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JUDGE ADVOCATE GENERAL'S DEPARTMENT

BOARD OF REVIEW

Holdings Opinions and Reviews

VOLUME 80

including

CM 331033 - CM 331975

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

JAGN-CM 331033

25 June 1948

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

T W E L F T H A I R F O R C E)

v.)

Private ALFONSO B. ALVARADO)
 (39283120), Squadron A,)
 321st Air Force Base Unit.)

Trial by G.C.M., convened at)
 March Air Force Base, Riverside,)
 California, 10 May 1948. Dis-)
 honorable discharge and confine-)
 ment for four and one-half (4½))
 years. Disciplinary Barracks.)

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Alfonso Alvarado, Squadron A, 321st Air Force Base Unit, March Air Force Base, Riverside, California, did, at Bombing and Gunnery Range, Tonopah, Nevada, on or about 12 August 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort MacArthur, California, on or about 6 March 1948.

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

(2)

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 only the evidence pertinent to the admission of that document will be summarized.

The extract copy of the morning report shows the accused absent without leave on 12 August 1943 (Pros. Ex.1). The defense objected to its admission into evidence, stating:

"The defense will object to the introduction of this document inasmuch as we contend the document is incompetent evidence in that the cited extract contains no initials or signature of the person making that entry and we therefore believe that omission of the name or initials of the person making these original entries on the morning reports are such as render them of no probative value * * *" (R. 6).

After extended argument by the defense in support of the objection, the Prosecution offered in evidence the following stipulation, signed by the trial judge advocate, defense counsel and accused:

"It is hereby stipulated and agreed by and between the prosecution, the defense, and the accused as follows:

"That on 16 April 1948, Headquarters March Air Force Base, Riverside, California, received a reply from the Adjutant General, Photo Processing Section, Adjutant General's Office, Records Administration Center, St. Louis 20, Missouri, to the effect that the extract copy of the morning report of 413th Base Headquarters and Air Base Squadron, prepared by them on 4 February 1948, the extract of which contains an entry dated 14 August 1943, pertaining to one Private Alvarado, AF 39 283 120, was verified and found correct and that their records further disclose that the above mentioned extract contained no initials or signature appearing thereon of the person who made the original entry" (Pros. Ex. 2).

Following the offer of the stipulation the following occurred:

"DEFENSE: We are quite willing to enter into the stipulation that the prosecution now has.

LAW MEMBER: This will be received as Prosecution Exhibit 2 for identification.

DEFENSE: If it please the court that is exactly what the defense has contended, that the original entry contains no signature of the person making it.

LAW MEMBER: Alvarado, do you understand this stipulation?

ACCUSED: Yes sir.

LAW MEMBER: And you desire this stipulation to be entered in the record? Talk to your counsel.

ACCUSED: Yes sir.

The court was closed.

The court was opened.

LAW MEMBER: The Prosecution Exhibits 1 and 2 for identification will be received in evidence and marked as Prosecution Exhibits 1 and 2 respectively. Do you have any further evidence to substantiate the extract copy of morning report and the stipulation" (R. 9; Underscoring supplied).

4. An original morning report is competent evidence of the facts recited except as to entries obviously not based on personal knowledge (par. 117a, MCM, 1928), and a duly authenticated copy thereof is admissible to the same extent the original would be (par. 116a, MCM, 1928). A presumption of regularity of such an entry exists unless there is a showing to the contrary (CM 273922, Ortega, 47 BR 117). Therefore, in the instant case, in the absence of any showing of irregularity the extract copy of the morning report (Pros. Ex. 1) was prima facie evidence of accused's initial absence without leave.

The objection by the defense, however, on the ground that the omission of the name or initials of the person making the original entry rendered it of no probative value, presents the question of whether or not the original morning report was prepared in accordance with existing regulations, thus authorizing the admission of the extract copy thereof under the provisions of the Manual for Courts-Martial, 1928, cited above.

The regulations covering the preparation and signature of morning reports existing at the time of preparation of the morning report under consideration contain the following provision:

(4)

"6. Authentication. - a. Signature - The company morning report and/or the headquarters morning report will be authenticated by the commanding officer, adjutant, or any officer designated by the commanding officer. The name, grade, organization, and arm or service will be typed or otherwise printed in the space provided on the signature line. * * *" (AR 345-400, 7 May 1943).

The stipulation relative to the signature on the morning report (Pros. Ex. 2) is ambiguous because of the use of the words "the extract copy of the morning report * * *, the extract of which contains an entry * * *" and "that the above mentioned extract contained no initials or signature appearing thereon of the person who made the original entry." It is difficult to determine whether the prosecution by introducing the stipulation intended to show merely that the extract copy did not reflect the initials or signature of the person making the original entry, or whether it intended to admit that the original entry contained no initials or signature. It appears, however, from the statement made by the defense counsel "that the original entry contains no signature of the person making it," and from the subsequent statement of accused that he understood the stipulation and accepted it, that certainly the defense and accused interpreted the stipulation in the light of the latter alternative.

The information contained in the "reply" stipulated as having been received from The Adjutant General was, of course purely hearsay, since such "reply" was not in the proper form required by paragraph 117a, Manual for Courts-Martial, 1928. Although hearsay testimony is not ordinarily considered by the Board of Review, in the instant case the information contained in the letter from The Adjutant General was placed before the court by agreement between the parties and it appears that the defense and accused relied on the belief that they were stipulating that the original morning report was not signed. In view of such circumstances it must be considered that the court had before it certain information which was sufficient to raise a doubt as to the authenticity of the morning report entry, and to destroy any presumption as to its regularity. Where the evidence appears to be insufficient for a proper determination of any issue, the court may, and ordinarily should obtain additional evidence and make further investigation or inquiry relative thereto (par. 75a, MCM, 1928).

In view of the ambiguity of the stipulation and the interpretation thereof relied on by accused, and the fact that no steps were taken to clarify the communication received from The Adjutant General, the Board of Review is required to hold that the stipulation must be interpreted in the light most favorable to the accused and the ambiguity

resolved in his favor. It must, therefore, be considered that the stipulation referred to the original morning report entry. It follows, since it thus appears that the original entry in the morning report was not signed as required by existing regulations, and there is no other evidence of the initial absence without leave, that the findings of guilty of the court cannot be sustained.

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.

Signed _____, Judge Advocate.

Signed _____, Judge Advocate.

Signed _____, Judge Advocate.

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

JAGN-CM 331078

UNITED STATES)

FRANKFURT MILITARY POST

v.)

Privates First Class WILBERT)
 J. DETMER (17211960), RICHARD)
 S. GASKILL (11164210), Private)
 MARVIN J. DENNIS (17224054), all)
 of 909th Ordnance Heavy Autom-)
 otive Maintenance Company, and)
 Private BARNEY D. THOMAS)
 (38340912), 7702 Headquarters)
 and Service Battalion.)

Trial by G.C.M., convened at)
 Frankfurt-am-Main, Germany, 22)
 April 1948. Dennis: Dishonorable)
 discharge and confinement for)
 two (2) years. Federal Re-)
 formatory. Detmer and Gaskill:)
 Dishonorable discharge (sus-)
 pended) and confinement for one)
 (1) year. Disciplinary Barracks.)
 Thomas: Dishonorable discharge)
 (suspended) and confinement for)
 nine (9) months. Disciplinary)
 Barracks.)

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

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

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

CHARGE: Violation of the 93rd Article of War.

As to each accused:

Specification 1: In that Private Marvin J. Dennis, 909 Ordnance Heavy Automotive Maintenance Company; Private First Class Richard S. Gaskill, 909 Ordnance Heavy Automotive Maintenance Company; Private First Class Wilbert J. Detmer, 909 Ordnance Heavy Automotive Maintenance Company and Private Barney D. Thomas, Company "C", 7702 Headquarters and Service

Battalion, all acting jointly and in pursuance of a common intent, did, at Frankfurt-am-Main, Germany, on or about 5 March 1948, feloniously take, steal and carry away, one microscope of a value of eighty dollars (\$80.00), one fountain pen of a value of five dollars (\$5.00), one ladies' wrist watch of a value of forty dollars (\$40.00), one man's wrist watch of a value of forty dollars (\$40.00), one pair of binoculars with case of a value of fifty dollars (\$50.00), one gold wrist band of a value of thirty dollars (\$30.00) and one leather suit case of a value of five dollars (\$5.00), all being of a total value of more than fifty dollars (\$50.00), and all the property of Samuel Cymes.

As to accused Dennis, Gaskill and Detmer only:

Specification 2: In that Private Marvin J. Dennis, 909 Ordnance Heavy Automotive Maintenance Company, Private First Class Richard S. Gaskill, 909 Ordnance Heavy Automotive Maintenance Company and Private First Class Wilbert J. Detmer, 909 Ordnance Heavy Automotive Maintenance Company, all acting jointly and in pursuance of a common intent, did, at Frankfurt-am-Main, Germany, on or about 2 March 1948, feloniously take, steal and carry away, one Leica Camera of a value of more than fifty dollars (\$50.00), the property of Kaete Schroer.

Each accused pleaded not guilty to, and was found guilty of, the respective Charge and Specifications as they related to each accused. Accused Dennis was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. Accused Gaskill, Detmer and Thomas were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. As to the accused Dennis 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 pursuant to Article of War 50 $\frac{1}{2}$. As to the accused Gaskill and Detmer the reviewing authority approved the sentence and ordered it executed but suspended execution of the dishonorable discharge as to each accused until their release from confinement, and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement. As to the accused Thomas the reviewing authority approved the sentence, reduced the period of confinement to nine months, ordered execution thereof, suspended execution of the dishonorable discharge

until the soldier's release from confinement, and designated the Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement.

3. In view of the action taken by the reviewing authority respecting the sentences of the accused Gaskill, Detmer and Thomas, the Board of Review will here only consider the legal sufficiency of the record of trial to support the findings as to value, and the sentence, as to the accused Dennis.

4. Specification 1, of which accused was found guilty, alleges the larceny of "one microscope of a value of eighty dollars (\$80.00), one fountain pen of a value of five dollars (\$5.00), one ladies' wrist watch of a value of forty dollars (\$40.00), one man's wrist watch of a value of forty dollars (\$40.00), one pair of binoculars with case of a value of fifty dollars (\$50.00), one gold wrist band of a value of thirty dollars (\$30.00), and one leather suit case of a value of five dollars (\$5.00), all being of a total value of more than fifty dollars (\$50.00), and all the property of Samuel Cymes." Specification 2, of which accused was found guilty, alleges the larceny of "one Leica Camera of a value of more than fifty dollars (\$50.00), the property of Kaete Schroer." The sole evidence of value contained in the record of trial is a statement of a German national, Karl Heinz Wendt, who accompanied the four accused to the home of the victim of the larceny alleged in Specification 1, that of the articles taken from the house he sold a watch, arm band and two fountain pens for 3800 marks (R. 31), and the following stipulations:

"* * * At this time the prosecution, the defense and each of the accused, Private Detmer, Gaskill, Dennis and Thomas, with the permission of the court, have entered into a stipulation that if Friedrich Fischer, Oberursel, were present in court he would testify that the microscope marked Zeiss-Jena, No. 60182, has been appraised by him as having a value over fifty dollars.

"* * * The stipulation is agreed to by the consent of all accused in open court, not as to any agreement as to the value but only as to the fact that if that witness were present he would state it was of that value.

* * *

"* * * It is further stipulated by and between the prosecution, the defense and the accused and each of them that if Friedrich Fischer were present in court he would testify that the binoculars, offered in this case as Prosecution's Exhibit 3, have been appraised by him and that he has valued the binoculars as being valued more than twenty dollars but less than fifty dollars.

"* * * That is agreeable to the accused, all of them consenting in open court.

* * * It is further stipulated by and between the prosecution, the defense and each of the accused, that if Friedrich Fischer were present in court and sworn as a witness he would testify that he has appraised the Leica camera, No. 155361 with summar lens as being valued more than fifty dollars.

"* * * That is agreed to by the defense and the accused consent in open court.

* * * It is further stipulated between the prosecution and defense and the accused and each of them, that if Horst Hetebrueg were present in court and sworn as a witness he would testify that he has appraised the Eterna watch, serial number 3141928 as being valued at more than twenty dollars and less than fifty dollars. Is that stipulation entered into?

"* * * That is agreed to by the defense and is consented to by the accused in open court" (R. 71, 72).

5. The value of the articles stolen was not susceptible of proof through the testimony of the witness Wendt, for the sale described by him may be classified as a black market transaction and it was not otherwise shown that he was in any manner qualified to submit his opinion as to value. Ordinarily, except as to distinctive articles of Government issue, or other chattels having, because of their character, readily determinable value, the value of personal property to be considered in determining the measure of punishment authorized for larceny is the worth of the property in the open market at the time and place of the offense (CM 330899, Garcia (1948) and cases therein cited). As stated in TM 27-255, par. 100b:

"The value to be proved is the 'market value' of the property, that is what it is worth in the open market at the time of the offense. The court cannot determine the specific market value of any property unless evidence is introduced to prove it, or unless there is a stipulation by both sides as to that value. (See par. 68b, supra, as to stipulations as to value.) Proper evidence of market value is the testimony of someone who, by virtue of his knowledge and experience, knows what that value is."

The stipulations entered of record would, of course, meet the requirements

of the rule provided it were shown who Friedrich Fischer and Horst Hetebrueg were and that they were qualified as experts in evaluating articles of the type described in the Specifications. Perhaps the court knew these essential facts but nothing of record so indicates. Judicial notice may not be taken of the market value, for such value is not a matter of fixed and common knowledge, and obviously the court itself, lacking technical and expert trade knowledge, may not find a market value simply by inspection (CM 324747, Van Dyne et al, 73 BR 354; CM 213952, Myer, 10 BR 296). As to each Specification the court was limited to finding the articles stolen were of some value, hence so much of the finding in each Specification of the value of the items stolen as exceeds \$20.00 may not be sustained (par. 149g, MCM, 1928).

The total maximum confinement authorized by paragraph 104c, Manual for Courts-Martial, 1928, for the two separate offenses of larceny of property of a value of \$20.00 or less is one year. Since the punishment by confinement may not legally exceed one year penitentiary confinement is not authorized (AW 42).

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of each Specification as to value as finds some value not in excess of \$20.00; legally sufficient to support the finding 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 one year in an authorized place of confinement other than a penitentiary, Federal reformatory or correctional institution.

Edward Johnson Judge Advocate.

Frank C. Alfred Judge Advocate.

George Springston Judge Advocate.

(12)

JAGO, CM 331078

1st Ind

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

TO: The Secretary of the Army

1. Pursuant to the provisions of Article of War 50 $\frac{1}{2}$, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) there is transmitted herewith for your action the record of trial and accompanying papers in the case of Private First Class Wilbert J. Detmer (17211960); Richard S. Gaskill (11164210); Private Marvin J. Dennis (17224054) all of the 909th Ordnance Heavy Automotive Maintenance Company and Private Barney D. Thomas (38340912), 7702 Headquarters and Service Battalion, together with the holding by the Board of Review.

2. Upon a joint trial by general court-martial each accused was found guilty of the joint larceny of one microscope of a value of \$80.00, one fountain pen of a value of \$5.00, one ladies wrist watch of a value of \$40.00; one man's wrist watch of a value of \$40.00, one pair of binoculars, one gold wrist band of a value of \$30.00, one leather suit case of a value of \$5.00; of a total value of more than \$50.00, in violation of Article of War 93 (Specification 1, Charge I). Accused Dennis, Gaskill and Detmer were found guilty of the joint larceny of one Leica camera of a value of more than \$50.00, in violation of Article of War 93 (Spec. 2, Charge I).

Accused Dennis was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. Accused Gaskill, Detmer and Thomas were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. As to the accused Dennis 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 pursuant to Article of War 50 $\frac{1}{2}$. As to the accused Gaskill and Detmer the reviewing authority approved the sentence and ordered it executed but suspended execution of the dishonorable discharge as to each accused until their release from confinement, and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement. As to the accused Thomas the reviewing authority approved the sentence, reduced the period of confinement to nine months, ordered execution thereof, suspended execution of the dishonorable discharge until the soldier's release from confinement, and designated the Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement.

3. The record of trial supports the sentences as to accused Gaskill, Detmer and Thomas (suspended dishonorable discharges). The record of trial

as to accused Dennis only has been considered by the Board of Review under Article of War 50 $\frac{1}{2}$. The Board of Review holds that the record of trial as to accused Dennis is legally sufficient to support the finding of guilty of the Charge, legally sufficient to support only so much of the findings of guilty of each Specification as to value as finds that the property respectively described therein is of some value not in excess of \$20.00, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal reformatory or correctional institution. I do not concur in the board's holding with respect to the legal insufficiency of the findings as to value and as to the sentence and for the reasons hereinafter stated am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to accused Dennis.

4. With respect to the value of the microscope and binoculars described in Specification 1, it was orally stipulated that if Friedrich Fischer were present in court he would testify that he appraised the microscope marked ZEISS-JENA No 60182 (Pros. Ex. 4), and the binoculars (offered in evidence as Pros. Ex. 3). He appraised the microscope as having a value of over \$50 and the binoculars as having a value of more than \$20 but less than \$50.00.

It was also stipulated that if Horst Hetebrueg were present in court he would testify that he had appraised the Eterna watch (serial no. 3141928, Ladies Wrist Watch, Pros. Ex. 2) as having a value of more than \$20.00, but less than \$50.00 (R. 71-72).

With respect to the value of the Leica camera described in Specification 2, it was orally stipulated that Friedrich Fischer would testify that he appraised the Leica camera with Summar lens as being valued at more than \$50.00 (R. 72). In its holding the Board of Review indicated that the stipulated testimony as to value is not competent because there is no showing in the record that the appraisers in question were qualified as experts.

The general rule in military law is that, except as to distinctive items of government issue or other personal property which, because of its character, has no readily determinable market price, the value of personal property to be considered in determining the authorized punishment in larceny is the market value at the time and place of the offense. Testimony as to value by persons not qualified as experts or shown to have special knowledge on the subject has been consistently held not to be competent.

Paragraph 112b, Manual for Courts-Martial, 1928, provides that:

(14)

"* * * an expert witness should be qualified as such before the court, prior to being permitted to express an opinion."

The foregoing provision of the Manual should not, however, be construed as requiring such proof of qualification of an expert if there is an expressed or implied waiver of proof.

"There is no prescribed form for making a waiver. Thus, if it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of such objection" (MCM, 1928, par. 126b, p. 137).

Since the opinion evidence of a person not qualified as an expert is incompetent as to proof of value, it would be unreasonable to suppose that the defense would enter into a stipulation as to such incompetent evidence. Accordingly, I am of the opinion that, under the circumstances of this case, the stipulation by the defense as to the testimony of Fischer and Hetebrueg amounted to a waiver of proof of their qualification as experts.

5. It is to be noted that there is no competent evidence as to the value of the fountain pen, man's wrist watch, gold wrist band, and suit case, described in Specification 1. Furthermore the court found the value of the microscope, ladies watch and binoculars to be \$30.00, \$40.00 and \$50.00 respectively whereas the proof shows the value of the microscope to be of a value in excess of \$50.00, and that of the binoculars and watch to be of some value of more than \$20.00 but less than \$50.00 respectively. Nevertheless the court's finding as to the total value of the articles described in Specification 1 is sustained by the evidence. Accordingly, the findings as to the value of individual articles in Specification 1 may be treated as surplusage.

For the foregoing reasons I am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to the accused Dennis and recommend that the sentence in his case be confirmed.

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



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.

(15)

JAGH CM 331212

9 JUL 1948

UNITED STATES)

v.)

First Lieutenant CHESTER R.)
SNICKLES (01000287), AGD,)
Headquarters United States)
Army, Pacific, APO 958.)

UNITED STATES ARMY, PACIFIC

Trial by G.C.M., convened at
APO 958, 6 May 1948. Dismissal
and total forfeitures.

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

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

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

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

Specification 1: In that First Lieutenant Chester R. Snickles, AGD, Headquarters United States Army, Pacific, APO 958, did, at APO 958, on or about 4 February 1948, with intent to defraud, wrongfully and unlawfully make and utter to Fort Shafter Officers' Club a certain check, in words and figures as follows, to wit:

Honolulu, Hawaii, U.S.A. 4 Feb 19 48 No. _____

BANK OF HAWAII 59-102

Pay to the
Order of Fort Shafter Officers' Club \$ 200.00

Two hundred 00/100

DOLLARS

/s/ Chester R. Snickles
A-1146 Nol

and by means thereof did fraudulently obtain from Fort Shafter Officers' Club \$200.00, he the said First Lieutenant Chester R. Snickles then well knowing that he did not have and not intending that he should have sufficient funds in the said Bank of Hawaii for the payment of said check.

(16)

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

	<u>Date of Check</u>	<u>Amount</u>
Specification 2	14 February 1948	\$ 50.00
Specification 3	16 February 1948	\$ 50.00
Specification 4	18 February 1948	\$ 30.00
Specification 5	18 February 1948	\$ 30.00
Specification 6	21 February 1948	\$100.00
Specification 7	21 February 1948	\$ 50.00
Specification 8	24 February 1948	\$100.00
Specification 9	26 February 1948	\$125.00
Specification 10	28 February 1948	\$ 25.00
Specification 11	4 March 1948	\$150.00

Specification 12: In that First Lieutenant Chester R. Snickles, AGD, Headquarters United States Army, Pacific, APO 958, did, at APO 958, on or about 12 March 1948, with intent to defraud, wrongfully and unlawfully make and utter to Fort Shafter Officers' Club a certain check, in words and figures as follows, to wit:

Honolulu, Hawaii, U.S.A. 12 Mar 19 48 No.

BANK OF HAWAII 59-102

Pay to the
Order of Fort Shafter Officers' Club \$ 150.00

One hundred fifty 00/100

DOLLARS

/s/ Chester R. Snickles No.12

A-1146

and by means thereof did fraudulently obtain from Fort Shafter Officers' Club \$150.00, he the said First Lieutenant Chester R. Snickles then well knowing that he did not have and not intending that he should have any account with the said Bank of Hawaii for the payment of said check.

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

Specifications 1 through 12: (Same as Specifications 1 through 12, Charge I).

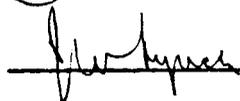
He pleaded not guilty to all Charges and Specifications but in the course of the trial changed his plea from not guilty to guilty of Charge I (Violation of the 95th Article of War). He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced 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 pursuant to Article of War 48.

3. The Board of Review adopts the statement of the evidence and law contained in the review of the United States Army, Pacific, Judge Advocate, dated 2 June 1948.

4. Records of the Department of the Army show that accused is 35 years of age and married. He enlisted in the Regular Army on 24 September 1937, and continued to serve in an enlisted status until 8 August 1942, when upon successful completion of a course of instruction at The Adjutant General's Officer Candidate School, he was honorably discharged as a technical sergeant, for the convenience of the Government, to accept a commission and active duty as a Second Lieutenant, Army of the United States. On 22 May 1945 he was promoted to the rank of First Lieutenant. On 8 July 1946 he was honorably separated from his commissioned status as a First Lieutenant (AUS) and on the same day was appointed First Lieutenant Officers' Reserve Corps. On 16 June 1946 he enlisted in the Regular Army as a technical sergeant. He was honorably discharged in that grade on 6 August 1946 to accept active duty as a First Lieutenant (ORC), on which date he entered upon his current tour of extended active duty. He departed for the Pacific Theater, on 22 November 1944 and returned to the Zone of Interior on 21 November 1945. He was awarded a Bronze Service Star for each, the New Guinea, Luzon, and Southern Philippine Campaigns. He departed from the Zone of Interior for his current tour in the Pacific on 15 November 1947. His efficiency ratings for principal duty ranged from "Excellent" 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 is mandatory upon conviction of a violation of the 95th Article of War. A sentence to dismissal and forfeiture of all pay and allowances due or to become due is authorized upon conviction of a violation of the 96th Article of War.

 _____, Judge Advocate

 _____, Judge Advocate

_____, Judge Advocate
(On temporary duty)

JAGH CM 331212

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 First Lieutenant Chester R. Snickles (01000287), AGD, Headquarters United States Army, Pacific, APO 958.
2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully, and with intent to defraud, making and uttering eleven checks drawn on the Bank of Hawaii in which he had insufficient funds, and one check on the Bank of Hawaii when he had no account therein, and fraudulently obtaining the proceeds, in violation of Articles of War 95 and 96 (Charges I and II, Specs 1 to 12). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.
3. A summary of the evidence may be found in the review of the United States Army, Pacific, Judge Advocate, dated 2 June 1948, which was adopted in the accompanying opinion of the Board of Review as a statement of the evidence and the 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 wrongfully and unlawfully and with intent to defraud, making and uttering twelve checks. All of the checks were drawn on the "Bank of Hawaii, Honolulu, Hawaii, U.S.A.", made payable to Fort Shafter Officers' Club, and bore dates ranging from 4 February 1948 to 12 March 1948 and are in amounts varying from thirty (\$30.00) dollars to two hundred (\$200.00) dollars, totaling nine hundred ten (\$910.00) dollars. Eleven of the checks were duly deposited by the payee club in its account with the Bishop National Bank. Upon their being presented, through banking channels, to the Bank of Hawaii, none of the checks were honored; nine being dishonored because of insufficient funds and two not being honored because the account had been closed by the Bank of Hawaii, as an "unsatisfactory" account, prior to the presentation of the checks for payment. A twelfth check was neither deposited in its account, nor presented for payment by the payee club, because there had already been returned to the club, a check marked "account closed." Accused had opened a checking account at the Bank of Hawaii with an

initial deposit of one hundred fifty (\$150.00) dollars on 2 February 1948, this being the only deposit made in the account during its existence.

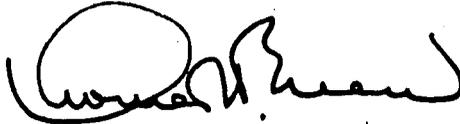
The accused admitted that he made and uttered the checks and that the extent of his account with the Bank of Hawaii had been one hundred fifty (\$150.00) dollars, but denied his intention of defrauding the Club. He and his wife had tried to maintain an emergency fund of one thousand (\$1000.00) dollars. He assumed his wife had placed this money in a bank account but did not know whether she had done so. He wrote her two letters and telephoned her for the money but she failed to make the transfer. Accused tried unsuccessfully to borrow one thousand (\$1000.00) from his sister. He agreed to liquidate this indebtedness by making monthly payments to the Club of two hundred fifty (\$250.00) dollars from his pay, but at the time of trial he had made but one payment of one hundred twenty-five (\$125.00) dollars.

4. The accused is 35 years of age and married. He enlisted in the Regular Army on 24 September 1937, and continued to serve in an enlisted status until 8 August 1942, when upon successful completion of a course of instruction at The Adjutant General's Officer Candidate School, he was honorably discharged as a technical sergeant, for the convenience of the Government, to accept a commission and active duty as a Second Lieutenant, Army of the United States. On 22 May 1945 he was promoted to the rank of First Lieutenant. On 8 July 1946 he was honorably separated from his commissioned status as a First Lieutenant (AUS) and on the same day was appointed First Lieutenant, Officers' Reserve Corps. On 16 June 1946 he enlisted in the Regular Army as a technical sergeant. He was honorably discharged in that grade on 6 August 1946 to accept active duty as a First Lieutenant (ORC), on which date he entered upon his current tour of extended active duty. He departed for the Pacific Theater, on 22 November 1944 and returned to the Zone of the Interior on 21 November 1945. He was awarded a Bronze Service Star for each, the New Guinea, Luzon, and Southern Philippine Campaigns. He departed from the Zone of Interior for his current tour in the Pacific on 15 November 1947. His efficiency ratings for principal duty ranged from "Excellent" to "Superior."

On 23 April 1948 three weeks after Charges had been referred for trial accused tendered his resignation for the good of the service in lieu of trial by court-martial. On 19 May 1948 the resignation was not favorably considered by the Department of the Army.

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

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



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 142, 2 August 1948)

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

(21)

JAGK - CM 331213

4 AUG 1948

UNITED STATES)

82D AIRBORNE DIVISION

v.)

Trial by G.C.M., convened at Camp
Campbell, Kentucky, 19 May 1948.
Dismissal.

First Lieutenant JOHN L. ZUMWALT)
(O-1996166), Company H, 505th)
Airborne Infantry Regiment)

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.
2. The accused was tried upon the following charge and specifications:
CHARGE: Violation of the 85th Article of War.
Specification: In that First Lieutenant John L. Zumwalt, 505th Airborne Infantry Regiment was, at Fort Bragg, North Carolina, on or about 2 May 1948, found drunk while on duty as Regimental Officer of the Day.

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

3. Evidence for the Prosecution

Daily Bulletin No. 99, Headquarters 505th Airborne Infantry Regiment, Fort Bragg, North Carolina, 30 April 1948, detailed the accused as Regimental Officer of the Day for 1 May 1948. Second Lieutenant John D. Burrer was detailed for the same duty on 2 May 1948. The tour involved duty from 1700 hours on the day designated until 1700 hours of the following day (R 6,7, Pros Ex 1). Lieutenant Burrer testified that at about 1545 hours on 2 May 1948 he was in the regimental area preparatory to relieving the accused as officer of the day, and found him at the guardhouse on the ground "shooting craps." The defense objected to the remark concerning the dice game and the objection was sustained. The witness stated that the accused was improperly dressed and unshaven, there was an odor of liquor.

on his breath, he talked with a thick tongue, and was unsteady on his feet when he walked. In the opinion of Lieutenant Burrer the accused was drunk. During roll call at the guardhouse both the accused and the sergeant of the guard appeared before the prisoners and were staggering as they walked. Subsequently the new officer of the day, Lieutenant Burrer, placed the accused and the sergeant of the guard in arrest of quarters. It was the opinion of Lieutenant Burrer that the accused was "sufficiently under the influence that he could not perform his duties correctly." Defense counsel objected to the admission in evidence of the witness' opinion respecting accused's condition but the objection was overruled (R 7-9). On cross-examination Lieutenant Burrer asserted that "whenever I would start to speak to him, all he would say, was everything all right." In further describing accused's condition the witness stated: "In my opinion a man can be drunk and still carry on his work but not to a point that he would do too well. A man can also be drunk to a point when he can not do any of his work. It is to this situation we are referring now" (R 9-11).

Technician Fifth Grade Roy B. Ward, Headquarters and Headquarters Company, 505th Airborne Infantry, testified that on 2 May he was the bartender at the 505th Officers Club. At about 1 o'clock in the afternoon the accused and a staff sergeant appeared at the bar and the witness served the accused four or five "beers." At about "4:30" the accused returned and bought some more beer. (R 12-14).

Staff Sergeant Claude L. Hamberlin testified that he was the sergeant of the guard of the 505th Parachute Infantry Regiment who went on duty 2 May 1948. He first saw the accused at 1630 hours when he went to the Officers' Club to "pick him up." The witness stated that "he was, I would say, dead drunk. He was in mess uniform, khaki cap, and staggering all over the ground" (R 15). The witness smelled the odor of liquor on accused's breath and observed that he had difficulty in speaking. The old sergeant of the guard assisted the accused as he entered the door of the guardhouse (R 17).

Technical Sergeant Frederick E. McFarlan was the Charge of Quarters, 505th Stockade, on 2 May 1948. At about 1700 hours Lieutenant Burrer and the guards conducted a roll call at the guardhouse. After the prisoners had been dismissed the accused requested Sergeant McFarlan to "fall the prisoners back into formation for another head count." The Sergeant asked the accused if he was serious about the matter and the accused stated that he was "just kidding." Witness stated that "The Lieutenant's speech was very thick, his dress was not becoming to an officer, his dress was improper and it is not customary for a First Lieutenant to tell a Technical Sergeant that he is kidding about a formation." The witness smelled whiskey or beer on the accused's breath and he was positive that the accused was "under the influence of alcohol" (R 19).

4. For the Defense

First Lieutenant James T. Shelton, Neuropsychiatrist, 307th Medical Battalion, testified that ordinarily it was difficult to determine when a person was drunk. He knew of no regulation which prescribed any absolute test, but that there were three tests used both in the Army and civilian practice. These consisted of the test for "alcohol content of the breath, the alcohol content of the sweat, and the blood." The witness did not have any knowledge of the accused's condition on the date in question (R 20-21).

Sergeant Cleo Hamm was Charge of Quarters in Orderly Room "H" on 2 May 1948. He saw the accused at about 1500 hours and again at about 1700 hours on that date, but he did not notice "anything unusual about his appearance or actions" (R 22). On cross-examination the witness stated that he was a member of the accused's company (R 24).

Technician Fourth Grade Merrill E. Shutman stated that he saw the accused "practically all day" on 2 May 1948 and he did not consider him to be under the influence of alcohol, or drunk. On cross-examination the witness stated that he was the corporal of the guard on the accused's tour of duty as officer of the day. At about "3:30" they had a crap game at the guardhouse (R 24-27).

Corporal Frederick K. Whitfield, Company H, 505th Airborne Infantry Regiment, testified that he saw the accused at roll call formation on the morning of 2 May 1948 and at 1700 hours on the same day. He stated that "I could not say he was drunk." On cross-examination the witness stated that he was a member of the accused's company and that Lieutenant Zumwalt had asked him to testify (R 28-30).

Corporal Robert H. Keyt, a member of the guard on 2 May 1948, testified that he saw the accused at about 1700 hours. Upon being asked his opinion as to the accused's sobriety, he stated, "As far as I know, he was the same as everyone else" (R 31).

Technician Third Grade Arthur P. Hurley, first cook in accused's company, testified that he prepared a sandwich for the accused at about 1530 hours on 2 May 1948 and that "he seemed the same as always." The witness did not smell liquor on his breath (R 32-35).

Sergeant Erwin Hewitt, Headquarters Company, 2nd Battalion, 505th Airborne Infantry Regiment, was Corporal of the Third Relief on 2 May 1948. He observed the accused at various times during the day but saw nothing unusual about his condition. He did not smell liquor on the accused's breath. The witness did not see any crap game being played at the guardhouse (R 35-38).

The defense also called Technical Sergeant Frederick E. McFarlan and asked him to describe the accused's uniform on the day in question. The witness stated, "He had on OD pants, trousers, mohair tie, which were neat. He needed a shave, which is undoubtedly part of his uniform" (R 38).

It was stipulated that if Lieutenant Colonel John Norton, GSC, were present he would testify that the accused served as platoon leader in his regiment during July-November 1947. He had intimate contact with the accused during this period and considered him to be an officer and gentleman of high moral character. He had never observed accused to exhibit intemperance in drinking. He rated Lieutenant Zumwalt as "generally excellent" (R 39). The defense thereupon rested..

5. Discussion

The accused was charged with being found drunk on duty as Regimental Officer of the Day on 2 May 1948 in violation of Article of War 85.

Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of Article of War 85 (MCM 1928, par 145, p. 160).

Inasmuch as drunkenness is to a great extent a matter of common observation, it is no infringement of the rules of evidence to permit a non-expert witness, who states somewhat in detail the observed facts upon which his conclusion is based, to state, as a fact, that the accused was drunk (Winthrop Mil Law & Proc., 2nd Ed., pp 338, 615).

Competent evidence for the prosecution established as a fact that shortly before the expiration of his tour of duty as regimental officer of the day on the date alleged the accused was drunk. Evidence adduced by the defense, if accepted by the court, tended to cast doubt upon or refute the fact alleged. The court determined the controverted question adversely to the accused. We are of the opinion that the court was legally justified in concluding beyond any reasonable doubt that the accused was drunk on duty at the time and under the circumstances alleged. There is therefore no legal basis on appellate review to disturb the court's findings (CM 300339, Pritchard, 5 BR. (ETO) 25,53).

6. Department of the Army records show that the accused is 33 years old and married. He graduated from high school, and served as an enlisted man in the U.S. Marines from August 1934 to August 1938. He was thereafter engaged as a worker in the oil fields of the Southwest until 26 June 1942 when he enlisted in the U.S. Army Air Corps. In March 1943 he was appointed Flight Officer and in September 1944 the accused was commissioned second lieutenant, AUS. He spent 17 months overseas and engaged in combat glider missions in Normandy, Holland and the Rhine River

Sector. The accused has been awarded the Purple Heart and Air Medal with 2 oak leaf clusters.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 85 in time of peace and is mandatory in time of war.

Charles W. Hilborn, Judge Advocate

(On temporary duty), Judge Advocate

Harley A. Lanning, Judge Advocate

(26)

JACK - CM 331213

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 17 APR 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John L. Zumwalt (O-1996166), Company H, 505th Airborne Infantry Regiment.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty as Regimental Officer of the Day in violation of Article of War 85. 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 pursuant to Article of War 48.

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

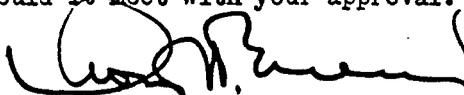
Pursuant to proper orders the accused was designated to perform duty on 1 May 1948 as Regimental Officer of the Day for the 505th Airborne Infantry Regiment, Fort Bragg, North Carolina. His tour involved duty from 1700 hours on 1 May 1948 to 1700 hours on 2 May 1948, at which time he was to be relieved by Second Lieutenant John D. Burrer as the new Officer of the Day. At about 1545 hours on 2 May 1948 Lieutenant Burrer, preparatory to relieving the accused, sought him in the Regimental area. He found the accused at the Guardhouse "shooting craps" with some enlisted men. The accused was unshaven, wearing improper uniform, and his manner of speech and walk was such as to convince Lieutenant Burrer that the accused was drunk. The new sergeant of the guard who assisted in the roll call at the guardhouse testified that the accused was "dead drunk" and staggered as he appeared before the prisoners. Lieutenant Burrer placed the accused in arrest of quarters. An enlisted man who had served as bartender at the Officers Club on 2 May 1948 testified that during the afternoon the accused, accompanied by a sergeant, appeared two different times at the bar and ordered some "beers." On the first occasion he got about four or five beers. Several enlisted men, testifying for the defense, stated that they observed the accused at various times on 2 May but that they did not notice anything unusual concerning his condition. Some of the defense witnesses, who appeared to be enlisted members of the accused's company, testified that they did not observe him to be drunk on the occasion in question. The accused elected to remain silent.

The record contains recommendations for clemency, one signed by a member of the court, and another by the defense counsel and assistant

defense counsel. Both stress the accused's prior record. The accused enlisted in the U.S. Marines in 1934 and served four years. He enlisted in the Army in 1942 and served 17 months in the European Theater and engaged in combat glider missions in Normandy, Holland and the Rhine campaigns. He has been awarded the Purple Heart and the Air Medal with two oak leaf clusters. He is 33 years of age and married..

I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of \$100 per month for six months and that as thus commuted the sentence be carried into execution.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 156, 26 August 1948).

and figures, to-wit: "Lawton, Okla., March 19, 1948; The American National Bank; Pay to the order of S/Sgt FREDDIE E. TEAFF, \$72.00, SEVENTY TWO AND NO/100 Dollars, Signed: Roy Millin, Typed: ROY MILLIN, Capt., FA, 035641," which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification 1: Finding of not guilty.

Specification 2: In that Staff Sergeant Freddie E. Teaff, Enlisted Detachment, 4011th Area Service Unit, Station Complement, with intent to defraud, did, at Fort Sill, Oklahoma, on or about 15 March 1948, unlawfully issue a certain check, made by him, the said Staff Sergeant Freddie E. Teaff, in words and figures as follows: "Lawton, Okla., March 15, 1948, The City National Bank, Pay to Fort Sill Exchange, \$10.00, Ten & no/100 Dollars, For 4011th ASU En Det., Signed: S/Sgt Freddie E. Teaff, 18050017," well-knowing that said issuance was false and by means thereof did fraudulently obtain cash of the value of ten dollars (\$10.00).

Specifications 3, 5 and 6 vary from Specification 2 only as to the date the check was alleged to have been issued, the bank upon which each was drawn, the amount of check and the person to whom issued.

Specifications 4 and 7: Finding of guilty disapproved by Reviewing Authority.

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

Specification 1: Finding of not guilty.

Specification 2: In that Staff Sergeant Freddie E. Teaff, Enlisted Detachment, 4011th Area Service Unit, Station Complement, with intent to defraud, did, at Oklahoma City, Oklahoma, on or about 22 March 1948, unlawfully issue a certain check, made by him, the said Staff Sergeant Freddie E. Teaff, in words and figures as follows: "Oklahoma City, Okla., 3/22/48, American Natl Bank, Lawton, Okla., On Demand Pay to the Order of The Skirvin Hotel, \$10.00, Ten and no/100 Dollars, Signed: S/Sgt Freddie E. Teaff, 4011th 6th Armd F. A., Fort Sill, Okla.," well-knowing that said issuance was false and

by means thereof did fraudulently obtain cash of the value of ten dollars (\$10.00).

Specifications 3 and 4: Finding of guilty disapproved by reviewing authority.

Specification 5: In that Staff Sergeant Freddie E. Teaff, Enlisted Detachment, 4011th Area Service Unit, Station Complement, with intent to defraud, did, at Oklahoma City, Oklahoma, on or about 22 March 1948, unlawfully issue a certain check, made by him, the said Staff Sergeant Freddie E. Teaff, in words and figures as follows: "Furnished by City National Bank and Trust Company, Oklahoma City, Oklahoma, 3-22-1948, Pay to the order of Sears Roebuck & Co, \$20.00, Twenty and no/100 Dollars, for value received and charge to account of (signed) S/Sgt Freddie E. Teaff, 18050017, American National Bank of Lawton, Lawton, Okla," well-knowing that said issuance was false and by means thereof did fraudulently obtain cash of the value of twenty dollars (\$20.00).

The accused pleaded not guilty to all charges and specifications. He was found not guilty of Specification 1 of Charge III and not guilty of Specification 1 of the Additional Charge, but guilty of all 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 at such place as the reviewing authority might direct for a period of two years. The reviewing authority disapproved the findings of guilty of Specifications 4 and 7 of Charge III and Specifications 3 and 4 of the Additional Charge, approved and ordered executed only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for one year, 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 might direct as the place of confinement. The result of trial was promulgated by General Court-Martial Orders No. 61, Headquarters, The Artillery Center, Fort Sill, Oklahoma, dated 8 June 1948.

3. Evidence Relating to Charge I and its Specification

The evidence in this case with respect to Charge I and its Specification (absence without leave) consisted of the identification

of accused and the introduction of properly authenticated extract copies of morning reports of accused's organization showing his absence without authority on 18 March 1948, and return to military control as of 24 March 1948. This evidence was admitted without objection and was not controverted by the defense. (R. 6-7, Pros. Ex. 1 and 2). The evidence with respect to the remaining Charges and Specifications need not be summarized.

4. Error Occurring During Trial.

At the close of the prosecution's case, the accused, after being duly instructed as to his rights as a witness, was sworn and testified in his own behalf. His testimony was limited solely to his prior military experiences. He testified that he entered the Army in 1939 at the age of "14, going on 15" and had been a prisoner of war in the Philippines and in Japan (R. 42, 43). Upon cross-examination, the trial judge advocate asked the accused to state whether he wrote all the checks which had been admitted in evidence as Prosecution Exhibits 3 to 15 inclusive. The defense objected upon the ground that the accused had not testified concerning such matters on direct examination. The objection was overruled and accused was directed to answer the question. He stated that he had written "the" checks (R. 43). Prosecution Exhibit 3 was the check described in the Specification of Charge II alleging forgery, and the other exhibits were the checks described in the remaining charges and specifications.

The court examined accused as to his reasons for issuing the checks. He stated that he did not intend to defraud anyone, but intended to go back at a later time and pick them up. He was asked, "Was that clear in everybody's mind?" in response to which he testified it was "up to the point that they were notified then or at a later date that I would pick them up.". When asked if he had enough money to pick up the checks accused testified, "I would have had when I left Tulsa.". The prosecution then asked accused if he had an account with the City National Bank, whereupon the defense renewed its objection to the cross-examination as being improper. Again the objection was overruled (R. 43). After accused was excused as a witness, he voluntarily testified further concerning certain of the checks. The matters which he testified to concerned those specifications of which he was either found not guilty or as to which the findings of guilty were disapproved. The re-cross examination was upon a specification concerning which accused had not testified, namely, the Specification of Charge II (R. 44).

It is fundamental that under the military law "no witness *** shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him ***" (AW 24). Of course, an accused can waive the immunity afforded him against self-incrimination,

and when he "testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense". But "where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified". (MCM 1928, par. 112b; underscoring supplied).

It will be observed from the foregoing that an accused cannot, without prejudice to his substantial rights, be compelled to testify on cross-examination concerning any offense about which he has not testified on his direct examination. In the instant case, accused voluntarily took the stand as a witness and testified only as to the period and nature of his military service. He was compelled on cross-examination to testify as to whether he had in fact written all of the checks referred to in the pleadings. The ruling of the law member in compelling the accused to so testify on the issue of his guilt resulted in error highly prejudicial to accused's substantial rights and was fatal to the findings of guilty of all the offenses concerning which he was compelled to testify. (CM 330132, Trease and cases there cited).

As the accused was not compelled to testify concerning Charge I and its Specification (unauthorized absence) the error did not reach and vitiate the finding of guilty of that offense. (CM 330132, Trease, supra). The maximum authorized punishment for absence without leave for six (6) days is confinement at hard labor for eighteen (18) days and forfeiture of twelve (12) days' pay (MCM 1928, par. 104c, Table of Maximum Punishments).

5. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification but legally insufficient to support the findings of guilty of the remaining charges and the specifications thereto and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for eighteen (18) days and forfeiture of accused's pay for twelve (12) days.

Robert A. Silvers Judge Advocate
Albert J. Abroyd Judge Advocate
Harley A. Lanning Judge Advocate

(34)

JAGK - CM 331360

SEP 20 1948

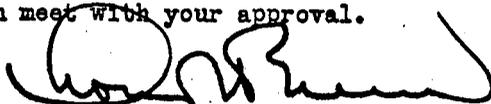
JAGO, Dept. of the Army, Washington 25, D. C.

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, 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 Staff Sergeant Freddie E. Teaff (RA 18050017), Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma.

2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge II and its specification, Charge III and Specifications 2, 3, 5 and 6 thereunder, and the Additional Charge and Specifications 2 and 5 thereunder and so much of the sentence as is in excess of confinement at hard labor for eighteen (18) days and forfeiture of pay for twelve (12) days be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action 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 168, 7 October 1948).

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

JAGN-CM 331429

U N I T E D S T A T E S	)	NINTH AIR FORCE
)	
v.	)	Trial by G.C.M., convened at
	)	Greenville Air Force Base, South
Staff Sergeant RUTH E. TODD	)	Carolina, 28 May 1948. Dis-
(A 414059), Squadron W, 309th	)	honorable discharge and con-
Air Force Base Unit, Greenville	)	finement for two (2) years.
Air Force Base, Greenville,	)	Federal Reformatory for Women,
South Carolina.	)	Alderson, West Virginia.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that S Sgt Ruth E. Todd, Sq. W, 309th AF Base Unit, Greenville Air Force Base, S.C., did at Greenville, South Carolina on or about 18 March 1948, with intent to defraud, wrongfully and unlawfully make and utter to the Brock's Inc., 218 North Main Street, Greenville, S. C. a certain check, in words and figures as follows, to wit:

The South Carolina National Bank
Greenville, South Carolina March 18, 1948 No.

Pay to the order of CASH \$50.00

Fifty -----0/100 Dollars

Ruth E. Todd /Signed/
S Sgt Sq "WW" 309th AF BU

and by means thereof, did fraudulently obtain from Brock's Inc., cash in the amount of fifty dollars. She the said S Sgt Ruth E. Todd, then well knowing that she did not have and not intending that she should have sufficient funds in the South Carolina National Bank, Greenville, South Carolina, for the payment of said check.

Specification 2: (Finding of Not Guilty).

Specification 3: In that S Sgt Ruth E. Todd, Sq #WW, 309th AF Base Unit, Greenville Air Force Base, S.C., did at Greenville, South Carolina on or about 8 April 1948, with intent to defraud, wrongfully and unlawfully make and utter to Dixie Home Store, Br #149, 1506 Augusta Rd, Greenville, S.C., a certain check, in words and figures as follows, to wit:

Greenville, S.C. April 8, 1948

The South Carolina National Bank

Greenville, South Carolina

Pay to the order of Dixie Home Stores \$50.00

Fifty -----0/100 Dollars

Address Sq W, 309th AF Bu S Sgt Ruth E. Todd /Signed/

and by means thereof, did fraudulently obtain from Dixie Home Store Br #149, cash in the amount of fifty dollars. She the said S Sgt Ruth E. Todd, then well knowing that she did not have and not intending that she should have sufficient funds in The South Carolina National Bank, Greenville, S.C. for the payment of said check.

Specification 4: In that S Sgt Ruth E. Todd, Sq #WW, 309th AF Base Unit, Greenville Air Force Base, S.C., did at Greenville, South Carolina on or about 12 Apr 48, with intent to defraud, wrongfully and unlawfully make and utter to Dixie Home Stores Br #149, 1506 Augusta Rd. Greenville, S.C., a certain check, in words and figures as follows, to wit:

Greenville, S.C. Apr 12 1948

The South Carolina National Bank
of Greenville, S.C.

Pay to the order of Dixie Home Stores

Twenty-Five -----Dollars \$25.00

Address: S Sgt Ruth E. Todd /Signed/ Sq W, 309th AF BU, GAFB

and by means thereof, did fraudulently obtain from Dixie Home Stores Br #149, cash in the amount of Twenty-five dollars. She the said S Sgt Ruth E. Todd, then well knowing that she did not have and not intending that she should have sufficient funds in the South Carolina National Bank, Greenville, South Carolina, for the payment of said check.

Specification 5: In that S Sgt Ruth E. Todd, Sq "WW", 309th AF Base Unit, GAFB Greenville, South Carolina, did at Greenville, South Carolina on or about April 12, 1948, with intent to defraud, wrongfully and unlawfully make and utter to Dixie Home Stores Br #149, 1506 Augusta Rd., Greenville, S.C. a certain check, in words and figures as follows, to wit:

Greenville S.C. April 8, 1948

The South Carolina National Bank
of Greenville, S.C.

Pay to the order of Dixie Home Stores

Fifty dollars Dollars \$50.00

Address Sq W 309th GAFB S Sgt Ruth E. Todd /Signed/

and by means thereof, did fraudulently obtain from Dixie Home Stores Br #149, cash in the amount of fifty dollars. She the said S Sgt Ruth E. Todd, then well knowing that she did not have and not intending that she should have sufficient funds in The South Carolina National Bank, Greenville, South Carolina, for the payment of said check.

Specification 6: In that S Sgt Ruth E. Todd, Sq "WW", 309th AF Base Unit, GAFB, Greenville, South Carolina, did at Greenville, South Carolina, on or about 14 April 1948, with intent to defraud, wrongfully and unlawfully make and utter to Gulf Supreme Service Station, 321 North Main Street, Greenville, SC, a certain check, in words and figures as follows, to wit:

Greenville, S.C. Apr 14 1948 No--

The South Carolina Bank 67-43
of Greenville, S.C. 5

support a finding of guilty of the Charge and of Specifications 1, 3, 4 and 7. The questions requiring consideration are (1) the legal sufficiency of the record of trial to support a finding of guilty under Specifications 5 and 6 and (2) the propriety of the designation of a Federal Reformatory as the place of confinement.

4. With respect to Specification 5 which alleges the making and uttering of a check dated 8 April 1948, the court apparently received in evidence in support thereof a photostatic copy of a check dated 12 April 1948 (Pros. Ex. 3). It was identified by Carl B. Bullock, manager, Dixie Home Stores (R. 8, 9). This was one of three checks alleged to have been cashed for the accused by the drawee, Dixie Home Stores on the 8th and 12th of April. Two of these checks were in the amount of \$50.

In the identification of the check (Pros. Ex. 3) it cannot be determined whether the witness Bullock referred to the check described in Specification 3 or the check described in Specification 5. The Board assumes that Prosecution Exhibit 2 was offered in evidence in support of the offense alleged in Specification 3 and the testimony of Carl B. Bullock, manager of the Dixie Home Stores (R. 8), appears consistent with this assumption. The only other \$50 check made payable to the Dixie Home Stores is dated 12 April 1948, which was received in evidence as Prosecution Exhibit 3. This check does not have evidentiary character as to any specification, and if offered in support of Specification 5, the proof fails by reason of the fatal variance. There was no evidence of an additional check for \$50, dated 8 April 1948, made payable to Dixie Home Stores, having been made or uttered by the accused. Under the circumstances the variance in the pleading and proof under Specification 5 is material and cannot be said to be without prejudice to the accused.

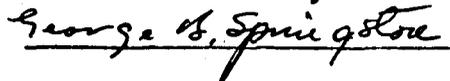
5. With respect to Specification 6 which alleges the making and uttering of a check in the amount of \$20, dated 14 April 1948, drawn on the South Carolina Bank of Greenville, South Carolina, the court received in evidence a photostatic copy of a check drawn on the South Carolina Bank of Greenville, South Carolina (Pros. Ex. 4), which was identified by Mr. Curtis B. Brookshire, Greenville, South Carolina, Service Station operator (R. 11). The prosecution offered this check as a check drawn on the South Carolina National Bank (R. 12). Mr. Brookshire stated that the South Carolina National Bank and the South Carolina Bank of Greenville were the same bank (R. 13). Unquestionably the witness Brookshire was incompetent to give evidence on this point. There is no evidence in the record of trial to show that the check received in evidence as Prosecution Exhibit 4 was ever presented to the South Carolina Bank of Greenville, South Carolina (if such a bank exists) and payment thereof refused. In this respect there was a failure of a material element of proof.

6. The maximum confinement for any one of the offenses under Specifications 1, 3 and 4 of which accused was found guilty, is one year for each offense, and under Specification 7, of which accused was found guilty is six months. Accused has not been convicted of an act recognized as an offense of a civil nature punishable by confinement in a penitentiary for more than one year by some statute of the United States or by any provisions of the District of Columbia Code. Under Article of War 42 confinement in a penitentiary is not authorized.

7. For the reasons stated above, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 1, 3, 4 and 7 thereunder, and legally insufficient to support the findings of guilty of Specifications 5 and 6, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal Reformatory or correctional institution.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

(41)

JUL 30 1948

JAGN-CM 331429

1st Ind

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

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

1. In the case of Staff Sergeant Ruth E. Todd (A 414059), Squadron W, 309th Air Force Base Unit, Greenville Air Force Base, Greenville, South Carolina, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Specifications 5 and 6 be disapproved and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal Reformatory or correctional institution. 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 331429).

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 331508

26 AUGUST 1948

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

UNITED STATES CONSTABULARY

v.)

) Trial by G.C.M., convened at Stuttgart-
) Vaihingen, Germany, 14 May 1948. Dis-
) missal, total forfeitures and confine-
) ment for ten (10) years..

) First Lieutenant WILLIAM
) HARVEY, CAC (O-1042050),
) Battery B, 494th AAA Gun
) Battalion (SM).)

OPINION OF THE BOARD OF REVIEW
SILVERS, ACKROYD and LANNING, Judge Advocates

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

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

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

Specification: In that First Lieutenant William D. Harvey, Battery "B", 494th AAA Gun Battalion (SM), did, at London, England, on or about 10 September 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 11 August 1947.

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

Specification 1: In that First Lieutenant William D. Harvey, Battery "B", 494th AAA Gun Battalion (SM), did, at London, England, on or about 31 May 1946, present for payment and approval a claim against the United States to Second Lieutenant H. S. Bielawski, F.D., an officer duly authorized to approve and pay such claims, in the amount of \$310.07, for pay and allowances for the month of May 1946, which claim was false and fraudulent in that the said First Lieutenant William D. Harvey was in desertion for that period, which was then known by the said First Lieutenant William D. Harvey to be false and fraudulent.

(44)

Specifications 2,3,4,5,6, and 7 vary materially with Specification 1 only as to the date the voucher was presented for payment, the amount claimed thereon, and the name of the finance officer to whom presented.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Rehearing.

The trial herein was upon rehearing. On 30 December 1947 the accused was found guilty of desertion for the period 10 September 1945, terminated by apprehension on 11 August 1947, in violation of Article of War 58. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority disapproved the sentence therein and ordered a rehearing before the court which tried the accused in this case.

4. Evidence for the prosecution.

On motion of the prosecution there was received in evidence as Prosecution Exhibit 1 a certified extract copy of the morning report of Battery B, 494th AAA Gun Battalion (SM), for 2 September 1945 submitted at "Champagne 1 mi SW VV 5862 Nar D'Guerre [France]" as follows:

"2 September 1945

X	X	X
Harvey William D.	O 1 042 050	1st Lt.
Fr Dy to (7) day	leave	UK
X	X	X

/s/ Jacob Ames
Capt CAC" (R 8; Pros Ex 1).

The defense objected to the introduction of the foregoing exhibit contending that the entry thereon was immaterial to the issues. There was also received in evidence, over objection, as Prosecution's Exhibit 2, a duly certified extract copy of the morning report of Battery B, 494th AAA Gun Battalion (SM), for 22 October 1945 submitted at St. Valery, France, L-910610, as follows:

"22 October 1945

X	X	X
Harvey William D O 1 042 050 1st Lt		
Fur to AWOL as of undetermined date		
(Above off left this Unit for seven		
(7) days leave in the UK on 2 Sep 45,		
has not re-joined)		
X	X	X

/s/ Robert S. Cutling
Capt CAC" (Pros Ex 2)

The objection to this document was predicated on the fact that the effective date of "AWOL" was shown to be "undetermined." Each of the documents mentioned bears the usual authenticating certificate signed by B. R. Scott, Captain, AGD, as custodian of the original.

By agreement of the parties, including the accused, it was stipulated that if Joseph MacLeod, BMI, U. S. Navy, Chief Master at Arms, London, England, were present he would testify as follows:

"On August 8, 1947, we received information that there was a U. S. Army man living in Hut Number 18, an ex-Army gun site, Bushey Road. I called Scotland Yard to have them investigate. On 11 August 1947 at approximately 1400 hours, I was informed by them that they had one William Harvey in their custody. I sent a patrolman, D. M. Ware, BM 1, US Navy, to escort him to US Naval Headquarters, Grosvenor Square. He returned at 1500 hours with William D. Harvey who was confined to the U. S. Navy building by order of S. W. Don, Lieutenant Colonel, FA, Executive Officer, U. S. Army." (R 9)

Mr. George Harrington Downey, 119 Lanark Road, Maida Vale, London, West 9, England, testified that he was finance clerk in charge of the Officers Pay Section, U. S. Army Finance Office, 20 Grosvenor Square, London, England, and had been so employed for three years and eight months prior to the time of the trial. The witness identified the accused and stated that he was acquainted with him. He first met accused in May 1946 at the finance office, then located at Cavendish Square, where the officer had appeared and requested payment of his salary. Pay vouchers for the accused for the months of May, June, July, August, September, October and November 1946 were prepared in the finance office where witness was employed. Second Lieutenant H. S. Bielawski was the Finance Officer until August 1946, at which time he was succeeded by Major H. A. Soskin (R 11). Mr. Downey stated that he distinctly remembered the accused, due to his "somewhat furtive and untidy appearance" the last time he had applied for his pay. At that time he had become suspicious of accused. Downey prepared the vouchers but actual payment thereon was made by the cashier. The witness identified a paper marked Prosecution's

Exhibit 3 as being accused's pay data card (WD FD Form No. 3) which was retained on file in the finance office. This card was the "record from which the vouchers were prepared for payment." The information thereon had been furnished by the accused. Prosecution's Exhibit 3 bore a heading "Pay Card - Commissioned Officer" (WD FD Form No. 3) and the following information which was descriptive of the accused: "(1) Harvey, William D., 1st Lt. CAC, O-1042050, (2) APO 562, CCE No. 2, (3) On duty, per paragraph No. 3, SO No. 95, Hq CCE No. 2, June 11, 1946," etc. (Pros Ex 3). The card also showed that the accused was allowed total credits for each month as follows: May 1946, \$310.07; June 1946, \$308.67; July 1946, \$348.40; August 1946, \$348.40; September 1946, \$347.00; October 1946, \$348.40; November 1946, \$347.00; certain deductions were also shown as having been made for each month leaving a net amount due accused. The number stamped in each "block" on the pay card for the month shown was identical with the number of the voucher for that particular month and signified that payment had actually been made to accused. Mr. Downey identified Prosecution's Exhibits 4 to 10, inclusive, as being the "pay vouchers" referred to on the pay card. Downey stated that his initials "GD" appeared at the bottom of Exhibits 4,6,7,8,9 and 10 (R 14-16). Prosecution's Exhibits 4 to 10, inclusive, appear to be photostatic copies of WD Forms No. 336, Pay and allowance Accounts, fully executed by accused, for the months of May to November 1946, inclusive. The accused is shown as a creditor of the United States for his monthly pay on each voucher as follows: May, \$310.07; June, \$308.67; July, \$348.40; August, \$348.40; September, \$347.00; October, \$348.40; November, \$347.00. Each voucher is signed "William D. Harvey (1st Lt CAC)" on line 16 (Certificate that the account is correct and that prior payment has not been made) and on line 18 (Receipt for net payment in cash). The vouchers for May, June, July and August bear the stamp: "Paid by H. S. Bielawski, Lt. F. D. Finance Officer, U S Army Finance Office, London." Those for September, October and November bear the similar stamp of H. A. Soskin, Major, F. D. (R 9-17).

On motion of the prosecution, the court took judicial notice of the provisions of War Department Technical Manual (TM-14-501) "Officers Pay and Allowances" and Army Regulations 35-1360 (R 17).

Mrs. Vera Downey testified that she had been employed for the past six years in the Officers Pay Section, United States Army Finance Office, Grosevenor Square, London, England. She knew the accused inasmuch as he had appeared at the finance office on several occasions to get his pay. Mrs. Downey identified Prosecution's Exhibit 3 as the accused's Pay Card and as a record kept by the finance office in the regular course of business. Certain entries thereon had been made personally by her. Normal procedure required that the officer present copies of his orders with his request to be paid. Entries were made on the pay card from information furnished by the officer. The voucher was prepared in the

finance office and signed by the applicant officer. The voucher and the pay card were then presented simultaneously to the cashier where payment was actually made. Prosecution's Exhibit 3 was received in evidence (R 18-20). Mrs. Downey stated that the voucher (Pros Ex 6) was typed by her. She knew accused's signature and stated that the signature appearing on Prosecution's Exhibits 4 to 10 inclusive were those of the accused. These exhibits were thereupon received in evidence (R 24). On cross-examination the witness asserted that she knew the accused's signature because "I was there at the time he signed the vouchers" and had particularly observed him to sign his name on at least two occasions (R 17-25).

No further material evidence was presented by the prosecution.

The defense offered no witnesses. The law member explained to the accused his rights as a witness and he stated that he desired to remain silent. By agreement there was received in evidence as Defense Exhibit "A" certain entries extracted from accused's Officers' Qualification Card, "66-1." Pertinent matters thereon are set forth in paragraph 6 hereof.

5. Comment.

Charge I and its Specification.

The extract copies of the morning report entries of Battery B, 494th AAA Gun Battalion (SM), for the dates 2 September 1945 and 22 October 1945 (Pros Ex 1,2) were properly authenticated and competent as evidence. Prosecution's Exhibit 1 established prima facie that First Lieutenant William D. Harvey was granted a seven day leave to visit the United Kingdom and that he left his organization on 2 September 1945. Prosecution's Exhibit 2 showed that he had not reported to his organization on 22 October 1945 and was therefore carried as "AWOL" as of an undetermined date. The effective date of his unauthorized absence would, in the absence of intervening conditions, necessarily be immediately following the termination of his authorized seven day leave or 10 September 1945. The signature of B. R. Scott, Captain, AGD, Records Service Branch, AGO, St. Louis, Missouri, certifying that he was the custodian of the original and that the entries (Pros Ex 1,2) were true copies thereof was sufficient, prima facie, to authenticate each exhibit as being a copy of the original record of the reporting unit (MCM, 1928, par. 116a, pp. 119,120). It may be pointed out here that the originals referred to are records "in the War Dept, including its bureaus and branches."

The evidence shows that on or about 10 September 1945 accused's military status was that of absent without leave from his proper organization. Such status is presumed to continue until the contrary is shown (MCM, 1928, par 112a, p. 110). The stipulated testimony of Mr. Joseph

MacLeod is sufficient to establish his apprehension and return to military control on or about 11 August 1947. The court was fully justified in inferring his intent to desert the service by virtue of his prolonged unexplained absence of nearly two years.

Charge II and the Specifications thereto

Inasmuch as the accused was in desertion for the period from September 1945 to August 1947, it is obvious that he rendered no service to the Government and was not therefore entitled to his salary or any part thereof during such period (50 USC, Appendix 1002, CM 324725, Blakely, 73 BR 307,324). The evidence shows that at various times from May to December 1946 he appeared at the United States Finance Office in London where he had prepared and signed his name to pay vouchers for the months of May, June, July, August, September, October and November, 1946 (Pros Ex 4-10) in the amounts as alleged in Specifications 1 to 7 of Charge II. The witnesses who were employees of the Finance Office at London, England, referred to Prosecution's Exhibits 4 to 10 inclusive as though they were the original pay vouchers. They identified them as having been prepared in the finance office and as having been executed by accused. Mrs. Downey testified that she knew the signature of accused and she as well as Mr. Downey identified the signatures appearing on lines 16 and 18 of the pay vouchers (Pros Ex 4-10) as being those of accused. In view of this evidence the court was justified in admitting Prosecution's Exhibits 4 to 10 inclusive, in evidence and considering them as duplicate originals. The accused's signature appearing on line 16 of each of the vouchers having been identified as genuine, it could be fairly assumed that accused assented to and adopted the claims for pay and allowances appearing above his signature in each voucher (CM Blakely, supra).

Accused's signature appeared also on line 18 of each of the vouchers, indicating that he had in fact received payment in cash of the net balance stated therein. In addition the witnesses identified Prosecution's Exhibit 3 as accused's pay card and testified that the entries thereon were made in the regular course of business and that the card was kept in the Officers' pay section of the finance office. Accordingly the pay card was properly admitted in evidence. The card was competent evidence of the information contained thereon irrespective of whether all the entries were made by the witnesses testifying (28 U.S.C. 695). It was shown that the pay card had to be submitted to the cashier simultaneously with the pay voucher in order for the officer to receive payment. In each monthly "block" of the pay card from May to November 1946, inclusive, a number was stamped which was identical with the number appearing on the voucher for each of those months which was positive proof that the accused was paid in cash for each of the months from May to November. The accused having received payment on the vouchers in question at the United States Army Finance Office, London, England, the court was warranted in assuming that he must in fact have presented for approval and payment the claims

therein set forth to the government financial officials as alleged (CM 320478, Vance, 71 BR 415; CM Blakely, supra; CM 330108, Allan). We conclude therefore that the court was justified in finding accused guilty of Specifications 1-7 of Charge II and Charge II.

The sentence adjudged at the rehearing herein, although more severe than that imposed at the original hearing, is based upon findings of guilty of offenses (Chg II and its Specs) not considered upon the merits at the original hearing and is authorized (AW 50 $\frac{1}{2}$; MCM, 1928, par. 87b).

6. Department of the Army records show that the accused is 30 years old and married. He attended college from 1936 to 1940 and was employed as a machinist when inducted into the service in January 1942. He graduated from Officers Candidate School and was commissioned a second lieutenant on 31 July 1942. Shortly thereafter he was sent to Iceland and then to the European Theater. His efficiency ratings have been either "Excellent" or "Superior."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Articles of War 58 or 94.

Charles D. Silver, Judge Advocate

Robert S. Boyd, Judge Advocate

Harley L. Lanning, Judge Advocate

(50)

JAGX - CM 331508

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 William D. Harvey, CAC (O-1042050), Battery B, 494th AAA Gun Battalion (SM).

2. Upon trial (rehearing) by general court-martial this officer was found guilty of deserting the service on 10 September 1945 and remaining absent in desertion until he was apprehended at London, England, on or about 11 August 1947, in violation of Article of War 58, and of presenting for approval seven false and fraudulent pay vouchers in violation of Article of War 94. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48.

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

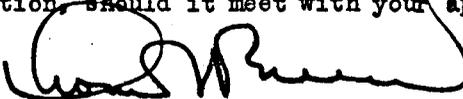
On 2 September 1945 the accused, a member of Battery B, 494th AAA Gun Battalion (SM), then located in France, was granted a seven day leave to visit England. He never returned to his unit, which on 22 October 1945 reported him as being absent without leave. On 11 August 1947 Scotland Yard operatives apprehended the accused, who was then living in a hut on an abandoned Army site near London, England. He was thereupon identified and returned to military control. At various times during the period May to December 1946 the accused appeared at the U.S. Finance Office in London, England, and by false representations purporting to show that he was on a duty status, caused vouchers to be prepared which he signed, presented to the finance officer, and was paid his salary for the months of May to and including November 1946. The record shows, and the court found, that the accused was in desertion throughout the entire period for which claim was made for the foregoing salary payments. The accused elected to remain silent and no evidence was presented in his behalf. By agreement, excerpts from his Officers Qualification Card were attached to the record. A recommendation for clemency signed by the defense counsel is also attached to the record. It is contended therein that the sentence is too severe.

4. Department of the Army records show that the accused is 30 years

old and married. He attended college from 1936 to 1940 and was employed as a machinist when inducted into the service in January 1942. He graduated from Officers Candidate School and was commissioned a second lieutenant on 31 July 1942. Shortly thereafter he was sent to Iceland and then to the European Theater. His efficiency ratings have been either "Excellent" or "Superior."

5. I recommend that the sentence be confirmed but that the period of confinement be reduced to five years and that as thus modified the sentence be carried into execution. I further recommend that an appropriate United States disciplinary barracks be designated as the place of confinement.

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



2 Incls	THOMAS H. GREEN
1. Record of trial	Major General
2. Form of action	The Judge Advocate General

(GCMO 175, 8 October 1948).

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

JAGN-CM 331556

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

HEADQUARTERS FORT ORD

v.)

Trial by G.C.M., convened at
 Fort Ord, California, 8 June
 1948. Dishonorable discharge
 and confinement for one (1)
 year. Disciplinary Barracks.

Private MICHAEL J. DIGGINS)
 (16279583), Company D, 12th)
 Infantry Regiment, Fort Ord,)
 California.)

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Michael J. Diggins, Company "D", 12th Infantry Regiment did, at Fort Ord, California on or about 26 April 1948 commit the crime of sodomy by feloniously and against the order of nature having carnal connection, per anum with Private Donald E. Johnson.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution consisted only of the

uncontroverted testimony of Private First Class Donald E. Johnson. Private Johnson testified that he was in the Post Stockade on the 26th of April and that one of the prisoners approached his bunk saying "go take a shower kid." He entered the shower and was told to "lay down in the corner" whereupon the act of sodomy was committed upon him by three prisoners including the accused. He states further that he was an unwilling party to the act (R. 8). He was not threatened but was afraid (R. 11).

The accused testified in his own behalf and stated that on the day the act is alleged to have been committed he went into the shower room and saw "Johnson and two other boys in the shower room" (R. 12, 13) but he was not present when the offense was committed (R. 14). The defense rested with that testimony but the court recalled Private Johnson who testified that only after the completion of the act had the three prisoners threatened him (R. 15) and that he did not protest because he was afraid (R. 16). The court conducted a lengthy re-examination of the witness (R. 14-23) and then called Captain Edward J. Clawson, Police and Prison Officer of the stockade wherein the offense was committed. Captain Clawson testified that on 28 April a guard "came to me and said he suspicioned that something was happening within the stockade, and I asked him if he could identify the person. We went to the stockade and he identified Johnson at the time" (R. 24). He then said that the guard based his suspicion upon "talk among the prisoners" (R. 24, 25). The court then interrogated the witness as follows:

- "Q. What did you do with the witness Johnson after you took him into the office and talked with him the evening of the 28th?
- A. I removed him from the stockade.
- Q. On the evening of the 28th?
- A. That is when he disclosed what was happening to him by several prisoners in the stockade.
- Q. Did you have any difficulty withdrawing this information from Johnson? Did he immediately voluntarily give forth on occurrences or incidents which had happened?
- A. After some questioning, he gave forth the information. He stated later he was scared of the prisoners.
- Q. At that time did Johnson give you account of occurrence of this incident happening on only one evening, or only one occasion, or on numerous occasions on different evenings?
- A. Different evenings.
- Q. Did he inform you Captain as to why he hadn't previously reported this incident?

- A. He said he was afraid of the prisoners, afraid they would beat him up.
- Q. Captain you stated that the casual guard that reported this to you -- it was given by a casual guard, one of the guards that are detailed to you from the casual company? That guard was not a regular guard on duty?
- A. No, sir.
- Q. In your questioning of Johnson, did he or did he not mention any specific names?
- A. Yes, sir, he did.
- Q. Who were those people he mentioned?
- A. Louden, Berry, Hernandez, Copeland, Luna, Diggins, Woodward, and Valenzuela. (Reads from document in his possession.)
- Q. Is that the actual list of names?
- A. That is his sworn statement, I took from Private Johnson on that.
- Q. Does it include the name of Private Diggins on that statement?
- A. Yes, sir, it does.
- Q. Is there a special date on that sworn statement?
- A. No, sir" (R. 25-26).

Private Johnson was again recalled by the court and testified:

- "Q. What did you tell him?
- A. Just told him I was afraid of the boys in the stockade and wanted him to take me out of there and put me in the cage.
- Q. Did you tell him why you were afraid?
- A. No, sir, I did not.
- Q. How soon after you went into the guard house did you go to Captain Clawson?
- A. Approximately --soon, when I first went to the stockade.
- * * *
- Q. Private Johnson, were there any other witnesses at any of those occasions that didn't take part in the offenses?
- A. I don't know who they would be if there were, sir.

- Q. Did all of the offenses take place in the shower room?
A. No, sir.
- Q. Where were some of the others previously?
A. Cadre room, black box
- Q. That is right you did mention the black box in another instance. The incident that occurred in the cadre room, weren't there others present there that didn't take part?
A. Just one man" (R. 28, 29).

After Private Johnson was excused as a witness, the following occurred:

"The court was closed and upon being opened the president announced that the court would like to have the CID agents who investigated this case.

PRESIDENT: Court will recess for ten minutes.

The court then took a recess until 1123 hours at which time the membership of the court and the personnel of the prosecution and defense, and the accused and the reporter resumed their seats.

PRESIDENT: Court will come to order.

PROSECUTION: The CID agents requested by the court are not available at the present time. Agent Doty is on detail away from the post and will not be present until Thursday morning. Agent McAfee is on a thirty-day leave and will not be available until approximately 8 July and there is no one else at the office that has knowledge of this case.

PRESIDENT: Court will be closed" (R. 29-30),

whereupon the court voted in the usual manner and announced its findings and sentence.

4. It is clear that the court was confronted with a serious criminal charge, proof of which rested solely upon the veracity of the witness Johnson. Although his testimony was sufficient to establish a prima facie case against the accused the latter denied any knowledge of or connection with the alleged offense. Consideration

of the events disclosed in the record of trial as a whole clearly reveals that the members of the court had grave doubts and misgivings with respect to the testimony of Private Johnson. This is demonstrated by the fact that after both sides rested, on their own initiative they twice recalled him for extensive re-examination and called Captain Clawson as a witness for the court. The testimony of Captain Clawson, elicited by the court, was, of course, purely hearsay. The fact that the defense did not object to the admission of such testimony is immaterial, as a failure to object to the admission of hearsay evidence does not amount to a waiver thereof (par. 126c, MCM, 1928). With respect to the consideration to be given the acceptance of the incompetent hearsay evidence, it has been repeatedly held:

"The test of legal sufficiency to be applied in cases of admission of illegal evidence is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty (CM 127490 (1919; CM 130415 (1919); Dig. Op. JAG 1912-30, sec. 1284, p. 634; CM 211829 (1939), 10 BR 133, 137)" (CM 316780, Leech, 66 BR 46).

We are mindful of the rule that the Board of Review may not weigh the evidence, but must pass the record of trial as legally sufficient to support the sentence if it contains some substantial evidence of each element of the offense charged and if no error injuriously affecting the substantial rights of the accused was committed. But we cannot ignore the fact that the prosecution's case was bottomed solely upon the uncorroborated testimony of the party associated in the commission of the crime, whose testimony was unsupported by any other evidence, and that this fact caused the court to summon its own witnesses in order to determine the truth. It then clearly appears that the court accepted illegal evidence from its witness in order to arrive at a determination of guilt.

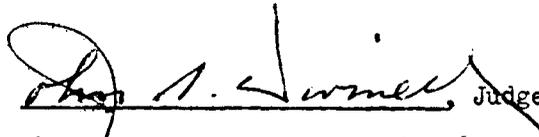
The very evident indecision of the court and the action taken following the testimony of Captain Clawson distinctly indicates that in the minds of the court members the legal evidence of record was insufficient to prove accused's guilt beyond a reasonable doubt. It is unquestionable that his hearsay testimony had a decisive effect upon their final decision.

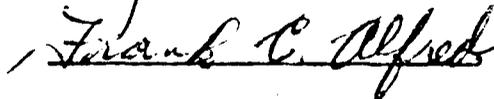
In arriving at our conclusion it is unnecessary to consider

whether Private Johnson was an accomplice or not. His testimony as an accomplice would, of course, be received with great caution (par. 124a, MCM, 1928; CM 210207, Kemerson, 8 BR 223, 224).

We are forced to conclude that the admission of the incompetent hearsay evidence constituted substantial error which cannot be considered as falling within the class of non-prejudicial error covered by the curative provisions of the 37th Article of War. Its reception must be held to vitiate the findings of guilty.

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.


John A. Linnell, Judge Advocate.


Frank C. Alfred, Judge Advocate.


George S. Spurgeon, Judge Advocate.

JUL 16 1948

JAGN-CM 331556 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Fort Ord, California.

1. In the case of Private Michael J. Diggins (16279583), Company D, 12th Infantry Regiment, Fort Ord, California, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated. Upon taking this action you will have authority to direct a rehearing.

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

(CM 331556).



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 331574

UNITED STATES)

RYUKYUS COMMAND

v.)

) Trial by G.C.M., convened at
) APO 331, 20 May 1948. Dis-
) honorable discharge and con-
) finement for one (1) year.
) PHILRYCOM Stockade.

) Private First Class ALFREDO
) V. LLOREN (10344094), Ser-
) vice Company, 44th Infantry
) (PS), APO 331.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Alfredo V. Lloren, Service Company, 44th Infantry (Philippine Scouts) did, at Camp Nupunja, Okinawa, on or about 2250 hours, 17 April 1948, with intent to do him bodily harm, commit an assault upon Private First Class Esteban Villagracia, by cutting him on the back, with a dangerous weapon, to wit, a pocket knife.

He pleaded not guilty to the Specification and the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence but remitted one year of the confinement, designated the General Prisoner Branch, 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 evidence for the prosecution establishes that about 2250 hours, 17 April 1948, during an altercation and fist fight between Private Esteban Villagracia and the accused, Villagracia was knifed by the accused. There was some conflict in the evidence on whether the victim had provoked the assault by throwing a stone at the accused.

The prosecution called as a witness Captain Ray A. Stieff, the accused's company commander. Captain Stieff testified that on the night of the incident he was summoned to the company area and investigated the circumstances and questioned members of his company. As a result of a search of the place where the fight occurred he discovered a blood stained jack knife lying on the ground. He marked the knife with "two scratches," identified it in court and it was received in evidence (R. 18, 19). He then testified as follows:

"Q. When you were investigating this case, did you interrogate Lloren?

A. I did.

Q. Before doing so, did you explain his rights to him under the 24th Article of War?

A. I did, Sir.

Q. Will you tell the court as closely as you can the exact language you used?

A. I explained to Lloren that under the 24th Article of War he did not have to answer any of my questions or make any statement to me whatsoever if he did not desire to do so. That he did not have to make any statements or answer any questions that may incriminate him in any way and that he did not have to make any statement, written or otherwise, unless it was of his own free will.

Q. Did the accused understand this?

A. He did.

Q. Did he make any statement?

A. He did.

* * *

EXAMINATION BY THE COURT

Q. Where were you and where was the accused when you made this investigation?

A. He was in the RYKOM Stockade at the time I made this investigation.

- Q. What sort of a place did you talk to him in?
 A. I talked to him in the visitor's room in the RYKOM Stockade. It is a small room about this size (indicating with hands).

* * *

RE-CROSS EXAMINATION

Questions by defense

- Q. What was the date that you had this conference with the accused - the day after the incident, the 18th?
 A. No, Sir. I had two conversations with him. The first conversation took place either two or three days after the incident and the second conversation took place, roughly speaking, either from one week to ten days from the time the investigation was made.

DEFENSE: The defense renews its objection, citing the fact that it is remote.

LAW MEMBER: Was this statement made by Lloren after a long period of grilling or was it just shortly after you had interviewed him?

- A. It was made very shortly after I arrived and started in the grilling.

* * *

- Q. Will you tell the court what statement Lloren made to you in regard to this incident?
 A. Lloren stated to me in regard to this incident that when he came back to his quarters he went into his barracks with a couple other of his companions and Lloren was causing considerable noise and commotion. Sergeant Bascos, who is a member of the barracks, asked him to be quiet and Villagracia, the man who was stabbed, also told him to be quiet and asked if he didn't have any consideration for him. There was various words exchanged according to his statement and then they proceeded outside, at which time Lloren stated that Villagracia threw a rock at him, which hit him, and then they got into a close tussle, at which time Lloren had a knife in his hand and at which time he slashed Villagracia in the back. He stated that he opened the knife to threaten Villagracia and when they closed together he used it in a moment of anger.

Q. Did you exhibit to him this knife that you found at the scene of the crime?

A. No, Sir, I did not.

Q. Then he might have stabbed Villagracia in a moment of anger?

A. He did not.

Q. Did you reduce the statement to writing?

A. I did not.

Q. Why not?

A. I refused to take a written statement from him for the reason I was in a case being investigated for general court. I was assistant defense counsel and I advised him it would be better for him not to make any written statements.

* * *

EXAMINATION BY THE COURT

Q. You say you investigated the case about three or four days after and a week to ten days later. Were you appointed by special orders to make the investigation?

A. No, sir, I was not. I went down to the stockade about two days after the incident.

Q. This was just your own investigation as Commanding Officer?

A. Yes, Sir, that was my investigation prior to making out the charge sheet. I made that investigation and then I was present at the investigation made by the investigating officer" (R. 20, 21, 22-23).

4. The question presented for consideration is the prejudicial effect, if any, of the testimony of Captain Stieff pertaining to accused's oral confession in the light of his statement as to the capacity in which he was acting at the time of his investigation. Although the record does not clearly show on what date the confession was obtained nevertheless Captain Stieff conducted his investigation about "two days after the incident" and again about "a week to ten days later" (R. 22). The alleged incident occurred on 17 April 1948 and on 26 April 1948 the order convening the court which tried accused designated Captain Stieff as assistant defense counsel. He did not participate in the trial but was excused to testify for the prosecution.

5. The great weight of judicial authority, founded upon reasons of public policy, has determined the settled doctrine to be that an

inviolable privilege attaches to communications between attorney and client. It is a matter of common knowledge that in criminal cases a court is empowered to assign counsel to the accused. We may reasonably assume that every soldier is cognizant of the established policy of appointment of counsel for the defense. Here, it appears, an officer had approached an accused soldier in the role of advisor and thus obtained his confidence. To thereafter deny an implied relationship of attorney and client permits a destruction of a delicate and sacred relationship which the courts have zealously guarded since the 16th Century. Wigmore says that the history of the privileged communication between attorney and client "goes back to the reign of Elizabeth, where it already appears as unquestioned" (Wigmore on Evidence, Vol. V, 2nd Ed., Sec. 2290). Nor do we feel that the soldier is charged with a special scrutiny of the power and authority of his counselor. In this connection Wigmore points out:

"The theory of the privilege clearly requires that the client's 'bona fide' belief in the status of his adviser as an admitted attorney should entitle him to the privilege. No doubt an intention to employ only such a person is necessary, as well as a respectable degree of precaution in seeking one; but from that point onwards he is entitled to peace of mind, and need not take the risk of a deception, or of a defective professional title" (Wigmore on Evidence, Vol. V, 2nd Ed., Sec. 2302, p. 40).

Authoritative discussion of various aspects of the rule indicate that:

"An inference of professional employment is justly drawn from the fact that prior and subsequent to the transaction the parties consulted professionally; and the communication is privileged, even though counsel regarded it as a matter stated in a mere casual conversation" (Wharton's Criminal Evidence, Vol. 3, Sec. 1229, p. 2089); and

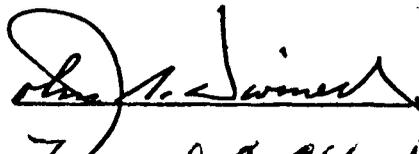
" * * * a communication to an attorney made under the impression that he had consented to act as the attorney of a party has been declared to be privileged, even though the attorney himself may not have so understood the agreement" (Ruling Case Law, Vol. 28, Sec. 144, p. 554); and

"The modern tendency of the courts is to give the rule its fullest possible application, and to apply

it in both civil and criminal proceedings, not only to oral or written communications passing between attorney and client, but to all information which is acquired by the former because of the existence of the professional relation. It matters not whether the information has been derived from the client's words, actions, or personal appearance" (Underhill's Criminal Evidence, 4th Ed., Sec. 333, p. 635).

6. The Board of Review deems it unnecessary to enter into refinements of the language used by Captain Stieff, but construes it to be an unequivocal statement describing his status as "defense counsel" and as advisor to the accused. His testimony that he "was assistant defense counsel and I advised him it would be better for him not to make any written statements," seems to preclude any doubt on the point. We are confronted with the unqualified statement of the witness that he "advised" the accused. If doubt existed that this created a confidential relationship in view of the foregoing principles of law the benefit of any such doubt would be resolved in favor of the accused. The witness testified to a complete confession by the accused and since it was a confidential communication between attorney and client it was erroneously received in evidence and prejudiced the substantial rights of the accused, incapable of being remedied by the curative provisions of Article of War 37.

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

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

(67)

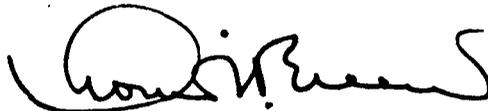
JUL 16 1948

JAGN-CM 331574 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 Alfredo V. Lloren (10344094), Service Company, 44th Infantry (PS), APO 331, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated. Upon taking this action you will have authority to direct a rehearing.

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

(CM 331574).



THOMAS H. GREEN
Major General
The Judge Advocate General
RYKOK

1 Incl
R/T

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

JAGN-CM 331592

UNITED STATES)

6TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at
APO 6, 22 April 1948. Magnus: ^

Privates First Class BOBBY)
G. COPELAND (18296757), and)
DONALD F. MAGNUS (15255097),)
both of 6th Signal Company,)
APO 6.)

Acquitted. Copeland: Dis-
honorable discharge and confine-
ment for three (3) years. Dis-
ciplinary Barracks.

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

1. The record of trial in the case of accused Copeland has been examined by the Board of Review. Accused Magnus, tried in a common trial with accused Copeland, was acquitted.

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

CHARGE I: Violation of the 86th Article of War.

Specification: In that Private First Class Bobby G. Copeland, 6th Signal Company, APO 6, being on Guard and posted as a sentinel at APO 6, on or about 31 March 1948, did leave his post before he was regularly relieved.

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

Specification: In that Private First Class Bobby G. Copeland, 6th Signal Company, APO 6, did at APO 6, in the vicinity of Pusan, Korea on or about 31 March 1948, unlawfully kill four human beings, names unknown, by knowingly pouring an inflammable liquid, to wit, gasoline, on a fire in a building, then occupied by the above four human beings whose names are undetermined.

He pleaded not guilty to the Charges 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 three years. There was no evidence of previous convictions. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence fully establishes the guilt of accused for the offense of leaving his post as a sentinel, under Article of War 86, hence the evidence hereafter summarized is limited to the offense of manslaughter charged under Article of War 93. Accused, while on guard duty as a member of the 6th Signal Company, APO 6, on 30 March 1948, after midnight entered the Construction Building on the post where about fifty men were quartered in barracks (R. 14, 28). In the Construction Building office there was an M-1943 wood stove (R. 16). Accused poured gasoline on the coal in the stove, some of which ran down the front of the stove and on the floor (R. 39; Pros. Ex. 1). While the facts are not clear on this point it appears that either accused or Private First Class Donald F. Magnus lighted the gas, the gas fumes exploded, the building caught fire and the fire consumed the building. The following day the remains of four human bodies were recovered from the area where the burning building stood (R. 19, 20).

4. The accused was arraigned upon a specification alleging that he did "unlawfully kill four human beings, names unknown, by knowingly pouring an inflammable liquid, to wit, gasoline, on a fire in a building, then occupied by the above four human beings whose names are undetermined." We are faced with the problem of ascertaining whether an offense has been alleged and whether, in the record of trial, competent proof may be found of all of the essential elements of the offense charged in order to sustain a conviction, whether it be for manslaughter or for negligent homicide. The specification is unique in that it charges the unlawful killing of four human beings without identifying them by name or description. Examination of both federal and state cases discloses that while an indictment may be properly framed to charge the unlawful killing of an unknown person (see Isaacs v. United States, 159 U.S. 487; Brooks v. State, 56 S.W. 924), it is the uniform practice to assure identity of the deceased through appropriate terms of description. It is well settled that "a man's name is part of the description by which he is identified and if known * * * it must be given in the indictment" (Reese v. State, 8 So. 818, 820).

It is obvious that in order to sustain a finding of homicide it must appear that the injury was inflicted upon a living person; no injury to a corpse can be homicide (Jackson v. Commonwealth, 38 S.W. 422;

100 Ky. 239; 66 ASR 336), and Boards of Review, as stated in CM 316930, Mitchell, 66 BR 117, 118, have consistently held:

"In cases involving homicide, the identity of the deceased with the person alleged to have been killed in the specification and with the person shown to have been assaulted by accused must be fully established (CM 262359, Turner, 6 BR 87, 122; CM ETO 17663, Taylor, CM CBI 49, Coe)."

We thus conclude that identity of name, where established, is sufficient, but where identity of person is relied upon (as it must be when the charge is the unlawful killing of an unknown person) such identity of person must be supported by appropriate description in the specification of the charge and corresponding proof in the record of trial. It is simply a question of identity and the essential requirement is conformation of the proof and the offense described in the pleading in order to inform the accused of the offense with which he is charged and to protect him from another prosecution for the same offense (Compare Brooks v. State, supra). This record of trial contains no description of the alleged deceased persons in the specification or evidence, nor does it appear in the record that there ever was life in the remains of the bodies found in the debris. It does not even appear that any of the troops quartered in the building were missing after the fire, a fact easily ascertainable on an Army post. We are left to speculate on all of these essential matters. The record is barren of proof except that through a negligent act of accused a building was burned and four human remains were thereafter found in the ruins. It is impossible to sustain a charge of homicide on such a paucity of proof.

The meagre facts established by the evidence might be said to raise a suspicion that accused was guilty of killing four unknown persons, but mere conjecture or suspicion are insufficient and offer no substitute for the established requirements of legal proof (CM 330193, Jeffcoat, (1948); CM 322600, Short et al, 71 BR 293; CM 208895, Zerkel, 9 BR 62).

The record of trial contains other errors such as the erroneous ruling of the law member (R. 52) that "each statement will be accepted as evidence and given such weight as the court may wish to give it" and the erroneous admission of Prosecution Exhibits 5 and 6. In the first instance the statements of the two accused were not admissible as against each other (par. 114c, MCM, 1928), and in the second case Prosecution Exhibit 5 was unsworn, and a simple reading of Prosecution 6 discloses the use of highly improper methods in obtaining such statement. Both should have been excluded. In view of the holding of the Board it is not deemed necessary to determine whether such errors in themselves constitute fatal error.

5. The maximum penalty imposable for the offense of leaving his post as a sentinel, of which accused was found guilty, and which is sustained by the evidence of record, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

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

John S. James, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springston, Judge Advocate.

JUL 20 1948

JAGN-CM 331592 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 6th Infantry Division, APO 6, c/o Post-
master, San Francisco, California.

1. In the case of Privates First Class Bobby G. Copeland (18296757) and Donald F. Magnus (15255097), both of 6th Signal Company, APO 6, I concur in the foregoing holding by the Board of Review and recommend that as to accused Copeland the findings of guilty of Charge II and its Specification be disapproved and that as to the accused Copeland only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. Upon taking such action you will have authority to order the execution of the sentence as to accused Copeland.

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 331592).

1 Incl
Record of trial



THOMAS H. GREEN
Major General
The Judge Advocate General



Chong Yang Ni, Korea, and Chun Chon, Korea, on or about 3 March 1948, with intent to do him bodily harm, commit an assault upon Kang Hyeng Sik, by willfully and feloniously throwing him off a moving train.

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

Specification: In that Private First Class James H Brill, Headquarters Company, 1st Battalion, 31st Infantry Regiment, and Private First Class Kelly Brown, Headquarters Company, 1st Battalion, 31st Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Pal Mi Ree, Korea, on or about 3 March 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Kim, Kyung Sun, a human being by throwing him off a moving train.

Each accused pleaded not guilty to all Charges and Specifications. The accused Brill was found guilty of all Charges and Specifications except the Specification of Charge I of which he was found guilty except the words "and Private First Class Kelly Brown, Headquarters Company, 1st Battalion, 31st Infantry Regiment acting jointly and in pursuance of a common intent" of which excepted words he was found not guilty. The accused Brown was found guilty of all Charges and Specifications except Charge I and the Specification of Charge I, each of which he was found not guilty. No evidence of previous convictions was introduced as to accused Brill. Evidence of one previous conviction by summary court-martial was introduced as to accused Brown. The accused Brill was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The accused Brown was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, or such other place as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence for the prosecution is summarized as follows:

On 3 March 1948, accused, Privates First Class Brill and Brown, both of Headquarters Company, 1st Battalion, 31st Infantry Regiment, were assigned to duty as train guards on a freight car loaded with lumber scheduled to be moved from Camp Sobinggo, Seoul, Korea, to Chun Chon, Korea (R 89, Pros Exs 10,12). After drawing rations, they boarded the train (Pros Exs 10,12). When the train arrived at

Chong Yang Ni, Brill called Kim Kyung Sun and Kang Hyeng Sik, two Korean boys, who were playing near by and asked them to get on the car (R 7,14,17). Kim was fifteen years of age by Korean computation and Kang was approximately the same age (R 17,29). After Kim and Kang got on the freight car, the accused Brown appeared (R 8). Both Brill and Brown offered the boys food and drink, which they accepted (R 8,14). As the train began to move out of the Chong Yang Ni station, Kang and Kim asked accused where the car was going (R 8), to which they replied, "It doesn't go any place" (R 8). As the train moved along, the Koreans stated in very definite terms that they wanted to get off the train, whereupon the accused told them that they could get off at the next station (R 9). Upon arrival at the next station, however, the accused refused to let the boys leave the freight car (R 9,17) and promised them that if they would go to Chun Chon, the train's destination, they would give them food and a ticket to return to Seoul, Korea (R 9).

Brown, by gestures, showed Kang that he desired to have Kang perform an act of sodomy per os on him, but Kang refused (R 10,11). Brill attempted to compel Kim to commit an act of sodomy per os on him, but Kim refused (R 10,11). Brown, with Brill standing by, threatened the Koreans with a carbine, in order to compel them to perform the act of sodomy upon them, but to no avail (R 10,18). Brown continued to attempt an act of sodomy upon Kang, but apparently the act was not consummated (R 10,11,16). Brown then grabbed Kang by the neck and proceeded to choke him (R 10). At the same time Kang saw Brill choking Kim (R 17,18). Kang pretended to be unconscious or "dead" as Brill looked at him with a flashlight. Brill grasped Kang by the hands and Brown grasped his feet and, as the train was moving between Chong Yang Ni and Chun Chon, they threw Kang from the freight car (R 10,11,17).

Fortunately, the injuries Kang received as a result of the fall were minor, and he proceeded to the next railroad station, where he informed the stationmaster and a Korean Constabulary guard of his experience (R 12). Kang stayed there overnight and the next morning he and the Constabulary guard rode a train towards Chun Chon (R 12). As they proceeded they observed a body at the bottom of a steep embankment adjacent to the railroad tracks, and after stopping the train, got off and observed the body (R 12). Kang identified it as the body of Kim Kyung Sun (R 12,13). Kang then proceeded to Chun Chon and there identified Brill and Brown as the two soldiers who were on the freight car with him and Kim when the acts heretofore related occurred (R 16,17,18).

On the afternoon of 4 March 1948, 1st Lieutenant George A. Roberts, MC, viewed the body of Kim, where it was lying face down in a shallow ditch at the base of a steep incline below and parallel to the railroad tracks south of Chun Chon (R 21,22). Pictures were taken of the body (R 24,25; Pros Exs 2,3,4,5,6). The body was fully clothed and a small laceration over the left eye was clearly visible (R 22). Lieutenant

Roberts pronounced the boy dead and had the body removed to the 2nd Battalion area, Camp Chun Chon, Korea (R 23). The following day the body was taken to the 34th General Hospital for an autopsy (R 22).

Pictures of deceased (Prosecution's Exhibits 2,3,4,5 and 6) were identified by Kang as those of Kim (R 13). On 5 March 1948 Kim Sun In, the father of Kim Kyung Sun, identified the body as that of his son and claimed it for burial (R 28,29).

Captain Ernest B. Mullinaux, MC, performed an autopsy on Kim Kyung Sun (R 30). The autopsy report was admitted in evidence as Prosecution Exhibit 11, without objection by the defense (R 32). Captain Mullinaux testified that his examination of Kim's body revealed that he was a Korean male of approximately thirteen to fifteen years of age; that he had received an injury which caused a laceration over the left eye and several hemorrhages deep in the scalp, the most lethal hemorrhage being in one portion of the scalp called the medulla, which governs the heart action and respiration (R 31). Captain Mullinaux also testified that the cause of death was asphyxia, resulting from the hemorrhage to this portion of Kim's head (R 31). When Kim's clothes were removed, a wide area of abrasion, or "brush burn," on his chest, extending far down on his stomach, was revealed (R 31). The deep laceration over Kim's left eye contained a quantity of dirt and gravel and there were several minor bruises on his body (R 32). There was no evidence that Kim had been submersed in water (R 32), and there was no evidence of mechanical strangulation on Kim's neck (R 33). Captain Mullinaux stated that in his opinion Kim was still alive when thrown from the train and that he died as a result of the injury or blow to his head, resulting in a hemorrhage to the medulla portion of his scalp (R 33,34).

Accused Brown was questioned by Agent Hass, in the presence of others, on 5, 9 and 12 March. Hass testified that on each of these occasions he informed Brown of his rights under the 5th Amendment to the Constitution of the United States and the 24th Article of War (R 34, 35,38,39,47,48,49,50). Agent Hass specifically informed Brown that if he made a statement it could be used against him in court (R 51,52) and that if he was convicted of murder under the 92d Article of War as a result of the statement, the verdict would be either a life sentence or execution (R 52). The accused Brown took the stand as a witness, after being properly informed as to his rights as a witness, to refute the fact that he had made the statement voluntarily (R 40). He testified that Agent Hass told him that he was not trying to convict him but to help him; that Agent Hass warned him of his rights under the 24th Article of War just before making his statement, but not prior to that time. He further testified that Agent Hass told him that if he told the truth he would "get off a lot easier" and that if he lied Hass would "get" him for perjury (R 42,43). Brown stated that he believed perjury meant

lying and that it did not include the taking of the oath in connection with the telling of a lie (R 45). Brown testified that on 12 March Agent Hass told him that Brill had admitted everything and stated that Brown might as well do the same (R 45). Agent Hass was recalled to the stand as a witness after Brown, and denied making any promises or threats to Brown (R 47, et seq). The two statements made by Brown on 9 March and 12 March were admitted by the court as Prosecution Exhibits 10 and 12, over objection by the defense.

In his pretrial statements Brown states that on 3 March 1948 he was present and awake during most of the time Kim and Kang were in the freight car. Brown identified Kang and the photographs of Kim as the two Korean boys who rode on the train with him and Brill, and upon further questioning stated as follows:

"Q. Now, after you left this station, what took place? Tell us the whole story?

A. Well, sir, when it started getting dark, BRILL said he was going to throw the little boys off the train, and I told him not to throw them off because he could not beat the law. While I was up at one end of the car, he threw one of them off the car, and then, later on, he threw the other one off. That is all there was to it. He threw them off, and we went on up to Chun Chon.

Q. Why did BRILL want to throw the boys off?

A. I don't know, sir, unless he had a personal grudge against the Koreans. They attacked him one time while he was on guard.

Q. Which boy did he throw off first, the little one who is still alive?

A. Yes, the one who is still alive.

Q. Do you recall between which stations the boys were thrown off?

A. No, sir, but it was only 3 or 4 minutes after he threw the first one off that he threw the second one off.

Q. Was the train in motion when he threw the first boy off?

A. Yes, sir.

Q. Was the train in motion when he threw the second boy off?

A. Yes, sir." (Pros Ex 12)

On 9 March Agent Hass obtained a statement from accused Brill, after having questioned him once or twice before that date (R 56,58). Agent Hass carefully read and explained the meaning of the 24th Article of War

to Brill and Brill's answers to questions were coherent and logical (R 58,59). At no time did Agent Hass question Brill alone (R 58), and the statement which Brill made on 9 March was completely voluntary and influenced by no promises or threats of any kind (R 58,59,61,62). Agent Hass told Brill that anything he might say could be used against him (R 62). After his statement had been reduced to writing Brill read it slowly, asked no questions relative thereto, and after being sworn, signed it (R 62). In order to refute Agent Hass's testimony that the statement he made was voluntary, Brill took the stand as a witness (R 63) and stated that he had told Agent Hass that he did not desire to make a statement until he had seen a lawyer (R 64); that Hass took off his coat, rolled up his sleeves, and called him a "yellow young one" and said that he would punch Brill in the nose (R 64); that Hass said that he would see that leniency was granted "when the report went to Washington" (R 66). The defense then called Kang Hyen, a Korean interpreter who was present during the interrogation and the taking of Brill's confession, who stated that he did not see Hass remove his coat or threaten Brill (R 68,69,70). Agent Hass was then recalled to the witness stand and he testified that Brill had not requested a lawyer (R 70,72); that Hass did not threaten Brill, call him names, or take his coat off at any time Brill was in his presence (R 70,71,72); and that there were witnesses present on each occasion that he and Brill were together (R 72). Brill's confession was then admitted as Prosecution's Exhibit 13, over objection by defense (R 87).

He stated in substance that on 3 March 1948, he and Brown, as train guards, boarded a freight car at Sobinggo siding, Seoul, Korea, and at the first stop Kim and Kang boarded the car. He further stated that Kang committed an act of sodomy on him and he pushed Kang off the moving train. He also stated that he (Brill) threw Kim off the train.

4. For the defense.

The accused Brown, after explanation of his rights as a witness in his own behalf, elected to testify under oath (R 88). He stated that he was assigned as a train guard on a freight car, loaded with lumber, which was leaving from Camp Sobinggo, Seoul, Korea (R 89); that at a station, the name of which he did not remember, two Korean boys got on the car (R 90). He stated that as soon as the Korean boys entered the car he went to sleep and slept continuously, except for once or twice when he woke up for an instant, until the train reached Chun Chon. During the remainder of the trip he did not see the Korean boys again. He denied having thrown either of them off the train, or assisting or seeing anyone do so. He denied striking or "laying a hand" on the Korean boys (R 91).

The defense presented several witnesses who stated that Brill could read and write very little (R 78,80,84). Agent Hass was called as a

witness for the defense and stated that Brill read his pretrial statement and was asked if he had read and understood it, to which he replied, "Yes"; that in the presence of Captain Harry J. White, Brill was again asked if he had read and understood the statement, to which he replied again in the affirmative; and that he was then sworn by Captain White, and signed the statement (R 86).

The court explained to the accused Brill his rights as a witness and he elected to remain silent.

5. Discussion.

a. Specification, Charge I.

Both accused were jointly charged with wrongfully and unlawfully enticing and taking two Koreans on board a train for the purpose and with the intent of committing sodomy thereon. The accused Brown was found not guilty of this specification. The evidence established that the alleged victims were called by Brill and asked to get on board the train, which they did. There is evidence that Brill subsequently solicited Kim Kyung Sun to commit sodomy but Kim refused, and also evidence that Kang Hyeng Sik was compelled to commit an act of sodomy on Brill. It can be presumed from such facts that the victims were enticed on board the train for such purpose. Wrongfully taking or enticing the minors on board a train for the purpose of committing sodomy is an offense under Article of War 96 (CM 273879; Simpson, 47 BR 99,109).

b. Specification 2, Charge II (Assault with intent to do bodily harm).

The evidence was sufficient to sustain the findings of guilty as to both accused on this specification. It was established by the testimony of prosecution witness, Kang Hyeng Sik, that at the time and place alleged accused Brill grasped him by the hands and that accused Brown grasped his feet and threw him from the moving train to the ground. Accused Brown denied any part in the transaction. Accused Brill in his pretrial statement stated that he shoved Kang Hyeng Sik off the train with one hand and the butt of his rifle. He also stated that accused Brown was asleep and did not participate in the act. Such statement is not evidence for or against accused Brown (22 CJS 1333). It was for the court to determine the credibility of the witnesses and the weight of the evidence and it chose to believe the testimony of Kang Hyeng Sik.

The intent to commit bodily harm can be inferred from the manner in which the act was committed and the willful and wanton nature of the act. Bodily harm could well be anticipated and the fact that through no fault of accused serious bodily harm did not actually result will not

negative the implied intent. The evidence did establish that the wrist of the victim was injured.

It is noted that the name of the victim is alleged as Kang Hyeng Sik in Specification 2 of Charge II, and as Kang Hyun Sik in the Specification of Charge I. The evidence establishes his correct name as Kang Hyeng Sik (R 7). The variance is immaterial and accused was not misled thereby. There was no objection by accused to such misnomer. The doctrine of idem sonans is applicable (Sec 1047, p.1842, Wharton's Criminal Evidence, 11th Ed).

c. Specification, Charge III (Murder).

With respect to this specification the evidence introduced is insufficient to sustain the finding of guilty as to accused Brown but is legally sufficient to sustain the findings of guilty as to accused Brill.

It was established by prosecution witnesses that deceased, Kim Kyung Sun, was on the train during the night in question. His dead body was subsequently found on the side of the railroad track at about the place where accused Brill stated he threw him from the train. That the victim was thrown from the train by Brill was established only by the pretrial statement of accused Brill that he threw Kim Kyung Sun off the moving train. In this statement he says that accused Brown was asleep at the time. Pretrial statements made by Brown were not admissible to establish the guilt of Brill, nor were the pretrial statements of Brill admissible to establish the guilt of Brown. In his pretrial statements and on the witness stand accused Brown denied taking any part in the offense but did state that the victim was on board the train.

The fact that Brown may have been present at the scene, during the course of the official performance of his duties, is not sufficient to establish that he was a principal in the commission of the offense (CM 238485, Rideau, 24 BR 263, 272, 273). There is no specific evidence that he aided or abetted in the commission of the offense alleged in this specification. He testified that he was sleeping at the time. True he aided in throwing the other victim from the train but unlike the case of CM 268994, Fowler, 4 BR (ETO) 337, 3 Bull JAG 284, or CM 273817, Johnson, 6 BR (ETO) 291, there was no pre-conceived plan with reference to the deceased victim in which accused Brown participated. The homicide was not committed by Brill pursuant to a common purpose or as a natural or probable consequence thereof. Official duty required Brown to be on the car. He was found not guilty of taking the victim on the train. Although not evidence against this accused, it is to be noted that Brill exonerated Brown in his pretrial statement. Such facts do not warrant a finding that Brown participated

in, or was guilty of, the homicide (1 Bull JAG 24, CM 221019, Goodman, 49 BR 123; CM 283439, Davis, 12 BR (ETO) 239,252-256).

The act of accused Brill in pushing deceased from the moving train was willful and deliberate from which legal malice can be inferred. Accused Brill must have been aware that great bodily injury or death might result. Although the deceased may have been on the train without proper military authority, he had been invited by accused Brill to come on the train and there was no legal justification for ejecting him from the train in the manner in which it was done.

Even if it be assumed that the deceased were a trespasser the willful or wanton act of pushing him from the moving train was not justifiable (CM 255162, Lucero, 34 BR 47,52). Trespassing on property, though wrongful, is not sufficient provocation to justify a homicide and to reduce it to voluntary manslaughter (Sec 426, p.663, Sec 822, p.1113, Sec 638, p.873, Wharton's Criminal Law, 12th Ed).

Malice aforethought exists when there is knowledge that the act which causes death will probably cause death of or grievous bodily harm to the victim, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not. (Par 148, MCM 1928; Sec 440, p.676, Wharton's Criminal Law, 12th Ed). The deliberate, premeditated eviction of Kim Kyung Sun from a moving train onto rugged terrain was an act which possesses inherently the elements of criminality necessary to sustain the murder charge (CM 273817, Johnson, 6 BR (ETO) 291,296).

The cause of death was established by medical testimony as follows:

"The body was that of a young Korean male whom I judged to be about 13 to 15 years of age. It had apparently received some sort of injury or blow which caused a laceration over the left eye and a hemorrhage deep in the scalp.

"There was no fracture of the skull, but there was a hemorrhage, a very fine diffuse type, over the left frontal portion of the brain as well as deep within the left hemisphere of the brain. However, the most lethal hemorrhage was in one portion called the medulla, which governs the heart action and respiration.

"Of the latter hemorrhages there were three. The most lethal, perhaps, was in the area of the respiratory center and definitely contributed to death. This was identified by gross inspection and also under the microscope.

"These things were grossly visible and in addition were ascertained when studied under a microscope in the slides prepared

of all of these regions. Hemorrhages, very fine, petechial, hemorrhages, were apparent throughout both hemispheres of the brain, and there were many numerous hemorrhages in the medulla.

"Now those are anatomical injuries. Of those, those of the medulla would lead to cessation of heart action and respiration. Therefore, from a physiological angle, such a man dies from asphyxia, which were our findings in this case." (R 31)

The medical officer did not testify that the trauma sustained by accused could have been caused by being thrown to the ground from a moving train, nor was there evidence that the trauma causing death was sustained by the deceased at the time he was thrown from the train. It is not believed that medical testimony was necessary to establish that this trauma could have been caused by the fall since the court can find that a trauma to the head such as testified to by the medical witness was a natural and probable consequence of being thrown from the train, without resort to expert testimony. The cause of the death through the acts of accused may be shown by circumstantial evidence.

"The general rule in homicide is that the criminal agency - the cause of death, the second element of the corpus delicti, - may always be shown by circumstantial evidence. Criminal agency is sufficiently shown where a dead body is found with injuries apparently sufficient to cause death, under circumstances which exclude inference of accident or suicide; or in such a place as it could not probably get without human agency; - -." (Sec 872, Wharton Cr. Ev. 11th Ed.)

The victim was apparently in good health when he boarded the train and the injuries in question, according to the medical officer, were such as to indicate they were caused by contact with the ground. While it is possible that the victim may have sustained these fatal injuries from other causes after being thrown from the train such conclusion is not probable. Kang Hyeng Sik was thrown from the train at about 7:30 p.m. Kim Kyung Sun was thrown from the train at approximately the same time. His body was found the next day at about 10:00 a.m. by the side of the tracks near the place it was thrown off. Medical testimony indicates death was almost simultaneous to the time the trauma was sustained. There is no evidence indicating how long deceased had been dead when his body was found but the evidence does show that it was "very stiff" when examined at about 3:00 p.m. of the same day. This would indicate that death occurred a number of hours earlier. These facts were sufficient to warrant the finding that the trauma causing death was sustained as a result of being pushed from the moving train.

An autopsy protocol on the body of "Kim Kyun Sun" was introduced in evidence by prosecution without objection by defense. This protocol was identified by the medical officer who made it. The medical officer who prepared the autopsy protocol also testified as to the cause of death. Certain parts of the autopsy protocol were inadmissible, viz, the statement as to the place and date of death, and that part of the clinical abstract which states deceased had reportedly been killed following an attack at the hands of military personnel after which he was thrown from a Korean train (CM 323197, Abney, 72 BR 149,158). This, however, does not constitute substantial error in view of all the evidence in the case.

Pretrial statement of accused Brill.

There was no error in admitting into evidence the pretrial statement of accused Brill (Pros Ex 13). Although this accused sought to establish that the statement was involuntary, his testimony was directly contradicted by prosecution witnesses. The court could determine the credibility of the witnesses. While defense introduced several witnesses to establish that Brill could not read, in order to show that he did not read the statement before he signed it, it appeared that the content of the statement was a transcript of answers given by accused in response to questions propounded. Even had accused not signed the statement such transcript of his oral statements would have been admissible.

"Prior to the trial accused made a statement to the officer who investigated the charges under Article of War 70. Some of the language was rephrased by the investigating officer. Prior to giving the statement, accused was warned of his rights. Article of War 24 and Article of War 70 were read to him by the investigating officer. The statement was recorded on a stenotype by Corporal Inga B. Anderson, WAC. He read the typewritten transcript prepared by her, made certain minor changes in the language, after which he stated that it was correct. He declined to sign the statement, until it had been discussed with his civilian counsel. It was never signed. The lack of a signature is immaterial, since a confession may be either oral or written. The vital question presented to the court was whether the confession was voluntary, and whether the transcript accurately recited the substance of accused's statement. Whether the transcript was the statement of the accused is a question of probity. Whether it was voluntary is a question of admissibility. A mixed question of law and fact was thereby presented." (CM 273879, Simpson, 47 BR 110)

Pretrial statement of accused Brown.

There was no error in admitting into evidence the pretrial statements (Pros Exs 10,12) of accused Brown. The voluntary nature of the statements

was contested and it was for the court to determine the credibility of the witnesses. In view of the fact that this accused gave sworn testimony substantially as set out in his pretrial statements, the rights of the accused could not have been prejudiced by the admission of such statements. It appears, however, from one of the pretrial statements (Pros Ex 12) that accused was asked if he had ever been tried by a military or civil court. He responded that he had been tried by two summary courts for being drunk and disorderly in barracks. It was error to admit this part of such statement into evidence. After the findings, there was evidence of one previous conviction (Pros Ex 14) which apparently was one of the trials referred to by accused in his statement. In view of all the circumstances, the error does not warrant a disapproval of the finding although it may warrant a reduction of the sentence.

6. The accused Brill is 20 years of age. He enlisted in the Army on 5 January 1945 and was separated on 17 December 1945. He reenlisted in the regular Army on 25 April 1946 for a period of three years. The review of the 7th Infantry Division Judge Advocate states: "His military record shows one AWOL for three days, * * otherwise, he has no record of previous convictions, and he appears to have no civilian police record." A report of psychiatric examination made 20 April 1948 indicates accused has an AGCT score of 91, a mental age of 12 years and 6 months and an ability to distinguish right from wrong. He was diagnosed as a pathological and anti-social personality, chronic, severe, manifested by refusal to accept responsibility for his own conduct, and an inability to experience any emotional pleasures in life except those which meet his own immediate personal satisfaction. The report of the investigating officer indicates he attended school for five years and that he completed an Army literacy school in 1947 at XXIV Corps University, Seoul, Korea.

Accused Brown is 22 years of age. He enlisted in the regular Army on 25 April 1946 for three years, at which time he had eleven months prior military service. There was evidence of one previous conviction by summary court-martial for being drunk and disorderly in quarters. A report of psychiatric examination made 21 April 1948 indicates accused has an IQ of 73, and a mental age of 10 years (borderline mental deficiency). He was diagnosed as a pathological and schizoid personality.

7. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors, except as herein noted, injuriously affecting the substantial rights of either accused were committed. In the opinion of the Board of Review, the record of trial is legally sufficient to support all findings of guilty except the words "and Private First Class Kelly Brown, Headquarters Company, 1st Battalion, 31st Infantry Regiment, acting jointly and in pursuance of a common intent," of the Specification of Charge III, legally sufficient to support the sentence as to accused Brill, and to warrant confirmation thereof;

legally sufficient to support only so much of the sentence as to accused Brown as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. A sentence to death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92 (Charge III and its Specification).

R. H. Weinstein, Judge Advocate

C. O. Waife, Judge Advocate

W. H. H. H., Judge Advocate
concurring as to Bill

JAGH CM 331601

1st Ind

JAGO, Department of the Army, Washington 25, D.C. 14 SEP 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Private First Class James H. Brill (RA 36931100), Headquarters Company, 1st Battalion, 31st Infantry Regiment, and Private First Class Kelly Brown (RA 38568847), Headquarters Company, 1st Battalion, 31st Infantry Regiment.

2. Upon joint trial by general court-martial of Privates First Class Brill and Brown, Brill was found guilty of wrongfully and unlawfully enticing and taking two minor Korean boys, Kang Hyeng Sik and Kim Kyung Sun, on board a train with intent to commit sodomy, in violation of the 96th Article of War; of committing an assault with intent to do him bodily harm upon Kang Hyeng Sik by throwing him from a moving train, in violation of the 93d Article of War; and of the murder of Kim Kyung Sun by throwing him from a moving train, in violation of the 92d Article of War. He was sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. Brown was also found guilty of murder and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life.

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

The evidence shows that after enticing two Korean boys onto a train and after attempting to force them to commit sodomy on him, Brill threw both from the train while it was moving, and thus killed one of them. Although the evidence is clear that he threw the deceased from the train without provocation, there did not appear to be any specific purpose to kill. The other victim thrown from the train shortly prior to the time deceased was thrown was unharmed except for a slight wrist injury.

I recommend that the sentence as to Brill be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty-five years, that the sentence as thus commuted be carried into execution and that a United States penitentiary be designated as the place of confinement.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

- 3 Incls
- 1 Record of trial
- 2 Draft of letter for
sig S/A
- 3 Form of Executive action

(GCMO 179, 15 October 1948). As to Brill.

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

JAGH CM 331601

20 August 1948

U N I T E D S T A T E S	)	7TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at Seoul,
	)	Korea, 7,8 and 11 May 1948. Brill:
Private First Class JAMES H.	)	To be hanged by the neck until dead.
BRILL, RA 36931100, and Private	)	Brown: Dishonorable discharge and
First Class KELLY BROWN, RA	)	confinement for life. United States
38568847, both of Headquarters	)	Penitentiary, McNeil Island,
Company, 1st Battalion, 31st	)	Washington.
Infantry Regiment.)	

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

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

2. The accused, Private First Class Kelly Brown (RA 38568847), Headquarters Company, 1st Battalion, 31st Infantry Regiment, was tried jointly with Private First Class James H. Brill; (RA 36931100, Headquarters Company, 1st Battalion, 31st Infantry Regiment, upon the following Charges and Specifications:

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

Specification: (Finding of not guilty as to Brown).

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

Specification 1: (Nolle Prosequi)

Specification 2: In that Private First Class James H Brill, Headquarters Company, 1st Battalion, 31st Infantry Regiment, and Private First Class Kelly Brown, Headquarters Company, 1st Battalion, 31st Infantry Regiment, acting jointly and in pursuance of a common intent, did, between Chong Yang Ni, Korea, and Chun Chon, Korea, on or about 3 March 1948, with intent to do him bodily harm, commit an assault upon Kang Hyeng Sik, by willfully and feloniously throwing him off a moving train.

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

Specification: In that Private First Class James H. Brill, Headquarters Company, 1st Battalion, 31st Infantry Regiment,

and Private First Class Kelly Brown, Headquarters Company, 1st Battalion, 31st Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Pal Mi Ree, Korea, on or about 3 March 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Kim, Kyung Sun, a human being by throwing him off a moving train.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except Charge I and the Specification of Charge I, on each of which he was found not guilty. There was evidence of one previous conviction by summary court-martial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, or such other place as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Evidence for the prosecution is summarized as follows:

On 3 March 1948, accused, Privates First Class Brill and Brown, both of Headquarters Company, 1st Battalion, 31st Infantry Regiment, were assigned to duty as train guards on a freight car loaded with lumber scheduled to be moved from Camp Sobinggo, Seoul, Korea, to Chun Chon, Korea (R 89, Pros Exs 10,12). After drawing rations, they boarded the train (Pros Exs 10,12). When the train arrived at Chong Yang Ni, Brill called Kim Kyung Sun and Kang Hyeng Sik, two Korean boys, who were playing nearby and asked them to get on the car (R 7,14, 17). Kim was fifteen years of age by Korean computation and Kang was approximately the same age (R 17,29). After Kim and Kang got on the freight car, the accused Brown appeared (R 8). Both Brill and Brown offered the boys food and drink, which they accepted (R 8,14). As the train began to move out of the Chong Yang Ni station, Kang and Kim asked accused where the car was going (R 8), to which they replied, "It doesn't go any place" (R 8). As the train moved along, the Koreans stated in very definite terms that they wanted to get off the train, whereupon the accused told them that they could get off at the next station (R 9). Upon arrival at the next station, however, the accused refused to let the boys leave the freight car (R 9,17) and promised them that if they would go to Chun Chon, the train's destination, they would give them food and a ticket to return to Seoul, Korea (R 9).

Brown, by gestures, showed Kang that he desired to have Kang perform an act of sodomy per os on him, but Kang refused (R 10,11). Brill attempted to compel Kim to commit an act of sodomy per os on him, but Kim refused (R 10,11). Brown, with Brill standing by, threatened the

Koreans with a carbine, in order to compel them to perform the act of sodomy upon them, but to no avail (R 10,18). Brown continued to attempt an act of sodomy upon Kang, but apparently the act was not consummated (R 10,11,16). Brown then grabbed Kang by the neck and proceeded to choke him (R 10). At the same time Kang saw Brill choking Kim (R 17,18). Kang pretended to be unconscious or "dead" as Brill looked at him with a flashlight. Brill grasped Kang by the hands and Brown grasped his feet and, as the train was moving between Chong Yang Ni and Chun Chon, they threw Kang from the freight car (R 10,11,17).

Fortunately, the injuries Kang received as a result of the fall were minor, and he proceeded to the next railroad station, where he informed the stationmaster and a Korean Constabulary guard of his experience (R 12). Kang stayed there overnight and the next morning he and the Constabulary guard rode a train towards Chun Chon (R 12). As they proceeded they observed a body at the bottom of a steep embankment adjacent to the railroad tracks, and after stopping the train, got off and observed the body (R 12). Kang identified it as the body of Kim Kyung Sun (R 12,13). Kang then proceeded to Chun Chon and there identified Brill and Brown as the two soldiers who were on the freight car with him and Kim when the acts heretofore related occurred (R 16,17,18).

On the afternoon of 4 March 1948, 1st Lieutenant George A. Roberts, MC, viewed the body of Kim, where it was lying face down in a shallow ditch at the base of a steep incline below and parallel to the railroad tracks south of Chun Chon (R 21,22). Pictures were taken of the body (R 24,25; Pros Exs 2,3,4,5,6). The body was fully clothed and a small laceration over the left eye was clearly visible (R 22). Lieutenant Roberts pronounced the boy dead and had the body removed to the 2nd Battalion area, Camp Chun Chon, Korea (R 23). The following day the body was taken to the 34th General Hospital for an autopsy (R 22).

Pictures of deceased (Prosecution's Exs 2,3,4,5,6) were identified by Kang as those of Kim (R 13). On 5 March 1948 Kim Sun In, the father of Kim Kyung Sun, identified the body as that of his son and claimed it for burial (R 28,29).

Captain Ernest B. Mullinaux, MC, performed an autopsy on Kim Kyung Sun (R 30). The autopsy report was admitted in evidence as Prosecution Exhibit 11, without objection by the defense (R 32). Captain Mullinaux testified that his examination of Kim's body revealed that he was a Korean male of approximately thirteen to fifteen years of age; that he had received an injury which caused a laceration over the left eye and several hemorrhages deep in the scalp, the most lethal hemorrhage being in one portion of the scalp called the medulla, which governs the heart action and respiration (R 31). Captain Mullinaux also testified

that the cause of death was asphyxia, resulting from the hemorrhage to this portion of Kim's head (R 31). When Kim's clothes were removed, a wide area of abrasion, or "brush burn," on his chest, extending far down on his stomach, was revealed (R 31). The deep laceration over Kim's left eye contained a quantity of dirt and gravel and there were several minor bruises on his body (R 32). There was no evidence that Kim had been submerged in water (R 32), and there was no evidence of mechanical strangulation on Kim's neck (R 33). Captain Mullinaux stated that in his opinion Kim was still alive when thrown from the train and that he died as a result of the injury or blow to his head, resulting in a hemorrhage to the medulla portion of his scalp (R 33,34).

Accused Brown was questioned by Agent Hass, in the presence of others, on 5, 9 and 12 March. Hass testified that on each of these occasions he informed Brown of his rights under the 5th Amendment to the Constitution of the United States and the 24th Article of War (R 34, 35,38,39,47,48,49,50). Agent Hass specifically informed Brown that if he made a statement it could be used against him in court (R 51,52) and that if he was convicted of murder under the 92d Article of War as a result of the statement, the verdict would be either a life sentence or execution (R 52). The accused Brown took the stand as a witness, after being properly informed as to his rights as a witness, to refute the fact that he had made the statement voluntarily (R 40). He testified that Agent Hass told him that he was not trying to convict him but to help him; that Agent Hass warned him of his rights under the 24th Article of War just before making his statement, but not prior to that time. He further testified that Agent Hass told him that if he told the truth he would "get off a lot easier" and that if he lied Hass would "get" him for perjury (R 42,43). Brown stated that he believed perjury meant lying and that it did not include the taking of the oath in connection with the telling of a lie (R 45). Brown testified that on 12 March Agent Hass told him that Brill had admitted everything and stated that Brown might as well do the same (R 45). Agent Hass was recalled to the stand as a witness after Brown, and denied making any promises or threats to Brown (R 47, et seq). The two statements made by Brown on 9 March and 12 March were admitted by the court as Prosecution Exhibits 10 and 12, over objection by the defense.

In his pretrial statements Brown states that on 3 March 1948 he was present and awake during most of the time Kim and Kang were in the freight car. Brown identified Kang and the photographs of Kim as the two Korean boys who rode on the train with him and Brill, and upon further questioning stated as follows:

- "Q. Now, after you left this station, what took place? Tell us the whole story?
- A. Well, sir, when it started getting dark, BRILL said he was going to throw the little boys off the train, and I told ,

him not to throw them off because he could not beat the law. While I was up at one end of the car, he threw one of them off the car, and then, later on, he threw the other one off. That is all there was to it. He threw them off, and we went on up to Chun Chon

- Q. Why did BRILL want to throw the boys off?
A. I don't know, sir, unless he had a personal grudge against the Koreans. They attacked him one time while he was on guard.
- Q. Which boy did he throw off first, the little one who is still alive?
A. Yes, the one who is still alive.
- Q. Do you recall between which stations the boys were thrown off?
A. No, sir, but it was only 3 or 4 minutes after he threw the first one off that he threw the second one off.
- Q. Was the train in motion when he threw the first boy off?
A. Yes, sir.
- Q. Was the train in motion when he threw the second boy off?
A. Yes, sir." (Pros Ex 12)

Brill's confession was admitted as Prosecution's Exhibit 13, over objection by defense (R 87).

He stated in substance that on 3 March 1948, he and Brown, as train guards, boarded a freight car at Sobinggo siding, Seoul, Korea, and at the first stop Kim and Kang boarded the car. He further stated that Kang committed an act of sodomy on him and he pushed Kang off the moving train. He also stated that he (Brill) threw Kim off the train.

4. For the defense.

The accused Brown, after explanation of his rights as a witness in his own behalf, elected to testify under oath (R 88). He stated that he was assigned as a train guard on a freight car, loaded with lumber, which was leaving from Camp Sobinggo, Seoul, Korea (R 89); that at a station, the name of which he did not remember, two Korean boys got on the car (R 90). He stated that as soon as the Korean boys entered the car he went to sleep and slept continuously, except for once or twice when he woke up for an instant, until the train reached Chun Chon. During the remainder of the trip he did not see the Korean boys again. He denied having thrown either of them off the train, or assisting or seeing anyone do so. He denied striking or "laying a hand" on the Korean boys (R 91).

The court explained to the accused Brill his rights as a witness and he elected to remain silent.

5. Discussion.

a. Specification, Charge I.

Accused Brown was acquitted of this Charge and Specification and no comment will be made thereon.

b. Specification, Charge II (Assault with intent to do bodily harm.)

The evidence was sufficient to sustain the findings of guilty of this Specification. It was established by the testimony of prosecution witness, Kang Hyeng Sik, that at the time and place alleged accused Brill grasped him by the hands and that accused Brown grasped his feet and threw him from the moving train to the ground. Accused Brown denied any part in the transaction. Accused Brill in his pretrial statement stated that he shoved Kang Hyeng Sik off the train with one hand and the butt of his rifle. He also stated that accused Brown was asleep and did not participate in the act. Such statement is not evidence for or against accused Brown (22 CJS 1333). It was for the court to determine the credibility of the witnesses and the weight of the evidence and it chose to believe the testimony of Kang Hyeng Sik.

The intent to commit bodily harm can be inferred from the manner in which the act was committed and the willful and wanton nature of the act. Bodily harm could well be anticipated and the fact that through no fault of accused serious bodily harm did not actually result will not negative the implied intent. The evidence did establish that the wrist of the victim was injured.

It is noted that the name of the victim is alleged as Kang Hyeng Sik in Specification 2 of Charge II, and as Kang Hyun Sik in the Specification of Charge I. The evidence establishes his correct name as Kang Hyeng Sik (R 7). The variance is immaterial and accused was not misled thereby. There was no objection by accused to such misnomer. The doctrine of idem sonans is applicable (Sec 1047, p.1842, Wharton's Criminal Evidence, 11th Ed).

c. Specification, Charge III (Murder).

The evidence is legally insufficient to sustain the findings of guilty of this Specification.

It was established by prosecution witnesses that deceased, Kim Kyung Sun, was on the train during the night in question. His dead

body was subsequently found on the side of the railroad track at about the place where accused Brill stated he threw him from the train. That the victim was thrown from the train by Brill was established only by the pretrial statement of accused Brill that he threw Kim Kyung Sun off the moving train. In this statement he says that accused Brown was asleep at the time. Pretrial statements made by Brown were not admissible to establish the guilt of Brill, nor were the pretrial statements of Brill admissible to establish the guilt of Brown. In his pretrial statements and on the witness stand accused Brown denied taking any part in the offense but did state that the victim was on board the train.

The fact that Brown may have been present at the scene, during the course of the official performance of his duties, is not sufficient to establish that he was a principal in the commission of the offense (CM 238485, Rideau, 24 BR 263,272,273). There is no specific evidence that he aided or abetted in the commission of the offense alleged in this specification. He testified that he was sleeping at the time. True he aided in throwing the other victim from the train but unlike the case of CM 268994, Fowler, 4 BR (ETO) 337, 3 Bull JAG 284, or CM 273817, Johnson, 6 BR (ETO) 291, there was no preconceived plan with reference to the deceased victim in which accused Brown participated. The homicide was not committed by Brill pursuant to a common purpose or as a natural or probable consequence thereof. Official duty required Brown to be on the car. He was found not guilty of taking the victim on the train. Although not evidence against this accused, it is to be noted that Brill exonerated Brown in his pretrial statement. Such facts do not warrant a finding that Brown participated in, or was guilty of, the homicide (1 Bull JAG 24, CM 221019, Goodman, 49 BR 123; CM 283439, Davis, 12 BR (ETO) 239,252-256).

Pretrial statement of accused Brown.

There was no error in admitting into evidence the pretrial statements (Pros Exs 10,12) of accused Brown. The voluntary nature of the statements was contested and it was for the court to determine the credibility of the witnesses. In view of the fact that this accused gave sworn testimony substantially as set out in his pretrial statements, the rights of the accused could not have been prejudiced by the admission of such statements. It appears, however, from one of the pretrial statements (Pros Ex 12) that accused was asked if he had ever been tried by a military or civil court. He responded that he had been tried by two summary courts for being drunk and disorderly in barracks. It was error to admit this part of such statement into evidence. After the findings, there was evidence of one previous conviction (Pros Ex 14) which apparently was one of the trials referred to by accused in his statement. In view of all the circumstances, the error does not warrant a disapproval of the finding although it may warrant a reduction of the sentence.

6. Accused Brown is 22 years of age. He enlisted in the regular Army on 25 April 1946 for three years, at which time he had eleven months prior military service. There was evidence of one previous conviction by summary court-martial for being drunk and disorderly in quarters. A report of psychiatric examination made 21 April 1948 indicates accused has an IQ of 73, and a mental age of 10 years (border-line mental deficiency). He was diagnosed as a pathological and schizoid personality.

7. The court was legally constituted and had jurisdiction of the person and offenses. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and Specification 2 of Charge II, legally insufficient to support the findings of guilty of Charge III 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 at a place other than a penitentiary.

Hottelstein, Judge Advocate

C.O. Wolfe, Judge Advocate

(Dissent), Judge Advocate

(98)

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

20 AUG 1948

JAGH CM 331601

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

7TH INFANTRY DIVISION

v.)

Private First Class JAMES H. BRILL, RA 36931100, and Private First Class KELLY BROWN, RA 38568847, both of Headquarters Company, 1st Battalion, 31st Infantry Regiment.)

Trial by G.C.M., convened at Seoul, Korea, 7,8 and 11 May 1948. Brill: To be hanged by the neck until dead. Brown: Dishonorable discharge and confinement for life. United States Penitentiary, McNeil Island, Washington.

DISSENTING OPINION BY
LYNCH, Judge Advocate

I dissent to the conclusions of the majority that the findings of guilty of Charge III and its Specification and the sentence insofar as they pertain to Brown are not supported by the record of trial; and am of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification of Charge III and the sentence as to the accused Brown. The record of trial shows that the two accused in this case committed assaults upon the two Koreans involved with an intent to commit sodomy, and in the case of Brill, there is evidence that an act of sodomy was consummated. It would appear that in the pursuance of their unnatural desires the two accused acted in concert. Thus it is shown that Brown threatened the two Koreans with a carbine in order to compel them to perform an act of sodomy upon himself and Brill. At a time subsequent to the completion of their unnatural pursuits there is evidence that shows the two accused grasped the Korean, Kang, and threw him from the train. A short time later, according to the evidence adduced by the prosecution, the accused Brill acting alone, seized the Korean, Kim, and threw him from the train, thereby causing his death. On this statement of facts I am of the opinion that the accused Brown has been legally convicted of the murder of Kim.

I find that the law applicable to this factual situation is stated in CM 321915, McCarson et al., 70 BR 411,418-19, as follows:

"For one to stand by sympathetically in the presence of a vicious onslaught upon the person of another by his associates, without resentment toward his acting confederates and without concern for the victim, knowing or having reason to know that the aggression he is witnessing may run the gamut of violence,

extending to attempted robbery, murder, or other heinous crime, is in itself evidence from which the triers of fact may fairly infer that he lent his approval to and cooperated in the particular assault committed (CM 285969, Sanders, 10 BR (ETO) 255,266; CM 300447, Dale, 29 BR (ETO) 129,134; People v. Martin, 12 Cal. (2d) 466, 85 P (2d) 880, 883; State v. Kneedy, 232 Iowa 21, 3 N.W. (2d) 611,615; People v. Marx, 291 Ill. 40, 125 N.E. 719, 722; 9 Halsbury's Laws of England (2d Ed) 30, note h). By virtue of Section 332 of the Federal Criminal Code (18 U.S.C. 550), which is applicable here, a principal in the second degree at common law, that is, an aider and abettor, becomes a principal in the first degree and, as such, is as criminally responsible for the acts of his confederates as though he had committed them himself (CM Sanders, supra)."

In this case where the evidence shows that Brown actively participated in assaults with intent to commit sodomy upon the two Korean boys and actively participated in throwing Kang from the train, I also believe that Brill's subsequent act of throwing Kim from the train was a natural or probable consequence of the prior concerted action. In this view of the case likewise Brown is guilty of murder:

"But where two or more persons acting with a common intent jointly engage in the same undertaking and jointly commit an unlawful act, each is chargeable with liability and responsibility for the acts of all the others, and each is guilty of the offense committed, to which he has contributed to the same extent as if he were the sole offender. And the common purpose need not be to commit the particular crime which is committed; if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal, if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose, or as a natural or probable consequence thereof. In order to show a community of unlawful purpose it is not necessary to show an express agreement or an understanding between the parties. Nor is it necessary that the conspiracy or common purpose shall be shown by positive evidence; its existence may be inferred from all the circumstances accompanying the doing of the act, and from conduct of defendant subsequent to the criminal act; in other words, preconcert or a community of purpose may be shown by circumstances as well as by direct evidence." (16 C.J., sec. 115, p.128; 22 C.J.S., sec. 87a, p.155, cited in CM 273817, Johnson and Loper, 6 BR (ETO) 294). (Underscoring supplied)

Additionally from the circumstances shown by the record and their joint action in throwing Kang from the train the court could find that it was their then present intention to perform the same act with respect to the deceased.

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DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General (101)
Washington 25, D. C.

JAGK-CM 331611

30 AUGUST 1948

UNITED STATES	)	1ST U. S. INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at
Private JACK BEJINO	)	Furth, Germany, 9 March 1948.
(RA-17093132), Headquarters	)	Confinement for four (4) months
Detachment, 7810 Station	)	and forfeiture of fifty dollars
Complement Unit.	)	(\$50) per month for a like
	)	period. Post Stockade.

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

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

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

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

Specification: (Finding of Not Guilty).

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

Specification: In that Private Jack Bejino, Headquarters Detachment, 7810 Station Complement Unit, did at Nurnberg, Germany, on or about 21 January 1948, knowingly and wilfully misappropriate a 3/4 ton 4x4, of the value of more than \$50.00, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Charge I and its Specification and guilty of Charge II and its Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved only so much of the findings of guilty of

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the Specification of Charge II and of Charge II as involves a finding that accused did, at the time and place alleged, wrongfully take and use a 3/4 ton 4x4, of the value of more than \$50, property of the United States, furnished and intended for the military service thereof, in violation of Article of War 96, and approved and ordered executed only so much of the sentence as provided for confinement at hard labor for four months and forfeiture of fifty dollars per month for a like period. The result of trial was published in General Court-Martial Orders No. 155, Headquarters 1st United States Infantry Division, APO 1, 20 May 1948.

3. The problem here presented is whether or not the findings as approved by the reviewing authority that accused did, at the time and place alleged, wrongfully take and use a 3/4 ton 4x4, of the value of more than \$50, property of the United States, furnished and intended for the military service thereof, in violation of Article of War 96, was lesser than and necessarily included in the offense of misappropriation, in violation of Article of War 94, as originally charged.

The reviewing authority may approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when in his opinion the record of trial will support only the lesser included offense (AW 47).

The rule has been established that in order for an offense to be properly considered a lesser included offense of that charged such offense 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 the offense charged (CM 323728, Wester, 72 BR 383; CM 330750, Pilgrim).

Accused stands convicted as approved by the reviewing authority of wrongfully taking and using a motor vehicle, property of the United States, furnished and intended for the military service, in violation of Article of War 96. This offense obviously includes the element of wrongful taking. A wrongful taking is not necessary to establish the offense of misappropriation with which accused was charged and of which the court found him guilty. Such conclusion was reached by the Board of Review in a similar case (CM 324805, Gatchalian, 73 BR 373), wherein it was stated:

"It may thus be concluded from the opinions cited CM 243287, Poole, 27 BR 321; CM 318499, White, 67 BR 331 that either the offense of misappropriation or that

of misapplication may be committed by acts which are in no way connected with taking by trespass, and where the taking of property was rightful or wrongful, or where there is no taking at all." (Underscoring supplied)

Inasmuch as the offense approved by the reviewing authority herein included an element not necessary to sustain a conviction of the offense charged, the approved findings are unauthorized.

4. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty as approved by the reviewing authority and the sentence.

Charles D. Filmer, Judge Advocate.
Edith H. Stuyvesant, Judge Advocate.
Harley A. Lanning, Judge Advocate.

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SEP 20 1948

JAGK - CM 331611

1st Ind

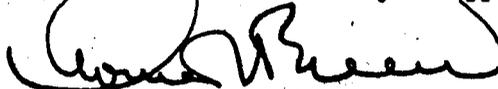
JAGO, Dept. of the Army, Washington 25, D. C.

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, 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 Jack Bejine (RA 17093132), Headquarters Detachment, 7810 Station Complement Unit.

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 sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action designed to carry into effect the recommendation hereinabove made 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 169, 7 October 1948)•

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

(105)

JAGH CM 331627

9 August 1948

U N I T E D S T A T E S	)	MILITARY DISTRICT OF WASHINGTON
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Myer, Virginia, 21-22
First Lieutenant ARTHUR L.	)	June 1948. Dismissal.
GREGORY, 02020723, Infantry,)	
Company C, 3rd Infantry Regi-)	
ment, Fort Myer, Virginia.)	

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 Charges and Specifications:

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

Specification: In that First Lieutenant Arthur L. Gregory, Third Infantry Regiment was at Washington, District of Columbia, on or about 15 May 1948, at a public place, to wit: at or near the vicinity of 12th Street and New York Avenue, North West, drunk and disorderly while in uniform.

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

Specification 1: In that First Lieutenant Arthur L. Gregory, Third Infantry Regiment, did at Washington, District of Columbia, on or about 15 May 1948, remove his collar insignia of rank or grade, and wrongfully appear without same in uniform on a public street to wit: at or near 12th Street and New York Avenue, Northwest.

Specification 2: In that First Lieutenant Arthur L. Gregory, Third Infantry Regiment did at Washington, District of Columbia, on or about 2330 hours, 15 May 1948, wrongfully strike Bernard J. Brogley in the jaw with his fist.

Specification 3: (Finding of not guilty).

Specification 4: In that First Lieutenant Arthur L. Gregory, Third Infantry Regiment, did at Washington, District of

Columbia, on or about 16 May 1948, wrongfully strike Sergeant Ernest Wingler, a Military Policeman then in the execution of his office, in the mouth with his fist.

Specification 5: In that First Lieutenant Arthur L. Gregory, Third Infantry Regiment, did at Washington, District of Columbia, on or about 16 May 1948, address an assembly of people on a public street, to wit: at or near 12th Street and New York Avenue, Northwest, and while so doing did wrongfully and unlawfully use abusive and indecent language in shouting words "bastard", "jew", and "4-F", or words to that effect to the prejudice of good order and military discipline.

Specification 6: (Nolle Prosequi by direction of reviewing authority).

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

3. The Board of Review adopts the statement of evidence and the law contained in the review of the Military District of Washington Judge Advocate, dated 28 June 1948.

4. Records of the Army show that accused is 26 years of age and married. He completed the ninth grade of school. His civilian employment if any is not indicated. He had enlisted service in the South Carolina National Guard from 21 February 1940 to 16 September 1940 and federal enlisted service from 16 September 1940 until 7 July 1945 when he was commissioned a second lieutenant, Army of the United States. He was promoted to first lieutenant on 22 May 1947. He had foreign service in the European Theater from August 1942 until August 1945. On 8 March 1943 he was awarded the Soldier's Medal for heroism. His efficiency ratings of record are uniformly "Excellent."

5. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to be dismissed the service is mandatory

upon conviction of a violation of Article of War 95 and is authorized
upon conviction of violations of Article of War 96.

A. H. Weinstein, Judge Advocate

C. O. Wolfe, Judge Advocate

J. W. Lynch, Judge Advocate

JAGH CM 331627

1st Ind

JAGO, Department of the Army, Washington 25, D.C. 19 AUG 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Arthur L. Gregory, O2020723, Infantry, Company C, 3rd Infantry Regiment, Fort Myer, Virginia.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place in violation of Article of War 95; of appearing in uniform in a public place without his insignia of rank, of assault and battery upon a civilian and upon a military policeman, and of using abusive and indecent language while addressing an assembly of people in a public place, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the review of the Military District of Washington Judge Advocate, dated 28 June 1948, which has been adopted in the accompanying opinion of the Board of Review as a statement of the evidence and the law in the case. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

At approximately 2330 hours 15 May 1948 in the downtown section of Washington, D.C., accused who was accompanied by two enlisted men was walking along New York Avenue in the vicinity of 12th Street, N.W., when he collided with Bernard J. Brogley, a civilian. After Brogley had remonstrated with him, accused struck Brogley on the jaw. At the time accused was in uniform, but without insignia of rank on his collar. Technician Fourth Grade Johnson who was with accused was dressed in civilian clothing and the other enlisted man, Private Armacost, was in uniform. Brogley was unsuccessful in having some shore patrolmen take accused into custody and, therefore, went in search of civilian police. In the vicinity he found two military policemen, Sergeant Ernest D. Wingle and Technician Fifth Grade Bill R. Coppock, and made his complaint to them. At the time he noticed accused and his companions approaching and pointed to accused as the man who had assaulted him. An argument started between accused and Armacost and Brogley. Upon being ordered to get into the patrol jeep by Sergeant Wingle accused did so but when Brogley approached the jeep accused jumped out and

grappled with him. They were separated and accused again was placed into the jeep. In the meantime a crowd had assembled and accused addressed them, referring to Brogley as a "Jew son of a bitch" and other terms equally derogatory and also referred to the military police in epithet. Accused again jumped from the jeep and engaged in a fight with a technical sergeant who was standing in the crowd. Wingler tried to separate them and accused turned and struck him, at the same time uttering an insulting and obscene remark. A short time later civilian police arrived and took accused and his companions into custody. A few hours later accused approached Wingler and asked him to be as easy on him as he could. The night after the incident, accused and his wife visited Brogley and asked him to go easy on the accused and offered to make restitution. Brogley and the military police who were present during accused's escapade testified that accused was drunk and Master Sergeant Gratehouse, desk sergeant at the military police call block at Fort McNair, testified that he saw accused at 2:00 a.m., 16 May 1948 and that in his opinion accused was intoxicated at that time.

Accused testified in his own behalf and denied that he had seen Brogley on the night in question until he was confronted by Brogley in the company of Sergeant Wingler. His testimony in this respect was corroborated by Armacost and Johnson. They testified that as they were leaving a bar at New York Avenue and 12th Street, Brogley, who was entering, deliberately collided with Armacost. After a few words Armacost hit Brogley.

Subsequently they met accused and prevailed on him to join them, at which time accused removed his insignia from his collar. They subsequently met Brogley who was with two military policemen and Armacost and Brogley had another fight which accused tried to stop. Subsequently a general free-for-all started which accused testified he attempted to "break up."

Accused admitted having one drink before dinner on the evening in question. Armacost and Johnson testified he was sober and did not have anything to drink in their presence. James S. Croson, Washington police officer who took accused to the police station, stated that when he arrived at the scene of the fracas accused was neither drunk nor disorderly. First Lieutenant Walter R. Glass who took accused in custody at Fort McNair, approximately at midnight, testified that in his opinion accused was sober, but one could tell that accused had had one or two drinks.

4. The accused is 26 years of age and married. He completed the ninth grade of school. His civilian employment if any is not indicated. He had enlisted service in the South Carolina National Guard from 21 February 1940 to 16 September 1940 and federal enlisted service from 16 September 1940 until 7 July 1945 when he was commissioned a second lieutenant, Army of the United States. He was promoted to first

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lieutenant on 22 May 1947. He had foreign service in the European Theater from August 1942 until August 1945. On 8 March 1943 he was awarded the Soldier's Medal for heroism in Iceland. His efficiency ratings of record are uniformly "Excellent."

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

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



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 159, 26 Aug 1948).

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

(111)

JAGK - CM 331628

22 SEP 1948

UNITED STATES)

v.)

First Lieutenant CLARENCE
L. JEFFERS (O-587861), Air
Corps, Company D, 3rd Military
Government Regiment)

FIRST U. S. INFANTRY DIVISION

Trial by G.C.M., convened at
Weiden, Germany, 2 to 11 March
1948. Dismissal and confine-
ment for one (1) year.

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

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

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

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

Specification 1: In that First Lieutenant Clarence L. Jeffers, Company D, Third Military Government Regiment, did, at or near Tirschenreuth, Germany, on or about 5 August 1947, feloniously embezzle by fraudulently converting to his own use nine hundred sixty (960) German Reichmarks, of the value of \$96.00 the property of the United States, entrusted to him by the United States by virtue of his assignment as a United States Military Government Summary Court Officer, the said nine hundred sixty (960) German Reichmarks having been received by the said First Lieutenant Clarence L. Jeffers as payment in lieu of confinement in the Summary Court case of Karl Schuster.

NOTE: Specifications 2 to 9, inclusive, are identical with Specification 1 except as to date of the offense, amount embezzled, and the person from whom received, as follows:

<u>Spec.</u>	<u>Date of offense</u>	<u>Amount embezzled</u>	<u>Received from</u>
2	22 July 1947	1150 Reichmarks	Kathe Theusinger
3	23 July 1947	1140 Reichmarks	Gerhard Schreuer
4	24 July 1947	100 Reichmarks	Vladimir Golosow
5	27 August 1947	870 Reichmarks	Baptist Gmeinder

6	8 Sep 1947	1200 Reichmarks	Johanna Rau
7	2 Sep 1947	260 Reichmarks	Anton Rossler
8	2 Oct 1947	2000 Reichmarks	Jan Semernikowski
9	2 Oct 1947	2000 Reichmarks	Nikolaus Barabsch

Specifications 10 to 28, inclusive: (Findings of not guilty).

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

Specifications 2 to 11, inclusive, and 16: (FINDINGS OF NOT GUILTY).

Specifications 1, 13, 14 and 15: (Findings of guilty disapproved by reviewing authority).

Specification 12: In that First Lieutenant Clarence L. Jeffers, ***, did, in conjunction with Elfriede Kube, at or near Tirschenreuth, Germany, on or about 15 March 1947, wrongfully deliver ten dollars in United States Military Payment Certificates to Isak Mittelman, whose possession of United States Military Payment Certificates was known to the said First Lieutenant Clarence L. Jeffers to be in violation of War Department Circular No. 256, dated 23 August 1946.

He pleaded not guilty to all charges and specifications. The court found accused guilty of Charge I and Specifications 1 to 9, inclusive, thereof; guilty of Charge II and Specifications 1,12,13,14 and 15. He was found not guilty of Specifications 10 to 28, inclusive, of Charge I, and Specifications 2 to 11, inclusive, and 16 of Charge II. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority disapproved the findings of guilty of Specifications 1,13,14 and 15 of Charge II, disapproved so much of the findings of the respective values of Reichmarks as to specifications 1 to 9, inclusive, of Charge I as exceeded a value of \$20.00, and approved the sentence but reduced the period of confinement to one year. He 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 relating to the approved findings of guilty

For the Prosecution

During the period April to October 1947 the accused was the Public Safety and Summary Court officer of the Third Military Government Regiment with headquarters at Tirschenreuth, Germany. As summary court officer, his duties involved presiding over trials of minor offenders against the Military Government regulations; the imposition of sentences, including

fine, imprisonment or both; and the proper disposition of the prisoner. He was required to keep records of the business transacted by his court, to deposit all fines collected with a U.S. Army finance officer and to forward monthly or semi-monthly reports to higher headquarters showing the disposition of any fines collected. In the event no fines were collected he was required to forward negative reports (R 43,46,94-98).

Mrs. Eleanora Stieda testified that during the period April to October 1947 she was secretary and recorder for the accused as Summary Court Officer, Third Military Government Regiment. She recorded the court's proceedings and prepared the records for accused's signature. The witness identified, and there was received in evidence without objection, the original court register of cases tried by the accused (Form 11A) for the period of his tenure as summary court officer. Permission was granted to withdraw the register and submit for the record of this trial photostatic copies of certain entries contained therein (R 42-46, Pros Ex 1). These extracts, Prosecution Exhibit 1, show the court proceedings with respect to the persons named in Specifications 1 to 9, inclusive, of Charge I. Each entry shows the docket number, the date of trial, name of accused, offense charged, plea, findings of the court, and, with one exception hereinafter mentioned, the sentence adjudged. The register shows that Karl Schuster was sentenced to four months confinement with the remark, "sentence will be suspended if subject returns to the Russian Zone." Kathe Theusinger was sentenced to four months confinement, also with a proviso for suspension of sentence upon return to the Russian Zone. Gerhard Schreuer was sentenced to four months confinement, the remark indicating that the prisoner was placed on probation. Vladimir Golosow was convicted but the sentence adjudged and disposition of the prisoner is not recorded. Baptist Gmeinder received a sentence of three months confinement. The following remark with respect to Gmeinder appears on the register, "remainder can be converted into a fine (10 RM for one day)." Johanna Rau was sentenced to four months confinement, the register stating further, "suspended upon immediate return to the Russian Zone." Anton Rossler was given a sentence of 30 days confinement. Jan Semernikowski and Nikolaus Barabsch were each given a four months sentence with the proviso that "a part of the sentence can be converted to a fine" (Pros Ex 1).

Mrs. Stieda also identified and there were received in evidence the following described documents: The commitment (legal Form No. 5) and copy of the record of trial in the case of Karl Schuster, showing that Schuster was on 10 July 1947 convicted in accused's court of a "violation of Ordinance 1, Article II, Section 43," and sentenced to "4 months imprisonment - suspended if subject returns to the Russian Zone" (R 49, Pros Ex 2); the commitment and transcribed copy of the record of trial in the case of Kathe Theusinger showing that on 17 July 1947 she was convicted of violating "Ordinance 1, Art II, Sec 43" and sentenced to four months imprisonment with the provision that the "sentence will be suspended if subject returns to the Russian Zone" (R 53, Pros Ex 3); commitment and trial proceedings showing that Gerhard Schreuer was on 17 July 1947 convicted of illegally

crossing the border and sentenced to "four months imprisonment - sentence will be suspended if subject returns to the Russian Zone" (R 58, Pros Ex 4); "Military Government court, Case Record" (Legal Form No. 8), including the transcribed proceedings and commitment in the case of Vladimir Golosow, showing that on 24 July 1947 he was convicted of riding a bicycle in darkness without lights and sentenced to 10 days imprisonment (R 58-60, Pros Ex 5); commitment and record of trial in the case of Baptist Gmeinder showing that on 21 August 1947 he was found guilty of a "violation of law No. 161, 'Frontier Control'" and sentenced to three months imprisonment or to pay a fine of "RM 900" (R 63, Pros Ex 7); "Military Government Court, Case Record" (Legal Form No. 8), including transcribed proceedings and commitment, showing that on 21 August 1947 Johanna Rau was found guilty of violating the frontier law and sentenced to "4 months imprisonment - suspended upon immediate return to the Russian Zone," that no fine was paid or to be paid and that the prisoner was not confined (R 65, Pros Ex 8); commitment and court proceedings in the case of Anton Rossler showing that on 28 August he was convicted of violating the frontier law and sentenced to 30 days imprisonment (R 66, Pros Ex 9); commitment and court record in the case of Jan Semernikowski showing that on 2 October 1947 he was convicted of unlawfully buying a pig and sentenced to "four months imprisonment/ a part of the sentence can be converted into a fine" (R 68, Pros Ex 10); commitment and record of proceedings in the case of Nikolaus Barabsoh showing that on 2 October 1947 he was convicted of illegally buying a young pig and sentenced to "four months imprisonment/ a part of the sentence can be converted into a fine" (R 71, Pros Ex 11). Mrs. Stieda asserted that she knew the accused's signature, having habitually observed him signing his name to the court records, and that the signature, "Clarence L. Jeffers," which appeared on each and all of the foregoing exhibits as "Summary Military Court of Tirschenreuth" was accused's signature. None of the records showed that any fines had been collected. The commitments and court records bore in each case a number which corresponded with the number of the case shown on the court register (Pros Ex 1).

Defense counsel objected to the admission in evidence of Prosecution Exhibits 2 to 11, inclusive, contending that they were irrelevant and immaterial to the issues.

The witness, Eleanora Stieda, identified the accused's signature acknowledging the receipt of money on four writings which were received in evidence as Prosecution Exhibits 13 to 16, inclusive, as follows: Voucher No. 2889, dated 22 July 1947 at Tirschenreuth, which recites that accused received "1150 marks" from Katha Theusinger in payment of "court fine" (Pros Ex 13); Voucher No. 2890, dated 23 July 1947 at Tirschenreuth recites that accused received "1140 marks" from Gerhard Schreuer in payment of "court fine" (Pros Ex 14); Voucher No. 2896, dated 8 September 1947 at Tirschenreuth recites that accused received "1200 marks" from Johanna Rau in payment of "court fine" (Pros Ex 15); receipt on letterhead of Military Government Liaison and Security Office dated 2 September 1947 at Tirschenreuth which states that "this is to certify that I have received for the prisoner Rossler, Anton the fine of RM 260." (R 75-84)

During the period February to October 1947 Mrs. Elfriede Kube was employed as secretary and interpreter for the accused in his capacity as Public Safety Officer. On occasion she also acted as typist and court reporter (R 247-250). Mrs. Madelaine Gaertner testified that Karl Schuster had been billeted in her home prior to August 1947. On some date, about the middle of August, she took 960 marks, money belonging to Schuster, to the office of the Military Government in Tirschenreuth and delivered the money to a "slim blonde woman" whom she identified as Mrs. Kube. Herr Koller (the jailer) was present when she delivered the money to Mrs. Kube. She did not get a receipt (R 139-141).

Kathe Theusinger testified that in July 1947 she crossed the border illegally from the Russian Zone to the American Zone, was tried by Military Government Court, and confined in jail. After she had served four days she was released (R 132-133). Annemarie Koindek stated that on 22 July she paid 1,150 marks to the Military Government at Tirschenreuth for the release of Mrs. Theusinger. She handed the money to "Frau Kube" in the presence of accused and got a receipt which she delivered to Herr Koller. She identified Prosecution Exhibit 13 as the receipt to which she referred (R 135-136).

Gerhard Schreuer testified that he was tried by military government court in Tirschenreuth on 18 July and sentenced to jail by the accused. Six days later he was released through the assistance of his "Boss" Karl Bahner. Mr. Bahner was called as a witness and stated that on or about the 23rd of July 1947, in the Office of the Military Government, he paid 1140 marks to Frau Kube in accused's presence for the release of Mr. Schreuer. He got a receipt for the money which he took to the prison and Mr. Schreuer was immediately released (R 143-145).

Vladimir Golosow testified that on or about 24 July at Tirschenreuth he was sentenced to imprisonment or to pay a fine of 100 Reichmarks. He immediately paid the fine to the "young lady" and received a receipt which he presented to the court (R 156-158).

Baptist Gmeinder testified that he was tried by the accused in August 1947 and sentenced to three months confinement. He was released after serving three days by paying 870 Reichmarks to the jailer (R 146-147).

Johanna Rau testified that on 21 August 1947 she was sentenced to six months confinement by the Military Government court at Tirschenreuth but was released after serving two days of the sentence. Her husband, Hans Johann Rau, was sworn as a witness and testified that on or about 23 August he paid 1000 marks to the Office of Military Government in Tirschenreuth for his wife's "temporary" release. Later Mrs. Rau paid 200 Reichmarks to Mrs. Kube in the presence of the accused (R 124-131).

Anton Rossler appeared as a witness and testified that on about 28 August he was sentenced by the accused to serve thirty days imprisonment.

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He was released after serving four days of the sentence. His wife had procured his release (R 148-149).

Jan Semernikowski testified that on about 29 September 1947 he was tried by the accused and sentenced to be confined or to pay 2000 Reichmarks. After serving three days in jail he paid 2000 Reichmarks to the jailer and was released. He secured a receipt from the jailer which he presented to the court (R 160-162).

Nikolaus Barabsch stated that in early October 1947 he was sentenced by the accused to four months imprisonment or to pay a fine of 2000 Reichmarks. While in prison his wife came to the jail and in his presence paid the jailer 2000 Reichmarks for his release (R 162-164).

Ludwig Koller, Jr., son of the jailer at Tirschenreuth, was called as a witness and he testified that in August or October 1947 he took 4000 marks, which was paid for the release of Mr. Semernikowski and Mr. Barabsch and delivered the money to "Mrs. Kube" (R 237-239).

Elfriede Kube testified in detail concerning her activities in 1947 as secretary to the accused. She identified Prosecution Exhibit No. 25 as being a receipt voucher dated 5 August 1947 at Tirschenreuth and acknowledging receipt of 960 Reichmarks from Karl Schuster in payment of court fine. The signature "Clarence L. Jeffers" thereto was affixed by her. She stated that she had authority to sign the accused's name thereto. On motion of the prosecution, Prosecution Exhibit 25 was received in evidence (R 247-253).

Isak Mittelman, a tailor residing in Tirschenreuth, testified that he was Polish but at present was stateless. On or about 15 March 1947, pursuant to information given him by Mrs. Kube to the effect that American script was being called in and converted, he had sent thirty dollars in "script" to her at the Military Government Office. After the date for conversion of American script Miss Margaret Heller, who had delivered Mittelman's old script to Miss Kube, called at the Military Government Office and requested the accused in person to deliver Mittelman's converted script. The accused stated, "I even didn't get to get it converted *** and he will have ten dollars, and if he isn't satisfied with that, he can come and complain about it" (R 174). Later Mittelman received an envelope from Mrs. Kube containing "ten dollars" (R 172).

The court took judicial notice of the provisions of War Department Circular No. 256, dated 23 August 1946. This circular is entitled, "Military Payment Certificates" and recites that its purpose is to "establish a permanent phase of foreign currency exchange control" with respect to overseas military establishments. Part II thereof authorizes U.S. military personnel and certain civilians connected with the military establishment to utilize "military payment certificates." It also provides that

under no circumstances will these certificates be accepted from or exchanged for persons other than U.S. authorized personnel, viz., military personnel and certain civilians connected with the U.S. military establishment.

The court-martial also took judicial notice that the exchange rate of German Reichmarks was 10 cents per Reichmark (R 327-328).

For the Defense

After having been advised of his rights as a witness, the accused elected to testify under oath. He asserted that he had become affiliated with the Office of Military Government in Tirschenreuth sometime in November 1946 and had become public safety director and summary court officer in February 1947. He had no previous experience or background fitting him for either position. During his eight months service as summary court officer he had tried from about 25 to 75 cases a week, or a total of about 500. Court was normally held on Thursday of each week. Entries reflecting disposition of the cases were made in the court register (Pros Ex 1) by Mrs. Kube or Miss Stieda who were his interpreters and secretaries. Weekly reports showing disposition of the cases were submitted by courier each Friday to the legal section at Regensburg. Accused stated that he believed that it was legal to release a prisoner from jail upon payment of a fine even though the sentence provided only for confinement. He stated that -

"I honestly believed that these were out of five hundred some cases you find ten exceptions, that weren't carried out to the letter; that weren't decided to every damn thing in the book. In each case, you find each one paid ten marks for a day. I didn't think it was wrong for letting a man out of jail for some reason or other. Now, here you find some poor woman who came over the border - we were to give them sentences, or send them to the Russian Zone. You couldn't force them - you gave them sentences and suspended it on condition they returned back. Then you got a person in jail, he said, 'I refuse to go. I'll stay in jail.' Something comes up like this old lady was sick. You can't keep her in jail." (R 554)

"Those people paid that money as a fine, in lieu of time in jail of the standard rate of ten Marks for each day in jail, and they were given a receipt for their money they paid their fine, and given a receipt, and I didn't get no money out of the thing." (R 555)

Accused stated further on direct examination that Karl Schuster was fined 10 marks for every day of his unexpired jail sentence. The records did not show any fine because his report, which showed only a jail sentence,

had been forwarded to Munich about four days prior to Schuster's release and he could not change the report. He stated that he accepted 1150 marks as a fine in the case of Kathe Theusinger, 1140 marks in the case of Gerhard Schreuer, 100 marks in the case of Vladimir Golosow, 1200 marks on behalf of Johanna Rau, and 260 marks in the case of Anton Rossler. He imposed a sentence of three months confinement convertible into a fine in the case of Baptist Gmeinder, but did not remember whether Gmeinder served time or paid the fine. Someone paid Jan Semernikowski's fine and he was released (R 557-569). He asserted that he had collected the foregoing as fines, kept the money and applied it in payment of bills that "came in." The bills were for repairs to automobiles and billets, manufacture of furniture for the military government and other purposes which, he asserted, were legitimate and would eventually have been paid out of the German economy. "It might not have been the right procedure, but it accomplished the same purpose in the end" (R 580-581).

On cross-examination accused stated that he first learned in June that he was required to "turn in" fines collected and make a monthly report thereof. He had reported and turned in the fines collected in June. He could not remember whether he had sent in a report for July. The trial judge advocate handed to accused a document which he (accused) identified as a letter from the Military Government Office at Tirschenreuth, dated 20 August 1947, "Subject: Collected Fines." Accused thereupon admitted that he made "negative" reports with respect to fines collected for the periods 1 July to 31 July and 1 August to 31 August 1947 (R 608, 612, 614).

First Lieutenant Werner L. Dickinson, Finance Department, a witness for the defense, explained the regulations governing the receipt and disposition of foreign currencies by the Military Government during the period April to October 1947. He asserted that all fines, forfeitures and confiscations were received by the finance disbursing officers and transmitted in kind to the central disbursing office in Friedberg. Eventually they were transferred to the German economy by being deposited to the credit of the Land Minister of Finance. The witness was of the opinion that such currencies at no time were considered "assets in the Treasury of the United States" (R 354-371, Def Exs C,D,E). Major Wesley L. Viers, FD, also explained the manner of ultimate disposition of the funds mentioned and stated they were eventually used in connection with the German economy and that in his opinion the Treasury of the United States received no benefits from the funds, however, the Finance Office had lawful possession thereof in the name of the United States (R 571-574).

Josef Zahn, a banker and burgomaster of Tirschenreuth, testified that in March 1947 the accused, acting for the military government, paid some bills amounting to about 2000 marks. These bills included payment for furniture ordered for the officers' quarters and for help employed by the military government (R 384-389).

Eleanora Stieda was called by the defense and testified that the

accused paid various bills for services, including printing, motor vehicle repairs, maid service in the officers' billets, and "some bills coming from the Constabulary in Waldsassen", one of which amounted to 1000 marks. One motor bill was for 370 marks and another was for 800 marks (R 463-468). On 1 April 1947 the accused paid a printing bill rendered to the Military Government in the sum of 439 marks. Automobile repair bills paid by him amounted to about 4000 marks (R 428-436) (Def Ex I).

4. Discussion

The defense counsel objected to the jurisdiction of the court, asserting that the accused was "an Air Force officer, and only detailed to duty with Military Government." In support of this contention he submitted for the record a copy of letter orders, "Hq Co. 'D' 3rd Military Govt Regiment, APO 225 U S Army, Regensburg, Germany, 31 December 1947," which recites in effect, that accused is a member of the "Dept of the Air Force" and will use the prefix "AO" to his serial number.

The record shows that accused was in fact a member of the Department of the Air Forces on duty with a component of the Department of the Army at the time he was tried (2-11 March 1948) by a general court-martial appointed by the Commanding General, 1st Infantry Division. The Board of Review has consistently held, however, that the National Security Act of 1947 (Public Law 253, 80th Congress, approved 26 July 1947) which created the Department of the Air Forces under the National Military Establishment, did not, with respect to court-martial jurisdiction, effect a change in the status of personnel in "the military service of the United States," which service includes the Air Force (AW 2). For a further discussion of the above act see opinion of the Board of Review in CM 326147, Nagle, 75 BR 159. We conclude therefore that the plea to the jurisdiction was properly overruled.

The defense also objected to the jurisdiction of the court-martial which heard the case, asserting that the charges had been previously referred to another court appointed by the Commanding General, 1st Infantry Division. The record reveals that charges, relating to some of the acts alleged herein, were on 15 December 1947 referred for trial by a general court-martial appointed by paragraph 1, Special Orders No. 126, Headquarters 1st Infantry Division, 15 December 1947. That court appears to have convened on 23 December 1947 and the accused was arraigned but did not plead to the issues. The court thereupon adjourned and did not reconvene for the trial of accused. On 6 February 1948 the Commanding General, 1st Infantry Division, by Special Orders No. 14, appointed another court for the trial of accused "only." New charges were prepared and served upon accused and a new investigation was had prior to the trial. The only logical conclusion to be drawn from the foregoing is that the authority referring the case for trial in the first instance withdrew the case for good and sufficient cause before any finding had been reached and referred the case for trial to the court herein. Such procedure is authorized and is not "double jeopardy" within the meaning of Article of War 40 (par 5(a)).

MCM 1928; CM 324725, Blakeley, 73 BR 307,318).

Specifications 1 to 9, inclusive, of Charge I allege that accused embezzled by fraudulently converting to his own use the stated amounts of German Reichmarks, property of the United States entrusted to him as a U.S. Military Government Summary Court Officer and having been received by him as payment in lieu of confinement of the persons named.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come" (Moore v. U.S., 160 U.S. 268). The gist of the offense, as distinguished from larceny, is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship. The proof required for a conviction of the offense is "(a) That the accused was entrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent" (MCM 1928, par 149h, pp 173-174).

The proof shows, and accused admitted, that in his capacity as Military Government Summary Court Officer he collected "fines" from the persons in confinement and in the amounts as alleged. His authority to assess the "fines," at least in an amount equal to 10 marks for each day of confinement is not questioned. It appears, however, by accused's admissions, that he was required to deposit the amounts so collected with a U.S. Army finance officer and to report that fact to higher headquarters. In June 1947, prior to the alleged offenses he had deposited some fines and made a report thereof, but in July and August 1947, the months during which the "fines" mentioned in Specifications 1 to 5, inclusive, of Charge I were proven to have been collected, accused reported that he had not collected any fines. According to the court records kept by accused and by his judicial admissions, none of the fines mentioned in any of the specifications were ever reported and none of the money was deposited with the finance office.

Each specification alleges that the fines so collected were "property of the United States entrusted to him by virtue of his assignment as a U.S. Military Government Summary Court Officer." Although there was evidence that the Military Government in Germany ultimately caused foreign money which was collected as fines to be deposited to the credit of the "German Economy," and that such funds were never covered into the U.S. Treasury, we are of the opinion that the United States acting through the Military Government was at the very least the special owner of the fines collected. It may be observed here that a special or qualified ownership of property is sufficient to sustain a charge of embezzlement thereof (CM 317327, Durant, 66 BR 277, 310; U.S. v. U.S. Brokerage and Trading Co., 262 Fed. 459;

People v. Pentis, 362 Ill. 306, 199 N.E. 805; Comm. v. Bain, 240 Ky. 611, 42 S.W. 2nd 876). It is immaterial to the issues herein that the United States, acting through its Military Government in Germany, suffered the fines collected to revert to the German Economy.

The circumstances under which the moneys in question were collected, concealed and withheld by accused raise the presumption that accused converted such funds with a fraudulent intent, that is, to deprive the United States of its property (CM 276435, Meyer, 48 BR 331,338; CM 320308, Harnack, 69 BR 323,329).

Accused's explanation was that he used the funds to pay German civilians for services rendered to the military government and its personnel at Tirschenreuth, which he contended was the same use to which such money would have been applied had it been put through the regular channels as was required.

The Board of Review in CM Harnack, supra, 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.)" (Underscoring supplied.)

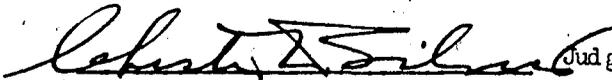
The court was not bound to accept as true accused's testimony that his unauthorized use of the money was for the benefit of the United States or the German Economy and that he received no personal advantage therefrom (CM 330490, Overend). The court in finding accused guilty of embezzlement as alleged rejected his explanation and we find no reason to disturb such findings.

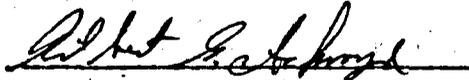
With respect to Charge II and Specification 12 thereof the evidence shows that on about the 15th of March 1947 Elfrieda Kube, one of accused's secretaries, caused Isak Mittelman to send about thirty dollars in U.S. Military Payment Certificates to accused's office to be converted into new certificates. The evidence shows that possession of such "money" by persons other than U.S. military personnel and certain civilian employees

of the military establishment was unauthorized. The evidence does not show specifically that Mittelman was not a member of the class of civilian employees authorized to have and use such "script" but the only reasonable inference to be drawn from the evidence is that his possession thereof was unauthorized. Otherwise he could have converted the script himself without surrendering it to Kube. Thereafter, when demand was made of accused for "Mittelman's converted script" accused stated that Mittelman would get ten dollars and no more. Ten dollars of the converted script was subsequently received by Mittelman from Mrs. Kube. These facts and circumstances are sufficient to justify the court in concluding that Mrs. Kube was acting for the accused and it was he in fact who caused to be delivered to Mittelman the military payment certificates. The surreptitious manner in which the transaction was effected and the fact that the accused returned only one third of the amount received shows with reasonable certainty that accused and all the parties knew that possession of this money by Mittelman was in violation of the mentioned War Department circular and that delivery to Mittelman of the \$10 in Military Payment Certificates was wrongful.

5. Department of the Army records show that accused is 35 years of age and married. He graduated from high school and was engaged in farming prior to being inducted in the Army Air Forces in August 1940. He completed Officer Candidate School at Army Air Forces Training Center No. 1, Miami Beach, Florida, on 24 June 1944 and was commissioned second lieutenant, AUS. Accused was appointed first lieutenant, Air Corps, AUS, on 17 May 1945. His adjectival efficiency ratings have been uniformly "Excellent."

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

 Judge Advocate

 Judge Advocate

 Judge Advocate

SEP 28 1945

JAGK - CM 331628

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 Clarence L. Jeffers (O-587861), Air Corps, Company D, 3rd Military Government Regiment.

2. As approved by the reviewing authority, this officer was convicted of nine offenses of embezzlement by converting to his own use various amounts of German Reichmarks of a value in each case not in excess of \$20, property of the United States entrusted to him by virtue of his assignment as U.S. Military Government Summary Court Officer, in violation of Article of War 93 (Specifications 1 through 9 of Charge I), and of wrongfully delivering \$10 in U.S. Military Payment Certificates to an unauthorized person in violation of Article of War 96 (Specification 12 of Charge II). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, but reduced the period of confinement to one year, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement and forwarded the record of trial for action under Article of War 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.

During the period April to October 1947 the accused was Public Safety and Summary Court Officer of the Third Military Government Regiment with headquarters at Tirschenreuth, Germany. As summary court officer he tried civilians for minor offenses, mostly illegal crossings from the Russian to the American Zone, and had authority to impose sentences including fines, imprisonment or both. He kept a court register of each case tried showing the name of the accused, the offense charged, finding of the court and the sentence imposed. With the assistance of two interpreters and recorders he prepared and signed transcribed records of trial in each case showing in detail the proceedings had and the disposition of the prisoner. He was required to deposit all fines collected with a U.S. Army finance officer and report such deposits to higher headquarters either semi-monthly or monthly.

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Accused's court register and the transcribed records of trial, including commitment papers, show the following trials and sentences imposed by accused: 10 July 1947, Karl Schuster, "4 months imprisonment - suspended if subject returns to the Russian Zone"; 17 July 1947, Kathe Theusinger, four months imprisonment with the provision that "sentence will be suspended if subject returns to the Russian Zone"; 17 July 1947, Gerhard Schreur, "four months imprisonment - sentence will be suspended if subject returns to the Russian Zone"; 24 July 1947, Vladimir Golosow, 10 days imprisonment; 20 August 1947, Baptist Gmeinder, "three months imprisonment or to pay a fine of RM 900"; 21 August 1947, Johanna Rau, "4 months imprisonment - suspended upon immediate return to the Russian Zone"; 28 August 1947, Anton Rossler, 30 days imprisonment; 2 October 1947; Jan Semernikowski, "four months imprisonment - a part of the sentence can be converted to a fine"; 2 October 1947, Nikolaus Barabsch, "four months imprisonment - a part of the sentence can be converted to a fine."

At about the time of the trial of the above mentioned persons, or shortly thereafter the accused accepted German Reichmarks varying in amounts from 260 in the case of Rossler, to 2000 in the cases of Semernikowski and Barabsch, as fines for the release of each of the persons named. Accused never at any time reported the fines collected and did not deposit any of the money with a finance officer as required. For the months of July and August 1947, during which most of the fines were collected, he forwarded negative reports as to fines collected.

On or about 15 March 1947 the accused received through his secretary about thirty dollars in U.S. Military Payment Certificates "script" from a Polish civilian named Isak Mittelman for the purpose of converting it into new script. Mittelman was not a member of the class of persons authorized by regulations to use or have in his possession this form of currency. After demand for a return of the money had been made upon him, the accused caused to be delivered to Mittelman \$10 of the converted Military Payment Certificates.

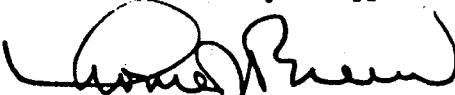
The accused testified that he did not deliver any Military Payment Certificates to Mittelman, but did collect the monies mentioned above as fines and failed to report and deposit the fines. He asserted that he had spent the money for various services rendered military personnel in the area and although his actions were "irregular," such funds were customarily covered into the "German Economy" and used for the same purposes to which he applied them. Two finance officers testified that foreign currency collected as fines was required to be forwarded to a central disbursing office in Friedberg where it was transferred by the Military Government to the Land Ministry of Finance.

4. Department of the Army records show that accused is 35 years of age and married. He graduated from high school and was engaged in farming prior to being inducted in the Army Air Forces in August 1940. He completed Officer Candidate School at the Army Air Forces Training

Center No. 1, Miami Beach, Florida, on 24 June 1944 and was commissioned second lieutenant, AUS. Accused was appointed first lieutenant, Air Corps, AUS, on 17 May 1945. His adjectival efficiency ratings have been uniformly "Excellent."

5. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution, and that a United States disciplinary barracks be designated as the place of confinement.

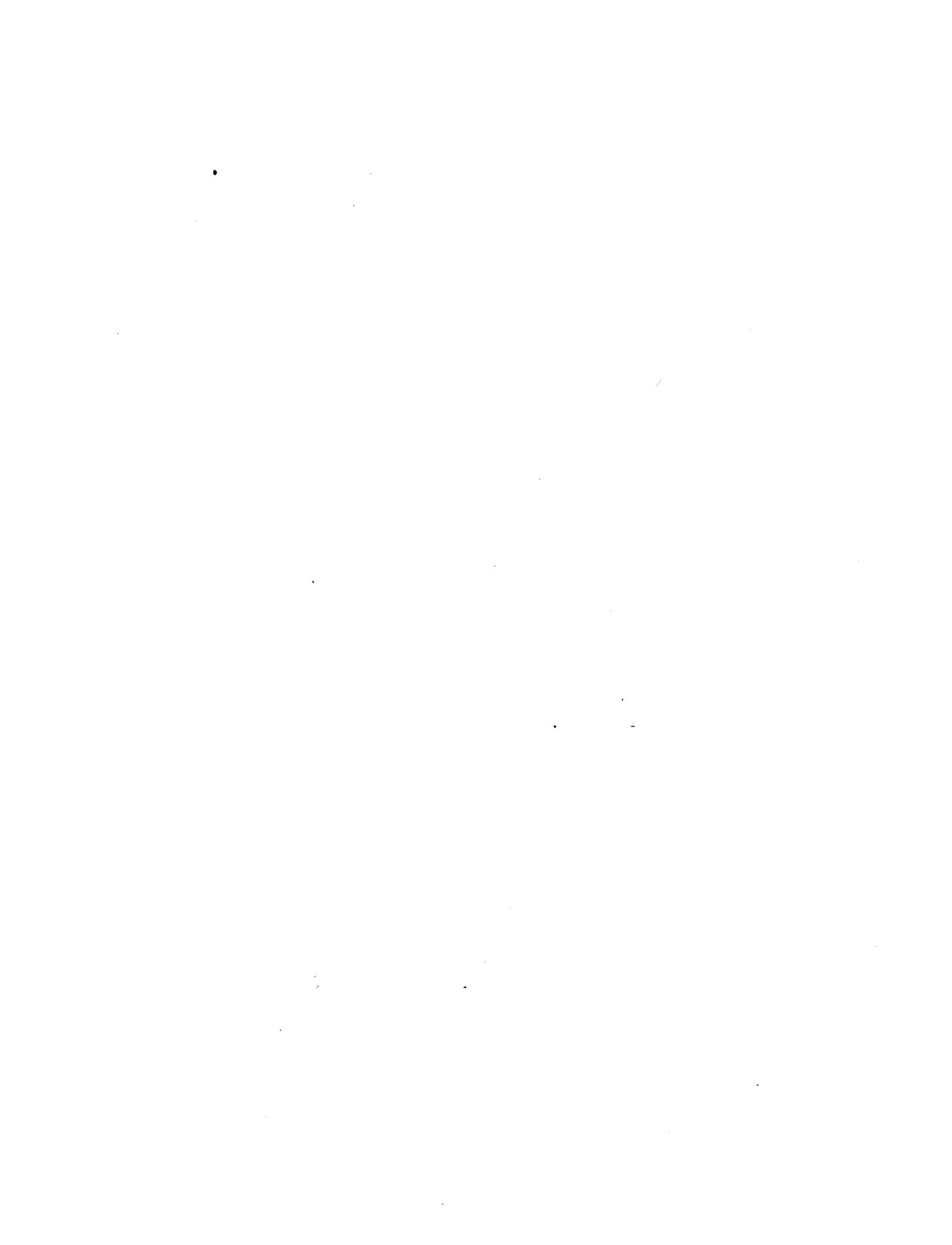
6. Inclosed is a form of action designed to carry into effect the foregoing recommendation should it meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 176, 8 Oct 1948).



DEPARTMENT OF THE ARMY

In the Office of The Judge Advocate General

(127)

JAGK - CM 331650

Washington 25, D. C.

20 APR 1948

UNITED STATES)

EIGHTH ARMY

v.)

) Trial by G.C.M., convened at APO 343,
) 22 and 23 April 1948. Dismissal, total
) forfeitures and confinement for two (2)
) years.

Captain ELDRIDGE DOWNES, III)
(O-31450), Headquarters Special)
Troops, Eighth Army, APO 343)

OPINION of the BOARD OF REVIEW

SILVERS, ACKROYD and LANNING, 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 93d Article of War.

Specification 1: In that Captain Eldridge Downes III, Headquarters Special Troops, Eighth Army, APO 343, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 12 January 1948, feloniously take, steal and carry away about eleven (11) cases (132) bottles of whiskey, of the value of Two Hundred Twenty Dollars (\$220.00), property of the Eighth Army Locker Fund.

Specification 2: In that Captain Eldridge Downes III, ***, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 14 January 1948, feloniously take, steal and carry away about seven (7) cases (84) bottles of whiskey, of the value of One Hundred Forty Dollars (\$140.00), property of the Eighth Army Locker Fund.

Specification 3: In that Captain Eldridge Downes III, ***, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 21 January 1948, with intent to defraud, willfully, unlawfully, and feloniously make as true and genuine, a certain paper in substantially the following words and figures:

"To Whom It May Concern.

This is to certify that I gave Mr. Katsukawa two cases (24 bottles) of whiskey on 19 January 1948, to be used for a party, which he was going to give for me and some of my friends.

The entire transaction is perfectly legal, and the whiskey was given by me to Mr. Katsukawa as a gift only for the purpose of the party, and for no other reason.

I would appear in person at the police station to make this explanation, but at the present time I am confined to my quarters with a bad cold, and the doctor has advised that I do not go out for a couple of days. I shall be happy to appear in person to make any further explanation or identification that you may think necessary, in the event that this explanation does not satisfy.

/s/ R. E. Jackson
/t/ R. E. JACKSON
Capt., Inf."

a writing of a private nature which might operate to the prejudice of another and said writing was, as he, the said Captain Eldridge Downes III then well knew, falsely made and forged.

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

Specification 1: In that Captain Eldridge Downes III, ***, did, at or in the vicinity of Tokyo, Honshu, Japan, on or about 12 January 1948, wrongfully and unlawfully deliver about eleven (11) cases (132 bottles) of whiskey to Taisuke Katsukawa for value, which whiskey was not the property of Captain Eldridge Downes III and Captain Eldridge Downes III well knowing that he had no right, title, or interest thereon, and had no right to sell or otherwise dispose of it to Taisuke Katsukawa.

Specification 2: In that Captain Eldridge Downes III, ***, did, at or in the vicinity of Tokyo, Honshu, Japan, on or about 14 January 1948, wrongfully and unlawfully deliver about seven (7) cases (84 bottles) of whiskey to Taisuke Katsukawa for value, which whiskey was not the property of Captain Eldridge Downes III and Captain Eldridge Downes III well knowing that he had no right, title, or interest thereon, and had no right to sell or otherwise dispose of it to Taisuke Katsukawa.

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

He pleaded not guilty to all charges and specifications. He was found guilty of Charges I and II and the specifications thereunder and not guilty of Charge III and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard

labor at such place as the reviewing authority might direct for two years. The reviewing authority approved only so much of the finding of guilty of Specification 1 of Charge I as involved a finding of guilty of larceny of the described property as alleged, of some value in excess of \$50, approved only so much of the finding of guilty of Specification 2 of Charge I as involved a finding of guilty of larceny of the property as alleged, of some value in excess of \$50. He approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the Prosecution

On some date in October 1947 First Lieutenant William R. Clark, Infantry, Yokohama Quartermaster Depot, introduced the accused to Mr. Taisuke Katsukawa, a Japanese national who had formerly been employed as manager of the Quartermaster sales store (R 14). Taisuke Katsukawa testified that on the day following his introduction to the accused he had some further conversations with him through Mr. Sakamoto, formerly the official interpreter at the sales commissary. In the early part of January 1948 the accused contacted Katsukawa and requested him to purchase some whiskey. Katsukawa interviewed some prospective Japanese purchasers and inquired as to possible selling price. He "relayed this price" to the accused. On about 12 January the accused delivered to Katsukawa eleven cases of whiskey. On about 17 January the accused also delivered to the Japanese about seven cases of whiskey. On 21 January Katsukawa paid to the accused the sum of 170,000 yen. Shortly after the second delivery was made, Katsukawa's son and a Japanese who was working with him were apprehended with some of the whiskey by the Japanese police. Katsukawa upon hearing of the arrests phoned the accused and urgently requested that he assist in procuring the release of the men. Shortly after 1700 hours on the same day the accused appeared at Katsukawa's office and stated in effect, "I cannot go myself so I make document so you could take this over and bring them back." The accused thereupon executed, signed and delivered to Katsukawa in the presence of Sakamoto, the following described document which was identified and received into evidence without objection as Prosecution Exhibit 2:

"To Whom it May Concern.

"This is to certify that I gave Mr Katsukawa two cases (24 bottles) of whiskey on 19 January 1948, to be used for a party, which he was going to give for me and some of my friends.

"The entire transaction is perfectly legal, and the whiskey was given by me to Mr Katsukawa as a gift only for

the purpose of the party, and for no other reason.

"I would appear in person at the police station to make this explanation, but at the present time I am confined to my quarters with a bad cold, and the doctor has advised that I do not go out for a couple days. In the event that this explanation does not satisfy, I shall be happy to appear in person to make any further explanation or identification that you may think necessary.

/s/ R. E. Jackson
R.E. JACKSON
Capt., Inf." (R 12, 19-24,84)

It was stipulated that if Eiichi Sakamoto were present he would testify in detail as set forth in a statement appearing in the record and which substantially corroborates the aforementioned testimony of Katsukawa. A doctor's certificate was received in evidence showing that Sakamoto was confined to his bed by illness and therefore unable to appear at the trial (R 82-84).

Captain Ilmer H. W. Kaempfe testified that on 26 January 1948 he succeeded the accused as "warehouse and distributing officer for the 8th Army Locker Fund." The purpose of the fund was to purchase whiskey for and to distribute it to all of the occupation forces in Japan. The procedure adopted for the operation of the fund was that each month the personnel made up their orders which, together with a sufficient amount of money to cover the cost, was given to the major units of the occupation forces. The major unit made up a consolidated order and sent it together with the money to the fund. The orders were then combined and the whiskey was ordered by the fund. About 60 or 90 days later when the shipment of whiskey arrived the warehouse and distributing officer for the fund would break the whiskey down for distribution to the major units where it was further broken down for delivery to the individuals. The warehouse and distributing officer also had the additional duty of distributing the whiskey to the individuals of the Eighth Army Headquarters and attached units which was considered a major unit. The distributing officer would not open each case of whiskey to discover broken bottles, but did add a certain number of extra bottles to the amount given to the major units to cover breakage, however, no broken bottles were replaced after once delivered. After distribution there was always some whiskey left over which was kept in the warehouse and was reported to the council who decided what disposition should be made of it. The distributing officer had full charge of the warehouse and made the distribution. The witness made an audit of the Eighth Army Locker Fund concerning the receipts and distribution of liquor for Eighth Army Headquarters and attached units. This audit covered the orders received for the months of August, September and October 1947 and the distribution made when shipments

arrived. The audit did not show how many bottles were broken or stolen but did have a column showing the number of bottles unaccounted for each month. Witness testified that there were no papers or records of any kind to show the disposition made of these bottles. As revealed by the audit a total of 22-11/12 cases of whiskey were unaccounted for for August, 20-5/12 cases for September, and 7-8/12 cases for October or a grand total of 51 cases for the entire period. The whiskey ordered in October as shown by the audit was distributed in December 1947 and January 1948, at which time accused was the distributing officer. The defense objected to the receiving of the audit in evidence as it did not show how many bottles of those unaccounted for were broken, but when the law member ruled it would be received as Prosecution Exhibit 3 "for what it disclosed" the objection was withdrawn. During February 1948, the first month after relieving accused, witness had a breakage of three cases and four bottles (R 45-56).

Major Frederick P. Rawson, Infantry, testified that he was custodian of the 8th Army Locker Fund and he identified Prosecution Exhibit 3 as an audit which he had caused to be made. The prices on the audit represented the cost of the whiskey which ranged from \$8.70 per case for Bellows Gin to \$19.62 per case for Old Crow Bourbon whiskey. On cross-examination he stated that with respect to breakage allowance, "we try to run somewhere around one percent." The audit did not state that any cases were "stolen." It simply showed "merchandise not accounted for." Captain Downes, the accused, had become warehouse and distributing officer on 18 October 1947. The collections for August and September 1947 had been made before Captain Downes became connected with the fund, however, he had made the distribution based on the aforementioned collections. The fund operated theoretically as follows:

"*** we collect money, we order the merchandise, we get the merchandise in, we distribute it and we are without money and without merchandise. However, we have another part to the 8th Army Locker Fund. We take special orders and I cannot say that the warehouse is empty, it is not." (R 56-62)

Agent Billy R. Smith of the Criminal Investigation Division, identified in the court room "16 cases of whiskey minus one bottle" which he testified that he and a Japanese detective of his detachment had confiscated at Karamata Building No. 2, 2 Chome, Kotabuyki Cho, Tokyo, Japan, on the night of 24 January 1948. There were twelve four-fifths bottles to the case consisting of 107 bottles of Old Crow, 12 bottles of Old Granddad, 60 Bellows whiskey and nine bottles of Bellows gin. He procured the liquor as a result of an interrogation of Mr. Katsukawa who directed him to the place where it had been found (R 62-66). The prosecution recalled Taisuke Katsukawa to the stand and he identified Prosecution Exhibit 4 as being part of the whiskey he and the accused had delivered to Kubo's home and then transferred to the home of Seikichi Murai. He had accompanied Mr. Smith when the latter confiscated the whiskey. The defense

contended that the whiskey had not been properly identified, but the objection thereto was overruled and the liquor was received in evidence as Prosecution Exhibit 4 (R 85-87). The prosecution introduced further evidence showing that the liquor had been received, inventoried and retained at the headquarters of the "44th CID" prior to being brought into court at the trial (R 75). The inventory was received in evidence as Prosecution Exhibit 5 (R 80).

Master Sergeant Andrew G. Waldhauser, Military Police Investigation Section of Yokohama, testified that he was assigned to investigate "an illegal transaction of whiskey that Captain Downes was involved in." He had interviewed the accused on 24 January 1948 at Room 411, New Grand Hotel, where the accused had spent the night in arrest of quarters. On orders from Major Diaz, Commanding Officer of the 44th Criminal Investigation Division, Sergeant Waldhauser had permitted Miss Kay Womack to visit the accused for about one-half hour. The witness testified that the accused had requested to be permitted to go to Criminal Investigation Division headquarters and make a statement. At headquarters Sergeant Waldhauser read and explained the 24th Article of War to the accused, who stated that he fully understood his rights and desired to make a complete confession. No promises or threats were employed. The accused thereupon made a voluntary statement in his own handwriting which he swore to before Captain J. W. Brant, Summary Court. The witness identified Prosecution Exhibit 1 as this statement (R 24-26).

Captain John W. Brandt, Commanding Officer, 44th Criminal Investigation Division, Yokohama, Honshu, Japan, identified Prosecution Exhibit 1 as a statement written by the accused and sworn to before him as summary court officer. Captain Brandt stated that he had explained to the accused his rights under Article of War 24 before taking the statement. On cross-examination the witness testified that he had interviewed the accused at his quarters and the accused asserted that he did not desire to make any statement (R 29-33).

Major Demetrio D. Diaz, Chief of the Yokohama Criminal Investigation Division, testified that on the morning of 24 January 1948 he conferred with the accused respecting the charges against him. He read and explained the 24th Article of War to the accused and did not exercise any "duress or pressure" on him. Major Diaz ordered the accused detained in the Grand Hotel pending investigation of his case. Miss Womack had called at Major Diaz's office and at either her request or that of the accused, she was permitted to visit accused at the Hotel. She was not connected with the Criminal Investigation Division in any manner. On motion of the prosecution, Prosecution Exhibit 1 was received in evidence (R 35-42), and in part is as follows:

"During the first week of January 1948, this Officer approached Mr. Katchikawa and asked him if he would be interested

in purchasing some whiskey. Mr. Katsukawa replied that he would buy it, and asked me how much I had, and how much I wanted per case. To which I replied that I did not know how much I would have to sell, but that I wanted 16,000 Yen per case. (I had heard a party, who is entirely disassociated with this case or myself, say that that is what whiskey was selling for). Mr. Katsukawa replied that he didn't know what he could sell the whiskey for, and would give me whatever he could get. To this I agreed.

"This and future conversations were carried on thru a Japanese interpreter in Mr. Katsukawa's office. The interpreter is definitely an innocent third party, in that to my knowledge, he received nothing from the transaction, and did not want any part of same. He should not be penalized for my mistake.

"I issued the October Locker Fund to all the major units in Japan, and then to all units of and attached to 8th Army. All units received the amounts as set forth on each individual unit statement, the amount being counted and verified by the receiving Officer at which time the unit Officer of each unit would sign my copy of the issue statement and depart. The quantities shown on each statement were figured out in our office by M/Sgt K. Brown, and in every case the units received at least this amount or more from me. Hence when the last unit had departed, there were still approximately eighteen (18) cases of whiskey on hand. It is this amount that I delivered with Mr. Katsukawa in my car to a house in Tokyo.

"At this time Mr. Katsukawa told me that he could only get 9000 Yen per case, to which I replied that I wanted 170,000 Yen for the merchandise, to this he agreed. The payment was to be made to me on 20 January in Mr. Katsukawa's office, and was effected on that date. The money was in an ordinary paper bag, and I did not even take the time to look in the bag, as by this time I was already more than aware of the huge mistake I had made, and desired to get away from the office and Mr. Katsukawa as soon as possible. I merely asked if 170,000 Yen were in the bag, and he replied that it was."

4. Evidence for the Defense

Captain Theodore E. DeMasse, Ordnance, testified that he had known the accused for about six years and had observed his manner of performance of duties. He stated that the accused was a person of the highest moral character and "very much of a gentleman" (R 88). No further evidence was presented by the defense and the accused, after being duly advised of his rights as a witness, elected to remain silent (R 95).

After announcing the sentence the president of the court stated that he would confer with the defense regarding the preparation of a letter that

the court desired to sign and attach to the record. This letter dated 9 June 1948 and addressed to the Commanding General, Eighth Army, states that the accused does not appear to be of the criminal type, that he has a past excellent record and that for the reasons stated it was recommended that the reviewing authority approve only so much of the sentence as involved dismissal from the service.

5. Comment

Detailed oral arguments were made by counsel after the evidence had been presented. It was the contention by the defense that the prosecution's evidence did not establish the offense or offenses of larceny but that if accepted by the court the evidence would at most show embezzlement of the described property. The theory of the defense was that the accused, as the officer charged with the procurement and distribution of the liquor, occupied a fiduciary relation with respect to the fund so that a "misappropriation" by him of the property constituted a breach of trust. This same question was raised and disposed of contrary to the defense's contention in CM 318296, Mayer, 67 BR 211, 217, wherein it was pointed out that an officer who by virtue of his military office is charged with the supervision over property does not have possession of such property in contemplation of law, but merely a custody limited to the care and lawful regulated disposition thereof. Such custody and control by the officer is always subject to regulations and orders by higher authority. The locker fund of the 8th U.S. Army was an association or instrumentality created and operated by that Army. The wrongful carrying away of the property with intent to deprive the fund of its property involved such trespass in law as to adequately support the charge of larceny of the property (see also CM 317327, Durant, 66 BR 277, 307, and cases therein cited). Although the value of the whiskey was not clearly and specifically proven, the cost prices were shown on the audit (Pros Ex 3) and most of the cases of whiskey were before the court (Pros Ex 5). The court was not warranted in finding a specific value for the whiskey as alleged but would have been warranted in finding that the value of the whiskey described in Specifications 1 and 2 of Charge I was in each instance in excess of \$50 (CM 317327, Durant, 66 BR 277, 307; CM 324519, Davis, 73 BR 251, 265; CM 327842, Coleman).

Specification 3 of Charge I alleges forgery of the instrument shown in Prosecution Exhibit 2. The proof shows that when the accused was notified that some of the Japanese who were involved in the disposition of the whiskey had been apprehended by the Japanese police, the accused, in the presence of Katsukawa and the interpreter Sakamoto, executed and signed the name "R.E. Jackson, Captain, Infantry," to a paper bearing typewriting which represented that the said Japanese were engaged in a legal transaction. The paper writing was clearly shown to be false in its entirety, made with the intent to deceive the officers, and was such an instrument as, if genuine, would have imposed a legal liability on the person whose

name appeared thereon. The record does not show whether any such person as "R. E. Jackson, Capt. Inf." actually existed, but where there is an intent to defraud, forgery may be committed by signing a fictitious name (par 149j, MCM 1928; CM 271591, Bailey, 41 BR 129,138). It follows that the evidence adduced was sufficient to support the findings of guilty of Charge I and the specifications thereunder as approved by the reviewing authority.

Specifications 1 and 2 of Charge II each alleges the wrongful delivery, for value, to Katsukawa of the same property alleged to have been stolen in Specifications 1 and 2 of Charge I. Although inartfully expressed, the specifications indicate that wrongful sale of the property is the gist of the offenses denounced. The evidence clearly shows, and the accused admitted, that he wrongfully sold and delivered the described property to Katsukawa. Delivery was made in separate transactions and on different dates, although the payment for both deliveries was made at one time.

It may here be noted that no undue multiplication of charges resulted in arraigning the accused upon specifications alleging larceny of property under the 93rd Article of War and also the wrongful sale and delivery of the identical property in violation of Article of War 95, each of the alleged offenses being separate and distinct from the other (CM 319858, Correlle, 69 BR 183, 201; CM 304486, Green, 21 BR (ETO) 189).

The counsel for defense vigorously attacked the integrity of the audit (Pros Ex 3) on the ground that it did not show how much of the whiskey, which was unaccounted for, was for breakage. The officer who made the audit testified that there were absolutely no records to show what disposition was made of the liquor reported in the audit as unaccounted for, but that a portion thereof may have been broken. The audit was properly admitted in evidence as proof that there was whiskey missing from the fund. The proof adduced by the prosecution showing that accused was in charge of receiving and distributing the whiskey of the fund, that surplus whiskey remained in his charge after distribution, that he surreptitiously contacted a Japanese national to arrange for a sale of whiskey, that he sold and delivered eleven cases and seven cases of liquor, that he executed a false writing for the purpose of obtaining the freedom of two Japanese implicated in the transactions, that the audit of the accounts of the fund while he was warehouse and distributing officer showed a large amount of whiskey as unaccounted for and the presentation in court of approximately sixteen cases of the whiskey sold by accused to a Japanese produce a chain of circumstances from which court could reasonably infer that the crimes alleged probably were committed (CM 325377, Sipalay, 74 BR 169). It follows that the corpus delicti of each of the offenses charged having been established by competent evidence the accused's pre-trial voluntary confession was properly admitted in evidence.

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6. Department of the Army records show that the accused is 36 years of age and unmarried. He completed Officers Candidate School and was commissioned a second lieutenant, Quartermaster Corps, AUS, on 14 August 1942. He was commissioned a captain in the regular Army on 24 November 1946.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 93.

Charles D. Silvers, Judge Advocate

(On temporary duty), Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 331650

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 18 AUG 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 Eldridge Downes, III (O-31450), Headquarters Special Troops, Eighth Army, APO 343.

2. Upon trial by general court-martial this officer was found guilty of the larceny of 18 cases of whiskey of the value of more than \$50, property of the 8th Army Locker Fund (two specifications), the forgery of a certain certificate all in violation of Article of War 93 (Chg I, Specs 1, 2 and 3); and the "delivery for value" to a Japanese of 18 cases of whiskey not belonging to him (two specifications) in violation of Article of War 95 (Chg II, Specs 1 and 2). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks 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 that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

In January 1948 the accused was the warehouse and distribution officer of the 8th Army Locker Fund. The fund was operated for the procurement and distribution of liquors to all of the occupation forces of Japan. On 12 January 1948 and in furtherance of a pre-arranged agreement, the accused wrongfully sold and delivered to a Japanese civilian eleven cases (132 bottles) of whiskey, the property of the Locker Fund. On 14 January 1948 he wrongfully sold and delivered seven cases (84 bottles) of whiskey belonging to the fund to the same Japanese person. On 21 January 1948 the Japanese paid the accused 170,000 yen for the liquor. On about 21 January 1948 Japanese police officers arrested the son of the purchaser and the Criminal Investigation Division confiscated part of the whiskey. In an attempt to secure the release of the Japanese, the accused executed a certificate and signed the name "R.E. Jackson, Capt Inf" thereto, stating that the transaction was entirely legal and that the writer had given the whiskey to the Japanese to be used for a party.

In a pre-trial statement to the investigating officer, the accused admitted the acts constituting the offenses of which he was convicted and stated that he did not want the yen but was attempting to procure a

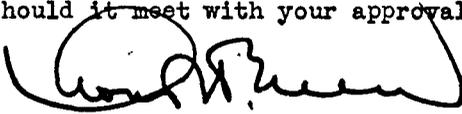
diamond ring for his fiance.

4. The accused is 36 years of age and unmarried. He was commissioned a captain, Quartermaster Corps, Regular Army, on 24 November 1946. In a letter to the reviewing authority, which was attached to the record of trial, the president of the court recommended that in view of the accused's prior excellent record, only so much of the sentence be approved as involved dismissal from the service.

5. On 9 August 1948 Mr. Eldridge Downes, father of the accused, and Mr. John D. Carter, both of Denton, Maryland, appeared before the Board of Review and made oral arguments in the case. They submitted for consideration character references in the form of letters from various officials and citizens, which letters have been attached to the record of trial.

6. I recommend that the sentence be confirmed and carried into execution. I further recommend that an appropriate United States disciplinary barracks be designated as the place of confinement.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 153, 26 August 1948)

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

(139)

9 JUL 1948

JAGQ - CM 331723

UNITED STATES)

v.)

Private JOHN W. SOWDER,)
(RA 35983738), Troop C,)
6th Constabulary Squadron.)

UNITED STATES CONSTABULARY

Trial by G.C.M., convened at
Schweinfurt, Germany, 3 June
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 record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private John W. Sowder, Troop C, 6th Constabulary Squadron, did, at Coburg, Germany, on or about 17 April 1948, in his testimony before a Summary Court-Martial at the trial of John W. Sowder, make under oath a statement in substance as follows: "I was not absent without leave from 2 April 1948 to 14 April 1948, but was sent as a patient from the 385th Station Hospital to the 98th General Hospital Munich and was a patient there during the period I am being tried for being absent without leave." which statement he did not believe to be true.

Accused pleaded not guilty to, and was found guilty of the Charge and Specification. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three (3) years. The reviewing authority approved the sentence, reduced the period of confinement to one (1) 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 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that accused was advised of his rights under Article of War 24 and sworn as a witness in his own behalf at his trial by Summary Court-Martial on 16 and 17 April 1948 (R. 5,7,8,9). He was being tried for the offense of absence without leave from 2 April to 14 April 1948 and testified on the first day of his trial that he was in the 98th General Hospital during the period he was alleged to have been absent without authority. Because his testimony "sounded truthful", Major George A. Lucey, the Summary Court Officer, continued the trial in order to verify accused's statement. According to Major Lucey, he reconvened the court the following day when "I had a telephone check by the squadron surgeon made with the hospital which the results were negative, stating he was not in the hospital" (R.5). After again being advised of his rights and sworn on 17 April when the court reconvened accused ". . . elaborated and clarified the fact concerning the hospital . . ." to the Summary Court Officer (R. 5,8,9).

To establish the falsity of accused's sworn statement, the prosecution offered the affidavit of one Staff Sergeant Mickelson who was then absent without leave and therefore not available as a witness. At the direction of Major Lucey following the trial, Sergeant Mickelson and another non-commissioned officer purportedly made a physical check of the 98th General Hospital to determine the truthfulness of accused's testimony. The defense objection to the admission of Sergeant Mickelson's sworn statement was sustained, but thereafter Major Lucey was permitted to testify over defense objection that Sergeant Mickelson made an official report to him in which Sergeant Mickelson stated accused was not in the 98th General Hospital in Munich during the period 2 to 14 April 1948 (R. 6,7).

Master Sergeant Samuel I. Davis, Chief Clerk in the Registrar's Office, 98th General Hospital, testified that he was supervisor of all the hospital records and that according to these records accused was not in that hospital between 2 April 1948 and 14 April 1948 (R. 10,11).

4. For the defense Technical Sergeant John D. Shultz testified that he was present on both days of accused's trial (R. 12). Accused's Special Defense Counsel, who was sworn as a witness, testified, however, that Major Lucey informed him Sergeant Shultz was not present on the first day of the trial (R. 12, 13). Accused, after being warned of his rights as a witness, testified that there was no one present besides Major Lucey in the court room on the first day, and that he (accused) was at no time administered a formal oath (R. 14). He testified that he made a statement, not sworn, to the effect that he was in

the 98th General Hospital in Munich, between the 2nd and 14th of April, having been admitted by "a WAC T/3". He further testified that he was in fact in that hospital during the period in question (R. 14).

5. The necessary elements of the offense of false swearing for which accused was tried and found guilty 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).

In support of the first two elements of proof, there was competent evidence adduced showing that accused was advised of his rights under the 24th Article of War, sworn as a witness on both days of the Summary Court-Martial proceeding, and that the oath was duly administered to him by Major George A. Lucey, serving in the capacity of Summary Court Officer. To establish the falsity of accused's testimony, as required by sub-paragraph (c) above, the prosecution after failing in their efforts to introduce the sworn statement of Sergeant Mickelson, which statement was clearly inadmissible, elicited testimony from Major Lucey over defense objection concerning an "official report" made to him by Sergeant Mickelson. This testimony of Major Lucey was clearly hearsay and incompetent, and of such character that its reception constituted serious error. The fact that it was an "official report" does not change or modify its hearsay character or make it competent evidence. (Par. 113b, MCM 1928 p. 113).

Independent of this incompetent testimony, the only evidence tending to prove the falsity of accused's statements under oath was the testimony of Master Sergeant Samuel I. Davis, of the 98th General Hospital to the effect the records of that institution reflected accused was not present during the period 2 April to 14 April 1948. Since this testimony stands uncorroborated in the record by other competent evidence, a serious question arises as to the proof of the third element set forth in sub-paragraph (c) above, when considered in the light of the rule announced in CM 322255 Ruch, 9 September 1947. In that case, the Board of Review, after discussing the rule long recognized in perjury cases which requires corroboration of the testimony of a single witness as to the falsity of the fact or facts to which accused allegedly testified, held the same principle applicable to the offense of false swearing. The following language of the Board in that

holding is clearly decisive of the question here presented:

"Fundamentally, the same reasoning and logic is applicable also in the case of false swearing, and the rule requiring corroboration has similarly been adhered to with respect to the essentials of proof for conviction of this offense, viz:

' . . . A conviction [for false swearing] will not be sustained unless founded on the evidence of two credible witnesses, or on that of one such witness corroborated strongly by circumstances pointing to the falsity of the statements.' (Sec. 713(658) Underhill's Criminal Evidence, Fourth Edition, p. 1326; State v. Miller, Missouri App. 159; (Sic) Aguierre v. State, 31 Texas Cr. 519, 21 S.W. 256; Regina v. Browning, 3 Cox C.C. 437, 438).

"Although the question of whether or not corroboration is necessary for conviction of false swearing has not been expressly decided by military tribunals, the only available precedent strongly indicates that the rule does apply, to wit:

'We may assume, though the question has not been authoritatively settled for court-martial procedure, that the rule applying to prosecutions for perjury, that the testimony of one witness is insufficient to convict without corroboration by other evidence, direct or circumstantial, tending to prove falsity (p. 175 MCM) applies in false swearing cases such as this one' (CM 192495, Dockery (1930)).

"Aside from the testimony of one witness, Technical Sergeant Elliot B. Taft (R. 13, 14), the record of trial in the instant case is wholly void of proof of falsity, either direct or circumstantial, of accused's alleged acts of (1) going into the Special Service Building at Gaffey Barracks, Wetzlar, Germany, during the afternoon of 26 December 1946, or (2) attempting to handle liquor in that building on the same date. The evidence of record being thus limited, there is a failure of legal proof of false swearing, as found by the court."

There being no competent evidence corroborating the testimony of Master Sergeant Davis in the instant case to the effect that accused's testimony was false, there was consequently a failure of legal proof of a necessary element of the offense charged unless it is determined that the fact Davis' testimony was based entirely upon the "records" of the hospital is sufficient within itself to prove the falsity of accused's statement, within some recognized exception to the "two witness" rule.

Considering the evidence in the instant case as if the actual records of the hospital had been introduced in evidence, the question for determination is whether such evidence causes this case to fall within the following exception to the rule enunciated above:

"The cases in which a second living witness in issues of this class may be dispensed with are thus summed up by the Supreme Court of the United States: Where a person is charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony springing from himself with circumstances showing the corrupt intent; where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath being proved to have been taken corruptly; where the party has been charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it." (Wharton's Criminal Law, Vol. 2, p. 1840-41). (Underscoring supplied).

The Manual for Courts-Martial also states:

"Documentary evidence is especially valuable in this connection; proof of perjury for example, where a person is charged with a perjury as to facts directly disproved by documentary or written testimony springing from himself with circumstances showing the corrupt intent; or where the testimony with respect to which perjury is charged is contradicted by a public record proved to have been well known to the accused when he took the oath." (MCM 1928, par. i, p. 175).

The above statements of the rule and the exceptions thereto were first announced in this country by the Supreme Court of the United States in the case of United States v. Wood, 39 U.S. 430 (cited with approval in Hammer v. United States, 271 U.S. 627), at page 441 as follows:

"We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule. In what cases, then, will the rule not apply? Or in what cases may a living witness to the corpus delicti of a defendant, be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to; or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it.

' Let us suppose a case or two, in illustration of the positions just laid down. A defendant, in two answers to a bill in equity, swears unequivocally to a fact, and as positively against it. A document is produced, executed by himself, decisive of the truth of the fact. In such a case, can a living witness be wanted; or could any number of living witnesses prove, more certainly, the false swearing, than it would be proved by the document and the defendant's contradictory oaths? Or, take the case of defendant being sued in equity, to recover from him the contents of a lost bond. In answer to a call upon him to say whether he had or had not made such a bond, he swears that he never had made such a bond. The bond is afterwards found and proved; is not his answer, then, upon oath, disproved by a circumstance, stronger than words can be, coming from the mouth of man? Again, suppose a person, in order to

obtain a right under a statute, is required to take an oath to a fact which is the mutual act of himself and another, and which from its nature is unequivocal. He swears contrary to the fact. Subsequently, his letters, written before and after his oath, are found; which disclose not only the real fact, but a general design to misrepresent facts of the same kind, and a book or other written paper is produced, bearing directly upon the fact, from its being the original of the transaction, reduced to writing contemporaneously with its occurrence, and recognised by the defendant to be such, though it is in the handwriting of another; will not the defendant's recognition of it, with the auxiliary evidence of the letters, without a living witness to speak directly to the corpus delicti of the defendant, justify the whole being put before a jury, in a case of perjury; for them to decide whether the defendant has sworn falsely and corruptly? In such a case, if the person was called in whose handwriting the book or other written paper was, it might happen, that he had only been the recorder of the transaction, at the instigation of one of the parties to it, without his ever having had any communication with the other respecting its contents. The witness then would only prove so much, without proving anything which bore upon the charge of false swearing. But when the defendant himself has recognised the book or writing as evidence of his act (and such recognition is proved), there is no rule of evidence which requires other proof, beyond his admission, to prove the contents of the book or paper to be true." (Underscoring supplied).

It seems clear from the principle embodied in the above quotation and subsequent illustrations set forth therein that the only exception to the general rule within which the present case might conceivably fall is the case "where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath", as it cannot be contended that accused in the instant case in any manner "recognized" or admitted that the hospital records were true or correct. In fact, he testified in his own behalf, reiterating his innocence and still contending that he was actually in the hospital during the period in question despite what the records of that institution reflected.

Assuming, but not deciding, that the hospital records were "public records" within the meaning of that phrase as used by the Supreme Court, the next question for determination is whether the necessary requirements of proof under the "public record exception" to the general rule was fulfilled by the evidence in the present case. The Board of Review is of the opinion that they were not complied with for several reasons. First, it will be noted that in the language of the Supreme Court, the "public records" relied upon to establish the falsity of accused's statement must be "proved to have been well known to the defendant when he took the oath". There was no evidence either direct or circumstantial from which the court could even infer that accused had any knowledge of what the hospital records disclosed at the time he took the oath and made the statement in question. If he was actually in the hospital as he contends, he had every reason to believe the records of that installation would so reflect. In short, records of this character are not compiled by accused or made in his presence and he cannot be charged with their accuracy, truthfulness, or knowledge of their contents. In our opinion, the type of "public record" which would be so well known to an accused that no corroboration of its contents would be necessary to prove beyond any doubt the falsity of accused's oath, must be one which could not be made without his knowledge, such as his conviction by a court of record or a bond which he signed in a judicial proceeding, which latter illustration was used by the Supreme Court in the quotation above set forth.

Furthermore, it is a matter of common knowledge that while records of hospitals are competent evidence and admissible as an exception to the hearsay rule, they are not infallible and mistakes do occur in their preparation and maintenance. Consequently, the Board of Review is not prepared to hold that such records alone, with no showing of any corroborating circumstances as to their accuracy, or that their contents were known to accused, are sufficient upon which to base a finding of guilty of an offense of perjury or false swearing.

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

W. H. Johnson Jr., Judge Advocate
Wilbert T. Bingham, Judge Advocate
A. H. Kauer, Judge Advocate

(147)

JUL 23 1948

JAGQ - CM 331723

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 John W. Sowder (RA 35983738), Troop C, Constabulary Squadron, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be disapproved.

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

(CM 331723).

1 Incl
Record of Trial



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(150)

shoes, low quarter, tan, value about \$5.13, the property of the United States, issued and furnished for the use and benefit of Private First Class Philip T. Liberatore, Company B, 4th Signal Battalion; one jacket, field, M1943, value about \$10.28, one hood, jacket, field, value about \$1.13, and one pair shoes, low quarter, tan, value about \$5.13, the property of the United States, issued and furnished for the use and benefit of Private Leonard A. Little, Company A, 4th Signal Battalion; a total value of \$40.33.

Accused pleaded not guilty to and was found guilty of the Charge and Specification except the words "and Private Thomas Budkey, Jr., Company B, 4th Signal Battalion, acting jointly, and in pursuance of a common intent," and "one bag, barracks, value about \$1.17, and three pair trousers, cotton Khaki, value about \$8.73, the property of the United States, issued and furnished for the use and benefit of Private First Class John W. Anders, Company A, 4th Signal Battalion," and "one jacket, field, M1943, value about \$10.28, one hood, jacket, field, value about \$1.13, and one pair shoes, low quarter, tan, value about \$5.13, the property of the United States, issued and furnished for the use and benefit of Private Leonard A. Little, Company A, 4th Signal Battalion; a total value of \$40.33," substituting therefor "of a total value of \$13.89." Of the excepted words, Not Guilty. Of the substituted words, Guilty.

3. It is to be noted that that part of the specification of which accused was found guilty alleges the larceny on or about 27 May 1948, at Fort Bragg, North Carolina of "* * * one pair boots, service combat, value about \$8.76, the property of the United States, issued and furnished for the use and benefit of Technician Fifth Grade Ira W. Price * * *" and "* * * one pair shoes, low quarter, tan, value about \$5.13, the property of the United States, issued and furnished for the use and benefit of Private First Class Philip T. Liberatore * * *." Assuming without deciding that this allegation may be treated as tantamount to one in which the property alleged to have been stolen is described as "property of the United States, furnished and intended for the military service," it then becomes necessary to determine whether all the elements of the offense alleged were proven, in order to support the findings of guilty.

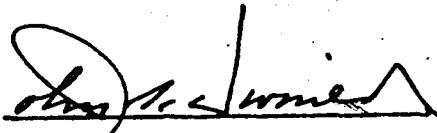
4. The evidence for the prosecution established beyond doubt that accused stole one pair of combat boots from Technician Fifth Grade Price and one pair low quarter shoes from Private First Class Liberatore, each of the value alleged. With respect to the ownership of the property, however, the evidence for the prosecution shows by competent uncontradicted evidence that Technician Fifth Grade Price was the owner of the combat boots described in the specification (R. 11) and that Private

First Class Liberatore was the owner of the low quarter shoes of which accused was found guilty of stealing (R. 12, 13). No effort was made to show that these items were property of the United States, or that they were issued for the use of the soldiers named as alleged in the specification.

The production of the items at the trial before the court is not sufficient to prove Government ownership of property susceptible to private ownership, particularly where there is prosecution evidence of private ownership (CM 270549, Richmond, 45 BR 310). Also, the mere fact that items of clothing are of a type used in military service does not justify an inference that they were Government property, as it is a matter of common knowledge that uniform articles of this kind may be privately purchased and personally owned by soldiers (CM 318062, Guevara, 67 BR 121; CM 192952, Scoles, 2 BR 51).

The record would have been legally sufficient to support a finding of guilty of larceny of the items as the respective property of the two soldiers, Price and Liberatore, in violation of Article of War 93, but accused was not charged with that offense and it is not a lesser included offense of the one with which he was charged (CM 270549, Richmond, 45 BR 310). Since an essential element of the offense of larceny under the 94th Article of War is "that the property belonged to the United States", (par. 150i, MCM, 1928) in the absence of competent proof of that element the findings of guilty of the Charge and Specification cannot be sustained.

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

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

(152)

JUL 19 1948

JAGN-CM 331750

1st Ind

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

TO: Commanding General, Headquarters Fort Bragg, North Carolina.

1. In the case of Privates Thomas Budkey, Jr. (33929841), Company B, and Bobbie G. Freels (18172653), Company A, both of 4th Signal Battalion, I concur in the foregoing holding by the Board of Review and recommend that as to accused Freels the findings and sentence be vacated.

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

(CM 331750).

RECORDED



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.

(153)

JAGH CM 331754

10 August 1948

UNITED STATES	)	MILITARY DISTRICT OF WASHINGTON
v.)	
First Lieutenant ROBERT F.	)	Trial by G.C.M., convened at
ENT, O-1688248, Infantry, Special	)	Fort Myer, Virginia, 30 June
Distribution Section, Intelligence	)	1948. Dismissal.
Division, Department of the Army.)	

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 94th Article of War.

Specification 1: In that First Lieutenant Robert F. Ent, Infantry, Special Distribution Section, Intelligence Division, Department of the Army, did, at Pentagon Building, Arlington County, Virginia, on or about 27 May 1948, feloniously take, steal, and carry away one typewriter, of the value of about \$35.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Robert F. Ent, Infantry, Special Distribution Section, Intelligence Division, Department of the Army, did, at Washington, D. C., on or about 28 May 1948, wrongfully and knowingly sell one typewriter, of the value of about \$35.00, property of the United States, furnished and intended for the military service thereof.

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

3. Evidence.

a. For the prosecution.

The evidence is summarized as follows. The accused is in the military service and at the time of the offenses alleged was on duty as a security courier, Intelligence Division, Department of the Army (R 30, Pros Ex 3, R 48). At about noon on 28 May 1948 he offered to sell a typewriter to "Bela's Gift and Typewriter Company, 3019 14th Street, N.W., Washington, D.C." Since Daniel Schlosburg, the proprietor of the store was not in, the sale was not consummated at that time. Accused left the typewriter at the store and stated he would come back when Mr. Schlosburg was there. The typewriter was a late model "L C Smith" typewriter (R 10). Accused returned about seven o'clock in the evening and sold the typewriter to Schlosburg for \$35.00 (R 14). At the time accused identified himself giving his correct name, rank, and serial number and showing his identification card (R 18). Payment was effected by giving accused a check drawn by Schlosburg's wife, which accused immediately endorsed, returned to Schlosburg and received cash therefor (R 21,22). Schlosburg identified an "L C Smith typewriter" serial No. 1A1663287 as the typewriter which he purchased from accused and the typewriter was admitted in evidence. (Pros Ex 1, R 29). With reference to purchases of used articles Schlosburg testified:

"Whenever a dealer buys a used machine, he is to record that on a record, and it is to be sent to the Police Department; and we are to hold that machine for fifteen days before disposal. Within after eleven hours after we purchase that machine, that report is supposed to be in." (R 15)

In the transaction with accused Schlosburg made out the report in accused's presence. Schlosburg denied that he lent money on typewriters and with reference to his transaction with accused insisted that it was an absolute purchase (R 15). With reference to possible recovery of the typewriter by accused he testified:

"Q. Suppose the accused had come back on the next day and talked to you and said, 'Mr. Schlosburg, I made a mistake, I would like to recover my typewriter, here are your thirty-five dollars.' What would have been your answer?
Defense: Objection. It is a hypothetical question.

Law Member: Objection overruled.

Q. Will you please answer that question?

A. Yes, I can answer that question. I would not accept the thirty-five dollars, and I would not release the machine."
(R 15-16)

Otto Wiener, an employee of Schlosburg, testified that as far as he knew it was not the policy of the store to lend money on typewriters (R 9).

On 29 May 1948 Schlosburg's report of the purchase of a typewriter was received by Detective Richard F. Flynn of the Pawn Office of the Metropolitan Police Department, Washington, D.C. (R 38). Flynn noticed that the typewriter which was the subject of the report had been "put up" by an Army lieutenant, so he gave the serial number of the typewriter to a Public Buildings Administration detective. Four or five hours later Flynn received information that the typewriter had been stolen (R 39).

Captain Glenes E. Wicker, Intelligence Division, Special Distribution Section, The Pentagon, Washington, D.C., testified that in June 1947 he made an inventory of property in his section and listed the property found in the section at that time. He identified the typewriter designated as Prosecution Exhibit 1 as an item of property which he had listed at that time. In May 1948 the typewriter was declared surplus but was being held in the office until it would be picked up by the service branch of the Intelligence Division. On 2 June 1948 following a conversation with Lieutenant Colonel Konopaska, Captain Wicker made a physical check of his office and found the typewriter missing (R 30,31,32).

Upon cross-examination Captain Wicker testified he had known accused for approximately five or six months during which time accused had been assigned to his section. Captain Wicker had considered accused to be an outstanding and superior officer and "would have him again in the company in the field." He further testified that accused's reputation for truth and veracity was outstanding (R 33,34).

On 2 June 1948 at 0900 hours accused was interrogated by Agent Cleo F. Hardin, 4th Criminal Investigation Detachment. Prior to the interrogation Agent Hardin advised accused of his rights under the 24th Article of War. In obtaining accused's subsequent answers no threats or promises were made to accused (R 47). Agent Hardin identified a document signed by him, Agent Leindecker, and accused, and sworn to before Colonel Royden A. Konopaska, as the statement made by accused and it was admitted in evidence as Prosecution Exhibit 3 (R 48). In the statement accused admitted in response to questioning that at 1830 hours 27 May 1948 he took a typewriter which he believed to be of L. C. Smith make from Room 2C802, The Pentagon. On 28 May 1948 he sold the typewriter at a store on 14th Street and received thirty-five dollars for it. He intended, however, to recover the typewriter. He stated that he was in trouble and had to have one hundred dollars "fast" as a woman was causing him trouble. He had received a telegram from the woman demanding one hundred dollars from him or she would make trouble for accused and his wife.

The same day, accused, Detective Flynn, Agent Hardin and one other CID Agent went to Schlosburg's store and picked up the typewriter (R 39, 46). At the time accused paid Schlosburg thirty-five dollars (R 19,46)

and received a receipt from Schlosburg as follows:

"June 2, 1948

TO WHOM IT MAY CONCERN:

Received from Lt. Robert F. Ent the sum of THIRTY FIVE (\$35.00)
DOLLARS IN PAYMENT for claim of L. C. Smith Typewriter No.
1A1663287

/s/ Daniel Schlosburg" (Def Ex A, R 19)

With reference to the terminology of the receipt Schlosburg testified as follows on cross-examination:

- "Q. Now, Mr. Schlosburg, I notice in this statement you say: 'Received from Lt. Robert F. Ent the sum of thirty-five dollars in payment for claim of L. C. Smith typewriter,' and then there is a number. I notice you called that a claim. Doesn't that contradict the testimony you have given previously to this court?
- A. No. It was my claim against the amount that I had invested.
- Q. Are you sure you are not referring to the fact that Lieutenant Ent had a claim against this machine?
- A. No." (R 19,20)

Detective Flynn testified on cross-examination that by law there are no "hock shops" in the District of Columbia but that one could sell property to a second hand shop and later repurchase it after a fifteen day wait. With reference to business customs among second hand dealers in the District Flynn testified:

- "Q. Isn't it a fact that there is a business custom in the District among second-hand shop dealers to the effect that when a customer comes in and sells an item such as this typewriter, or what we commonly call hocks an item in another State, that the owner of the shop holds on to that item for a reasonable period after the fifteen days so that the original owner can reclaim it?
- A. It varies in different places. In the second-hand dealers in town, there are three or four classes. Some of them have a big overturn in the course of a year and others have to struggle along to make an honest living out of it. The dealers that have an enormous income in a year, they make a common practice to hold on to property for maybe a month, most of them I would say thirty days. Then if the person that sold the article to him doesn't reclaim it or come back and pay them, well, he sells it to anybody he can get his money back out of it." (R 45)

b. Evidence for the defense.

It was stipulated between the prosecution, defense, and accused that if Lieutenant Colonel Howard E. Michelet were present he would testify that:

"the accused, First Lieutenant Robert F. Ent, entered the Army of the United States 29 January 1943 and served for a period of eighteen months in actual combat with the 88th Infantry Division as a Staff Sergeant. He received a battlefield commission 15 June 1945 in the Mediterranean Theater of Operations.

"He has received the following awards, decorations and citations:

Silver Star
 Bronze Star Medal
 Unit Citation, 88th Infantry Division
 Good Conduct Medal
 Combat Infantryman Badge
 American Campaign Medal
 World War II Victory Medal
 European, Mediterranean Theater Medal with
 three battle stars
 Army of Occupation Medal, European." (Def Ex B, R 50)

After being apprised of his rights accused elected to testify in his own behalf.

He stated that prior to his marriage in April (R 54) 1948 he had had relations with his wife's cousin (R 51,52,54). He received a telegram from this woman who was pregnant, asking for one hundred dollars. He needed about \$40.00 to make up the needed amount. He was unable to borrow any money and decided to pawn the typewriter, but upon learning there were no pawn shops in the District of Columbia, he had to sell the typewriter. With reference to his transaction with the purchaser he testified: "* * I asked him, is it possible to buy back the typewriter? He didn't answer my question directly. He just merely said the typewriter would be kept here for fifteen days." (R 51) Upon cross-examination he identified the typewriter introduced in evidence as Prosecution Exhibit 1 as the typewriter which he had taken and sold, and stated that to the best of his knowledge it was property of the Army (R 54).

4. Accused was found guilty of the larceny and sale of a typewriter of a value of \$35.00 property of the United States furnished and intended for the military service in violation of Article of War 94. The uncontradicted evidence adduced by the prosecution and the judicial statement of accused show that on 27 May 1948 accused took a typewriter from the

Special Distribution Section, Intelligence Division, Department of the Army, located in the Pentagon. The following day accused sold the typewriter to a typewriter shop in Washington. The typewriter in question had been in use in the Special Distribution Section for at least a year and had been listed as property of that section. There can be no doubt that the typewriter was property of the United States furnished and intended for the military service. It is not necessary that a bill of sale be introduced in evidence showing the manner, or at what time, that a piece of property became government property. In the absence of evidence to the contrary, evidence of long-continued possession and use of property by the military establishment is sufficient to show that the property involved is property of the United States furnished and intended for the military service thereof.

The main contention of the defense in this case was that accused did not have the intent to deprive the government permanently of its property, and it was claimed that in effect his transaction with Schlosburg was a pledge of the typewriter. It was stated by one of the witnesses, a detective of the Metropolitan Police Department that pawn shops are illegal in the District. The same witness testified, however, that it was a custom of some second hand dealers in the District of Columbia to resell to persons from whom they had purchased property, that is to say, to hold the property until the seller appears to repurchase it. The accused contends that his transaction with Schlosburg was of this type.

Actually, however, the transaction in this case was an absolute sale in which accused would not have the right of repurchase for fifteen days even if the purchaser from him were disposed to sell the property back to him. The factual situation as shown by the evidence is the subject of the following commentary in Par 11.9g, MCM 1928, p.173: "Proof of a subsequent sale of stolen property goes to show intent to steal * *."

5. Records of the Army show that accused is 24 years of age and married. He was graduated from high school and completed one half year of college work at Centenary College. He had enlisted service from 29 January 1943 to 15 June 1945 when he was commissioned a Second Lieutenant, Army of the United States. He was promoted to First Lieutenant on 7 December 1945. He was separated from the service on 9 July 1946 and was recalled to active duty on 28 August 1946. He had two tours of foreign service in the Mediterranean Theatre, the first of 29 months duration terminated in June of 1946 and the second extending from December 1946 to June 1947. He had combat duty for approximately a year with the 88th Infantry Division. In 1944 while an enlisted man he was convicted by Special Court-martial for a short absence without leave and was sentenced to forfeit twenty dollars of his pay.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of violations of Article of War 94.

A. H. Hester, Judge Advocate

C. A. Wolfe, Judge Advocate

J. W. Lynch, Judge Advocate

(160)

JAGH CM 331754

1st Ind

JAGO, Department of the Army, Washington 25, D.C. 19 AUG 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Robert F. Ent, O-1688248, Special Distribution Section, Intelligence Division, Department of the Army.

2. Upon trial by general court-martial this officer was found guilty of the larceny and sale of a typewriter, property of the United States, of value of about \$35.00, furnished and intended for the military service, in violation of Article of War 94 (Chg, Specs 1 and 2). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

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

At the time of the commission of the offenses alleged accused was on duty in the Special Distribution Section, Intelligence Division, Department of the Army, The Pentagon. On 27 May 1948 accused took a government L. C. Smith typewriter from his section and the following day sold it at a typewriter shop in Washington receiving \$35.00 therefor. At the time of sale accused correctly identified himself and made no attempt at concealment.

The accused testified in his own behalf and admitted the taking and sale of the typewriter, but claimed that he intended to repurchase it and return it. He ascribed his difficulties to a demand upon him for money by a woman who was a cousin of his wife, with whom he had been intimate before his recent marriage.

4. The accused is 24 years of age and married. He was graduated from high school and completed one half year of college work at Centenary College. He had enlisted service from 29 January 1943 to 15 June 1945 when he was commissioned a Second Lieutenant, Army of the United States. He was promoted to First Lieutenant on 7 December 1945. He was separated from the service on 9 July 1946 and was recalled to active duty on 28 August 1946. He had two tours of foreign service in the Mediterranean

Theatre, the first of 29 months duration terminated in June 1946 and the second extending from December 1946 to June 1947. He had combat duty for approximately a year with the 88th Infantry Division, and has been awarded the Silver Star and Bronze Star Medals. In 1944 while an enlisted man he was convicted by Special Court-martial for a short absence without leave and was sentenced to forfeit twenty dollars of his pay.

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

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



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO, 157, 26 August 1948)

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

(163)

JAGH CM 331759

20 SEP 1948

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

v.

Private EMICK J. ROMERO, RA
18317948, Detachment Medical
Department, 382nd Station Hospital,
APO 901.

) KOREA BASE COMMAND

) Trial by G.C.M., convened at
) Korea Base Command, 7,12 May
) 1948. Dishonorable discharge
) (suspended) and confinement
) for six (6) years. Branch
) United States Disciplinary
) Barracks, Camp Cooke, California.

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

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

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

Specification 1: In that Private Emick J. Romero, Detachment Medical Department, 382nd Station Hospital, APO 901, did, at Camp Ascom, APO 901, on or about 31 January 1948, without proper authority, wrongfully take and use a government vehicle, to wit, U.S. Government 1½ ton truck No. 3299979, of the value of more than fifty (\$50.00) dollars, property of the United States.

Specification 2: In that Private Emick J. Romero, Detachment Medical Department, 382nd Station Hospital, APO 901, did, on Route #2, Seoul-Inch'on highway, APO 901, on or about 31 January 1948, wrongfully and unlawfully operate a motor vehicle in a public place, to wit, Seoul-Inch'on highway, while under the influence of intoxicating liquor, to the prejudice of good order and military discipline.

Specification 3: In that Private Emick J. Romero, Detachment Medical Department, 382nd Station Hospital, APO 901, did,

on Route #2, at Chuan, Korea, APO 901, on or about 31 January 1948, kill Shin, Kun Chul, a Korean national, by careless and negligent operation of a U. S. Government vehicle, said conduct being of a nature to bring discredit upon the military service.

Specification 4: In that Private Emick J. Romero, Detachment Medical Department, 382nd Station Hospital, APO 901, did, at Chuan, Korea, APO 901, on or about 31 January 1948, having been involved in an accident while operating a motor vehicle in which Shin, Kun Chul, a Korean national was physically injured, wrongfully fail to stop and render aid or assistance to the said Shin, Kun Chul, to the prejudice of good order and military discipline.

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

Specification: In that Private Emick J. Romero, Detachment Medical Department, 382nd Station Hospital, APO 901, did, on Route #2, at Chuan, Korea, APO 901, on or about 31 January 1948, willfully, feloniously, and unlawfully kill Shin, Kun Chul, a human being by running into the said Shin, Kun Chul with a U.S. Government 1½ ton truck No. 3299979.

The accused pleaded not guilty to and was found guilty of all Specifications and Charges. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for six years. The reviewing authority approved the sentence and ordered it executed, 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 may direct as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 31, Headquarters Korea Base Command, APO 901, 7 June 1948.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specifications 1, 2, and 4 of Charge I and Charge I and the only questions presented are whether the record is legally sufficient to support the findings of guilty of Specification 3, Charge I, the Specification of Charge II and Charge II, and the sentence.

4. Evidence relating to the Specification of Charge II and Charge II.

About 3:00 p.m. on 31 January 1948 Technical Sergeant Melvin M. Hull, 2nd Engineer Construction Group, parked a 1½ ton truck No. 3299979 in the

motor pool at the 382nd Station Hospital. He entered the hospital where he stayed a short time. Upon his return to the motor pool he observed the accused driving away in the truck he had parked in the motor pool. The radiator and fan on this truck were unbroken at the time the accused drove it from the motor pool (R 6-8).

The accused was outside the 382nd Station Motor Pool on the afternoon of 31 January 1948. Prior to the time he left in a truck he had two or three drinks from a fifth of whiskey. He was under the influence of whiskey and staggered while walking (R 10-14).

About 4:30 p.m. on 31 January 1948 in the town of Kan Suk Dong, which is located between Ascom and Inch'on, a medium sized United States Army truck driven by a white man dressed in OD uniform, passed a Korean truck. The Army truck was traveling "very fast." Shin Kun Chul was walking along the road and was struck by the left bumper of the Army truck and thrown some thirty feet "down on the road." He fell on the road in front of the Korean truck. The Army truck did not stop. Han Oon Su who witnessed the incident testified that he thought the army truck involved was a 2½ ton truck, and "understood" that "the wheel was four wheel." The Korean truck stopped after the front portion had passed over Shin Kun Chul. The wheels of the Korean truck, however, did not pass over his body. There was snow along the road, but the road itself was dry (R 14-23).

About 4:00 p.m., 31 January 1948, Corporal O. D. Warner was dispatched with a truck to return a work detail to the Inch'on stockade from Ascom. He secured the detail consisting of several prisoners and guards and proceeded along the highway towards Inch'on. Corporal Hunt was in this detail (R 20).

General Prisoner Albert M. Jiminez was one of the prisoners in the truck driven by Corporal Warner. He testified that he observed a "GI truck" about 100 yards in front of them and that:

"* * * The GI truck passed a Korean truck in the interval space on each side of four feet, and it kept on going. At the same time after the truck passed I seen some Korean people on both sides of the road. There was quite a commotion going on. We slowed down and we passed up this Korean truck. As we passed the Korean truck the man at the rear seen a Korean man laying under the Korean truck partly under.

Q. Did you see the Korean man under the truck?

A. At the same time I got up and looked to the back of the truck and I seen this Korean man partly under the Korean truck. There was a Korean lady arguing or saying something with a Korean man in front of the truck. We kept on going. * *." (R 28)

Jiminez also testified that he could not tell what type of vehicle accused was driving but by looking in its back judged it to be a "3/4 ton."

They proceeded along the road about three-fourths of a mile and overtook a truck which was being driven by the accused. Steam was coming out of the radiator of this truck. The truck driven by accused then passed the truck containing the work detail. The accused was "driving all over the road." Corporal Hunt ordered the driver to speed up and stop the accused. They stopped the accused and observed that he was drunk (R 23-31).

On 1 February 1948, Mr. Ralph J. Thomas, Special Agent, First CID, examined the truck driven by accused on 31 January 1948. He observed:

"My examination--first I looked for damage. I found no trace of blood and the damage to the truck is as follows: Radiator perforated, fan bent, fan belt broken, right fender scraped, frame beside driver's seat on right side bent in, left headlight bent back, left light grille bent, left front bumper scratched, left front fender scratched, left front wheel hub cap and bolts scratched and broken. In addition to the damage found on the left side of the front bumper I found a small piece of cotton I have that here. Very small--sticking out on the front bumper. The object in getting that was to see if the person who was injured had padded clothing. I did examine the clothing of the dead man but I can't establish by laboratory tests whether it's the same or not." (R 33)

It was the same truck which had been taken by accused from the 382nd Hospital (R 7,8,33).

He, Thomas also obtained a voluntary statement from the accused which was admitted in evidence as Prosecution Exhibit 3. In this statement the accused said that about 2:30 p.m. on 31 January 1948 he was drinking at the motor pool. He drank about a half bottle of whiskey and some beer. He did not remember anything about driving a truck or any other events until about 10:00 p.m. Sunday 1 February 1948 (R 33,34; Pros Ex 2).

Shin Kun Chul's body was taken to his home where it was examined by a Korean surgeon (R 21,39). Shin Kun Chul was dead. His death occurred by reason of "cranial basis fracture, left femur fracture, right humerus fracture" (R 41). The deceased was wearing Korean clothes made of cotton and cotton padding (R 40).

5. For the defense.

Chief Warrant Officer Robert F. Vigeant testified that the accused worked about a month as a prisoner in a quartermaster warehouse and did an excellent job (R 42).

The accused was warned of his rights as a witness and elected to remain silent (R 43).

6. Discussion.

Under the Specification of Charge II, accused was charged with and found guilty of "willfully, feloniously, and unlawfully" killing a human being.

The Manual for Courts-Martial, 1928, defines manslaughter as follows:

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, not likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law." (MCM 1928, par 149a) (Underscoring supplied)

Voluntary manslaughter is intentional homicide and possesses all of the elements of the crime of murder except that of malice aforethought. Involuntary manslaughter, on the other hand, is unintentional homicide, which occurs in the commission of an unlawful act less than a felony and not likely to endanger life or by reason of culpable negligence committed in performing a lawful act.

There can be no doubt that accused was charged with and found guilty of voluntary manslaughter since the word "willfully" appears as an allegation in the Specification.

Bouvier's Law Dictionary (Vol 2, p.3454) states that in an indictment "willfully" means intentionally. It implies that the act is done knowingly and of stubborn purpose, but not with malice (State v. Swain, 2 S.E. 68). A willful act is one that is done knowingly and purposely, with the direct object in view of injuring another (Hazle v. Southern Pacific Company, 173 Fed 431). It is synonymous with intentionally, designedly, without lawful excuse, and, therefore, not accidentally. (Miller v. State, 130 Pac 613).

The evidence shows that the accused, while under the influence of intoxicating liquor, drove a truck on a Korean highway. While passing through the town of Kan Suk Dong he passed a Korean truck. In passing this truck the circumstances of record show that he struck and killed

Shin, Kun Chul. This death resulted from his unlawful act of driving a motor vehicle in a culpably negligent manner while under the influence of intoxicating liquor. There is nothing in the record of trial indicating an intention or purpose to strike the victim nor is there any evidence present from which willfulness, as defined above, can be inferred. The element of willfulness necessary for a conviction of voluntary manslaughter being absent, the record of trial with respect to the Specification of Charge II is legally sufficient to sustain only a finding of guilty of the lesser included offense of involuntary manslaughter, which is a felonious and unlawful killing without the element of willfulness required for voluntary manslaughter (CM 234896, Neider, 21 BR 209; CM 329585, Rogers).

The maximum punishment for the offense of involuntary manslaughter is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years (CM 327731, Adams; par 104c, MCM 1928).

7. Punishment for offenses charged in Charge I.

It is noted that Specification 3 of Charge I alleges that the accused did "on or about 31 January 1948, kill Shin, Kun Chul, a Korean National, by careless and negligent operation of a U.S. Government vehicle, said conduct being of a nature to bring discredit upon the military service."

The homicide which is the basis of this Specification is the same homicide which was charged in the Specification of Charge II. The acts found to constitute the negligent homicide of which accused has been found guilty in Specification 3, Charge I, are the same acts found by the court as being an element of the offense found in Charge II and its Specification. The acts found to constitute the negligent homicide of which accused has been found guilty merged into and became an integral part of the involuntary manslaughter, a finding of which we find to be supported by the record. Where as in this case it is found that a lesser offense merges into and becomes an integral part of a greater offense, the findings of guilty of the lesser offense should be disapproved (CM 325200, Hightower, 74 BR 103, 118-119; 7 Bull JAG 20-21).

The offense charged in Specification 1, Charge I (wrongfully taking and using a vehicle) is punishable by confinement at hard labor for four months and forfeiture of two-thirds pay per month for four months.

The maximum punishment for the offense charged in Specification 2, Charge I (driving a motor vehicle while under the influence of intoxicating liquor) is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months (CM 329200, Staley and Bone).

In connection with this offense it would appear that it constitutes but another aspect of the act upon which the charge of manslaughter was based. It would further appear that accused's act of driving while drunk is a circumstance upon which of necessity his conviction of involuntary manslaughter must depend. We conclude, therefore, that the finding of guilty of Specification 2, Charge I, may not serve as a basis of punishment additional to that which may be imposed for the offense of involuntary manslaughter.

The maximum punishment for the offense charged in Specification 4, Charge I (failing to stop and render aid after an accident) is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months (CM 301581, Shelton, 13 BR (ETO) 1).

8. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specifications 1, 2, and 4 of Charge I and Charge I, legally sufficient to support only so much of the findings of guilty of the Specification of Charge II and Charge II as finds that the accused did, at the time and place alleged, feloniously and unlawfully kill one Shin, Kun Chul, a human being, by striking him with a motor vehicle, legally insufficient to support the findings of guilty of Specification 3 of Charge I, 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 three years and ten months.

(On leave) _____, Judge Advocate

C.O. Wolfe, Judge Advocate

J.W. Lynch, Judge Advocate

(170)

JAGH - CM 331759

1st Ind

SEP 28 1948

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

TO: The Secretary of the Army

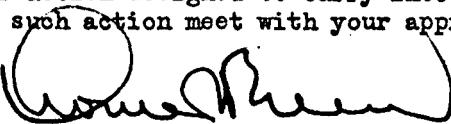
1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Private Emick J. Romero, RA 18317948, Detachment Medical Department, 382nd Station Hospital, APO 901.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as finds the accused guilty of the Specification except the word "willfully," legally insufficient to support the finding of guilty of Specification 3, Charge I, legally sufficient to support the findings of guilty of Charge I and Specifications 1, 2 and 4 thereunder, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and ten months. I concur in that opinion and for the reasons stated therein recommend that the finding of guilty of Specification 3 of Charge I, so much of the finding of guilty of the Specification, Charge II, as involves a finding of guilty of the word "willfully," and so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years and ten months, be vacated and that all rights, privileges, and property of which accused has been deprived by virtue of those portions of the findings and sentence so vacated be restored.

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

2 Incls

1. Record of trial
2. Form of action


THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 171, 7 October 1948).

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

JAGH-CM 331841

30 SEPTEMBER 1948

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

) SAN FRANCISCO PORT OF EMBARKATION

v.

) Trial by GCM convened at Camp
) Stoneman, California, 9 June
) 1948. Martinez and Perez: Dis-
) honorable discharge (suspended)
) and confinement for five (5)
) years. Disciplinary Barracks.
) Vasquez: Sentence disapproved
) by Reviewing Authority.

) Privates First Class ROBERT
) MARTINEZ (19259453), Company
) B (Pipeline); BEN C. VASQUEZ
) (19303610) and FERNANDO H. PEREZ
) (19308407), both of Company F,
) all of 9213 Technical Service
) Unit-Transportation Corps, Re-
) placement Center, Camp Stoneman,
) Personnel Center.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Robert Martinez, Company B (Pipeline), 9213 Technical Service Unit-Transportation Corps, Replacement Center, Camp Stoneman Personnel Center, Private First Class Ben C. Vasquez, Company F, 9213 Technical Service Unit-Transportation Corps, Replacement Center, Camp Stoneman Personnel Center, and Private First Class Fernando H. Perez,

Company F, 9213 Technical Service Unit-Transportation Corps, Replacement Center, Camp Stoneman Personnel Center, acting jointly and in pursuance of a common intent, did, at Bella Vista, California, on or about 1 May 1948, by force and violence and by putting him in fear, feloniously take, steal, and carry away from the person of Private Jose L. Aguirre about \$60.00, lawful money of the United States, the property of Private Jose L. Aguirre.

Each accused pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for a period of five years. As to accused Martinez and Perez the reviewing authority approved each sentence and ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. The Branch United States Disciplinary Barracks at Camp Cooke, California, was designated as the place of confinement. As to accused Vasquez, the reviewing authority disapproved the findings and sentence. The result of trial was published in General Court-Martial Orders No. 73, Headquarters San Francisco Port of Embarkation, Fort Mason, California, 7 July 1948.

3. Evidence.

a. For the prosecution:

Private Jose L. Aguirre met the three accused about 8:30 p.m., on 1 May 1948 in Pittsburgh, California (R. 7), had three or four beers with them in the town, and then took a taxi with them to another place about one mile from Pittsburgh where they arrived about 10:30 p.m. (R. 8-13). Accused and Aguirre spoke Spanish (R. 9). In the second place at a bar they had more beer and accused began to talk among themselves. It seemed to Aguirre "like they were figuring on doing something." Aguirre withdrew to another part of the room and the accused apparently left. Aguirre then left at about 11 o'clock p.m. (R. 8, 9). As he left the place Aguirre was struck from behind, knocked to the ground and severely beaten (R. 8, 29). Aguirre was not rendered unconscious but remained on the ground because of fear he would be stabbed (R. 31). When his assailants left, he hollered for the Military Police who came and took him to the MP's office (R. 8). As to the identity of the persons who committed the assault, Aguirre testified:

"* * * As I was going out the door, just a little ways, I was attacked by these guys. One of them met me and talked to me in Spanish, I couldn't place which one it was, because it was kind of dark. Then all of a sudden I was hit in the back of my head and I hit the floor and I was kicked. I saw some 'G.I.' boots all around me. They were talking in Spanish.

* * *

Where was it that you first met the three accused?
 A. I met them in Pittsburg * * * (R. 8).

* * *

"* * * Then I decided to come back to Camp Stoneman, I walked out, but all of a sudden I was attacked by one of them. I couldn't place which one, but they were talking Spanish. I knew they were the guys.

* * *

Q. Is there any other way you could recognize the accused?

A. He told me to stop and I stopped, then all of a sudden I was hit on the back of the head, I don't know which one did it. I think they were waiting for me" (R. 9).

* * *

"Q. Who hit you?

A. I couldn't say who hit me. One of the guys talked to me in Spanish, I couldn't say who hit me.

Q. Do you understand Spanish?

A. Yes, sir" (R. 16).

* * *

"Q. Did you see either one of these men hit you?

A. I couldn't say because I was hit in the back.

Q. You don't know?

A. No.

Q. You don't know whether it was any of these three men or not?

A. I couldn't say, because they -- Well, they were Spanish and the guy who stopped me spoke in Spanish, but I couldn't say who it was or who hit me.

Q. Did you ever at any time see any or either one of these three men hit you?

A. No, couldn't say who hit me. They were 'G.I.'s, I know, and when I met them they talked to me in Spanish and I seen this fellow who spoke to me in Spanish.

at that time. It had been the first time I had met these fellows, I couldn't say who it was I spoke to.

Q. Did you at any time see either of these men hit you?

A. No, sir" (R. 18).

* * *

"Q. Private Aguirre, I think you testified that you got back to the Provost Marshal's Office, will you tell the Court what happened the next day?

A. I was there when they brought these three guys in, they looked at me. One of them was pretty loaded, he must have kept on drinking. I told the Marshal what had happened and he asked me if they were the guys, and I said that I could swear they were the guys, that I was with them" (R. 19).

* * *

"Q. You didn't see anybody hit you and you didn't see anybody take the wallet off of you, is that correct?

A. I seen the guy stop me, a guy who spoke Spanish, he was one of those guys that I first met in Pittsburg, but I couldn't say who it was" (R. 27).

* * *

"Q. I want to get this to the Court again, which one of these men, if any of them, did you see strike you?

A. Wall, one of them stopped me, sir, and I was hit in the back, I couldn't say who it was. They were talking in Spanish and when I was on the ground they were talking to each other.

Q. Which one of the men, if any, took your wallet off of you?

A. I couldn't say which one, they were gone by the time I could get up" (R. 28, 29).

* * *

"Q. Was it dark?

A. It was kind of dim, the lights were on on the outside.

Q. Did you see the man as he spoke to you?

A. He spoke to me and asked me where I was going in Spanish.

Q. Was he facing you?

A. Yes, kind of facing me.

Q. When you walked out the door, where was the fellow, who spoke to you in Spanish, where was he standing?

A. To the right side of the door, just about four steps, couldn't have been more.

Q. Was it too dark out to recognize the features of the man, his face?

A. Yes, he was talking to me, but I knew it was one of them, because I had met them that night. I couldn't place which one it was.

Q. Did you see his face at all?

A. Yes, I seen him, but I couldn't say who it was. I knew it was one of them, but I couldn't say which one of the three" (R. 29, 30).

* * *

"Q. Were there any other Spanish speaking people in the place?

A. No.

Q. Did you see any?

A. No, there weren't any Spanish people in there. There were a lot of white people in there" (R. 30, 31).

Prior to leaving the bar accused had \$74.00 in bills in his purse (R. 10, 26). These were gone after the assault (R. 10, 24, 27, 34).

The three accused were subsequently apprehended by the Military Police and taken to the Provost Marshal's Office about 2 or 3 o'clock a.m. the following morning, where they were questioned by Captain Hussey, the Provost Marshal, in the presence of Aguirre (R. 19, 21). Concerning this interrogation, Aguirre testified:

"Q. (By the prosecution). I think you stated further that at least one of them said that he struck you and had taken your money?

A. Yes.

Q. Do you know the name of the individual who said that?

A. It is one of them, I don't know the names of them. I can't remember, I couldn't place them by name.

Q. Would you recognize his features if you were to see him?

A. I believe it was the center one. (Thereupon the witness pointed to the accused Private First Class Martinez)" (R. 24).

* * *

"Q. That leaves one more soldier. Did you see him go behind the counter and talk to the M. P.?

A. This guy. (Thereupon the witness pointed to Private First Class Perez, the accused).

Q. * * * Did you hear any conversation relative to this case between this second individual and the M.P.'s?

* * *

Q. What did he say?

A. So they testified what they had done" (R. 25).

* * *

"Q. That is what I want you to tell the court, just what they said?

A. He asked them 'You testified you were the guys that assaulted this guy?' and they said 'Yes.'

Q. Which one said, 'Yes'?

A. These two, because the other one took off. (Indicating the Accused Privates First Class Martinez and Perez).

Q. * * * Both of the accused said, 'Yes', in response to a question asked them by the M.P.?

A. Yes, only he took them one at a time.

Q. They both said, 'Yes,' to that question?

A. Yes" (R. 26).

* * *

"Examination by the Court:

* * *

Q. What was it that you heard the man in the middle say to the Sergeant or the Provost Marshal? (Indicating Private First Class Martinez, the accused).

A. The Provost Marshal asked him about what had happened to me, if they were the guys, and if they were the ones who took the money. They said, 'Yes', and he asked them if they would be good enough to pay the money back and they said, 'Yes.'

* * *

Q. What they said is not what I want. What did they ask him?

A. They asked him if he was the guy that assaulted me and he said, 'Yes.' He asked him about the money and he said, 'Yes.' He said they divided the money between them" (R. 37).

* * *

"Q. Did he ask them each the same questions?

A. Yes, sir. He asked them if they were out together and they said 'Yes', and he asked them about the money and they said they took it.

- Q. What did he ask the man in the middle, I think you said his name was Perez? (Indicating the accused Private First Class Martinez).
- A. He asked him if they were the guys who assaulted this guy here, this soldier here, and they said 'Yes.'
- Q. Not what they said, what did the man in the middle say, that is what I want to know?"(R. 38).
- *A. The Provost Marshal asked him if he was the one who assaulted me and he said, 'Yes.'
- Q. What did the Provost Marshal ask him, that is the man on the end? (Indicating the accused, Private First Class Perez).
- A. If he was one of the guys that assaulted me and kicked me, and he said, 'Yes.'
- Q. * * * You just said that one of them said they divided the money between them, which one said that?
- A. That man. (Indicating the accused, Private First Class Martinez).
- Q. He said he was the one that divided it or it was divided between them?
- A. He said they divided it between them.
- * * *
- Q. Only one of them said that?
- A. Yes" (R. 39).

At about 1500 hours on 1 May 1948 C.I.D. Agent McCloskey interrogated accused Martinez in the C.I.D. office at Camp Stoneman (R. 48). At this time this accused stated that the three accused and Private Aguirre were in a tavern at Bella Vista drinking at 1500 hours on 30 April 1948 and that Aguirre left and that accused Martinez followed him out of the place, got in an argument with him, struck him with his fists numerous times and knocked him down (R. 48, 49).

b. For the defense:

The accused were advised of their rights and elected to remain silent. No evidence was presented by the defense.

4. Discussion.

The evidence was insufficient to establish that the three accused were guilty of the offense charged. The testimony of Aguirre was

vague and contradictory. Thus Aguirre testified that he was attacked by "these guys" (R 8) (referring to the accused) and again that he did not know if any of the three accused hit him (R 18), but that his assailants were Spanish and accused were Spanish (R 18). It is evident that he concluded that the accused committed the assault solely because of his association with them shortly prior to the offense and because of the fact that they spoke Spanish.

The burden was on the prosecution to establish the guilt of the accused beyond a reasonable doubt. The rule of reasonable doubt extends to every element of the offense. Unless the evidence clearly establishes the guilt of the accused, the findings cannot be sustained. As stated in CM 223336, Grice, 1 Bul JAG 159,162:

"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 50 $\frac{1}{2}$).

* * *

"We must look alone to the evidence as we find it in the record, and applying to it the measure of 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 Appeal, 490)" (CM 212505, Tipton)."

Proof of the identity of accused as the persons committing the offense is essential. Extreme caution must be exercised in considering evidence of identity.

"Again, a predisposition to connect an accused with a crime often leads to fancied resemblances, and witnesses give color to their testimony according to the force of such prejudgment. The clearest impressions of the senses are often deluding and deceptive to a degree that renders them worthless when tested by the actual facts. Often, grievous and irreparable wrongs are inflicted by reliance upon impressions that are frequently so valueless as to demand their complete rejection ***." (Sec. 936, Wharton's Criminal Evidence; 11th Ed.)

The conclusions of Aguirre based on conjecture arising from prior association with the accused together with the circumstance that they are Spanish speaking were clearly insufficient to establish identity (CM 303950, Robinson et al, 3 ER (A-P), 381,405). His testimony as to

identity was contradictory and uncertain. Conclusions or opinions are not evidence (par 112b, MCM, 1928).

"The value of testimony given by a witness on direct examination may be 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 44,45, 70 Corpus Juris.)

It is a matter of common knowledge that there are many persons speaking Spanish who live in California and who are in the Army. The fact that soldiers speaking Spanish committed the robbery does not therefore reasonably preclude the possibility that the offense may have been committed by persons other than accused.

The statement made by the accused, Martinez, to agent McCloskey concerning his assault on Aguirre does not incriminate accused. This assault occurred about 1500 hours which was long prior to 2300 hours, the time when the alleged robbery occurred. Therefore, it does not relate to the alleged robbery and is not a lesser included offense to such robbery.

The only other evidence which would serve to implicate the accused were the confessions made by the accused to Captain Hussey as related by the prosecution witness, Aguirre. In these conversations two of the accused, Martinez and Perez, in substance admitted that they assaulted Aguirre, took his money, and then divided the money among them. Technically such statements were confessions and not merely admissions. It is to be noted that Captain Hussey and the desk sergeant, Harmon, have no independent recollection of the exact substance of these conversations. Such evidence was insufficient to establish that said oral confessions were voluntary. The confessions were obtained after the accused were arrested by military police and brought by them to the Office of the Provost Marshal. Captain Hussey there proceeded to question each accused concerning the alleged offense. This was accomplished in the presence of the complaining witness, Aguirre. There is no indication in the record that the accused had been advised of their rights under the 24th Article of War, nor is there any other evidence of record tending to show that the confessions so obtained were in fact voluntarily made. The fact that Aguirre testified to the conversations between accused and the Provost Marshal, without objection by the defense, did not waive the deficiency in prosecution's proof (CM 237225, Chesson, 23 ER 317,319).

It is a well established principle of military justice that where a confession is made to a military superior, particularly in the case of an enlisted man, it is mandatory that inquiry be made into the circumstances surrounding the obtaining of such confession (MCM 1928,

Sec 114a, p 116). Where it is not clearly shown to be voluntary it will be rejected. As stated in CM 324725, Blakeley, 73 BR 307, 319:

"Consistently with these principles of law, as applied to human relationships somewhat peculiar to the military service, the Board of Review has generally held that where it appears that an accused has confessed upon being interrogated by one who is acting as his military superior, or as an agent of that superior, ***, the prosecution must establish, in order to overcome the implication of compulsion, that accused was cognizant of his right not to incriminate himself at the time he admitted his guilt. It is not necessary, in such a case, to show that the 24th Article of War has been read to accused, but it should appear that its substance was made known to him or that a reasonable basis existed for an inference that he was aware of its provisions or those of similar civilian guarantees." (See also CM 328351, Johnson (1948).)

It was not established that accused knew of their rights under the 24th Article of War. Captain Hussey and Sergeant Harmon who testified as witnesses in the case were not interrogated as to facts which would establish a predicate for introducing such confessions. Neither were asked if the accused were warned of their rights before taking any statements from them. Captain Hussey should have known if this was done since he interrogated the accused. The fact that he did not recall the incident does not satisfy the burden placed on the prosecution to establish that the confessions were voluntary. Aguirre did not testify as to hearing any explanation to accused of their rights. The failure of the prosecution to produce evidence which was within its control is a circumstance from which an inference can be drawn that such evidence if produced would be unfavorable to the prosecution (Sec. 183, p 189, 20 Amer. Jur.)

Therefore any confessions made by accused to Captain Hussey must be excluded in determining the sufficiency of the evidence to sustain the findings. Without these confessions the only relevant evidence was the testimony of Aguirre which was clearly insufficient to establish identity.

If it be considered that Aguirre's testimony was sufficient to identify the accused, such testimony was of such dubious character that the confessions must have been highly persuasive of the court's findings. Hence the admission into evidence of these incompetent confessions prejudiced the substantial rights of each accused and constituted substantial error within the purview of Article of War 37.

5. For the foregoing reasons and in view of the authorities cited

the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence as to each the accused Perez and Martinez.

C. O. Wolfe, Judge Advocate
J. W. Lynch, Judge Advocate
[REDACTED], Judge Advocate

(182)

JAGH CM 331841

1st Ind

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

12 OCT 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50¹, 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 Privates First Class Robert Martinez (RA 19259453), Company B (Pipeline), and Ben C. Vasquez (RA 19303610), and Fernando H. Perez (RA 19308407), both of Company F, all of 9213 TSU-TC, Replacement Center, Camp Stoneman Personnel Center.

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

3. Inclosed is a form of action designed to carry into effect the recommendations 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 188, 10 November 1948).

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

(183)

18 OCT 1948

JAGH CM 331849

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

RYUKYUS COMMAND

v.)

) Trial by G.C.M., convened at
) APO 331, 22,26 May 1948. To
) be hanged by the neck until dead.

) Private First Class CALIXTO
) ESTRADA, PS 10315790, 520th
) Quartermaster Depot Supply
) Platoon (PS), APO 331.)

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

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

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

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

Specification: In that Private First Class Calixto Estrada, 520th Quartermaster Depot Supply Platoon (PS), did, at Gushikawa, Okinawa, on or about 2 May 1948, with malice aforethought, willfully, deliberately, feloniously and with premeditation, kill one Staff Sergeant James E. Pound, a human being, by shooting him with a .45 caliber pistol.

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

Specification: In that Private First Class Calixto Estrada, 520th Quartermaster Depot Supply Platoon (PS) did, at Gushikawa, Okinawa, on or about 2 May 1948 with intent to commit a felony to wit, murder, commit assault upon Corporal Vernon W. Montgomery, by willfully and feloniously shooting the said Corporal Montgomery with a .45 caliber pistol.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Arraignment.

The accused was properly arraigned and pleaded not guilty to all Charges and Specifications. Due to the seriousness of the wound of Corporal Montgomery, the Surgeon at the 37th Station Hospital, APO 331, was of the opinion that he should be returned to the Zone of the Interior for treatment at the earliest possible date. Therefore, upon agreement between counsel for the prosecution and the defense, the accused was arraigned on the third day after service of charges in order that Corporal Montgomery's testimony might be taken. At the conclusion of his testimony a continuance of four days was granted, in order to allow ample time for the defense to prepare its case.

4. Evidence.

a. For the prosecution.

Accused, a Philippine Scout, is in the military service and on the date of the offense was a member of the 520th Quartermaster Depot Supply Platoon (PS) located at Tengan, Island of Okinawa (Pros Ex 10).

Corporal Vernon Q. Montgomery, testified that he, accompanied by Staff Sergeant James E. Pound, both of the 1391st Military Police Company, drove to the "off limits" village of Gushikawa, Okinawa, about 1900 hours on 2 May 1948, where they had a "date" with some native girls (R 7). Montgomery left the jeep, went across the road and engaged in conversation with Tomi Sueyoshi. She thought "it was too early" (not dark enough) and besides three Filipinos, among whom was the accused, were coming along the road toward them at the time Montgomery and Tomi stepped inside the rock wall (or courtyard of the house) and were followed by the three Filipino men, and then by Sergeant Pound (R 8). The accused felt "they are getting our girls" (R 9), whereupon Sergeant Pound said to the Filipinos; "I am C.I.D., let's forget the whole thing, we will all go" (R 8), or "come on, let's go, let's get out of here, let's have no trouble" (R 9). Montgomery then saw accused "pull something out of his pocket", whereupon he shot Sergeant Pound and then shot Corporal Montgomery who was running to help Sergeant Pound. Immediately thereafter all of the Filipinos ran away. Neither Corporal Montgomery nor Sergeant Pound was armed at the time (R 8).

On the evening of 2 May 1948 Tomi Sueyoshi was visiting in Gushikawa Village at the home of Kame Kinjo and Furugen Chiyo, all three of them being native Okinawan girls. Tomi testified that three Filipinos came to the house and one of them asked Furugen to "go to the woods" with him. Tomi and Kame ran away; one of the Filipinos pursued Tomi, but he left her after she threatened to report him "to the M.P.'s." Tomi returned to the vicinity of the house, where shortly thereafter she met two American military police who drove up in a jeep. While she was talking

to one of them, the same three Filipinos returned and one of them asked Tomi "are you going with that M.P." She told the military policeman that she did not know the Filipino, whereupon the other military policeman, who had remained in the jeep, came over to the group which also had been joined by Furugen and said something about the "C.I.D." At the same time he pulled his wallet out of his pocket, she heard a shot and then saw the American Sergeant (Pound) on the ground and the Filipino running away (R 18). One of the Filipinos had the gun which she saw when it was fired (R 21).

Furugen Chiyo testified that she was with Tomi and Kame at about 1800 hours, 2 May 1948 in the compound of Gushikawa Village, in which were located her home and the home of Kame. Three Filipinos came to the house where these three girls were talking and one of the Filipinos took off his shoes and tried to get into Furugen Chiyo's house. She told him to go away but he refused and grabbed her handbag. The other two girls ran away and Furugen finally wrested her handbag away from the Filipino. Shortly afterward, while Tomi was talking with an "MP, another MP came in." While the military policemen and the Filipinos were talking: "One of the M.P.'s drew his pocketbook from his pocket. I heard shots. I heard one M.P. fall on the ground. I didn't see the other M.P. fall on the ground. I had a wound on the right below the breast." She had previously been acquainted with the accused who was one of this group of Filipinos and had seen a .45 caliber gun in his possession. She identified Prosecution Exhibit 8, a .45 caliber pistol, which was the gun she had seen accused customarily carry. The accused was present in the inclosure at the time of the shooting (R 23,24).

Private First Class Pelagio Caceres, a Philippine Scout, and member of the same unit to which accused belonged, was with the accused on the evening of 2 May 1948, when they rode in a "weapon's carrier" (presumably from their company area) to Gushikawa Village, where they were obliged to stop because of (motor) trouble. He testified that while repairs were being made, the accused left the vehicle but returned when the repairs were completed, and drove off with Aranas, the driver, and left Caceres and Caparros behind (R 26). They returned with the weapons carrier shortly afterward and stopped next to a jeep parked near the house in Gushikawa. Caceres entered the courtyard of the house following behind the accused, who had been preceded by an American. Caparros followed Caceres, and was in turn followed by another American (R 27). The witness was interested in the girls in the house and did not pay much attention to the others, merely hearing the voices of one of the Americans (R 28). He then heard two shots and the two Americans were hit; "at the second shot, I saw Estrada The accused with the gun . . . in his hand." All three of the Filipinos, immediately after the shooting, ran for the weapons carrier, and the accused told the driver "to hurry up." In their barracks later in the evening, the accused told Caceres;

"Don't mention anything because I will shoot you" (R 29). Caceres identified Prosecution Exhibit 8 as the pistol the accused used on the night of 2 May and as the same pistol he had seen in accused's possession at least twice before (R 30). He further testified that Sergeant Pound was not facing the accused when he was shot (R 32).

Private First Class Gregorio Aranas, also of the 520th Quartermaster Depot Supply Platoon, testified that on the evening of 2 May 1948 he drove the accused in his "weapons carrier" from Gushikawa to the 520th Quartermaster Depot Area, where the accused said he wanted to get some cookies to give his "wife." Aranas then took accused back to Gushikawa where Caceres and Caparros joined them. When he parked, a jeep containing two Americans drove by and parked in front of the weapons carrier. One of the Americans left the jeep and went into the house followed by accused, who said he was "going to give the cookies." Caceres and Caparros also went into the inclosure. Aranas heard the sound of shooting and Caceres came out, got into the weapons carrier, and said to him that Estrada (the accused) had done the shooting (R 33). The accused came out of the inclosure with a gun in his hand which he pointed at Aranas and told him to drive fast. He saw no guns being carried by or in the possession of Caceres and Caparros (R 34).

Private First Class Reynaldo Caparros, of the 357th Quartermaster Service Company, testified that he was with Private First Class Caceres on the evening of 2 May 1948 when the accused and Aranas told them to "wait a minute," then drove away in the weapons carrier toward Tengan, indicating that they would return. They, accused and Aranas, returned in about fifteen minutes. A jeep containing two American soldiers came and parked about fifteen yards in front of the weapons carrier. One of the American soldiers left the jeep and walked into a native house followed by the accused. Caceres followed the accused, and Caparros, hearing the accused call him, followed Caceres into the inclosure. Here Caparros saw the American soldier talking with the accused (R 37). Caparros then "went over in front of the American fellow and Estrada walked away from the American, walked behind him." Then the other American soldier came into the inclosure and he asked "What's going on here, where are you guys from?" When no one answered him, the second American soldier said "You guys better go back to your barracks." Caparros then saw this American soldier reach for the back of his pocket as he said: "You just better get back to your job or else." Caparros then heard a shot and saw the blaze of a gun coming from the accused's direction. The American, when he was shot, was not facing the accused, but was facing the witness, with his side toward the accused (R 38). After the shooting, the accused, Caceres and witness, ran out of the gate and got into the moving weapons carrier. As the three Filipinos and their driver left the scene of the shooting, Caparros noted that the accused had a gun in his right hand pointing it at the driver. He

did not see any weapons in the possession of the Americans. Witness further stated that he did "not exactly see the gun" in the accused's hand at the time of the shooting, but saw the blaze of the gun from the accused's position (R 39). There was no question in his mind "as to where the blaze of the gun came from" (R 40).

First Lieutenant Wilbur L. Jensen, 1391st Military Police, Officer in Charge of the CID, after seeing and talking with the accused about a "dozen times" after the fatal shooting and after advising the accused of his rights against self-incrimination, both by reading and verbally explaining to him the 24th Article of War, took a statement from the accused on 12 May 1948 (R 40,41), in which the accused admitted having shot both of the American soldiers. The statement was taken by Lieutenant Jensen in the presence of Mr. Higa, Sergeant Minor, and a Filipino boy named Vic. In the statement (Pros Ex 10), prior to the signature of accused, appears the written notation "I certify that I read and explained the above statement to Calixto Estrada this date and witnessed taking of statement. (Signed) Vicente Dulce." Before the accused signed the statement, he corrected himself as to where he had obtained and where he had hidden the pistol used in the commission of the offense. He directed Lieutenant Jensen to the hiding place of the gun, where it was recovered.

In the statement accused stated that he had been read the 24th Article of War and fully understood his rights thereunder and that he was aware that any statement he made could be used against him. He further stated that on 2 May 1948 after obtaining his gun from his barracks bag, he joined three companions at Gushikawa about 1700 hours and proceeded to see his girl friend at a prearranged place. When he arrived there he saw two American soldiers in a jeep:

"The one not driving, the taller one got out of the jeep and went to the native house. I followed him, Cacares followed me, then I saw Caparros come from the weapon's carrier. When I went to the house, the big American soldier started to talk to me. The small American soldier came to the yard. When the small American came in I was scared. The small American said something. The American soldier started toward his pocket. I pulled a gun from my trousers and shot the two American soldiers, without knowing it." (Pros Ex 10)

"Q. Did you see either of the American soldiers with a gun?

A. No.

Q. Which American soldier did you shoot first?

A. I shot the small one first and then the big one.

* * *

Q. Why did you follow the American soldier to the native house?

A. I thought he was going to get my girl friend.

Q. Were you jealous of your girl?

A. Yes, I was." (Pros Ex 10)

Lieutenant Jensen turned over to Ballistic Expert Frank T. Hughes, the pistol found by him with the accused's assistance, together with two cartridge cases and a slug picked up at the scene of the shooting (R 43). Hughes testified that in his opinion they were fired from the pistol recovered by Lieutenant Jensen and identified as belonging to the accused (R 45,46).

First Lieutenant Menard S. Ihnen, Medical Corps, 37th Station Hospital, saw the deceased, Sergeant James E. Pound, in the hospital ward on 2 May 1948 while the Sergeant was still alive. He identified photos of the deceased (Pros Exs 2A and 2B). The following day he performed an autopsy on Pound's body. He also identified a death certificate pertaining to Sergeant Pound (Pros Ex 3). The cause of death "was exsanguination, secondary to hemothorax, right, secondary to laceration of liver, and hemoperitoneum, secondary to laceration of liver, secondary to gunshot wound." The cause of the injuries, which then became the cause of the death, was the gunshot wound (R 14-16). A true copy of the autopsy report was introduced in evidence (R 16; Pros Ex 4).

First Lieutenant Bernard L. Harden, Ward Officer in general surgical service at the 37th Station Hospital, examined Corporal Montgomery on 2 May 1948 as a result of which he made the following diagnosis; "Examining the abdomen, there was a perforating wound which entered about two inches to the right of the umbilicus and the point of exit was presumed to be about the crest of the left ilium." Upon operating Lieutenant Harden found "there was perforation of the transverse colon, and multiple perforating wounds of the ilium and two wounds perforating the viscera . . . I would say with reasonable certainty that gunshot was the probable cause of these injuries" (R 12-13).

b. For the defense.

The only evidence introduced by the defense was that given by the accused, who took the stand for the limited purpose of testifying in connection with the alleged coercion used in obtaining his confession (Pros Ex 10). Prior to this testimony defense counsel made the following statement:

"May it please the court, the rights of the accused have been explained to him in detail by myself and the other counsel, and he has expressed a desire to us to testify to the acts leading up to the alleged confession and to testify to those things only. However, it has been difficult to explain the exact rights of this accused to him, and we request that the Filipino Lieutenant on the court, who understands his native language reads the explanation of the accused's rights to him from the Technical Manual 27-255." (R 47)

He then testified through an interpreter that on 12 May 1948, he was brought into the office of the Kadena Stockade (R 51) where Lieutenant Jensen, in order to obtain a statement from him, grabbed him by the neck and the collar, choked him, and struck him in the stomach several times with his fist, until he became unconscious; that when he fell unconscious "Lieutenant Jensen placed a pin [pen?] in my finger and I don't know what happened, and when I felt fully conscious I found I already signed the paper from the Lieutenant" (R 52).

On cross-examination, over objection, accused was required to write his name three or four times on a piece of paper (R 53). The prosecution then offered in evidence a piece of paper purporting to bear the signature of accused (R 54; Pros Ex 12), which accused, on cross examination, admitted as his signature (R 55), for purpose of comparison. The writings made by accused do not appear in the record. Accused further stated that no one was present at the time he signed the paper except the Lieutenant (R 54). Prosecution, on further cross-examination, asked if accused took Lieutenant Jensen to the place where he had the gun and accused replied that he did after he signed the statement (R 54).

c. Prosecution rebuttal.

Mr. Harry Higa, a prosecution witness, testified that he was present on 12 May when Lieutenant Jensen questioned accused in the CID room and heard Lieutenant Jensen ask accused where the gun was (R 57). Accused said he threw it in the ocean. Lieutenant Jensen, accused, Mr. Higa, a corporal of the military police, and a diver then made preparations to go to the ocean. There was a delay and accused told Lieutenant Jensen that he had hidden the gun under a quonset (R 57). Lieutenant Jensen, accompanied by Mr. Higa, then took accused to the quonset where the gun was found. They then returned to the 1391st Military Police Stockade and accused made a statement to Lieutenant Jensen in the presence of Mr. Higa (R 57). No force was used and accused signed the statement in the presence of Mr. Higa (R 58). This witness further testified on examination by the court:

"Q. When Lieutenant Jensen talked to Private Estrada on the 12th of May, did you hear him say anything about any rights that the accused might have?

A. Yes, he read him the 24th Article of War and he stated that he fully understood the 24th Article of War.

Q. When you say 'him' whom do you mean?

A. Estrada.

Q. Did the lieutenant who was talking to him, interpret the reading to him?

A. Yes sir, he brought a Filipino interpreter from the Air Division and he fully explained the rights.

- Q. You were present at that time?
A. Yes sir, I was present.
- Q. Was Private Estrada asked through the interpreter if he understood what was being said to him?
A. Yes sir. He said he understood.
- Q. He said he understood?
A. The interpreter said he fully understood it.
- Q. He said Private Estrada had told him that?
A. Well, Private Estrada said in Filipino to the interpreter and the interpreter in English related to Lieutenant Jensen that he fully understood it.
- Q. Did you see Pfc Estrada sign this statement?
A. Yes sir, I did.
- Q. How long was that after you got back from looking for the pistol?
A. I can't quite tell the time.
- Q. From the time you went and recovered the pistol, then did you come back to the office?
A. Yes sir.
- Q. And how long after you got back to the office, how long after that was this paper signed?
A. I would say about twenty or thirty minutes after we got back from Tengan.
- Q. Was it typed and presented to him?
A. Lieutenant Jensen took the statement after we got back from Tengan.
- Q. Did he write it out on the typewriter, or write it out and have it typed?
A. I don't quite remember.
- Q. Were you present at the very time when he signed this paper?
A. Yes, I was present.
- Q. Did he appear in a dazed condition to you?
A. Lieutenant Rogers asked him how much of an education he had. He said sixth grades of education, and Lieutenant Rogers said that for six grades he answered very good.

Q. You haven't answered my question. Did Private Estrada appear to be in his right mind or dazed or groggy at the time he signed this thing?

A. He appeared natural." (R 58,59).

Lieutenant Jensen, as a witness, denied he had used any force on accused in obtaining the confession and stated that the confession was signed after the gun was obtained (R 56). He further testified that Higa was with him when he got the statement from accused (R 56).

d. Sanity.

It was stipulated by and between counsel and the accused, that pursuant to a psychiatric examination of the accused held on 15 May 1948, in the opinion of the three officer Psychiatric Board, Private First Class Estrada (the accused):

- (1). Knew right from wrong and was able to adhere to the right at the time of the alleged crime.
- (2). Knew right from wrong and was able to adhere to the right at the time of the Board's interview.
- (3). Was able constructively to cooperate in his own defense. (R 16)

5. Comment.

Accused has been found guilty of murder in violation of Article of War 92 and of assault with intent to commit murder in violation of Article of War 93.

Murder is the unlawful killing of a human being with malice aforethought. The proof required to sustain Charge I and its Specification is:

"a. That the accused killed a certain person named or described by certain means, as alleged, (that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and

"b. That such killing was with malice aforethought" (par 148a, MCM 1928).

Assault with intent to murder is an assault aggravated by the concurrence of a specific intent to murder; in other words it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats (par 1491, MCM 1928).

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Sergeant Pound died at 2200 hours 2 May 1948, the cause of death being exsanguination (loss of blood) secondary to a gunshot wound. Corporal Montgomery was evacuated to the Zone of the Interior for treatment necessitated by a gunshot wound which "perforated the transverse colon," and caused "multiple perforating wounds of the ilium and two wounds perforating the viscera." The gunshot wounds were inflicted at approximately 2000 hours 2 May 1948, in the village of Gushikawa, Okinawa, by .45 caliber bullets fired from a pistol in the hands of the accused. Malice is presumed from the use of a deadly weapon (Par 112a, MCM 1928).

Considering all the evidence, including the testimony of Montgomery (R 9) that after the deceased (Pound) said: "I am C.I.D., let's forget the whole thing, we will all go" or "come on, let's go, let's get out of here, let's have no trouble," he pulled his pocketbook from his pocket; and the testimony of Caparros that:

"A. Then I went in front of the American fellow and Estrada walked away from the American, walking behind him. There was then another American (deceased) came over and asked what's going on here; then he says where are you guys from and nobody answers; and he says you guys better go up to your barracks; and I see him reaching for the back of his pocket.

Defense: May the record show that he reached for his right, rear pocket.

The witness continued:

You just better get back to your job or else, that's all I heard. Then I heard a shot. When I heard the shot, I saw the direction from where the shot came from and saw the blaze from the gun." (R 38);

we conclude that the court could determine, as an issue of fact, that accused's act causing death was murder and was not committed in the heat of passion with adequate legal provocation or that it was not done in self-defense. Thus it is stated:

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

as men of fair average mind and disposition, should be taken as the standard, unless, indeed, the person whose guilt is in question is shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition." (26 Am. Juris, Homicide, 25).

"To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life . . . or to prevent great bodily harm to himself . . . The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can." (Par 148a, p.163, MCM 1928).

The prosecution's evidence is convincing that the deceased and Corporal Montgomery were unarmed, and that the deceased was merely taking his notebook (or pocketbook) from his pocket when the accused shot him. At the time he was shot, deceased had his right side turned toward the accused and was facing toward one of the other Filipinos. In fact, the bullet entered the right side of Sergeant Pound's back, fractured the 7th rib (left) and left the body just below the left nipple.

The issue of "reasonable grounds" for his acts, though not specifically raised by the defense, was raised by the evidence. The court's findings of guilty are based on its determination that reasonable grounds did not exist for the accused's possible belief that it was necessary for him to slay the deceased and seriously wound Corporal Montgomery in order to save his own life. Such determination in our opinion is amply sustained by the evidence. We are also of the opinion that provocation, if any, was indeed not of such a nature as to move the average person to the degree of violence to which the accused resorted.

In addition to the presumption of accused's sanity at the time of the offense (par 112a, MCM 1928), the court had the stipulated testimony of a psychiatric board which found the accused sane both at the time of the offenses and at the time of the examination. No question of the accused's mental competency is presented by the record of trial.

A pretrial statement of accused (Pros Ex 10) was admitted into evidence over objection of defense (R 41). The burden of proof was on the prosecution to establish that the confession was voluntary. A confession not voluntarily made must be rejected. The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring

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further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior (par 111a, p.116, MCM 1928).

The facts in this case indicate that accused was confined to the stockade on 3 May 1948 and that on that date Lieutenant Jensen talked to him twice, that he thereafter interrogated him on ten different occasions, and that the accused finally decided to make a statement on the 12th of May. Accused testified the confession was obtained by force and that he did not realize what he was doing. Under such circumstances and the testimony of accused the burden of proof was on the prosecution to establish that the statement was voluntary (CM 192609, Hulme, 2 BR 9,16,17).

There are several aspects of the case involved in determining if the confession was voluntary. First, accused contended that force was used to obtain the confession and that he was unconscious when he signed it. This was denied by prosecution witnesses. An issue of fact was thus raised which the court could determine. Apparently the court decided there was no force used and such finding is sustained by the evidence.

However, there is another aspect of the question as to whether the statement was voluntary. Accused, while in confinement, was questioned twelve different times before he was warned of his rights under the 24th Article of War. While the evidence does not establish what was said at these interrogations, it does raise a question whether such interrogation might have had some influence in the final decision of the accused to make a statement. Prosecution did not establish by witnesses what transpired during these interrogations. Failure to produce such testimony, which was within the control of the prosecution, raises an inference that it would be unfavorable (Sec 183, p.189, 20 Amer Jur).

Since the statement of accused was made to a superior officer, it should clearly appear from the record that accused understood that he did not have to make a statement and the force and effect thereof if he did make a statement. There is no legally competent evidence that accused was ever advised of his rights under the 24th Article of War. The only evidence on this question was that when the statement of 12 May was made, accused was advised of his rights under the 24th Article of War through an interpreter. The interpreter was not called as a witness. Therefore, proof of the fact that accused was warned of his rights was established by incompetent hearsay (CM 267450, Johnson, 3 BR (NATO) 135,142). The interpreter in this case was selected by Lieutenant

Jensen and it does not appear that accused had any choice in the matter. The rule under such circumstances is:

"Thus in cases where the declarant is under arrest and is undergoing interrogation through the medium of an interpreter in whose employment declarant has no choice the interpreter must authenticate his translation by testifying that his interpretation was accurately made (People v. Chin Sing, 242 N.Y. 419, 152 N.E. 248; Indian Fred v. State, 36 Ariz 48, 282 P. 930)." (CM 328416, Pierce)

Failure to object to this as hearsay does not cure the error and such hearsay evidence cannot be considered in determining the sufficiency of the evidence to show that the statement was voluntary (CM 272197, Dezan, 46 BR 269; CM 254940, Holden, 36 BR 1,3; Par 126b, MCM 1928).

Under such circumstances there was not sufficient proof of the voluntary nature of the confession, unless it appears that accused otherwise understood the confession at the time he signed it. The confession contains a certificate that the confession was read and explained to accused by Vicente Dulce. Although Lieutenant Jensen states that accused read the confession before he signed it, it is reasonable to assume under all the evidence that it was read to him by an interpreter. An interpreter was used at the trial. While there are some facts warranting an inference that accused understood "some English," the record does not affirmatively show he fully understood English. The record does affirmatively show an interpreter was used both when the confession was taken and at the trial. Any doubt in this respect must be resolved in favor of accused since the burden of proof was on the prosecution to establish that accused fully understood what he was signing.

The fact that the statement signed by the accused was prefaced by the recitation that accused had been read the 24th Article of War and fully understood his rights thereunder was not admissible to establish the voluntary nature of the confession.

"The statements appearing at the beginning and end of the confession to the effect that accused had been warned of his rights under the 24th Article of War and that the confession was voluntary and contained the truth, being affected by the same taint of coercion as the other statements therein, will not preclude a determination that such confession was in fact involuntary (CM 274678, Ellis, 47 BR 271,284)." (CM 320230, Huffman, 69 BR 261,268, 6 Bull JAG 120,121).

An isolated admission taken from an incompetent confession is not competent evidence (CM 187610, Williams, 1 BR 67,74; CM 323188, Hamrick,

72 BR 141,145). Obviously, if the entire confession was inadmissible, any part of it is inadmissible.

However, although the confession was not admissible because of failure of the record to show that accused was warned of his rights, (no physical force being used to obtain the confession) his substantial rights were not prejudiced since his guilt was established by compelling and convincing evidence aliunde the confession (CM 324725, Blakeley, 73 BR 307,321; CM 243384, Rowley, 27 BR 353,356). The confession itself was not at variance with other evidence.

6. Records of the Army disclose that the accused is a member of the Philippine Scouts, is 20 years of age and unmarried. He is the fourth of seven children and comes from a very poor family. His father died in 1946. The accused though having attained only the sixth grade in school exhibits a mental alertness which overcomes any deficiency in formal education. He was born at Mabini, Pangasinan, Philippine Islands. No evidence of criminal records against him or any other member of his family is known. He enlisted in the Philippine Scouts to serve for a term of three years on 13 August 1946. Although originally classified as an infantryman he has been assigned to general labor activities since his arrival on Okinawa in December 1947.

7. 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. 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 as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92, and dishonorable discharge, forfeiture of all pay and allowances due or to become due and imprisonment at hard labor for twenty years is authorized upon conviction of a violation of Article of War 93 (assault with intent to commit murder).

C. O. Waefe , Judge Advocate
E. J. Berkowitz , Judge Advocate
G. W. Lynch , Judge Advocate

JAGH CM 331849

1st Ind

JAGO, Department of the Army, Washington 25, D.C. 28 OCT 1948

TO: The Secretary of the Army

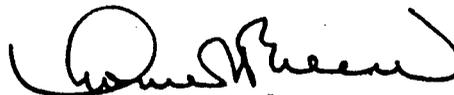
1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Private First Class Calixto Estrada, PS 10315790, 520th Quartermaster Depot Supply Platoon (PS), APO 331.

2. Upon trial by general court-martial this soldier was found guilty of murder in violation of Article of War 92, and of assault with intent to murder in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but in view of the proof that the homicide was committed in sudden passion in the course of a dispute (though without adequate legal provocation) recommend that it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of the natural life of accused, that the sentence as thus commuted be carried into execution, and that a United States Penitentiary be designated as the place of confinement.

4. Major General Charles T. Myers, USAF, Commanding General 1st Air Division, which unit is located on Okinawa, where the offenses were committed, has addressed a letter to me in which execution of the sentence adjudged is recommended.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(CCMO 192, 23 Nov 1948)

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

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JAGK - CM 331859

23 SEP 1948

UNITED STATES)

1ST U.S. INFANTRY DIVISION

v.)

Private JAMES T. PIERCE)
(RA 34667494) and Private)
JOE SMITH (RA 34553270),)
both 59th Transportation)
Truck Company)

Trial by G.C.M., convened at Munich,
Germany, 5, 6 and 7 May 1948. PIERCE:
Dishonorable discharge and confinement
for life. SMITH: Dishonorable dis-
charge and confinement for five (5)
years. EACH: Disciplinary Barracks

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

1. The Board of Review has examined the record of trial in the case of the soldiers named above.
2. The accused were tried upon the following charges and specifications:

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

Specification: In that Private James T. Pierce and Private Joe Smith, both members of the 59th Transportation Truck Company, acting jointly and in pursuance of a common intent, did, at Munich, Germany, on or about 13 March 1948, forcibly and feloniously against her will, have carnal knowledge of Martha Wolfgardt.

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

Specification: In that Private James T. Pierce and Private Joe Smith, both members of the 59th Transportation Truck Company, acting jointly and in pursuance of a common intent, did, at Munich, Germany, on or about 13 March 1948, with intent to commit a felony, viz, murder, commit an assault upon Gastone Douville, by willfully and feloniously stabbing the said Gastone Douville in the body with a knife.

Each pleaded not guilty to all charges and specifications. Accused Pierce was found guilty of the specification of Charge I except the words "and Private Joe Smith, both members" and "acting jointly and in pursuance of a common intent." He was found guilty of Charge I and guilty of Charge II and its specification. Accused Smith was found not guilty of Charge I and its specification but guilty of Charge II and its specification. Evidence of three previous convictions was introduced as to accused Smith. No evidence of previous convictions was presented as to accused

Pierce. The court sentenced Pierce to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. Smith 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 fifteen years.

The reviewing authority approved only so much of the findings of guilty of the specification, Charge II, with respect to each accused, as involved a finding that each did, at the time and place alleged, with intent to do bodily harm, commit an assault upon Gastone Douville, by willfully and feloniously stabbing him in the body with a knife. He approved the sentence as to accused Pierce, approved only so much of the sentence with respect to accused Smith as provided for dishonorable discharge, total forfeitures and confinement at hard labor for five years, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement as to each accused, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review adopts the statement of law and facts contained in the Staff Judge Advocate's review with the following additional comment.

Before pleading to the general issue defense counsel interposed an "objection to the entire constitutionality of this court on the ground that there are no colored officers present as members of this court." Counsel asserted that there were colored officers in Munich who were available for court duty, and that the failure of the appointing authority to designate officers of accused's race as members of the court herein rendered the court, as constituted, without jurisdiction to try them. In response to a question by the law member, counsel explained that he was not challenging any individual member of the court, but was objecting to "the composition of the court itself." The court overruled the objection and the defense excepted to the ruling.

The record is silent as to whether either of the accused had, prior to trial, made timely request of the appointing authority, that he appoint officers of the accused's race as members of the court. It would appear most probable that if any such request had been made, counsel would have made reference thereto. Obviously the members of the court herein appointed, and who heard the case, had no discretion whatever in the appointment of the membership of the courts-martial.

By the express provisions of Article of War 8, the Commanding General, 1st Infantry Division, had power to appoint a general court-martial for the trial of the accused. In the exercise of such power, Article of War 4 provides that "the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for

the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof." The law presumes regularity in the authorized acts of public officers and although this presumption is disputable there is no express or implied requirement that the membership of a court-martial include personnel of the same race as the accused. And the mere fact that the court which tried the accused did not contain a member of accused's race would not affect the court's jurisdiction (CM 220160, Faulkner, 12 BR 335, 338; Jackson v. Goff, Case No. 12402, N.D. Ga., Petition dismissed 22 April 1948, not yet reported). It follows that no error resulted from the court's action in overruling the objection to its jurisdiction.

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

Charles D. Siloub, Judge Advocate

Robert E. Abney, Judge Advocate

Harley L. Lanning, Judge Advocate

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

(203)

JAGK - CM 331975

30 SEP 1948

UNITED STATES)

FIRST U.S. INFANTRY DIVISION

v.)

Captain DONALD C. HENDERSON)
(O-1558157), 7833 Ordnance)
Salvage Detachment)

Trial by G.C.M., convened at Nurnberg,
Germany, 30 and 31 March 1948. Dis-
missal, total forfeitures and confine-
ment for one (1) year.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 94th Article of War.

Specification: In that Captain Donald C. Henderson, 7833 Ordnance Salvage Detachment, did, at or near Rothenbach, Germany, on or about 9 October 1947, wrongfully and knowingly dispose of by causing to be delivered to Alfons Vossen and Karl Sens, about twenty (20) truck tires, of the value of more than \$50.00, property of the United States, furnished for the military service thereof.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, 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 four years. The reviewing authority approved the sentence but reduced the period of confinement to one year. He 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

The evidence may be summarized briefly as follows:

Accused was the operations officer of the 7833rd Ordnance Salvage Detachment, also referred to in the record as the Rothenbach (Germany) Ordnance Scrap Collecting Depot or Point. The Detachment collected scrap

combat vehicles and materials such as rubber and metal, which it classified and stocked according to serviceability. It also stocked new materials for the maintenance of its own vehicles, cranes and other equipment. The scrap materials were "disposed of through sales by the chief of the Quartermaster, EUCOM, through quantitative receipt, from the officers of the Military Government for Land, which is Bavaria" (R 11). The accused, as operations officer had authority to "out-ship" property from the depot only on shipping orders from the Office of the Quartermaster General or the Chief of Ordnance, and also upon "quantitative receipt" approved by the Theater Commander. The term "quantitative receipts" appears to refer to transactions involving delivery of scrap materials to various German industrial corporations upon request of the Military Government (R 12). On about 8 October 1947, Alfons Vossen and Karl Sens, German civilians residing at Ansbach in the British Zone, went to accused's office at Rothenbach for the purpose of securing some tires which Vossen needed in his transport business. Sens had previously procured four tires by barter with one Dr. Munderloh who was employed in accused's office. When they arrived at the office they conferred with Dr. Munderloh who referred them to the accused. Through his interpreter, Hubert Borrman, the accused first refused the request for tires and Vossen produced a Contax II camera which he presented to the accused for examination. Vossen explained and demonstrated the operation of the camera. The accused then sent someone to the warehouse to ascertain if the depot had any tires of the size requested by Vossen. Later accused agreed to deliver twenty tires, size 900 x 20, to Vossen in exchange for the camera which accused retained in his possession. Accused caused Borrman to prepare a requisition for the twenty tires in favor of Sens, which he (accused) signed. This requisition was delivered by Borrman to the tire warehouse keeper, Wilhelm Eokhardt, and on the following day Vossen appeared at the warehouse with Sens' truck and driver and made claim for the tires. Vossen insisted on new tires and after some discussion between the parties Eokhardt delivered 20 tires and tubes to the claimants. Eokhardt made a list of these tires showing the names of the manufacturers and the serial numbers. All of the tires were of American type and manufacture. After the tires had been loaded accused directed the parties to proceed to the parking lot and wait for him. He then procured his private automobile and escorted Vossen to the gate of the compound where he told the guard that "the other car was OK." The German truck passed through without clearance papers. Other incriminating circumstances shown by the record are that accused, in Borrman's presence, destroyed the requisition papers relative to the tires and subsequently requested Borrman and another employee named Heim to not tell the Criminal Investigation Division that they had seen him with a camera in a brown leather case. The tires were subsequently recovered from Sens and Vossen, produced in court and were identified by Eokhardt who stated that 15 of them were in fact new and the other five had been slightly used (R 35-69). It was stipulated that the tires had a total value of \$600 (R 54).

Major Harold I. Williams, commanding officer of accused's detachment, and two civilian employees of the Detachment testified that accused's general reputation for "truth and honesty" was good. (R 72-73).

The accused, after being duly advised of his rights, elected to remain silent (R 74).

4. Discussion

Prior to the arraignment, defense counsel challenged Lieutenant Colonel Donald R. Patterson, Infantry, the law member, for cause and read to the court paragraph 1(c), War Department Letter, "Subject: Administration of Military Justice" dated 20 August 1947 which is as follows:

"e. Law Members. Law members should be trained lawyers or, if trained lawyers are not available, men of long experience in court-martial matters. Whenever possible officers of the Judge Advocate General's Department should be detailed as law members. Superior commands will assist subordinate commands by making available officers who have had training and experience as lawyers when necessary for service as law members."

The record is silent with respect to the qualifications of Colonel Patterson and counsel stated that the challenge was not to be construed as a "disparagement of the opinion he had for the law member." Evidence was heard which indicated that Major Arthur B. Ireland, JAGD, Headquarters Nurnberg Military Post, 7810 SCU, was, by virtue of his Judge Advocate duties, unavailable to sit as a member of the court-martial. The court closed and upon being opened the President announced that it appeared that no member of the Judge Advocate General's Department was available and that the challenge was denied.

We find no error in the court's overruling the challenge of the duly appointed law member. Article of War 8 provides that -

"The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. ***"

The court was fully justified in concluding that the appointing authority, in designating Colonel Patterson as law member, acted within the sound discretion conferred upon him by the Articles of War and his compliance or non-compliance with the terms of the administrative directive quoted would not, as a matter of law, effect the eligibility of the officer

named to perform the duties of law member (CM 231963, Hatteberg (1st Ind), 18 BR 349, 366-369; CM 229477, Floyd, 17 BR 149, 153).

Defense counsel objected to the admission in evidence of the records kept by the warehouseman Eckhardt showing the description of the tires he delivered to the parties in obedience to accused's orders. It was argued that these were personal records and not admissible under the business entry rule (28 USC 695). This contention is without merit. The witness identified his own record made at the time he delivered the tires. The document was admissible without the aid of the so-called business entry rule.

Counsel has challenged the sufficiency of the evidence to show that the property disposed of was "property of the United States, furnished for the military service thereof." Although no witness testified categorically that the tires in question were U.S. property furnished for the military service, the evidence shows that the tires were in a U.S. military depot, that they were of American origin, that the depot stocked material salvaged from the battlefields (excepting such materials as were stocked for the maintenance of the unit's equipment), that U.S. Army officers had the control and disposition of the materials and that they could only issue the same on proper orders approved by military authorities. The fact that the Military Government, with the approval of the Theater Commander caused some of the materials to be diverted to the "German Economy" does not overcome the reasonable presumption arising from such circumstances that the property belonged to the United States and was furnished for the military service thereof (CM 310950, Dickerson, 1 BR (NATO-MTO) 203; CM 318296, Mayer, 67 BR 211, 219).

5. Department of the Army records show that the accused is 37 years of age and married. He graduated from high school and was engaged as a mechanic until he entered the Army as a private in March 1941. He completed the course of instruction at The Ordnance School, Aberdeen Proving Ground, Maryland, on 4 December 1943 and was commissioned a second lieutenant, AUS. Accused's efficiency reports have been generally "Excellent."

6. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 84.

Robert T. Ribon Judge Advocate

Gilbert G. Akroyd Judge Advocate

4 Harley D. Lanning Judge Advocate

OCT 5 1948

JAGK - CM 331975

1st Ind

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

TO: 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 Donald C. Henderson (O-1558157), 7833 Ordnance Salvage Detachment.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and knowingly disposing of by causing to be delivered to Alfons Vossen and Karl Sens about twenty (20) truck tires, of the value of more than \$50, property of the United States furnished and intended for the military service thereof, in violation of Article of War 94. 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 four years. The reviewing authority approved the sentence but reduced the period of confinement to one year, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement and forwarded the record of trial for action under Article of War 48.

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

The accused was the operations officer of the 7833rd Ordnance Salvage Detachment, which maintained a salvage depot at Rothenbach, Germany. The detachment collected, sorted and stocked salvage materials, including rubber and metal from abandoned combat vehicles. It also stocked new tires and materials for the maintenance of its vehicles, cranes and equipment. Some of the salvage materials were being diverted to the "German Economy" and accused was authorized to "out-ship" this material on shipping orders from the Theater Quartermaster General, Chief of Ordnance, or from the Military Government with the approval of the Theater Commander.

On about 8 October 1947 Alfons Vossen and Karl Sens, German nationals residing at Ansbach in the British Zone, proceeded to Rothenbach for the purpose of securing some tires for Vossen's transport business. Sens had previously procured four tires by barter with one Dr. Munderloh, a civilian employee in accused's office. When they arrived at accused's office they conferred with Munderloh who referred them to accused. Through an interpreter, Borrmann, they requested that

accused deliver to them 20 new tires. Accused refused and Vossen thereupon exhibited to accused a Contax II camera, stating, in effect, that it was a very expensive model and that he would give it to accused in exchange for the tires. After examining the camera accused accepted the offer and issued a requisition for delivery of the tires to Sens. On the following day Vossen went to the tire warehouse where a civilian employee, Eckhardt, in compliance with the requisition duly signed by accused, delivered 20 tires and tubes, size 900 x 20, to the parties. All the tires were of American manufacture, fifteen were new and five were slightly used. As Vossen departed from the depot with the tires, which were in Sens' truck, the accused joined them in his private automobile and cleared them through the gate by telling the guard that the truck was "OK."

Subsequently the tires were recovered and they were exhibited at the trial. It was stipulated that they had a reasonable total market value of \$600. The Germans, Vossen and Sens, each testified that they were serving a one-year sentence imposed by a military government court for bribing an officer.

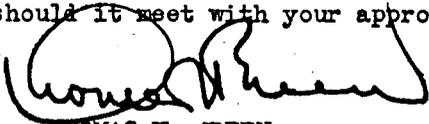
Accused elected to remain silent.

Mr. Joseph S. Robinson, attorney of New York, New York, appeared before the Board of Review, made oral argument, and filed brief in behalf of accused, which has been considered.

4. Department of the Army records show that the accused is 37 years of age and married. He graduated from high school and was engaged as a mechanic until he entered the Army as a private in March 1941. He completed the course of instruction at The Ordnance School, Aberdeen Proving Ground, Maryland, on 4 December 1943 and was commissioned a second lieutenant, AUS. Accused's efficiency reports have been generally "Excellent."

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

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



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 167, 7 October 1948).

