insufficient to show that all sheets from the Kanegafuchi Company became the property of the United States. Such sheets were not the property of the United States while in the process of manufacture. Prior to delivery title remained in the Japanese government. As pointed out above there was no prosecution testimony establishing that all sheets made by the Nisshimbo or the Kanegafuchi Company went to the United States Army. The defense testimony (Def Ex B) clearly established that all cotton from Japanese textile mills did not go to the United States military forces but that part of it went to Japanese domestic use. All cotton textile mills were under direct control of the Japanese government which Japanese government supplied requisition needs of the General Headquarters. Neither the Kanegafuchi Company nor the Nisshimbo Company dealt direct with the allied military forces. This was established by the testimony of both prosecution witness, Whiteen, and by defense witnesses and Defense Exhibit B. Upon completion of manufacture, the sheets were subject to disposition order of the Japanese government upon requisition by the Supreme Commander of the Allied Forces. It is clear therefore that if any of these sheets were disposed of, stolen or otherwise placed in public channels before delivery to General Headquarters, title would not be in the United States military forces. It was established by Defense Exhibit B that all sheets manufactured in Japan were not allotted to the United States Army. Part of all sheets manufactured in Japan were authorized to be held by the Japanese government either in reserve or were allotted to civilian Foreign Trade Hotels. This being true, the prosecution thesis has no foundation--viz, that because a sheet was shown to be identical with a sheet from the Kanegafuchi Mill it was necessarily the property of the United States.

The Trial Judge Advocate recognized this weakness in his chain of circumstantial evidence in his concluding argument but attempted to discount it by stating that the memorandum was dated 19 December 1947 and that the foreign trade hotels could not have gotten the sheets until after the offense was committed (R 151,152). The offense was alleged to have been committed on 2 January approximately two weeks later. It is perfectly possible for the sheets to have been made by the mills within two weeks. It was not necessary that they be processed or delivered to the hotels. The point is that all sheets made at the Nisshimbo or Kanegafuchi Mills after 19 December were not destined to become the property of the United States and consequently prosecution does not establish United States ownership merely by showing that the sheets sold came from either of these mills.

There was the further possibility, which cannot be discounted, that sheets may have been stolen from the Kanegafuchi Mills in which event title to such stolen sheets would not pass to the United States. It is true that the prosecution witness, Kitayama, testified that no sheets had ever been stolen from this company (R 35). However, the undisputed testimony of defense witnesses established that official reports of theft had been made by the Kanegafuchi Company to the allied headquarters. Based upon conditions existing in Japan, a conquered nation, where there is a shortage of food, clothes and essential household goods, one must be extremely gullible to presume that all cotton, cloth or sheets made at any textile mill by Japanese labor, under Japanese government supervision and control is in fact delivered to the United States military authorities, simply because there is a contract or trade agreement that it should be done. Experience of military personnel in such occupied territory demonstrates otherwise. Presumptions that could be made under normal peacetime conditions do not follow under such abnormal conditions.

> "Testimony may be incredible as a matter of law where it is inherently improbable and is impeached by physical facts, or is in contradiction of matters of common knowledge." (Sec 334, 64 C.J., p.357)

The fact that these sheets probably did not go from Japanese mills to the United States Army is further borne out by the fact that none of the sheets seized at the Yamoto Hotel had any markings on them indicating that they belonged to the United States.

As evidence that the sheets were shown to be government property, the Board of Review advances the contention that because the accused got on the witness stand and denied that he had sold any sheets the court could not only find that he testified falsely, but that having found this testimony to be false, could further infer a guilty knowledge on the part of accused, and from this could further infer that the sheets were property of the United States. In short the contention is advanced that such inference can take the place of direct testimony as to facts and thus supply the evidence necessary to establish the corpus delicti. Aside from the fact that a presumption cannot be based on another presumption (Sec 64, Wharton's Cr Ev, 11th Ed; Sec 27, p.85, 22 CJ; CM 238485, Rideau, 24 BR 263,274; CM 260828, Parker, 40 BR 31,34; CM 264831, Turner, 42 BR 329), such contention is neither logical nor in accordance with settled principals of law. Even in the cases where such inference is recognized, it must be shown that the inference rests upon logic and common sense or it will not be indulged in (2 CJ Evidence, p.109).

If such contention is correct then in any case where an accused gets on the stand and testifies, although he denied his guilt, the

court can disbelieve him, and in effect treat his testimony as a judicial admission of guilt. It is difficult to conceive how an inference of government ownership logically can be derived from a denial of the sale. The Board relies upon a quotation from Wigmore to the effect that fabrication of evidence raises an inference of a guilty mind. Wigmore does not hold that such inference of a guilty mind can take the place of substantive evidence required to establish the corpus delicti of the offense. It is well established that such inference cannot have probative force to establish the corpus delicti, and thus relieve the party having the burden of proof from establishing a prima facie case. Once the corpus delicti is established such inference can be called into force as a factor to be weighed by the court with proved facts (Sec 116, p.134, Wharton's Criminal Evidence, 11th Edition). As stated in 31 C.J.S.:

> "The unfavorable presumption or inference arising from the withholding of evidence is not conclusive against the party but is merely a fact for the consideration of the jury; and such failure cannot be relied upon by the other party as affirmative proof of facts as which the burden of proof is on him." (Sec 156a, Note 87, p.851).

This rule is recognized by Wigmore:

> "The opponent whose case is a denial of the other party's affirmation has no burden of persuading the jury. A party may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it, otherwise the first party would virtually be evading his legitimate burden. This distinction has been recognized and is reasonable; but it has been little developed in its application." (Sec 290, p.179, Wigmore on Evidence, 3rd Ed).

In this case the burden was on the prosecution to establish the corpus delicti and show that government sheets were sold. Util they did this at least by prima facie evidence, no case had been made out against the accused. The burden was on the prosecution and did not shift. The fact that the accused at this stage of the proceedings took the stand and denied the sale did not relieve the prosecution of its burden and no inference that the property sold was government property would arise.

In discussing the force and weight to be given to inferences and presumptions the rule is stated in a case note "Presumptions as Evidence"

in American Law Reports as follows (citing numerous authorities for the rule):

> "The rule approved by most text writers and a majority of courts is that a presumption itself contributes no evidence and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption--being a legal rule or a legal conclusion is not evidence."--(95 A.L.R. 881,893)

And it has been further stated that:

> "The rule has been stated that the presumption will not supply the missing link in an adversary's case and cannot be treated as independent evidence of a fact otherwise unproved." (Sec 193, 20 American Jurisprudence, p.195, Note 14).

The rule that inferences cannot take the place of facts required to be proved by direct evidence has been adopted by the Supreme Court of the United States. In the case of Western and Atlantic R.R. v. Henderson, 279 U.S. 639,643, 49 Supreme Court 445,447, 73 L.Ed 884, the Supreme Court reversed the judgment of the Supreme Court of Georgia in upholding the legality of Sec 2780 of the Georgia Civil Code which provided that a railroad should be liable for any damages done to persons or property by the running of its trains unless the company should make it appear that their agents had exercised all ordinary and reasonable care and diligence, "the presumption in all cases being against the company." This statutory presumption had been applied in plaintiff's favor without the proof of other facts showing negligence. The Trial Court Judge had charged the jury that when the evidence established the injury claimed by plaintiff the presumption arose that the railroad was negligent in each of the particulars specified in the petition. The appellee insisted that the presumption created by the statute had the effect of evidence and that it was for the jury to decide whether the company's evidence was sufficient to overcome the presumption. The Supreme Court said:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th amendment."

"The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone."

"The Georgia statute as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by #2780 is unreasonable and arbitrary and violates the due process clause of the 14th Amendment, Manley v. Georgia, supra; McFarland v. American Sugar Co, 241 U.S. 79, 60 L.ed. 899, 36 Sup Ct. Rep. 498; Bailey v. Alabama, 219 U.S. 219, 55 L.ed 191, 31 Sup. Ct. Rep. 145." (pp. 888,889)

Thus the court makes it clear that an inference alone cannot take the place of necessary facts. Yet if we follow the Board's opinion to its logical conclusion in this case, even though the prosecution introduced no evidence, the court could treat accused's denial of the sale of sheets an an affirmative fact sufficient to establish not only the sale of the sheets, but also the requisite corpus delicti, to wit, that the sheets were United States property issued for use in the military service. Any such holding is, within the purview of the above decision of the Supreme Court, clearly violative of due process of law.

The rule enunciated by the Supreme Court has been consistently followed by federal courts. Goff v. U.S., 257 Fed 294,296; Gerson v. U.S., 25 F 2d 49,60 (CC 8); Ariasi v. Orient Ins Co, 50 F 2d 548 (CC9); U.S. ex rel Scharlon v. Pulver, 54 F 2d 261,263 (CC 2); Langer v. U.S. 76 F 2d 817,827 (CC 8); Fulbright v. U.S., 91 F 2d 210 (CC 8); U.S. v. De Winsky, 41 F Supp 149,154 (Citing 9 Wigmore on Evidence, 3rd Ed, Sec 2511, Note 4).

In the case of Fulbright v. U.S., supra, accused was charged on two counts with conspiracy to harbor and conceal one Clarence Sparger and one John Langan for whom warrants of arrest had been issued. The court held that knowledge that a warrant had been issued was an essential element of the crime charged. There was no direct evidence in the record that accused had specific knowledge that any warrants had been issued. The accused testified in her own behalf but made contradictory statements concerning the length of stay of the fugitives at a cottage, her point of contact with them and details surrounding the capture. The prosecution contends that such testimony was false and that from this a guilty knowledge could be inferred. In holding that the evidence was insufficient to establish the guilt of accused the court said:

"The government bases its case in part upon contradictory statements of the appellant concerning the length of stay of the fugitives at the cottage, her contact with them, and details surrounding the capture as establishing guilty knowledge. But contradictory statements as to those facts, while perhaps destroying her own defense, * * would not of themselves establish knowledge on the part of appellant that federal process had been issued for the fugitives. Wilson v. U.S., 162 U.S. 613,620, 16 S. Ct. 895, 40 L.Ed, 1090, upon which the government relies, was a case in which there was otherwise substantial evidence that the defendant had committed the crime in question. The most that the government can gain from the defendant's contradictory statements under the doctrine of Wilson v. U.S., supra, is proof of general malevolence; and, as pointed out in Pettibone v. U.S., supra, that is not sufficient in a case of this character."

"It may be that, as counsel for the government argues, all the circumstances shown in evidence tend to show that appellant had a corrupted conscience, and that in harboring Langan and Sparger she entertained a sense of guilt. The circumstances warranting such inferences, however, fall short of establishing or of tending to establish such sense of guilt was connected with knowledge that federal warrants had been issued for the arrest of the criminals. Want of proof of the corpus delicti itself cannot be supplied by proof of a guilty conscience." (Underscoring supplied)

"Every circumstance pointed out is consistent with knowledge that Langan and Sparger were criminals, but it is equally consistent with appellant's ignorance of outstanding warrants for their arrest. Such circumstantial evidence will not sustain the burden or proof cast upon the government in a criminal case, where a citizen's liberty is at stake. Langer v. U.S. (CC 8), 76 F 2d 817,827." (91 F 2d, 213,214).

The present case is very similar to the above case. The accused testified and denied the sale of sheets. Under the doctrine announced in the Fulbright case such evidence even if false might warrant an inference of a guilty conscience but would not supply proof of corpus delicti, to wit, that the sheets were government property. Even if accused had a sense of guilt in selling the sheets, this would not evidence that the sheets belonged to the United States anymore than it would evidence that they belonged to the Kanegafuchi Mills or the Japanese government. Accused might feel equally guilty if he was wrongfully selling sheets in either case. Yet if the sheets belonged to any one other than the United States, accused would not be guilty of the crime charged. The burden was on the prosecution to prove ownership as alleged and there was no burden on accused to disprove ownership in the United States.

The Board of Review cites the cases of Lindsey v. United States, and Shama v. United States in support of their contention. An examination of each of these cases clearly shows that the evidence was sufficient to establish the corpus delicti without the testimony of accused. This being true an inference might be raised which could be weighed by the court. In the Lindsey case the court said:

> "The labels on the packages and bottles and the identity in marks and other respects were strong proof that the whiskey in the automobile and that in the scow made up a large shipment from without the state into the state of Virginia. This was the essence of the crime charged in the indictment, and it made no difference that there was no proof of transportation from Baltimore. Malcolm v. United States, 256 Fed. 363, 167 CCA 533. The proof of the corpus delicti was therefore plenary." (Underscoring supplied)

In the Shama case, the court upon the authority of Kelly v. U.S., held that evidence of the conduct of the parties at the end of the journey was sufficient to sustain a conviction, and consequently that there was sufficient evidence to convict the accused. Proof of this corpus delicti was further bolstered by allegedly false testimony of accused which the court held could be considered in determining the guilt. But the court did not hold that such false testimony could take the place of proof of corpus delicti.

That a presumption is not evidence has been recognized in a number of opinions of The Judge Advocate General (CM 302854, Juhl, 59 BR 99,104; CM 207591, Nash, Morris, 8 BR 359,362 (cited supra); CM 204639, McMullen, 8 BR 25,46,47).

For the reasons above stated it is my opinion that the evidence is insufficient to sustain the findings of guilty as to Specification 1 of Charge I. I concur that the evidence is legally sufficient to sustain the findings as to Specifications 2 and 3 and as to the Charge and legally sufficient to sustain the sentence.

C. O. Wolf, Judge Advocate

JAGH CM 330993 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review (one member dissenting) in the case of First Lieutenant Ellsworth A. Ranguette (AO-510931), 39th Troop Carrier Squadron, 317th Troop Carrier Group, APO 704.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully selling Government property, and of entering an "off-limits" establishment (2 specifications) in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the review of the Fifth Air Force Judge Advocate which was adopted with certain additions in the accompanying majority 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.

The accused and Technical Sergeant James E. Brown, supply sergeant at the "dependant's warehouse" (United States Government warehouse in Japan), at about 1900 hours, 2 January 1948, met two Japanese girls, Yukiko Inouye and Uyeda Fumiko, in the Tachibana Tea Room in Hachioji, Japan, an establishment to which entry by occupation personnel was prohibited. An hour later, all four left the place and drove in a "jeep" to the Yamato Hotel in Hachioji, where after some discussion with Isamu Senuma, the proprietor, the accused offered for sale to Senuma forty-two (42) cotton bed sheets at fifteen hundred (¥1500) yen per sheet. A price of thirteen hundred (¥1300) yen was finally agreed upon, and Senuma paid accused twenty thousand (¥20,000) yen and promised to pay the balance, thirty-four thousand six hundred (¥34,600) yen, five days later. In the presence of Senuma and the two Japanese girls, accused gave approximately half of the twenty thousand (¥20,000) yen to Sergeant Brown. The forty-two (42) bed sheets in question were shown to be of a type and kind furnished, or intended for, or issued for use in the military service. Sergeant Brown, accused's accomplice, had access to thousands of similar sheets in the government warehouse. Forty-one of the sheets were recovered.

On the afternoon of the following day, 3 January 1948, military policemen "on VD patrol" saw a "jeep" standing in the roadway outside the Tachibana Tea Room. On investigation the military policemen found the accused and Sergeant Brown inside the tea room and reminded them of the fact that the premises were "off limits" whereupon the latter two left the place at once.

One member of the Board of Review is of the opinion that the evidence does not satisfactorily prove that the sheets sold by accused were issued for use in the military service of the United States. There is no direct evidence that the sheets were so issued, but they were of the type furnished and intended for the military service and in storage in a warehouse where accused's accomplice was on duty. The circumstances, considered as a whole, leave no real doubt in my mind that, as found by the court, the sheets were property of the United States and had been issued to the warehouse for use in the military service.

4. The accused is a high school graduate, 39 years of age, married and has one child. He was commissioned a second lieutenant (AUS) on 15 January 1943, entered upon active duty on 21 January 1943, and was promoted to first lieutenant on 13 October 1943. In civilian life he was employed as a civilian pilot. He had no prior enlisted or commissioned service. He is authorized to wear the European and Mediterranean Campaign medal, the American Theater ribbon, World War II medal and Army of Occupation ribbon. He served in the European Theater prior to his present tour in Japan. His efficiency ratings range between "Very Satisfactory" and "Superior."

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 174, 8 Oct 1948).

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

JAGK - CM 330998

1 [illegible] 1948

UNITED STATES	PHILIPPINES-RYUKYUS COMMAND
v.	Trial by G.C.M., convened at Headquarters PHILRYCOM, APO 707, 19 March 1948. Dishonorable discharge (suspended), total forfeitures and confinement for two (2) years. Stockade
Private APOLINARIO S. SANTIAGO (10331000), Company C, 97th Infantry Battalion (PS)	

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

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

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

CHARGE: Violation of the 83rd Article of War.

Specification: In that Private Apolinario S Santiago, Company C 97th Infantry Battalion (Philippine Scouts) APO 707, did, at Manila, Luzon, Philippine Islands on or about 20 January 1948, willfully suffer thirty (30) bales containing one hundred (100) undershirts each, of a value in excess of fifty dollars ($50.00), military property belonging to the United States to be wrongfully disposed of by failing to perform the duties of a guard.

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 at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated O'Donnell Division, PHILRYCOM Stockade, General Prisoner Branch, APO 613, or elsewhere as the Secretary of the Army might direct as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 120, Headquarters Philippines-Ryukyus Command, APO 707, dated 14 May 1948.

3. The only question necessary to be considered is whether or not the specification states an offense cognizable in military law.

The defense counsel, prior to entering a plea to the general issue, made a motion to strike the specification of the charge on the ground that the manner of the disposition of the described military property of the United States was not alleged. This motion was denied by the law member.

It has been uniformly held that a specification and charge, like an indictment, must set forth the offense with such certainty and particularity as to advise accused of the charge against him and to enable him to prepare his defense and to plead the judgment which might be rendered against him in bar to a subsequent prosecution for the same offense (Arnold v. United States, 94 F (2d) 499; CM 318296, Mayer, 67 BR 211, 219).

In the instant case the manner of wrongful disposition was not alleged in the specification. The words "dispose of" have been held to mean a myriad of things such as to arrange, to find a place or use for, to have the control or ordering of, to dispose of troops, pawn, barter, give away, burn, destroy, to determine the fate of, mortgage, and many others. It has also been said that "Standing by themselves without qualification these words /dispose of/ have no legal signification" (CM 138334, Haynes; CM 138679, Frisbie; CM 217868, Schiedinger, 11 BR 329, 338). When, however, the words "dispose of" are coupled together with the word "wrongfully" as they are in Article of War 83 and are used along with the terms "to be lost, spoiled, damaged" the meaning intended to be attributed to the phrase in question could be only that accused has by reason of his action or inaction allowed the United States to be divested or deprived, although perhaps only temporarily, of the military property described (CM 314444, Sessoms, 64 BR 147,156). But inasmuch as the types of disposition by which the Government may be wrongfully divested of its property are numerous and varied, one charged with the suffering either willfully or through neglect the wrongful disposition of military property is entitled to know with reasonable certainty what manner or type of wrongful disposition he is required to defend against. In the discussion of Article of War 83 in the Manual for Courts-Martial, 1928, paragraph 143, page 158, it is stated that the proof required for conviction under the Article is as follows:

> "Proof. - (a) That certain military property belonging to the United States was lost, spoiled, damaged, or wrongfully disposed of in the manner alleged; (b) that such loss, etc., was suffered by the accused through a certain omission of duty on his part; (c) that such omission was willful, or negligent, as alleged; and (d) the value of the property as alleged." (Underscoring supplied.)

As the specification did not allege the manner of wrongful disposition as required by the Manual for Courts-Martial it was defective. It is further provided in paragraph 73, Manual for Courts-Martial, 1928:

"If a specification, while defective, is nevertheless sufficient fairly to apprise the accused of the offense intended to be charged, the court upon the defect being brought to its attention will, according to circumstances, direct the specification to be stricken out and disregarded, or continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case, or permit the specification to be so amended as to cure such defect, and continue the case for such time as in the opinion of the court may suffice to enable the accused properly to prepare his defense in view of the amendment. * * *" (Underscoring supplied.)

In CM 162158, Boleley (Dig Op JAG 1912-40, sec 452 (20)), it was held that a specification under Article of War 94 which failed to allege the manner of wrongful disposition was defective; and where an objection to the defect was overruled by the court resort may not be had to the evidence under the provisions of paragraph 158a, MCM, 1921 (now par 73, MCM, 1928) for the purpose of curing the defect. See also CM 319857, Dingley, 69 BR 155,164, for a detailed discussion of this problem. Although neither of the foregoing cases involved suffering wrongful disposition, it would seem that in such cases it is essential that the manner of disposition be both pleaded and proved. It follows that defense counsel's objection to the sufficiency of the specification should have been sustained and the error was fatal to the prosecution's case.

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

Robert T. Wilson, Judge Advocate

(On temporary duty), Judge Advocate

Harlan R. Fenning, Judge Advocate

JAGK - CM 330998 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 20 AUG 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 Apolinario S. Santiago (10331000), Company C, 97th Infantry Battalion (PS).

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 154, 26 Aug. 1948).

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TITLE

DATE	BORROWER'S NAME	EXT.