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VOL. 81

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JUDGE ADVOCATE GENERAL'S DEPARTMENT

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Holdings Opinions and Reviews

VOLUME 81

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

JAGH CM 332083

19 OCTOBER 1948

U N I T E D S T A T E S v. Technician Fourth Grade JAMES C. FERGUSON, RA 17093584; Technician Fifth Grade DUANE S. GILLESPIE, RA 15244157; Technician Fifth Grade HERMAN J. SCHROEDER, RA 17212558; Private WILBUR W. WAUGH, RA 15237123; Private CORNELIOUS J. ECKARD, RA 15227766; and Technician Fourth Grade EUGENE A. SWESSEL, RA 16181946, all of 90th Transportation Harbor Craft Company, APO 59.	KOREA BASE COMMAND Trial by G.C.M., convened at APO 901, 30 April 1948. Each: Dishonorable discharge (suspended) and confinement for three (3) years. Branch United States Disciplinary Barracks, Camp Cooke, California.

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

1. The record of trial in the case of the soldiers named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty as to all accused except Technician Fifth Grade Duane S. Gillespie, and the sentences as to the accused having been examined by the Board of Review, 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 Technician Fourth Grade Eugene A. Swessel, 90th Transportation Harbor Craft Company, APO 59, and Technician Fourth Grade James C. Ferguson, 90th Transportation Harbor Craft Company, APO 59, and Technician Fifth Grade Duane S. Gillespie, 90th Transportation Harbor Craft Company, APO 59, and Technician Fifth Grade Herman J. Schroeder, 90th Transportation Harbor Craft Company, APO 59, and Private Cornelious J. Eckard, 90th Transportation Harbor Craft Company, APO 59, and Private Wilbur W. Waugh, 90th Transportation Harbor Craft Company, APO 59, acting jointly and in pursuance of a common intent, did at, Camp Inch'on, Korea, APO 59, on or about, 7 February

1948, feloniously take, steal, and carry away, Post Exchange Supplies, to wit: Camel cigarettes, value over Fifty Dollars ($50.00), the property of the USAFIK Central Exchange, APO 235.

Each accused pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of one previous conviction each was introduced as to accused Eckard and Waugh. Each accused was sentenced to be dishonorably discharged the service, and to forfeit all pay and allowances due or to become due. Accused Ferguson, Eckard and Waugh each was sentenced to be confined at hard labor for five years, and the accused Swessel, Gillespie, Schroeder each was sentenced to be confined at hard labor for three years, each at such place as the reviewing authority might direct. As to each accused the reviewing authority approved the sentence but reduced the period of confinement to three years as to accused Ferguson, Waugh and Eckard. As thus modified execution of the sentence was ordered as to each accused, but the execution of the dishonorable discharge was suspended as to each accused until the soldier's release from confinement. Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct was designated as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 38, Headquarters Korea Base Command, APO 901, dated 15 June 1948.

3. The record of trial is legally sufficient to support the findings of guilty and the sentence as to the accused Technician Fifth Grade Duane S. Gillespie, but legally insufficient to support the finding of guilty and the sentence as to each of the other accused.

4. Evidence for the prosecution.

On 7 February 1948 at the 3rd Transportation Major Port, APO 59, 998 cases of Camel cigarettes, property of the USAFIK Central Exchange were transferred from the S. S. Luckenbach to LCT 684. These cases of cigarettes were marked "BOUT-W-P AKJ 886, Purchase Order No. Z-7413." (R 7,9).

Between 7 February 1948 and 6 March 1948 the six accused were "assigned as a crew to the tug ST-46."

On the night of 7 February 1948 the tug ST-46 was tied up at a fuel barge. The LCT 684 was also tied to this barge (R 16; Pros Ex 4).

On 9 February 1948 the LCT discharged cargo including the cigarettes received from the S. S. Luckenbach. At this time there were 869 cases of the Camel cigarettes (R 8,9). These cigarettes were valued at $45.00 per case (R 10).

Gonzalo Malarego was a Filipino shipmate of accused on tug ST-46 (R 15,18). He testified in part:

"Q. Do you know the accused in this case?
A. Yes, sir.

Q. Will you identify them to the court?
A. They were all right in our tug, sir.

Q. Do you know the accused in this case by name?
A. Swessel, Eckhard, Waugh, Ferguson, Gillespie.

Q. On about the 7th of February 1948, while you were present aboard the ST-46, did you see any cigarettes?
A. Yes, sir.

Q. Who did you see present with these cigarettes--who was with them?
A. Ferguson, Waugh and Red, Herman, Schroeder.

Q. Where were these cigarettes?
A. They were right in the quarters, sir.

Q. What did you see these men do with the cigarettes?
A. They kept them right in the water tank.

Q. Later, several days later, did Eckard speak to you about these cigarettes?
A. Yes, sir.

Q. What did he tell you?
A. They were no longer in the water tank, but transferred to the engine room.

* * *

Q. How many cigarettes did you see?
A. One case, sir.

* * *

Q. Gonzalo, did one of the men now present give you a carton of cigarettes?
A. Yes, sir.

Q. Which one was that?
A. Ferguson.

Q. Do you know where those cigarettes came from?
A. Yes, sir.

Q. Where?
A. From the case.

Q. Is that the same case that was in the quarters when all those men were present?
A. Yes, sir.

Q. Did you see him take the carton out of the case?
A. Yes, sir.

Q. You saw him take it out of the case?
A. Yes, sir.

Q. Was there a light on? It was at night, wasn't it?
A. Yes, when they brought the cigarettes on board it was night.

Q. Was there a light there in the room?
A. Yes, there's a light in the quarters.

Q. Was it a bright light?
A. Yes, sir." (R 18-21)

"Q. Did Eckard ever say to you that the cigarettes were no longer aboard the ST 46 because they had gotten rid of them?
A. Yes, sir.

Q. Will you explain to the best of your knowledge his words--the words he used?
A. Well, he says, he asked me if I know anything about the cigarettes on board, you know that--I mean if I know that they get rid already. He didn't say he sold it but he says that they get rid of it already, see.

* * *

Q. In your previous testimony you had stated that on the night in question you saw Ferguson, Schroeder, Waugh and Gillespie present in one room on this boat with a case of cigarettes in that room at the same time?
A. Yes, sir." (R 25,26)

Captain Augustine G. MacDonald, 90th Transportation Harbor Craft Company testified:

"A. A few days before the 6th of March, I believe it was around the 1st or 2nd of March, I first started investigating the theft of all the cigarettes off the LCT 684 and T/5 Gillespie requested to see me. He came into the office and stated that he had heard Private Birnie, a member of the crew of LCT 684 was going to be charged with the theft of all 129 cases of missing cigarettes. He stated that he himself had taken three cases of cigarettes off the LCT and had them on YOGL barge--it's a barge tied in the LCT anchorage. He said the same day

he took these three cases, he had them on the barge, and went back later and they were missing. I got a statement from him to that effect and continued the investigation of the case. During this investigation I received more information which led me to believe that the crew of the tug, if he was involved directly, must have known something about the theft of the cigarettes. I called in Gillespie again and after questioning him, I got the confession which appears on the statement. Do you want me to give the whole statement?

* * *

Q. What is that document?

A. This is a statement or confession I took from T/4 Gillespie." (R 16)

Captain MacDonald identified the statement taken from the accused Gillespie and it was introduced into evidence as Prosecution Exhibit 4 without objection by the defense (R 16). In this statement Gillespie admitted that on 8 February 1948 he took seven cases of cigarettes from LCT 684. He also implicated his co-accused in the taking of these and other cigarettes (Pros Ex 4).

About 6 March 1948 tug ST-46 was searched on three different occasions. The first search revealed nothing (R 10,12). The second search was conducted by First Sergeant Charles N. Wolfe. His instructions were:

"My instructions were to go into the engine room, make a search under the deck plates and also to search under the floor boards in the boiler room and pilot house." (R 14)

During his search he found two cases of cigarettes marked Z-7413 which he turned over to Captain MacDonald. These cigarettes were received in evidence as Prosecution Exhibit 1 (R 10,14,15,17). Wolfe further testified that during the third search 3200 yen was found in a "corn meal box in the galley" and "I found this cigar box, sir, with 25,000 yen wrapped in a comforter on the top bunk, port side forward sleeping compartment. Also, in the same bunk I found in the pillow case 17,900 yen, sir." On the bunk was a pair of trousers in the pockets of which were identification tags belonging to accused Swessel and a letter addressed to Swessel. There was no other indication as to who occupied this bunk (R 13-14). The yen were received in evidence as Prosecution Exhibits 2 and 3 (R 11,13). The defense objected to the introduction of the yen in evidence, at which time the prosecution stated that the cigarettes were not recovered and that the yen was in lieu of the cigarettes and that the prosecution would prove that the yen came into the possession of the accused by sale of the purloined cigarettes (R 13).

5. <u>Evidence for the defense.</u>

(6)

Captain MacDonald was recalled as a witness for the defense and testified:

"Q. Captain, as Commanding Officer of the 90th Transportation Harbor Craft Company, will you explain to the court the various duties that these men have in your organization and their manner of performing them?

A. T/4 Ferguson was the skipper, the master of ST-46. His performance of duty has always been superior. At the time he took over his vessel it was not running and was one of the dirtiest boats I have. When he left that boat it was the best I have. T/4 Swessel is the Engineer of the tug. I had him in the office once for company punishment for a minor offense. His work was always superior. Other than that one minor offense I have never had a bit of trouble with him. T/5 Gillespie has not, to my recollection, ever had company punishment. He always done his job in an excellent manner. Private Schroeder, I wasn't too well acquainted with. I know he has had no company punishment and he has always done a good job, as far as I know. Private Eckard was on a 30 day restriction for Summary Court at the time of the alleged theft. He is, in my opinion, a malcontent--a trouble maker. Although I have never had too much trouble with his work. It has been satisfactory. Private Waugh at the time of the alleged theft was also under 30 days' restriction under Summary Court. I believe that's the first offense for him. His work, in my opinion, was always excellent." (R 21)

The accused were warned of their rights as witnesses and Swessel, Gillespie, Schroeder and Waugh elected to remain silent (R 22).

The accused James C. Ferguson and Cornelious J. Eckard each testified as to his actions on 7 and 8 February 1948 and each denied that he had any connection with the taking of cigarettes from the LCT (R 22-24).

6. Discussion:

The evidence shows that between 7 February 1948 and 9 February 1948, 125 cases of Camel cigarettes belonging to the USAFIK Central Exchange, APO 235, were stolen from LCT 684. These cigarettes were valued at $45.00 per case. The accused Gillespie made a voluntary pretrial statement wherein he confessed that he stole seven cases of cigarettes from the LCT. In this extrajudicial statement he implicated his co-accused in the theft of cigarettes from the LCT. It is a well settled proposition of law that the confession or statement of one

joint accused made after the transaction is completed is inadmissible as against the other accused (CM 202225, Leach, 6 BR 11; CM 331601, Brown; par 76, MCM 1928, p.61).

Gillespie's extrajudicial confession made subsequent to the commission of the alleged offense as admitted into evidence implicated both himself and other accused. Where conspirators or accomplices are tried in a joint or common trial and a pretrial confession of one of them, not made in pursuance of the common design or act, is received in evidence the court can consider it as evidence only against the particular accused who made it (Par 114c, MCM 1928). Therefore, such confession cannot be considered in this case as evidence against the accused other than Gillespie.

After eliminating the extrajudicial confession of Gillespie from consideration as against his co-accused, there is no evidence connecting the accused Swessel with the offense charged except that trousers containing his identification tags and a letter addressed to him were found on a bunk, in which bunk yen were found. According to the testimony of the witness Melgarego, accused Ferguson, Schroeder, Waugh and Gillespie were present in the crew's quarters the night he saw a case of cigarettes. Swessel and Eckard were not present on this occasion. Melgarego also testified that several days after the time he saw the cigarettes in the crew's quarters, Eckard told him that the cigarettes "were no longer in the water tank, but transferred to the engine room.". Eckard also asked Melgarego: "he asked me if I know anything about the cigarettes on board, you know that * * * I mean if I know that they get rid already. He didn't say he sold it but he says they get rid of it already see."

This evidence is insufficient to establish Eckard as a party to the original theft. His knowledge of the transfer of cigarettes from one place on the tug to another place on the same tug and that the cigarettes were later disposed of is far short of any acknowledgement that he was a party to the theft of the cigarettes or that he had any of the cigarettes in his possession or that he had disposed of them.

Although the testimony of Melgarego established that accused Ferguson, Schroeder, Waugh and Gillespie were present in the crew's quarters on 7 February 1948 and at that time a case of cigarettes was also present, his testimony fails to show that this case of cigarettes was stolen or that it came from LCT 684. It is obvious from his testimony that he did not know where the cigarettes came from and did not see them prior to the time they were in the crew's quarters. He did not testify as to the marking on the case or as to the brand of cigarettes which he saw on 7 February 1948.

Although the evidence establishes that two cases of cigarettes marked Z-7413 were found on board the tug on 6 March 1948 the record of trial is barren of any evidence showing who had possession of these cigarettes. The record likewise fails to show that the cigarettes so found were the same cigarettes that Melgarego saw on 7 February 1948.

The evidence is therefore insufficient to establish that the cigarettes Melgarego saw on 7 February 1948 were stolen from LCT 684 or that they were the property of USAFIK Central Exchange.

The accused were members of the crew of the tug and as such it was proper for them to be in the crew's quarters. The fact that they may have assisted in concealing stolen cigarettes aboard the tug might establish them to be accessories after the fact of the theft but such acts will not establish their guilt of the original taking of the cigarettes. Accessories after the fact are not chargeable as principals to the original crime (CM 210619, Jewell, 9 BR 283,295).

The court received in evidence 42,900 of the yen found aboard the tug on 6 March 1948 upon the statement of the Trial Judge Advocate that the same would be shown to be the proceeds of the sale of cigarettes stolen from the LCT. The prosecution failed to introduce any proof to establish this contention. Although it was proper to receive the yen in evidence subject to being connected with the offense charged it was error to consider such evidence against the accused in the absence of proof connecting the yen to the offense and to the accused.

7. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence as to the accused Technician Fourth Grade Duane S. Gillespie and legally insufficient to support the findings of guilty and the sentences as to the accused Technicians Fourth Grade James C. Ferguson and Eugene A. Swessel, Technician Fifth Grade Herman J. Schroeder and Privates Wilbur W. Waugh and Cornelious J. Eckard.

C. O. Wolfe, Judge Advocate

C. J. Berkourtz, Judge Advocate

Jno Lynch, Judge Advocate

JAGH CM 332083 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. 28 OCT 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Technician Fourth Grade James C. Ferguson, RA 17093584; Technician Fifth Grade Duane S. Gillespie, RA 15244157, Technician Fifth Grade Herman J. Schroeder, RA 17212558, Private Wilbur W. Waugh, RA 15237123, Private Cornelious J. Eckard, RA 15227766, and Technician Fourth Grade Eugene A. Swessel, RA 16181946, all of the 90th Transportation Harbor Craft Company, APO 59.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to the accused Gillespie, and legally insufficient to support the findings of guilty and the sentences as to the accused Ferguson, Swessel, Schroeder, Waugh and Eckard. I concur in that opinion and for the reasons stated therein recommend that the findings and sentences as to Ferguson, Swessel, Schroeder, Waugh and Eckard, be vacated and that all rights, privileges and property of which accused 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 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 185, 10 Nov. 1948

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

JAGN-CM 332124

U N I T E D S T A T E S v. Private JAMES C. TAYLOR (12065088), Headquarters & Headquarters Detachment, 1225th Area Service Unit, Harbor Defenses of New York, Fort Hancock, New Jersey.	)))))))))	FIRST ARMY Trial by G.C.M., convened at Fort Hancock, New Jersey, 10 June 1948. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

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

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

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

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

Specification: In that Private James C. Taylor, Headquarters and Headquarters Detachment, 1225th Area Service Unit, Harbor Defenses of New York, Fort Hancock, New Jersey, did, without proper leave, absent himself from his station at Fort Hancock, New Jersey, from about 25 April 1948 to about 1 May 1948.

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

Specification: In that Private James C. Taylor, Headquarters and Headquarters Detachment, 1225th Area Service Unit, Harbor Defenses of New York, Fort Hancock, New Jersey, having been duly placed in

arrest at Fort Hancock, New Jersey, on or about 3 May 1948, did, at Fort Hancock, New Jersey, on or about 9 May 1948, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Private James C. Taylor, Headquarters and Headquarters Detachment, 1225th Area Service Unit, Harbor Defenses of New York, Fort Hancock, New Jersey, did, at Fort Hancock, New Jersey, on or about 8 May 1948, feloniously take, steal and carry away about $185.00, lawful money of the United States, the property of Technician Grade Four Joe L. Waddell.

Accused pleaded not guilty to each of the Charges and their Specifications. He was found guilty of Charges I and II and their Specifications and guilty of Charge III and its Specification excepting the words "185.00" substituting therefor "25.00," of the excepted words not guilty and of the substituted words guilty. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence in the record of trial is legally sufficient to support the finding of guilty of Charge II and its Specification. The questions requiring consideration are (1) the legal sufficiency of the record of trial to support a finding of guilty under Charge I and its Specification, (2) the legal sufficiency of the record of trial to support a finding of guilty under Charge III and its Specification and (3) the legality of the sentence.

4. With respect to Chargo I and its Specification the only evidence in the record is the signed stipulation, entered into by the Trial Judge Advocate, the Special Defense Counsel and the accused, as follows:

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

1. That the accused, Private James C. Taylor, Headquarters and Headquarters Detachment, 1225th Area Service Unit, Fort Hancock, New Jersey, did without proper leave, absent himself from his station at Fort Hancock, New Jersey, from about 25 April 1948 to about 1 May 1948.

2. That the accused did surrender himself to military authority, 1240th A.S.U., P.M.M.P. unit, 39 Whitehall Street, New York, N.Y., at 1530 hours 1 May 1948.

3. That the accused was then transferred to 1201st A.S.U., Fort Jay, N.Y. for disposition.

4. That the accused was issued rail transportation by the 1201st A.S.U., Fort Jay, N.Y. on 3 May 1948 and that he did return to his home station without guard and that he did report to his organization at 1430 hours 3 May 1948."

Prior to receiving the stipulation the court propounded only two questions to the accused:

"* * * Pvt. Taylor, did you sign this stipulation?
A: Yes.

PROSECUTION: You understand what it says?
A: Yes.

LAW MEMBER: Stipulation will be read and marked Exhibit 'A'" (R. 7).

Major Calvin B. Leek testified for the prosecution stating that he was "Major, Coast Artillery, 1225th ASU, HDNY, Ft Hancock, New Jersey." He identified the accused as "private, 1225th Area Service Unit, Fort Hancock, New Jersey" (R. 16). The record does not indicate the official status of the witness Major Leek with respect to the accused. There being no evidence affirmatively showing this fact the Board cannot assume that Major Leek was the Battery Commander of the accused and custodian of the morning reports of the 1225th Area Service Unit. The Trial Judge Advocate mentioned the existence of certain morning reports which evidently referred to the accused but they were not offered in evidence. Concerning these morning reports Major Leek was questioned by the prosecution and gave testimony as follows:

"Q. I have before me extract copies of morning reports for 25 April 1948 and 9 May 1948. These are to refresh your memory. The accused stipulated that he went absent without leave on 25 April 1948, that he turned himself in on 1 May 1948 to the military authorities at 39 Whitehall Street, that he was transferred to the military authorities at Fort Jay, that he was given rail transportation on 3 May 1948

to return to Fort Hancock, that he did return without guard, that he turned himself in to you. On 3 May 1948 was Taylor brought before you?

A. I would say yes, on or about that date. When he returned from that alleged absence I had the first sergeant bring him into my office" (R. 17).

The stipulation, which was the sole basis for conviction of the accused, concedes all of the material evidentiary facts. Embracing, as it does, every element of the offense charged its legal effect is a plea of guilty. Applying correct legal terminology this stipulation may be called a judicial admission. The theory of judicial admissions has been very thoroughly examined by Professor Wigmore who concludes:

> "An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn — i.e. ceremonial or formal — or <u>judicial admission</u>, or <u>stipulation</u>. It is, in truth, a substitute for evidence, in that it does away with the need for evidence" (Wigmore on Evidence, Vol. 5, Sec. 2588, p. 604).

> "The vital feature of a judicial admission is universally conceded to be its <u>conclusiveness</u> upon the party making it, i.e. the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it" (Wigmore on Evidence, Vol. 5, Sec. 2590, p. 605).

We then must determine whether we can give approval to a procedure permitting the accused who has originally pleaded not guilty to thereafter enter what clearly amounts to a plea of guilty by the medium of stipulation without requiring the court to make inquiry to ascertain whether the accused fully understood the legal import of his act and the maximum punishment that might be imposed and without requiring some evidence by the prosecution of the offense charged. The Manual for Courts-Martial provides:

> "A stipulation need not be accepted by the court, and should not be accepted where any doubt exists as to the accused's understanding of what is involved" (par. 126<u>b</u>, MCM, 1928).

Concerning pleas of guilty, it has been suggested in TM 27-255, App. 1, page 149 (Military Justice Procedure) that the court address questions to the accused and make additional explanations if necessary, that he understands the effect of a plea of guilty and wishes it to stand.

To obtain a just result, therefore, the court should hear some evidence to be satisfied that a crime in fact has been committed and evidence sufficient to enable it to determine whether the act of the accused in confessing guilt by plea or stipulation is provident. Paragraph 126b, MCM, 1928, also states that a stipulation "which practically amounts to a confession * * * should not ordinarily be accepted." This refers to the use of discretion by the court and discretion in these cases will be abused and misused when and if a court fails to be cautious and circumspect upon accepting complete stipulations that in effect amount to a plea of guilty where the formal plea entered is not guilty. The duty to inquire devolves upon the court when at the very outset of the prosecution's case a complete admission of guilt by stipulation is made. In the case of CM 275648, Creighton, 48 BR 123, after mentioning the provisions of paragraph 126b, MCM, 1928, quoted herein above, the Board stated:

> "'However, the language of the Manual leaves the acceptance or rejection of the stipulation to the discretion of the court' (CM 248408, Young, 31 BR 249). Since the original checks and a duplicate statement of accused's account with the bank were introduced in evidence, and the theory of the defense was not to deny the commission of the offenses but to excuse them by proving lack of mental responsibility, it cannot be said that the court abused its discretion in receiving the stipulation."

It is thus noted in the case referred to that in addition to the stipulation the prosecution presented at least a prima facie case and the defense offered evidence to admit but excuse the offense.

In the case of CM 231469, Marcellino, 18 BR 222, the Board stated:

> "Although parties may stipulate as to facts and as to evidence, a stipulation 'which practically amounts to a confession where the accused has pleaded not guilty and such plea still stands * * * should not ordinarily be accepted by the court' (par. 126b, MCM). If the so-called 'stipulation' in the present case was intended as a stipulation of facts or evidence, it comes within the proscription of the Manual."

We conclude that in view of the original plea of not guilty

by the accused the failure of the court to searchingly inquire into the propriety of the stipulation confessing guilt and the failure to require at least some evidence that the offense charged had probably been committed in addition thereto, was prejudicial to the rights of the accused.

5. With respect to Charge III and its Specification the court received evidence from the alleged victim of the larceny, Sergeant Joe L. Waddell, who stated that on the evening of 8 May 1948 he had $185.00 in his shirt pocket and went to sleep in the cook's room, Headquarters Detachment (R. 13). He missed the money "Sunday Morning around 7 o'clock" whereupon "we looked through the barracks for Taylor, who we suspected then." He testified further that he searched for the accused but could not find him (R. 14). Later he received $50.00 from the post chaplain (R. 15).

William A. Little, a taxi cab driver, testified that on the night of 9 May to 10 May he drove the accused in his cab from Highland, New Jersey to New York (R. 22), and that the accused paid him $25.00 in advance (R. 23). First Lieutenant John H. Richman, Provost Marshal, testified that he advised the accused of his rights under the 24th Article of War but accused declined to answer any questions. He then testified "I received $50.00 from the man's wife" and that "Taylor was making an effort to restore the money. It was representing a portion of the total amount" (R. 24). To support the evidence thus produced the prosecution offered into evidence an alleged confession of the accused. C.I.D. Agent John E. Coughlan and the accused himself then testified concerning the circumstances surrounding the taking of the pre-trial statement. The defense objected to the admission of the document stating:

> "The defense respectfully objects to the confession being entered as evidence against the accused based on the fact that it was not voluntarily made and that it was made under some form of benefit in order for the accused to give the confession, and further will read once again for a basis for the objection another statement on page 91, TM 27-255 which states even a slight assurance of benefit held out by a military superior to an accused under charges is ground for rejecting the confession. Based on the testimony of the CID Agent who said this man broke down and was under some kind of mental duress, that is the exact wording of the CID Agent, the defense feels that this confession was not voluntary" (R. 33).

Thereafter the following transpired:

> "The court was closed and upon being opened,

the president announced that in the matter of the statement of the CID Agent's report it is an official document and is admissible. The supposed or the indicated confession is not admissible.

DEFENSE: I would like an explanation of what statement is that?

LAW MEMBER: The statement that appears to be a part of the CID Agent's report. You realize that the court has not seen this paper you have on your desk. The court is under the impression that is a part of the CID Agent's report and is an attached confession signed by the accused.

DEFENSE: Very well.

Mr. John E. Coughlan, is recalled as a witness and reminded he is still under oath.

Questions by prosecution:

Q. The prosecution would like to enter as an exhibit the Criminal Investigation Report of Mr. Coughlan which has been shown to the defense. I would like Mr. Coughlan to identify this as his report and so be entered into the record.
A. That is my signature.

LAW MEMBER: It will be entered into the record and marked Exhibit B" (R. 33).

Examination of prosecution's exhibit B reveals that it is a "Criminal Investigation Report" made and dated 15 May 1948, signed by John E. Coughlan, Agent, C.I.D. Although the remarks of the law member, quoted above, are ambiguous, from the record of trial it appears that an exhibit previously attached to the Agent's report had been removed and was, without doubt, the "indicated confession" excluded by the court. Thus the report in evidence contains only a mere summary of facts made by the C.I.D. Agent under a heading marked "details" and ending with a paragraph marked "conclusions" which reads:

"That a sum of money was stolen.

That TAYLOR did take and wrongfully dispose of same.

That the sum taken was $185.00 in cash."

It is apparent that the agent's summary and conclusions were based upon the pre-trial statement not accepted in evidence by the court.

From the foregoing recital of evidence received by the court it is clear that the essential elements of taking and carrying away by the accused of the property alleged were not proved. Evidence of conclusions on the part of the Provost Marshal, Lieutenant Richman, that the accused was making an effort to restore the money representing a portion of the total amount, should not have been received and was, of course, prejudicial. Concerning the C.I.D. report it is to be noted that the court properly excluded therefrom the pre-trial statement of the accused since it was not voluntarily made. The written report of the agent (Pros. Ex. B) containing facts and conclusions obtained from that excluded statement should also have been rejected since it cannot, under any known rule of law, be considered legal evidence. The court accepted the document, however, on the basis that it was "official" but such a ruling was entirely erroneous.

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. Ops. JAG, 1912-30, sec. 1284, p. 634; CM 211829 (1939); 10 BR 133, 137)" (CM 316780, Leech, 66 BR 46).

Since the evidence in the record of trial aliunde the C.I.D. report is incomplete and clearly insufficient to prove the charge of larceny it follows that the admission of the C.I.D. report vitiates a finding of guilty of the Charge to which such evidence relates.

6. The authorized maximum sentence for the offense of breach of arrest for which the accused has been found guilty under Charge II and its Specification is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

7. For the reasons stated above, the Board of Review holds

the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification, legally insufficient to support a finding of guilty of Charges I and III and their Specifications and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

_____, Judge Advocate.

_____ON LEAVE_____, Judge Advocate.

_____, Judge Advocate.

(20)

AUG 30 194

JAGN-CM 332124 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, First Army, Governors Island, New York 4, New York.

1. In the case of Private James C. Taylor (12065088), Headquarters & Headquarters Detachment, 1225th Area Service Unit, Harbor Defenses of New York, Fort Hancock, New Jersey, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty of Charges I and III and their Specifications be disapproved and that only so much of the sentence be approved as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period. Upon taking such action you will have authority to order the execution of the sentence.

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

(CM 332124).

1 Incl
Record of trial

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

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

JAGK - CM 332164

20 OCT 1948

UNITED STATES v. Private First Class ELTON E. SOLES (RA 16210078), 564th Quartermaster Base Depot Company, APO 59, and Technician Fifth Grade MELVIN O. BUTCHER (RA 16251110), 514th Quartermaster Depot Supply Company, APO 59	KOREA BASE COMMAND Trial by G.C.M., convened at APO 901, 18 May 1948. BUTCHER: Confinement for four (4) months and forfeiture of $50 pay per month for four months. SOLES: Confinement for six (6) months and forfeiture of $50 pay per month for six months. Stockade

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

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1. The record of trial in the case of the above named soldiers, having been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings of guilty and the sentences in part, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 93rd Article of War

Specification: (Finding of not guilty).

CHARGE II: Violation of the 96th Article of War

Specification 1: In that Technician Fifth Grade Melvin O. Butcher, 514th Quartermaster Depot Supply Company, APO 59, did at APO 59, on or about 7 March 1948, unlawfully enter a Korean dwelling, which had been declared "OFF LIMITS," to Military Personnel, in violation of Memorandum 13, Headquarters 78th Quartermaster Base Depot, APO 59 dated 4 August 1947.

Specification 2: (Nolle Prosequi).

Specification 3: (Disapproved by reviewing authority).

Specification 4: In that Private First Class Elton E. Soles, 564th Quartermaster Base Depot Company, APO 59, did at APO 59, on or about 7 March 1948, unlawfully enter a Korean dwelling, which had been declared, "OFF LIMITS," to Military Personnel, in violation of Memorandum 13, Headquarters

78th Quartermaster Base Depot, APO 59, dated 4 August 1947.

CHARGE III: Violation of the 61st Article of War

Specification 1: In that Technician Fifth Grade Melvin O. Butcher, 514th Quartermaster Depot Supply Company, APO 59, did at APO 59, without proper leave absent himself from his Company Area, from about 2300, 6 March 1948 to about 0200, 7 March 1948.

Specification 2: In that Private First Class Elton E. Soles, 564th Quartermaster Base Depot Company, APO 59, did at APO 59, without proper leave absent himself from his Company Area, from about 2300, 6 March 1948, to about 0200, 7 March 1948.

Both accused pleaded not guilty to all charges and specifications. They were each found not guilty of Charge I and its specification. Accused Butcher was found guilty of Charge II and Specification 1 thereunder except the words "a Korean dwelling" substituting therefor the words "an area." He was found guilty of Charge III and Specification 1 thereunder. Accused Soles was found guilty of Charge II and Specifications 3 and 4 thereof excepting however in Specification 4 the words "a Korean dwelling," substituting therefor the words "an area." He was found guilty of Charge III and Specification 2 thereof. No evidence of any previous conviction was introduced as to either accused. Butcher was sentenced to be confined at hard labor at such place as the reviewing authority might direct for four (4) months and to forfeit $50.00 of his pay per month for four months. Soles was sentenced to be confined at hard labor at such place as the reviewing authority might direct for six months and to forfeit $50.00 of his pay per month for six months. The reviewing authority disapproved the findings of guilty as to Specification 3, Charge II (accused Soles), approved the sentences, ordered them executed and designated the Inch'on Stockade, APO 59, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 44, Headquarters Kobe Base Command, APO 901, 25 June 1948.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge III and its specifications.

4. <u>Evidence (respecting Charge II and Specifications 1 and 4 thereof).</u>

There was properly identified and received in evidence, without objection, Memorandum No. 13, Headquarters 78th Quartermaster Base Depot, dated 4 August 1947, as follows:

"AREAS OFF LIMITS

"1. The following areas are declared 'OFF LIMITS' to all personnel of this command and have been officially posted as

'OFF LIMITS' by Military Police. Only persons on authorized duty will enter these areas.

a. The Railroad siding Northeast of Quartermaster City main gate including the area from the main highway to and inside of Korean buildings West of the Railroad siding.

b. The Korean village East of Quartermaster City and all buildings therein, and including the area from the highway to QM City and extending to the sea wall.

c. The area between the QM City fence and the flats along the entire South side of QM City from the corner at the Korean village to the Salvage Yard.

d. The Quartermaster City fence around the entire perimeter of the area. The fence will not be climbed, stood on, or tampered with.

e. All Korean buildings within a one half mile radius of Quartermaster City.

2. This memorandum will be read to all members of each unit within twenty four (24) hours of receipt and a roster kept on file in the unit, showing attendance at such reading. Newly joined personnel will be read this memorandum on the day of joining. A certificate of compliance pertaining to the initial reading will be forwarded to this headquarters on the day of compliance."

It was shown that the foregoing memorandum had been read and explained to each of the accused prior to the date of the alleged offenses (R 7, 8, Pros Exs 1,2).

Further evidence presented by the prosecution established that at about 0100 hours on 7 March 1948, and while they were not on authorized duty, both accused were at a Korean dwelling house located at No. 606 Yong Hyong Dong, which house was on the road to Sang Do and about 200 meters from "Quartermaster City" or Headquarters 78th Quartermaster Base Depot. This house appears to have been off-limits as described in Memorandum 13 above.

Accused Soles elected to be sworn as a witness and asserted that he was with Butcher on the night in question but he denied that they entered "any Korean home." Butcher elected to remain silent (R 39-43).

5. Discussion

It will be observed that each accused was arraigned upon a specification alleging in effect that on 7 March 1948 he unlawfully entered "a Korean dwelling" which had been declared off limits, in violation of the quoted memorandum, and by exceptions and substitutions each was found guilty of unlawfully entering "an area" which had been declared off limits, in violation of the memorandum. Conceding for the purposes of this discussion that the prosecution's evidence tended to establish the offense charged, it is obvious that by excepting the alleged dwelling and substituting an unidentified area, the court acquitted each accused of the act denounced and found each guilty of an act or offense of which he was not charged. Memorandum 13 defines various areas and buildings the wrongful entry into any one of which would constitute an offense. Under the pleadings herein, had the proof failed to show that the accused were in "a Korean dwelling" prohibited by the Memorandum they would have been entitled to an acquittal. Similarly, the effect of the court's exceptions was to acquit them of being in "a Korean dwelling" and there is no authority for the court to convict them of another offense not necessarily included in that pleaded. Specifically, the act found, although probably intended to include the act pleaded, amplified it so as to embrace matters not necessarily within the compass of that pleaded. Such finding is unauthorized (MCM 1928, par 78c, CM 330750, Pilgrim).

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 4 of Charge II and Charge II, legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge III and Charge III and legally sufficient to support only so much of the sentence as to each accused as provides for confinement at hard labor for three days and forfeiture of two days pay.

Christy D. Silvers, Judge Advocate

James W. Boothe, Judge Advocate

Harley C. Lanning, Judge Advocate

JAGK - CM 332164 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 22 OCT 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Elton E. Soles (RA 16210078), 564th Quartermaster Base Depot Company, APO 59, and Technician Fifth Grade Melvin O. Butcher (RA 16251110), 514th Quartermaster Depot Supply Company, APO 59.

2. I concur in the opinion of the Board of Review and recommend the findings of guilty of Charge II and Specifications 1 and 4 thereunder and so much of the sentence as to each accused as is in excess of confinement at hard labor for three days and forfeiture of two days pay be vacated, and that all rights, privileges and property of which accused have been deprived by virtue of the findings of guilty and sentences so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 190 , 12 Nov 1948)/.

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

31 AUG 1948

JAGH CM 332180

UNITED STATES	)	RYUKYUS COMMAND
	)	
v.	)	Trial by G.C.M., convened at APO 331, 4 June 1948. To be hanged by the neck until dead.
	)	
Private DIOGRACIAS MORALES, PS 10321534, Company B, 44th Infantry Regiment (PS).	)	

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Diogracias Morales, "B" Company, 44th Infantry (Philippine Scouts) did, at White Beach, Okinawa, on or about 14 March 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Leon Carrillo, "B" Company, 44th Infantry (Philippine Scouts), a human being by shooting him with an M-1 rifle.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. a. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

Accused is in the military service. On 14 March 1948 Sergeant Jose Munoz, "B" Company, 44th Infantry, White Beach, was on duty as a cook. A Private Sirdinio who was drunk came into the mess hall and inquired of Munoz if the latter wanted to fight. Munoz replied "No," but Sirdinio "got his knife" and struck Munoz "by the shoulder" (R 25, 27). Munoz reported the incident to Staff Sergeant Bocanas. Munoz subsequently saw accused in the mess hall and stated that accused seemed to be on guard. (R 28). At about 1600 hours, 14 March accused went to the guardhouse and informed Sergeant Servillano D. Palma who at the time had completed his tour as Corporal of the guard, that he was to be on guard on Post No. 3 and requested a rifle and ammunition. Palma issued accused an M-1 rifle and eight rounds of ammunition (R 36,37). Sergeant Jose M. Villareal, "B" Company, 44th Infantry, was Corporal of the guard of the first relief for the tour of guard commencing at 1600 hours, 14 March 1948. At 1300 hours prior to commencement of the tour of guard he held guard mount. At the time accused, who was on Villareal's relief, was absent. Accused was also absent when Villareal posted the first relief, and Villareal did not post accused as a guard at any time during the tour (R 39,40). At about 1600 hours Technical Sergeant Marcelo Canos who was then Sergeant of the guard saw accused coming from the guardhouse with an M-1 rifle (R 43). Canos had learned from the Corporal of the guard that accused considered himself mess hall guard (R 47). Canos had been told by the officer of the day that no rifles were to be issued to the guard in the mess hall and so Canos told accused to turn the rifle in to the armory (R 43,44).

Private First Class Pascual Raquidan, artificer of "B" Company, testified that on 14 March accused drew a rifle from him. According to an entry in the weapons book of the Company, which was signed by accused, the rifle drawn by him was an M-1, serial number 3824625 (Pros Ex 2, R 50). Accused's form 32, clothing and equipment record, shows that accused had been issued the same rifle (Pros Ex 3, R 55). Subsequently at about 1720 hours Canos saw accused at the mess hall. At the time accused was armed and was dressed in "khakis." Canos previously had been told by Sergeant Palma that there had been trouble at the mess hall, but Canos did not observe any when he was there. Canos left the mess hall to inform the officer of the day that accused was armed (R 43-45). Canos testified that although accused was listed as a member of the first relief of guard he was not posted as a sentinel (R 46,47).

At about 1725 hours Sergeant Alejandro Duque, "B" Company, observed accused in the mess hall talking with Privates Sister and Ordonia. Accused was holding an M-1 on his right shoulder and was dressed in "khakis" and had on a helmet liner. Duque heard accused say to Sister and Ordonia "I am the man on guard and if anybody creates trouble, whose ever tribe it is, I will shoot." According to Duque, Sister and Ordonia answered, "If you are the one on guard and anyone creates trouble, whoever his tribe is, come on, you shoot."

On the evening of 14 March Privates First Class Jean Espiritu of "B" Company, and Hermenegildo Yanza then of "B" Company went to the mess hall to eat (R 7,10). Espiritu testified that they went to the mess hall at 1730 hours and Yanza testified that they went to the mess hall at about 1600 hours (R 8,11). When they left the mess hall they were preceded at a distance of three feet or four paces by Sergeant Carrillo. Espiritu saw accused holding his "M-1" at "port arm." Carrillo was walking away from accused and when he was at a distance of eight feet from accused the latter shot him in the back (R 7-9). Yanza heard the shot and saw Sergeant Carrillo "down" (R 10). After shooting Carrillo, accused turned and pointed the gun at Espiritu. Espiritu and Yanza ran away (R 7,10). Espiritu and Yanza did not observe any trouble in the mess hall and Espiritu testified that he did not hear Carrillo say anything outside the mess hall. Yanza testified that he did not hear any conversation between accused and Carrillo.

Corporal Urbano Aspa, "B" Company, went to the mess hall at 1700 hours. When he left after eating, Carrillo was about two paces in front of him. Aspa heard a shot and turning saw accused with a rifle about twenty feet from Carrillo. Aspa had not observed any trouble in the mess hall and did not hear any conversation between accused and Carrillo (R 13-15). Sergeant Duque who had previously overheard the conversation between accused and Sister and Ordonia had just left the mess hall when he heard a shot and saw Carrillo on the ground and accused holding his rifle at "port arm," standing about 15 yards from Carrillo (R 21).

Technician Fifth Grade Cosme Cariaga, Medical Department, 44th Infantry, was directed to pick up a dead man at the kitchen. He went to the mess hall and found Carrillo lying on the ground, his face "facing in the ground" but his body "not fully facing the ground." He had nothing in his hands, but a cigarette which was not burning was in his mouth. Cariaga felt his pulse and found that he was already dead (R 29-31). Second Lieutenant Lucio C. S. Daguno, the officer of the day, received a call that somebody had been shot and went to the scene, accompanied by Sergeant Carandang. They found Carrillo lying face down, "cold and not breathing." Carandang searched the body and found some items of personal property. The search revealed that deceased had neither a weapon nor ammunition (R 30,31-33). Lieutenant Daguno had previously been informed of trouble in the mess hall and had asked the Sergeant of the guard to send an unarmed special guard to the mess hall (R 32). Lieutenant Daguno also testified that accused was a member of the guard but that he was not posted in the mess hall (R 33).

Accused, subsequent to the shooting, turned himself in to Technical Sergeant Hubert H. Gilbert at the RYKOM Military Stockade. At the time he had an M-1 rifle, serial number 3824625, a bayonet, and two clips of ammunition. One clip had eight rounds and the other seven rounds. Gilbert inspected the file and found that it "smelled as if it had been fired" (R 56-59).

First Lieutenant Menard C. Ihnen, Chief of the Laboratory Section, 37th Station Hospital, testified that on 14 March he made an autopsy on Leon Carrillo. He identified Prosecution Exhibit 1 as a "mimeographed copy of the autopsy report" he had signed and the copy with the exception of one line deal ing with the place, date, and hour of death was admitted in evidence without objection (R 17). The report shows that an autopsy was performed upon the body of Staff Sergeant Leon Carrillo on 15 March 1948 at the 37th Station Hospital. Concerning the cause of death the report states:

> "SUMMARY: The primary cause of death is considered to be severe laceration of the right and left ventricles of the heart, secondary to gun-shot. Contributing factors are right and left hemothorax, fracture of the 11th thoracic vertebra, rupture of the left diaphragm, transection of the esophagus, laceration of the left lobe of the liver, and fracture of the 4th, 5th, 6th, 7th and 8th left ribs, all secondary to gunshot. The tract of the missile was in the back at the point described, through the right lateral aspect of the 11th thoracic vertebra, through the mediastinal parietal pleura, through the apex of the heart, through the left anterior diaphragm, the esophagus, and the left lobe of the liver, through the ribs described, and exit through the anterior chest wound." (Pros Ex 1)

b. For the defense.

Sergeant Palma was recalled as a witness for the defense and testified that although his tour of duty as Corporal of the guard was over at 1600 hours 14 March he remained at the guardhouse while his relief was posting the new guard. Palma received a telephone call from the mess sergeant in which the latter asked the whereabouts of the Sergeant of the guard and requested that two or more guards be sent to the mess hall to preserve order. When Sergeant Canos arrived at the guardhouse Palma informed him of the mess sergeant's request. A short time later accused came to the guardhouse and informed Palma that he was on Post 3, the area about the mess hall. At that time Palma issued accused a rifle and a clip of ammunition because he believed accused was to go on guard at Post 3 (R 59-62).

Accused after being apprised of his rights elected to make an unsworn statement substantially as follows:

On 14 March 1948 his name was on the guard roster. At 1600 he went to the guardhouse to inquire for the sergeant of the guard. He found him outside with Sergeant Tadday. The sergeant of the guard (Canos) told him to get his rifle and return to him for special orders which he did. Canos told him to go on duty at the mess hall as he had received a telephone call from the mess sergeant saying there was trouble at the mess hall. He went to the mess hall and spoke to Technician Fifth Grade Munoz who claimed someone tried to cut him with a knife, but refused to tell who it was. He then warned the men in the mess hall that he had been sent down as a special guard and that he did not want any trouble from them. Thereafter he marched out of the mess hall and met the sergeant of the guard who told him to be on the alert as there might be trouble. Upon reentering the mess hall he overheard Sergeant Carrillo talking in the Ilocano dialect with two friends and they were saying something about killing someone. When the three (friends) left the mess hall, he followed them as he knew some of them had weapons and that the group were known as "tough guys." He "knew" that Sergeant Carrillo was carrying a concealed pistol. He did not return to the company area but hitchhiked to the stockade since he was afraid someone might shoot him. He claimed that Yanza was not outside the mess hall at the time of the shooting and denied that he pointed his rifle at Espiritu or anyone else.

4. The evidence thus shows that on 14 March 1948 at White Beach, accused who was acting as sentinel at his organization mess hall, although it is not shown that he was posted as such, shot Staff Sergeant Leon Carrillo in the back. An autopsy performed upon deceased the following day showed that he died as a result of a bullet wound in the back.

While the defense sought and did show to some extent that there had been trouble in the mess hall at a prior time there is nothing in the evidence to show that Carrillo was involved. Eyewitnesses testified that Carrillo was proceeding away from the mess hall when accused shot him in the back at a distance of not more than fifteen yards. No conversation had passed between the two men. Other than the vague accusation of accused that the deceased was planning to kill someone there is no explanation in the record for accused's action.

"Murder is the unlawful killing of a human being with malice aforethought." The record clearly shows the absence of any legal excuse for the homicide, and from the apparent deliberate intent to cause death malice aforethought may be inferred (par 148a, MCM 1928, p.163; Vol I, Sec 439, Wharton's Criminal Law, 12th Edition.) The findings of guilty are supported by the evidence.

5. Accused is a Filipino, 23 years of age. He completed the fifth grade of school and in civilian life was employed upon the farm operated

by his family. He has no criminal record in civilian life. Since May 1946 he has had enlisted service in the Philippine Scouts. The character of his service prior to the offenses charged has been "Good" and he has not been previously convicted by court-martial.

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGH CM 332180 1st Ind

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

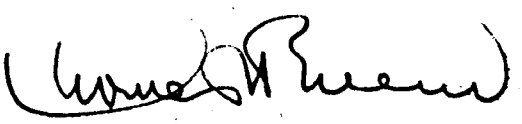
TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted for your action the record of trial and the opinion of the Board of Review in the case of Private Diogracias Morales, PS 10321534, Company "B", 44th Infantry Regiment (PS).

2. Upon trial by general court-martial this soldier was found guilty of the murder of another Philippine Scout in violation of Article of War 92. He was sentenced to be hanged by the neck until dead, all the members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. In a letter dated 15 July 1948, addressed to The Judge Advocate General, and attached to the record of trial, the reviewing authority recommends that the sentence be commuted to a fixed period of years or such lesser punishment as the President may deem proper in the circumstances.

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 all the circumstances and the recommendation of the reviewing authority, recommend that the sentence be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life, that the sentence as thus commuted be carried into execution and that a United States Penitentiary be designated as the place of confinement.

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



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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 180, 15 Oct 1948).

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

JAGH CM 332185

23 SEP 1948

UNITED STATES	)	MUNICH MILITARY POST
v.	)	Trial by G.C.M., convened at Munich, Germany, 3,4 June 1948. Dishonorable discharge and confinement for life. United States Penitentiary, Leavenworth, Kansas.
Private ROOSEVELT CURL, RA 38059422, 596th Transportation Truck Company.	)	

REVIEW by the BOARD OF REVIEW
WOLFE, LYNCH, and BERKOWITZ, Judge Advocates

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

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

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

Specification: In that Private Roosevelt Curl, 596th Transportation Truck Company, did, at Munich, Germany, on or about 13 December 1947, forcibly and feloniously, against her will, have carnal knowledge of Charlotte JAGER.

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

Specification: In that Private Roosevelt Curl, 596th Transportation Truck Company, did, at Munich, Germany, on or about 13 December 1947, with intent to do her bodily harm, commit an assault upon Charlotte JAGER, by striking her on the head, with a dangerous weapon, to wit, a pistol.

He pleaded not guilty to and was found guilty of the Charges and the Specification under each. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. a. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows: Charlotte Jager had been employed as a salesgirl in the "PX" in the "Flak Caserne," Munich, Germany, during the period extending from January to April 1947 and during this period had been driven to her home by accused who at the time was the driver of the "PX" truck (R 6, 7,11). After a period of employment in a German office, Miss Jager, in September 1947, was employed as a waitress in the Snack Bar at the Flak Caserne and was so employed on 13 December 1947. On 13 December she finished work at 2200 hours and with fellow workers went to the Keller Club where she remained until shortly before midnight. She then left the Flak Caserne in the company of Hilde Balzar, proceeded to the "Ingolstadter Strasse" and looked for transportation. A truck driven by accused stopped at a stop sign at "Ingolstadter Strasse." Accused was accompanied by another soldier whom Miss Jager did not know. She recognized accused and asked him where he was going. Accused replied that he was going to take the other soldier to his girl friend but that if Miss Jager would wait he would take her home. She accepted and got in the truck (R 8-11). Her companion, Miss Balzar, was left behind and a short time later obtained a taxi to take her home. Miss Balzar although she knew accused did not recognize any of the occupants of the truck nor the identification of the truck, but stated that "according to the conversation there were two in the front" (R 44-46). After Miss Jager entered the truck it proceeded in the direction of Wilhelm Herz Block. A stop was made and accused's companion, the soldier whom Miss Jager did not recognize, dismounted. Accused obtained a pistol from behind the seat and placed it in the glove compartment. Accused proceeded to a fork of two roads, one leading to Freising, the other leading to the Autobahn and the direction of Miss Jager's home. Accused drove onto the road leading to Freising and continued thereon despite the remonstrances of Miss Jager. When accused continued on she grabbed at the steering wheel and shouted that he should stop, that she wanted to go home even if she had to go on foot. Accused kept saying that if she gave him what he wanted he would take her home. Simultaneously to his assertions he kept putting his hand under her skirt. At other times he suggested that if she would get out she should jump out. After passing through Garching the truck stopped and Miss Jager jumped from the truck and "went into" a door of a house. She heard her name being called and looking out the door saw two soldiers. She went out of the house, knocked on the window and prevailed upon the occupants to open the inner door. She gained entry into the house but the accused was in close pursuit and seized her and pulled her outside where with the aid of the other soldier she was put into the rear of the truck. It was approximately one o'clock in the morning (R 11-15).

Julius Klaus, an inhabitant of Garching, testified that about one o'clock in the morning, 14 December 1947, somebody knocked on his window

and he heard a woman shouting "Hurry, hurry, open the door." He opened the hall door and a girl pushed her way in and started to cry. A colored soldier jumped in and he and the girl conversed in English. Klaus' father-in-law came out and the soldier sent him back to bed. The soldier then grabbed the girl's arm and pulled her outside. She appealed to Klaus for protection but he observed that the soldier was armed and did not intervene. Klaus had also seen another soldier standing at the door (R 47-49).

Accused climbed into the rear of the truck with Miss Jager and the other soldier drove it off in what Miss Jager thought was the direction of Freising. She was crying and appealed to accused to let her go but he seized her and reached under her skirt. She got away from the accused but he grabbed her again. He called to the other soldier who stopped the truck and joined them in the rear. The other soldier threw her to the floor of the truck and pinnioned her there by the shoulders. Concerning what then transpired she testified:

> "He first pulled off my pants. I tried to defend myself. I kept myself very stiff but then a regular sexual intercourse took place and the other soldier kept holding me down and when I still tried to defend myself, he pressed into my throat here. And then I was quite powerless because he pressed on my throat so that I hardly even had any breath left, I was without power to do anything. Then I heard how the other soldier said in the distance there is a car coming, there was some lights approaching in the distance, so Roosevelt immediately left me and jumped out of the truck. Then the other soldier took his hand away from my throat but he didn't let me get up from the ground or the floor. He immediately raped me too and the reason that he kept pressing on my throat was because I was yelling so in the truck.
>
> Q When you say 'this other soldier raped you too,' what did he do?
>
> A Well, it also developed into a sexual intercourse." (R 17)

While the second rape was being consummated accused started driving away. Subsequently he stopped the truck, came to the rear and ordered her to get out. She testified:

> "* * I looked for my pants and my pocketbook and got my things together and then got out of the truck. Then I started running away along the road but it didn't take long when I heard someone following me and then suddenly someone took hold of my arm and that was the accused. Then he took out his pistol and I asked him to please let me live but while I was saying that he lifted the pistol and hit me on the head. Then I started breaking down

> but I could see how he was bending down and then I became unconscious. He must have hit me that time a second time." (R 18)

She had three large holes and about six small holes in her head. She came to for a few minutes and saw the truck leave and she lapsed back into unconsciousness. She came to and estimated that at that time it was about two o'clock. She made her way to a house and was taken in. She told her story to the people there. They stayed up with her until about five o'clock when the flow of blood from her head was stopped. She remained there until noon when her mother and a policeman arrived and took her to a doctor. Subsequently she was taken to a hospital (R 18-20).

Josef Rederer, an inhabitant of Neufahrn, a place near Freising, testified that about two o'clock in the morning of 14 December 1947 Charlotte Jager knocked at the window of his house and asked to be let in stating that she was bleeding to death. Rederer brought her into the house and observed that she was covered with blood. She told Rederer that she had been raped and hit over the head with a pistol. About twelve hours after she arrived at the house her mother came and took her away (R 50-56).

Doctor Ferdinand Bauer, Munich, testified that in the first half of December 1947 he had occasion to examine Charlotte Jager. He found three open bleeding wounds in her head, an injury in "the upper and last third of her nose bone," and "a heavy injury" from pressure on the left shoulder joint (R 41).

While she was in the hospital two colored soldiers were brought to Miss Jager but she was unable to identify them (R 23). Six days after the attack she was taken to the Flak Caserne to attend a line-up of members of the 596th Truck Company. Concerning the line-up she testified:

> "The soldiers passed me twice and in spite of the fact that I inspected each one carefully the first time, in my opinion the accused was not amongst them. The second time, that was about 5 minutes later, the entire company passed me again and then I recognized the accused." (R 23)

Upon examination by the defense counsel she admitted that the day prior to the line-up she had made a statement in which she had described her assailant as being of medium build and light complexion, and as not having "the typical marks such as nose and mouth of a negro." (R 25-27)

Concerning the accused's appearance in the courtroom she testified:

"Do you consider the man that is in this court today as the accused, a light complected negro. * *.

* * *

A He is pretty dark complected somewhat." (R 28,29)

She also testified on cross-examination that she knew Georgia Ellen Rothlien, the accused's girl friend and that Miss Rothlien lived in Freimann (R 31).

Upon re-direct examination she testified that her description of accused as given in her pretrial statement was given by way of comparison with accused's companion. With reference to her statement that accused did not have the typical nose and mouth of a negro she stated that accused "doesn't have the broad nose with the broad nostrils and he doesn't have the lips that are as outstanding as a good many of the others." (R 34,35).

Upon recall examination by the court Miss Jager testified that about two weeks before the date of the offense alleged she allowed accused to play a record on the juke box on his promise that he would pay her for it the next day. While she was walking to work the next day accused stopped in a truck and paid her (R 121,122). She also stated that the line-up on Friday was the only one which she attended (R 123).

b. For the defense.

Accused elected to testify in his own behalf. He testified that he was a member of the 596th Transportation Truck Company, stationed at Munich, Germany, and that he had been in the Army seven and one-half years. He denied that he had driven the prosecutrix any place between the months of January and April 1947. He did not go to the Snack Bar very often but on the occasions when he did go there anyone working there would have an opportunity of seeing him and knowing him. During December 1947 he was working for "ration break-down" as a truck driver. Although his customary duty hours were from eight o'clock in the morning until four o'clock in the evening there were times when his duties were not completed until nine o'clock at night or later. On the evening of 13 December 1947 accused finished his work at 2100 or 2115 hours at which time he left the motor pool, turned in his trip ticket and picked up his pass. He placed on the trip ticket the time at which he turned his truck into the motor pool. After obtaining his pass he went to the Keller Club arriving there at 2125 hours. He left the club when it closed at midnight in the company of Corporal Williams. He parted company with Corporal Williams in front of the main gate. Accused then walked to his girl's house and arrived there at about 20 or 25 minutes after midnight (R 98-103).

In the latter part of December accused was present at a line-up conducted at the Flak Caserne. He was among a group attending "I & E Class" in the mess hall. There were three rows of seats and accused was sitting in the middle row. Miss Jager went down each row and looked at all the soldiers. She stopped and looked at two or three soldiers and asked them to talk. When the group left the mess hall they marched past a window in which Miss Jager was standing observing the group. She failed to pick anybody out. The following Monday another line-up was held on the occasion of the company morning formation. The men were lined up in two single files. The prosecutrix accompanied by "CID" men passed down the front rank and then the second rank. Accused was the thirteenth man from the end in the second rank. She had passed to the end of the second rank, stood awhile and talked with the "CID" men, then "came through ranks" and came up and said "That is the soldier there." (R 104-108)

Upon cross-examination accused reiterated that he left the Keller Club at midnight on 13 December 1947 and arrived at his girl's house 25 minutes later. He admitted making a statement on 20 December 1947 and identified Prosecution Exhibit 2 for identification as the statement he had signed. He could not, however, recall that he had been apprised of his rights under Article of War 24 prior to making the statement. He denied that he told the person taking the statement that he arrived at his girl's house at 0115 hours. He claimed that the CID agent wrote out the statement and gave it to him (accused) the following day to sign. Accused denied that he read the statement before he signed it (R 109-115). The statement was subsequently admitted in evidence without objection by the defense (R 126). In the statement accused claimed he arrived at his girl's house at 0115 hours (R 126; Pros Ex 2). Otherwise the statement comprised an alibi as to the offenses charged.

Accused admitted that one occasion he had talked with the prosecutrix, recalling that in the Service Club she had let him take a nickel to play the nickelodian and that he had later repaid her (R 116).

On examination by the court accused testified that at 1900 hours 13 December, prior to finishing his day's work, he had visited his girl accompanied by another soldier whose name he did not know. He made the trip by taxicab although his truck was still signed out. He turned his truck in at 2115 hours and put his trip ticket in a box in the orderly room (R 118-119).

Captain Beauregard King of the 596th Transportation Truck Company testified that accused had been a member of that company from 17 November 1946. The Friday following the date of the alleged offense a line-up was held in the company to see if the victim of the rape could identify accused. At the time the company was assembled in the mess hall for an

"I & E lecture." (R 58) Concerning the line-up and prosecutrix' subsequent identification of accused Captain King testified:

> "* * She came in and walked down the mess hall and looked at every man. Some of the men she stopped. She would look at them real hard and some she would have say something to her and some men would say words to her and she would pass on and she went back in front of the mess hall where the instructor stood and said she couldn't pick him out and I suggested to First Lieutenant Sexton who was investigating officer that he let her look at them in daylight instead of the light from the mess hall, so she stood by the window and had each man walk past and each man walked past and she looked at them a short time and she failed to point him out. That was Friday. The following Monday the CID who was also investigating the case, brought her back to the company for a line-up. This time it was a work day at 1:00 o'clock and I had the entire company line up outside in the company parade quadrangle and this time she picked out Curl after coming down the line two or three times. She came back to Curl and touched him on the arm and said, 'That is the man.'" (R 58,59)

At the first line-up accused was sitting "midway" of the second row (R 59).

Captain King testified that his company did not furnish transportation for "PX" personnel until after 1 July 1947.

As officer of the day on the night of 13 December, Captain King knew the company's commitments for trucks for that night and stated that three vehicles were assigned to take care of the Orlando Club, the Gruenwald Officers' Club, and the Keller Club. Accused was not detailed to drive any of these trucks. In order to take a vehicle from the motor pool at night it would be necessary to have the officer of the day sign the trip ticket. On the evening of 13 December Captain King did not sign any trip tickets for the company (R 60-61). When vehicles were returned to the motor pool after dark the vehicles were "signed in to the CQ who took the trip ticket and 'C' cards and in turn delivered them to the company commander." The trip ticket would reflect the time the vehicle was released by the using agency and the time the driver arrived at the motor pool. From the trip ticket it could be determined if any violation were committed in the use of a vehicle. No such violations were noted in trip tickets turned in for the period 13 to 14 December 1947. Captain King stated that all trip tickets for the year 1947 had been destroyed (R 63-64).

Upon examination by the court Captain King testified that the CID knew about accused before the first line-up and had him in custody prior to the identification (R 71).

On re-cross examination Captain King testified that he did not hear nor see anything which would indicate that suggestions as to her assailant were made to the prosecutrix by the CID Agent. (R 72)

Lieutenant Ivorey Cobb testified that he was I & E officer of the 596th Transportation Truck Company. He testified that during an I & E lecture held on a Friday in December 1947 a line-up was conducted in the company mess hall (R 74-75). Concerning the line-up he testified as follows:

> "* * There was a girl there and as I recall someone else with her. She was brought in and the men were all made to sit down and she was told ---the men were told why she was there and she was there to identify someone, if possible, and that she would look down and look at each one individually and see if such a person were present. There were about 3 rows of tables as I recall now, possibly 4 and she walked down the first row looking at each man individually to her right. She walked all the way down to the last man, turned around, came back and then went down the next row. When she looked at some of the men she looked for a long time and I know a couple of men in particular she was not sure about so after she had looked all the men over she came back and went over this row again and told the men to say something to her and they said something so she passed them on. In other words she failed to identify anyone while they were sitting at the tables so we brought her outside. There was a little hall running down by the mess hall and we brought her outside so she could stand with her back to the window and we had the men fall out one by one so she could look at them with the light shining on their faces. As they came out the door she looked at each one as they came out and she still failed to identify anybody. At least the person she wanted was not there on this occasion." (R 75,76)

Lieutenant Cobb was also motor officer of the company and had been same between January and April 1947. He testified that during that period it was possible that the company had a truck assigned to carry "PX" personnel (R 76-77).

He also testified that when a driver turned in his trip tickets he was supposed to enter on the trip ticket the time his vehicle was turned in (R 78).

On examination by the court he testified that accused was present at the line-up. He further stated that drivers were not usually armed (R 80,81).

Georgia Rothlien testified that she was an inhabitant of Freimann, Germany, and that she had been an acquaintance of accused since October 1946. During that period she had seen accused every day. Accused visited her on the afternoon of 13 December 1947, again at about 1900 hours the same day and a third time about 25 minutes after midnight. The last visit did not terminate until 1500 or 1600 hours on 14 December. She believed that accused walked to her house on this last visit as she did not hear any vehicle at the time he arrived (R 84-85). Concerning her recollection of the date of accused's visits she testified:

> "I am sure of that. I remember that it was a couple of days after they picked him up and he came back one day later and I asked him, 'Where have you been?' and he said, 'No, they picked me up. Somebody raped a girl from the Red Cross,' and I asked him, 'Did you do that?' and he looked at me and he said, 'No', he said, 'I can't understand---somebody said that is me'. I said, 'Do you know who done it?' and he said, 'No, how should I know?' and that was all." (R 86)

Captain King was recalled twice as a witness for the court. On the first occasion he testified that the company had three pistols which were usually locked in the arms room unless they were drawn by officers or members of the guard (R 83). On second recall he testified that the line-up conducted on 19 December, the Friday following the date of the alleged offense, was held under his supervision as part of a company investigation prior to preparation of charges. Prior to the line-up, on 18 December, the "CID" had taken accused into custody. He was released to the company on 17 December for the company investigation. Although accused was in the company line-up the complaining witness did not identify anyone at that time (R 129-131). There were no CID personnel at this line-up. On the following day another line-up was held with the "CID" present, and accused and a Private Hargrove were "picked out." Hargrove had a complexion slightly darker than that of accused (R 135). Captain King had verified his dates from the company morning reports (R 139).

During his tour of duty as officer of the day for 13-14 December Captain King visited the Keller Club and saw accused there with T/5 Abberson Williams. Captain King talked with the two and ascertained that accused had a pass. Captain King also stated that while accused was not drunk he had been drinking (R 140-142).

Captain King testified that if the bread ration truck was not in at 2100 hours on a Saturday it was not on an authorized trip and such late arrival would be caught by the checking system. His check of the records

did not disclose any such late arrival on his tour of duty as officer of the day on 13-14 December (R 145).

Lieutenant Cobb was recalled as a witness by the court and reiterated his former testimony to the effect that at the line-up conducted at his "I & E" class the prosecutrix failed to identify anyone (R 156-158). He added that after the line-up he went to the orderly room and saw the prosecutrix there in the company of Lieutenant Sexton, Captain King, and a German civilian whom he was told was a relative of the prosecutrix (R 158-159).

George O. Muse, CID Agent, was called as a witness by the court. He testified that on 19 December accused was identified by the prosecutrix as her assailant (R 147). Concerning the identification Muse testified as follows:

> "There was a class being held in a class room at the 596th and all the soldiers in this company were marched through the door one at a time and Jager was standing in a small hallway and they all passed to give Jager an opportunity to pick the accused. They passed once and were again reformed in the mess hall and the second time she touched one of the persons and said, 'This is the man'.
>
> * * *
>
> It was made the second time as the company marched through the door in single file. They were made to leave the door about 3 feet and stand still. Then Jager would look at each man and they marched through once that way and she wasn't sure so they did it again. They were all formed in the mess hall again and they went through again. This time she pointed to one man and said, 'I am positive', and she touched the man, 'This is the man'.
>
> * * *
>
> It was Roosevelt Curl." (R 147,148)

At the line-up Miss Jager saw another soldier, Hargrove, whom she thought might have been accused's accomplice but she was not certain. The line-up conducted on 19 December was requested by Muse (R 150). Accused had been in the custody of the "CID" prior to the line-up (R 152).

4. The evidence introduced by the prosecution shows that a short time after midnight on the night of 13-14 December 1947, in the vicinity of Frankfurt, Germany, accused, with the aid of an unknown soldier accomplice, by force and against the positive physical resistance of Charlotte Jager, consummated an act of sexual intercourse with Miss Jager. Miss Jager had accepted the offer of accused to take her to her home in the truck in which accused was driving and subsequently upon learning the nature of accused's intentions toward her, Miss Jager attempted to escape, but was recaptured, and placed in the rear of the truck. When accused was unable, without assistance, to overcome her physical resistance, he called upon his companion to aid him and with

the companion's aid overcame the victim's physical resistance and in the words of the victim "a regular sexual intercourse took place." These words fully import the requisites of carnal knowledge including penetration, and the evidence otherwise shows that the carnal knowledge so connoted was accomplished by force and without the consent of the victim. A rape similarly described by the victim was accomplished by accused's companion without the active participation of accused. The findings of guilty of Charge I and its Specification are warranted by the evidence.

(Charge II, Spec, Assault with intent to do bodily harm with a dangerous weapon.)

Following the events hereinbefore narrated Miss Jager was told to leave the truck and she went running down the road. Accused pursued and caught her, took out his pistol and, despite her entreaties, beat her on the head with his pistol until she was unconscious. The evidence sustains the allegations that accused did, with intent to do her bodily harm, commit an assault upon Miss Jager with a dangerous weapon at the time and place alleged, and the findings of guilty of Charge II and its Specification are warranted by the evidence.

5. Upon cross-examination accused was questioned concerning a pretrial statement and whether in the pretrial statement he had made a statement inconsistent with his testimony in court. Accused admitted making the statement which was subsequently admitted in evidence. Accused did not recall if, prior to making the statement, he had been advised of his rights under Article of War 24. The person to whom the statement was made, a "CID" agent, was not questioned concerning the circumstance of the statement although he testified at the trial. The statement itself was of a purely exculpatory nature and contained no admissions of guilt of the offenses alleged. It may be seen, therefore, that the prosecution was attempting to impeach accused by a showing of pretrial statements inconsistent with his testimony, although at the time the statement was not in evidence and the circumstance of its making had not been shown. In general it may be stated that an involuntary confession may not be used as a basis for the cross-examination of accused, nor may it be admitted in evidence as a part of that cross-examination (CM 270425, Stevenson, 45 BR 267,283-284). Additionally a confession may not be admitted in evidence without proof of the circumstances surrounding the making thereof, and a failure to object does not constitute a waiver (CM 237225, Chesson, 23 BR 317,319). On the other hand, admissions may be admitted in evidence without a showing of the circumstances under which they were made (CM 274482, Talbott, 47 BR 185, 190). In the instant case accused's pretrial statement was in no way incriminatory to him. It could not be considered as a confession and in that it contained no admissions against interest it, in effect, did not amount to an admission. The statement could be used for impeachment

purposes without any showing of the circumstances under which it was made.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for both the offense of assault with intent to do bodily harm with a dangerous instrument and for the offense of rape, recognized as offenses of a civil nature and so punishable by penitentiary confinement by sections 276, and 279, Criminal Code of the United States (18 USC 455,457).

C. O. Wolfe, Judge Advocate

[illegible], Judge Advocate

On Leave, Judge Advocate

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

JAGN-CM 332216

UNITED STATES v. Private CANDELARIO CUEVAS, SR. (18319762), Company B, 3rd Battalion, Medical Field Service School, Brooke Army Medical Center, Fort Sam Houston, Texas.	)	FOURTH ARMY Trial by G.C.M., convened at Fort Sam Houston, Texas, 15 June 1948. Dishonorable discharge and confinement for four (4) years. Penitentiary.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Candelario Cuevas, Senior, Company B, 3d Battalion, Medical Field Service School, did, at Fort Sam Houston, Texas, on or about 5 May 1948, wrongfully introduce for sale into station five (5) marihuana cigarettes.

Specification 2: In that Private Candelario Cuevas, Senior, Company B, 3d Battalion, Medical Field Service School, did, at Fort Sam Houston, Texas, on or about 7 May 1948, wrongfully introduce for sale into station four (4) marihuana cigarettes.

Accused pleaded not guilty to and was found guilty of the Charge and both Specifications thereof. He was sentenced to be dishonorably

discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for four years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of Specification 1 of the Charge and the Charge. The questions requiring consideration are (1) the legal sufficiency of the record of trial to support the findings of guilty under Specification 2, (2) the legality of the sentence as to the confinement imposed, and (3) the propriety of the designation of a United States Penitentiary as the place of confinement.

4. Summary of the Evidence:

On the night of 4 May Private First Class Clifton Bowdry, while on guard duty at the Third Battalion area of the Medical Field Service School, Fort Sam Houston, Texas, saw the accused walk close to "another fellow" and pass him what appeared to be a brown cigarette. He also saw the accused receive what appeared to be money (R. 7, 11). Private Bowdry then approached accused and accused asked him if he wanted some "weeds," offering to sell them for fifty cents apiece or five for $2.00 (R. 7, 12). Private Bowdry asked accused to meet him later at the bowling alley and after being relieved from his sentry post, in the company of his friend, Private First Class Freddie D. Edwards, reported the matter to his platoon sergeant, Corporal Lloyd J. Faul (R. 7). Later that evening accused again accosted Private Bowdry and Private Edwards, at the bowling alley, asked them if they wanted to "buy them," and when asked if he would sell on credit replied in the negative but stated that, if they would get the money, he would let them have as many as they wanted to buy (R. 7, 8). As a result of the report made to Corporal Faul, on 5 May Privates Bowdry and Edwards were furnished the sum of $4.00 by the C.I.D. for the purpose of purchasing the cigarettes offered them by accused (R. 8). That afternoon they met accused in front of the orderly room. They went with him into the class room and bought five cigarettes for the sum of $2.00. They placed their initials and the date on them and turned them over to First Lieutenant Alpheus T. Stone (R. 8, 10, 13, 15, 21). Again on 7 May 1948 the two enlisted men purchased cigarettes from accused, this time paying $2.00 for four, again initialed and dated them, and delivered them to Lieutenant Stone (R. 9-11, 14-18). At the time of the latter purchase accused explained that he only had the four he was selling and he "got to get more" (R. 18). Prosecution's Exhibits 1 to 5 were identified by the witnesses in court as those purchased from accused and delivered to Lieutenant Stone (R. 9, 10, 14, 16, 21, 22).

Mr. Dave Mitzkus, after his qualifications as an expert were accepted by the court, identified Prosecution's Exhibits 1 to 5 as being marihuana cigarettes (R. 28).

On 12 May accused and his possessions were searched by the C.I.D. but no "contraband" was found (R. 24).

The accused elected to remain silent and no witnesses were called in his behalf.

5. The fact that on the dates 4, 5 and 7 May accused was in possession of marihuana cigarettes at the Medical Field Service School, Fort Sam Houston, Texas, is ample proof of their introduction into station as alleged in both Specifications (CM 252710, Bates, 34 BR 158), and the fact that such introduction was for the purpose of sale was proven by the evidence that accused was seen to pass what appeared to be a brown cigarette to an unnamed person, that he offered the sale of "weeds" to a witness, and on two later occasions sold marihuana cigarettes to the two witnesses. There is, therefore, adequate proof that on or before 4 May 1948 accused introduced into the station marihuana for the purpose of sale, thus establishing the commission of the offense on or about 5 May as alleged in Specification 1. With respect to Specification 2, however, the evidence to support the allegation of introducing the marihuana into the station is identical with that introduced to support the allegation of Specification 1. In both instances the introduction of the drug was established only by its possession by accused on the dates alleged and there is no evidence in the record of trial that the cigarettes he sold on 7 May were not introduced into the station together with those sold 5 May. The fact that at the time of the second purchase accused stated he had no more cigarettes indicates that he may not have replenished his supply between 5 and 7 May. There is, therefore, no evidence from which the court might infer that the introduction of the marihuana into the station constituted more than one offense. It follows that the finding of guilty of Specification 2 cannot be sustained.

6. The period of confinement adjudged by the court and approved by the reviewing authority for the two offenses of which accused was found guilty was four years. This sentence was doubtless based on the Table of Maximum Punishments wherein the maximum period authorizing confinement for the one offense of introducing a habit-forming narcotic drug into station for sale is fixed at two years (par. 104c, MCM, 1928, p. 101).

The Board of Review has held, however, that in the absence of proof that marihuana is a narcotic drug we are unable to take judicial notice thereof (CM 250475, Ellington, 32 BR 393). No such proof was

introduced in the instant case. It is true, as stated by the Staff Judge Advocate in his review of this case, that under Section 787, Title 49, United States Code, marihuana is included in the term "narcotic drug." The pertinent parts of the section read as follows:

"§ 787. Definitions.

When used in this chapter --

* * *

(d) The term 'narcotic drug' means any narcotic drug, as now or hereafter defined by sections 171-185 of Title 21, the internal-revenue laws, or the regulations issued thereunder; or marihuana as now or hereafter defined by the Marihuana Tax Act of 1937 or the regulations issued thereunder."

It will be noted that Title 49 includes only various transportation regulations. Section 787 is a part of Chapter 11 of Title 49, entitled "Seizures and Forfeitures of Carriers Transporting, Etc., Contraband Articles" and no penalty other than the provisions for seizures and forfeitures are contained in that chapter. It is thus evident that the definition of the drug given in section 787 may not be applied outside of the scope and provisions of Chapter 11, Title 49.

In the Ellington case (supra), however, the Board of Review held that although judicial notice may not be taken that marihuana is a narcotic drug, nevertheless it is common knowledge that its use produces a deleterious effect upon human conduct and behavior and thus the offense of introducing it into a military station is closely related to that of introducing a habit-forming narcotic drug, and carries the same maximum penalty. The period of confinement in the instant case, therefore, must be limited by the Table of Maximum Punishments, paragraph 104c, Manual for Courts-Martial, 1928. It follows that the maximum period of confinement authorized for the offense of which accused was found guilty is two years.

7. With respect to the place of confinement designated by the reviewing authority, examination of the statutes discloses that the act of introducing marihuana into a military station is not an offense under any Federal Statute or under any provision of the Code of the District of Columbia. Since accused has not been found guilty of an offense made punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, or by the law of the District of Columbia, penitentiary confinement is not authorized (AW 42).

8. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the finding of guilty of Specification 1 of the Charge, legally insufficient to support the finding of guilty of Specification 2 of the Charge, 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 two years in a place other than a penitentiary, Federal reformatory or correctional institution.

Thos. A. Lawrence, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George S. Springstee, Judge Advocate.

JAGN-CM 332216 1st Ind

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

TO: Commanding General, Fourth Army, Fort Sam Houston, Texas.

1. In the case of Private Candelario Cuevas, Sr. (18319762), Company B, 3rd Battalion, Medical Field Service School, Brooke Army Medical Center, Fort Sam Houston, Texas, I concur in the foregoing holding by the Board of Review and recommend that the finding of guilty of Specification 2 of the Charge 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 332216).

1 Incl
Record of trial.

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

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

CSJAGK - CM 332232

20 DEC 1948

UNITED STATES v. Private First Class RAYMOND D. LILLARD (RA 13214931), 609th Transportation Port Company, APO 59, and Private WILLIAM ANDERSON (RA 13206086), 609th Transportation Port Company, APO 59	HEADQUARTERS KOREA BASE COMMAND Trial by G.C.M., convened at APO 901 on 26 April 1948. LILLARD: Dishonorable discharge (suspended) and confinement for four (4) years. ANDERSON: Dishonorable discharge (suspended) and confinement for three (3) years. EACH: Disciplinary Barracks.

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

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

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

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

Specification 1: In that Private First Class Raymond D. Lillard and Private William Anderson, both of 609th Transportation Port Company, APO 59, acting jointly and in pursuance of a common intent, did at Camp Inch'on, Korea, on or about 1600 hours, 9 February 1948, with intent to commit a felony, viz larceny, commit an assault upon Chai Han Chul, Korean National, by willfully and feloniously striking the said Chai Han Chul in the face and on the chest with fists, and by willfully and feloniously pointing a United States Carbine at said Chai Han Chul.

Specification 2: In that Private First Class Raymond D. Lillard and Private William Anderson, ***, acting jointly and in pursuance of a common intent, did at Camp Inch'on, Korea, on or about 1600 hours, 9 February 1948, feloniously take, steal, and carry away two (2) cases of cigarettes, of the value of about ninety dollars ($90.00), property of USAFIK Central Exchange, APO 235.

CHARGE II: Violation of the 86th Article of War

Specification: In that Private First Class Raymond D. Lillard, 609th Transportation Port Company, APO 59, being on guard and posted as a sentinel at Camp Inch'on, Korea, on or about 1400 hours, 9 February 1948, did leave his post before he was regularly relieved.

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

Specification: In that Private First Class Raymond D. Lillard, 609th Transportation Port Company, APO 59, did without proper leave, absent himself from the military service of the United States, to wit: 382nd Station Hospital, at Camp Ascom, APO 901, from about 2 April 1948 to about 10 April 1948.

The accused Lillard pleaded not guilty to Charges I and II and all specifications thereunder but guilty to Charge III and its specification. The accused Anderson pleaded not guilty to Charge I and the specifications thereunder. Each accused was found guilty of Charge I and its specifications excepting however the words "about $90.00" substituting therefor the words "about $48.00" as to Specification 2 thereof. The accused Lillard was also found guilty of Charges II and III and the specifications thereunder. Evidence of one previous conviction was introduced as to the accused Lillard. The accused were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at such place as the reviewing authority might direct for ten years as to Lillard and nine years as to accused Anderson. The reviewing authority approved the sentence as to each but reduced the period of confinement to four years as to Lillard and to three years as to Anderson. He ordered the sentences executed as modified but suspended the execution of the dishonorable discharge until each soldier's release from confinement, and designated the United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army might direct as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 46, Headquarters Korea Base Command, APO 901, 30 June 1948.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges II and III and the specifications thereunder as to the accused Lillard.

4. Evidence concerning Charge I and its specifications as to both accused.

Purchase Order No. E-40821 provided for delivery of 1,000 cases of Camel cigarettes to the USAFIK Central Exchange Depot, Inch'on, Korea. On 6 February 1948 there were 999 cases actually unloaded from the SS China Victory to the shore at the Tidal Basin. The purchase order No.

E-40821 was stamped or printed on each case. On 7 February 1948 only 973 cases had been actually received by the USAFIK Central Exchange Depot (R 23-26).

Accused Lillard was assigned to guard duty at the Inch'on Tidal Basin for the period from 2:00 p.m. to 6:00 p.m. on 9 February 1948. Accused Anderson, though not a member of the guard detail, rode to the Tidal Basin in a weapons carrier with the guards and was present when accused Lillard was posted at Post No. 10 at the locks of the Tidal Basin. The guards, including Lillard, were armed with "regular issue" carbines. Shortly afterwards, that is, in about 15 minutes, he told Private First Class Cox, who was also a guard posted on the same post, that he was going to the latrine. He gave Private First Class Cox a clip of ammunition and proceeded in the direction of the latrine. Accused Lillard did not, however, return to his guard post before the end of his tour of duty at 6:00 p.m. (R 8,9,30-33).

Between 3:00 and 4:00 p.m. of the same afternoon accused Lillard together with accused Anderson, each of whom was carrying a case of cigarettes, appeared at Post No. 5, one of the gates in the Tidal Basin Area. They attempted to leave the area with the cigarettes, telling the Korean guard, Chai Han Chul, that a captain had given them the cigarettes and that they were authorized to take them out of the gate. The Korean guard restrained them, stating that if they had permission they should go out the main gate, whereupon accused Anderson struck the guard injuring him about the face and hands and knocking him down. At this time accused Lillard, who was standing about five feet away, pulled back the bolt of his carbine in what appears to have been a threatening manner. This action caused the Korean guard to be frightened (R 10-13).

Private First Class George Clark came to the Tidal Basin Area in the same truck with accused and was posted as a guard at Post No. 9, formerly known as Post No. 13. At about 3:30 p.m., 9 February 1948, he saw accused coming toward his post with two partially filled cases of cigarettes. Shortly thereafter five or six Korean guards came up behind them and Anderson took the carbine from Lillard and brought it to port arms, put a round in the chamber and told them to halt. About twenty minutes later Lieutenant Silverthorn arrived. Private First Class Clark stated that although the road was within his view he had not seen any jeep or captain during his tour of duty (R 13-16).

Lieutenant Silverthorn questioned accused concerning the cigarettes. Lillard said he had taken them away from some Koreans who had been pilfering them. He also said he was a guard on Post No. 9 and that a captain had told him to keep the cigarettes until the corporal of the guard brought his relief. Lieutenant Silverthorn took possession of the two cases of cigarettes, each of which were about one-third full. He then instructed accused Lillard to resume his post and accused Anderson to return to the paint shop where he stated he had been working that day. Posts No. 9 and

No. 10 are not adjacent to each other (R 16-19).

Technical Sergeant Joseph Russell was with Lieutenant Silverthorn when accused were found in possession of the cigarettes. Pursuant to the Lieutenant's orders he took the cigarettes to headquarters. Upon counting them it was revealed there were 53 cartons and four packages in the two cases. The two cases of cigarettes, having been identified as the ones in possession of the accused when accosted by Lieutenant Silverthorn, were admitted in evidence as Prosecution Exhibit 1 over the objection of defense (R 19-22). Major Harvey identified Prosecution Exhibit 1 as cigarettes which came from the SS China Victory inasmuch as each of the boxes bore a number "E-40821" (R 23).

Mr. John Baas, employee of Central Exchange Depot, testified that the value of the cigarettes admitted as Prosecution Exhibit 1 was $48.06 (R 26).

Each of the accused made pretrial statements which were admitted as Prosecution Exhibits 2 and 3 without objection by defense (R 27). Accused Lillard stated that on 9 February 1948 from 2:00 to 6:00 p.m. he was on duty as a guard at Post No. 10 at the Tidal Basin Area. He left his guard post about 2:20 p.m., giving Cox his clip, and then went to the latrine. At about 2:15 p.m. he saw two Koreans carrying two cases of cigarettes along the railroad tracks leading out of the Basin Area. The Koreans, upon being challenged, dropped the cigarettes and ran. He then stood guard over the cigarettes until a captain came along in a jeep who told him to take them to Post No. 13 (now Post No. 9) where the corporal of the guard would pick them up. The captain parked his jeep and walked up the tracks toward Charlie Pier. He saw accused Anderson for the first time that day at about 3:00 or 3:30 p.m. near the paint shop and called him over to help carry the cigarettes to Post No. 13. A Korean constable at the gate (Post No. 5) refused to let Anderson by and a fight between them ensued resulting in the Korean being knocked down. The accused then proceeded down the tracks followed by the Korean. When Lieutenant Silverthorn came along, accused Lillard turned the cigarettes over to him. Accused Lillard further stated that when he returned to his post at about 3:30 p.m. Private First Class Cox saw him. He also stated he was at his post between 4:00 and 6:00 p.m. of the day in question (Pros Ex 2).

Accused Anderson stated in his pretrial statement that he entered the Tidal Basin Area about 3:00 to 3:30 p.m. intending to visit Private Green at the paint shop, but found the shop to be closed. He met Lillard who asked him to help carry some pilfered cigarettes to Post No. 13 (now Post No. 9). At the gateway they met the Korean constable who refused to let Anderson pass. Anderson walked by and continued up the tracks. The Korean ran ahead of Anderson, stopping him again. During the course of the argument the Korean struck Anderson in the mouth. Anderson returned the blow, knocked the Korean down and proceeded on to Post No. 13 (now Post No. 9) where he put the cigarettes down. Lieutenant Silverthorn came along the tracks from "Charlie Pier." Two soldiers with the lieutenant

took the cigarettes to Charlie Pier. Anderson said he had been drinking American whiskey in the Enlisted Men's Club before 2:00 p.m. with Lillard but neither he nor Lillard was drunk (Pros Ex. 3).

b. Evidence for the Defense

After his rights were explained to him, accused Lillard was sworn and testified concerning his movements and the occurrence of the incidents in question on 8 February 1948, generally as stated in his pretrial statement except as follows:

He went to the latrine in Basin headquarters and on his return to his post he accosted the Koreans on the railroad tracks between Warehouse No. 1 and the Basin near Post No. 5 where the Korean national was on guard. He could tell at a distance of 100 feet that they had cigarettes because he unloaded the ships himself.

He never saw the captain referred to either before or since 9 February 1948.

He "was up the tracks a piece" when Anderson and the Korean guard had their altercation and he did not remove his carbine from his shoulder.

Upon direct examination he testified he did not return to his post as ordered by Lieutenant Silverthorn but went to Post No. 5 in search of the Korean guard. Upon cross-examination, however, he testified that he returned to his post as directed but made a telephone call to Post No. 5 for the Korean guard. He remained at his post only about five minutes and did not know whether Private Cox saw him or not.

He had two clips of ammunition for his carbine. He gave one to the other guard on his post, retaining the other in his possession but did not insert it in his carbine until he was walking back to his barracks from the basin.

The distance from Post No. 10 to Post No. 9 (formerly No. 13) was approximately 150 - 160 feet. Post No. 10 was at the locks to the Tidal Basin and Post No. 9 extended along the railroad tracks from "Charlie Pier" or port headquarters toward the basin "a couple of blocks." After the conflict with the Korean guard they proceeded toward Post No. 9.

The prosecution used a chart of the Basin area in questioning accused, to which reference was made but it was not attached to the record of trial.

After his rights were explained to him, accused Anderson was sworn and testified as follows:

He had been acquainted with accused Lillard for quite some time. He rode to the Basin area in the guard truck with Lillard and got off at the entrance to the Basin Area. His intentions were to visit Private Green at the paint shop. He found the paint shop closed and was walking toward Basin headquarters when Lillard called him. He was asked by Lillard to help carry the cigarettes to Post No. 13 (now Post No. 9). They picked up the cigarettes and proceeded down the tracks towards Post No. 13. When they got to the Korean guard post Lillard went on through because he had a rifle but the Korean would not let him (Anderson) pass, although he told the guard he was taking the cigarettes to Post No. 13. The Korean knocked the cigarettes from his shoulder and swung at him. He then struck the Korean knocking him (the Korean) down. He (Anderson) picked up the cigarettes and went up the tracks with Lillard. The Korean followed them. They met Lieutenant Silverthorn and talked to him, however, Anderson did not tell the lieutenant he worked at the paint shop.

Lillard did not say where the cigarettes came from until they got past the Korean guard.

Anderson said he had been a guard at the basin and at that time people were always allowed to go down the tracks, which is why he disobeyed the order of the Korean guard when he was told to stop.

Anderson did a lot of work on ships but denied working on the SS China Victory.

Defense called no other witness nor introduced any other evidence.

5. Discussion

Specification 2 of Charge I

The accused were found guilty of having jointly and in pursuance of a common intent committed larceny of two (2) cases of cigarettes of the value of about $48.00 property of USAFIK Central Exchange in violation of Article of War 93.

The Central Exchange Depot, Inch'on, Korea, had procured by purchase order 1,000 cases of Camel cigarettes, which, according to the manifest, were shipped aboard the SS China Victory. Cargo destined for Inch'on, Korea, had to be taken from the ship by lighter to the Tidal Basin where it was put ashore. A total of 999 cases of Camel cigarettes, each bearing Purchase Order No. E 40821, were unloaded in that manner on 6 February 1948 and 973 cases were actually delivered to the Central Exchange Depot on 7 February 1948. Thus, 26 cases were not accounted for in that they

never reached the consignee.

Accused Lillard by his own admission helped to unload the cargo of cigarettes from the SS China Victory. The accused were good friends who had been drinking together the morning of 9 February 1948, in fact they rode together to the Tidal Basin Area in the same truck. Within fifteen minutes after being posted as a guard Lillard left his post. He gave to the other guard the clip of ammunition which had been issued to him for use while on guard duty but he kept his carbine and another clip of ammunition which he had obtained by other than regular means. Although accused Lillard stated he never inserted the extra clip in his carbine there was evidence that on two separate occasions during the time they were attempting to get away with the cigarettes each of the accused pulled back the slide forcing a cartridge into the chamber. They approached the gate, guarded by the Korean national, in order to leave the area with the cigarettes. The guard told them that if they had authority to take the cigarettes out they should leave by the main gate. Rather than comply with the guard's request they assaulted the guard. When accosted by Lieutenant Silverthorn accused Lillard gave a spurious explanation as to the manner in which they came into possession of the cigarettes. The explanation was that accused Lillard came upon two Koreans on Post No. 9 as he was returning from the latrine. When he called to them to halt they dropped the two cases of cigarettes and ran away. Accused Lillard then took possession of the cigarettes. While standing guard over them a captain came along in a jeep who told him to turn the cigarettes over to the corporal of the guard when he posted the relief. The captain then drove away and was never seen again after that. Accused Lillard just happened to see Anderson whom he called over to help him carry the cigarettes. They were in the process of carrying out the captain's orders when they had the altercation with the Korean guard. Accused Lillard made the statement to Lieutenant Silverthorn that he was posted as a guard on Post No. 9 when in reality his proper duty station was at Post No. 10, which was some little distance away from where they were apprehended. Accused Anderson at the same time told Lieutenant Silverthorn he worked at the paint shop in the Tidal Basin Area, which statement was false. He also made statements that he arrived at the Basin area about 3:00 or 3:30 p.m. when as a matter of fact he arrived before 2:00 p.m. on the guard truck along with accused Lillard. Lieutenant Silverthorn directed Lillard to return to his post and for Anderson to return to the paint shop, however, Lillard did not return as directed, at least his companion guard did not see him nor was he present on duty when his relief was posted at 6:00 p.m.

The problem thus presented for consideration here and the law applicable thereto were well stated in CM 325457, McKinster, 74 BR 233, at page 241;

> "We thus have presented for our consideration a case in which the evidence adduced in support of the allegations of larceny of the radio and electric razor is in direct and

irreconcilable conflict with that adduced in defense thereof. There can be no doubt that if the court was warranted in accepting the former while rejecting entirely the latter, accused's guilt of the charge and specification here in question would be overwhelmingly established. Such conflicts are to be resolved, in the first instance at least, by the court and in so doing it is not required to accept as true the testimony of any witness, whether advanced by the prosecution or by the defense, but may give such weight as it deems fit to any evidence properly brought to its attention (Wharton's Criminal Evidence, 11th Ed., s. 881; CM 267476, Wilson, 44 BR 1, 9; CM 318085, Chance; par 78a, MCM, 1928). The only requirement is that, as an end result, the court's findings of guilty be based upon such evidence, apparently selected from the whole as worthy of belief, as would, standing alone and unencumbered by any unexplained contradictions within itself, be of the prescribed quantum and consistent with no other rational hypothesis than that of accused's guilt (par 78a, MCM, 1928; see CM 319322, Spencer - unexplained contradiction in evidence necessarily relied upon by court; CM 324396, Redmon - insufficient quantum in perjury case; CM 312356, Preater - proof consistent with reasonable hypothesis of innocence). In the instant case we believe the findings of guilty of Charge I and its Specification meet the above requirement and we have discovered no reason why they should be set aside."

In the instant case the court obviously rejected completely the explanation offered by the defense as to the manner in which the accused came into possession of the cigarettes. We believe that the court was warranted in doing so. The place where accused Lillard claimed to have apprehended the two Koreans with the cigarettes was in plain sight of witnesses who testified that they did not observe the incident. The roadway upon which the captain was supposed to have driven his jeep at the time and place of coming upon the accused Lillard was also within view of witnesses who testified that they had seen no captain in the area that particular afternoon. The defense did not offer any evidence in corroboration of the judicial statements of the accused. The fact that the accused attempted to force their way out of the area with the cigarettes not only renders their explanation unworthy of belief but also points to the conclusion that their possession was unlawful. It should also be noted that they stated they were attempting to comply with the said captain's orders when they had the altercation with the Korean guard but this is unbelievable in the face of the fact that once through the gate they would have been outside of the Tidal Basin area.

A consideration of the remaining competent evidence shows that they not only had an opportunity to steal the cigarettes after they had been unloaded from the ship and before they were delivered to the Central Exchange but that they did obtain the cigarettes by larcenous means. It

is inconceivable that innocent persons would have conducted themselves in the manner that the accused did both prior to and subsequent to their apprehension had they been in lawful possession of the cigarettes. Such conduct creates more than a suspicion, it points inevitably to the conclusion that the accused were guilty as alleged.

Specification 1, Charge I

Under this specification it was alleged that accused did jointly and in pursuance of a common intent at about 1600 hours on 9 February 1948 commit an assault upon Chai Han Chul, a Korean national, by willfully and feloniously striking the said Chai Han Chul in the face and on the chest with fists and by feloniously pointing a United States carbine at Chai, Han Chul, with an intent to commit a felony, to wit, larceny.

It should be noted here that the larceny alleged was of goods or merchandise of the value of about $48.00 which incurs a maximum penalty of only one year (par 104c, MCM 1928). Under the United States Code such a criminal offense would not be a felony (18 USC 541), however, it would be at common law as all larcenies were felonies irrespective of value of the property involved (par 149d, MCM 1928). The term "any felony" as used in Article of War 93 has uniformly been held to include both felonies at common law and by statute (CM 209548, Jones, 9 BR 77,93). It follows, therefore, that there is no inconsistency in the instant case by reason of the fact that the specification, alleging an assault with an intent to commit a felony, to wit, larceny, refers to a larceny where the value of the property involved was only $48.00.

The evidence clearly established that accused Anderson assaulted Chai Han Chul by striking him with his fists and knocking him down. The evidence also shows that accused Lillard stood nearby while accused Anderson and the Korean guard were fighting and that he removed his carbine from his shoulder and slid back the bolt in a threatening manner. Upon such direct evidence the court was warranted in finding each of the accused guilty of assault.

The assault being established we must now determine whether or not it may be considered an assault with an intent to commit a felony, to wit, larceny. It might be argued that at the time of the assault the offense of larceny had already been completed, and, therefore, that the assault could not be held to be one with an intent to commit that offense. It has, however, long been held as a principle of common law "that the legal possession of goods stolen continues in the true owner; and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation". The principle has also been stated in the following terms: "a thief is stealing the property from the time he takes it up until he lays it down" - the phrase "lays it down" referring to disposition of the property by the thief (Watson v. State (1859), 36

Miss. 593; State v. Brown, 55 Kan. 611, 40 Pac. 1001; Clark v. State, 23 Tx. A. 612, 55 S.W. 178; 156 ALR 864 et seq. and cases there cited; 17 RCL, Sec. 50-52; 1 Hawkins' Pleas of the Crown, c. 19, s. 52, p. 151). This principle has been applied most frequently to cases involving the question of venue. Where things have been stolen in one county and transported to another in the same state it has been held that a conviction may be had in the latter county for larceny on the theory that the bringing of the articles into the latter county by the thief was a continuing trespass and asportation amounting to a new offense (see 156 ALR 865 and cases there cited). There is, however, a conflict of authority concerning the application of the principle enunciated to cases involving transportation of stolen property by the thief from one state to another state in the United States, or from one country to another. On the theory that one state or country will not enforce the criminal laws of another, the general rule that larceny is a continuing offense has not always been applied in these circumstances (156 ALR, supra; Brown v. United States, 35 App. D.C. 548). In military law this problem does not arise for the Articles of War are not restricted in their application geographically but are applicable wherever troops of the United States may be. We are of the opinion that the attempt of the accused to force their way through the gate where the Korean guard was stationed and their assault upon him with the intent to make away with the property stolen was an assault with an intent to commit a felony, to wit, larceny.

6. For the foregoing reasons, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence with respect to each accused as approved by the reviewing authority.

Robert W. Silver, Judge Advocate

Earl M. Bradley, Judge Advocate

Harley A. Lanning, Judge Advocate

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

JAGK - CM 332252

18 OCT 1948

UNITED STATES	NURNBERG MILITARY POST
v.	Trial by G.C.M., convened at Bamberg, Germany, 2-4 June 1948. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant EDWARD L. BARRETT (0-2032900), AGD, Detachment of Patients, 385 Station Hospital	

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

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

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

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

Specification: In that Second Lieutenant Edward L. Barrett, AGD, Detachment of Patients, at 387th Station Hospital, formerly Detachment "B" 7810 Station Complement Unit, being then and there a Class B Agent Postal Finance Officer and the Commanding Officer of Army Postal Unit No. 139, did, at or near Bamberg in Germany, on divers occasions, between about 1 November 1947 and about 27 December 1947, as such Class B Agent and as such Commanding Officer, have and receive for and in behalf of the United States, large sums of money in exchange for United States Postage Stamps and United States Postal Money Orders during the operation by himself and subordinates of Army Post Office, No. 139, as well as many hundreds of unused United States Postage Stamps and a large number of unused United States Postal Money Orders, and did thereupon feloniously embezzle by converting to his own use large sums of the money and postage stamps thus received, property of the United States, value greatly in excess of fifty ($50.00) dollars.

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

Specification: In that Second Lieutenant Edward L. Barrett, ***, did, at or near Bamberg in Germany, on divers occasions between about 1 June 1947 and about 26 December 1947, in

conjunction with Paul Mahler, Helmut Kammer, Karl Meyer, Heinz Burk, and others (all German nationals) as well as Private Jerry R. Runyan, Detachment "B", 7810 Station Complement Unit, wrongfully and dishonorably commit and attempt to commit many acts of shocking indecency and gross immorality; among others, manual masturbation and sodomy (the latter, at times per os and at other times per anum), some of such acts being accomplished upon his own person by one or more of said German nationals, while others were consummated upon the persons of one or more of those named in this specification.

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

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

Accused pleaded guilty to Charge II and its specification but not guilty to Charges I and III and the specifications thereunder. He was found guilty of Charges I and II and the specifications thereunder and not guilty of Charge III and its specifications. The court sentenced accused 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 five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

With respect to Charge II and its specification, of which the accused pleaded guilty, there were received in evidence by agreement of the parties, as Prosecution Exhibits 1 to 8 inclusive, certain written statements signed and sworn to by seven male German nationals and one American soldier. The parties stipulated, accused expressly joining therein, that if present in court the parties signatory to the statements would testify substantially as shown in the exhibits. In view of accused's plea, and the obscene nature of the conduct attributed to him in these statements, no recital of the facts shown therein need be made. Suffice it to say, the evidence presented by the mentioned exhibits fully supports the allegations contained in Charge II and its specification (R 11-16).

By further stipulation there was read into the record a written report of psychiatric examination of the accused prepared by Major James Galvin, MC, Psychiatric Consultant, European Command. This report shows, inter alia, that the accused has a history of homosexual behavior of long standing but that he is "sane in the sense of par 35 c M.C.M. 1928 and has not been subject to irrevitable [irresistible] impulse." The reporting officer recommended administrative separation of accused from the service (R 18).

The proof with respect to Charge I and its specification will be summarized somewhat in detail. Prior to and during the time of accused's alleged embezzlement he was postal officer and commanding officer of the 139th Army Postal Unit at Bamberg, Germany. By paragraph 39, Special Orders No. 231, Headquarters U.S. Forces European Theater, dated 19 August 1946, he had been appointed Class B Agent Finance Officer for Captain J. A. Babcock, for the purpose of disbursing postal funds in the European Theater (R 32,33, Pros Ex 12).

Captain John A. Babcock, AGD, Postal Finance Officer, 25th Base Post Office, testified that he was "accountable to the Treasury of the United States and the Chief of Finance for all of the postal funds in the European Command, *** that is, stamp stock funds, excluding money order business." It was the witness' responsibility to place Government funds in the hands of each postal officer, who was at the same time Class B agent disbursing officer. The funds consisted of "U.S. postage stamps, stamped envelopes and cash." The postal officer would sell the stamps, remit the proceeds, and requisition a like amount of stamps so as to replace and keep his stock in a "liquid condition." Each Class B agent postal officer was required to have his accounts audited on the 20th of each month and to forward a copy of the report of audit to his principal (R 24). The witness identified and there was received in evidence, without objection, as Prosecution Exhibit 10 a photostatic copy of a "Receipt for Trust Funds," W.D. FD Form 45-A, dated 20 August 1946, which is signed by the accused and which states that on the date shown thereon he had received from Captain Babcock cash in the amount of $10,000.00 as a "fixed credit" to be disbursed by accused as agent for Captain Babcock, accused assuming full pecuniary responsibility therefor. It was noted thereon that "This receipt revokes all previous receipts for funds in favor of Frank N. Nixon, Capt. AGD." (The record shows that Captain Babcock relieved Captain Nixon as Base Postal Finance Officer on the date shown.) The receipt is stamped "cancelled" as of 20 January 1948 by Captain Babcock (R 26, Pros Ex 10). Captain Babcock testified that he accepted the receipt from accused on the "strength" of an audit conducted on 20 August 1946 and signed by two disinterested officers. This "fixed credit" was never "officially diminished" in any manner (R 27). On about 20 December (1947) accused reported to Captain Babcock that "he had in his possession $10,000.00" (R 33). On 7, 8 and 14 January 1948 Captain Babcock personally inventoried the accounts of APO No. 139. The accused was being relieved as postal officer and Class B Agent Finance Officer by Second Lieutenant Daniel A. Spezzacatena. This audit revealed a shortage in accused's accounts of three thousand five hundred and ninety-three dollars ($3,593.00). As a result thereof Captain Babcock executed on 14 January 1948 WDAGO Form 14-50 (Acknowledgment of Return of Funds and Statement of Balance) which showed a cash balance of $6,407.00 in the hands of accused as agent officer and a "Loss of Public funds" of $3,593.00. This statement was received in evidence without objection as Prosecution Exhibit 11 (R 28, 29). The witness was permitted to refer to memoranda he had prepared

at the time of his inventory. He stated that the assets found consisted of $5,201.72 in postage stamps and $1,199.55 in cash (R 30).

On cross-examination Captain Babcock stated that he did not actually receive $6,407.00 from the accused, but this amount being the total assets discovered, accused was relieved of responsibility therefor and the fund was transferred to his successor (R 36). On redirect examination, Captain Babcock stated positively that since issuance of the $10,000 fixed credit to the accused in 1946, there had been no increase or decrease in the fund according to the records of his office (R 41). The defense stipulated that accused "had received $10,000 from the U.S. Government" (R 42). With further reference to his inventory, Captain Babcock stated that subsequent to 14 January 1948 he had received information from Lieutenant Spezzacatena that stamped envelopes of the value of $186.06 had been found in a compartment which constituted the base upon which the safe of the APO rested. These envelopes were part of the "funds" of which the accused had been credited but which were overlooked when the inventory was made (R 49-50). The witness asserted that the actual discrepancy between the funds entrusted to accused and the total found amounted to $3,597.00 (R 51).

Captain Stephen M. Waldike, TC, Detachment B, 7810 SCU, Bamberg, Germany, testified that on 27 December 1947 he, Major Louis Schiavo and Captain Warren S. Hutchison were duly appointed as a board of officers to go to Bamberg and inventory the accounts of APO No. 139. Pursuant thereto the three officers went to the APO, procured the keys to the safe and made a record of all assets found. The witness identified and there was received in evidence with accused's consent as Prosecution Exhibit 14 a true copy of the report of the proceedings of the board which had been forwarded to the Commanding Officer, Nurnberg Military Post. This report which is signed by the officers named and approved on 30 January 1948 by the Commanding General of Nurnberg Military Post recites, inter alia, that the board met at 1000 hours on 27 December 1947 to inventory the accounts and property of APO No. 139 "prior to turn-over to 2nd Lt Daniel A. Spezzacatena, *** vice 2nd Lt Edward L. Barrett *** relieved, sick in hospital." Among the exhibits listed and attached to the report is a "Copy WDAGO Form 14-49 Return of Funds and Statement of Agents Officer's Balance of 2nd Lt Edward L. Barrett." This exhibit shows that accused, as agent officer of "Sub Post APO 139" reported to Captain J. A. Babcock on 20 December 1947 that he had on hand a balance of $10,000.00 in his fund plus a 50 cents overage. The report (Pros Ex 14) contains an itemized statement of all the funds and physical property the Board found at APO No. 139. On 3 January 1948 the Board reconvened and concluded that (as shown by the entries contained in its report) the accused was short $3,779.97 in his funds. The Board also reconvened on 9 January 1948 at the 387th General Hospital, Stuttgart, Germany, to inform the accused of its findings and "to ask an explanation or justification for the shortage

in his accounts." Accused was asked if he desired counsel and he replied, "No, sir." He was warned of his rights under Article of War 24 and elected to remain silent. The Board thereupon found that "the evidence adduced that public fund, US Government Post Office account of 2nd Lt Edward L. Barrett were found to be short in the amount of $3,779.97" (R 58, Pros Ex 14).

The defense cross-examined Captain Waldike at length as to the manner employed by the members of the Board in conducting the audit of the funds mentioned. It appeared that there were certain enlisted personnel employed as clerks in the APO and who had fixed credits allotted to them by the accused. The amounts found in the hands of these persons tallied substantially with the amount allotted to each. Minor irregularities in the handling of the funds and the keys to the safe were proven (R 60-66).

Second Lieutenant Daniel A. Spezzacatena was called as a witness and stated that he was acting postal officer of APO 139 from about December until January when he signed for the fund and property, relieving accused. He personally observed and checked the inventory and audit conducted by the board of officers and "concurred" in the board's findings. At first he had signed for approximately $6200 but $187.00 worth of stamped envelopes were subsequently found in a compartment which had been overlooked and after being satisfied that accused was entitled to credit for these envelopes he (witness) signed a new receipt to Captain Babcock for $6,407, which amount the witness asserted he was accountable for at the time of trial. Upon examination by the court Lieutenant Spezzacatena asserted that his original accountability was approximately $6225.00 (R 68-78). Staff Sergeant John J. Peregrin, Private Clyde E. Royer and Private First Class Jerry R. Runyan, clerks in APO 139 during 1947, each testified at length concerning his duties and the manner of handling funds entrusted to him. At the time of the inventory and audit on 27 December 1947 Peregrin had a fixed credit of $2,000.00 from accused. Royer and Runyan each had a credit of $500.00. They had each accounted for and surrendered the respective credit at the time of the inventory. On occasion Sergeant Peregrin had access to the safe where the accused kept the postal funds. The law member, after advising Sergeant Peregrin that he had absolute right to refuse to answer, asked the sergeant if he did at any time "take any money personally from the safe." Peregrin asserted that he did not consider the question as a "personal affront" and stated, "No, sir, I did not, sir" (R 79-90). Corporal Arthur R. Van Ordsdale testified that he assisted "Sgt" Runyan at APO 139 and that Runyan had given him a fixed credit of about $150.00. On either 27 or 28 December Captain Hutchison had checked his credit and it balanced out (R 114). It was stipulated by the parties that if Captain Warren S. Hutchison, FD, were present he would testify that he was a member of the board of officers which on 27 December 1947 inventoried the assets of APO 139, which was until that time under the supervision of accused, and

> "That total assets discovered were $7,747.62, of which $1,527.59 belonged to the Postmaster, New York, New York; the net balance belonging to APO 139 was $6,220.03. It was later

found, on 13 January 1948, by Lieutenant Spezzacatena, air mail envelopes totaling $186.06. The total balance then belonging to APO 139 was $6,406.09." (R 79, Pros Ex 19)

In view of the findings of not guilty with respect to Charge III and its specifications the evidence in respect thereto need not be summarized.

4. For the Defense

No witnesses were presented by the defense. After being advised of his rights the accused elected to make an unsworn statement as follows:

"ACCUSED: Yes, I am. -- I would like to make an unsworn statement, and I make it in the form of an unsworn statement not because it isn't the truth or I'm afraid to be questioned on it, but to eliminate possibly another day or two of this thing I've been through. I did not at any time take, steal, or embezzle one cent from APO 139. That's all." (R 158)

5. Comment

With respect to Charge I and its specification the proof shows that accused was entrusted with U.S. funds in the form of money and stamps in the sum of $10,000 as a fixed credit for the operation of APO No. 139. The fund was perpetually maintained either in stamps or money. As the stamps were sold the proceeds would be forwarded and a corresponding amount of stamps returned to maintain the fund. On 20 December 1947 accused certified that he had the fund of $10,000 plus a 50¢ overage. On about 27 December 1947 when he was hospitalized as a result of an accident an inventory and audit was made by a board of officers and it was finally determined by the board that about $6,406.00 of the fund was all that could be discovered. The board, considerate of accused's physical condition, went to the hospital where he was confined and reported their findings to him, giving him an opportunity to offer an explanation of the shortage before they made a final report. He refused counsel and chose to remain silent. He had a right to remain silent but there is a well-established legal presumption, fully justified by human experience, that one who has assumed the stewardship of another's property has embezzled such property if he does not and 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 to be resolved by the court (CM 320308, Harnack, 69 BR 323,329; CM 262750, Splain, 4 BR (ETO) 197, 204).

The report of the board of officers was admitted in evidence with the express consent of the accused. The testimony of witnesses other than

members of the board corroborate the board's findings, although there appear to be minor discrepancies in the exact amount of the shortage. The discrepancies can be attributed in part to the fact that some of the witnesses testified from memory, giving only approximate figures. But a shortage in excess of $3500.00 of the funds entrusted to the accused was conclusively established. Neither accused's plea of not guilty nor his unsworn denial are sufficient upon the evidence presented to overcome the presumption of guilt arising from the circumstances proven. The court was legally justified in finding accused guilty of embezzlement as alleged, in which finding we concur.

6. Records of the Department of the Army show that accused is 34 years old and married. He was a junior assistant purser in the U.S. Coast Guard prior to January 1945 when he enlisted as a private in the Army of the United States. In January 1947 accused was commissioned second lieutenant, AUS. His adjectival efficiency ratings are "Excellent."

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

Charles L. Gilbert, Judge Advocate

James H. Booth, Judge Advocate

Harley A. Lanning, Judge Advocate

CSJAGK - CM 332252 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 1 DEC 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward L. Barrett (O-2032900), AGD, Detachment of Patients, 385th Station Hospital.

2. Upon trial by general court-martial this officer was found guilty of embezzlement in Germany by converting to his own use during the period 1 November to 27 December 1947, sums of money and postage stamps, property of the United States, of value in excess of $50.00, in violation of Article of War 93 (Charge I and its spec.); and of committing and attempting to commit acts of indecency and immorality including sodomy per os and per anum with certain named male German nationals in violation of Article of War 95 (Charge II and its spec.). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A 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.

Accused was the postal officer and Class B Agent Finance Officer of the 139th Army Postal Unit located at Bamberg, Germany. As Class B Agent Finance Officer there was entrusted to him $10,000.00 in money and stamps, property of the United States, as a fixed credit for the operation of his postal unit. On 20 December 1947 he certified that he had in his possession the $10,000 fund plus a 50¢ overage. On or about 27 December 1947 he was involved in an automobile accident and hospitalized. An officer was appointed to succeed him as postal officer and agent finance officer. On the same day (27 Dec) a board of officers was convened at the postal unit to inquire into accused's accounts. The board made a complete inventory and audit, the result of which indicated that accused was short $3,779.97 in his accounts. The board reconvened at the 387th General Hospital, Stuttgart, Germany, where accused was then convalescing, informed him of its findings, gave him opportunity to have counsel and warned him of his rights concerning self-incrimination. Accused rejected counsel and elected to remain silent. The board thereupon made a final report, finding that there existed a shortage in accused's accounts in the aforesaid amount. By agreement of the parties, it was stipulated that if Captain Warren S. Hutchison, FD, the president of the

board of officers, were present he would testify to certain facts and figures which would show that the shortage found was subject to a credit of $186.06, which represented stamped air mail envelopes found in a compartment after the board had made its original report. The actual shortage was thereby shown to be $3,593.91.

The accused made an unsworn statement in which he denied embezzling any Government funds.

Accused pleaded guilty to Charge II and its specification charging immorality and indecency and the defense requested that no witnesses be called to testify in respect thereto. By agreement there was received in evidence, as Prosecution Exhibits 1 to 8 inclusive, sworn statements of seven German male youths and one American soldier that on numerous occasions between June and December 1947 accused engaged in various forms of sexual perversion, including sodomy per os and per anum with named Germans. He also made gifts of money, jewelry and food to the Germans who were his partners in unnatural coition.

By agreement there was received in evidence a report of psychiatric examination of the accused made by a medical officer. This report states that in the opinion of the reporting officer the accused is legally sane but that he has a history of homosexual behavior extending from the time of his youth.

4. Department of the Army records show that accused is 34 years old and married. He was a junior assistant purser in the U.S. Coast Guard prior to January 1945 when he enlisted as a private in the Army of the United States. In January 1947 accused was commissioned second lieutenant, AUS. His adjectival efficiency ratings are "Excellent."

5. I recommend that the sentence be confirmed and carried into execution and that an appropriate U.S. penitentiary be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 197, 14 Dec 1948).

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

18 AUG 1948

JAGH CM 332295

UNITED STATES	)	2D ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 2 July 1948. Dishonorable discharge (suspended) and confinement for one and one-half ($1\frac{1}{2}$) years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.
Technician Fifth Grade CHARLES E. ELKINS, RA 38580944, Enlisted Detachment, 4005th Area Service Unit, Station Complement, Camp Hood, Texas.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Technician Fifth Grade Charles E. Elkins, Enlisted Detachment, 4005 Area Service Unit, Station Complement, Camp Hood, Texas, (formerly of Headquarters and Headquarters Battery, 78th Armored Field Artillery Battalion, Camp Hood, Texas), did, at Camp Hood, Texas, on or about 6 December 1946, desert the service of the United States and did remain in desertion until he returned to military control at Camp Hood, Texas, on or about 21 May 1948.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one and one-half years. No evidence of previous convictions was considered. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The

result of trial was published in General Court-Martial Orders No. 58, Headquarters 2d Armored Division, Camp Hood, Texas, 30 July 1948.

3. The record of trial shows that Captain James H. Davis, Corps of Military Police, who signed and swore to the Charge and Specification, was the accuser (Par 60, MCM 1928), and participated in the trial as a member of the court. Article of War 8 provides in part that ". . . . no officer shall be eligible to sit as a member of such court when he is the accuser . . ." Accordingly, the trial court was not legally constituted and the proceedings are null and void ab initio (Sec 365(7), Dig Ops JAG 1912-1940; CM 216028, Nix, 11 BR 87; CM 220693, Dye, 13 BR 53; CM 232797, Coombs, 19 BR 211; CM 265840, Brown, 43 BR 97).

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

[illegible], Judge Advocate

C. O. Wolfe, Judge Advocate

J. W. Lynch, Judge Advocate

JAGH CM 332295 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Technician Fifth Grade Charles E. Elkins, RA 38580944, Enlisted Detachment, 4005th Area Service Unit, Station Complement, Camp Hood, Texas.

2. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated, that the accused be released from the confinement imposed by the sentence in this case, and that all rights, privileges, and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 160, 27 Aug 1948).

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

CSJAGH CM 332388

20 DECEMBER 1948

UNITED STATES v. Lieutenant Colonel WILLIAM E. RABB, O-172393, 9201 Technical Service Unit-Transportation Corps Ships' Complement Detachment.	NEW YORK PORT OF EMBARKATION Trial by G.C.M., convened at Brooklyn, New York, 26 May, 2, 14,16,17,18,21,22,23 June 1948. Dismissal and forfeiture of four hundred ($400.00) dollars of his pay.

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 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. (Finding of not guilty)

Specification 1: (Finding of not guilty).

Specification 2: In that Lieutenant Colonel William E. Rabb, 9201 Technical Service Unit, Transportation Corps Ship's Complement Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting as Transport Commander of USAT General Simon B. Buckner, at sea, en route from New York, New York to Bremerhaven, Germany, on or about 20 February 1948, wrongfully say to Technician Fourth Grade Helen F. Gorecki, a member of the ship's staff, to wit: "He was hoping that I would come up to see him," "that he had his eye on me, that I reminded him of his old girl and would I please visit with him some time", or words to that effect. (Nolle Prosequi)

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

Specification 1: In that Lieutenant Colonel William E. Rabb, Transportation Corps, 9201 Technical Service Unit, Transportation Corps, Ship's Complement Detachment, New York Port of

Embarkation, Brooklyn, New York, did, while acting as Transport Commander of USAT Simon B. Buckner, at sea, en route from New York, New York, to Bremerhaven, Germany, on or about 8 March 1948, without official business, wrongfully enter the cabin occupied by Mrs. Mabel L. McCurdy, a dependent passenger, in violation of Paragraph 301.01 c (8) (b), Army Transport Manual, Headquarters, New York Port of Embarkation, Brooklyn, New York, dated 1 June 1947.

Specification 2: In that Lieutenant Colonel William E. Rabb, Transportation Corps, 9201 Technical Service Unit, Transportation Corps, Ship's Complement Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting as Transport Commander of USAT General Simon B. Buckner, at sea, en route from New York, New York to Bremerhaven, Germany, and from Bremerhaven, Germany to New York, New York, wrongfully fail and neglect, as Transport Commander, to make ship's inspections as required by Paragraph 303.01, Army Transport Manual, Headquarters, New York Port of Embarkation, Brooklyn, New York, dated 1 June 1947, and Paragraph 12, Army Regulations 55-435.

Specification 3: In that Lieutenant Colonel William E. Rabb, Transportation Corps, 9201 Technical Service Unit, Transportation Corps, Ship's Complement Detachment, New York Port of Embarkation, Brooklyn, New York, did, while acting as Transport Commander of USAT General Simon B. Buckner, at sea, en route from New York, New York, to Bremerhaven, Germany, between on or about 4 March 1948 and on or about 13 March 1948, and return from Bremerhaven, Germany, to New York, New York, on or about 17 March 1948 to 25 March, 1948, wrongfully fail and neglect to stop fraternizing between female passengers and crew members, male passengers, and/or permanent staff, in violation of Paragraphs 301.01 c (8) and 211.15 a, Army Transport Manual, Headquarters, New York Port of Embarkation, Brooklyn, New York, dated 1 June 1947.

Specification 4: (Disapproved by the reviewing authority).

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

Specification 1: In that Lieutenant Colonel William E. Rabb, Transportation Corps, 9201 Technical Service Unit, Transportation Corps, Ships' Complement Detachment, New York Port of Embarkation, Brooklyn, New York, did, while married and acting as Transport Commander of USAT General Simon B.

Buckner, at sea, en route from New York, New York to Bremerhaven, Germany, on or about 7 March 1948, wrongfully say to Technician Fourth Grade Helen F. Gorecki, a member of the ship's staff, to wit: "I was hoping that you would come to see me", "that I've had my eyes on you, that you remind me of my old girl and would you please visit with me sometime", or words to that effect.

Specifications 2, 3, and 5: (Finding of not guilty).

Specification 4: (Motion for finding of not guilty granted).

Specification 6: (Motion to strike sustained).

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

Specification 1: (Finding of not guilty).

Specification 2: (Motion to strike granted).

He pleaded not guilty to all Charges and Specifications thereunder. He was found not guilty of Specification 1 of Charge I and Charge I, Specifications 2, 3, 4 and 5 of Additional Charge I; not guilty of Specification 1 of Additional Charge II and Charge II; guilty of Specifications 1, 2, 3, and 4 of Charge II and Charge II; and guilty of Specification 1 of Additional Charge I, and of Additional Charge I "guilty," except the words "95th Article of War," substituting therefor respectively the words "96th Article of War;" of the excepted words "not guilty," of the substituted words "guilty." No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit four hundred dollars of his pay. The reviewing authority disapproved the finding of guilty of Specification 4, Charge II, 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 pertinent to the findings of guilty is summarized as follows:

Effective 15 February 1948, the accused, who was assigned to the San Francisco Port of Embarkation, was relieved from his assignment as Transport Commander on the USAT Admiral W. S. Simms with the concurrence of the Commanding General, San Francisco Port of Embarkation, and placed on detached service on board the USAT General Simon B. Buckner, (a

transport under the jurisdiction of the New York Port of Embarkation) as Transport Commander, pursuant to Par 10, Special Orders 27, Headquarters New York Port of Embarkation, Brooklyn, New York, dated 5 February 1948 (R 226, Pros Ex 3). On 9 February 1948 he proceeded to Newport News, Virginia, on temporary duty status to participate in the trial run of the USAT Simon B. Buckner (R 321).

During all the times mentioned in the Specifications of the Charges, the accused was a married man (R 309).

Accused, as Transport Commander, on the USAT Simon B. Buckner, made an outbound voyage from New York to Bremerhaven, commencing 4 March 1948 and ending 13 March 1948 (R 240,253). The accused also acted as Transport Commander on the USAT Simon B. Buckner on the return voyage from Bremerhaven to New York between 17 March and 25 March 1948 (R 194,266).

Specification 1, Charge II.

Mrs. Mabel L. McCurdy, housewife, (R 297) was a dependent passenger on the USAT Buckner on the voyage from New York to Bremerhaven (R 298). She occupied Cabin 134 on the Promenade Deck. The cabin had only one door which was locked by turning a night latch which caused a bar to slide and fasten the door. The lock had a chain latch at the top, the use of which was restricted. All passengers were requested to avoid the use of the chain latch for safety reasons (R 300). During this voyage the accused frequently made use of her cabin to point out to other persons safety regulations for children, ventilation and space accommodations. During these times he conversed briefly with Mrs. McCurdy (R 301). Accused had other conversations with Mrs. McCurdy with respect to miscellaneous matters, such as the time of her attendance at messes. According to Mrs. McCurdy, "about the 5th or 6th day out on our voyage at about 2 o'clock in the morning, my cabin door was opened, a light flashed on and by the time I raised up the light flashed off, but all three of my children awakened, and started screaming and I mean screaming. I could see the outline of a man. He stood inside my cabin with the door closed. It seemed to me three or four minutes. The children kept screaming. I was scared and finally snapped on my light. I then saw that the man in my cabin was the accused, Lieutenant Colonel William E. Rabb. I said 'You had better get out.' He said 'I am sorry, terribly sorry, I will see you and apologize in the morning.' He left the room. I tried to quiet my children, ages six months, 18 months, and 3 and one-half years. I went to the nurse to get medicine to quiet the 18 months old child" (R 302).

First Lieutenant Jean Barbara Koziol, ANC, the night nurse in the Ship's Hospital, became acquainted with Mrs. McCurdy at that time and had a conversation with her (R 308).

Paragraph 301.01 c (8) (b), Army Transport Manual, Headquarters New York Port of Embarkation, Brooklyn, New York, as changed by Change No. 118, 9 September 1947, provides (R 52,53,p.10, certificate of correction):

"(8) Positive non-fraternization between male and female passengers, Army Staff members, and/or crew members, licensed or unlicensed will be enforced. A twenty-four (24) hour guard to all entrances to passenger quarters will be posted if necessary.

(a) Females will not enter the cabins of male personnel. This applies to and includes all male personnel on the ship. (This directive will not be construed as prohibiting formal entertainment of passengers by the Ship's Master in his office.)

(b) Male passengers will not enter the cabins of female passengers, apart from strictly official business.

(c) The rules above enunciated under sub-paragraphs (a) and (b), patently, cannot and do not apply to family units being accommodated aboard ships as family units.

(d) Any instances of fraternization by crew members noted by the Transport Commander will be reported to the Master of the vessel; a duplicate report being submitted to the Chief, Ships' Complement Section, indicating name, number and position of employment of offender, and a report of disciplinary action taken by the Master.

(e) Any instances of fraternization by members of the permanent party will be acted upon aboard the ship; a report being submitted to Chief, Ships' Complement Section, indicating name, rank, ASN, and assignment of the offender, together with a report of the circumstances and disciplinary action taken. If courts-martial of an officer is indicated, the charge sheets and all necessary documents will be prepared at the time and submitted to Chief, Ships' Complement Section, Water Division, N.Y.P.E., at the termination of the voyage."

Specification 2, Charge II.

The Transport Commander, before sailing on the outbound voyage to Bremerhaven, was oriented with regard to the provisions of Transport Manual by representatives of the Water Division of the New York Port of

Embarkation, Brooklyn, New York (R 230). The ship carried first class passengers, as well as troop passengers.

First Lieutenant Marguerite Brierley, Assistant Transport Commander, had a conversation with the accused prior to the outbound voyage to Bremerhaven concerning the inspection of the first class passenger cabins. He stated that there would be no inspections of the first class cabins; that he did not want the passengers to be inconvenienced by any inspections; and that any information would be brought to him by the stewardesses (R 236,240,247). Therefore, no inspections of the first class cabins were made by the Assistant Transport Commander during the voyage (R 254); and she knew of none having been made (R 277).

The Transport Surgeon on the voyage was Milton Shoob, physician in civilian life (R 173). Lieutenant Dereamer was Chief Nurse and there were five enlisted men and four WACs in the ship's hospital (R 174). Due to the very heavy sick call, only two ten o'clock inspections were attended by the Transport Surgeon (R 175,176); however, the ship's mess was inspected at least once a day by the Transport Surgeon (R 176). The Transport Surgeon attended at least two ten o'clock inspections (R 177).

Colonel Clifford B. Cole, FA, was the Senior Unit Commander on the return voyage of the USAT Simon B. Buckner to New York (R 198). Colonel Cole was oriented by accused in respect to his duties and was informed that his duties pertained solely to that of the troops and that the Transport Commander would inspect the first class cabin passengers (R 199). Colonel Cole spoke to the Transport Commander about the composition of the inspection party and the route to be followed. The subject was also discussed with Chief Mate of the vessel, Mr. F. J. Codoner (R 190). Accused and Mr. Codoner were not in agreement as to the composition of the party; the areas and route to be followed in the inspection (R 191). Accused stated that he desired to follow the New York Port of Embarkation instructions in the matter and that the inspection of the galleys and pantries in public places should follow the troop inspection as the Senior Unit Commander was only concerned with the troop inspection and it was desirable to complete the troop area inspection so that the troops should go below (R 192). In this matter, neither the Senior Unit Commander nor the Chief Officer nor the accused were in accord. On the first day out accused attended the ten o'clock formal inspection where the Senior Unit Commander and his staff were present (R 202). The inspection lasted about an hour and a half and proceeded through troop areas, latrines, and galleys (R 182). On Saturday, 20 March, a further ten o'clock inspection was held at which Colonel Rabb was not present. Captain Lioi represented the Transport Commander. Mr. Codoner, the Chief Officer, was also present (R 203). This inspection proceeded through the same areas except that at eleven o'clock Captain Lioi, Post Exchange Officer, dropped out of the party and proceeded on his other

duty (R 108). On the following day no inspection was had as it was Sunday. On Monday, the 22nd of March, Captain Lioi represented the Transport Commander. Mr. Codoner and Colonel Cole were present (R 204). The inspection proceeded as on the previous day. The following day both Captain Lioi and Sergeant Malone of the Transport Commander's Office were present (R 206). The inspection on the 24th of March was similar in all respects to the one on the previous day. The ship docked on the 25th of March in New York (R 206). The troop inspections were not made to the satisfaction of the Senior Unit Commander (R 207). At the first meeting Colonel Cole made a protest to the Transport Commander concerning the same but made no further protest after that date (R 207). When all the formal inspections commenced, the Transport Commander or a representative of his office was present (R 218). On several occasions the Transport Commander or his representative dropped out of the inspecting party before the inspection was finished (R 188). The first class cabins were not inspected by either Colonel Cole or the Chief Officer (R 189).

Transport Manual of New York Port of Embarkation, as changed by Change No. 57, dated 13 March 1947, provided by Par 303:01 as follows:

> "Transport Commander and Senior Unit Commander and the Transport Surgeon and the Master or his representative will inspect all troop and passenger areas, including troop and passenger galleys each morning at 1000 hours except Sundays." (R 193)

Paragraph 12, Army Regulations 55-435, dated 1 September 1942, provides:

> "12. Transport inspection.--a. The commanding officer of troops or his representative, accompanied by the master or his representative, the officer of the day, the police officer, and transport surgeon, will inspect all troop spaces, including troop galleys, etc., each morning at 10 o'clock except Sunday.
>
> b. All officers making inspections on board ship will carefully observe any damage to or loss or destruction of any of the ship's fittings or property which may have been caused by individuals, and will make immediate report thereof in writing to the commanding officer of troops, who will thereupon take action, as prescribed in Army Regulations, for fixing the responsibility and securing restitution to the Government for such damage, loss, or destruction as has been due to carelessness, wilfulness, or neglect. Copies of each report and action thereon will be furnished the master.
>
> c. Orders will be issued by the commanding officer of troops requiring all staterooms to be vacated daily for cleaning and

inspection at the fixed hour. The police officer and company commanders will cause a cleaning to be given the areas under their control prior to taps. They will make an after taps inspection to insure the thorough cleanliness of their respective areas, and that adequate ventilation is provided in troop quarters.

d. When practicable, the troop quarters are to be cleared of all persons except those detailed to clean them, daily, from 8 a.m. until morning inspection is completed."

Specification 3, Charge II.

The ship's passenger list, both outbound and inbound, included troops and dependents. Field grade officers were berthed with their wives in first class cabins on A Deck (R 248 and 198). The wives of other officers and of enlisted men were berthed in groups in cabins set aside solely for female dependents. To restrict soldiers in certain areas a guard was established (R 200 and 369). No male personnel without a pass were permitted in the female dependents' area (R 219). Passes were given out to all husbands by roster and at the same time they were warned to observe visiting hours' limitations, 1000 hours to 2200 hours, to leave doors open and not to annoy other female passengers (R 219,371; Def Ex 9).

During inspection trips by Technician Fourth Grade Helen F. Gorecki, who was required to walk through the various passageways and stairwells of the vessel during the day and up until about 2230 hours of night, she noticed the husbands in the room of their wives sitting on beds with them (R 82,96,97). During such times there were other women passengers present in the cabin (R 98).

Sergeant Lorraine Smith, 9201 Technical Service Unit-Transportation Corps, Ships' Complement Detachment, also saw men in the cabins occupied by female dependents (R 153). The doors were open and other women were in the cabin at the same time (R 154). On the return voyage there were quite a few instances when the same conditions prevailed (R 158); however, she believed that all of the men in these cabins were visiting their wives (R 158).

First Lieutenant Marguerite Brierley, the Assistant Transport Commander, also saw males in dependents' quarters, sitting and talking or lying in beds while other females were present (R 248). These matters were reported to the Transport Commander, on the voyage over to Bremerhaven, who said that he did not wish to keep males and females apart on the ship (R 249). On the return voyage, inbound to New York, the accused restated his policy not to disturb first class passengers (R 255). During this voyage a passenger in Cabin 237, in which there was berthed a woman and a fourteen year old daughter, another woman with a five year old child,

and another woman and her eighteen month old infant, stated that the husband of the last mentioned woman had "stayed all night in that cabin" (R 256). This was discussed also with the Transport Commander and he said in reply "I am surprised we do not have more of them staying" (R 256). Miss Lightfoot of Cabin 260 complained also that the husband of one of her eight cabin mates came into the cabin at 8:30 in the morning, shaved and remained there all day. She had no privacy and the visitor generally came in before she got out of bed (R 257). Lieutenant Brierley stated on cross-examination that the women lying in bed were there because of seasickness in all probability (R 268), and that during the times that the men were in the cabins the doors were always open (R 263). The Senior Unit Commander made an announcement on the loud speaker about the third day out of Bremerhaven (R 311) to the effect that there would be a curfew for husbands. Prior to the announcement there had been no limit to the length of the visit of the respective husband (R 284).

Par 211.15, Army Transport Manual, Headquarters, New York Port of Embarkation, dated 1 June 1947, is as follows:

> "211.15 ACCOMMODATIONS, AREAS, VISITATION OR REQUESTING OF QUARTERS BY UNAUTHORIZED PERSONNEL, FRATERNIZING.- a. The Transport Commander will stop all fraternizing between female passengers and crew members, male passengers, and/or permanent staff; posting a twenty-four (24) hour guard to all entrances to passenger quarters if necessary.
>
> b. The Transport Commander will orient all permanent party personnel under his command as to courtesy toward passengers and will draw a line of demarkation where female courtesy ceases and fraternization begins.
>
> * * *
>
> d. The Transport Commander and the Master will prohibit invitations from crew members to passengers, and vice versa, to visit their cabin staterooms, fo'castles, or other assigned areas or quarters, or the acceptance of such invitations, for any purpose what-so-ever. Passengers found in such quarters or areas will be removed by both the Master and/or the Transport Commander. Licensed and unlicensed crew members' areas will be 'OFF LIMITS' to all traveling personnel, regardless of branch of service or category. (See par. 301.01 c (8) for regulations regarding formal entertaining by the Master.) * * *
>
> i. The Master will cause notices, 'Privacy of Passengers' to be posted in conspicuous locations throughout the ship and will be responsible for the enforcement of the regulation in its entirety. See par. 110.07, this manual, for the cited U. S. Coast Guard Regulations, stated in full. The Transport Commander and the Master will take vigorous action to insure the unimpeachable conduct of

military personnel and crew members toward female passengers. The undesirable potentialities of the slightest misbehavior in this respect are obvious. Only the strictest discipline can maintain the necessary degree of propriety. Both the Master and the Transport Commander will be responsible for maintaining of such discipline. Strict enforcement of existing Coast Guard Regulations, maritime laws, Army Regulations, port directives, and Ship's Standing Regulations, with full punishment for the least infraction is directed. The necessity for exemplary conduct on the part of Army and USAT personnel on board cannot be too strongly stressed." (p.7,8, Certificate of correction)

Par 301.01 c (8) as changed by Change No. 118, dated 9 September 1947 is as follows:

"(8) Positive non-fraternization between male and female passengers, Army Staff members, and/or crew members, licensed or unlicensed will be enforced. A twenty-four (24) hour guard to all entrances to passenger quarters will be posted if necessary.

* * *

(b) Male passengers will not enter the cabins of female passengers, apart from strictly official business.

(c) The rules above enunciated under sub-paragraphs (a) and (b), patently, cannot and do not apply to family units being accommodated aboard ships as family units." (R 52,53,96; p.10, Certificate of correction)

Specification 1, Additional Charge I.

While at sea, and on or about 7 March 1948 (R 85) during the outbound voyage to Bremerhaven, Germany, Technician Fourth Grade Helen F. Gorecki, a member of the WAC Detachment 31A, Fort Hamilton, Brooklyn, New York, assigned to the Buckner as an assistant in the formula room (R 82), came to accused with a complaint about a "misunderstanding with the Medical First Sergeant in the hospital." After discussion of this matter he said "he was glad that I came up to see him, and he had his eye on me for a long time, and wished I would come up sooner, he would like to get together with me and I reminded him of his old sweetie" etc. (R 86). In explanation of the words, etc., she further stated; "He asked me to come up and visit him of an evening some time, we would have a talk about our likes and dislikes and have a lot of fun some evening" (R 87). Sergeant Gorecki said nothing to the accused but just walked out of the room (R 87). At a further conversation with Colonel Rabb in the formula room, about eleven o'clock at night, he said "he wanted

to know what I was doing in the formula room at that hour." "I explained to him and he told me to come up to visit with him" (R 90). "I replied that I had too much to take care of and that I was going to fix my girl friend's hair and it was awfully late that night." He said "Well I'll be waiting for you" and he also said that "the door would be shut but it's o.k. for me to come in and to make sure that no one is in the passageway at the time" (R 90). He then left the formula room (R 90). She returned to the dispensary and talked to one of the WACs for a while (R 91). Later while returning to her own room accompanied by WAC Sergeant Smith, she passed Colonel Rabb's office. The door was open and he motioned for them to come in (R 92).

b. For the defense.

Accused, having been advised of his rights by the law member and by defense counsel, testified, in substance, as follows (R 485):

He was born 16 February 1893, at Point, Texas. He attended Texas Military Academy, Terrell, Texas and Weatherford College, where he remained one year. He also attended Brittons Training School at Cisco, Texas, for one year and Alexander Collegiate Institute, at Jacksonville, Texas. He graduated from Cumberland University Law School, at Lebanon, Tennessee, and received a degree of LLB (R 486). He was shortly thereafter admitted to the Texas Bar. In 1916 he was elected a county judge of Raines County, Texas. In 1917 he resigned to enter the military service as a private at Kelley Field, Texas, and served about one year. In July 1918, he married at San Antonio, Texas. He then attended Officers Training School at Camp Zachary Taylor, Kentucky, in September, but was discharged on 30 November 1918 due to the end of the war, as a Staff Sergeant (R 486). From 1919 to 1924, he joined his father-in-law in the wholesale grocery business in Atlanta, Texas. While so employed, he became principal of the high school, teacher of science and football coach. In 1930 he re-entered the practice of law in Atlanta, Texas. In 1921 he organized a National Guard Company and became Captain. He remained Captain for nine and a half years and then took a voluntary reduction to First Lieutenant, becoming Commanding Officer of Battalion Headquarters Company. He remained in that capacity about ten years. When called to Federal service in the fall of 1940 he had been nineteen and a half years as a company grade officer (R 488). He attended a thirteen-week course at the Infantry School, Fort Benning, Georgia. He returned to his regiment, 144th Infantry, 36th Division, and was promoted to Captain (R 488). He was assigned as instructor for infantry tactics and declared over-age in grade. He was at home on terminal leave when the Pearl Harbor disaster was announced. He was ordered back to active duty, sent to San Antonio, Texas, to open a censorship station. After six months, he went to the New Orleans Port of Embarkation as instructor, then to Indiantown Gap, Pennsylvania. He was promoted to Major in September 1942. In November 1942, he served at the Training Doctrine Desk at the Pentagon Building, Washington, D.C., again at New Orleans Port of Embarkation and at the Los Angeles Port

of Embarkation (R 489). In March 1944 he was assigned to the 511th Port Battalion as Commander. He took the battalion to England and to Cherbourg, France, in July 1944. In January 1945 while at Lucky Strike Camp near Cherbourg, he was promoted to Lieutenant Colonel. He then moved to Marseilles for redeployment to the Pacific. As commander of the 521st Battalion he served at Manila under Major General Plank (R 490). In December 1945, he flew home to attend his daughter's wedding and went on leave. He then reported to the San Francisco Port of Embarkation and was assigned as Transport Commander of the USAT Admiral Simms, on which he served for over seventeen months. The voyage to Bremerhaven was the only one made on the USAT Buckner. His efficiency ratings were all superior. On 23 July 1947, he was made a full Colonel in the Reserve (R 491). After the return of the USAT Buckner from Bremerhaven, the Superintendent of the Water Division relieved him from duty, for "certain derelictions" and stated that he was going to be court-martialed (R 492). He was also directed to reply to a letter concerning derelictions (which is spread on the minutes, R 493), which he did, making a general denial of same (R 494). In a conference with Colonel Mott, he stated that he believed that he violated no law whatever and "if there has been any small dereliction of duty it was not known to me and could be corrected across your desk" (R 494).

As to Technician Fourth Grade Helen F. Gorecki, some time in February she came to his office with a complaint about the Medical Sergeant Major. He said he would talk about the matter to the Transport Surgeon. He saw her again several days later in the formula room. He was outside of a low dutch door. He said that she did not come back for the report, that he had expected her, that apparently nothing could be done about the matter (R 499). He also said that if she had any complaints to bring them to him; however, he had no conversation with her that he "had his eyes" on her or that she "reminded him of his girl friend" or other alleged statements (R 500).

Mrs. Mabel L. McCurdy was a passenger on the outbound voyage to Bremerhaven. She had three small children. She came aboard about 4 March 1948. She came to the office several times. The calls were about matters of ventilation, heat and plumbing. On one occasion she called and there were two enlisted men in the office. She did not register her complaint. He said he would call on her immediately but it was midnight before he got around to it. He knocked on her cabin. She came to the door and opened it. The children began to cry. She became incensed and he apologized (R 507). The next day she talked to him and the incident appeared to be forgotten. He assisted her subsequently with her children. They appeared to be on a friendly basis (R 508).

Since World War I he has suffered from seasickness. The Air Corps transferred him as a consequence of an equilibrium test. He was seasick

on several occasions on this voyage. Seasick pills nauseate him. Some relief is obtained by lying on a bed. On several occasions an acute seasickness prevented him from performing his duty (R 509).

In regard to inspections: On the outbound voyage, Colonel Connor, the Commanding Officer of the Troops, was properly oriented at Camp Kilmer, New Jersey. He came aboard with the advance party a day before sailing. He had the situation well in hand and was thoroughly indoctrinated as to his duties (R 510). About two hours before the ship sailed, Colonel Lastayo conducted a further orientation with the master and senior unit commander. Inspections on the outbound voyage were conducted in a very fine manner and in accordance with the rules of the New York Port of Embarkation. On the return voyage, however, there was no orientation of the Senior Unit Commander prior to his embarkation. Colonel Cole came aboard the ship a day after the advance party had boarded. He was uninformed by the Port of his assignment as Senior Unit Commander and also uninstructed. The Port sent a copy of his orders and they were delivered by the Sergeant Major after he had come aboard. Just prior to lunch time he came to the Transport Commander's office and asked to be oriented and asked to learn the names of the staff. As a passenger orientation had just been completed, it was suggested that he and his staff be present the following day and receive a complete orientation at that time. After lunch, an effort was made to see him, but it was not until that evening that he returned and asked to be shown the location of the guard posts (R 511). The next morning Colonel Cole and his staff were properly oriented after the inspection. Questions were asked and all parties seemed to understand the rules and regulations. Colonel Cole did not complain at that time that he did not receive sufficient cooperation. The first inspection was attended by Colonel Cole, the Chief Officer, and all of the ship's staff, which included about twenty persons. On the next day Mr. Codoner, the Chief Officer, insisted on some changes. He desired to have a buck slip made when repairs were requested. He desired to omit making the inspection himself, and he desired to have the inspection party meet at a different place. These matters were talked over with him and the New York Port of Embarkation regulations read to him in pertinent sections. On the second inspection about twenty persons comprised the inspection party. Mr. Codoner wanted to inspect the kitchen refrigerators and mess halls first. Colonel Cole wanted to inspect the troops so that he could permit them to go below deck. The Transport Surgeon desired to return to his sick call as soon as possible. The inspections were lengthy and included all of the compartments available to troops, such as mess halls, galleys, refrigerators, theaters, and all public places. Inspections, however, did not include the first class cabins. The regulations in regard to inspection of these cabins were not fully understood. It was realized thatit was not required that the whole inspecting party inspect these cabins. It seemed proper

that the Steward's Department should keep these cabins properly cleaned. The Steward's Department did not wholly cooperate. They refused to clean the chapel. This had to be cleaned by volunteers. They refused to remove certain crayola markings on the bulkhead in the vicinity of the chapel and in the ladies' room. It was necessary for these to be removed by the Transport Commander himself, as he could find no one who was willing to do the work (R 513). He attended a five day class for Transport Commanders at San Francisco and, due to this training and understanding, he was in error in the inspection of the first class cabins; but at all times he knew that he was operating according to the New York Port of Embarkation rules and he did the best he could to follow the requirements and so stated to Major Looper before leaving on the long trip (R 514). This was his first trip operating under the New York Port of Embarkation rules and he "accidentally fell into the wrong procedure" (R 514).

The defense of Specification 2 of Charge II is, in substance, that there was no objection to the inspections on the outbound voyage; that in regard to the inbound voyage, either he or a number of his staff inspected the enlisted men's areas and public places every day. The ten o'clock inspection did not include an inspection of the first class cabins. As to this, he himself inspected "various parts of the cabin areas every day, spot-checked" (R 515). In all the official inspections a representative from the Transport Commander's Office was present (R 516).

In regard to fraternization, he interpreted the word to require illicit relationship (R 516) as meant during the war. During orientation talks, he took notes. His notes show no intermingling of unmarried people. This policy was openly discussed on the ship (R 516).

Cross-examination: He signed a certificate that he had read the Transport Manual (R 519). He read the section of the Transport Manual concerning inspections (R 521). He did not notify the first class passengers that their quarters would be inspected (R 522). He did not make a statement to Technician Fourth Grade Helen F. Gorecki, that "I was hoping that you would come to see me" etc, as stated, but he did say that he was "glad she came to see me" and that "her eyes reminded me of an old girl friend of mine" (R 530). He positively did not say "when you get through come and see me" (R 531), nor "I waited for you last night" (R 533). In regard to fraternization, he intended to follow carefully the New York Port of Embarkation Book, but that "was one of the errors I made" (R 535). In regard to the conversation with Lieutenant Brierley concerning inspections of first class cabin space, he did say that he "didn't want any inspections made of the female cabin quarters" but this inspection referred to the ten o'clock formal inspection (R 537). He did not feel it was necessary for the Senior Unit Commander to inspect

the first class cabin areas (R 537). In regard to Lieutenant Brierley's statement concerning the use of stewardesses for inspection, he was not correctly quoted. He used the stewardess to report the desires or necessities of the first class cabin passengers (R 537). He had a conversation with Miss Lightfoot during which Lieutenant Brierley was present, in which she complained that a husband was shaving in the cabin, but took corrective action in the matter and Miss Lightfoot was satisfied (R 539). In regard to Mrs. Collins' complaint, that a husband slept in the cabin all night, that was true; it was a "G.I. 369" who broke the rules. Corrective action was taken and the complainant expressed satisfaction with the manner in which the violation was handled (R 541). After the curfew, he "spot-checked" to see that the rule was observed (R 541). Lieutenant Brierley did not discuss with him the matter of men being dressed or partly dressed or lying in bed, in company with a female (R 542). In regard to the McCurdy incident, the time of the call was a little before midnight. He knocked first and she came to the door (R 542). He did not go into the room. He did apologize for disturbing her at that late hour (R 543).

Redirect examination: Colonel Mott did not say in his briefing on fraternization that all male personnel, even husbands of wives, were to be excluded (R 547). The only instances of failure of a soldier to observe the curfew which were reported to him were those reported by Mrs. Collins and Miss Lightfoot (R 547).

Recross-examination: He did orient Colonel Cole in regard to his duties but it was on the following day (R 548). He had no conversation with the Provost Marshal wherein he said that the first class cabins were outside of his jurisdiction (R 549).

Examination by the court: He removed crayola markings from the bulkheads because the Steward's Department had refused to remove them (R 549). The married troop class passengers could use the lounges (R 549). The trouble with the Steward's Department arose out of the requirement that light lunches at night would be served. He required that that policy be carried out (R 550). Mr. Zetting refused to give light lunches until required by the Master (R 552). Thereafter, he refused to cooperate (R 550). They refused to clean up the auditorium and man the elevator (R 551). The only trouble with the Deck Department was that Mr. Codoner was opposed to going on the inspections (R 551). He did not use soldiers to clean up first class cabin areas or prepare night meals for the cabin passengers as it was contrary to the "schooling in San Francisco" (R 553).

4. Comment.

Charges I and II and the specifications thereunder were preferred on 12 April 1948 and referred to trial on 23 April 1948 (R 31) and were

served on accused on the same date (R 40). The court-martial initially convened on 26 May 1948 and both accused and prosecution duly exercised their rights of challenge. The members of the court and personnel of the prosecution were then sworn (R 7). Thereupon the court adjourned to 2 June 1948 (R 7,18,19). On this latter date, due to illness of accused, the court again adjourned to meet at the call of the president (R 19,23). The court reconvened on 14 June 1948 at which time Lieutenant Colonel Matthewson, a member of the court, formerly absent, assumed his seat as a member of the court. He stated that he had read the transcript of the previous proceedings. He was then sworn (R 24). Defense objected to him being added as a member (R 24) but stated that he did not desire to challenge him for cause (R 25). There was no error in allowing him to sit (par 38b, MCM 1928; CM 201781, Thesenvitz).

Prosecution with permission of the court then amended specification 1 of Charge I and specifications 1, 2, 3 and 4 of Charge II (R 25). Since these amendments did not make any substantial changes, this was not error (paragraphs 41c and 73, MCM 1928). The accused was not misled or prejudiced thereby.

Accused was arraigned on 14 June 1948 on Charges I and II and specifications thereunder except specification 2 of Charge I (R 29). The court then adjourned until 16 June 1948. On this latter date accused was arraigned on Additional Charges I and II and the specifications thereunder (R 37,38, and certificate of correction). It appears that Additional Charges I and II and the specifications thereunder were preferred on 27 May 1948 and referred for trial on 10 June 1948. Since the court was sworn on 26 May 1948, it was not competent to hear additional charges which the accused had no notice to defend and regarding which the right to challenge had not been accorded him (par 62, p.48, MCM 1928). This would include all of Additional Charges I and II and all specifications except specification 1 of Additional Charge I.

It appears that specification 1 of Additional Charge I was substantially the same as Specification 2 of Charge I. However, prior to arraignment on specification 2 of Charge I, prosecution entered a nolle prosequi as to this specification "subject to its being re-incorporated in Additional Charges thereafter to be preferred" (R 25). As to this specification, therefore, the accused was fully advised and his rights of challenge were fully accorded him. While this specification is nominally a specification of an Additional Charge, it was in effect no more than an amendment of specification 2 of Charge I. The accused was not misled nor were his substantial rights prejudiced because of his arraignment on this specification.

Accused was not found guilty of the Additional Charge under Article of War 95 but was found guilty under the 96th Article of War. This was the same Article of War under which Charge II was preferred. Hence his rights were not prejudiced because of this finding in view of the fact that he was also found guilty of Charge II which was preferred under the 96th Article of War.

Accused moved to strike Additional Charges I and II and specifications thereunder prior to arraignment (R 49,50,51), and at the conclusion of the testimony again challenged the court's jurisdiction to try him thereon (R 558,559,560). The fact that the court erroneously heard evidence on and considered specifications under Additional Charges I and II (Except specification 1 of Additional Charge I,discussed above), does not constitute substantial error in this case. Accused was found not guilty of such specifications. Since such specifications alleged distinct and separate offenses from those alleged under Charges I and II of which accused was found guilty, it cannot be said that such evidence influenced finding upon Charges I and II and the specifications thereunder.

It appears that during the course of the trial the court ruled on several occasions that argument on motions would not be included in the record and such argument was excluded (R 41,43,44,45,47,48,52,100,559). A careful examination of each such ruling indicates that accused's motion or objection was recorded and the record includes so much of the proceedings as was necessary for a proper understanding of any objection made or question raised with respect to an argument. Such rulings of the court did not constitute error (Appendix 6, p.260, MCM 1928).

Accused made motions to strike specification 3 of Charge II. Thereupon prosecution stated to the court (R 44): "at this time, before answering the motion in rebuttal, I desire to amend specification 3 of Charge II, which now reads in part, 'USAT General Simon B. Buckner, at sea, en route from New York, New York, to Bremerhaven, Germany, and return to New York,' to read as follows:

> "USAT General Simon B. Buckner, at sea, en route from New York, New York, to Bremerhaven, Germany, between on or about 4 March 1948 and on or about 13 March 1948, and return from Bremerhaven, Germany, to New York, New York, on or about 17 March 1948 to 25 March 1948." (R 45)

Defense objected to this as being a substantial amendment (R 45) but the amendment was permitted by the court (R 45). It is to be noted that accused did not object to the specification because of its failure to allege a date. There was no error in the action of the court. The amendment did not change the nature of the offense.

Prosecution witness, Helen F. Gorecki, on cross-examination, was asked if she had made a written statement te Captain Schroeder on 6 April 1948. She testified that she had. She was then asked if she recalled saying in that paper anything at all along the line she had just testified about what occurred on 9 March 1948. Thepaper was handed to witness to read and she indicated in the statement what she had said. On further questioning it was shown that other matters included in her testimony as having occurred on the 10th of March were not included in the statement. Defense refused to introduce the written statement. On redirect examination prosecution had the witness identify this written statement. It was admitted into evidence over objection of accused as Prosecution Exhibit 2 (R 120-126). This did not prejudice the substantial rights of accused since her testimony as a witness included all matters covered by the statement.

Specification 1, Charge II.

The evidence was sufficient to sustain the findings of guilty as to specification 1 of Charge II. The testimony of Mrs. Mabel L. McCurdy established that at about 2:00 a.m. on the 6th day of the voyage the accused, without knocking, entered her cabin and flashed the light on and off. This awakened the witness and her children. They were frightened and the children began to scream. She then turned on the light and ordered accused to leave the cabin. He apologized and left. There was nothing to indicate that the intrusion was because of official business. The accused denied entering the cabin although he did admit that he knocked on the door at about midnight. There was a disputed issue of fact and it was for the court-martial to determine the credibility of the witnesses and the weight to be given their testimony. The conduct of accused as related by Mrs. McCurdy constituted an unwarranted intrusion and was prejudicial to good order and as such was a violation of the 96th Article of War (CM 257015, Reid, 36 BR 391,394; CM 250863, Arnold, 33 BR 69,76). Accused's position as transport commander did not authorize him to enter cabins on personal missions under such circumstances as to frighten, annoy and inconvenience passengers. The fact that accused apologized for his actions, rather than explained or justified them at the time of the occurrence indicates a consciousness of guilt.

It is noted that the specification alleges a violation of par 301.01 c (8) (b) Army Transport Manual, Headquarters New York Port of Embarkation. This subparagraph provides:

> "Male passengers will not enter the cabins of female passengers, apart from strictly official business."

It is clear from a reading of the entire Section 301.01 c (8) that there is a differentiation between Army Staff members and passengers. Accused

was not a passenger within the meaning of subparagraph (b) and hence did not violate such subparagraph or any other parts of the Manual paragraph as alleged. However, since the conduct of accused was expressly set out and alleged to be wrongful, if in fact, the evidence established that it was wrongful, to wit: disorderly conduct, the further allegation in the specification that it violated a certain Manual provision can be treated as surplusage (CM 211420, McDonald, 10 BR 61,62; CM 258105, Croslin, 37 BR 309,310).

Specification 2, Charge II.

The evidence was sufficient to sustain the finding of guilty of this specification. The undisputed evidence established that accused not only failed to make inspections of first class cabin areas but directed that such not be done because he did not desire to inconvenience these passengers. Accused admitted no such inspections were made. This was in violation of the Manual as alleged. Paragraph 12, Army Regulations 55-435, is not applicable since this Regulation does not apply to the Transport Commander. However, as noted above, it was unnecessary to show a violation of this Army Regulation if an offense was otherwise alleged and proved.

It is noted that the date of the offense is not alleged. The undisputed evidence established the dates of the offenses alleged in both specifications 2 and 3 of Charge II. The record of trial contains ample proof with respect to the date of the offenses alleged to provide accused with sufficient protection from any possible future jeopardy from the same offenses. The failure to allege the date of the offense in specification 2, and the insertion of the date in specification 3, by amendment, did not injuriously affect the substantial rights of accused within the meaning of Article of War 37 (Par 87b, MCM 1928; CM 228527, Wall, 16 BR 233,239; CM 229526, Van Winkle, 17 BR 173,189; CM 242082, Reid, 26 BR 391,399; CM 259026, Coleman, 38 BR 223,228; SPJG 1945/3846, 4 Bull JAG 136).

Prior to pleading, the defense moved to strike specification 2 of Charge II because it charged a violation of the Army Transport Manual, Headquarters New York Port of Embarkation (R 44). The motion was overruled (R 44). There was no error in this. The specification alleged that accused did "wrongfully fail and neglect, as transport commander, to make ship's inspections * *." This sufficiently alleged an offense without the necessity of quoting verbatim the provisions of the Transport Manual requiring inspections to be made.

Specification 3, Charge II.

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

It is to be noted that the specification does not allege any specific acts as constituting fraternization. Accused moved to strike this specification (R 44) and at the conclusion of the trial moved for a finding of not guilty (R 329). Neither par 301.01 c (8) nor par 211.15, Transport Manual, New York Port of Embarkation, define the term "fraternize" as used in the Manual. Par 301.01 c (8) states:

> "Positive non-fraternization between male and female passengers, Army Staff members, and/or crew members, licensed or unlicensed, will be enforced."

Paragraph c (8) as quoted above is ambiguous, and standing alone, does not sufficiently clarify or define the offense so that it could be the basis of a criminal charge. That the meaning of the expression "fraternize" is ambiguous, is further made clear by the provisions of paragraph 211.15 (b), Transport Manual, supra, which provides:

> "b. The transport commander will orient all permanent party personnel under his command as to courtesy toward passengers and will draw a line of demarkation where female courtesy ceases and fraternization begins."

Thus, if the transport commander is to determine what constitutes fraternizing, he would not be guilty of an offense in making his decision because his superior officers may disagree with his decision. The accused in this case contended that he interpreted fraternization to require illicit relationship and that he did not regard association between husband and wife as fraternization within the prohibition of the Transport Manual. Under the above circumstances, no violation of the regulation against fraternization is shown.

However, it is to be noted that subparagraphs (b) and (c) of paragraph 301.01 c (8) enumerate certain specific acts which are prohibited, as does likewise subparagraph (d) of paragraph 211.15, Transport Manual, supra. Therefore, the acts enumerated in these subparagraphs must be regarded as the only specific prohibitions involved. It is thus apparent that there was more than one way in which accused might be guilty of violating such specific regulations. He was entitled to know what specific acts or violations he was charged with. Fraternization in itself is not an offense and is not per se wrongful. If particular acts are wrongful, these acts must be the basis of the offense. The specification, therefore, is not only based upon a directive (viz, against fraternization) which is too vague to define the offense of wrongfully permitting fraternization, but is also multifarious in alleging the offense since the directive refers to several prohibited acts. The omission of essential elements in the specification rendered it too uncertain and

indefinite to acquaint the accused with the specific offense as to which he must defend, and might deprive him of the opportunity to offer a plea of former jeopardy in a subsequent trial for the same offense (CM 257469, MacKay, 37 BR 129,140; CM 232190, Lester, 19 BR 13,15; Par 29, MCM 1928). Since the specification was not sufficient to apprise accused of the specific offense intended to be charged, the substantial rights of accused were prejudiced.

Specification 1, Additional Charge I.

The evidence was sufficient to sustain the findings of guilty as to specification 1 of Additional Charge I.

The prosecution's evidence was sufficient to establish the commission of the acts alleged. Although accused denied making the solicitations, the court-martial could properly weigh the evidence and judge the credibility of the witnesses.

The court found that such conduct of accused constituted a violation of the 96th Article of War. That the solicitations of accused were prejudicial to good order and military discipline is clear. Accused as an officer and while Transport Commander solicited a female enlisted person in his command to visit with him. The alleged visit was not pursuant to official business. Social relations between officers and enlisted personnel is prohibited by military custom. The basis of the custom is military discipline (CM 264077, Patterson, 41 BR 365,368). If association of officers and enlisted personnel is prohibited, an attempt or solicitation to associate is likewise an offense (par 152c, p.190, MCM 1928).

Likewise, the attempt by accused to force his attentions upon a female in his command, while not insulting or violent, is nevertheless such as to bring discredit upon the military service (CM 249211, Stone, 32 BR 55,57,58; CM 264936, Sansweet, 42 BR 355,368).

Prior to pleading to Additional Charge I and specification 1, the accused moved to strike specification 1 for the reason that it did not state facts sufficient to constitute an offense (R 49). The motion was denied. This was not error. The conduct was set out and it was charged to be wrongful. It was for the court to decide whether it was wrongful under all the facts in the case.

This specification was originally specification 2 of Charge I and the effect of the nolle prosequi, after the court-martial was sworn, has been discussed above.

5. The accused is 55 years of age, married and has one dependent. He has served 27 years as an Army officer of which eight have been on extended

active duty. His personal history as disclosed in his testimony has been hereinbefore set forth and since it is in substantial accord with Department of the Army records, it is unnecessary to again recount it. He has efficiency ratings of record since 3 May 1941 of very satisfactory (1), excellent (14) and superior (9). In addition to service medals, he is authorized the meritorious service wreath, and two bronze stars for the European African Middle East Ribbon. Four members of the court-martial which tried accused and the defense counsel have recommended clemency. There is no record of previous disciplinary action against accused.

6. Major Raymond F. Body, special defense counsel, made oral argument in behalf of accused before the Board of Review.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors, except as herein noted, injuriously affecting the substantial rights of the accused, were committed. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 3 of Charge II, legally sufficient to support the findings of guilty of specifications 1 and 2, Charge II and Charge III, and Specification 1 of Additional Charge I and Additional Charge I, and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal, and forfeiture of four hundred dollars of pay is authorized upon conviction of a violation of Article of War 96.

C. O. Woefle, Judge Advocate

C. J. Berhourly, Judge Advocate

J. W. Lynch, Judge Advocate

CSJAGH CM 332388 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel William E. Rabb (0-172393), Transportation Corps, 9201 Technical Service Unit, Transportation Corps Ships' Complement Detachment, New York Port of Embarkation, Brooklyn, New York.

2. Upon trial by general court-martial, this officer was found guilty of wrongfully entering the cabin of a woman passenger on the transport of which he was transport commander (Specification 1, Charge II); of wrongfully failing to make ship's inspections on board the transport of which he was transport commander as required by regulations (Specification 2, Charge II); of wrongfully failing and neglecting to stop fraternizing between female passengers and crew members, male passengers and/or permanent staff on board the Army transport of which he was transport commander (Specification 3, Charge II); and of wrongfully saying to an enlisted female member of the ship's staff on the transport of which he was transport commander, "I was hoping that you would come and see me," "that I have had my eyes on you, that you remind me of my old girl and would you please visit with me sometime," or words to that effect (Specification 1, Additional Charge I), all in violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit $400 of his pay. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 3 of Charge II; legally sufficient to support the findings of guilty of Specification 1 and 2 of Charge II and Charge II, Specification 1 of Additional Charge I, and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

Effective 15 February 1948, accused, a married man, was placed on detached service with the New York Port of Embarkation and was assigned as transport commander of the United States Army Transport Simon B. Buckner. This Army transport made an outbound voyage from New York to Bremerhaven, Germany, commencing 3 March and ending 13 March 1948. Mrs.

Mabel L. McCurdy was a female passenger on the outbound voyage to Bremerhaven. According to the testimony of Mrs. McCurdy, on about 8 March at about 2:00 a.m., the accused, without knocking, entered her cabin, flashed the light on and off, awakening Mrs. McCurdy and her three children who were in bed, and remained standing in the cabin with the door closed for about five minutes until Mrs. McCurdy turned on the cabin light and ordered accused out of the cabin. Accused apologized and left. Mrs. McCurdy and her two children were frightened by accused's conduct. Accused testified he went to the cabin and knocked on the door because Mrs. McCurdy had previously made a complaint concerning her quarters and he had agreed to go there but had not found it possible to do so at an earlier hour. He denied entering the cabin.

On the same voyage, Technician Fourth Grade Helen F. Gorecki, a member of the WAC detachment, was assigned to duty on the transport. On or about 7 March, she went to accused to make a complaint about a sergeant in the hospital. After this matter was finished, accused stated that he was glad she had come to see him, that he had had his eye on her for a long time, and he then asked her to visit with him some evening, stating that they would have lots of fun. He further said that she reminded him of his old "sweetie", or words to that effect. The sergeant made no response to these suggestions of accused and walked out of his office. Later that night when Sergeant Gorecki and another WAC passed accused's office he motioned for them to come in but they walked on. Accused denied making these statements.

During both the outbound and inbound voyages of the USAT Simon B. Buckner, no inspections were made of first class passenger cabins as required by paragraph 303.01, Army Transport Manual, Headquarters New York Port of Embarkation, dated 1 June 1947. Accused admitted he was familiar with this regulation and that such inspections were not made and that he was in error in failing to inspect the first class cabins. He gave as a reason therefor that he did not want the passengers to be inconvenienced by such inspections.

Accused was charged with violation of the regulations of the New York Port of Embarkation in failing and neglecting to "stop fraternizing" on both the outbound and inbound voyage of the USAT General Simon B. Buckner. The defense moved to strike this specification. The proof shows that husbands and possibly other men were observed from time to time in cabins occupied by wives and other women. The Board of Review is of the opinion that the findings of guilty of this specification must be disapproved for the reason that the regulation alleged to have been violated is too vague and indefinite to constitute the basis of a criminal charge for its violation and for the reason that the specification

JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

fails to allege the specific act of misconduct charged as being in violation of such regulation. The omission of essential elements in the specification rendered it too uncertain and indefinite to acquaint the accused with the specific offense as to which he must defend.

4. Accused is 55 years of age, married and has one dependent. He has been on duty as a commissioned officer for eight years. According to accused's testimony, he enlisted as a private in 1917 and was discharged as a staff sergeant in 1918. In 1921 he was commissioned a captain in the National Guard. He entered on extended active duty on 5 November 1940 as a first lieutenant, was promoted to captain on 18 February 1941, to major on 21 August 1942, to lieutenant colonel on 1 June 1945 and to colonel, Officers' Reserve Corps, on 23 July 1947. He went overseas to England in March 1944 as Commanding Officer of the 511th Port Battalion. He later served in France, and in the Philippine Islands. He returned from overseas on 11 September 1946. He was then assigned to the San Francisco Port of Embarkation and served as transport commander on board the USAT Admiral Sims for seventeen months. He is authorized to wear the American Defense Service Medal, World War II Victory Medal, the American Asiatic, Pacific and European-African-Middle East campaign (2 bronze service stars) ribbons. He is also authorized the meritorious service wreath and the Philippine Independence ribbon. He has efficiency ratings of record since 3 May 1941 of very satisfactory (1), excellent (14), and superior (9). Four members of the court-martial which tried accused and the defense counsel have recommended clemency. The Staff Judge Advocate of the New York Port of Embarkation recommended that the sentence be commuted to a reprimand and a forfeiture of $400 of his pay. The reviewing authority did not concur in the recommendation.

5. I recommend that the finding of guilty of Specification 3 of Charge II be disapproved, and that the sentence be confirmed and carried into execution. I believe the conduct of accused demonstrates he is not worthy of being an officer.

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 6, Jan. 17 1949).

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

JAGN-CM 332393

UNITED STATES v. Privates First Class VICTORINO DUMO (10338258) and MATURINO PALAY (10338202), both of Battery A, 864th Antiaircraft Artillery Automatic Weapons Battalion.	)	MARIANAS BONINS COMMAND Trial by G.C.M., convened at Guam, Marianas Islands, 21 June 1948. Each: Dishonorable discharge and confinement for one (1) year. Philippines Command Stockade, APO 707.

HOLDING by the BOARD OF REVIEW

YOUNG, ALFRED and SPRINGSTON, Judge Advocates

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1. The record of trial in the case of the soldiers named above who were tried in a common trial has been examined by the Board of Review.

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

Private First Class Victorino Dumo:

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Private First Class Victorino Dumo, Battery A, 864th Antiaircraft Artillery Automatic Weapons Battalion, having taken an oath in a trial by general court-martial of Technician Fifth Grade Cristino Andrada, before First Lieutenant William H. Purkhiser, a competent officer, that he would testify truly, did, at Guam, Marianas Islands, on or about 22 April 1948, willfully, corruptly, and contrary to such oath, testify in substance that a civilian, and not Technician Fifth Grade Andrada, stabbed Corporal Jewell B. Chaffin, which testimony was a material matter and which he did not then believe to be true.

Private First Class Maturino Palay

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Maturino Palay, Battery A, 864th Antiaircraft Artillery Automatic Weapons Battalion, having taken an oath in a trial by general court-martial of Technician Fifth Grade Cristino Andrada, before First Lieutenant William H. Purkhiser, a competent officer, that he would testify truly, did, at Guam, Marianas Islands, on or about 22 April 1948, willfully, corruptly, and contrary to such oath, testify in substance that when Corporal Jewell B. Chaffin struck Technician Fifth Grade Cristino Andrada with a board, the said Andrada did nothing and that the said Andrada did not stab Corporal Jewell B. Chaffin, which testimony was a material matter and which he did not then believe to be true.

No evidence of previous convictions was introduced. Accused were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of one year. The reviewing authority approved the sentence, as to each accused, designated the Philippines Command Stockade as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Summarized, the evidence discloses that each accused, who was present when Corporal Chaffin, a Marine, was fatally stabbed, falsely swore in the trial of the assailant, Technician Fifth Grade Cristino Andrada, that the fatal act was committed by a civilian, and not by Andrada. Andrada was convicted of the killing by general court-martial. Since the evidence of record in this case is sufficient to sustain the findings as to accused Dumo, the Board's consideration of the case will be limited to the legal sufficiency of the record of trial to support the findings as to accused Palay. The facts relied upon to support Palay's conviction are found in the testimony of Corporal Estol L. Lowe, a Marine, and in a written statement in the nature of a confession made by Palay in effect reciting that Andrada stabbed the Marine, and that accused's story concerning the civilian was the invention of one Bangayan. He said that Bangayan had instructed him to deny that Andrada stabbed the Marine and to relate that the act was committed by a civilian from Camp Roxas. In addition to summarizing the evidence in the case we must also discuss a matter of trial procedure. The record discloses that the accused Palay can not read, write, speak or understand the English language. It also appears that he does not speak or understand Tagalog with any degree of knowledge or ability and speaks only Ilocano. These are native Philippine dialects (R 26).

In connection with the taking of the pretrial statement from Palay, Sergeant Benavente, who acted as interpreter for the CID on this occasion, testified that prior to taking the statement and acting on behalf of the CID agent he informed Palay of his rights under the 24th Article of War. Upon cross-examination and, in explanation of the manner in which accused was advised of his rights, however, the following occurred:

"Questions by defense:

"Q. What do you understand your rights to be under the 24th Article of War?
"A. According to if you are lying to the court, sir, I think you will be . . .

"Q. I don't believe you understood me. If I were an officer questioning you like I am right now, what would your rights be under the 24th Article of War? Did you ever have the Articles of War read to you?
"A. Yes, sir.

"Q. Do you know what this is? (Def counsel hands the witness the Manual for Courts Martial pointed to the 24th Article of War).
"A. Yes, sir.

"Q. Can you read that section?
"A. Yes, sir.

"Q. What is it?
"A. Article of War 24.

"Q. Can you read that to the court?
"A. Yes, sir. (Witness then proceeded to read to the court the 24th Article of War as set forth on page 208 of the Manual for Courts Martial).

"Q. Will you explain to the court what you just read? What do you understand by that?
"A. May I read it once more, sir? (Witness read again to himself the 24th Article of War).

"Q. Do you want me to repeat the question? Will you explain to the court what you have just read, what you understand the 24th Article of War to mean? Can you explain to the court? Do you know what it means?
"A. Yes, sir.

"Q. You understand what it means?
"A. I cannot understand very well.

"Q. You cannot understand, is that what you said? Do you understand or do you not understand what this article means?
"A. I can understand, sir, but it's hard for me to explain.

"Q. If you can understand, why is it hard for you to explain? Explain in your own words just what it means to you? Did Agent Castro explain to you the meaning of the 24th Article of War before asking you any questions?
"A. He told me in Tagalog, sir.

"Q. He told you in Tagalog?
"A. Yes, sir, and I interpret also Ilocano with Palay.

"Q. What did he tell you in Tagalog what the 24th Article of War means?
"A. To tell the truth if really Andrada was the one who stabbed that marine and I asked the question to Palay" (R. 28, 29).

The record further reflects that the only time an interpreter was used during the trial of accused Palay was when the right to testify on his own behalf or remain silent was explained to him (R. 55).

4. Accused was charged with and found guilty of perjury. Perjury may be defined as the willful and corrupt giving under oath, in a judicial proceeding, of false testimony material to the issue. Since it is an offense wholly dependent upon proof of false statements of the accused it is imperative that the accused be informed at the trial as to the nature of the testimony against him through an interpreter. How, otherwise, can he defend himself? How can he rebut the testimony produced? How can he inform his counsel of discrepancies, misstatements, untruths, or of any other factor presented, if he sits in ignorance while the prosecution builds up the evidence against him? He may know that he is the accused, that a trial is in progress, that witnesses are taking the stand, these events he may see, but knowledge of them is of no value to him if he is in complete and absolute ignorance of what transpires until he is suddenly advised of his rights when the prosecution's case is closed. Lord Reading, C.J., in a well reasoned opinion on this subject, said in the case of R. v. Lee Kun, 1 K.B. 337:

"The appellant, Lee Kun, a Chinese, was convicted of murder of one Clara Thomas. He appeals to this Court to quash the conviction on the ground that, being a foreigner and ignorant of the English language, he did not understand

the evidence for the prosecution, which was not translated to him.

"When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence and is undefended, the evidence given at the trial must be translated . . . If he does not understand the English language, he cannot waive compliance with the rule that the evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law.

"No trial for felony can be had except in the presence of the accused . . . The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings . . . If the accused is fit to plead, it may yet be that no communication can be made in the ordinary way; it may be that he is deaf and can only be approached by writing or signs; or dumb and can only make his views known by writing or signs; or a foreigner who cannot speak English and requires the assistance of an interpreter to understand the proceedings and make answer to them. In such cases the judge must see that proper means are taken to communicate to the accused the case made against him and to enable him to make his answer to it. In the case of a foreigner ignorant of the English language who is undefended no difficulty has arisen in practice. The evidence is always translated to him by an interpreter.

"The more difficult question arises when an accused

foreigner, ignorant of the English language, is defended by counsel and no application is made to the Court for the translation of the evidence. There is no rule of law to be found in the books on the subject, and as a result of inquiry which we have made since the argument, it has become clear that the practice of the Courts in this respect has varied considerably during the last fifty years.

"We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him, except when he or counsel on his behalf expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission. The judge should not permit it unless he is of opinion that because of what has passed before the trial the accused substantially understands the evidence to be given and the case to be made against him at the trial."

As explained in 8 Ruling Case Law 87:

"It is self-evident that the constitutional right would be a vain thing unless the witnesses testifying as in support of the accusation against defendant could be seen and heard by him. * * * If a defendant cannot understand the English language the court should provide an interpreter."

Professor Wigmore remarks on this point:

"Courts * * * tend to forget that one of the cruelest injustices is to place at the bar a person of alien tongue and then fail to provide him with the means of defending himself by intelligible testimony" (Wigmore, Vol. 2, 1923 Ed., page 122).

Precedent for the decision here reached may be found in an unpublished Review signed by E. H. Crowder, The Judge Advocate General, 25 February 1919, in the case of Private Whaddy W. Catt, a Seminole Indian who could not understand the English language, wherein it was said:

"* * * accused should have been afforded the opportunity, through an interpreter, to present all matters of extenuation and evidence tending to establish that his offense was not wilful, and that his unauthorized absence was not in violation of the 61st Article of War, and the failure of the Court, Judge Advocate and Counsel for Accused to safeguard his rights in this respect was inexcusable. It is obvious from the record that accused did not understand what transpired in the court-martial proceeding, and that his rights were prejudicially affected" (CM 125933 - Catt).

The Board can conceive of no situation in a trial more full of anguish than that of an accused who, having pleaded his innocence, cannot hear or understand the testimony of the witnesses against him. The error is too substantial in character to be cured by the remedial provisions of Article of War 37.

5. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as to the accused Dumo and legally insufficient to support the findings of guilty and the sentence as to accused Palay.

Isaac Young, Judge Advocate

Frank C. Offield, Judge Advocate

George S. Springston, Judge Advocate

JAGN-CM 332393 1st Ind NOV 8 1948

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

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

1. In the foregoing case of Privates First Class Victorino Dumo (10338258) and Maturino Palay (10338202), both of Battery A, 864th Antiaircraft Artillery Automatic Weapons Battalion, I concur in the holding by the Board of Review and for the reasons therein stated recommend that as to the accused Palay the findings of guilty and the sentence be disapproved. You have authority to order the execution of the sentence as to accused Dumo.

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 332393).

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.

(111)

JAGK - CM 332439

20 OCT 1948

UNITED STATES	MUNICH MILITARY POST
v.	Trial by G.C.M., convened at Munich, Germany, 22 July 1948. Dismissal, total forfeitures and confinement for one (1) year. Disciplinary Barracks.
Second Lieutenant JAMES M. TUTEN, JR. (O-1341726), Corps of Engineers, 7822 Station Complement Unit	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Second Lieutenant James M. Tuten, Jr, 7822nd Station Complement Unit (then of Headquarters, First Engineer Combat Battalion) did, at Munich, Germany, on or about 26 November, 1947, wrongfully and knowingly dispose of by bartering approximately ten tons of cement and approximately three thousand board feet of lumber (more specific amounts being unknown), of the value of over fifty dollars, 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 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 five 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, or elsewhere as the Secretary of the Army might direct, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Accused was construction foreman, First Engineer Combat Battalion, at the Karlsfeld Ordnance Depot (KOD), Munich, Germany, from about September 1947 to December 1947. Staff Sergeant Dan Brown was his assistant (R 13,41).

Walther Unkelbach, a German civilian who worked under accused as a building engineer, testified that he was approached by accused "one day" about obtaining some drafting instruments for him. Accordingly Unkelbach made arrangements for a meeting between accused and one Heinz Schiller, a dealer in drafting supplies. The meeting was held at Schiller's place of business sometime in the latter part of November 1947 and Unkelbach acted as interpreter. He stated that an agreement was reached whereby accused was to deliver to Schiller on the Isarthalerstrasse three truck loads of cement and two truck loads of lumber, in consideration for which Schiller agreed to deliver to accused certain drafting instruments valued at about 500-600 Reichmarks. Subsequently accused directed Unkelbach to make the necessary arrangements for the delivery of the cement and lumber to Schiller. Pursuant thereto, Unkelbach prepared a material issue slip which was signed by accused requisitioning eight cubic meters of lumber from the Bavarian Motor Works (BMW). "KOD" and "BMW" were in the same area and considered all one "American shop." (R 13-17)

Shortly after the deal concerning the drafting instruments was consummated accused told Unkelbach he would like to have a radio. Unkelbach brought one Pfleiderer, a German civilian, and accused together and he again acted as interpreter. Accused and Pfleiderer agreed that accused was to deliver to Pfleiderer one truck load each of cement and lumber for which accused would receive a radio (R 17,18).

On about 2 or 3 December 1947 after Unkelbach had been questioned by the authorities concerning these transactions accused told him he should say no lumber or building materials were traded but that he had traded five cartons of cigarettes for the drafting materials and radio (R 18-22).

Heinz Schiller corroborated the testimony of Mr. Unkelbach concerning the agreement reached by himself and accused. He also identified several drafting instruments which were accepted in evidence as Prosecution Exhibits 1-14, inclusive, as being those which he delivered to accused pursuant to their agreement (R 23-28).

Otto Pfleiderer also corroborated the testimony of Mr. Unkelbach concerning the agreement he made with accused and he identified a radio which was accepted in evidence as Prosecution Exhibit 15 as being the radio which he had given to the accused through one Floesser in exchange for one load each of cement and lumber (R 38-40).

Schmidtberger, Sigmundzik and Panczuk all testified that they were drivers for the 1st Combat Engineers and that during the latter part of November 1947 they received orders from Unkelbach to load their trucks with cement and lumber from "KOD" for delivery to addresses given them. Schmidtberger delivered two truck loads of cement to one address and one truck load of cement to another. Each load weighed about 2-1/2 - 3 tons. He could remember only one of the places which was Isarthaler Bahnhof. Sigmundzik delivered one truck load of cement weighing about three tons to a place near Isarthaler Railroad Station. Panczuk delivered three truck loads of lumber, each load being about four cubic meters. One was delivered to Pfleiderer and two loads to a place opposite Isarthaler Bahnhof (R 29-37).

Jacob Floesser, a German civilian, testified that during November 1947 he worked at "KOD." He accompanied Panczuk when they delivered a load of lumber to one Pfleiderer who gave to him a radio which he identified as being Prosecution Exhibit 15. Witness delivered the radio that same day to Unkelbach. Mr. Unkelbach testified that he delivered the same radio (Pros Ex 15) to accused within 10 minutes after receiving it (R 54-56).

Davis H. Santer, an American employee of the Army, was the property supervisor of the "KOD" supply division. He stated that according to his records (Pros Exs 16-21, Incl) made in the regular course of business that accused signed material issue slips requesting three lots of lumber, 6 cubic meters, 4 cubic meters, and 4 cubic meters, respectively, and that this lumber was picked up by some representative of accused. He had no personal knowledge concerning the final disposition of the lumber. He stated that each cubic meter of lumber was equal to 424 board feet (R 44-53).

Mr. Rubin Scharfman, a member of the Criminal Investigation Division, testified that he met accused about 3 December 1947. He advised him of his rights under Article of War 24 and accused voluntarily gave him a pre-trial statement in which he admitted that he authorized five tons of cement to be exchanged for "a planometer and various items such as pencils used for drafting and other office items that I could not get through regular channels." He denied ever bartering any cement or lumber for his own benefit. Mr. Scharfman had visited accused's quarters on 4 December 1947 and there found the radio (Pros Ex 15) hooked up for use and some wooden boxes addressed to "James Tuten, 1104 North Main, Greenville, South Carolina" (Pros Ex 23). He opened up two or three of the boxes and discovered certain drafting instruments therein. The witness identified Prosecution Exhibits 1 and 2 as instruments which had been found in accused's possession under the circumstances cited (R 57-63).

The prosecution requested the court to take judicial notice of Circular 140, Headquarters U.S. Forces, European Theater, dated 26 September 1946; Circular 153, same headquarters, dated 15 October 1946; and Circular 56, same headquarters, dated 18 July 1947 (R 12,56,57).

It was stipulated that if Captain R. W. Conant were present he would testify that the Quartermaster Price List of Construction shows the cost price of cement to be $.70 per 100 pound bag, and lumber, $.0235 per board foot. (R 56)

b. For the Defense

Staff Sergeant Dan Brown testified that the cement used in the Karlsfeld Ordnance Depot was of German manufacture and only about 30 to 60 percent of the quality of American cement.

It was stipulated that if Lieutenant Justice L. Fish were present he would testify that he had known accused since August 1946 and that in his opinion accused's character was very good (R 65).

Accused, upon being advised of his rights as a witness, elected to remain silent.

4. Discussion

Accused was charged with wrongfully and knowingly disposing of approximately ten tons of cement and three thousand board feet of lumber, property of the United States furnished and intended for the military service thereof, of the value of over fifty dollars, by bartering, in violation of Article of War 94.

Before pleading to the general issue defense counsel made two motions, one for a bill of particulars and another that the specification be made more definite and certain. He argued in support thereof that the specification should have alleged the particular circular or "War Department" directive, making it wrongful for accused to barter. These motions were properly denied by the law member. No provision has ever been made for the use of bills of particulars in court-martial procedure (CM 257469, Mackay, 37 BR 129,140). The specification sets forth with reasonable certainty an offense of wrongful disposition by bartering of specifically described property of the United States furnished and intended for the military service in violation of Article of War 94. The manner of disposition alleged, viz, by bartering, sufficiently apprised accused that he was being charged with wrongful disposition of Government property by trading it for other property. All of the essential elements of the offense as provided in paragraph 150i, MCM 1928, are alleged (CM 319857, Dingley, 69 BR 153; CM 330998, Santiago).

The evidence shows beyond any reasonable doubt that during the latter part of November 1947 accused, in his capacity as construction foreman at the Karlsfeld Ordnance Depot, Germany, entered into agreements with two German civilians for delivery to them of cement and lumber in the amounts pleaded which was shown to be the property of the United States furnished

and intended for use by the military service. Deliveries of the building materials were made as agreed to the addresses furnished by the Germans and accused received from them in exchange therefor a quantity of drafting instruments and a radio. About 4 December 1947 these articles were found in accused's quarters. The drafting instruments were contained in several wooden boxes addressed to "James Tuten, 1104 North Main, Greenville, South Carolina."

The only conclusion which can logically be drawn from such facts and circumstances is that the transactions between accused and the two Germans were of a purely private nature and for the personal benefit of the parties concerned rather than for the benefit of the United States as contended by accused.

The specification herein alleges that accused wrongfully and knowingly disposed of approximately 10 tons of cement and approximately 3,000 board feet of lumber. In order to establish that such was the amount of material disposed of by accused, the prosecution presented evidence of two acts of wrongful disposition of Government property on the part of accused. Each act was of the same nature and occurred at about the same time and place. It does not appear that accused was misled by the specification or that his substantial rights were prejudiced thereby (par 87b, MCM 1928; AW 37; CM 242312, Morton, 27 BR 35,39).

5. Department of the Army records show that accused is 21 years of age and single. He graduated from high school and had 1-1/2 years of college, majoring in mechanical engineering. He enlisted in the Army 1 May 1946, and was commissioned a second lieutenant, AUS, on 23 April 1947.

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 94.

Chester T. Gibbs, Judge Advocate

James H. Booth, Judge Advocate

Harley A. Lanning, Judge Advocate

JAGK - CM 332439 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 15 NOV 1948

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James M. Tuten, Jr. (0-1341726), Corps of Engineers, 7822 Station Complement Unit.

2. Upon trial by general court-martial this officer was found guilty of wrongfully disposing of by bartering approximately ten tons of cement and three thousand board feet of lumber, of a value of over $50, property of the United States, furnished and intended for the military service, 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 for five years. The reviewing authority approved the sentence, reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the 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.

In October 1947 accused was assigned as chief of the construction office at the Karlsfeld Ordnance Depot, Munich, Germany. Soon thereafter he approached Unkelbach, a German civilian employee in his office, and expressed a desire to obtain some drafting instruments. Unkelbach arranged a meeting between accused and Schiller, a dealer in such equipment. They met in the latter part of November 1947 with Unkelbach acting as interpreter. It was then agreed that accused would deliver to Schiller three truck loads of cement and two truck loads of lumber in exchange for certain specified drafting instruments valued at about 600 Reichsmarks. Accused subsequently received the instruments and caused the building materials, property of the United States, furnished and intended for the military service, to be delivered as agreed.

Shortly after acquisition of the drafting instruments accused advised Unkelbach of a desire to obtain a radio. The latter arranged a meeting between accused and a German, Pfleiderer, and served as interpreter for them. It was agreed that accused would deliver one truck load each of cement and lumber in return for a radio. He later caused the cement and lumber, property of the United States, furnished and intended for the military service, to be delivered and received the radio.

Each load of cement comprised 2-1/2 to three tons. The three loads of lumber were six cubic meters, four cubic meters and four cubic meters,

respectively, each cubic meter being equal to 424 board feet.

Accused elected to remain silent at the trial, but the prosecution introduced a pre-trial statement by him in which he claimed the drafting instruments were obtained for the Government and that he had not received a radio. Scharfman, a Criminal Investigation Division agent, testified, however, that on 4 December 1947 he accompanied accused to the latter's quarters and there found the radio "hooked up" for playing and the drafting instruments packed in shipping boxes addressed to accused's home address in South Carolina.

It was stipulated that if Second Lieutenant Justice L. Fish, Corps of Engineers, U.S. Army, were present he would testify that he had known accused since August and that in his opinion accused's character "is very good."

5. Department of the Army records show that accused is 21 years of age and unmarried. He graduated from high school and attended college for 1-1/2 years. He enlisted in the Army 1 May 1946, and was commissioned a second lieutenant, AUS, 23 April 1947.

Several officer acquaintances of the accused have recommended clemency for him, attributing his offenses to immaturity and poor judgment.

6. On 21 October 1948 Mr. and Mrs. James M. Tuten of Greenville, South Carolina, parents of the accused, in company with Honorable Joseph R. Bryson, Member of Congress from South Carolina, appeared before the Board of Review in this office, made pleas for clemency in behalf of the accused and represented that he was now a patient at Walter Reed General Hospital and seriously ill with poliomyelitis. Inquiry has been made of the medical authorities at the hospital and this office has been informally advised that accused has been a patient in the "serious cases" ward since 8 October 1948, that he is totally paralyzed in the portions of his body from his waist down. The opinion was informally expressed that accused can now be expected to survive but he will be permanently disabled for military service.

7. I recommend that the sentence be confirmed but in view of accused's physical condition that the confinement be remitted and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Record of trial
2. [redacted] action
(GCMO 200, Dec 14, 1948).

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

(119)

29 OCT 1948

JAGH CM 332445

UNITED STATES	)	HEADQUARTERS YOKOHAMA COMMAND
v.	)	Trial by G.C.M., convened at Yokohama, Honshu, Japan, 24,29 June, 6,7 July 1948. Dismissal and to pay to the United States government a fine of one thousand ($1,000.00) dollars.
First Lieutenant CESARE AUGUSTUS BUCCI, 0-1651809, 304th Signal Operation Battalion, Yokohama, Japan, APO 503.	)	

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant Cesare A. Bucci, 304th Signal Operation Battalion, APO 503, did, at or in the vicinity of Yokohama, Japan, in conjunction with Jamus M. Kobayashi, during the period from on or about 1 November 1946 to on or about 1 December 1946, wrongfully dispose of about 50 cartons of cigarettes of American manufacture, by selling the same to Mitsuyoshi Ugo, a Japanese National.

Specification 2: (Same as Specification 1, except the time alleged, "1 December 1946 to on or about 31 December 1946," and the amount alleged, "100 cartons of cigarettes.").

Specification 3: (Same as Specification 1, except the time alleged, "1 March 1947 to on or about 31 March 1947.").

Specification 4: (Same as Specification 1, except the confederate alleged, "Hogara Kaneko," the time alleged, "1 May 1947 to on or about 31 May 1947," the amount alleged, "40 cartons of cigarettes," and the vendee alleged, "Shoichi Sato.").

Specification 5: (Same as Specification 4, except the time alleged, "1 November 1947 to on or about 30 November 1947," and the amount alleged, "100 cartons of cigarettes.").

Specification 9: In that 1st Lieutenant Cesare A. Bucci, 304th Signal Operation Battalion, APO 503, did, at Yokohama, Japan, on or about 23 January 1948, wrongfully have in his possession about 57,000 yen, lawful money of Japan.

Specifications 6, 7 and 8: (Findings of not guilty).

Accused pleaded not guilty to the Charge and Specifications and was found not guilty of Specifications 6, 7, and 8 of the Charge and guilty of the other Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay to the United States government a fine of one thousand ($1,000.00) dollars. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3.a. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

Accused is in the military service and a member of the 72nd Signal Battalion. From the Fall of 1946 to approximately the first of February 1948 he had been a member of the 304th Signal Operations Battalion. While with this latter organization accused served as Club Officer, PX officer, and "personnel officer for civilian and Japanese personnel officers" (R 56,57). Prior to the time accused joined the 304th Signal Operation Battalion, Janus M. Kobayashi was employed by the battalion. When recalled as a defense witness Kobayashi testified that when he first started to work with the battalion he was told that part of his work would be the obtaining of yen through the sale of American goods (R 80). In the period extending from 1 November 1946 through to January or March 1947 Kobayashi sold 200 cartons of American cigarettes in three transactions to Mitsuyashi Ugo, a Japanese national residing in Tokyo City. The first transaction was in November 1946 when Kobayashi sold Ugo approximately 50 cartons, and the second in December 1946 when Kobayashi sold Ugo approximately 100 cartons of American cigarettes. The cigarettes involved in these two transactions were obtained from the accused and the proceeds of the two sales were turned over to accused. The third transaction took place in January or March 1947 and involved 50 cartons of American cigarettes. Kobayashi did not testify as to the source of these cigarettes but did testify that he turned over the proceeds of this sale to accused (R 12,31-34).

Mitsuyashi Ugo testified that he purchased a total of approximately 200 cartons of cigarettes from Kobayashi in three transactions. These transactions took place in November and December 1946 and either January or March 1947 (R 65-66).

In May and November 1947 Hogara Kaneko, an employee in the labor office at the 304th Signal Operation Battalion, sold stateside cigarettes at accused's request. In May he sold approximately 25 cartons and in November, approximately 70 cartons. The cigarettes were sold to a Mr. Sato and "one more person" whose name Kaneko did not exactly know. Sato was a Japanese national. Kobayashi realized 500,000 yen on the sales which he paid to accused. Kaneko did not secure any profit to himself (R 25-29).

Shoichi Sato testified that he was a Japanese national residing in Yokohama, that in May or June 1947 he purchased about 50 cartons of American cigarettes from Kaneko and that again in November 1947 he purchased approximately 100 cartons of American cigarettes from Kaneko (R 23-24).

On 23 January 1948, Perry E. Dent, Special Agent, 44th CID, accompanied by a Mr. Donohoo and Majors Moskowitz and Critchlow, searched accused's room. In the course of the search, Dent found 57,000 yen in Japanese money under accused's bed. Dent identified Prosecution Exhibit 5 as the 57,000 yen he found and the Exhibit was admitted in evidence (R 59-60).

b. Evidence for the defense.

Accused testified on voir dire as to the voluntary nature of a pretrial statement. Although the statement was admitted in evidence it pertained to an offense of which accused was acquitted. It is not necessary, therefore, to set forth accused's testimony as to the voluntary nature of his pretrial statement.

Accused elected to remain silent on the merits.

Kobayashi, recalled as a witness for the defense, testified that during his employment with the 304th Signal Operation Battalion he knew that improvements had been made in the Officers' Club and Officers' quarters and had been told that proceeds from the sale of cigarettes were to be used to defray the cost of the improvements (R 71-73). He further testified that certain purchases for the battalion and some improvements in the battalion area were paid for by accused (R 78-80).

Kaneko, recalled as a witness for the defense, testified that on one occasion the Commanding Officer of the 304th Signal Operation Battalion observed him moving cigarettes from the area. Kaneko also

testified that some of the improvements made in the battalion were secured by cash payment made by accused rather than by means of procurement demand (R 74-75).

Shigio Shiraishi, a contractor, testified that he had performed work at the 304th Battalion area in the officers' quarters, and the Katase Club, and had built furniture for the "EM" Club. For the work performed by his company he had received approximately 420,000 yen which had been paid to him by accused. Some of the work had been ordered by Major Bowman (R 81-83).

Major David W. Bowman, testified that he was former Commanding Officer of the 304th Signal Operation Battalion and that during the time he was commanding officer a number of improvements were made in the battalion area. With the exception of one project which he claimed was paid for by procurement demand, he denied knowledge of how payment was made for the improvements. He also denied knowledge of an arrangement whereby cigarettes were sold out of "Post Exchange Stock" to defray expenses of improvements (R 76-78).

Major Stanley H. Kretlow testified that he was a member of the 304th Signal Operation Battalion, and that he had known accused when the latter was a member of the same organization. In Major Kretlow's opinion accused was an energetic, conscientious and punctual officer. If the witness were rating accused he would rate him as "superior." (R 83-84)

Major Corvin Q. Wadsworth testified that he was a member of the 72nd Signal Service Battalion to which unit accused had been transferred on 1 March 1948. Major Wadsworth was of the opinion that accused was the outstanding junior officer in the battalion and his "manner of performance" in the battalion was "superior." (R 84-85).

4. Accused is found guilty of wrongfully selling in conjunction with one Kobayashi, American cigarettes on three occasions to Japanese nationals (Chg, Specs 1,2 and 3). The evidence shows that Kobayashi sold American cigarettes in the amount alleged to Mitsuyashi Ugo in November and December 1946, and January or March 1947, and turned over the proceeds of the sales to accused. Kobayashi also testified that the cigarettes which he sold to Ugo in November and December 1946 were furnished him by accused. He did not testify as to the source of the cigarettes which were the subject of his last transaction with Ugo. From the evidence that accused received the proceeds of all three sales, and that the cigarettes sold on the first two occasions were furnished by accused, it must be concluded that as to the three sales accused was principal and Kobayashi his agent for the sale of the cigarettes, and that the sales to Ugo, a Japanese national, were sales made by accused.

Accused was also found guilty of wrongfully selling, in conjunction with one Kaneko, American cigarettes to a Japanese national, Shoichi Sato

(Chg, Specs 4 and 5). The evidence shows that on two occasions Kaneko was requested by accused to sell American cigarettes and pursuant to such request Kaneko sold American cigarettes to Shoichi Sato, a Japanese national, in June and November 1947. According to Kaneko he sold 25 cartons to Sato in May and 70 cartons to Sato in November 1947. Sato on the other hand testified that in May or June 1947 he purchased approximately 50 cartons of American cigarettes from Kaneko, and in November 1947 approximately 100 cartons. The evidence thus establishes that Kaneko was accused's agent in the sale of American cigarettes to Sato and the allegation with reference to accused's sale of American cigarettes to Sato, a Japanese national, are sustained by the evidence.

Curbs against "black market" activities in Japan have been prescribed successively in Circular 39, General Headquarters, United States Armed Forces, Pacific, dated 23 April 1946, and Circular 26, General Headquarters Far East Command, 10 March 1947, the latter supplanting the former. The prohibitions in these Circulars are "directive in nature and became part of the written military law on their effective dates." (CM 324352, Gaddis) Accused's conduct denounced in Specifications 1 and 2, and possibly 3, of the Charge, were committed prior to 10 March 1947, the effective date of Circular 26, supra, and it is necessary to consider the conduct denounced in those Specifications in the light of Circular 39, supra. Circular 39 provides:

> "I. PURPOSE.—1. The purpose of this circular is to curb black market activities by prohibiting illegal importation, transportation, sale, barter, and exportation of goods into, within and from this theater, and prevent wrongful use of United States mail, and means of communication and transportation furnished by the United States."
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> * * *
>
> "V. IMPORTATION, TRANSPORTATION, SALE, BARTER AND EXPORTATION.—6. No persons who are members of the United States Forces and/or any United States Governmental agency subject to military control nor any others subject to military law shall:
>
> "a. Use any means of transportation operated or furnished by or on behalf of the United States Government or her allies, or operated under contract with the United States Government to import, transport, or cause to be imported or transported, either on his own behalf or for or through others, directly or indirectly, except as specifically authorized, into this Theater and/or between any geographical points within this Theater, any article, merchandise, material or equipment not needed for official or personal use.
>
> "b. Sell or barter any article, merchandise, material, or equipment imported or transported under paragraph a above.

(This shall not be construed so as to bar non-profit sales or barters of personal items by and between members of the United States Forces and/or any Governmental agency subject to military control nor any others subject to military law."

"c. Use any means of transportation operated or furnished by or on behalf of the United States Government or her allies, or operated under contract with the United States Government, except as specifically authorized, to export, transport or cause to be transported, either on his own behalf or for or through others, directly or indirectly, out of this Theater and/or between any geographical points within this Theater, any articles, merchandise, material or equipment for commercial purposes. This will include sending to United States or other places, for private use or ownership, items of United States property issued or intended for issue in United States service."

The evidence which shows that the cigarettes sold by accused were American cigarettes establishes the probability that the cigarettes were transported into Japan by means of transportation operated or furnished by or on behalf of the United States Government (CM 323589, Ward, 72 BR 301,310). The evidence otherwise shows that the cigarettes subject of Specifications 1, 2 and 3 were sold to persons other than those to whom sale without profit was authorized. The sales of American cigarettes by accused to a Japanese national in the period between 23 April 1946 and 10 March 1947 as reflected by the record of trial constituted violations of Circular 39, supra.

Accused's sales of American cigarettes to a Japanese national in the period subsequent to 10 March 1947 are denounced in Sections 5 and 5a, Circular 26, General Headquarters Far East Command, 10 March 1947 as follows:

"5. Acts prohibited. Except as authorized by law, regulation, competent order or directive, the following acts by American personnel are prohibited:

"a. Trading in American goods with other than American personnel or authorized personnel."

Sections 4a and 4b, Circular 26, supra, define American personnel and authorized personnel as:

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

"b. 'Authorized personnel.' All persons who are authorized by law or regulation to make purchases at Army sales stores, commissaries or exchanges."

It is clear that the person to whom were made the sales of American cigarettes subsequent to 10 March 1947, was not a person to whom such sales were authorized and, hence, the sales in each case constituted conduct denounced by the Circular.

Finally accused was found guilty of wrongfully possessing 57,000 yen, lawful money of Japan (Chg, Spec 9). The evidence shows that at the time alleged 57,000 Japanese yen were found underneath a bed in accused's quarters. We are unaware of any directive whereby the possession of Japanese yen in any amount is rendered unlawful. It is contended, however, that in view of accused's "black market" operations in which American goods were sold to Japanese nationals, the yen found in accused's quarters were obtained as a result thereof and, hence, their acquisition was in conflict with the prohibition against acquiring money indigenous to an occupied territory from other than a United States Finance Officer or disbursing office (Paragraph 7, Section I, Part 2, Circular 247, War Department, 6 September 1947; Paragraph 3d, Circular 1, General Headquarters Far East Command, 7 January 1947.) Accused is not, however, charged with a violation of the cited directives but, if he were, the circumstance of his possession of yen, without a showing of an unlawful source thereof, would not suffice to establish such violation. In order to prove a violation of the cited directives it would be necessary to show either an unlawful source of the yen or to exclude the possibility that the yen were obtained from a lawful source. Assuming but without deciding that possession of yen obtained from other than a lawful source would constitute wrongful possession of the yen, we merely state that a wrongful possession premised upon an unlawful acquisition would necessitate evidence of a quality equal to that required to establish unlawful acquisition. It is shown that accused in the five illicit sales of which he has legally been found guilty acquired some amount in excess of 500,000 yen over a period of approximately twelve months. Although not germane to any of the charges against accused the prosecution showed that in the period extending from March 1946 to March 1947 accused gave approximately 100,000 yen to Taeko Sagara. The defense showed that accused at an unspecified time paid 420,000 yen to a Japanese contractor for improvements made in the 304th Signal Operation Battalion area. It is not unlikely that accused's revenues from his unlawful sales of American goods were expended within fair proximity to the time of their acquisition. In any event a conclusion that the 57,000 yen found in his quarters on 23 January 1948 constituted part of his unlawful revenues would be based upon pure conjecture. In the absence of any lawful prohibition against the possession of yen we find that the findings of guilty of Specification 9 of the Charge are not supported by the record of trial.

5. Accused is 24 years of age and single. He is a high school graduate and attended Union College for 2½ years majoring in electrical engineering. In civilian life he had employment as a newspaper inserter and as a workman in an industrial plant. He had enlisted service in the Army from 26 June 1944 until 14 November 1945 when he was commissioned a Second Lieutenant. He was promoted to First Lieutenant 11 April 1947. He has had foreign service in the Pacific Theater from 28 February 1946. His efficiency ratings of record are "Excellent" and "Superior."

6. The court was legally constituted and had jurisdiction of the person and of the 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 insufficient to support the findings of guilty of Specification 9 of the Charge, legally sufficient to support the other findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal and to pay the United States government a fine of $1,000.00 is authorized upon conviction of violations of Article of War 96.

C. O. Wolfe, Judge Advocate

E. J. Berkowitz, Judge Advocate

J. W. Lynch, Judge Advocate

JAGH CM 332445 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 5 OCT 1948

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 First Lieutenant Cesare Augustus Bucci, O-1651809, 304th Signal Operation Battalion, Yokohama, Japan, APO 503.

2. Upon trial by general court-martial this officer was found guilty of wrongfully selling, on five occasions, American cigarettes to Japanese nationals (Specs 1-5) and of wrongfully possessing 57,000 yen, lawful money of Japan (Spec 9), in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay to the United States a fine of one thousand ($1,000.00) dollars. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 9 of the Charge, legally sufficient to support the other findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

Accused served with the 304th Signal Operation Battalion, Yokohama, Japan, from the Fall of 1946 to March 1948. Among his duties were those of Post Exchange Officer. During the period mentioned accused through Japanese employees of the battalion sold American-made cigarettes to Japanese civilians on five occasions, for sums in excess of 500,000 yen, thereby violating local directives aimed at curbing "black market" activities.

In January 1948 accused's quarters were searched and 57,000 yen were found underneath his bed. However, there is no evidence that the yen found were unlawfully acquired and the mere possession of yen is not denounced by any law, directive, or regulation.

Accused elected to remain silent, but otherwise the defense tended to show that accused's activities in selling cigarettes were in part at least for the purpose of financing improvements in the recreational activities of the 304th Signal Operation Battalion, and that accused's then Commanding Officer had knowledge of his activities. The Commanding

Officer, Major Bowman, a reluctant witness, denied such knowledge. There is indication he may also be tried.

It may be inferred that accused personally profited by his sales in substantial amounts.

4. Accused is 24 years of age and single. He is a high school graduate and attended Union College for 2½ years majoring in electrical engineering. In civilian life he had employment as a newspaper inserter and as a workman in an industrial plant. He had enlisted service in the Army from 26 June 1944 until 14 November 1945 when he was commissioned a Second Lieutenant. He was promoted to First Lieutenant 11 April 1947. He has had foreign service in the Pacific Theater from 28 February 1946. His efficiency ratings of record are "Excellent" and "Superior."

5. I recommend that the sentence be confirmed and ordered 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 183, 9 Nov 1948).

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

7 OCT 1948

JAGH - CM 332510

UNITED STATES	)	6TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 6, 16, 17 and 19 July 1948. Dismissal and confinement for three (3) years.
	)	
First Lieutenant MARCUS R. RAWLINGS (0-2010653), QMC (INF), 569th Quartermaster Salvage Repair Company	)	

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

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

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

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

Specification 1: In that First Lieutenant Marcus R. Rawlings, 569th Quartermaster Salvage Repair Company, did, at Pusan, Korea, on or about 5 July 1948, unlawfully kill CHUNG, Myung Kuk, by striking him with a vehicle, to wit, a jeep.

Specification 2: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Marcus R Rawlings, 569th Quartermaster Salvage Repair Company, was, at Pusan, Korea, on or about 5 July 1948, drunk and disorderly in uniform, in a public place, to wit, the street of Pusan, Korea, in the vicinity of Command Post, 6th Infantry Division, and Water Point Number 1, on what is sometimes known as Route 1.

Specification 2: In that First Lieutenant Marcus R Rawlings, 569th Quartermaster Salvage Repair Company, did, at Pusan, Korea, on or about 5 July 1948, wrongfully and unlawfully leave the scene of an accident in which he was involved, without making known his name or other identification.

CHARGE III: Violation of the 95th Article of War.
(Finding of not guilty).

Specifications 1 and 2: (Findings of not guilty).

He pleaded not guilty to the Charges and Specifications and was found not guilty of Charge III and the Specifications thereunder and Specification 2, Charge I, and guilty of the other Charges and Specifications, except the words, "Command Post, 6th Infantry Division" in Specification 1 of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. a. Evidence for the prosecution.

Accused is a member of the 569th Quartermaster Salvage Repair Platoon (R 6). About 0930 hours, 5 July 1948, accused went to the house of Kim, In Gun, in Pusan, Korea. At accused's behest Kim, In Gun procured a bottle of saki. After each had a glass of saki they proceeded to the Saki house belonging to the mother of Kim, In Gun bringing with them the bottle of saki. About thirty minutes later, after the bottle was consumed, they left the Saki house and went to Kim, In Gun's wife's house. There they had about a half bottle of saki and a half hour later left, had a tire repaired, and returned to the wife's house (R 9-10). There they picked up Kim, In Gun's daughter, brother-in-law, and a friend of the latter, and proceeded to a restaurant to drink. They arrived at the restaurant at 1430 hours and left the restaurant sometime between 1730 and 1830 hours. While at the restaurant they consumed four and one-half bottles of saki (R 7,8,11,13). When they left the restaurant accused was intoxicated (R 13). He offered to take Kim, In Gun and and his daughter home, and the party took off in the jeep which accused was driving. Kim, In Gun was riding in the right front seat with his daughter and Shin, Yun Chul was also in the front seat. Kim, Jun Chul was seated in the right rear. Kim, In Gun had expected to be taken to his house but was too intoxicated to know where they were going until they were near the railroad engine shop at Kokwang where he was aroused by a shock and then noticed they were headed in the direction of Pusan. When they came to the 71st Station Hospital at Minakai, accused turned the jeep around at a very fast rate of speed and proceeded toward Bomil Chung near the water point at the end of the "horse taxi." There accused ran into the back of the horse taxi (R 7,11,12,13,14).

Kim, Jun Chul testified that on their way into Pusan accused struck a man but continued on toward Pusan and did not stop (R 7).

Shin, Yun Chul was unaware of any of the details of the ride until accused turned at the Minakai building. He observed then that they were going in the direction of Pusanjin, the end of the "horse taxi company." The jeep was traveling very fast and ran into the "horse taxi" (R 14).

At about 1830 hours 5 July, Kim, Dong Yun, was standing in front of a basket shop at Ko Kwang when an American jeep traveling at a "faster than usual vehicle speed" hit a Korean man. The vehicle did not stop but continued on in the direction of Pusan (R 15).

At approximately 1830 hours 5 July 1948 Technicians Fourth Grade Gene L. Wale and Leon Delosreyes, Technician Fifth Grade Leroy E. Boyer, and Private First Class Kenneth D. Kathlean, were riding toward Ordnance in a three-quarter ton truck (R 16, 17½, 20). As they approached a place variously described by them as the Pusanjin railroad station (R 17½, 19) or the water point (R 22), they saw a jeep driven by accused hit a Korean (R 16, 17½, 19, 22). Their vehicle was stopped at a distance of about 200 feet from where the Korean lay after being hit (R 17, 20, 22). Wale, who was unable to state who was the driver of the jeep testified:

> "I seen a jeep come around the corner, down by the railroad station; turn around the engine house. The jeep came around the corner at a high rate of speed, swerved around. I stopped; seen him hit a Korean on the right side of the road and knocked him about the middle of the tracks. He hit him about the right side of the tracks and he lit about the middle of the tracks and he run over him again." (R 16)

At the place the Korean was hit there were no sidewalks, and at that place it was customary for the Koreans to walk at the edge of the road. As the jeep driven by accused came around the curve it was very close to the building (R 16, 17, 17½).

Kathlean did not see accused's vehicle hit the Korean but did see it run over him. Kathlean testified that accused was traveling pretty fast (R 18).

Boyer's attention was attracted to accused's vehicle which was going at a pretty high rate of speed because he thought it was going to run into the side of the building as it was negotiating a corner. He saw the jeep strike a Korean who was about five feet from the buildings. His view of the jeep had been temporarily obscured by a horse drawn taxi. Accused's vehicle passed the taxi on the inside and then swerved around and struck the Korean knocking him into the middle of the tracks where accused's vehicle passed over him (R 20, 21, 27).

Delosreyes also witnessed the incident and testified that accused's vehicle was traveling at a "pretty high rate of speed". He observed the markings "KBC 5690" on the rear bumper of accused's vehicle (R 22). The one jeep assigned to accused's platoon was marked "KBC 569Q" (R 71).

Accused did not stop his vehicle but continued on in the direction of Pusan (R 17, 18, 19, 23).

The Korean who was hit was about forty years of age (R 20).

At approximately 1830 hours 5 July 1948, Corporal Clarence Burnette was driving a pass truck into Pusan. Privates First Class Samuel B. Reichley, Paul A. Wolf, Wilson Morris and Daniel T. Boone were passengers in the truck (R 28, 32, 34, 36, 37). Reichley and Burnette observed a jeep coming from the direction of Pusan toward the water point traveling at a speed of about 30 to 35 miles an hour and weaving from one side of the road to the other. Going around the bend at the water point Burnette had to cut his truck over in order to get out of the way of the oncoming jeep. There were some Koreans in the jeep and Reichley recognized accused as the driver. Later the pass truck was passed by the jeep which this time was going in the direction of Pusan. Burnette testified that at the time the driver whom he did not recognize resembled a man "looking out the windshield when it rains". Reichley testified that accused was slumped over the steering wheel. Subsequently the pass truck came on a Korean lying in the road (R 28, 29, 32). The place where the Korean was found was at the top of the hill on the Pusan side of the water point where "the streetcar makes a bend" (R 33), close by the railroad yards (R 28), and opposite the railroad station (R 36). The Korean was of average build for Koreans, had a little moustache, short hair cut, and was wearing a white undershirt. Boone testified that in addition the Korean had on a dark coat. The Korean's face was bleeding and one eye was shut (R 33, 35, 37). Burnette and Reichley identified Prosecution's Exhibit Number 1 as a picture of the Korean they found in the road (R 67, 69).

Reichley and Boone laid the Korean in the truck and he was taken to the 71st Station Hospital (R 33, 37). Reichley placed his hand over the Korean's heart but could not determine if it were beating (R 67). En route to the hospital Reichley saw accused again and left the truck. He flagged a "418th truck" and followed accused past the place where the Korean had been found. In answer to a question as to the speed of the truck in which he was pursuing accused Reichley testified that "It was floorboarded ***". During the chase accused's jeep was going from one side of the road to the other. Reichley finally caught accused's vehicle at the water point. Accused was seated at the driver's seat and when Reichley told him to get out he (accused) looked at Reichley "glassy eyed" (R 30, 31).

First Lieutenant John G. Mayne, Medical Corps, testified that he was on duty at the 71st Station Hospital, Pusan, Korea, on 5 July 1948. At about 1930 hours on that day a dead Korean was brought to the hospital. A wax seal bearing the name,"Chung, Myung Kuk", was found in the deceased's clothing. As to deceased's dress Lieutenant Mayne testified:

> "He had on a dark blue or navy blue coat. Inside of the coat, on the left inner pocket, just about over it, there was a label - Korean characters, evidently, a name and resembling the name on the out patient index record, but one of those three names, the last two or three changed - I'm not sure what it was. It was embroidered in red silk. He had on a white shirt and dark trousers. Other than that, I can't recall anything else." (R 40).

Lieutenant Mayne was unable to state the exact cause of death but expressed the opinion that the deceased had probably sustained a broken neck (R 38-41).

Shim, Mo Im identified Prosecution's Exhibit Number 1 as a picture of her deceased husband, "Chung, Myung Koo" (R 70).

At approximately 1830 hours, 5 July 1948, Major Arthur C. Cheyne, Provost Marshal, 6th Infantry Division, Pusan, received an accident report and as a result thereof he, accompanied by Master Sergeant William O. Frese, went to Hialiah, otherwise known as the race track, in search of accused. They found him in a house used by him; he was in bed dressed in pajamas. They were unable to arouse him and finally Sergeant Frese dressed accused and carried him from the house, put him in a jeep and carried him to the Station Hospital (R 57, 58, 59).

On the morning of 17 July 1948 prior to his appearance before the court-martial Major Cheyne made a road test to determine the distance from the water point to the 71st Station Hospital. Concerning the distance from the water point to the hospital and to intermediate points he testified as follows:

> "From the Water Point to the Pusanjin Station down the line is 1.1 miles; to the fire station, 2 miles exactly; to the police station, that is, the 15th Police Station, it is 2.6 miles; to the manually operated traffic signal near the Railway Hotel, 2.7 miles, and the 71st Station Hospital is 3.2 miles from the Water Point. I also, in my observations, I noticed there were at least twenty-six signs posted stating that the speed limit is fifteen miles per hour." (R 58).

He further testified that the speed limit on that road was fifteen miles per hour (R 58).

b. For the defense.

Accused after being apprised of his rights elected to remain silent. A pretrial statement of Lieutenant Colonel William J. Power was admitted in evidence without objection. Colonel Power stated that he examined accused at 0120 hours, 5 July 1948, and found him to be moderately drunk.

4. Accused was found guilty of unlawfully killing one Chung, Myung Kuk by striking him with a motor vehicle (Charge I, Spec 1). The evidence shows that accused spent the day in question drinking saki in the company of some Korean friends. At approximately 1800 hours the party left a Korean restaurant where they had been drinking for approximately three hours and accused was to drive the Koreans to their home. All members of the party were intoxicated and the Koreans were not too aware of the details of the ride which followed. Suffice it to say that one of the Korean passengers testified that accused ran down a Korean pedestrian. Near the engine shop at the top of the hill in Kokwang, one of the other passengers was aroused from his alcoholic stupor by a shock.

At about 1830 hours the same day, a second group of witnesses, riders in a truck proceeding out from Pusan in the direction of the water point, observed a jeep making a turn near the Pusanjin railroad station strike a Korean. For convenience we designate this group of witnesses as Group A. Some of these witnesses identified accused as the driver of the jeep. One witness who testified in greater detail than the others stated that his attention was directed to accused's vehicle by its difficulty in negotiating the curve, that he thought the jeep was going to run into the buildings. This witness' view of the jeep wasmomentarily obscured as it went to the inside of a horse drawn vehicle. After the jeep passed the horse drawn vehicle it swerved out and hit the Korean, drove the Korean away a distance and then passed over him. When the Korean was first hit he was not more than five feet from the buildings lining the road. At that point of the road there were no sidewalks.

At about the same time a third group of witnesses whom we designate Group B, were in a pass truck headed for Pusan and witnessed the erratic peregrinations of a jeep which first passed them from the direction in which the pass truck was proceeding and then passed them traveling in the same direction as the pass truck. One of these witnesses was able to identify accused as the driver of the jeep. Subsequently on arriving at a point in the road opposite the railroad station they found a dead Korean on the road. The circumstances of record show conclusively that the place where Group B found the dead Korean was the same place where Group A saw a Korean struck by the jeep operated by accused, and that the Korean found by Group B was the same Korean whom Group A had seen struck by accused's vehicle. One of the Group B witnesses identified Prosecution's

Exhibit Number 1 as a picture of the dead Korean, and a Korean woman, Shim, Mo Im, identified the same exhibit as a picture of her deceased husband, Chung, Myung Koo. Applying the rule of Idem Sonans we find that the person struck by accused's vehicle was the person alleged, Chung, Myung Kuk.

At about 1930 hours 5 July 1948 a deceased Korean man was brought to the 71st Station Hospital where a search of the deceased's person's effects disclosed a wax seal bearing the name, "Chung, Myung Kuk". This evidence would not extablish the identity of the deceased as Chung, Myung Kuk in the absence of other evidence showing that Chung, Myung Kuk usually carried on his person a similar wax tablet (40 C.J.S. 1104). The circumstance that Chung, Myung Kuk was brought to the 71st Station Hospital at time co-incidental to the time that the deceased Korean with the hitherto described wax tablet was received in the hospital, together with the similarity of attire, sufficiently establishes the deceased Korean as Chung, Myung Kuk. Although the cause of death was not established by medical testimony it must be concluded that death resulted from the force applied by the vehicle operated by accused.

Involuntary manslaughter of which accused has been found guilty is defined as "homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law" (Par. 149a, Manual for Courts-Martial, 1928). The testimony of accused's Korean drinking and driving companions establishes that accused was grossly intoxicated during the course of his wild drive through Pusan and its environs. Testimony of other witnesses establishes that a short time after the fatal accident hereinbefore described accused was found in an insensible condition. Such testimony was competent to show his condition as to sobriety at the time of the fatality (CM 327497, Anderson, 1948). The fatality occurred as accused was careening around a corner, at a high rate of speed, coming precariously close to the buildings bounding the corner, passing a horse drawn vehicle on the inside, and then as he swerved toward the center of the road striking the deceased who was near the side of the road. The evidence shows conclusively that the death of Chung, Myung Kuk,was caused by the culpably negligent operation of a motor vehicle by accused.

Accused was found guilty of being drunk and disorderly in uniform in a public place, to wit, a Pusan street in the neighborhood of Water Point Number 1 in violation of Article of War 96 (Charge II, Spec. 1). The evidence shows that at the time and place alleged accused who was grossly intoxicated was driving a motor vehicle in a reckless manner swerving from one side of the road to the other, and forcing another motor vehicle to pull over in order to avoid being hit. At the time accused was accompanied by some intoxicated Koreans and his driving was observed by a number of enlisted men. We are of the opinion that the

evidence showing that accused while intoxicated drove a motor vehicle in a reckless manner sustains the allegations of drunk and disorderly conduct.

Finally accused was found guilty of leaving the scene of an accident in which he was involved without making known his name or identification in violation of Article of War 96 (Charge II, Spec. 2). The evidence shows that after striking Chung, Myung Kuk and causing his death accused continued on his way without stopping and making his identity known. The allegations in the specification are supported by the evidence, and the conduct denounced therein constitutes conduct to the discredit of the military service (CM 264077, Patterson, 41 BR 365, 368-369).

5. Accused is 26 years of age, married, and has one adopted child. He completed the tenth grade of school, and attended the Case Technical School for five months. In civilian life he was employed as a service station manager and as an assistant foreman in a machine shop. He had enlisted service in the Army from 30 November 1942 until he was commissioned a second lieutenant on 16 March 1945. He was separated from the service in the latter grade on 26 January 1946. He had subsequent enlisted service in the grade of Master Sergeant from April 1946 until September 1946 when he was recalled to active duty as a Second Lieutenant. He was promoted to First Lieutenant on 10 July 1947. He had foreign service in the European Theatre from October 1944 to June 1945 and combat service in that theatre from November 1944 to May 1945. His current tour of foreign service extends from February 1947. He has been awarded the Silver Star, Bronze Star, and Purple Heart. On two occasions accused has been punished under Article of War 104. His efficiency ratings of record are "Excellent" and "Very Satisfactory".

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 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. A sentence to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years, is authorized upon conviction of violations of Articles of War 93 and 96.

C. O. Haefe, Judge Advocate

Jno Lynch, Judge Advocate

C. J. Berkowitz, Judge Advocate

JAGH CM 332510 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 20 OCT 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 First Lieutenant Marcus R. Rawlings (0-2010653), QMC (INF), 569th Quartermaster Salvage Repair Company.

2. Upon trial by general court-martial this officer was found guilty of the involuntary manslaughter of a Korean civilian by striking him with a vehicle in violation of Article of War 93; and of being drunk and disorderly in uniform in a public place and leaving the scene of an accident without identifying himself in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

On 5 July 1948 accused, a member of the 569th Quartermaster Salvage Repair Company, stationed at Pusan, Korea, spent the day drinking saki with some Korean friends. At sometime between 1730 and 1830 hours he started to take his friends to their house in a jeep which was assigned to his organization. At the time he was drunk and his operation of his vehicle was erratic and hazardous to other users of the road. While turning a corner at an excessive rate of speed he struck and killed one Chung, Myung Kuk, and continued on his way without stopping.

4. Accused is 26 years of age, married, and has one adopted child. He completed the tenth grade of school, and attended the Case Technical School for five months. In civilian life he was employed as a service station manager and as an assistant foreman in a machine shop. He had enlisted service in the Army from 30 November 1942 until he was commissioned a second lieutenant on 16 March 1945. He was separated from the service in the latter grade on 26 January 1946. He had subsequent enlisted service in the grade of Master Sergeant from April 1946 until

September 1946 when he was recalled to active duty as a second lieutenant. He was promoted to first lieutenant on 10 July 1947. He had foreign service in the European Theatre from October 1944 to June 1945 and combat service in that theatre from November 1944 to May 1945. His current tour of foreign service extends from February 1947. He has been awarded the Silver Star, Bronze Star, and Purple Heart. On two occasions accused has been punished under Article of War 104. His efficiency ratings of record are "Excellent" and "Very Satisfactory."

5. I recommend that the sentence be confirmed but in view of the creditable combat service of accused I further recommend that the term of confinement be reduced to two years, that the sentence as thus modified be carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(186 GCMO, 10 Nov 1948).

DEPARTMENT OF THE ARMY
In( )ffice of The Judge Advocate( )neral
Washington 25, D.C.

(139)

13 OCT 1948

JAGQ - CM 332514

UNITED STATES	)	THE ARMORED CENTER
	)	
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 23 June and 13 July 1948. Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.
	)	
Private JOSEPH R. MATTINGLY (35105955), Casual Detachment, 2128th Area Service Unit, Station Complement.	)	

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SKINNER, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Joseph R Mattingly, Casual Detachment, 2128th Area Service Unit, Station Complement, Fort Knox, Kentucky, formerly of 2nd Platoon Company "B" 92nd Quartermaster Battalion, Albuquerque Air Base, Louisiana, did, at Albuquerque Air Base, Louisiana, on or about 9 December 1941 desert the Service of the United States and did remain absent in desertion until he surrendered at Fort Knox, Kentucky on or about 17 May 1948.

Prior to entering a plea to the general issue, the defense made a "... motion in bar of trial" on the grounds that accused was absent without leave before the outbreak of the war on 7 December 1941 and that as a result the offense was barred by the Statute of Limitations. Thereupon, the President of the court-martial, acting in the absence of the Law Member, announced that the motion in bar of trial was "suspended", since the "... charges and specifications as drawn ...", alleged that the desertion occurred on 9 December 1941. Accused then pleaded guilty, except the words "desert 9 December 1941" and "in desertion", substituting therefor respectively the words "absent himself without leave from 6 December 1941" and "without leave"; of the excepted words not guilty, of the substituted words guilty, and not guilty to the Charge but guilty of a violation of the 61st Article of War. The accused, after having the meaning of his plea of guilty explained, elected to have his plea of guilty

stand, whereupon the following evidence was adduced by the prosecution and by the defense:

a. Evidence for the Prosecution.

Accused was identified as a member of the military service (R. 6). The prosecution introduced, over the objection of the defense, a duly authenticated extract copy of the morning report of the Second Platoon, Company B, 92nd Quartermaster Battalion, containing the following entries:

"12-9-41 Pvt.(SST) Mattingly Duty to
A.W.O.L. 6:00 A.M. P.W.B."

"1-22-1942 Pvt. (SST) Mattingly A.W.O.L.
to Desertion. P.W.B." (R. 6, 7; Pros. Ex. 1).

Prosecution entered without defense's objection an extract copy of the morning report of the 2128th ASU Army Casualty Detachment, Fort Knox, Kentucky, for 7 June, showing accused "AWOL fr 92d QM Bn Barksdale Fld La to surrendered Mil Auth this sta 1120 17 May 48 Atchd for dy pending disposition" (R. 7, 8; Pros. Ex. 2). Accused's pretrial statement to the investigating officer, wherein he stated he went absent without authority on 6 December 1941 and surrendered at Fort Knox, Kentucky, on 17 May 1948, was admitted by stipulation (R. 8; Pros. Ex. 3). Prosecution then requested the court to take judicial notice of (1) the first part of Article of War 39; (2) the "Joint Resolution" of the First Session, 77th Congress, December 1941 (Public Law No. 328), wherein war was declared upon the Imperial Government of Japan; and (3) the Executive Order of 3 February 1942, suspending the limitation upon punishments for violations of Articles of War 58, 59 and 86 (R. 9, 10).

b. Evidence for the Defense.

Mr. James E. Mattingly, accused's brother, testified that accused was present at their sister's home, 1629 Garland Avenue, Louisville, Kentucky, on 7 December 1941. Accused told his brother at that time that he was on leave (R. 10-13). Mr. Mattingly clearly remembered the date because it was "Pearl Harbor Day". Mr. John Leo Mattingly, another brother of accused, Mrs. Lillian Mattingly, accused's wife, and Mrs. Susie Cecil, accused's sister, also testified that accused was present at the above address, Louisville, Kentucky, 7 December 1941 (R. 13-22).

Accused again took the stand and testified under oath that he came in the Army on 8 July 1941, and was assigned to Company B of the 92nd Quartermaster Battalion and that he left his organization on 6 December 1941, and spent the night of 6-7 December at his sister's house at 1629 Garland Avenue, Louisville. The following day he proceeded to his home at

Bradersville, Kentucky. Accused also testified that he did not have permission to go home (R. 22-24). Affidavits from Reverend C. L. Smith, Holy Name of Mary Church (Def. Ex. A), Harry Wathen, Sheriff of Marion County, Kentucky (Def. Ex. B), of Henry G. Boldrick, County Attorney of Marion County (Def. Ex. C) and F. E. Hardesty, County Judge Pro Tem (Def. Ex. D) were admitted by stipulation (R. 25, 26). Aside from a statement in Defense Exhibit A to the effect that accused went absent without leave on 6 December 1941, these exhibits related to accused's character and good record.

3. Following the introduction of evidence, the court closed and, upon opening, the president announced that the court had considered and sustained the special plea entered by the defense in bar of trial (R. 26). The court then, on 23 June 1948, proceeded to other business and the record was duly authenticated (R. 27).

4. Pursuant to the following letter of the appointing authority the court reconvened on 13 July 1948:

> "1. The record of trial of Private Joseph R. Mattingly, held 23 June 1948, reveals that a 'special plea in bar of trial' was sustained by the Court.
>
> "2. The charges in this case allege that accused deserted the service of the United States on or about 9 December 1941 and remained absent in desertion until he surrendered on or about 17 May 1948.(MCM 1928 page 50-52)
>
> "3. A plea in bar of trial should be sustained only in the event that the specification on it's face shows that the statute of limitations has run against the offense. The specification as drawn shows that the alleged desertion occurred on 9 December 1941, and at that time a state of war existed which barred the running of the statute. (MCM 1928, Par. 67)
>
> "4. In view of this disagreement with the ruling of the court, the record of trial is returned herewith. You are instructed to reconvene the court and reconsider your action in respect to sustaining the special plea in bar of trial.
>
> "5. In the event your action relative to the plea in bar of trial is reversed in accordance with the views herein expressed, you will continue with the case to a final determination."

At these proceedings, the members of the court, prosecution, defense, and accused were accounted for, a new reporter was sworn, and the prosecution

announced there was no evidence in addition to that presented relative to the plea in bar of trial. Thereafter the court was closed and upon opening, the president announced:

> "The court has reconsidered the motion in bar of trial and has overruled its former action on that motion and overrules the motion". (R. 28).

Following oral argument by the defense counsel, the court found accused guilty of the charge and specification and sentenced him to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one and one-half (1½) years. The reviewing authority approved the sentence, designated Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

5. The only questions presented for discussion and determination by the Board of Review in the present case concern the legal effect of the above set forth directive of the appointing authority and the legality of the resulting findings and sentence.

In considering the question of the legal right of the reviewing authority to return the record of trial to the court-martial under the circumstances shown, the Board is confronted at the outset with a basic and fundamental concept of military jurisprudence, viz:

> "An officer who has power to appoint a general court-martial may determine the cases to be referred to it for trial and may dissolve it; <u>but he can not control the exercise by the court of powers vested in it by law</u>. He may withdraw any specification or charge at any time unless the court has reached a finding thereon." (par. 5<u>a</u>, MCM, 1928, p. 4; underscoring supplied).
>
> * * *
>
> "<u>The functions of a court-martial and the convening authority are, and should remain, separate and distinct. It is the function and duty of the court-martial alone to pass upon questions arising during the trial</u> (with certain authorized exceptions not here material), <u>to arrive at findings on the guilt or innocence of the accused based upon the evidence of record, and upon conviction to impose a legal, appropriate and adequate sentence</u>. No higher authority, or for that matter no authority whatever, should be consulted by, or should directly or indirectly interfere with or influence the action of the court in its closed sessions. This principle is

fundamental and its violation strikes at the very root of justice and opens the door for undue influence." (CM 216707, Hester, 11 BR 161, 162; underscoring supplied).

The limitation upon the control by the reviewing authority over ".... the exercise by the court of powers vested in it by law ....." is further imposed, and defined to a degree, by the terms of the oath or affirmation taken by each member of the court to "..... well and truly try and determine, according to the evidence, the matter now before you ....." (Article of War 19; CM 260479, Mankowski, 39 BR 277).

There are necessarily exceptions to the principle that the functions of the court-martial and the reviewing authority remain separate and distinct in all instances, however, as stated parenthetically in the above-quoted portion of the opinion in CM 216707, Hester, supra. Of these, one of the most commonplace relates generally to the matter of pleas, provided for in paragraph 64, Manual for Courts-Martial 1928, page 50, as follows:

> "Notwithstanding the action of the court on special pleas or other similar objections, the trial may proceed in the usual course as long as one or more specifications and charges remain as to which a plea to the general issue may be made or stands. For example, when pleas in bar are sustained to all but one specification and charge, to which the plea is not guilty, the trial on that specification and charge may continue. But where, as a result of the action of the court on special pleas or other similar objections, the trial can not proceed further, the court adjourns and submits the record of its proceedings as far as had to the reviewing authority. If the reviewing authority disagrees with the court, he may return the record to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its action with respect to the matters as to which he is not in accord with the court. To the extent that the court and reviewing authority differ as to a question which is merely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the reviewing authority; and the court may properly defer to such views in any case. The order returning the record should include an appropriate direction with respect to proceeding with the trial. If the reviewing authority does not wish to return the record, he will take other appropriate action." (Underscoring supplied).

Notwithstanding this provision which is clearly limited to questions of law, it is well settled that issues of fact are independently determined

by the court-martial itself, without interference. This is well illustrated by the following language from the recent case of CM 323089, Gale, 72 BR 41, 77:

> ".... It must also be presumed, prima facie, that the court tried the case according to the evidence pursuant to its oath (AW 19). Great care must be exercised that no suggestion of the appointing authority's or the staff judge advocate's personal opinion as to the merits of the case come to the attention of the court (MCM 1928, par 41d, p 32, CM 125676, Dig Op JAG, Sec 395 (53); CM 260479 Mankowski, 39 BR 277; CM 291449 Thorne, 7 BR (NATO - MTO) 287; CM 318664 Lapada, 6 Bull JAG 122)"

Application of these principles necessitates only a determination of whether the question on the accused's special plea involved a question of fact or a question of law since action by the reviewing authority was clearly limited to the latter case (par. 64, MCM, supra). In this connection Bouvier's Law Dictionary, Rawle's Third Edition, Volume 2, page 2784, provides as follows:

> "When the doubt or difference arises as to what the law is on a certain state of facts, this is said to be a legal question; and when the party demurs, this is to be decided by the court; when it arises as to the truth or falsehood of facts, this is a question of fact, and is to be decided by the jury."

Insofar as may reasonably be determined from the record in the present proceedings, the court-martial was under no misapprehension as to either the language or the legal import and effect of the Statute of Limitations. That the legal issues were clear to the court from the outset of the proceedings is well illustrated by the language of the President wherein he "suspended" the defense motion because the offense as recited in the specification was not barred by the Statute of Limitations. Thus there was no question or difference as to the legal issues but rather solely a question as to the truth or falsity of accused's contention that he went absent without authority prior to 7 December 1941. Accordingly, the court's action in sustaining the accused's plea amounted to a factual adjudication or finding of fact. The correctness of this conclusion is emphasized by the fact that the court did not decide upon the motion until both the prosecution and defense had finished introducing their evidence, and that the allegations were not modified or changed between the court's first (R 5a) and final (R 26) ruling. It is thus manifest that the evidence adduced provided the sole basis for the court's action upon the motion and that the court, by its ruling following a closed session,

made a factual determination that the accused was absent without authority prior to 7 December 1941. It is the opinion of the Board of Review, therefore, that this action of the court-martial upon the accused's special plea following the introduction of the evidence was tantamount to a finding of not guilty and accordingly, under the circumstances of this case, the reviewing authority was without power legally to return the record of trial to the court for reconsideration.

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.

Wilbert J. Baughn, Judge Advocate

John T. O'Brien, Judge Advocate

[illegible], Judge Advocate

(146)

NOV 19 1948

CSJAGQ - CM 332514 1st Ind

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

TO: Commanding General, The Armored Center, Fort Knox, Kentucky

1. In the case of Private Joseph R. Mattingly (35105955), Casual Detachment, 2128th Area Service Unit, Station Complement, 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 332514).

8 DEC 1948

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

JAGK - CM 332590

9 NOV 1948

UNITED STATES	YOKOHAMA COMMAND
v.	Trial by G.C.M., convened at Yokohama, Honshu, Japan, 27 and 28 July 1948. Dismissal and to pay to the United States a fine of $1,000.00.
First Lieutenant FRANCIS P. McLAUGHLIN (0-1949404), 243d Transportation Port Company, APO 503	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant Francis P. McLaughlin, 243 T. Port Company, 2d T. Medium Port, APO 503, did, in conjunction with Sergeant Grover C. Brantley, 243 T. Port Company, 2d T. Medium Port, APO 503, at or in the vicinity of Yokohama, Japan, on or about 28 May 1948, in violation of Circular 26, General Headquarters Far East Command, APO 500, 10 March 1947, wrongfully dispose of three burlap bags containing 3,005 vials of penicillin and 150 vials of streptomycin, American manufactured, by delivering them to Miyoko Honda, a Japanese national.

Specification 2: In that 1st Lieutenant Francis P. McLaughlin, ***, did, in conjunction with Sergeant Grover C. Brantley, 243 T. Port Company, 2d T. Medium Port, APO 503, at or in the vicinity of Yokohama, Japan, on or about 28 May 1948, in violation of Memorandum No. 9, Headquarters 2d T. Medium Port, APO 503, 29 April 1948, wrongfully remove from South Pier three burlap bags containing 3,005 vials of penicillin and 150 vials of streptomycin, by driving through the check point without presenting a waybill and securing clearance for the cargo removed.

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 and to pay a fine of $2,000. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and a fine of $1,000 and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Upon motion of the prosecution and without objection thereto the court took judicial notice of the provisions of Circular No. 26, General Headquarters Far East Command, APO 500, dated 10 March 1947, entitled, "Prevention of Black Market Activities" and Memorandum Number 9, Headquarters 2nd Medium Port, APO 503, dated 29 April 1948, entitled, "SOP for Vehicular Traffic Control at Central and South Piers." Copies of the foregoing directives are attached to the record of trial and pertinent extracts from each are as follows:

"CIRCULAR)
No... 26)

PREVENTION OF BLACK MARKET ACTIVITIES

* * *

"3. Purpose. This circular is intended to inform persons subject to military law within or in transit to or from the occupied area of Japan, including but not restricted to military personnel, civilian employees of the War Department, and dependents, of the necessity for avoiding participation, direct or indirect, in black market activities; and the rules to be observed by them in respect to dealing in supplies transported to Japan for the use of American personnel.

* * *

d. 'American goods'. Any goods, wares, merchandise or other personal property of any kind which either:

(1) are of American origin, growth, production or manufacture;

* * *

(4) bear either on the container, unit or otherwise, a trade mark, trade name, producer's, manufacturer's or distributor's name, brand, revenue stamp, free of tax stamp, label or other mark, or stamp or device of any kind indicating it to be American growth, origin, production or manufacture, or intended for use or consumption by American personnel or authorized personnel.

e. 'To Trade'. To enter into, carry on, complete, or perform any contract, agreement, or obligation; to buy, sell, loan, extend credit, trade in, deal in, exchange, transmit, transfer, assign,

dispose of or receive; or to have any form of business or commercial communication or intercourse.

* * *

"5. Acts prohibited. Except as authorized by law, regulation, competent order or directive, the following acts by American personnel are prohibited:

a. Trading in American goods with other than American personnel or authorized personnel."

"Memorandum
NUMBER 9

SOP FOR VEHICULAR TRAFFIC CONTROL
AT CENTRAL AND SOUTH PIERS

"4. ***

e. Outbound cargo vehicles regardless of the type will submit a copy of the waybill before clearance is authorized by the Control Point Personnel.

* * *

"5. South Pier Check Point:

a. This is both a military guard check point and a control point for all cargo carrying vehicles leaving the pier area.

* * *

c. Outbound cargo vehicles will be processed as in par 4e."

During the times hereinafter mentioned, accused was a member of the 2nd T. Medium Port, Yokohama, Japan, and assigned to duty as assistant superintendent of the pier. Sergeant Grover C. Brantley was under his immediate command. At about 1800 hours on 28 May 1948, while supervising the unloading of the ship "Flying Arrow" accused directed Sergeant Brantley to "tag" some burlap bags which were about three feet long and one foot in diameter. These bags had been recently removed from the Flying Arrow. The master of the ship supplied Brantley with the tags and both he and accused asserted to Brantley that the burlap bags contained personal luggage. Accused then directed Brantley to load the bags in his (accused's) "civilian" jeep. Brantley thereupon backed accused's "blue" or "greenish-blue" jeep into the warehouse at the south pier and with the aid of some Japanese laborers began to load the bags. When Brantley asserted to accused that "I can't get over two or three bags in the jeep" accused replied, "Put what you can in there and get away from here" (R 8,12,17-22). Three of the mentioned bags were loaded in the jeep. Brantley and accused then mounted the vehicle and with Brantley driving they proceeded through the south pier gate without stopping and without presenting any waybill or securing clearance. Technician Fifth Grade Wesley Lawson, a guard on the pier, observed the loading and saw accused directing the operation. He walked to a point where he could observe the vehicle pass through the gate. Lawson conferred with Technician Fourth Grade William E. Taylor, the guard at the gate or "check point," and found that no waybill had been presented by either accused or Brantley (R 13). Sergeant Taylor asserted that the jeep passed through the check point without stopping. He observed Brantley driving and accused sitting

to his right in the front seat. He also noticed a burlap bag in the back of the jeep (R 16). After passing the check point the parties drove "to the end of that street and picked up a girl." Sergeant Brantley testified that this girl was to "show us where the baggage was to be taken" (R 24).

Miyoko Honda, a 23-year old Japanese girl, testified that in accordance with prior instructions from "two Chinese nationals" she met the accused near the harbor at about 1800 hours on 28 May 1948 and rode with him and the driver, directing them to her house where the bags were to be delivered. When they arrived at her house in the Yokohama area accused unloaded three bags from the back of the jeep and placed them on the doorstep. She stated that she did not know the contents of the bags which she described as "stuff." Her husband was inside the house. The witness could not name the Chinese who had directed her to meet accused and direct him to her home. She stated that later "the CID took the bag and myself" (R 32-34). On cross-examination Miss Honda was not able to state whether she had positively identified accused at an identification parade. Upon being examined by the court she stated that she had failed to identify accused at one time but this was due to the fact that he was wearing "dark glasses" (R 43). After delivery of the burlap bags to Miss Honda's home, the accused and Sergeant Brantley went back to the south pier where they "picked up" the master of the Flying Arrow. The three then went to accused's quarters where they, in company with accused's wife, had dinner and "talked" for about three hours. At about 2100 hours, as they were returning the master of the ship to his quarters all three of the men were arrested by members of the Criminal Investigation Division (R 25).

Mr. Bernard Dimon, Special Agent, 2nd Port, Criminal Investigation Division, testified that at 1930 hours on 28 May 1948 he confiscated nine bags of penicillin at the south pier. At approximately 0100 hours on 29 May he had confiscated three bags containing 3005 vials of penicillin and 150 vials of streptomycin from the home of the Japanese, Miyoko Honda, at "number 33, 1-chome, Nakamura-cho, Minami-ku, Yokohama-shi." The bags were marked with Chinese characters and both the packages and vials inside were labeled in printed English. Some of these labels bore the name "John Lilly & Co, USA" and the others "Merck & Co., Inc., Rahway, N.J." During his investigation concerning "these drugs" Mr. Dimon advised accused of his rights under Article of War 24 and on two occasions he denied being in his vehicle at the time the bags were transported to Honda's house. At a third interrogation accused admitted being a passenger in his vehicle at the time it passed through the South Pier check point on the evening of 28 May 1948 (R 47-50).

On cross-examination Mr. Dimon stated that Honda's house was registered in the name of a Chinese known as Fung Nien, alleged to be the husband of Honda. Nien was present in the house when Mr. Dimon confiscated the bags of drugs (R 51).

Sergeant Taylor was recalled to the stand and the law member read to the court excerpts from Memorandum No. 9, Headquarters 2nd T. Medium Port, dated 29 April 1948. The witness stated that "South Pier Check Point" mentioned in the memorandum was the place where he was on duty when accused and Brantley passed through in the jeep without presenting a waybill (R 53).

Technician Fifth Grade Lawson was recalled by the court and stated that he heard accused tell Sergeant Brantley to "get a waybill so the guard will let us out." From what he had observed he had decided to watch and see if a waybill was actually presented at the check point (R 54).

Mr. Bernard Dimon was recalled and stated that he was not a chemist but that he was familiar with the drugs in question and had handled great quantities thereof. He had opened the packages found in the three described bags and ascertained for a fact that the contents were the substances described on the labels. None of the labels bore the notation "for export." After the defense had withdrawn objection thereto Dimon asserted that Robert Mauldin, "skipper of the Flying Arrow" had been convicted for violating shipping regulations (R 57).

4. For the Defense

Two officers of accused's organization, Major William G. Turnbull and First Lieutenant John Jurbala, testified that accused had a good reputation among his military associates for honesty and efficiency. Accused was advised of his rights and stated, "I do not wish to testify, sir" (R 60-64).

5. Discussion

Specification 1 states in effect that at the time and under the circumstances alleged accused wrongfully disposed of the described property by delivering the same to Miyoko Honda in violation of Circular 26. The mentioned circular prohibits what is called black market activities and forbids any and every sort of commercial transaction in the occupied area of Japan between persons subject to military law and other than American or authorized personnel. The term "To Trade" is defined in such comprehensive language as to include practically every conceivable species of exchange or dealing and the acts incident thereto such as to "transmit, transfer, assign, dispose of or receive" property of American origin. The authority of military commanders to prohibit black market transactions, and to take disciplinary action against offenders is unquestioned. If accused's delivery of the American manufactured drugs to the civilian house was an act arising out of or in furtherance of a black market transaction as defined in the circular then the "transfer" of the property amounted to a wrongful disposition thereof. The court's determination

of this question appears to have been based entirely on the reasonable and obviously compelling inferences to be drawn from the acts and statements of accused. The burlap bags were part of the cargo removed from the Flying Arrow. The accused and the master of the ship caused Sergeant Brantley to tag the bags, making it appear to be personal property, and each represented that the contents were personal luggage. Accused then caused Brantley to load his jeep with the bags and with Brantley driving they proceeded through the check point without stopping or presenting a waybill as required, for the rendezvous with Miyoko Honda. When accused had delivered the items to Honda's house he and the sergeant returned to the port and met the master of the ship. They then proceeded to accused's quarters where they remained for some three hours. The Criminal Investigation Division recovered the three bags from a closet in Honda's house and confiscated the other nine bags at the pier. It can be reasonably inferred from the foregoing that accused knew the true contents of these bags and it is well settled in military jurisprudence that in the absence of a showing to the contrary an officer is chargeable with knowledge of the provisions of the circulars and directives of his command (CM 302741, Hege, 17 BR (ETO), 247,252). Although any one of the above mentioned acts of accused, isolated from the other, might not have incriminating significance, the sum total of all the surreptitious conduct leads unerringly to the conclusion that this was a black market transaction within the meaning of the quoted circular. Evidence which may be colorless if it stood alone may get a new complexion from other facts which are proved, and in turn may corroborate the conclusion which would be drawn from the other facts (Comm. v. Mulrey, 170 Mass. 103, 149 N.E. 94). Although there is no direct evidence that accused was a party to a black market trade or deal with unnamed civilians, we have no difficulty in concluding, as did the court, that his removal and delivery of the drugs under the circumstances proved was in furtherance of a black market transaction prohibited by the circular.

With respect to Specification 2 the evidence is clear and uncontradicted that accused caused his jeep to be driven through the check point at the south pier without presenting a waybill and securing clearance for the property or cargo in the jeep. Both the "trading" and driving through the check point under the circumstances shown appear to have been closely related in the genera unlawful scheme to deal on the black market, however, we are of the opinion that the specifications allege separate and distinct offenses. The failure to present a waybill or credentials at the check point is the gravamen of the offense alleged in Specification 2 and the act was wrongful within the meaning of Memorandum No. 9 irrespective of disposition to be made of the cargo. No prejudice to accused's rights resulted from the fact that Specification 2 was so drafted as to include matters contained in Specification 1 (CM 231487, Campbell, 18 BR 225, 232).

6. Department of the Army records show that accused is 34 years of age and married. He was engaged in the stevedoring business prior to enlisting in the Army on or about 5 June 1942. He attended the Army Service Forces Transportation Corps School, New Orleans Army Air Base, and was

commissioned a second lieutenant, AUS, on 17 January 1945. His adjectival efficiency ratings are "Excellent."

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

Christian D. Bilrud, Judge Advocate

James H. Booth, Judge Advocate

(On Temporary Duty), Judge Advocate

JAGK - CM 332590 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 16 NOV 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 Francis P. McLaughlin (0-1949404), 243d Transportation Port Company, APO 503.

2. Upon trial by general court-martial this officer was found guilty of the wrongful disposition of three bags of American manufactured penicillin and streptomycin by delivering them to a Japanese national, in violation of Circular 26, General Headquarters Far East Command, and of wrongfully transporting the same property through the 2nd Medium Port Check Point without presenting a waybill and securing clearance therefor in violation of Memorandum No. 9, Headquarters 2nd Transportation Medium Port, Yokohama, Japan. Both offenses were laid under Article of War 96. Accused was sentenced to be dismissed the service and to pay to the United States a fine of $2,000.00. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and a fine of $1,000.00 and forwarded the record of trial for action under Article of War 48.

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

Circular No. 26, General Headquarters, Far East Command, dated 10 March 1947, prohibited all forms of commercial activities or dealing in American manufactured goods between persons subject to military law and unauthorized civilians. Memorandum No. 9, Headquarters 2nd Transportation Medium Port, 29 April 1948, regulated vehicular traffic at the Port's central and south piers (Yokohama, Japan). It provided that all outbound cargo vehicles, regardless of type, would submit a copy of a waybill before clearance would be authorized by the Control Point Personnel. Accused was assistant superintendent of the pier, 2nd Transportation Medium Port. At about 1800 hours on 28 May 1948, while supervising the unloading of the ship "Flying Arrow" he directed a sergeant under his command to procure some tags from the master of the ship and affix them to some burlap bags which were on the pier. The bags were about three feet long and one foot in diameter. Both accused and the master of the ship told the sergeant that the bags contained personal luggage. After they were tagged accused directed the sergeant to load them on his personal jeep. The sergeant loaded three on the jeep and reported to accused. Accused and the sergeant then mounted the jeep, the sergeant driving, and they

proceeded through the south pier check point without presenting any way-bill or otherwise securing clearance for the cargo. At some point beyond the check point and in accordance with previous arrangements, they were met by a Japanese woman, Miyoko Honda, who directed them to her house in Yokohama where accused delivered the bags to her door. He and the sergeant then returned to the port and joined the master of the ship. Shortly thereafter Criminal Investigation Division agents confiscated nine similar bags at the port and the three bags which accused and the sergeant had delivered to the home of Miyoko Honda. These three bags contained a total of 3,005 vials of penicillin and 150 vials of streptomycin. Labels and markings on the drugs were in English, gave the names of American manufacturers, and showed clearly that the products originated in the United States. There was no notation on the products indicating that they were for export. It is clearly inferrible that the bags of drugs were delivered in a "black market" transaction and for personal profit.

The accused elected to remain silent. Two officers testified that he had a good reputation for honest and efficient conduct of duties.

4. Accused is 34 years of age and married. He was a longshoreman prior to enlisting in the Army on or about 5 June 1942. He attended the Army Service Forces, Transportation Corps School, New Orleans Army Air Base, and was commissioned a second lieutenant, AUS, on 17 January 1945. His adjectival efficiency ratings are "Excellent."

5. A recommendation for clemency addressed to the reviewing authority and signed by one member of the court, the special defense counsel, and the regularly appointed defense counsel is attached to the record of trial. It is stated that others involved in the unlawful transaction herein were convicted and received sentences as follows:

Robert Maldin, Master of the vessel Flying Arrow, confinement for five years and fine of $1,000.00 (confinement suspended).

Myo Fung Nein, Chinese national, three thousand yen fine, six months confinement and deportation.

Miyoko Honda, agent of Myo Fung Nein, twenty thousand yen fine, and confinement for one year (confinement suspended).

Sergeant Grover Brantley, six months confinement and forfeiture of two-thirds pay for a like period.

6. I recommend that the sentence be confirmed, but because there is indication that the accused was prevailed upon by the master of the ship to join in the action as a personal favor, and may not have personally profited from the transaction, I recommend that the fine be

remitted and that as thus modified the sentence be carried into execution.

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 1, Feb 7 1949).

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

JAGH CM 332620

17 SEP 1948

UNITED STATES	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Nagoya, Honshu, Japan, 28,29 July 1948. Dishonorable discharge (suspended) and confinement for two (2) years. The Branch, United States Disciplinary Barracks, Camp Cooke, California.
Private EARL F. LANGDEAU, RA 17212100, 725th Ordnance Maintenance Company, 25th Infantry Division, APO 25.	)	

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 sufficient to support the findings of guilty of Charge III and its Specification, and legally sufficient to support only so much of the findings of guilty of the Specification of Charge I as involves findings of guilty of involuntary manslaughter, and legally sufficient to support the sentence. The record of trial has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private Earl F. Langdeau, 725th Ordnance Maintenance Company, did, at Shiragiku-cho, Nishi-ku, Nagoya-shi, Nagoya Prefecture, Honshu, Japan, on or about 1925 hours 23 May 1948, willfully, feloniously, and unlawfully kill Yukitomo Endo by driving a United States 1/4 ton 4 x 4 vehicle on over or against Fujiko Endo at a time while the said Fujiko Endo was carrying Yukitomo Endo on her back.

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

Specification: (Disapproved by the reviewing authority).

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

Specification: In that Private Earl F. Langdeau, 725th Ordnance Maintenance Company, was at Shiragiku-cho, Nishi-ku, Nagoya-shi, Nagoya Prefecture, Honshu, Japan, on or about 23 May 1948, drunk, while driving a United States Government 1/4 ton 4 x 4 vehicle U. S. Register number 20739521.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and III and of the Specification under each. As to Charge II and the Specification thereunder the court found accused guilty by exceptions and substitutions. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for a period of two years. Evidence of one previous conviction was considered by the court. The reviewing authority approved the findings of guilty of the Specification of Charge I and Charge I and of the Specification of Charge III and Charge III, but disapproved the findings of guilty of the substituted Specification of Charge II and Charge II. The reviewing authority approved the sentence and ordered it executed, but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. The Branch, United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, was designated as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 36, Headquarters 25th Infantry Division, APO 25, dated 14 August 1948.

3. The record of trial is legally sufficient to support the findings of guilty of Charge III and its Specification. The only question presented is whether the record is legally sufficient to support the finding of guilty of Charge I and its Specification (voluntary manslaughter in violation of Article of War 93).

4. Evidence for the prosecution.

At about 1400 hours on 23 May 1948 accused, while driving a jeep, picked up two other soldiers in Nagoya, Honshu, Japan. During the course of the afternoon accused and his companions obtained three bottles of whiskey and some beer. Accused drank some of the purchased beverages. At the time of the accident about one-half bottle of whiskey had been consumed and each of accused's companions was by then "pretty well" intoxicated (R 21-23,29).

At about 1830 hours on 23 May 1948 at Nagoya, Japan, Mrs. Fujiko Endo, was walking on the extreme left side of a road near her home.

At this time she was carrying her baby girl, Yukitomo Endo, on her back. Suddenly she noticed a jeep, approaching from behind, "very unsteady," at a slow rate of speed and zig-zagging and swerving. Although she attempted to get out of the way she was struck in the back by the vehicle and knocked to the ground. When struck she was on the extreme edge of the road and almost off the road. About three to five people were walking behind her (R 9-11). Her daughter, Yukitomo Endo, was taken to the hospital immediately after the accident and when examined there was found to be dead. Expert medical testimony showed that the child had been thrown on a hard surface where it had struck its head, causing a brain contusion (R 16-19).

Two Japanese eyewitnesses to the accident testified that they saw the jeep, driven slowly by the accused approaching on the left side of the road, and saw it strike Mrs. Endo on the back. They identified accused as the driver of the jeep and testified that he appeared to be intoxicated. He could not walk straight and was not driving very steadily (R 12-15). One of the eyewitnesses testified that the jeep struck four people on the road before striking Mrs. Endo (R 12), and the other testified that the vehicle struck one other person (R 15).

Corporal Dixon, 1127th Military Police Company, testified that he was called to the scene of the accident about 1900 hours, 23 May 1948. When he arrived he found accused present and, in witness' opinion, under the influence of alcohol. Accused smelled of alcohol. He tried to tell witness what happened "but didn't seem to know much about it." (R 20,21).

5. Evidence for the defense.

Accused after having been duly advised of his rights testified that immediately prior to the accident he had been talking to his two companions when the jeep he was driving struck something. He became "scared" and confused, looked back to see what it was and discovered it was a woman. It was while he was looking back that the jeep struck Mrs. Endo (R 26). He did not consider himself intoxicated at that time. On cross-examination accused admitted that he had had one or two beers and about one-fourth of a bottle of whiskey. He started drinking shortly before the accident but did not drink as much as his companions. He estimated that the speed of the jeep, the speedometer of which was broken, was about ten or fifteen miles per hour when he struck the first woman (R 26-29)

6. Discussion.

The evidence of record shows that accused, while under the influence of intoxicating liquor, drove the vehicle he was driving in such a manner as to collide with and kill a small Japanese child who was being carried

on her mother's back. There is no evidence indicating that the act was done in a willful manner as alleged in the Specification, or that accused had any intention or design to strike anyone at the time the accident occurred or prior thereto. On the other hand, the record contains ample evidence that accused was driving the vehicle in a culpably negligent manner and that by reason of such negligence, fatal injuries were sustained by the victim. Inasmuch as the necessary element of willfulness is absent, the record of trial herein does not support a conviction of voluntary manslaughter, but is legally sufficient only to sustain a finding of guilty of the lesser included offense of involuntary manslaughter. The Board of Review in passing on this question has stated:

> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law." (MCM 1928, par 149a) (Underscoring supplied)
>
> "Voluntary manslaughter is intentional homicide and possesses all of the elements of the crime of murder except that of malice aforethought. Involuntary manslaughter, on the other hand, is unintentional homicide, which occurs in the commission of an unlawful act less than a felony and not likely to endanger life or by reason of culpable negligence committed in performing a lawful act.
>
> "There can be no doubt that accused was charged with and found guilty of voluntary manslaughter since the word 'willfully' appears as an allegation of each Specification.
>
> "Bouvier's Law Dictionary (Vol 2, p.3454) states that in an indictment 'willfully' means intentionally. It implies that the act is done knowingly and of stubborn purpose, but not with malice (State v. Swain, 2 S.E. 68). A willful act is one that is done knowingly and purposely, with the direct object in view of injuring another (Hazle v. Southern Pacific Company, 173 Fed 431). It is synonymous with intentionally, designedly, without lawful excuse, and, therefore, not accidentally. (Miller v. State, 130 Pac 813).
>
> "* * There is nothing in the record of trial indicating an intention or purpose to strike the victims, nor is there any evidence present from which willfulness as defined above, can be inferred. The element of willfulness necessary for a conviction of voluntary manslaughter being absent, the record of trial * * is legally sufficient to sustain only a finding of guilty of the lesser included offense of involuntary manslaughter, which is

a felonious and unlawful killing without the element of willfulness required for voluntary manslaughter (CM 234896, Nieder, 21 BR 209)." (CM 329585, Rogers, 1948).

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

7. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of Charge I as finds that accused did, at the time and place alleged, feloniously and unlawfully kill Yukitomo Endo by driving a United States ¼ ton 4 x 4 vehicle on, over or against Fujiko Endo at a time while the said Fujiko Endo was carrying Yukitomo Endo on her back, legally sufficient to support the finding of guilty of Charge I, legally sufficient to support the findings of guilty of Charge III and its Specification and legally sufficient to support the sentence.

On Leave, Judge Advocate

C. O. Woefe, Judge Advocate

Geo Lynch, Judge Advocate

JAGH CM 332620 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522), is the record of trial in the case of Private Earl F. Langdeau, RA 17212100, 725th Ordnance Maintenance Company, 25th Infantry Division, APO 25.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification, Charge I, as finds the accused guilty of the Specification except the word "willfully," legally sufficient to support the findings of guilty of Charge III and its Specification and legally sufficient to support the sentence. I concur in that opinion and for the reasons stated therein recommend that so much of the findings of guilty of the Specification, Charge I, as involves a finding of guilty of the word "willfully," be vacated and that all rights, privileges and property of which accused has been deprived by virtue of the findings so vacated be restored.

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

(Thomas H. Green)

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(GCMO 170, 7 Oct 1948).

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

18 OCT 1948

JAGH CM 332672

UNITED STATES	)	FIRST ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Jay, Governors Island,
Captain LYNN A. HAWKINS, MSC,	)	New York, 12 August 1948.
01543070, 307th Airborne Medical	)	Dismissal.
Company, 82nd Airborne Division.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty).

Specifications 2 through 8: (Nolle prosequi).

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

Specification 1: In that Capt Lynn A. Hawkins, MSC, 307th Airborne Medical Company, 82nd Airborne Division, did, at New York, New York, on or about 10 April 1948, with intent to defraud, wrongfully and unlawfully make and utter to the New Yorker Hotel, a certain check, in words and figures as follows, to wit:

"NO. New York 10 April 1948

Name of Bank First National Bank

City Dothan, Alabama

Pay to the Order of Cash $50 $\frac{00}{100}$

Fifty and o/100 Dollars

For value received, I represent that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof."	Signature	Lynn A Hawkins, Capt 0-1543070
	Address	Surgeon Office, 1st Army Governors Island, N. Y.

and by means thereof, did, fraudulently obtain from the New Yorker Hotel, $50.00, he, the said Capt Lynn A. Hawkins, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in the First National Bank of Dothen, Alabama, for the payment of said check.

Specification 2: In that Capt Lynn A. Hawkins, MSC, 307th Airborne Medical Company, 82nd Airborne Division, did, at New York, New York, on or about 12 April 1948, with intent to defraud, wrongfully and unlawfully make and utter to the New Yorker Hotel, a certain check, in words and figures as follows, to wit:

"NO. New York, 12 April 1948

Name of Bank First National Bank of Dothan

City Dothen, Alabama

Pay to the Order of Hotel New Yorker $165 97/100

One Hundred and sixty-five and 97/100 Dollars

For value received, I represent that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof."	Signature	Lynn A. Hawkins, Capt. 0-1543070
	Address	Surgeon Office, 1st Army Governors Island, N.Y.

in payment of an account with the said New Yorker Hotel, he, the said Capt Lynn A. Hawkins, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in the First National Bank of Dothan, Alabama for payment of said check.

ADDITIONAL CHARGE II: Violation of the 58th Article of War.

Specification: In that Capt Lynn A. Hawkins, MSC, 307th Airborne Medical Company, 82nd Airborne Division, did, at New York,

New York, on or about 7 April 1948, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Jay, New York, on or about 2 May 1948.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of the Charge and the Specification thereunder. He was found guilty of Additional Charge I and the Specifications thereunder. He was found not guilty of Additional Charge II but guilty of a violation of the 61st Article of War, and guilty of the Specification of Additional Charge II except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty and of the substituted words guilty. 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. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows:

Under date of 17 December 1947 the accused executed and delivered to the Atlantan Hotel, of Atlanta, Georgia, a check (Pros Ex 5) drawn on the First National Bank of Dothan, Alabama, in the sum of $100.00 for which he received cash. At the time the check was cashed, the hotel contacted the bank by telephone and ascertained that there were sufficient funds to pay the check. However, the bank refused to certify the check by telephone. The check was presented for payment in due course but payment was refused because of insufficient funds. Accused subsequently redeemed this check by paying the hotel $100.00 (R 15).

Under date of 1 April 1948 a letter order bearing symbol and number 300.4 AHFAG, LO 4-10 was issued by Headquarters First Army, addressed to accused at 307th Airborne Medical Company, 82nd Airborne Division, Pine Camp, New York, directing accused to proceed on or about 7 April 1948 from his station to Governors Island, New York, on temporary duty, for a period of approximately thirty days (R 11; Pros Ex 1). This order was corrected under the same date so as to provide for a period of temporary duty of approximately 111 days (R 11; Pros Ex 2). An extract copy of the morning report Headquarters, 1209th ASU, Sta. Comp. for 14 April 1948, certified by the Commanding Officer, Headquarters Pine Camp, New York, evidenced the following entries:

"Hawkins Lynn A (MSC) 01543070, Capt
Fr atchd to TDY Gov Isl NY per
LO 4-10 Hq 1st Army Gov Isl NY
dtd 1 Apr 48 (30 days) as of
6 Apr 48 Departed" (R 12; Pros Ex 3)

Accused reported to Fort Jay, Governors Island, New York, for the first time on 2 May 1948 (R 15; Pros Ex 4) and signed the officers' register at First Army Headquarters on that date (R 14,41; Pros Ex 12).

Under date of 10 April 1948 accused then a guest at the Hotel New Yorker, executed a check in the sum of $50.00 drawn on the First National Bank of Dothan, Alabama, payable to the order of cash and delivered same to the Hotel New Yorker in New York, New York, in return for cash advanced (R 22,27; Pros Ex 8). On 12 April 1948 the accused upon leaving the Hotel New Yorker, executed a check in the sum of $165.97 also drawn on the First National Bank of Dothan, Alabama, payable to the order of the Hotel New Yorker and delivered same to the Hotel New Yorker in New York, New York, in payment of money due for rent on a room jointly occupied by accused and another officer (R 22,27; Pros Ex 7). On each of these checks below his signature as drawer and in a space provided for address was the notation "Surgeon Office 1st Army, Governors Island, N.Y." These checks were forwarded to the drawee bank for collection and were returned unpaid because the account had been closed (R 22,34,35; Pros Exs 9,10,11). The hotel later received a postal money order for $99.31 for the checks and they were delivered to Major Levy (R 23,24,29,30,32). A credit of $99.31 was given to accused since he owed only half of the room rent (R 30).

On 17 December 1947 accused had a checking account of $104.41 in the First National Bank of Dothan, Alabama (R 34). The records of the First National Bank showed the account to be in the name of "Captain Lynn A. Hawkins & or Mrs. Alice L. Hawkins" with a balance on March 28, 1946, of $65.00 and one deposit of $200.00 made on 8 December 1947 (Pros Exs 9 and 10). The account was closed on 22 January 1948 (Pros Exs 11,9). Accused did not have an account in this bank on 10 April 1948 or subsequent thereto (R 34; Pros Ex 11).

b. Evidence for the defense.

After being duly advised as to his rights by the court, the accused elected to give sworn testimony (R 39).

He stated that in September 1947 he was stationed at Fort Bragg and on 15 September 1947 he was transferred to Pine Camp on temporary duty, by orders which provided that upon completion of exercise snowdrop on 1 March 1948 he was to return to Fort Bragg (R 46,51; Def Ex A). He remained at Pine Camp after 1 March 1948 upon verbal authority of the Surgeon, First Army, for the purpose of closing the hospital, which was completed on 15 March (R 46). Accused's battalion commander also verbally authorized this extension of duty. On 25 March he told the Adjutant at Pine Camp he was going back to Fort Bragg, but a few days later the Adjutant called and told accused he was to go to First Army on temporary duty. On 5 April Pine Camp received a telegram stating accused was being ordered from Pine Camp to First Army on temporary duty per letter order 4-10 (R 47).

He stated that he did not receive the original order placing him on temporary duty with Headquarters First Army, but did receive the corrected order on 1 August 1948 (R 46). He left Pine Camp for New York on 7 April 1948. In New York he talked to a Lieutenant at First Army but did not report in since the prior order issued to him in September 1947 contained contrary instructions to the order of 1 April 1948, as to the place to which he was to proceed upon completion of his duty at Pine Camp. He remained approximately four days in New York, then went to Fort Bragg; upon arrival at Fort Bragg he talked to his battalion commander and a couple of officers in Division Headquarters about where to report in and they advised him to return to New York. He next proceeded to Atlanta, Georgia, Headquarters Third Army, and talked to an officer in the Adjutant General's Section, where he was again advised to return to New York. He then proceeded to Washington to talk to an officer in the Surgeon General's Office in order to see if he could stay with the Division. Subsequent to that conversation he did return to New York (R 49). He wore his uniform during the time he was absent, and it was never his intent to desert or even to be absent without leave from the Army (R 49).

He made an allotment to his mother of $250.00 a month, effective in November 1947, for which she opened a joint checking account. Thereafter, deductions from his pay for this allotment continued for five months, the last deduction being on 31 March, making a total of $1250.00 (R 50). The account was carried in the Dothan National Bank as a checking account in the name of accused and his mother and either could draw checks (R 52).

Accused gave the Atlantan Hotel the $100.00 check (Pros Ex 6) and at that time he had an account at the Dothan National Bank (R 51). He thought he had $250.00 in the bank at that time (R 52). He subsequently paid the check (R 52). He drew the two checks introduced into evidence (Pros Exs 7,8) in favor of the Hotel New Yorker in April 1948, but he thought he had $700.00 in his account at the time (R 52). He subsequently made these checks good (R 52). He had no knowledge his account had been closed when he drew the checks (R 52), and had no intention of defrauding the hotel. His mother opened the account and she received the statements and cancelled checks. She informed him she had received his allotment checks, but did not specifically tell him she deposited any of the allotment checks except the first one (R 60).

On cross-examination accused stated the Adjutant at Pine Camp had telephoned and told him orders were being published for him to go to Fort Jay. He further stated that he did not report in when he arrived at Fort Jay, New York (R 54). He did not attempt to straighten out the conflict in his orders. He arrived in New York, New York, on 8 April 1948 and stayed at the Hotel New Yorker (R 55). He drew some checks payable to the Hotel New Yorker, then went to Fort Bragg. From there he went to Fort McPherson, then to Washington, D.C., and then to Fort Jay where he signed in in the Officers' Register. He had never received

a statement from his bank and never endeavored to find out the status of his account. He first learned about the Hotel New Yorker checks being returned about 6 May 1948 (R 59).

In a deposition, the mother of the accused stated that she received an allotment check about 6 December 1947 in the amount of $250.00, which she placed in the bank, and that she received approximately five checks altogether, from December 1947 through April or May 1948 which she placed in a joint account at the First National Bank, Dothan, Alabama. Subsequently she withdrew all the money and sent her son the cancelled checks (R 51; Def Ex B). Upon being recalled by the court, accused denied having received cancelled checks which his mother stated she had mailed to him, and stated that he did not receive the bank statement from either her or the bank (R 64).

A deposition from John L. Mullins, Cashier of the First National Bank, Dothan, Alabama, dated 11 June 1948 indicated that the bank had no record pertaining to various checks purportedly issued by accused (R 62; Def Ex C).

Accused further testified that he enlisted in the Army on 20 September 1938; that he served four and one-half years and was given an honorable discharge while in the grade of Technical Sergeant to accept a commission. He was promoted to First Lieutenant in 1943 and to Captain in 1945. He stated that he served with the 27th Division in Hawaii in 1943 and 1944, and that in June 1944 he was attached to the Second Marine Division and went to Saipan; that after the Saipan Campaign he joined the 38th Field Hospital; that he was later with the Fifth Marine Division and went to Iwo Jima where he stayed until the end of the war. He then returned to Saipan from where he returned to the States in January 1946. He further testified that he was wounded in Saipan in August 1944 and was entitled to wear the Purple Heart and the Bronze Star decorations; and that he has never been tried for an offense either in civil life or in the Army.

4. Specification 1, Additional Charge I.

The evidence established that on 10 April 1948 accused executed and delivered to the New Yorker Hotel a check for $50.00 drawn on the First National Bank of Dothan, Alabama, for which he received cash. At that time accused did not have an account with the bank and payment was refused by the bank. Accused subsequently redeemed the check to the satisfaction of the hotel. The question of whether in so making and uttering such check the accused acted fraudulently, knowing that he did not have and not intending that he should have any account with or sufficient funds in the drawee bank for payment of the check was an issue of fact which the court was authorized to determine. The fact

that the account was closed at the time raises a presumption that accused knew of this fact and consequently his act would be prima facie fraudulent. (CM 280898, Donnelly, 53 BR 403,411,412; CM 218946, Joly, 12 BR 185,193,194; CM 202601, Sperti, 6 BR 171,214).

As stated in CM 296654, Scharosch, 58 BR 219,223:

> "The making and uttering of the checks, and the obtaining of the face amount thereof in cash is not questioned. It is also not disputed that the checks were presented to the bank and dishonored because accused had no account. Accused, however, denies any intent to defraud and asserts that in writing the checks he acted under the impression that he did have an account. The basis for this misconception was accused's alleged request, some two months prior to the time he wrote the first check, that his brother-in-law deposit $500 in the bank for him. Accused testified that he 'had reason to believe' that his request had been granted. On the other hand, he admitted he had never signed a signature card at the bank, had never asked for nor received any bank statement, and had had no communication with the bank. Itwas within the province of the court-martial, as the determiner of questions of fact, to accept or reject accused's story, and, by its findings, the court has indicated that it preferred the latter course."

The testimony of accused that he did not know the account had been closed did not conclusively rebut such presumption. There were corroborative circumstances fortifying such presumption. It appeared from the records of the bank that the account had been closed in January of 1948 and that no deposits had been made after that date. Accused knew that there was a question of the sufficiency of his account after payment of the $100.00 check to the Atlantan Hotel had been refused in December of 1947 on the grounds of insufficient funds. He redeemed the check. He could and should have made inquiry at that time as to the state of his account. It was his duty to keep advised as to the condition of the account. Accused testified that he relied on his mother to make monthly deposits. Although his mother testified that she made five deposits of $250.00 each in the bank, the records of the bank reflect only that one deposit of $200.00 was made. The mother further testified that she closed out the account and sent accused all cancelled checks. If the mother closed out the account on the date shown in the bank records, then accused knew it or had ample opportunity to know it long before he made and uttered the check in question.

5. Specification 2, Additional Charge I.

The evidence establishes that on 12 April 1948 after spending two days at the hotel and at the time of departure accused made and delivered

to the Hotel New Yorker a check for $165.97 payable to cash and drawn on the First National Bank of Dothan, Alabama, as payment for rent due on a room occupied by accused and another officer. The drawee bank refused to pay the check because the account had been closed. Accused subsequently redeemed this check for $99.31.

For the reasons stated in the discussion under Specification 1 of this Charge, the evidence was sufficient to warrant the court in finding that accused made and uttered the check well knowing that he did not have and not intending that he should have any account with or sufficient funds in the First National Bank of Dothan for payment of said check. However, in view of the fact that the check was given in payment of the hotel account the question is presented as to whether there could be an intent to defraud at the time the check was given. It was held in CM 330282, Dodge, (June 1948) that where a check was given in payment of a past due indebtedness accused could not be guilty of making and uttering such check with intent to defraud:

> "However, the $25 check was apparently given by Sergeant Turner in consideration of expense moneys which the Sergeant had advanced on the journey to Columbus, Georgia. Sergeant Turner had obviously already paid these expenses at the time he received the check from accused and consequently he gave up nothing in reliance upon accused's check. He was not, then, defrauded out of the expense money by means of the check. This being so, accused cannot legally be convicted of having intended to defraud Sergeant Turner even though it was not alleged in the particular specification in question that accused 'fraudulently obtained' anything of value by means of the $25.00 check (CM 321734, Creighton, 70 BR 355,359, 35 CJS, p.662 and cases there collected."

But there are exceptions to the above rule. Where the recipient of the worthless check which is given in consideration of an existing debt has changed his legal position for the worse, as in the case where such check is given in payment of a currently due hotel bill, such conduct of the drawer of the check may amount to fraud since the hotel has relinquished the innkeeper's lien in reliance upon the check (CM 330282, Dodge, supra; 35 CJS, p.670)

However, under the facts in this case the sum paid the hotel on account did not constitute payment of a past due indebtedness. The furnishing of the accommodations and the payment therefor were to be concurrent. There was nothing to indicate that the hotel at any time intended to extend credit to accused. It is a matter of common knowledge that large reputable hotels collect from transients on a cash basis when they leave the hotel. In other words credit is not contemplated and payment is to be made in cash when the services are rendered. The

hotel completed its part of the undertaking to furnish the services when accused checked out of the hotel. His part of the contract was then to be performed, viz., payment for these services. Thus in the case of Commonwealth v. Devlin, 141 Mass 423, 6 N.E. 64 it was held (Headnote):

> "Where certain sheep were sold to the defendant with the understanding that he was to pay cash for them, and he gave a check representing that it was good, and the seller took it, relying on such representations, the check in fact being worthless, the defendant was guilty of obtaining goods under false pretenses, and although the giving of the check in payment took place about an hour after the delivery of the sheep, the delivery was made on the understanding that the payment was to be substantially simultaneous with the delivery, and the delivery was conditioned upon immediate payment."

It is to be noted that in cases where a check is given in payment of an antecedent indebtedness, the drawer of a worthless check may be guilty of an intent to "deceive," as distinguished from an intent to "defraud." (CM 329503, Frith (April 1948).

Although accused did not owe the full amount evidenced by this check he did owe $99.31, and consequently the evidence sustains an intent to defraud which taints the entire transaction. The intent is not severable in this respect.

6. Specification, Additional Charge II.

That the accused absented himself without leave from 7 April 1948 to 2 May 1948 as found by the court, was clearly established not only by prosecution evidence but by the testimony of accused. It was shown that he was verbally informed of the orders directing him to proceed to First Army Headquarters and that he failed to report there as directed. There was no legal justification for his failure to report. The orders issued by Headquarters First Army, under whose command and jurisdiction accused was at the time, had the effect of countermanding prior orders and in the absence of any showing to the contrary such orders are presumed to be legal (par 134b, MCM 1928).

7. The accused is 28 years of age, divorced, and has a dependent mother. He completed four years of high school. In civilian life he was a checker for a wholesale grocery company. He served in an enlisted status from 22 September 1938 to 19 December 1942, the highest grade held being that of Technical Sergeant. He was commissioned Second Lieutenant, Medical Administrative Corps, on 19 December 1942 and was subsequently promoted to First Lieutenant on 5 June 1944, and to Captain on 14 November 1945. He has had foreign service as an officer from 25 January 1943 to

21 January 1946. He is authorized the Good Conduct Medal, the American Defense Medal with Bronze Star, the American Theater Medal, the Asiatic-Pacific Theater Medal, the World War II Victory Medal, the Parachutist Badge and seven overseas bars. He is authorized Bronze Stars for the Midway, Oahu and Western Pacific campaigns. He has efficiency ratings of record of Very Satisfactory (2), Excellent (11), and Superior (6). There is no evidence of previous convictions either in civil or military courts. The court-martial which tried accused unanimously recommended clemency "in view of the fine army record of accused."

8. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of violations of the 95th Article of War.

C. D. Wolfe, Judge Advocate

C. J. Berkowitz, Judge Advocate

Jno Lynch, Judge Advocate

JAGH CM 332672 1st Ind

JAGO, Department of the Army, Washington 25, D.C. 29 OCT 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 Lynn A. Hawkins, Medical Service Corps, 01543070, 307th Airborne Medical Company, 82nd Airborne Division.

2. Upon trial by general court-martial this officer was found guilty of wrongfully making and uttering to the Hotel New Yorker, on 10 and 12 April 1948, respectively, with intent to defraud, two checks, drawn on the First National Bank of Dothan, Alabama, the first in the sum of $50.00, by means of which he fraudulently obtained $50.00 from the Hotel, and the second in the sum of $165.97, given in payment of an account with the Hotel, the accused then knowing that he did not have and not intending that he should have any account with or sufficient funds in the bank for the payment of either of the checks, in violation of the 95th Article of War, (Add Chg I, Specs 1 and 2). Accused was also found guilty of absenting himself without leave from the service of the United States from 7 April 1948 to 2 May 1948 in violation of the 61st Article of War (Add Chg II, Spec). 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 of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

The evidence established that accused, while on duty at Pine Camp, New York, was directed to proceed to Governors Island, New York, on or about 7 April 1948 for temporary duty at Headquarters First Army. He left Pine Camp on 7 April 1948; but did not report to Headquarters First Army for duty until 2 May 1948; instead, without authority, he went to New York, then to Fort Bragg, Atlanta, Washington and finally to his station. The accused testified that he did not report to Headquarters First Army as directed because of prior inconsistent orders, which he was endeavoring to clarify, directing him to return to Fort Bragg upon completion of temporary duty at Pine Camp.

The evidence further established that while in New York on 10 April 1948 the accused obtained $50.00 in cash from the Hotel New

Yorker, where he was then staying, in return for which he made and uttered to the Hotel a check in that amount, drawn on the First National Bank of Dothan, Alabama, and that on 12 April 1948, upon leaving the Hotel New Yorker, the accused made and uttered to the Hotel in payment of his account another check drawn on the First National Bank of Dothan in the sum of $165.97.

Both of the checks were dishonored because the account of the accused in the drawee bank had been closed. The accused had had an account in the First National Bank of Dothan, Alabama, in January 1948, but it had been closed on 22 January 1948, and no money had been deposited in the account after that date.

Accused testified that his mother had opened the account at the bank for him; that it was a joint account; that he had made an allotment of $250.00 a month to his mother which he presumed she was depositing in the bank each month; that at the time he uttered and delivered the two checks he thought the account was sufficient to pay the checks; and that he had no intent to defraud the Hotel New Yorker. Accused's mother testified by deposition that she had opened the joint account in the Bank and deposited approximately five of the allotment checks but that she had subsequently closed the account and sent accused all cancelled checks. Accused denied receiving the checks and receiving information that the account had been closed. The two checks were redeemed by the accused prior to trial.

4. The accused is 28 years of age, divorced, and has a dependent mother. He completed four years of high school. In civilian life he was a checker for a wholesale grocery company. He served in an enlisted status from 22 September 1938 to 19 December 1942, the highest grade held being that of Technical Sergeant. He was commissioned Second Lieutenant, Medical Administrative Corps, on 19 December 1942 and was subsequently promoted to First Lieutenant on 5 June 1944, and to Captain on 14 November 1945. He has had foreign service as an officer from 25 January 1943 to 21 January 1946. He is authorized the Good Conduct Medal, the American Defense Medal with Bronze Star, the Asiatic-Pacific Theater Medal, the World War II Victory Medal, the Parachutist Badge and seven overseas bars. Although not shown by Department of the Army records, accused testified he is also entitled to the Purple Heart Medal for wounds received at Saipan. He has efficiency ratings of record of Very Satisfactory (2), Excellent (11), and Superior (6).

5. There is attached to the record of trial a unanimous recommendation for clemency dated 12 August 1948 wherein it is stated in part:

> "In view of the fine Army record of the accused, the members of the court felt that the sentence of dismissal which the court was compelled to adjudge was of too great severity, and recommend

that a lesser sentence be imposed, with a warning to accused that any further instances of a similar character to those for which he was convicted, would result in the imposition of severe punishment."

6. I recommend that the sentence be confirmed and in view of the fact that certain of the offenses appear to have involved deliberate fraud, recommend that the sentence be carried into execution.

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

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 184, 9 Nov 1948).

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

JAGN-CM 332697

U N I T E D S T A T E S	)	24TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Kokura, Kyushu, Japan, 16 August 1948. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private FELIX MARTINEZ, JR. (14086204), 24th Military Police Platoon, 24th Infantry Division.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of Not Guilty).

Specification 2: In that Private Felix Martinez, then Private First Class, 24th Division Military Police Platoon, did, at Tobata, Kyushu, Japan, on or about 2 July 1948, with intent to commit a felony viz sodomy, commit an assault upon Takubo Toshio by forcibly seizing him and against his will attempting against the order of nature to have carnal connection with the said Takubo Toshio.

Specification 3: (Finding of Not Guilty).

Accused pleaded not guilty to all Specifications of the Charge and the Charge. He was found not guilty of Specifications 1 and 3, guilty of Specification 2 and guilty of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due

or to become due and confinement at hard labor for three years. The reviewing authority approved the sentence, reduced the period of confinement to one year, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution established a prima facie case of accused's guilt of Specification 2 by the testimony of the victim of the assault, Takubo Toshio (R. 6-12). Defense testimony with respect to Specification 2 consisted merely of statements of Private Billie T. Bible that Japanese guards with whom he had been on duty "made passes" at him. Accused remained silent and the evidence adduced from Toshio stands uncontradicted and unimpeached. During the trial, however, the prosecution introduced into evidence a pre-trial statement of the accused which, while not a complete confession of the offense of which he was found guilty, was nevertheless a confession of other offenses closely connected therewith and constituting a part of the same scheme. The question for consideration is whether certain irregularities relating to the admission of such document into evidence are of such nature as to constitute fatal error despite the positive and conclusive nature of the remaining legal evidence.

4. Preparatory to the introduction of accused's pre-trial statement the prosecution called as a witness First Lieutenant Earl Speed who testified that upon receiving a report that some of the men in the guard "had been playing around with the Japanese guards out there," he made an investigation, and in the course of the investigation he questioned accused, who stated "he wanted to make a confession of what had happened." Lieutenant Speed's testimony on direct examination then continued as follows:

"A. * * * He told me what had happened, and I explained to him that under the 24th Article of War he did not have to make any written statement whatever, and if he did, he did not have to state anything that would incriminate him in any way. He said he would like to make a statement. He wrote it out. After it was typed up, he was brought back in. I read it and he read it, and I asked him if he wanted to sign it, and he said, 'Yes.' I asked him if he understood that he had incriminated himself, and he said 'Yes.' So I swore him, then he signed the statement, and I signed it myself.

Q. Did you use any force or duress of any kind in getting this statement.

A. No.

Q. Did you make any promises if he did give you the statement?
A. No, only the fact that I would have to put it before a court, that I had no alternative to do anything else" (R. 17).

The prosecution then called as a witness Sergeant Stanley F. Fortuna who also identified accused's written statement and testified that accused signed it voluntarily after being explained "his rights under the 24th Article of War" (R. 19).

After the testimony of Sergeant Fortuna was completed the following colloquy occurred:

"PROSECUTION: The prosecution would like to introduce in evidence as prosecution's exhibit 1 the statement of Pvt Martinez dated 9 July 1948.

DEFENSE: We object, due to the fact that the defense would like to know if the statement is being introduced as a confession.

PROSECUTION: It is being introduced as a confession.

DEFENSE: I would like to point out one thing before this is introduced, which is found in the Manual for Courts-Martial on page 116, the third paragraph down, reading: 'The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior.' Is it possible for us to put the accused on the stand solely in connection with the taking of this statement, nothing to do with the case itself?

LAW MEMBER: It will not be allowed at this time. The confession will be admitted as evidence and marked prosecution's exhibit 1.

The prosecution read its exhibit 1 to the court" (R. 21).

That part of accused's statement which is in the nature of a confession is as follows:

"While on guard in Tobata, without using any force

mentioned, I had a suck job and further in the night a hand job from a Japanese Civilian Guard in Tobata. I admit I was wrong in doing so, but sexual intenses cannot be controled. Then three nights after the same thing occurred, but the man only gave hand job. Since I do not have any witnesses and I have two (2) man (homosexuals) against me it will be hard for me to defend myself. The man was reading a book that to my knowledge of Japanese the word 'Skivi' means fuck. The man told me that it was 'Skivi,' book and when he told me (translated) that Skivi and Pom Pom was joto. I got a hard on and man felt my prick and I asked him for a suck job. He said, 'joto' and than again man gave me a hand job to kill my hard on. I said 'arigato' and nothing else was said during the night" (Pros. Ex. 1).

After testimony of defense witnesses, the record reflects the following:

"DEFENSE: We have explained his rights to the accused, and he elects to remain silent.

The law member again explained to the accused his rights, and asked him what he desired to do.

ACCUSED: I desire to remain silent.

DEFENSE: The defense rests" (R. 29).

In addition to the Specification recited above, of which accused was found guilty, he was tried for and found not guilty of an act of sodomy per os with one Takubo Toshio at Tobata, Kyushu, Japan, on or about 2 July 1948, and of an act of sodomy per anum with one Isao Fukamaki at Tobata, Kyushu, Japan, on or about 6 July 1948.

4. The first question to be considered is whether or not the written statement of accused, having been made to a military superior, was of such a nature as to constitute a confession and requires further inquiry into the circumstances under which it was made as provided by paragraph 114b, Manual for Courts-Martial, 1928. A confession is an acknowledgment of guilt (par. 114a, MCM, 1928, p. 114). It must be noted in the present case that accused did not acknowledge guilt of the offense of assault with intent to commit sodomy of which he was found guilty. He does admit definitely one act of sodomy per os with a Japanese civilian guard in Tobata. Although the statement contains no date, considered with the testimony of the witness Takubo Toshio and other evidence of record, it obviously refers to the events of 2 July 1948, the date of the offense of which accused was found guilty. A confession made by

an accused of an offense different from that with which he is charged and in no way connected with it is not admissible as proof of the offense for which he is tried, but if it is of an offense which is part of the same scheme, or is so connected as not to be severed from the offense on trial, it is admissible (Wharton's Criminal Evidence, p. 992). Furthermore, evidence of accused's act of sodomy per os with the Japanese guard, as admitted in his statement, was relevant and admissible with respect to the offense of assault with intent to commit sodomy of which he was found guilty, as being an act not too remote in point of time, and manifesting criminal intent and guilty knowledge (par. 112b, MCM, 1928, p. 112).

It is impossible to speculate as to the extent of consideration given by the court to accused's confession to a criminal act of a similar nature and obviously a part of the same scheme as the crime of which he was found guilty. We must conclude that evidence of the offense to which accused confessed was admissible with respect to the crime charged in Specification 2 and that it was considered by the court in arriving at its findings of guilty.

5. The relevancy of accused's statement as evidence against him in the trial for the charge under which he was found guilty having been established, it is unnecessary to decide here whether it constituted a confession to that charge or merely an admission against interest. If the statement is considered a confession, then it must be subjected to the strict rules governing the admission of such documents into evidence (par. 114a, MCM, 1928). On the other hand the Board of Review recently held that if such statements are considered admissions against interest, although normally admissible in evidence without any showing that they were voluntarily made, they fall within the rule enunciated in paragraph 114b, Manual for Courts-Martial, 1928, that if it is shown that such admissions were procured by means which the court believes were of such a character that they may have caused the accused to make a false statement, they may be excluded (CM 330852, Crawford et al, (1948)).

The admissibility of the statement in evidence, therefore, became a material if collateral issue before the court. The defense raised the issue of admissibility, citing the provision in the Manual for Courts-Martial for further inquiry into the voluntary nature of a confession when made to a military superior (par. 114a, MCM, 1928, p. 116), and requested permission to put the accused on the stand. We have no way of knowing what his testimony might have been regarding the manner in which the statement was procured or to what extent such testimony might have influenced the court. It is, however, well established that the accused has the right to testify for the limited purpose of establishing the involuntary nature of his confession

offered in evidence by the prosecution (CM 275738, Kidder, 48 BR 148). Moreover, whether we consider the statement as a confession or an admission against interest, the right of the accused to testify in his own behalf to such a material issue of fact is clearly and positively established by Title 28, United States Code, 1946 Edition, Section 632 (Crawford et al, supra).

The court was therefore obviously in error in refusing the request of the defense. Whether such error was cured by some means reflected in the record of trial or by operation of Article of War 37 requires further consideration. After the prosecution rested the accused was advised, pro forma, of his right to testify, make an unsworn statement, or remain silent, but the record does not show that he was advised at that time that he would then be given an opportunity to supply the limited testimony which had been earlier denied him. Furthermore, at that time the statement had already been admitted in evidence and read to the court, and there is no indication that the court had any intention of hearing further testimony on the question of its admissibility. Even considering the form of the law member's ruling that "It will not be allowed at this time," since he immediately thereafter admitted the document in evidence, and the issue was never subsequently raised, it must be assumed that the matter was considered closed by all concerned.

The Board of Review, in a recent similar case, made the following pertinent remarks:

> "In determining whether the errors complained of have injuriously affected the substantial rights of the accused within contemplation of the remedial provisions of Article of War 37 the Board, in view of the obviously arbitrary and unwarranted denial to the accused of his mandatory right to testify concerning the voluntary nature of his confession, must presume that such testimony, if the court had permitted him to give it, would have been the most favorable to his cause. Irrespective of its ultimate nature the action of the court, when viewed in the light of the legal rule above stated, deprived the accused of a fundamental right, and forces us to the conclusion that the provisions of Article of War 37 are ineffective to cure these errors" (CM 328886, Worthy (1948)).

Thus, it must be concluded that, although the statement did not amount to a confession to all the elements of the offense of which accused was found guilty, the refusal of the court to allow him to testify as to its voluntary nature, coupled with its admission into evidence, constituted substantial error which cannot be considered

as falling within the class of non-prejudicial error covered by the 37th Article of War.

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

SICK IN QUARTERS, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George D. Springer, Judge Advocate.

JAGN CM 332697 1st Ind OCT 1 6 1948

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

TO: Commanding General, 24th Infantry Division, APO 24, c/o Postmaster, San Francisco, California.

1. In the case of Private Felix Martinez, Jr. (14086204), 24th Military Police Platoon, 24th Infantry Division, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be vacated.

2. Upon taking the action recommended above you will have authority under Article of War 50½ to direct a rehearing.

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

(CM 332697).

1 Incl
R/T

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

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

20 October 1948

JAGQ - CM 332704

UNITED STATES v. Private LEROY J. BILBO (RA 34481602), 4106 Army Service Unit, Fourth Army Detachment, Guard Detachment, New Orleans Personnel Center, Camp Leroy Johnson, New Orleans, Louisiana.	)	NEW ORLEANS PORT OF EMBARKATION Trial by G.C.M., convened at New Orleans Port of Embarkation, 26 and 31 August 1948. Dishonorable discharge and confinement for two and one-half (2½) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'BRIEN and SKINNER, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leroy J. Bilbo, 4106 Army Service Unit, Fourth Army Detachment, Guard Detachment, New Orleans Personnel Center, Camp Leroy Johnson, New Orleans, Louisiana, then Assigned to Company B, Reception Center - Recruiting Station, No. 14, Camp Beale, California, did, at Camp Beale, California, on or about 18 May 1946 desert the service of the United States and did remain absent in desertion until he was apprehended at Keesler Field, Mississippi on or about 11 June 1948.

Accused pleaded guilty except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave" and not guilty to the Charge but guilty of a violation of Article of War 61. He was found guilty of the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for

two and one-half ($2\frac{1}{2}$) years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or such other place as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial pursuant to Article of War $50\frac{1}{2}$.

3. Following accused's plea of guilty to the offense of absence without leave for the period charged in the Specification, the defense counsel moved for a continuance submitting as his reason therefor that the accused was alleged to have in his possession, at his home in Pascagoula, Mississippi, documents and records showing where he was from 18 May 1946 "....when he was accused of going AWOL, until the date that he actually went AWOL, which is 23 September 1947" (R 6). The continuance was granted and, after the reconvening of the court on 31 August 1948, defense counsel again entered a plea of guilty to absence without leave, similarly unqualified as to duration, in violation of Article of War 61 (R 7).

4. a. Evidence for the Prosecution.

Prosecution introduced, without objection by the defense, a duly authenticated extract copy of the morning report of Company B, Receiving Center and Receiving Station No. 14, WDPC, Camp Beale, California, for the month of May 1946, showing:

"23 May 46
Bilbo Leroy J RA 34481602 Pfc
Atchd Unasgd Fur to AWOL 2359
18 May 46" (Pros. Ex. 1)

Prosecution also introduced in evidence, without objection by the defense, a duly authenticated extract copy of the morning report of Squadron F-1, 3704th Air Force Base Unit, Keesler Field Army Air Force Base, Keesler Field, Mississippi, for the month of June 1948, containing the following entry concerning accused:

"M/R 16 June 1948
ARWAF, USAF-P/L-F/P
ATTACHDED FROM OTHER ORGANIZATIONS
ENLISTED MEN
Bilbo Leroy J RA 34481602 pfc 542
Atchd and jd (Conf Status) been apprehended by CID 11 June 48 at 3704th AFBU this sta by reason of being AWOL 11 May 1946 to 11 June 48 from ASF Co B RC-RS #14 Cp Beale Calif (EM now conf Keesler AFB Guardhouse pending further Disposition) par 13 PM 167 Hq 3704th AFBU Keesler Field, Miss"
(Pros. Ex. 2)

b. Evidence for the Defense.

The law member explained accused's rights whereupon the defense counsel stated that the accused would make an unsworn statement through his defense counsel (R 8). After accused stated to the court that it was his desire to make an unsworn statement through his counsel, defense counsel made the following statement:

"DEFENSE: Before making an unsworn statement on behalf of the accused, I want to bring to the attention of the court that in the specification of the charge the inclusive dates that Private Bilbo was presumably absent without leave starts from 18 May 1946. I have a copy of an order put out by Headquarters, Reception Center, Camp Beale, stating that Private Leroy J. Bilbo, RA 3448----. I cannot make out the remainder of the serial number as it is blanked out, was under Army control from the date of this order, 2 August 1946, disproving the fact that since 18 May 1946, the beginning of the inclusive dates that Private Bilbo was supposedly absent without leave, he had not returned under Government control. I wish to submit this to the prosecution for their approval before entering it as evidence." (R8).

Over objection by the prosecution this document was received in evidence as Defense Exhibit A. Pertinent legible parts thereof are as follows;

"HEADQUARTERS
RECEPTION CENTER RECEPTION STATION 14
Camp Beale, California

SPECIAL ORDERS) 2 Aug 1946
NUMBER 214)

* * * * * * *

46. TDM. PCS. 701-31 P 431-02 A 217045 S 99-999.
** - Upon compl Basic Tng Abn *** will be fdwd to TABS, Fort Benning, GA, Provided EM maintain the requirements fr Abn Dy.
29. (RC) The following EM NCWP to Fort Jackson, S.C.

Trfd to Fifth Corps. (Auth *** AGP-A-R 14 Jun 48). Enlisted * * * * * ** *

		PPS	MOS	Ros No	Br
(In Chg)P*c	Bilbo, Leroy J RA 3448*** (N)	A	542	B186	SigC
Pfc	Tracey, Raymond RA 3958692 (N)	C	345	B224	Armd

* * * * *

BY ORDER OF LIEUTENANT COLONEL KELLEY:

OFFICIAL:

M L ANDREWS
1st Lt, QMC
Adjutant"

In concluding the case, defense counsel made the following unsworn statement on behalf of the accused:

"In the charge sheet, Private Bilbo was supposed to have left Army control on 18 May 1946. I have submitted evidence, which has been accepted, of an order put out by Headquarters, Reception Center, Camp Beale, dated 2 August 1946. I wish to bring to the attention of the court- unfortunately, I do not have other official papers or documents substantiating the fact that Private Bilbo might have been, or might have remained under Army control after 2 August 1946 - but I wish to point out to the court the fact that there is a discrepancy in these dates, and I wish to emphasize the fact that there might be a certain possibility of doubt that the other inclusive dates might be erroneous. The fact that this order substantiates the incorrectness of the beginning of the inclusive dates is what I wish to point out to the court. I ask the court to properly evaluate that factor. The accused has pleaded guilty to absence without leave, but by reason of the fact that we have proved the inclusive dates erroneous, I believe there is a certain question of doubt in these dates, that the other dates might be correct. My case is hinged on that fact and I emphatically plead with the court to give this possible factor full and complete evaluation. The man has pleaded guilty to absence without leave, and from personal contact with the accused, he admits his mistake and is willing to serve whatever punishment might be meted out by the court. I would also like to bring to the court's attention that we do have the possibility of making a soldier out of the accused. He is willing to do his time before his return to the Army, and pleads another chance to honorably acquit himself in the eyes of the Army. That is why my statement here today is hinged on a discrepancy of dates as mentioned in the specification of the charge, and I repeat my wish to the court to please give this date discrepancy as much evaluation as you possibly can. I also wish the court to consider that we have a chance of making a soldier out of the accused. He made his mistake and he wants to pay his debt. Give him a chance to go back and do some decent soldiering. That is all." (R 9).

Oral arguments were made by the defense and the prosecution (R 9).

5. The question presented for determination by the Board of Review is whether the accused was afforded a fair trial and his substantial rights adequately protected in view of the manner in which the pleas were entered and his defense was conducted by defense counsel.

The record shows that defense counsel initially entered an unqualified plea to the lesser included offense of absence without leave in violation of Article of War 61 on behalf of accused, and in his next statement, moved for a continuance on the basis that the accused was not in fact absent without leave during the period charged in the specification and to which he had just pleaded accused guilty. Counsel contended at that point that accused was guilty only of absence without leave from 23 September 1947 until 11 June 1948 but did not temper or limit accused's plea of guilty with this qualification. This demonstration of inaptness and disregard for detail related directly to the substantive issues before the court for adjudication and at the outset manifestly denied to the accused his right to a fair and intelligent presentation of his defense. Defense counsel again failed in his duty of properly protecting the rights of accused when he reiterated the same unqualified plea at the meeting of the court following the continuance.

Further analysis of the record shows that the case of the prosecution consisted solely of two exhibits of documentary evidence. The first of these, an extract copy of the morning report previously quoted, purports to establish accused's initial absence as of 18 May 1946 and, as heretofore mentioned, defense counsel made no objection thereto. Department of the Army records reflect, however, that the accused was previously tried and convicted by summary court-martial at Camp Beale, California, for the offense of absence without leave from about 18 May 1946 to about 25 June 1946, in violation of Article of War 61. At that trial he was sentenced to be reduced to the grade of private, to be confined at hard labor for a period of one month, and to forfeit $33 of his pay. The sentence was approved and ordered executed on 5 July 1946. Clearly, then, the offense upon which the accused was arraigned and for which he was tried in these proceedings involved an unauthorized absence for a part of the same period as that for which he was punished as result of the above trial by summary court-martial. As to that portion of the offense, there was a former jeopardy and plea in bar of trial should have been entered by defense counsel (AW 40, par. 68, MCM 1928, p. 53). Accordingly, the morning report entry itself was obviously incompetent to establish the initial absence of the accused in the present case, and should have been objected to by counsel, assuming he had properly performed his duties in preparing his case for trial. In being critical of the conduct of the case by counsel, the Board of Review is not unmindful

of the fact that in all probability defense counsel had no knowledge of the above summary court-martial but he was chargeable with notice that irregularities existed because of Defense Exhibit A. That defense counsel was so chargeable with knowledge of irregularity is additionally illustrated by his statement on accused's behalf heretofore quoted. In that statement, as previously observed, counsel states that "unfortunately" he did not have other official papers or documents substantiating the fact that accused conceivably remained under military control subsequent to 2 August 1946. This remark of defense counsel, as well as the tenor of other parts of his statement on accused's behalf, likewise reflects lack of adequate investigation and preparation of the case for trial.

The second documentary exhibit of the prosecution shows accused's apprehension at Keesler Field, Mississippi, whereas the allied papers forwarded with the case show that accused was actually apprehended at Pascagoula, Mississippi, and not at Keesler Field. This morning report entry therefore, which was also not objected to by defense counsel, was likewise incompetent to establish accused's apprehension by reason of its hearsay character and should have been objected to by defense counsel. Thus, both documents offered by the prosecution and received in evidence without objection by defense counsel were wholly incompetent for the purpose for which they were offered. This being true, the only competent evidence adduced during the trial showing accused's initial absence without leave was through the admissions of his defense counsel, to with:

> "...until the date the accused went AWOL, which is 23 September 1947" (R 6).

Although Prosecution Exhibit No. 2 was competent to show accused's return to military control, the above admission by defense counsel was the only other competent evidence of record in any manner related to the offense.

With respect to the manner in which the defense was conducted by accused's counsel in a similar case, the Board of Review has stated:

> "5. Ordinarlily, a presumption of regularity in the performance of their duties by officers responsible for the administration of military justice may be indulged (MCM 1928, par 112a; p 110). It may ordinarily be presumed that defense counsel performed his duty (CM 201537, Fouts, 6 BR 157). But this presumption is rebuttable and disappears when the fact is shown to be otherwise (CM 297700, Carmensciano, 13 BR (ETO) 263, 272 (4 Bull JAG 174); CM 297170, Woods, 13 BR (ETO) 37). In this case it plainly appears that the defense counsel did not perform his duties properly." (CM 320618, Gardner, 70 BR 71, 74).

In an opinion filed with CM 200989, Osman, 5 BR 39, 40, the Acting Judge Advocate General stated:

> "The rule of the courts of common law, both civil and criminal, that a party has no relief against errors, omissions, or poor judgment of his counsel, can have but a limited application in court-martial practice, where the majority of counsel are not learned in the law, and where it is the duty of every one connected with the administration of military justice, and not least my own, to see that the rights of every accused are adequately protected."

In the present case, as heretofore discussed, the prosecutions' entire case is predicated upon evidence which was wholly incompetent and should have so appeared to a defense counsel who properly discharged his duties. In view of these factors it cannot be assumed that the accused was afforded a fair trial and should be chargeable with the unskilled presentation of the case by counsel. Even assuming accused may have been uncooperative, still this does not excuse the actions with respect to entering pleas wholly inconsistent with the theory of accused's defense. The accumulation of these errors and misjudgments of counsel so seriously prejudiced the substantial rights of the accused as to deny him a fair trial in the opinion of the Board of Review. The right of counsel is so fundamental that encroachment thereupon constitutes a lack of due process of law which cannot be cured by clear and compelling evidence of guilt (CM 194997, Elberson, et al, 2 BR 173, 178, CM 297170, Woods, 13 BR (ETO) 37; CM 297700, Carmisciano, 13 BR (ETO) 263; CM 316979, Howard, 26 BR (ETO) 197; CM 315877, Ellis, Ellsworth and Elrod, 65 BR 151; and CM 320618, Gardner, supra).

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.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 332704 1st Ind

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

TO: Commanding Officer, New Orleans Port of Embarkation,
New Orleans, Louisiana

1. In the case of Private Leroy J. Bilbo (RA 34481602), 4106 Army Service Unit, Fourth Army Detachment, Guard Detachment, New Orleans Personnel Center, Camp Leroy Johnson, New Orleans, Louisiana, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be disapproved. Upon taking such action you will have authority to 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 332704).

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.

JAGH CM 332711

13 OCT 1949

UNITED STATES	)	FIFTH ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Leavenworth, Kansas, 27
Master Sergeant OVERTON J.	)	April, 1 and 9 June 1948. To
LOMAN, RA 2295766, United	)	forfeit $50 pay per month for
States Army, Retired.	)	three (3) months.

OPINION of the BOARD OF REVIEW
WOLFE, BERKOWITZ, 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 finding of guilty and the sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by reviewing authority).

Specification 2: In that Master Sergeant Overton J. Loman, United States Army, Retired, being indebted to Josephine Regan, Pascagoula, Mississippi, in the sum of about $100.00, which amount became due and payable on or about 15 October 1946, did, at Fort Crook, Nebraska, from about 15 October 1946 to about 1 July 1947, dishonorably fail and neglect to pay such debt.

The accused stood mute refusing to plead to the Charge and Specifications thereunder and the court entered a plea of not guilty in his behalf. He was found guilty of the Specifications of the Charge and the Charge, and was sentenced to forfeit fifty dollars ($50.00) of his pay per month for six months. No evidence of previous convictions was considered by the court. The reviewing authority disapproved the finding of guilty of Specification 1 of the Charge, approved the findings of guilty of Specification 2 of the Charge, and the Charge, and approved only so much of the sentence as provided for forfeiture of fifty dollars ($50.00) pay per month for three months and ordered the sentence as thus modified duly executed. The result of trial was promulgated in General Court-Martial Orders No. 224, Headquarters Fifth Army, Chicago 15, Illinois, dated 20 August 1948.

3. Evidence for the prosecution.

The evidence pertinent to the approved findings of guilty is summarized as follows.

Mrs. Josie Loman Conerly testified that she resided with the accused in Pascagoula, Mississippi (R 18). During the month of March 1946 she received a check for $100.00 from her daughter, Mrs. Josephine Regan Goodwin (R 19,23). She cashed the check and gave the whole proceeds to the accused who needed the money pending his retirement from the military service. Accused said he would repay the sum when he received his lump retirement pay. Accused has not made repayment (R 19). On cross-examination, the witness stated that accused had requested the loan of the money from her daughter in the witness's presence; that she did not know why her daughter had sent the money to her (R 21,22); that she was not responsible for the repayment of the loan even though the check from her daughter was made out to her as payee; and that she did not have to give the accused the proceeds of the check (R 25,26).

Mrs. Josephine Regan Goodwin deposed that she loaned the accused the sum of $100.00 in either April or May 1946 which loan was to be repaid in June of that year; that she mailed the $100.00 to the accused; that the loan was never repaid by the accused; and that she took no action to recover the debt owed her by the accused (R 31; Pros Ex 4).

4. Evidence for the defense.

The accused, after having been duly advised by the court of his rights as a witness, elected to remain silent.

5. Discussion.

The accused is charged with dishonorably failing and neglecting to pay a debt in the sum of $100.00 due and payable at Fort Crook, Nebraska. The only question requiring consideration is the legal sufficiency of the evidence to support the finding of guilty of the Charge and its Specification.

A person subject to military law may by his conduct in incurring a personal debt or by his attitude toward it or his creditor thereafter, reflect discredit upon the service to which he belongs within contemplation of the 96th Article of War. There is no distinction in this respect as between an officer and a soldier. (Par 152b, p.188, MCM 1928). However, in order for a failure or neglect to pay a just obligation to be dishonorable or service discreditable and cognizable as a violation of the Articles of War, there must be a showing by the prosecution that the debt was contracted under false representations, or the failure

to pay characterized by deceit, evasion, false promises, denial of the obligation and the neglect to discharge the obligation for an unconscionable period (Winthrop's Military Law and Precedents, Reprint 1920, p.715). In CM 207212, Thompson, 8 BR 319, the Board of Review held:

> "It is conceivable that accused, through his failure to pay his just debts, brought discredit upon the military service in that the good reputation of members of the service for prompt payment of their debts might thus have been impaired, but unless his failure and neglect to pay his debts involved some species of evasion or indifference to his just obligations (not amounting to dishonor or moral fault), there would not appear to have been an offense cognizable by the articles of war. If he made reasonably diligent efforts to pay his just debts but was financially unable to do so, the customs of the military service relieve his insolvent acts from the taint of criminality. The Judge Advocate General has so held. With respect to convictions of failure and neglect to pay just debts to the discredit of the military service, in violation of the 96th Article of War, it was stated:
>
> > 'Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Where the non-payment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit or specific promises of payment, it may be properly deemed to constitute an offense.' (CM 121152, Robertson; par. 1494, Dig. Ops. JAG, 1912-30.)
>
> Again, with respect to similar charges:
>
> > 'The record shows no false representations by the accused, nor a failure to pay, characterized by deceit, evasion, or dishonorable conduct. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Inasmuch as this specification does not allege or the evidence prove any circumstances amounting to dishonorable conduct in the non-payment of this debt, the finding of guilty of specification 4, charge II, cannot be supported.' CM 123090, Hansbrough; par. 1494, Dig. Ops. JAG, 1912-30."

And in CM 217636, Nichols, 11 BR 285, the Board of Review stated:

> "* * While it is true that some of the debts were long overdue and that accused did not always reply to demands for payment, there is nothing of substantial weight to indicate that he finally intended to avoid his obligations, or that he did not make reasonable efforts to discharge them. In such a case, it

is believed that his acts were not proved beyond reasonable doubt to have been dishonorable within the meaning of the 95th Article of War or discreditable within the meaning of the 96th Article of War."

See also CM 307416, Jones, 61 BR 111; CM 320687, Terrebonne, 70 BR 143; CM 240754, Raquet, 26 BR 115; and CM 240018, Abele, 25 BR 331.

The pertinent evidence of record shows that the accused was in financial need during the early part of 1946. He requested a loan from Mrs. Josephine Regan Goodwin promising to make repayment when he was retired from the military service. The loan was made and has not been repaid and the lender has taken no action whatsoever to effect repayment. There is no evidence to indicate that the accused's promise to repay Mrs. Goodwin was made with a false, fraudulent or deceitful intent or that accused's failure and neglect to repay her is characterized by deceit, evasion, false promises or denial of the indebtedness.

In the opinion of the Board of Review the evidence does no more than establish the existence of an unpaid debt and fails to characterize the transaction with any culpable or dishonorable circumstance which would make it an offense cognizable under the Articles of War.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence. The court was legally constituted and had jurisdiction of the person and the offense.

C. O. Wolfe, Judge Advocate

G. J. Berkourtz, Judge Advocate

F. W. Lynch, Judge Advocate

JAGH CM 332711 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C. 20 OCT 1948

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat 724; 10 USC 1522), is the record of trial in the case of Master Sergeant Overton J. Loman, RA 2295766, United States Army, Retired.

2. I concur in the opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges, and property of which accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 191, 12 Nov 1948).

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

(201)

29 OCT 1948

JAGK CM 332728

U N I T E D S T A T E S	)	NURNBERG MILITARY POST
	)	
v.	)	Trial by G.C.M., convened at Bamberg, Germany, 11-12 June 1948. Dishonorable discharge (suspended), and confinement for one (1) year. Branch United States Disciplinary Barracks, Fort Hancock, New Jersey.
Staff Sergeant NORMAN P. TROY, RA 33604997, Detachment "B", 7810th Station Complement Unit, APO 139.	)	

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

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

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

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

Specification: (Disapproved by the reviewing authority).

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

Specification: In that Staff Sergeant Norman P Troy, Detachment "B", 7810th Station Complement Unit, did, at or near Bamberg, Germany, on divers occasions between the months of October 1947 and April 1948, being then and there foreman of the tire shop, feloniously, wrongfully and knowingly dispose of by selling and by barter about ten (10) tires, value of about $225.00, one Jaeger pump and motor, value of about $125.00, total value of about $350.00, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Charges and Specifications with certain exceptions and substitutions. With respect to the Specification of Charge II, the court excepted the words "value of about $225.00"; "value of about $125.00" and "total value of about $350.00" substituting therefor respectively the words "value of more than $50.00" and "value more than $50.00" and "total value of more than $100.00." He

was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for two years and six months. The reviewing authority disapproved the findings of guilty as to Charge I and its Specification. He approved only so much of the finding of guilty of Charge II and its Specification as:

> "involves guilt under the 96th Article of War of wrongfully permitting the selling and bartering of Government owned tires valued at more than Fifty ($50.00) Dollars, on divers occasions between October 1947 and April 1948, from a Military installation at Bamberg in Germany, in derogation of his duty to keep those tires secure from theft or other wrongful conversion."

He approved and ordered executed only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army might direct as the place of confinement. The result of trial was published in General Court-Martial Orders No. 24, Headquarters Nurnberg Military Post, APO 696, United States Army, 30 August 1948.

3. The only question requiring consideration is whether the offense substituted by the reviewing authority may be considered as a lesser offense necessarily included in that charged.

In CM 323728, Wester, 72 BR 383, the Board of Review said:

> "The particular offense found, in order to be properly considered a lesser included offense of that charged, must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not contained in such offense. It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM, 1928, par. 78c)."

In the instant case it was alleged in the Specification to Charge II that accused did "wrongfully and knowingly dispose of by selling and by barter" the described tires, pump and motor, however, the reviewing authority approved only so much of the findings of guilty of that Specification as involved (under Article of War 96) "wrongfully permitting the selling and bartering" of the tires "in derogation of his duty to keep these tires secure from theft or other wrongful conversion in violation of Article of War 96."

Reduced to its simpliest terms, the pleadings charged and accused was found guilty by the court of wrongfully disposing of government property. He now stands convicted of a neglect of duty by permitting others to do the acts of which he was originally charged. The offense substituted by the reviewing authority is obviously not lesser to and necessarily included in that charged. The approved finding was therefore unauthorized and cannot afford the basis for a legal sentence (CM 332164, Soles; CM 330750, Pilgrim; CM 318777, Weber, 68 BR 47).

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

Charles D. Silverg, Judge Advocate

James H. Boole, Judge Advocate

(On special duty), Judge Advocate

(204)

JAGK - CM 332728 1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 USC 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Staff Sergeant Norman P. Troy (RA 33604997), Detachment "B", 7810 Station Complement Unit, APO 139.

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

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 187 , Nov 10 1948).

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

JAGN-CM 332778

27 SEP 1948

UNITED STATES	)	6TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 6, 29 and 30 July 1948.
Private First Class ALFRED	)	Dishonorable discharge and
C. JONES (RA-18306515),	)	confinement for three (3)
578th Quartermaster Gas	)	years. Federal Reformatory.
Supply Company.	)	

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Alfred C. Jones, 2nd Platoon, 578th Quartermaster Gas Supply Company, being at the time in possession of oil for the purpose of delivering it, did, at Pusan, Korea, on or about 21 July 1948, knowingly and willfully misappropriate oil and drums, to wit, sixteen (16) drums and eight hundred fifty (850) gallons Grade 30 Oil, Lubricating, of a value in excess of fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno,

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

3. The record of trial is legally sufficient to support the findings of guilty, and the only question presented here is the propriety of the designation of a Federal reformatory as the place of confinement.

4. The term "penitentiary" as used in Article of War 50½, is construed to include the term "Federal reformatory" (CM 323136, Ligon, 72 BR 101). Thus it follows that a Federal reformatory may be properly designated as a place of confinement only where penitentiary confinement is authorized under the provisions of Article of War 42.

The offense of willful misappropriation, denounced by Article of War 94, is similar to but is not one of the offenses made punishable by penitentiary confinement under the provisions of Title 18, United States Code, 1946 Edition, Section 87. Neither is it an act recognized as an offense of a civil nature made punishable by penitentiary confinement for more than one year by any other statute of the United States of general application within the United States, excepting section 289, Penal Code of the United States, 1910, (18 U.S.C., 1946 Ed., Sec. 468) or by the law of the District of Columbia (AW 42; CM 319499, Smith, 71 BR 412).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years in a place other than a penitentiary, Federal reformatory or correctional institution.

Frank C. Alfred, Judge Advocate.

George D. Springston, Judge Advocate.

On Leave
_____, Judge Advocate.

SEP 30 1948

JAGN-CM 332778 1st Ind

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

TO: Commanding General, 6th Infantry Division, APO 6, c/o Postmaster, San Francisco, California.

1. In the case of Private First Class Alfred C. Jones (RA 18306515), 578th Quartermaster Gas Supply Company, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three 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 332778).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
R/T

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

CSJAGK - CM 332824

6 DEC 1948

UNITED STATES	FORT MONMOUTH, NEW JERSEY
v.	Trial by G.C.M., convened at Fort Monmouth, New Jersey, 17,18,23, and 25 August 1948. Dismissal
Major EDWIN E. WINTERLING (0-415593), Field Artillery, Headquarters, Fort Monmouth, New Jersey	

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

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

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

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

Specification 1: In that Major Edwin E. Winterling, Field Artillery, Headquarters, Fort Monmouth, New Jersey, did, at Fort Monmouth, New Jersey, on or about 12 May 1948, with intent to deceive Captain Neva B. Maiser, Signal Corps, the Acting Adjutant General, Fort Monmouth, New Jersey, officially state to the said Captain Neva B. Maiser, for the purpose of obtaining assignment of public quarters at Fort Monmouth, New Jersey, that he was making application for such quarters on the basis of four (4) dependents, to wit: a wife and three (3) minor dependents, which statement was untrue in that the basis for his application was not his wife and in that the minor dependents listed in his application were not dependents entitled to the assignment of public quarters.

Specification 2: (Finding of not guilty).

Specification 3: In that Major Edwin E. Winterling, ***, did, from about 12 May 1948 to about 30 June 1948, wrongfully and scandalously occupy public quarters in Fort Monmouth, New Jersey, and cohabit with Lucena B. Humphreys, a woman who was not his wife, and three (3) illegitimate children who had been

born to the said Lucena B. Humphreys, as a result of her relationship with the said Major Edwin E. Winterling prior to her arrival at Fort Monmouth, New Jersey.

Specification 4: In that Major Edwin E. Winterling, ***, did, at Fort Monmouth, New Jersey, on or about 31 May 1948, with intent to deceive Major H. C. Eichen, Finance Department, Finance Officer, Fort Monmouth, New Jersey, officially state in a pay and allowance voucher signed by him, the said Major Edwin E. Winterling, for the month of May 1948, that his wife was Lucena B. Winterling, which statement was untrue in that Lucena B. Winterling was not the wife of the said Major Edwin E. Winterling.

Specification 5: In that Major Edwin E. Winterling, ***, did, at Fort Monmouth, New Jersey, on or about 30 June 1948, with intent to deceive Major H. C. Eichen, Finance Department, Finance Officer, Fort Monmouth, New Jersey, officially state in a pay and allowance voucher signed by him, the said Major Edwin E. Winterling, for the month of June 1948, that Lucena B. Winterling was his wife, which statement was untrue in that the said Lucena B. Winterling was not the wife of the said Major Edwin E. Winterling.

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

Specifications 1 and 2: (Findings of not guilty).

Accused pleaded not guilty to all charges and specifications. He was found not guilty of Charge II and its specifications and of Specification 2 of Charge I. He was found guilty of Specifications 1, 4 and 5 of Charge I, guilty of Specification 3 of Charge I with certain exceptions and substitutions, and guilty of Charge I. With respect to Specification 3 of Charge I, the court excepted the words "from 12 May 1948 to about 30 June 1948"; "scandalously"; and "and three (3) illegitimate children who had been born to the said Lucena B. Humphreys as a result of her relationship with the said Major Edwin E. Winterling prior to her arrival at Fort Monmouth, New Jersey," substituting therefor the words "from about 1 June 1948 to about 2 July 1948." He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

The material facts in this case are not in dispute. At least as long ago as 1933, accused and Lucena Byrum Humphreys began living together in Maryland as husband and wife. He had not previously been married, and her prior marriage had ended in divorce. No formal marriage was ever

solemnized between accused and Lucena, but she testified that they exchanged vows of fealty and he gave her a wedding ring. Three children (Edwin E., Jr., Neal H., and Elaine B.) have been born of their relationship. The births are recorded under the surname of Winterling in the Department of Health of Baltimore City, Maryland, and Edwin E. and Lucena Winterling are shown as the parents of each of the children on their Certificates of Baptism issued by the pastor of the Sudbrook Methodist Church, Pikesville, Maryland (R 12,13,23,28,50,54-56,91-92,106,124; Pros Ex 6, p 8; Def Exs 2-7).

After telling her mother in February 1934 that they had been married on the 7th of the preceding October, they lived for a time with her parents in Baltimore, Maryland. Subsequently, about 1936, they lived with his mother in Philadelphia, Lucena and the older boy staying there and accused coming from Baltimore for week-ends. The summer of 1937 Lucena and the older boy spent in Wormsleyburg, Pennsylvania, with a sister and brother-in-law of accused, and accused again commuted. During these periods they were introduced and generally regarded as husband and wife. "Edwin and Lucena Winterling, Parents" are named as beneficiaries in a policy of insurance dated 19 September 1938 on the life of Neal H. Winterling; and Edwin E. Winterling, Sr., "Husband", is beneficiary of a policy dated 4 January 1943 on the life of Lucena B. Winterling. Lucena is beneficiary of a $10,000 National Service Life Insurance Policy and of a $10,000 policy with Massachusetts Mutual on the life of accused. Accused and Lucena maintained a joint bank account and had charge accounts together. He has consistently named her as his wife on Army pay vouchers and other Army records (R 25, 50-54,86,93,107,125; Def Exs 8,9).

On 3 February 1941 accused was inducted into the Federal service with the 29th Division. He was stationed at several different camps and Lucena remained in Baltimore. In the latter part of 1941 accused began "keeping company" with Charlotte Barnes Bramble, who previously had been married and divorced. Their relationship soon became intimate. He saw her from time to time on visits to Baltimore, and they spent the week-end of 31 July to 2 August 1942 together in Charlotte, North Carolina, where they registered as man and wife at the Hotel Charlotte (R 37-39,46; Pros Ex 6, pp 2,3,8; Pros Exs 17,18,19).

In the fall of 1942 Lucena went to Texas, arriving there on the 5th of October. Accused, then stationed at Camp Hood, had procured quarters for her in a rooming house in Gatesville, He was there with her during off-duty periods and they held themselves out as husband and wife to the landlord, to other Army officers, and to the public generally. During her stay she was introduced by accused to the battalion chaplain and accompanied accused to the officers' mess of the headquarters company which he commanded, and her sister visited them there in October of 1942. In January of 1943 accused was sent to Camp Young, California. Using a power of attorney given her by accused

Lucena sold their home in Maryland. She then went with the children to California in March 1943 to be with accused. The family was moved to California at Government expense. Lucena settled in Los Angeles with the children. Accused returned to Camp Hood at the end of March 1943 and later spent periods of leave with Lucena and the children in California on at least two occasions. In 1945 a home in Los Angeles was purchased in the names of Edwin E. and Lucena B. Winterling (R 21-28, 55-58,100,111; Def Exs 10,20; Pros Ex 6).

In April of 1943 Charlotte went to Temple, Texas, where she registered at the Kyle Hotel as Mrs. Edwin E. Winterling upon her arrival on 16 April. About two weeks later she secured lodgings in a private home. Accused visited her frequently at both places and they were known as man and wife. Accused was thereafter transferred to North Camp Hood, and Charlotte moved to Waco. She obtained employment there as Mrs. Charlotte Winterling, and thus remained in Waco, where accused visited her frequently and was introduced by her as her husband. In May of 1943 Charlotte underwent "a complete physical check up" at McCloskey General Hospital, Temple, Texas, as Mrs. Charlotte B. Winterling. During all of this time Charlotte was aware of accused's relationship with Lucena (R 11,33,39-49,82-84,99; Pros Exs 6,20).

Lucena again went to Texas early in April of 1944. She brought their second son with her and remained in Gatesville until 31 May 1944. Accused was with her frequently during this time and they were known as man and wife (R 21-31,56-57,82).

On 3 July 1944 Charlotte and accused went to Waxahachie, Texas, procured a marriage license, and went through a formal religious marriage ceremony. Shortly thereafter he was transferred to Camp Wheeler, Georgia, and she accompanied him to nearby Macon, Georgia, where they lived as husband and wife from about 7 August 1944 to 27 March 1945. Accused went overseas soon after the latter date and while there continued the lively correspondence with Charlotte which he had carried on since 1942 (R 1,34,80; Pros Exs 1,6,19-30).

According to Lucena she has always regarded accused as a good husband and in her opinion he has supported his family adequately. Since 1 March 1943 he has maintained an allotment in Lucena's favor and she always regarded him as her husband. The allotment was originally $300 per month, but in 1944 it was reduced to $250.00 per month. She desires him to continue as her husband and regards him as a good father to the children who have been taught to, and do, have a high regard for him. In addition, accused contributed unstated amounts to Charlotte's support before their marriage ceremony, and since that time has given her $100.00 almost every month. Accused testified that while overseas he determined to terminate his relationship with Charlotte but continued to send her money to forestall execution of her threats to report him to the military authorities. He returned to the United States from China in March of 1948. In April of 1948 he ceased making payments to Charlotte and she promptly wrote to The Adjutant General. That letter apparently produced another payment of $100.00 from accused as well as the investigation which led to his trial by general court-martial herein. Prior to the trial he had not

seen Charlotte since they parted on 27 March 1945. Accused testified that he intends to continue as Lucena's husband and take whatever legal action may be necessary to clear the records with respect to his ceremonial marriage to Charlotte (R 10,30-31,52-59,71,75-76,104,112-113,122-126; Pros Ex 6).

Accused was ordered to Fort Monmouth, New Jersey, by Department of the Army Special Orders dated 2 April 1948 and arrived at Fort Monmouth 12 May 1948. Lucena and the three children were transported from California to Fort Monmouth at Government expense. They arrived at the post 12 June 1948, and occupied quarters with accused. On 2 July 1948 they moved to Baltimore where they now reside with accused's mother. Accused stipulated that he signed the application for quarters referred to in Specification 1 of Charge I and the vouchers described in Specifications 4 and 5 of Charge I and in the two specifications of Charge II. He also admitted that he had received payment on the vouchers and acknowledged that he had occupied quarters on the post with Lucena and their three children (R 13, 78,122; Pros Exs 2,6-13).

Lieutenant Colonel Elva K. Johnson, Inspector General, Fort Monmouth, New Jersey, accused's immediate superior, testified that he had known accused since 13 May 1948 and considered his conduct to be exemplary (R 61). Colonel George L. Richon, Signal School, Fort Monmouth, New Jersey, testified that he has known accused since meeting him in New Delhi, India, in the late summer or early fall of 1945; that they became well acquainted in May or June of 1946; that they traveled and worked together and lived in the same apartment building as members of a small staff in China; and that the general opinion there was that accused "was competent and there was no question whatsoever as to his integrity, and *** his reputation was excellent" (R 64). Leo F. Winterling, accused's brother, testified that he had believed accused was married; that accused's wife was named Lucena; that they had been married in "1933 or thereabouts"; that he had always been very close to his brother, had looked up to him, and never suspected accused had another wife; that accused always held Lucena out to be his wife both to members of the family and to others; and that accused's general reputation was "the best" (R 106-108).

Captain Samuel Vitiz, Post Judge Advocate, Headquarters, Fort Monmouth, New Jersey, was called by the prosecution as an expert witness and, after stating that he is a graduate of the Harvard University Law School, is admitted to practice in New York state, and has been "doing Judge Advocate work" since December 1943, testified concerning the law relating to common law marriage in Maryland, Pennsylvania, Texas, California, and New Jersey. He stated that his testimony was based upon information obtained from Martindale-Hubbell Law Digest for 1945, supplemented by some independent research. After both sides had completed presentation of their cases and the court had been closed to consider the evidence, the court was reopened and Captain Vitiz was requested by the court to send the entire record of trial to the Attorney General of Texas asking an opinion of that official on three specific questions relating to accused's marital status under

Texas law. Advice was obtained by telephone from the office of the Staff Judge Advocate, Headquarters, First Army, that the court should consider the evidence before it and make its own findings. The court was then closed and proceeded to make the findings already indicated (R 127,128).

4. Discussion

Examination of the four specifications under which the accused was found guilty by the court reveals that each of them is bottomed upon the allegation that accused and Lucena were not husband and wife at the time of commission of the alleged offenses. Unless the evidence establishes this basic allegation beyond a reasonable doubt, the normal presumption of innocence must prevail and the conviction cannot be sustained. It therefore becomes necessary to determine whether accused and Lucena were ever married in the eyes of the law, and, if so, whether that marriage still subsisted at the times in question.

The validity of a marriage is normally determined by the law of the state in which it was contracted. If a marriage is valid under the laws of the state where contracted we must recognize it as valid in determining the guilt or innocence of an accused in any case in which the validity of accused's marriage is a material question. It was conceded at the trial that there has been no ceremonial marriage of accused to Lucena. Accordingly, if a legally recognized marital relationship has been contracted by them it must have arisen by virtue of a so-called common law marriage. It was stated by the Board of Review in CM 264826, Ratliff, 42 BR 299,323:

> "*** A defective foreign marriage may be cured by the occurrence of facts establishing a common law marriage in a state which recognizes common law marriages as valid (Stone v. Stone, 111 N.J. Eq. 579,163 Atl. 5, cited in Beale, 'Conflict of Laws', p. 676).
>
> "Whether the legal status of marriage is created by the acts and intentions of the parties is determined by the law of the place where the acts occur. If that law attaches to such conduct the consequence of a valid marriage, then that marriage is valid everywhere, and the parties are husband and wife. This is true of a common law marriage, as of any other, regardless of the rule as to validity of its own common law marriage prevailing in the other jurisdiction. (Beale, Conflict of Laws, p. 671; 133 A.L.R. 746; Clark and Marshall, Crimes, 4th Ed., page 625). ***"

The accused and Lucena first took up their abode together in the State of Maryland. The law of that state, however, does not recognize common law marriages entered into within its borders (State v. Clay, 182 Md. 639, 35 A. 2d 821; Mitchell v. Fredericks; 166 Md. 44, 170 A.

733; Schaffer v. Richardson, 125 Md. 88, 93 A. 391; LeBrun v. LeBrun, 55 Md. 496). In point of time, therefore, the locus in which the relationship between accused and Lucena might first have ripened into a valid common law marriage was the Commonwealth of Pennsylvania. It behooves us, therefore, at the outset, to examine the law of Pennsylvania relative to common law marriages, although the possibility of a valid common law marriage in that State appears to have been summarily dismissed from consideration by the court upon the basis of the very positive testimony by the Staff Judge Advocate on that point. He testified that no common law marriage could be brought to fruition in Pennsylvania unless a marriage license was first obtained. He further testified that the source of his information was the 1945 edition of Volume 2 of the Martindale-Hubbell Law Directory.

Upon examination of the authorities, it appears that from the earliest times common law marriages have been recognized by the Pennsylvania courts. Of course, not all litigants asserting substantive rights based upon such relationships have been successful, but without exception the failures have been attributable to weaknesses in the factual situations established, rather than to any question concerning applicability of the common law. (In re Craig's Estate, 273 Pa. 530, 117 A. 221; In re Stevenson's Estate, 272 Pa. 291,116 A. 162; Richard v. Brehm, 73 Pa. 140; Vincent's Appeal, 60 Pa. 228; Commonwealth v. Stump, 53 Pa. 132). Some doubt as to the validity of common law marriages newly entered into in Pennsylvania was created by the Superior Court of Pennsylvania in deciding the case of Fisher v. Sweet & McClain (154 Pa. Super. 216, 35 A. 2d 756) on 27 January 1944. The court appears to have stated by way of dictum that "hereafter" under an act of the legislature approved 17 May 1939 marriage licenses must be obtained, pursuant to existing marriage license statutes, before any valid marriage, either ceremonial or common law, might be contracted in Pennsylvania. Although this was not an opinion of the highest court of the state and was obiter dictum, it did serve to engender doubts as to the validity of common law marriages in Pennsylvania. Such was the state of the law at the time of compilation of the digest upon which the Staff Judge Advocate based his testimony.

Assuming the dictum in the Fisher case to be in fact the law of Pennsylvania, it can have no application to the present case. This is true because Lucena and accused lived as husband and wife in Pennsylvania in 1936 and 1937, whereas the statute relied upon in the Fisher case was not enacted until 1939, and the decision itself was not forthcoming until 1944. There are, however, better reasons for rejecting the mentioned dictum, as it was expressly repudiated by the Superior Court on 1 October 1946 in its unanimous decision in Buradus v. General Cement Products Company (159 Pa. Super. 501; 48 A. 2d 883). On appeal, the Supreme Court of Pennsylvania on 14 April 1947 unanimously adopted as its own the opinion of the Superior Court and caused it to be reproduced in its entirety as the opinion of the higher court (Buradus v. General Cement

Products Co., 356 Pa. 349, 52 A. 2d 205). Other recent pronouncements of the highest court of Pennsylvania recognizing that valid common law marriages may be contracted in that state are to be found in Pierce v. Pierce (8 Nov 1946), 355 Pa. 175, 49 A. 2d 346, and In re Horton's Estate (26 May 1947), 357 Pa. 30, 52 A. 2d 895).

With respect to the quantum and character of evidence required to establish a valid common law marriage, the Supreme Court of Pennsylvania in the Horton case states it to be the Pennsylvania rule that:

> "*** Where the ultimate fact at issue is a common law marriage and there is no proof of an actual contract, evidence must be adduced from which reputation and cohabitation as husband and wife may properly be inferred. Reputation and cohabitation are facts required to be proved by the party asserting the marriage. Proof of habit of the parties, expressive of and consistent with the relation of husband and wife, is a basic requirement. In Re McGrath's Estate, 319 Pa. 309, 315, 179 A. 599, 602, this Court said 'It is settled in this state that, if other proof is not available, "the marriage may be established *** by proof of reputation and cohabitation, declarations and conduct of the parties, and such other circumstances as usually accompany the marriage relation"'. The nature of evidence to prove marriage by cohabitation and reputation is considered in Re Craig's Estate, 273 Pa. 530, 534, 117 A. 221, 222: 'In considering the effect of evidence offered to prove marriage by cohabitation and reputation, it is necessary to bear in mind the following language in Bicking's Appeal, 2 Brewst. 202, 222: "If a man and woman live together as husband and wife, are reputed to be such by their acquaintances, are visited and recognized by the friends of both parties, attend together places of worship or of public amusement, call each other and are called by the same name, and educate and recognize their children as legitimate - a marriage proved to have been solemnized in facie ecclesiae would not be more satisfactorily shown *** conduct of the parties must be such that almost any one acquainted with them would naturally infer that they bore that relation to each other "'."

Applying the tests laid down in the Horton case for determining whether a valid common law marriage has been perfected in Pennsylvania, it appears that accused and Lucena probably did contract such a relationship there. Lucena has testified that an actual exchange of vows took place between them. That statement, taken at face value, can avail them nothing as the vows were exchanged in Maryland. However, they lived at least two summers in Pennsylvania, one with his mother and one with his sister. They were then known by the members of his

immediate family as husband and wife and appear to have held themselves out to the world as bearing that relationship. At the same time they were recognized as husband and wife by her family with whom they previously had shared living quarters in Maryland.

The intention of the parties, at the time they lived in Pennsylvania, to be and remain husband and wife is demonstrated by their subsequent conduct. After residing in Pennsylvania they continued to live as a family unit. Two more children were born to them, they had a joint bank account, owned property together, each took out life insurance naming the other as beneficiary, and they conducted themselves generally as would the parties to a ceremonial marriage. Accused appears to have supported Lucena and the children adequately. The children were registered at birth and later baptized under his surname, and so far as the record discloses, their home life appears to have been harmonious. In all official military papers since entry on active duty accused has shown Lucena as his wife. He has collected additional rental and subsistence allowances on her account, and caused her and the children to be transported from Maryland to California and from California to Fort Monmouth at Government expense. In fact, the specifications upon which he was tried allege in essence that he is still treating her as his wife and representing in official documents that she bears that relationship to him.

Although courts-martial are courts of criminal jurisdiction and cannot make fully effective and binding adjudications with respect to civil matters, it nevertheless becomes necessary on occasion to pass upon such matters collaterally. The rule generally applied by the courts in testing personal relationships of the character here in question was well put by the Court of Appeals of the State of New York in Hynes v. McDermott (91 N.Y. 451,459):

> "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

Similarly, the Supreme Court of Maryland, the original home state of all of the parties in this case, stated this rule in the case of LeBrun v. LeBrun (55 Md. 496,503):

> "*** Marriage has been considered, among all civilized nations, as the most important contract into which individuals can enter, as the parent, not the child of civil society. The great basis of civilized society throughout the civilized world, is founded on marriage and legitimate offspring; and where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion, or by the mere

declarations of either of the parties, and should only be brought in question upon the most undisputed proofs. ***"

The law respecting common law marriages being what it is, we find ourselves unable to say, on the basis of all of the facts and circumstances disclosed by the record, that no valid common law marriage was contracted by accused and Lucena in Pennsylvania (see Travers v. Reinhardt, 205 U.S. 423; Maryland v. Baldwin, 112 U.S. 490).

The presumption of regularity and legality attaches also to accused's later ceremonial marriage to Charlotte. In view of the formal nature of that marriage the presumption goes only to the capacity of the parties, raising an inference of the dissolution of any former marriage. This presumption or inference, however, is rebuttable. In the case of Dockery v. Brown (209 S.W. 2d 801), where one widow made a claim to a decedent's estate based upon a ceremonial marriage, and another "widow" made a claim based upon a later ceremonial marriage, the Court of Civil Appeals of Texas, in delivering its opinion on 9 October 1947, stated:

"It has long since been the law that a ceremonial marriage entered into in accordance with legal forms will raise the presumption, or inference of its legality and the dissolution of a former marriage. But this is rebuttable. Nixon et al v. Wichita Land and Cattle Co., 84 Tex 408, 19 S.W. 560; Kinney v. Tri State Tel. Co., Tex. Com. App. 222 S.W. 227; Floyd v. Fidelity Union Casualty Co., Tex. Civ. App., 13 S.W. 2d 909, and to which might be added many other authorities. But Vera Marie was not required to establish absolutely nor to a moral certainty that her marriage to Dockery had not been dissolved, but the requirements of the law were met if she introduced sufficient evidence, standing alone, to negative such dissolution. Floyd, etc., supra. ***"

In the Dockery case, the county clerk of the county in which both the claimant and decedent resided appeared as a witness. He testified that he had searched the records of the District courts of the county but had found no record of any case involving the claimant and decedent; that he kept an accurate index, both direct and reverse of such proceedings; and that both he and his deputy had searched the indices and found nothing. No such direct evidence on the point of the possibility of a divorce was adduced in the present case, but the proof presented showed clearly that accused's actions toward Lucena have remained more consistent with marriage than with divorce, and she testified that she still regards him as her husband. Obviously their relationship has not been dissolved by death, and the prosecution's entire case was inconsistent with any theory of possible divorce. A valid marriage once contracted may be dissolved only by death or divorce. We are convinced, therefore, that the relationship between accused and Lucena, which probably ripened into a valid common

law marriage in Pennsylvania, still existed at the time of commission of the alleged offenses.

It was agreed at the trial that Texas recognizes common law marriages. The correctness of this conclusion cannot be doubted (Jones v. Hutchinson, 5 Feb 1948, Court of Civil Appeals of Texas, 208 S.W. 2d 579). The record contains the most eloquent possible proof that the court entertained a serious belief that accused and Lucena may have contracted a valid common law marriage in Texas. This belief was manifested when, after having closed to consider the evidence and agree on its findings, the court reopened and requested that the Staff Judge Advocate send the entire record of trial to the Attorney General of Texas seeking an expression of his opinion concerning the following questions:

> "1. Did or did not a common law marriage take place between the accused and Lucena in Texas at any time.
>
> "2. Was or was not the ceremonial marriage entered into between the accused and Charlotte on 3 July 1944 a valid and subsisting marriage.
>
> "3. What was the effect of the relationship as established by the evidence in this record, between the accused and Lucena upon the ceremonial marriage entered into by the accused and Charlotte on 3 July 1944."

In considering this case it should be borne in mind that there is no controversy concerning the material facts. The sole dispute relates to the question of what results flow from those facts as a matter of law. The mentioned questions arose in the minds of the members of the court as a result of the relationship shown to have existed between accused and Lucena in Texas. The record points with equal, or as we think greater, force to a valid common law marriage having been theretofore perfected in Pennsylvania. It can be reasonably assumed, therefore, that the court would not have made its ultimate finding of guilty had it been correctly advised with respect to the Pennsylvania law.

As previously indicated, we are of the opinion that all of the elements of a common law marriage in Pennsylvania were established by competent proof. Introduction of evidence of accused's ceremonial marriage to Charlotte raised an inference or presumption of its regularity and of the dissolution of any prior marriages. This presumption was rebutted effectively as we have shown. We conclude, therefore, as a matter of law, upon all the evidence, that the proof is as consistent with the inference that accused and Lucena B. Humphreys were legally married each to the other at the times alleged, as it is with the contrary inference that no legal marriage existed between the parties and that accused acted scandalously and with intent to deceive. We, therefore, must hold that the conviction herein cannot be sustained. Several irregularities appear in the record of trial but need not be considered because of the view we take

of the case.

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

Chester D. Silvers, Judge Advocate

James H. Booth, Judge Advocate

Harley A. Lamming, Judge Advocate

CSJAGK - CM 332824 1st Ind

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

TO: Commanding General, Fort Monmouth, New Jersey

1. In the case of Major Edwin B. Winterling (0-415593), Field Artillery, Headquarters, Fort Monmouth, New Jersey, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the findings of guilty and the sentence be disapproved. I find no reasonable basis for an inference that Lucena B. Humphreys is not the legal wife of accused or that he acted, as alleged, with intent to deceive or scandalously.

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

(CM 332824).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

9 NOV 1948

JAGH CM 332879

U N I T E D S T A T E S v. Captain JOHN R. BOUGHMAN, AO-1003482, Executive Officer, Company M, Signal Training Regiment, Fort Monmouth, New Jersey.	)	FORT MONMOUTH NEW JERSEY Trial by G.C.M., convened at Fort Monmouth, New Jersey, 27 August 1948. Dismissal.

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 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 Captain John R. Boughman, Signal Training Regiment, Signal Corps, Fort Monmouth, New Jersey, did at Fort Monmouth, New Jersey, on or about 2 June 1948, with intent to defraud, wrongfully and unlawfully make and utter to the Fort Monmouth Officers' Club a certain check, in words and figures as follows, to wit:

No. _____ 2 June 1948

LONG BRANCH TRUST CO.
LONG BRANCH, N. J.

Pay to the order of CASH

TWENTY DOLLARS- - - - - - - - - - - - - - - - - - xx/100 DOLLARS

$20.00/100

JOHN R. BOUGHMAN
Capt. Sig. C.

ENDORSEMENT

Fort Monmouth
Officers Club
Bldg 270
Captain C. A. Merritt

and by means thereof, did fraudulently obtain from the Fort Monmouth Officers' Club, the sum of Twenty Dollars ($20.00), he the said Captain John R. Boughman, then well knowing or having reason to know that he did not have and not intending that he should have sufficient funds in the Long Branch Trust Company for the payment of said check.

Specifications 2,3, 5-8, 11-15 vary materially from Specification 1 only with respect to the date of the offense and the date and amount of check as follows:

Spec	Date of offense	Date of check	Amount of check
2	18 June 1948	18 June 1948	$25.00
3	1 July 1948	1 July 1948	$20.00
5	3 July 1948	3 July 1948	$20.00
6	3 July 1948	3 July 1948	$10.00
7	3 July 1948	3 July 1948	$35.00
8	3 July 1948	3 July 1948	$10.00
11 & 12 (Identical)	8 July 1948	8 July 1948	$35.00
13 & 14 (Identical)	8 July 1948	8 July 1948	$30.00
15	13 July 1948	13 July 1948	$35.00

Specifications 4, 9 and 10 have an additional variance as to the payee (person defrauded) as follows:

Spec	Date of offense	Date of check	Amount of check	Payee (person defrauded)
4 & 10 (Identical)	3 July 1948	3 July 1948	$20.00	Capt Leonard Carlson
9	3 July 1948	3 July 1948	$10.00	Elizabeth E.Lewis

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

Specifications 1 through 15: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and the Specifications thereunder, and guilty of Charge I and its 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 under Article of War 48.

3. Evidence.

a. For the prosecution.

(Introductory note: The checks which are the subject of the various specifications when introduced into evidence by the prosecution were given a numerical designation corresponding to the Specification to which it pertains; i.e., Prosecution Exhibit 1a, is the check to which Specification 1 pertains. The procedure followed by the prosecution was to show the witnesses photostatic copies of the checks in question which when identified by the witnesses as "checks" were introduced in evidence. Subsequently, except as to the check which was the subject of Specification 9, the original checks were introduced into evidence (R 33,36,37), and the court was then able to make a comparison and determine that the photostatic copies concerning which the witnesses testified were identical to the original checks.)

The evidence pertinent to the findings of guilty is summarized as follows:

It was stipulated that the organization of accused on 2 August 1948 and at the time of trial was the Signal Training Regiment, Fort Monmouth, New Jersey, and that accused is in the military service and is subject to military control (R 22).

Wesley Herrlein, cashier of the Officers' Club, Fort Monmouth, New Jersey, identified Prosecution Exhibits 1,5,7,8,12,14 and 15, as checks which he had cashed for accused at the Club. The checks bore the following dates and amounts:

Exhibit	Date	Amount
Prosecution Exhibit 1	2 June 1948	$20.00
Prosecution Exhibit 5	2 June 1948	$20.00
Prosecution Exhibit 7	3 July 1948	$35.00
Prosecution Exhibit 8	3 July 1948	$10.00
Prosecution Exhibit 12	8 July 1948	$35.00
Prosecution Exhibit 14	8 July 1948	$30.00
Prosecution Exhibit 15	13 July 1948	$35.00

The checks as designated above were admitted in evidence. All were drawn upon the Long Branch Trust Company, Long Branch, New Jersey, and all bore accused's purported signature (R 22-25).

Grace Herrlein, another cashier at the Fort Monmouth Officers' Club, identified Prosecution Exhibits 6 and 13 as checks which she had cashed for accused at the Club. The checks bore accused's purported signature

as drawer, were drawn upon the Long Branch Trust Company, Long Branch, New Jersey, and bore the following dates and amounts:

Exhibit	Date	Amount
Prosecution Exhibit 6	3 July 1948	$10.00
Prosecution Exhibit 13	8 July 1948	$30.00 (R 26-27)

On 3 July 1948 Captain Leonard W. Carlson cashed two checks, each in the amount of $20.00 for accused. He identified Prosecution Exhibits 4a and 10a as the checks which he had cashed and they were admitted in evidence. The checks were drawn upon the Long Branch Trust Company, Long Branch, New Jersey, to the order of Captain Carlson, were dated 3 July 1948, and bore the purported signature of accused as drawer. Captain Carlson indorsed each check and cashed each check at the Fort Monmouth Officers' Club. He was subsequently called to the Club and informed that the checks had been returned for insufficient funds. Captain Carlson reimbursed the Officers' Club and later was reimbursed by accused without demand. Captain Carlson did not believe that accused intended to defraud him and stated that he would cash another check for him (R 28-31).

On 3 July 1948, at the race track, Lieutenant Elizabeth E. Lewis, ANC, cashed a check in the amount of $10.00 for accused. She in turn cashed the check at the Fort Monmouth Officers' Club. Upon being informed that the check had been returned because of insufficient funds she reimbursed the Club. Accused got in touch with her and reimbursed her and at that time she returned the check to him. Lieutenant Lewis stated that had accused asked her for the loan of $10.00 instead of asking her to cash a check she would have made the loan (R 31-33, 51-52). She identified Prosecution Exhibit 9 as a photostatic copy of the check (R 32).

Mr. Harry Schoppel testified that he was office manager, business manager, and auditor of the Officers' Club, Fort Monmouth, New Jersey. In the normal course of business checks presented for payment at the Club did not come through his hands unless they were returned from the bank with a "discrepancy." He identified Prosecution Exhibits P2a, P3a and P11a as checks he had had occasion to see. The checks were drawn upon the Long Branch Trust Company, Long Branch, New Jersey, bore accused's purported signature and the dates and amounts thereof were as follows: (Pros Ex P2a) 18 June 1948, $25.00; (Pros Ex P3a) 1 July 1948, $20.00; and (Pros Ex P11a) 8 July 1948, $35.00. Schoppel had a conversation with accused about the checks and with reference to the conversation testified as follows:

"Q Have you ever had occasion to speak to Capt Boughman regarding these three checks?
A Which three, sir?

Q These three which I hold in my hand and show to you.
A Well, with particular reference to the check drawn June 18th, I had occasion to talk to Capt Boughman.

Q Are you referring to the check identified as Prosecution's Exhibit 2 for identification?
A That is right, I had occasion to talk to Capt Boughman about this check. He asked me to hold it for several days for payment and I had some occasion previously on another check returned to me and when I called Capt Boughman he immediately gave me the money, so I did hold this check for several days. This was the second check I received back from the bank, so when I talked to Capt. Boughman I asked him to make payment immediately and he promised it back in two or three days, to come in and give me the money.

Q Did he come in within two or three days?
A No sir.

Q Has he ever reimbursed the club for that check? For this check?
A Well, we did receive a check for $150.00.

PRESIDENT AND LAW MEMBER: You must identify these checks by exhibit number.

Q As regards this check, which is the original of Prosecution's Exhibit 2 for identification. Did Capt Boughman ever admit to you that he did write that check?
A It was implied when I called and said his check came back and he said just to hold it for a few days and he would get the money for it.

Q Did you tell him what time that check was drawn, the date?
A No, I was primarily interested in making collection, I had no occasion to tell him the date of the check.

Q As regards Prosecution's Exhibit 11 for identification, did you also speak to Capt Boughman as regards that check?
A I did attempt to get in touch with Capt Boughman, and in view of the fact that we had a number of checks come back from the bank, I talked to Capt Boughman in reference to all the checks combined rather than this particular check which was included, of course.

Q Did you talk with him in person, or by telephone?
A By telephone, and on the first occasion I only talked to him about the first check which was Exhibit 2, $25.00, July 18th.

Q In other words, at the time you talked to Capt Boughman, you talked to him by phone and you told him about these checks, and what did he tell you at that time? Did he ask you to do anything about the checks or admit they were his, or anything of that nature?
A On the telephone, yes. In view of the fact that we had some checks come back, I stressed the importance to Capt Boughman that payment should be made immediately and the gentleman promised to make payment.

Q By his promise to make payment to the club for those checks, were you led to believe that he implied that the checks were actually his?
A Yes indeed.

Q Has Capt Boughman at any time denied that those checks were his checks?
A No sir.

Q He has never denied writing any of the checks?
A No sir." (R 35,36)

Schoppel had received a check from the bank on 29 June upon which accused made restitution. Additionally in July accused made restitution of $150.00. At this time his indebtedness to the Club including his returned checks amounted to $414.50.

With reference to a check dated 2 June Schoppel testified upon cross-examination that in fact the check was pre-dated and was not cashed until 2 July 1948.

Mr. Stanley H. Green, assistant treasurer of the Long Branch Trust Company, identified a document as pertaining to accused's bank account. It was a list of checks showing the dates and amounts thereof, the dates of presentation and the balance of the account at presentation. The document which was in affidavit form and signed by Green was admitted in evidence without objection as Prosecution Exhibit 16.

Green testified as follows concerning the status of accused's account:

"Q Mr. Green, I hand you a copy of Prosecution's Exhibit 16. Will you explain to the Court the meaning of the various computations in sequence, date by date, the cash balance, and give the true status of the accused's account with your bank?

A The account is in the name of John R. Boughman, Capt, Signal Corps. A check dated June 2, 1948, was presented to us for payment on June 9, 1948, drawn to cash in the amount of $20.00. The balance at this time, $11.00. The check was returned. Under date of June 18, 1948, a check was presented to us for payment, dated 18 June, 1948, presented 28th of June for payment, drawn to cash in the amount of $25.00, balance $8.00. Check returned. A check dated 1 July 1948, presented July 9, 1948, payable to cash for $20.00, balance $2.00, check returned. Check dated 3 July 1948, presented July 9, 1948, payable to Capt Leonard Carlson, balance $2.00, check returned. Check dated 3 July 1948, presented July 9, 1948, payable to cash $20.00, balance $2.00, check returned. Check dated 3 July 1948, presented July 9, 1948, payable to cash for $10.00, Balance $2.00, check returned. Check dated July 3, 1948, presented July 9, 1948, payable to cash for $35.00, balance $2.00, check returned. Check dated 3 July 1948, presented July 12, 1948, payable to cash for $10.00, account overdrawn 35¢, check returned. Check dated July 3, 1948, presented July 12, 1948, payable to Elizabeth E. Lewis for $10.00, account overdrawn 36¢, check returned. Check dated July 3, 1948, presented July 13, 1948, payable to Capt Leonard Carlson for $20.00, account overdrawn 36¢, check returned. Check dated July 8, 1948, presented July 16, 1948, payable to cash for $35.00, account overdrawn $3.36, check returned. Check dated July 8, 1948, presented July 16, 1948, payable to cash for $35.00, account overdrawn $3.36, check returned. Check dated July 8, 1948, presented July 16, 1948, payable to cash for $30.00, account overdrawn $3.36, check returned. Check dated July 8, 1948, presented July 16, 1948, payable to cash $30.00, account overdrawn, check returned. Check dated July 13, 1948, payable to cash for $35.00, account overdrawn $3.36, check returned." (R 44)

On cross-examination Green testified that on 1 July 1948 accused paid off a debt of $250.00 to the bank although the debt could have been retired over the course of a year in $25.00 monthly installments. Had the accused merely paid the requisite $25.00 installment and applied the remainder to his checking account he would have had sufficient funds.

The defense introduced four checks into evidence as Defense Exhibits D2, D3, D4 and D5. These checks all bore accused's purported signature

as drawer, were all dated 3 July 1948 and in amount totaled $80.00. Green testified that these checks had been paid by the bank on 9 July 1948.

b. For the defense.

Accused elected to remain silent.

Lieutenant Colonel Walter E. Lotz, Jr., who conducted the pretrial investigation of the case testified that accused cooperated fully in the investigation. He read to the court his investigation report in which he recommended that the charges be sent to trial under Article of War 96 as a conviction under Article of War 95 would result in automatic dismissal. (R 54,55)

Upon cross-examination Colonel Lotz testified that he had shown accused photostatic copies of the checks mentioned in the Specifications and that accused admitted that the signatures appearing on the checks were his (R 55).

4. a. (Specification 1, Charge I)

The evidence shows that accused cashed a check dated 2 June 1948 at the Officers' Club, Fort Monmouth, New Jersey. The check which was drawn upon the Long Branch Trust Company, Long Branch, New Jersey, and which bore accused's purported signature, was payable to the order of cash in the amount of $20.00. The person cashing the check did not testify as to the date of the transaction, but did identify Prosecution Exhibit 1 as a photostatic copy of that check. The reverse side of the check bore the Club's indorsement, and a clearing house indorsement dated 8 July 1948. A check dated 2 June 1948, payable to cash in the amount of $20.00 and bearing accused's purported signature, was presented for payment at the Long Branch Trust Company on 9 June 1948 at which time accused's balance in the bank was $11.00. The assistant treasurer of the Trust Company testified that this check was returned on 9 June 1948 but did not specify to whom the check was returned. Harry Schoppel, manager of the Officers' Club, testified that the check designated Prosecution Exhibit 1a which was dated 2 June 1948 was a check which had been received from the bank. Upon cross-examination he testified as follows concerning this check:

"Q Can you explain why it took a check dated 2 June so long to come up at this time?
A Certainly. The change there marking a date of June 2nd is incorrectly made, in view of the fact that our cashier cashed that check July 2nd. It was predated but the check wasn't

cashed June 2nd, I have record of the fact that the check was cashed July 2nd." (R 39).

It must be concluded that the check dated 2 June which was the subject of the foregoing cross-examination was the check designated as Prosecution Exhibit 1a.

We find, therefore, that the 2 June 1948 check concerning which the assistant treasurer of the Long Branch Trust Company testified was a different check from that designated as Prosecution Exhibit 1a and which the evidence tends to show was cashed at the Officers' Club on 2 July. We are unable to find that the 2 June check which was the subject of the bank official's testimony was one which was cashed at the Officers' Club.

The record further shows that on 1 and 3 July 1948 accused's balance in the drawee bank was $2.00, that four of accused's checks, dated 3 July 1948, upon the same bank, were paid upon presentment on 9 July 1948, and that six other 3 July 1948 checks drawn upon the same bank were returned because of insufficient funds. The checks were subsequently received back from the bank. The inferences of fact which the court was entitled to draw from the evidence sustain the findings of the court with the exception of the date of the offense. The evidence conclusively shows that the date of the offense was 2 July 1948. The variance between the date alleged and the date proven is, however, immaterial in this case (CM 203112, Burk, 7 BR 43,44; CM 235011, Goodman, 21 BR 243).

b. (Specifications 4-10, inclusive, and 12-15, inclusive, Charge I).

The evidence shows the following facts with reference to the checks which are the subject of the Specifications under discussion in this paragraph. The checks which are the subject of Specifications 4 and 10 were cashed by the payee named therein, Captain Leonard Carlson, on 3 July 1948. The check pertinent to Specification 9 was cashed by Elizabeth E. Lewis, the payee, on the same date. The checks pertaining to the other Specifications under discussion were payable to "cash" and were cashed by cashiers of the Officers' Club, Fort Monmouth, New Jersey, on dates not specified. All checks bore accused's purported signature. Checks similar to those herein described were presented for payment against accused's account at the Long Branch Trust Company, Long Branch, New Jersey, and it must be concluded that the checks discussed here were the checks presented to the bank. The following situation is shown with respect to accused's account at the time the checks under consideration were presented:

Date of check	Amount of check	Date of presentation of check	Balance in accused's account when check presented
Spec 5) 3 Jul 48	$20.00	9 Jul 48	$ 2.00
Spec 6) 3 Jul 48	$10.00	9 Jul 48	$ 2.00
Spec 7) 3 Jul 48	$35.00	9 Jul 48	$ 2.00
Spec 8) 3 Jul 48	$10.00	12 Jul 48	-$ 0.35
Spec 9) 3 Jul 48	$10.00	12 Jul 48	-$ 0.36
Spec 10)3 Jul 48	$20.00	13 Jul 48	-$ 0.36
Spec 12)8 Jul 48	$35.00	16 Jul 48	-$ 3.36
Spec 13)8 Jul 48	$30.00	16 Jul 48	-$ 3.36
Spec 14)8 Jul 48	$30.00	16 Jul 48	Account overdrawn
Spec 15)13 Jul 48	$35.00	Date of presentation of check not shown	-$ 3.36

As to the check, subject of Specification 4 dated 3 July 1948 and payable to Captain Leonard Carlson in the amount of $20.00 it is shown that a check bearing that date and payable to Captain Leonard Carlson in an amount not shown was presented to the Long Branch Trust Company for payment on 9 July 1948. It must be concluded that the check dated 3 July 1948 payable to Captain Carlson was the check which was the subject of Specification 4. Thus when the check cashed by Carlson was presented for payment on 9 July 1948 accused's balance was $2.00 against a demand for $20.00.

In the absence of evidence to the contrary, a written instrument is presumed to have been executed on the date which the instrument bears. It must be concluded, therefore, that the checks cashed at the Officers' Club (Specs 1,5-8 inclusive; and 12-15 inclusive) must have been cashed on or subsequent to the dates shown upon the checks. They may not be considered to be postdated checks.

There is no direct evidence that any of the checks under consideration were in fact made and signed by accused. The circumstances that accused's purported signature was on the checks as drawer and that the checks were uttered by him are sufficient to establish his authorship of the checks.

Thus we find that the checks here considered were drawn and cashed by accused and that subsequently, upon presentation at the bank, his balance at the bank was insufficient for the payment thereof. It was charged that accused with intent to defraud made and uttered the checks and fraudulently obtained money therefor "then well knowing or having reason to know that he did not have and not intending that he should

have sufficient funds" for the payment thereof. Ascribing the widest possible latitude thereto, the defense was that at the time each individual check was cashed, accused's balance at that time was sufficient to pay the check. Thus the defense offered evidence that four of accused's checks totaling $80.00, all executed on 3 July 1948 were paid by the bank upon presentation on 9 July 1948. The record otherwise shows that upon the same day accused executed other checks totaling $105.00. All of accused's 3 July checks were presented for payment on two dates, 9 and 12 July, at which time checks totaling $105.00 were dishonored. In slightly over a month accused uttered at least thirteen checks totaling $255.00, which were dishonored upon presentment. A similar factual situation was considered in CM 307125, Keller, 60 BR 335, and the Board of Review stated:

> "* * His uttering of 50 worthless checks in the short period of less than two months and thus procuring $650 was clearly fraud. The fact that until 19 September he had in his account funds equal in amount to some of the worthless checks uttered on and after 7 September does not absolve him in any way, since by issuing certain checks which cleared the bank prior to those issued on and after 7 September he created a condition in his account such that on the dates when he uttered the worthless checks there were not in fact funds sufficient for the payment thereof; such funds as he then had were, as it developed, sufficient only to pay checks which had cleared the bank before the worthless checks were presented for payment." [See also CM 225648, Creighton, 48 BR 122,123].

The findings of guilty of the Specifications under consideration are warranted by the evidence, and the conduct denounced in the Specifications is in violation of Article of War 95 (CM 221992, Moore, 49 BR 153,164).

c. (Specifications 2, 3 and 11, Charge I).

The evidence shows that Mr. Harry Schoppel received from the Long Branch Trust Company three checks drawn upon the Long Branch Trust Company bearing accused's purported signature. The checks were drawn to the order of cash and bore the following dates and amounts: 18 June 1948, $25.00 (Spec 2); 1 July 1948, $20.00 (Spec 3); and 8 July 1948, $35.00 (Spec 11). Mr. Schoppel testified that he talked with accused concerning the 18 June check and accused promised to make it good. Upon this statement of facts, may it be found that accused uttered the checks to and received cash therefor from the Fort Monmouth Officers' Club as alleged?

With reference to the question of uttering of the checks, it must be emphasized that the checks were bearer instruments and could be

negotiated without indorsement with no impairment of negotiability. The checks in question bore no other indorsement than the Club's indorsement. There is no evidence in the record as to the manner in which the checks originally came into the possession of the Club. The mere fact that accused admitted liability directly as to one of the checks and inferentially as to the other checks may not be considered as evidence that accused uttered the checks to the Club. We are aware that, in practice, few if any persons would accept a bearer instrument without the indorsement of the person presenting it, but we have been unable to discover any rule of law that where a bearer instrument has no indorsement thereon it would be presumed that the instrument was negotiated directly by the maker to the holder. We find that the evidence fails to support the allegation that accused uttered the checks in question and it necessarily follows, in the absence of such finding, that there may be no finding that accused obtained money from the Officers' Club by virtue of uttering a check with insufficient funds for the payment thereof. The evidence additionally fails to disclose that a then present consideration was given for the checks in question at the time the Club came into possession of the checks. The findings of guilty of the Specifications here considered are not supported by the record of trial.

5. Jurisdiction.

Department of the Army official records show that accused was commissioned a Second Lieutenant in the Army of the United States (AUS) and ordered to active duty with the Army Air Forces, Communications Wing, Ashville, North Carolina, on 28 July 1943. He was subsequently promoted to the grades of First Lieutenant and Captain, respectively, while on duty with the Army Air Forces. On 25 April 1947, he was commissioned Captain, Air Corps, Officers Reserve Corps. He continued on active duty until 23 June 1947 when he reverted to inactive duty status. On this date, he enlisted in the Regular Army (Air Corps) and was promoted to the grade of Master Sergeant. On 13 October 1947 while assigned to 702d AAF Base Unit (Headquarters 52d AACS Group), Airways and Air Communications Service, ATC, United States Air Forces, he was transferred from Mitchel Field, New York, to Fort Myer, Virginia, for detached service with Headquarters Company, United States Army, South Post, Fort Myer, Virginia, for approximately six months, with instructions to return to his station upon completion of the detached service. On 30 December 1947, pursuant to his request, he was called to active duty in the grade of Captain, Air Corps, Officers Reserve Corps, by orders issued by The Adjutant General, Department of the Army, and was assigned to duty with the Army Signal Corps, Fort Monmouth, New Jersey. Fort Monmouth is an Army installation. On 9 August 1948, by orders issued by the Department of the Air Force, he was transferred from the Air

Force Reserve to the Army Signal Corps Reserve, pursuant to his written request, without change in his duty assignment at Fort Monmouth. Accused was tried on 27 August 1948 by a general court-martial appointed by the Commanding Officer, Fort Monmouth, New Jersey.

It is thus noted that at the time of the commission of the alleged offenses, accused was on active duty with the Army as a Captain, Air Force Reserve, but on 27 August 1948, the date of the trial, had officially been transferred from the Air Force Reserve to the Army Signal Corps Reserve. It, therefore, becomes material to determine if the Army court-martial had jurisdiction to try the accused.

The Departments of the Air Force, Army and Navy were created by the National Security Act of 1947 which became effective on 18 September 1947 (Public Law 253, 80th Congress). This law did not automatically transfer personnel from the Army to the Air Forces. Section 209 of said law provides that each transfer, assignment or change in status under sections 207 and 208 should take effect upon such date or dates as should be prescribed by the Secretary of Defense. It is, therefore, clear that until personnel were transferred from the Army to the Air Force they remained under the court-martial jurisdiction of the Army. Department of the Army Bulletin No. 1, paragraph 4a, dated 12 November 1947, effective 26 September 1947, provides:

> "4. Transfer of individuals:
>
> "a. All commissioned officers commissioned in the Air Corps, United States Army and all officers who hold commissions in the Air Corps, Reserve, and Air Corps, Army of the United States, are transferred to the Department of the Air Force. All warrant officers and enlisted men now under the command, authority or jurisdiction of the Commanding General, Army Air Forces, are transferred to the Department of the Air Force except, to the extent qualified by paragraph 4 (e) below, those:
>
> (1) Assigned to units listed in inclosure 1.
> (2) Assigned to units, organizations or installations organized from bulk authorizations which furnish medical service.
> (3) Assigned to medical duties in Air Force units."

Paragraph 4g provides, however, that:

> "Any individual transferred to the Department of the Air Force under this order who does not desire such transfer may submit a written request to the Chief of Staff, United States Army, prior to 1 July 1949, requesting transfer to the Department of the Army."

Joint Army and Air Force Adjustment Regulations 1-1-1, dated 13 November 1947, implement Bulletin 1, supra, and contain directives for determining the Departmental status of individuals with respect to separation of the Departments. Paragraph 3 indicates that accused had a Reserve Officer status in the Air Force prior to his transfer to the Army Signal Corps Reserve.

As noted above, accused applied to The Adjutant General of the Army for recall to active duty in November 1947, and was ordered to duty with the Army Signal Corps in December 1947. It can be assumed that this order was lawful. He was subsequently transferred from the Air Force Reserve to the Army Signal Corps Reserve. Did the Army, by virtue of such assignment and duty, obtain jurisdiction to try accused for offenses committed while on duty with the Army? It is believed that it did. The reorganization of the National Military Establishment, as contemplated by Public Law 253, was not accomplished immediately upon the passage of the law but was to take place by orderly processes over a period of time. Section 208(e) of said law provides:

> "For a period of two years from the date of enactment of this act, personnel (both military and civilian), property, records, installations, agencies, activities and projects may be transferred between the Department of the Army and the Department of the Air Force by direction of the Secretary of Defense."

It is clear that the legislative intention was that during the reorganization there was to be no break in the continuity of military service under such transfer or transfers. Under such circumstances Army court-martial jurisdiction attaches over personnel transferred to it so as to cover offenses committed while such personnel was assigned to the Air Force. The conclusion that the accused came under the jurisdiction of the Army at least from the date of the transfer of his Reserve commission from the Air Corps to the Army Signal Corps, if not from the date he was ordered to active duty, is further supported by the provisions of Section 305(a), Public Law 253, which provides:

> "All laws * * and other actions applicable with respect to any * * personnel * * transferred under this Act, or with respect to any officer * * from which such transfer is made, shall, except to the extent rescinded, (or) modified * * have the same effect as if such transfer had not been made; but, after any such transfer, any * * law * * or other action which vested functions in or otherwise related to any officer, * * from which such transfer was made shall, * * be deemed to have vested such function in or relate to the officer, department or agency to which the transfer was made."

Section 208(c) of Public Law 253 specifically provides that insofar as personnel transferred from the Army to the Air Force was concerned such change in status did not alter or prejudice the status of any individual so transferred so as to deprive him of any right, benefit, or privilege to which he may be entitled under existing law. It follows that if by lawful orders this same officer was transferred back to the Army within the two year period, his original status as it existed in the Army before he was transferred to the Air Force would be reinstated and consequently the Army would have jurisdiction to try any offenses which he may have committed while technically assigned to the Air Force. Such intent of the law is further made clear by Section 207(f), Public Law 253, which provides:

> "That, in order to permit an orderly transfer, the Secretary of Defense may, during the transfer period hereinafter prescribed, direct that the Department of the Army shall continue for appropriate periods to exercise any of such functions, insofar as they relate to the Department of the Air Force, or the United States Air Force, or their property and personnel."

It is further to be noted that under the provisions of paragraph 4g (quoted above) of Army Bulletin No. 1, persons transferred to the Air Force who did not desire such transfer had until 1 July 1949 to submit a written request for transfer to the Army (See also Par 19, Joint Army and Air Forces Adjustment Regulations, 1-1-1, 13 November 1947). It is believed such transfer to the Army would be retroactive to the extent that it authorized trial by Army court-martial even though the offense was committed prior to such transfer. This conclusion is further fortified by the provisions of Section 208(c), Public Law 253, supra, providing that change in status was to be without prejudice to any right under existing law.

In considering this question it further becomes necessary to consider the effect of Public Law 775 (80th Congress) which provided for the administration of military justice in the United States Air Force. It has been held that Public Law 253, prior to the enactment of Public Law 775, did not have the effect of repealing the Articles of War and that Department of the Air Force personnel continued subject to the Articles of War. Air Force courts-martial continued to try personnel on duty with organizations under the United States Air Force (CM 326147, Nagle, 75 BR 159,164). However, since Public Law 253 did not create a Judge Advocate General for the Air Force, The Judge Advocate General of the Army continued to exercise appellate review of cases tried by Air Force courts-martial.

Public Law 775 became effective 25 June 1948. It seems clear that one purpose of this law was to establish in the United States Air Force the Office of The Judge Advocate General, United States Air Force, and to grant to him appellate review over court-martial cases tried by Air Force Courts-martial. Public Law 775 does not repeal the Articles of War, nor does it create a separate identical Articles of War for the Air Force. The mentioned Act recognized, but did not change the punitive Articles of War, but merely varied certain procedural aspects, insofar as they were applicable to Air Force personnel. Therefore, subsequent to 25 June 1948, during which the offenses here considered were committed, the accused might have been subjected to Air Force disciplinary action. Failure so to do could not have constituted any condonation of the offense, since the Officer was serving at an Army installation, and Army officers were apparently exercising primary control of him. It follows that being an Army officer at the time of his trial, and having been subject to the Articles of War within the meaning of Article of War 2(a) at the time of and since the commission of the offenses, the court-martial which tried him had jurisdiction over the person and the offenses.

6. Accused is 43 years of age, married, and has three children, the eldest of which is 3 years of age. He is a high school graduate and had four years of college work in business administration and accounting. He has enlisted service from January 1921 to January 1924 and from January 1943 until July 1943 when he was commissioned as second lieutenant. He had foreign service in the Pacific Theater for over three years. His efficiency ratings of record are "Very satisfactory" and "Excellent." On 24 March 1947 he was punished under Article of War 104 for borrowing money from enlisted men and not repaying the loans as agreed. Punishment consisting of a reprimand and forfeiture of one-half month's pay was imposed upon him.

7. 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. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 2, 3 and 11, Charge I, legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of Article of War 95.

C. O. Woefel, Judge Advocate

C. J. Berkowitz, Judge Advocate

[illegible], Judge Advocate

CSJAGH CM 332879 1st Ind

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

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 John R. Boughman, 0-1003482, Executive Officer, Company M, Signal Training Regiment, Fort Monmouth, New Jersey.

2. Upon trial by general court-martial this officer was found guilty of uttering fifteen checks with insufficient funds for the payment thereof, thereby defrauding the Officers' Club, Fort Monmouth, New Jersey, and two officers of the Army, of a total of $355.00, in violation of Article of War 95 (Chg I, Specs). He was acquitted of similar specifications laid under Article of War 96 (Chg II, Specs 1-15). 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 of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications 2, 3 and 11, Charge I, legally sufficient to support the other findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

Accused at all pertinent times was on duty at Fort Monmouth, New Jersey, and in the period extending from 18 June to the middle of July 1948 cashed eight checks totaling $205.00 at the Officers' Club, Fort Monmouth, New Jersey. The eight checks were returned to the Officers' Club by the drawee bank because the funds in accused's account were insufficient for the payment of the checks. On 3 July 1948 Captain Leonard J. Carlson cashed two of accused's checks totaling $40.00 and Lieutenant Elizabeth E. Lewis cashed one of accused's checks in the amount of $10.00. These checks were also returned unpaid by the drawee bank by reason of the depleted state of accused's account therein.

There was also evidence that three other checks of accused were received at the Officers' Club, having been returned by the drawee bank because of insufficient funds. These three checks were bearer instruments and there was insufficient evidence that accused cashed these checks at the Officers' Club. Additionally it is not shown that the Officers' Club parted with a consideration at the time of its original acquisition of the three checks. The findings of guilty of the

Specifications of which these checks are the subject (Chg I, Specs 2,3, and 11) are accordingly not supported by the record of trial.

Accused elected to remain silent. The pretrial investigating officer called as a witness for the defense testified that accused cooperated fully in the pretrial investigation.

4. Accused is 43 years of age, married, and has three children, the eldest of which is 3 years of age. He is a high school graduate and had four years of college work in business administration and accounting. In civilian life he worked as a telegrapher and timekeeper. He had enlisted service from January 1921 to January 1924 and from January 1943 until July 1943 when he was commissioned as second lieutenant. He had foreign service in the Pacific Theater for over three years. His efficiency ratings of record are "Very satisfactory" and "Excellent." On 24 March 1947 he was punished under Article of War 104 for borrowing money from enlisted men and not repaying the loans as agreed. Punishment consisted of a reprimand and forfeiture of one-half month's pay.

Informal information has been received that all of the checks here in issue have been made good by the officer. There is also informal indication of other instances of financial irresponsibility on the part of the accused.

5. I recommend that the findings of guilty of Specifications 2, 3 and 11, Charge I, be disapproved and 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 201, Dec 16, 1948).

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

CSJAGQ - CM 332882

22 NOV 1948

UNITED STATES v. Recruit HARRY J. ALLEN (RA 42219941), 7850th Quartermaster Depot Group.	WETZLAR MILITARY POST EUROPEAN COMMAND Trial by G.C.M., convened at Wetzlar, Germany, 1 September 1948. Dishonorable discharge and confinement for six (6) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, SKINNER and STEVENS, Judge Advocates

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

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

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

Specification 1: In that Recruit Harry J. Allen, 7850th Quartermaster Depot Group did, without proper leave, absent himself from his organization at Giessen, Germany, from about 2145 hours, 21 July 1948 to about 1000 hours, 26 July 1948.

Specification 2: In that Recruit Harry J. Allen, 7850th Quartermaster Depot Group, did, without proper leave, absent himself from his organization at Giessen, Germany, from about 0630 hours, 2 August 1948 to about 1000 hours, 14 August 1948.

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

Specification 1: In that Recruit Harry J. Allen, 7850th Quartermaster Depot Group, did, at Giessen, Germany, on or about 19 July 1948, feloniously take, steal and drive away a 1/4 ton vehicle, value over fifty dollars ($50.00), property of Richard K. Yardley, Department of the Army Civilian.

Specification 2: In that Recruit Harry J. Allen, 7850th Quartermaster Depot Group did, at Giessen, Germany, on or about 27 July 1948, feloniously take, steal and carry away one (1) wrist watch, make "Cornell", one (1) carton of "Lucky Strike" cigarettes, and one (1) pair of cavalry boots, of a total value of about forty-five dollars ($45.00), property of Recruit George G. Carpenter.

Specification 3: (Finding of Not Guilty).

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

Specification: In that Recruit Harry J. Allen, 7850th Quartermaster Depot Group, did, at Giessen, Germany, on or about 11 July 1948, knowingly and willfully apply to his own use and benefit, one 1/4 ton truck, of a value over fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Accused pleaded guilty to Charge I and the Specifications thereunder and to Charge III and its Specification but not guilty to Charge II and the Specifications thereunder. He was found guilty of Charge I and the Specifications thereunder and of Charge III and its Specification. Of Specification 1 of Charge II, accused was found guilty except the words "feloniously take, steal and carry [drive] away", substituting therefor the words "wrongfully and unlawfully take, and use without the consent of the owner" and not guilty of a violation of the 93rd Article of War, but guilty of a violation of the 96th Article of War. Of Specification 2 of Charge II, he was found guilty, except the words and figure, "about forty-five dollars ($45.00)," substituting therefor the words "of some value less than twenty dollars ($20.00)," and guilty of Charge II (A.W. 93) as to this Specification. Evidence of two previous convictions was considered. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six (6) years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring discussion by the Board of Review concerns the maximum punishment authorized for the offenses of which the accused has been found guilty. Independent of Specification 1 of Charge II, the maximum punishment authorized for the other offenses is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, seven months,

twenty-one days (Par. 104c, MCM 1928, pp. 97, 99, 100). Accordingly, the legality of the record to support the present sentence involving dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six (6) years is dependent upon whether the Specification will support a sentence involving confinement for a period of at least four months and nine (9) days.

The court, by exceptions and substitutions, found that accused did, at Giessen, Germany, on or about 19 July 1948, wrongfully and unlawfully take and use without the consent of the owner a 1/4 ton vehicle, value over fifty dollars ($50.00), property of Richard K. Yardley, Department of the Army civilian. With reference to similar specifications of which two accused were found guilty in the recent case of CM 329200, Staley and Bone, 10 March 1948, the Board of Review stated:

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

> 'wrongfully take, and use without consent of the owner, a certain motor vehicle, to wit, a one-quarter (¼) ton, 4x4 truck, * * * of the value of more than fifty dollars.'

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

"Thereafter, it was determined in CM 326883, Meece (Feb. 1948), that the doctrine enunciated in the Sattler case, supra, applied to a Specification which alleged that accused did 'wrongfully and without lawful permission or authority use' a vehicle, property of the United States. The basis of the decision in the Meece case, supra, was that such a Specification charged only the commission of a tortious act in such a manner and under such

circumstances that accused's conduct constituted the criminal offense of a disorder to the prejudice of good order and military discipline in violation of Article of War 96. This holding was in conformity with CM 307097, Mellinger, 60 BR 214 wherein the Board of Review stated:

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

"The only facts in the instant case which distinguish it from the Meece case, supra, are that the Specification in the present case alleges that accused did 'wrongfully take and use' a vehicle while the Specification in the Meece case, supra, alleged that accused did 'wrongfully and without lawful permission or authority use' a vehicle, and the fact that the value of the vehicle was alleged in the instant case while no value was charged in the Meece case. Consequently, the sole question for the Board of Review to determine is whether the use of the additional word 'take' and the allegation of value in the Specification in this case is sufficient to hold that as a matter of law the offense so charged is more than a tortious act constituting a mere 'disorder' to the prejudice of good order and military discipline. The Board of Review is constrained to hold that the principles applied in the Sattler and Meece cases are controlling in the present case. The following excerpt from the Meece holding is equally applicable to the present case and clearly shows that the reasons upon which that decision was based makes the conclusion inescapable that the Specification in the present case charges a mere 'disorder' as distinguished from the more serious charge of larceny or misapplication:

> 'It is within the province of the Board of Review to examine the evidence in the record of trial to determine whether it is legally sufficient to establish the wrongful nature of the act alleged. However, it cannot affirm a punishment inflicted for the commission of an offense which may have been proven but which is not alleged by, contained within, or reasonably to be implied from the original verbiage of the Specification. Sans "wrongfully" the allegations contained in this Specification do not state or imply

misconduct, since the accused might well have committed such an act through mistake, and a will to do wrong may not be inferred where it is not inherent in the act. The physical act of accused might, depending upon all of the circumstances including the nature of accused's intent, constitute on the one hand the offense of a simple disorder and on the other hand any one of several felonies cognizable in military law. In such cases, when used alone as the charging word, "wrongfully" indicates only the slightest degree of criminality which might be applicable to the acts alleged. Thus here, in the absence of other or additional words by which an offense of greater gravity would be stated or might be reasonably implied, we are forced to the conclusion that the offense of which accused has been found guilty is a simple disorder in violation of Article of War 96.'

"The offense of wrongfully taking and using a vehicle without the consent of the owner is not specifically listed in the Table of Maximum Punishments (par 104c, MCM, 1928). However, the offense described as 'disorderly under such circumstances as to bring discredit upon the military service' is listed therein with a maximum authorized punishment not to exceed confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period."

Similarly, in the instant case, the findings do not show the commission of an offense of greater gravity or contain words from which such an offense could reasonably be inferred. Quite to the contrary, the court has by its findings expressly rejected the allegations contained in the Specification upon which the accused was arraigned, charging that the act, was done feloniously. The only distinction between the Specifications in CM 329200, Staley and Bone and the findings in the present case is the use of the word "unlawful" in the latter. This is of no material consequence, however, since the act is also alleged to have been wrongful and in violation of an Article of War and any violation of an Article of War is "per se" unlawful. Accordingly, and in the light of the above precedent, the Board of Review is constrained to hold that the maximum authorized punishment for the offense presently under consideration is confinement at hard labor for a period of not to exceed four months and forfeiture of two-thirds pay per month for a like period. It follows that the sentence imposed by the court and approved by the reviewing authority is nine days in excess of that authorized (Par. 104c, MCM, 1928).

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, eleven months and twenty-one days.

On Leave
_____, Judge Advocate

_____, Judge Advocate

E. L. Stevens, Jr., Judge Advocate

NOV 3 0 1945

CSJAGQ - CM 332882 1st Ind

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

TO: Commanding Officer, Wetzlar Military Post, APO 159,
c/o Postmaster, New York, New York

1. In the case of Recruit Harry J. Allen (RA 42219941), 7850th Quartermaster Depot Group, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years, 11 months and 21 days. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 332882).

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 332967

U N I T E D S T A T E S v. Recruits DANIEL T. DORSA (12253794), Headquarters Company, Eighth Army, APO 343, and RALPH CURCIO (42281700), Headquarters & Headquarters Detachment, 2nd Replacement Battalion, 4th Replacement Depot, APO 703.	)	YOKOHAMA COMMAND Trial by G.C.M., convened at APO 503, 5 and 30 August 1948. Dorsa: Dishonorable discharge and confinement for ten (10) years. Federal Reformatory. Curcio: Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Ralph Curcio, Headquarters and Headquarters Detachment, 2nd Replacement Battalion, Fourth Replacement Depot, APO 703, and Private Daniel T. Dorsa, Headquarters Company, Eighth Army, APO 343, acting jointly, and in pursuance of a common intent, did, at the Yuyama Hotel, Otsuki-machi, Honshu, Japan, on or about 22 May 1948, by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Moto Yuyama about nine thousand five hundred yen (¥9,500), property of Konai Yuyama, of the approximate value of thirty five and 15/100 dollars ($35.15), United States currency.

Specification 2: In that Private Ralph Curcio, Headquarters and Headquarters Detachment, 2nd Replacement Battalion, Fourth Replacement Depot, APO 703, and Private Daniel T. Dorsa, Headquarters Company, Eighth Army, APO 343, acting jointly, and in pursuance of a common intent, did, at or in the vicinity of Otsuki-machi, Honshu, Japan, on or about 22 May 1948, by force and violence and by putting him in fear, feloniously take, steal and carry away from Yoshitoshi Omata, one bicycle, property of the said Yoshitoshi Omata, of some value.

Specification 3: In that Private Ralph Curcio, Headquarters and Headquarters Detachment, 2nd Replacement Battalion, Fourth Replacement Depot, APO 703, and Private Daniel T. Dorsa, Headquarters Company, Eighth Army, APO 343, acting jointly, and in pursuance of a common intent, did, at or in the vicinity of Otsuki-machi, Honshu, Japan, on or about 22 May 1948, by force and violence and by putting him in fear, feloniously take, steal and carry away from Jinki Omata, one bicycle, property of the said Jinki Omata, of some value.

Specification 4: In that Private Ralph Curcio, Headquarters and Headquarters Detachment, 2nd Replacement Battalion, Fourth Replacement Depot, APO 703, and Private Daniel T. Dorsa, Headquarters Company, Eighth Army, APO 343, acting jointly, and in pursuance of a common intent, did, on the Otagahara National Highway, Enkyo-machi, Honshu, Japan, on or about 22 May 1948, with intent to commit felony, viz, robbery, commit an assault upon Paul H. Ito, and Edwin N. Matsusaka, by willfully and feloniously pointing a loaded pistol at the said Paul H. Ito, and Edwin N. Matsusaka, and ordering them to dismount from the vehicle in which they, the said Paul H. Ito, and Edwin N. Matsusaka, were seated.

<u>As to accused Curcio only</u>.

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

Specification: In that Private Ralph Curcio, Headquarters and Headquarters Detachment, 2nd Replacement Battalion, Fourth Replacement Depot, APO 703, did, on the Otagahara National Highway, Enkyo-machi, Honshu, Japan, on or about 22 May 1948, with intent to do him bodily harm, commit an assault upon Edwin N. Matsusaka, by willfully and feloniously firing upon him, the said Edwin N. Matsusaka, with a pistol.

Accused pleaded not guilty to and were found guilty of the Charges and Specifications as indicated above. Evidence of three previous convictions as to each accused was introduced. The court was closed, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentenced the

> "ACCUSED DANIEL T. DORSA to be dishonorably discharged the service of the United States, to be confined at hard labor at such place as the reviewing authority may direct for ten years and to forfeit all pay and allowances due or to become due.
>
> "ACCUSED RALPH CURCIO to be dishonorably discharged the service of the United States, to be confined at hard labor at such place as the reviewing authority may direct for fifteen years and to forfeit all pay and allowances due or to become due" (R. 50).

The court was opened, the President announced the findings and sentence, and the court adjourned on 5 August 1948. The record was authenticated. On 30 August 1948 the court reconvened, whereupon the prosecution read the following letter from the appointing authority to the court:

> "Headquarters,Yokohama Command, APO 503, 26 August 1948 YCJA 250.411, Subject: Proceedings in Revision, To: Captain Donald A. Synnott, Trial Judge Advocate, Headquarters Yokohama Command, APO 503.
>
> 1. The record of trial by general court-martial in the case of Recruit (formerly Private) Daniel T. Dorsa, RA 12253794, Headquarters Company, Eighth Army, APO 343, and Recruit (formerly Private) Ralph Curcio, RA 42281700, Headquarters and Headquarters Detachment, 2d Replacement Battalion, Fourth Replacement Depot, APO 703, is returned herewith for revision in accordance with paragraph 83, Manual for Courts-Martial, 1928.
>
> 2. The record recites that accused Curcio was sentenced to confinement at hard labor for fifteen years, upon the concurrence of two-thirds of the members present, whereas the 43rd Article of War provides that no person shall be sentenced to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken.
>
> 3. Inasmuch as the requisite number of members did not concur in adjudging the sentence to confinement imposed against accused Curcio, the members of the court present

at the original trial should reconvene, revoke their previous sentence, and adjudge a sentence appropriate in the premises.

4. Upon completion of such action, the record of trial, together with the record of the proceedings in revision will be returned to this headquarters.

By Command of Brigadier General Garvin. Signed by J. A. Mercer, Lt Col, AGD, Assistant Adjutant General" (R. 51, 52).

The court was closed and upon reopening the record discloses the following proceedings:

"PRES: The court revokes its former sentence as to the accused Ralph Curcio and upon secret written ballot three-fourths of the members present concurring sentences the Accused Curcio to be dishonorably discharged the service of the United States, to be confined at hard labor at such place as the reviewing authority may direct for fifteen years and to forfeit all pay and allowances due or to become due.

The court was opened and the president announced the revision of sentence as to the accused Ralph Curcio" (R. 52).

The record in revision was then authenticated and again forwarded to the reviewing authority for action. The reviewing authority approved the sentence as to each accused, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement for accused Dorsa, and the United States Penitentiary, McNeil Island, Washington, as the place of confinement for accused Curcio, and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty by the court as to each accused. The only question presented is the legality of the sentence imposed as to the accused Curcio.

Article of War 40 provides in part:

"No authority shall return a record of trial to any court-martial for reconsideration of —

"(d) The sentence originally imposed, with a view to increasing the severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

"And no court-martial in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited."

In CM 152731 (1922), the President, on 24 August 1922, approved the opinion of the Acting Judge Advocate General that --

"When the record of a court-martial is 'finally approved and adopted by the court as a body and authenticated by the signature of its president and the trial judge advocate', the accused is entitled as of right to have it forwarded to the appointing authority. Until the 'legal record' is thus brought into existence, the court has plenary power over it for the purpose of making it 'speak the truth' and for the further purpose of revising its sentence in accordance with truth and justice * * *."

In the instant case, after the record of trial had been finally approved and adopted by the court as a body, authenticated by the signature of its President and the trial judge advocate and transmitted to the reviewing authority, it could not legally be returned to the court for revision proceedings for the purpose of increasing the severity of the sentence adjudged by the court at its session of 5 August 1948. The record clearly shows that the court did not purport to revise the record to make it "speak the truth" with respect to the proceedings had on 5 August 1948, nor was it returned by the reviewing authority for this purpose. The sentence as to the accused Curcio, being divisable, was not void ab initio and could legally have been reduced by the reviewing authority to a ten year period of confinement which may be imposed by a two-thirds vote under Article of War 43 (par. 87, MCM, 1928; CM 185899, Jenkins, April 1929). The sentence, therefore, was legal insofar as it imposed dishonorable discharge, total forfeitures and confinement for ten years, and being a legal sentence to this extent its severity could not thereafter be increased. The action taken on 30 August 1948, in violation of Article of War 43, was illegal as to the period of confinement at hard labor imposed in excess of ten years, and to the extent of the excessive sentence was void and of no effect (CM 233806, McCaslin, 20 BR 139, 141). In the McCaslin case the court in revision proceedings amended the record of trial by inserting in the sentence imposed the words "and to be dishonorably discharged the service, and to forfeit all pay and allowances due or to become due." The Board of Review held that:

"* * * the reviewing authority could not legally have returned this record of trial to the court for revision proceedings and for the increase in severity of the sentence adjudged by the court at its session on March 23,

1943, and the court likewise was without authority to increase, by amendment, the severity of the sentence in that manner on March 23, 1943, after the record of the court-martial had been finally approved and adopted by the court as a body, authenticated by the signatures of its president and the trial judge advocate, and transmitted, on March 20, 1943, to the convening authority" (CM 233806, McCaslin, 20 BR 139, 141).

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as imposes dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years as to each accused.

SICK IN QUARTERS, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George B. Springston, Judge Advocate.

OCT 20 1948

JAGN-CM 332967 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Yokohama Command, APO 503, c/o Postmaster, San Francisco, California.

1. In the case of Recruits Daniel T. Dorsa (12253794), Headquarters Company, Eighth Army, APO 343, and Ralph Curcio (42281700), Headquarters & Headquarters Detachment, 2nd Replacement Battalion, 4th Replacement Depot, APO 703, I concur in the foregoing holding by the Board of Review and recommend that only so much of the sentence as to accused Curcio be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years at the place designated. Upon taking such action you will have authority to order the execution of the sentences.

2. In the case of accused Curcio you have designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Since Curcio is less than 26 years of age and does not have more than 10 years' confinement to serve, an appropriate Federal reformatory should be designated as the place of confinement (par. 9 (d) 4, AR 600-375, 6 January 1948).

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

(CM 332967).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGH CM 333001

10 NOV 1948

U N I T E D S T A T E S	)	YOKOHAMA COMMAND
v.	)	Trial by G.C.M., convened at Yokohama, Japan, 9,10,11,13, 16,17,18 and 19 August 1948. Dishonorable discharge and confinement for life. United States Penitentiary, McNeil Island, Washington.
Private First Class WILLIAM CARSON MANIS (RA 14225252), Headquarters Detachment, Sugamo Prison, APO 181.	)	

REVIEW by 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.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class William Carson Manis, Headquarters Detachment, Sugamo Prison, did at Tokyo, Honshu, Japan, on or about 5 April 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one, Captain (Chaplain) John A. Ryan by shooting him with a firearm.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of the Army may direct as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution.

Captain William F. Harrigan, Commanding Officer, Headquarters Detachment, Sugamo Prison, identified the accused by name and grade,

pointed him out in the courtroom, and testified that accused was in the military service and a member of Headquarters Detachment, Sugamo Prison (R 11,12).

On the evening of 5 April 1948, shortly after eight o'clock, the body of the deceased victim, Captain (Chaplain) John A. Ryan, was discovered near the Ikebukuro Rotary, also known as the First Cavalry Circle, which is located a few hundred feet from the main gate of the Sugamo Prison, in Tokyo, Japan. The body was placed in a jeep and removed to the dispensary (R 157,162,166; Pros Ex 1), at Sugamo Prison where it was examined by Captain John R. Kersten, the medical officer on duty. Captain Kersten pronounced Chaplain Ryan dead and diagnosed the cause of death as "gunshot wound penetrating through the fourth intercostal space, base of pulmonary artery, lung, to parietal pleura. Massive internal hemorrhage." (R 13; Pros Ex 2).

Captain Edwin L. Scott, Medical Corps, testified that on the following day, 6 April 1948, he performed an autopsy on the body of Chaplain Ryan. His testimony was to the effect that the cause of death was a bullet wound in the thorax which was perforated about an inch and a half to the left of the mid-line and perforated the pulmonary artery and the left lung; that he removed the bullet, approximately .25 caliber in size from Chaplain Ryan's lung and, he retained said bullet in his possession until it was turned over to the CID; and that death took place in two or three minutes (R 15,50; Pros Ex 3). On cross-examination, Captain Scott testified that the bullet he had extracted from Chaplain Ryan's body was discharged at close range, had entered in a horizontal line and was deflected upward when it contacted the fifth rib (R 16,17).

By expert testimony, it was shown that the lethal bullet was a conventional .25 caliber automatic pistol bullet of foreign make (R 20, 50) and that examination of the uniform jacket worn by Chaplain Ryan on the night he met his death (R 142; Pros Ex 5) indicated that he had been shot at extremely close range (R 21); that Chaplain Ryan had been shot at twice; that the first bullet was deflected from the person of the deceased by a thick notebook which he carried in his pocket; that the second bullet penetrated the Chaplain's jacket, O.D. shirt, undershirt impinged his skin and entered his body in the manner determined by the medical witnesses (R 22); and that the report of the shots would be audible in still air for fifty yards (R 26).

Miss Seiko Motohashi, a Japanese female, also known as "Mary", testified that she was a "street girl" who earned her livelihood by associating with allied personnel (R 61). She was acquainted with Chaplain Ryan since September 1946 and considered him to be her friend (R 62). On the night of 5 April 1948, at 8:10 or 8:12 o'clock she was in the Ikebukuro area, walking toward the Ikebukuro Rotary. She observed

two persons talking. As she approached closer, she recognized Chaplain Ryan by his voice although his back was toward her. She stopped. Chaplain Ryan raised his voice and assumed an angry tone. A jeep came from behind her and its headlights revealed to her that Chaplain Ryan was speaking to a soldier whom she identified as the accused. She became frightened by Chaplain Ryan's angry voice and retreated to a house nearby where she hid behind a fence (R 62,63,64,70,74). She heard a gunshot, and as she stuck her head out of her hiding place, she heard Chaplain Ryan shriek in agony and saw the accused leave in the direction of the Ikebukuro Rotary. She saw Chaplain Ryan quiver as if he was about to fall. In fright, she ran from the scene toward a nearby market (R 65). She further testified that she had initially told investigators a story that differed from her court testimony. The only variance in her previous statement to the authorities, which was not under oath, and her sworn testimony to the court, however, was that another Japanese girl whom she named, and not she, had seen the incident on the night of 5 April 1948. She assigned as her reason for not admitting that she had personally witnessed the shooting of Chaplain Ryan was that she feared she would be confined in a Japanese police station as a witness and thereby rendered incapable of supporting her mother and child. When on 7 June 1948, the Chief of the Japanese police confronted her with a picture of the girl she had named as her informant and advised her that this girl had denied any knowledge of the slaying of Chaplain Ryan, she admitted that she was the one who had witnessed the shooting of the Chaplain and had told the police the identical story as reiterated by her to the court from the witness stand (R 65,66,67,74).

On cross-examination, the witness stated that she was unmarried but was the mother of a two year old child, the father of whom had returned to the United States (R 67); that she was to have attended a dance at the Sugamo Prison on the night of 5 April 1948 with a soldier (R 69); that she had waited until between 8:00 and 8:03 o'clock and the soldier did not appear; that in February 1948, Chaplain Ryan had done her a kindness by furnishing her with canned milk for her child (R 70); that prior to the shooting of the Chaplain, she had seen accused once at Sugamo Prison.

On redirect examination, the witness further testified that while she was hiding behind the fence, she saw a truck and two bicycles parked near the scene, two other bicycles pass, and a soldier, not the accused, with three stripes on his arm, cross the street toward a lighted store (R 75,76,77).

On recross-examination she denied that in her statement of 7 June 1948 she had said that the G.I. who had shot Chaplain Ryan was a face taller than the Chaplain (R 78,81). The court caused the statement to be reinterpreted by the interpreter and the defense monitor, and it was

determined that the witness had stated that the soldier's face "was seen from the shoulder of Father Ryan," which meant that he was shorter than the Chaplain (R 83).

Reiko Maeno, a Japanese female, testified that she was a "street girl." (R 83). She identified accused and stated that she had become acquainted with him during February 1948. She had seen and been with him four or five times prior to 5 April 1948 (R 85) and on that night had been in his company in the Ikebukuro area from about seven o'clock until shortly after Chaplain Ryan was shot. At the time, she was wearing a red blouse and cream-colored skirt and was carrying a grey overcoat (R 86,102). She knew Chaplain Ryan, who had cautioned accused about her in her presence ten days before his death and had ordered her to leave (R 86,87). After meeting accused on the night of 5 April 1948, she and accused walked to several places in the area in search of a place to indulge in sexual intercourse which accused desired (R 90). She and accused came to an unoccupied newly-built house that was suitable, and she asked accused for money. When accused told her that he would pay her on the following night, she refused to submit to his desires and he became angry (R 91). They retraced their steps and stopped at a fence, where accused renewed his requests for sexual intimacy. While accused was in the act of fondling and kissing the witness, Chaplain Ryan approached them and stopped (R 91,92,93). Chaplain Ryan called the accused and accused crossed the alley to where Chaplain Ryan awaited him. Chaplain Ryan then proceeded to caution accused about fraternization with Japanese females. Chaplain Ryan was facing the Ikebukuro Rotary during his conversation with accused and accused's back was toward it (R 93,94). They conversed for more than ten minutes, during which time their voices became louder and louder as they became more and more excited. While this exchange of words was taking place, a bicycle passed (R 95). The accused drew a pistol from inside his jacket (R 96,137), whereupon the Chaplain placed his hand on accused's shoulder and pushed him, saying, "What are you going to do?" Accused then discharged the pistol at the Chaplain at least two, and perhaps three times. Accused turned and ran toward the Rotary and the witness also ran away. She was between twelve and fifteen feet from the accused and the Chaplain when the incident occurred (R 96,97,98). She met accused shortly thereafter and they went to a nearby field where they sat down. Accused asked her to take and keep the pistol which he displayed to her but she refused. At accused's request, she agreed not to speak to anyone about the incident. Accused and witness then arose, walked out of the field and parted company (R 101,102). The witness further testified that when she was first questioned by Japanese police and the CID, she told them that certain Koreans to whom she assigned fictitious names had killed Chaplain Ryan. She had made this false statement in order to protect accused (R 103,104). In May or June 1948 she changed her story and told the truth in a sworn

statement (R 105). On cross-examination, the witness admitted that she was known by the name of Reiko Ishikawa (R 110,111). She further admitted in detail the falsity of her first statement (R 114,115,116, 117), and stated that accused had threatened her life if she told what occurred on 5 April 1948 (R 135).

Mrs. Chiyoko Hasei testified that at about 8:05-8:10 p.m., 5 April 1948 (R 33) she was returning to her home in the Ikebukuro Rotary area (R 27). By the light from a store which she was passing, she observed a Japanese girl wearing a red blouse in the company of a soldier (R 28-29). It was a distance of about 140 yards to the rotary from where the girl was standing (R 32). The witness heard no shots or screams that night (R 33).

Mr. Kaneshige Yonezawa, a shopkeeper, was in the Ikebukuro area on his way home by bicycle at 8:10 o'clock on 5 April 1948. He heard voices and a sound like the sound of a pistol followed by a shriek and a groaning voice which sounded once or twice. The time then was about 8:15 p.m. (R 38-39).

Mr. Kohei Kawashima, a resident of the Ikebukuro area testified that he was at his home on the evening of 5 April 1948. At about 8:20 o'clock he heard an unusual noise as if someone was in agony. At about the same time he heard the footsteps of someone running through the fence on the west side of his home (R 41).

Zennosuke Matsuoka, on the morning of 6 April 1948, found imprints of shoes, too large for a Japanese in his garden (R 44-45).

A policeman, Masakazu Yabuta testified that he had examined the footprints in the Matsuoka garden the day after Chaplain Ryan's death. He found that there were two sets, one large and one small, indicating that they were made by a man and a woman wearing shoes (R 54,55,58). The length of the stride indicated that the person was running (R 56).

Private First Class Cledus P. Savoy, a member of the Sugamo Prison Guard Section, testified that he knew accused for six months (R 156). On the night of 5 April 1948 at about 8:10 or 8:15 o'clock, he came out of a store after hearing a scream. He saw accused standing on the sidewalk looking toward the Rotary and asked him if he had also heard the scream. Accused admitted that he had heard it. The witness and accused then went to the prison gate, informed a guard who organized a searching party and returned to the area in jeeps. In the resulting search Chaplain Ryan's body was discovered (R 157). The witness, after being warned by the court of his rights under Article of War 24, admitted that he had made a prior inconsistent statement to investigators to the

effect that he was in an alley taking to a Japanese girl at the time he heard the screams and that when he emerged from the alley he saw accused (R 159,160,161).

On cross-examination, Savoy stated that accused was not out of breath and did not appear to be excited when he first encountered him in front of the store, and that on the way to the prison gate, he observed two civilian boys who were not present before (R 164).

4. Evidence for the defense.

Reiko Maeno was recalled as a defense witness. She admitted to relating falsely to investigators that certain Koreans were involved in Chaplain Ryan's death although she had been asked to tell the truth (R 173). She stated that accused had informed her that her life would be in danger if she "told on him" (R 174). She acknowledged talking to several persons about the incident and to being present on two occasions when the CID made futile searches for the murder weapon pursuant to information furnished by her to them (R 175). She described accused as having been attired in ordinary uniform and wearing a hat but no jacket (R 177). She stated that she had not identified accused the first time she was asked to do so because she was unable to point him out (R 178). She also testified that she was presented with a ring and lighter by accused (R 182).

On cross-examination, the witness identified an "Eisenhower jacket" shown her as an item of uniform worn by accused on the night Chaplain Ryan was killed, and stated that on the same night she was wearing the same clothing which she then was wearing in court. This costume consisted of a red blouse, a light skirt and brown shoes called "wedgies" (R 181).

Harry A. Washburn testified that he was Chief Agent for the 20th and 27th Criminal Investigation Divisions; that at the dispensary he photographed the body of Chaplain Ryan (R 183); and that he examined Chaplain Ryan's person, clothing and personal effects. He saw one penetration on the body of Chaplain Ryan, three holes in his uniform jacket, and a notebook in his breast pocket indicated that a shot had been deflected from it (R 185). In the course of his investigation, he had received the names of some Korean suspects and had directed other agents to further investigate the leads concerning these Koreans (R 186) and an individual named Aoki who was brought to his office (R 187).

Roger P. Rose, an agent of the Criminal Investigation Division, testified that he was present on 6 April 1948 when six soldiers, one of whom was accused, were lined up for identification in connection with

the slaying of Chaplain Ryan. The person who was present for the purpose of making the identification (assumed to be Reiko Maeno) did not identify any of the soldiers, indicate why identification could not be made or state that the slayer of Chaplain Ryan was not in the group (R 188). He had talked with accused during the investigation. Accused had been cooperative and had made a statement to another agent. The witness further testified that he had gone to Numazu in search of a weapon and had found a .32 caliber pistol but not the one he was seeking, and that on information furnished by a principal in the Ryan case who was in custody, the area around the Sugamo Prison fence had been unsuccessfully searched (R 191).

Private First Class Herman E. Collins, a member of the same organization as accused, testified that on the night of 5 April 1948, while he was with a girl whom he could not then identify, he had met accused at the corner near the Sugamo Prison gate. He had advised accused that the girl with him "was pretty good stuff" and had suggested that accused "should try some of it." He could not remember what time it was when he met accused. He went back to Camp and did not see accused again that night (R 193).

On cross-examination, the witness stated that at the time he met accused, he was on his way to the movie which started about 7:00 o'clock (R 194).

Examination by the court elicited testimony from the witness that he left the girl with accused outside the prison gate; that he was not certain whether anyone else was there; that he was not sure if he had seen the girl since the night of 5 April 1948; and that he did not know her name and was not sure whether he could then identify her (R 194).

On redirect examination, the witness stated that he did not know the exact time of his meeting with accused on 5 April 1948 and did not remember how his female companion was dressed (R 194).

On recross-examination, the prosecution with the permission of the court brought Reiko Maeno into the courtroom for the purpose of determining whether the witness could identify her as the girl he was with on the evening of 5 April 1948. The witness's testimony in this respect was as follows:

"Q Private Collins, is this the girl you were with on the night of 5 April?
A I can't say for sure, sir.

Q Do you believe this is the girl you were with?
A It looks like her and acts like her.

Q Was she dressed like that on the evening you were with her?
A I don't remember how she was dressed.

Q And you turned the girl over to Private Manis at the gate. Is that your testimony?
A Yes, sir." (R 196)

The prosecution, on further cross-examination of the witness, elicited from him that he had made a statement a month before which was inconsistent, in part, with the testimony given by him in court. Collins had previously stated:

"A. At the corner I met this girl. We went across the street and I left her there. I did not talk with anyone nor do I remember seeing anybody in particular on the way back to camp. After that I came back into camp and went to the show." (R 198).

He explained the discrepancy between his testimony and statement as follows:

"A. There was a lot of things I wasn't sure of then, sir, about the statement. They told me to write out to the best of my knowledge all I could remember about it.

Q. How can you be sure a month later?
A. After seeing this girl [Reiko Maeno] once or twice and a few more things to refresh my memory about it." (R 198).

Corporal Anthony DiGilarmo, a member of the same organization as accused, testified that at between 8:15 or 8:30 o'clock on the evening of 5 April 1948, when he left the movies at Sugamo Prison he met Private First Class Morgan who informed him of hearing screams and requested that they be investigated (R 201). The witness obtained a flashlight and billy club from the guard on duty at the gate where others confirmed hearing the screams. DiGilarmo, Morgan and Savoy then proceeded toward the indicated area. DiGilarmo separated from Morgan and Savoy at a certain point and searched an area inside a fence (R 202). On being asked, he stated that his shoes were size 11½ (R 203).

Private Leon R. Brightbill testified that he was on guard at the Sugamo Prison gate on the night of 5 April 1948 when a number of soldiers came to the gate and reported the Chaplain Ryan incident. He could not remember if accused was one of these soldiers. He went to the scene of the incident (R 206) and saw Chaplain Ryan's body in a jeep that was returning to the post (R 207).

Recruit David K. Morgan testified that on the night of 5 April 1948 at about 8:10 o'clock, at which time he was in the vicinity of the Ikebukuro Rotary, he had heard "a couple of screams for help and it sounded like a groan just like someone getting strangled" (R 211). He heard no shots and saw no gun flashes. He then proceeded toward Sugamo Prison and at the place where Chaplain Ryan's body was later found, he saw a Japanese or foreign national leaning out from a hole in the fence. He also saw some Japanese in the middle of the road around a truck (R 211,212,216). He ran until he encountered accused and Savoy and proceeded to the Sugamo Prison with them. At the Enlisted Men's Club, he reported the incident to Corporal DiGilarmo (R 213). He returned to the area where he had heard the screams and searched the area behind the fence (R 214). When he heard the screams, they sounded as if they came from directly in front of him but he could not discern any persons in front of him (R 215).

On cross-examination, the witness described the truck he had seen as a charcoal truck. The persons around it were shabbily dressed, wore wooden shoes and were not Americans (R 216,217). He had never told anyone that he had seen two persons attack Father Ryan, or that he had heard the shots, or that he had seen the body on the sidewalk or that he had told a person that he had seen a murder by stabbing and later changed it to a murder by shooting (R 218).

The President of the court explained to the accused his rights as a witness and accused elected to testify under oath whereupon he was duly sworn. His testimony is summarized as follows:

He was nineteen years of age. He had seven years of formal schooling during which time he worked on the farm of his parents and occasionally on the farms of others (R 222). He enlisted on 14 March 1947, came overseas on 30 June 1947 and since his assignment to Sugamo Prison, had been a guard in the cell blocks. He categorically denied knowing Reiko Maeno prior to 5 April 1948 or ever having seen her before (R 223). He left Sugamo Prison between 6:30 and 7:00 on the night of 5 April 1948, went up toward the train station and then returned to the corner at the entrance of the Prison (R 224). While standing at the corner, he saw Corporal Collins who was accompanied by two girls, and spoke with him. Corporal Collins recommended his companions to accused and suggested that he "try it" (R 225) whereupon accused took the arm of one of the girls and proceeded to walk down the street. Accused had never seen this girl before or made her any gifts. He and the girl walked about in search of a place at which to have sexual intercourse (R 226,227) and eventually arrived at a new building in the course of construction where his companion and he conversed in a friendly manner without anger. While thus engaged, he heard two screams and a cry for help and started back toward the main road (R 228). His girl companion accompanied him until

immediately prior to his joining Private Savoy whom he saw standing in front of a nearby lighted store (R 230). As he and Savoy started for the Sugamo Prison gate in pursuance of Savoy's suggestion to report the screams, he saw Private Morgan approaching from the direction of the Ikebukuro Rotary. Savoy, Morgan and accused then proceeded to the Sugamo Prison gate (R 231) where they reported hearing the screams to Corporal Brightbill. While awaiting the arrival of the guard jeep, a Japanese reported a drunken G.I. in front of his house. At this time Corporal DiGilarmo came to the gate with a flashlight and accused, Morgan, Savoy and others started back toward the area where the screams had been heard and upon arrival there, commenced searching (R 234). In the meantime, others discovered Chaplain Ryan's body. Accused joined them and assisted in loading the body into a jeep (R 235). By the light of a flashlight which someone else had, he found some keys. He believed them to belong to Chaplain Ryan and later turned them in at the orderly room (R 236). He denied ever having been cautioned by Chaplain Ryan about associating with Japanese girls or ever having been called into Chaplain Ryan's office. He knew Chaplain Ryan only by sight and had not seen him in the Ikebukuro Rotary area on the night of 5 April 1948. He stated that during the early part of the investigation of the death of Chaplain Ryan, he had been cooperative with the investigators and had furnished them with a statement identical with his sworn court testimony (R 237). He further stated that what Reiko Maeno had told the court was not the truth and he denied that he had ever known her sexually (R 238).

On cross-examination, accused admitted that Reiko Maeno was the girl he was with on the night Chaplain Ryan was killed but he maintained that he had not known her prior to that time. Since it was quite dark when he met her between 7:00 and 7:30 o'clock, the only detail of her clothing on that night that he could recall was that she was wearing a light skirt (R 239,240,245). He again described his peregrinations with Reiko during that evening and his hearing of two screams and a cry for help (R 240,241,242). Accused identified a sworn statement made by him on 12 May 1948 (R 244; Pros Ex 7) and admitted that Reiko Maeno was his companion on the night of 5 April 1948. He further stated that he had done nothing to make her angry and that she had no cause to accuse him of killing Chaplain Ryan (R 245).

On redirect examination accused denied ever owning a gun and stated that his commanding officer conducted shake-down inspections of his barracks (R 248).

In response to examination by the court, accused stated that he did not have a gun in his possession on the night of 5 April 1948; that the screams he heard came first, followed by the cry of help; and that he did not shoot Chaplain Ryan (R 248).

On recross-examination accused related that he had been placed in arrest on 3 July 1948 at which time he was searched and handcuffed; that he fainted and had experienced similar black-outs on previous occasions. He denied that he subsequently told a doctor at the Station Hospital that he had never fainted before (R 250,251).

Staff Sergeant Francis J. Carney testified that he was at one time suspected of the slaying of Chaplain Ryan (R 260).

The defense called numerous character witnesses in behalf of the accused including accused's detachment commander, first sergeant and hut leader. All were in agreement that accused was a fine soldier who performed his duties properly and that he possessed good character and enjoyed a good reputation (R 261-270). The examination by the court of accused's First Sergeant elicited the information that weapons and ammunition shake-downs were seldom if ever conducted but were left up to the hut leaders (R 268). On cross-examination, accused's hut leader testified that no shake-downs were conducted until after Chaplain Ryan was killed (R 270). Lieutenant Ellis C. Coker, one of the character witnesses, additionally testified that during a conversation between him and accused on or about 20 July 1948 he asked accused if he had shot Chaplain Ryan and accused replied "No sir, God knows I didn't." (R 265). Corporal Dick T. Yount, after testifying that accused bore a "mighty high reputation" and that he considered him of good character (R 269) stated that he had visited accused at the Eighth Army Stockade where they talked. The witness had asked accused "if he did it" and accused had replied "No, I hope none of you kids out there think I'd do a thing like that" (R 270).

5. Rebuttal evidence for prosecution.

Lieutenant Martin H. Kelser testified that he was a medical officer and on 3 July 1948 had examined accused at the Provost Marshal's Office in Tokyo after accused had fainted upon being arrested. The witness stated that during the examination he had asked accused if he had ever had similar fainting spells or fits as a child to which accused had replied in the negative (R 271,272,273).

Corporal Albert McDowell testified that in his presence on the night Chaplain Ryan met his death, the defense witness David K. Morgan had stated that he had seen several figures jump a man who proved later to be Chaplain Ryan. Corporal McDowell characterized Morgan's reputation in his unit for truth and veracity as follows:

"A. Sir, he's got a bad reputation for telling the truth at Sugamo. He tells the truth whenever he wants to, but if he sees that a lie will make it look better for him, he'll tell a lie." (R 275).

Similarly, Sergeant LeRoy Frisch testified that Morgan, who was one of his cooks, had a reputation that was "not very good for truth" and that one did not know when to believe him (R 278).

Mrs. Chiyoko Kajino testified that at about 8:10 on the evening of 5 April 1948, she was walking with her two daughters in the vicinity of the place where Chaplain Ryan's body was found in the Ikebukuro area; that at that time (R 282) she heard cries of agony two or three times; that she stopped for about a minute and looked around; that seeing and meeting no one in the neighborhood, she entered the house of "ITO;" (R 283).

Itsuko Niiyama testified that she was with Reiko Maeno on the evening of 5 April 1948 at the Sugamo Prison gate where they had a date with two soldiers (R 287). Three soldiers, one of whom she identified as accused, spoke to them. The other two soldiers left but accused remained. Reiko told the witness to wait and she and accused went off toward the Rotary. After some time had passed, the witness heard a sound "as though some person was hit by a car." (R 287,288,289).

On cross-examination the witness admitted she could not identify the other two soldiers. She assigned as her reason for being able to identify accused was due to his having remained when the others left and because he and Reiko Maeno appeared to be intimate with each other (R 291). The witness was asked to identify Private Collins but was unable to do so (R 293).

Mrs. Ruriko Kato, the proprietress of a store, testified that while the soldier (Savoy) was in her shop, she heard noise three times which sounded like cries of agony (R 299). She went to the door and looked out but could not see anything because it was dark. The soldier then went and looked out the door. The soldier then returned and they engaged again in their transaction which involved the sale of some clothing by the soldier to the witness. The soldier left after their transaction was unsuccessfully concluded which was approximately two minutes after they had first heard the noise (R 300).

Miss Saiko Sato, a "street girl" plying her profession at Ikebukuro and claiming her clientele to include allied occupation personnel (R 306), testified that she knew Reiko Maeno by that name and also as Reiko Ishikawa. She further testified that she had seen Reiko in the company of the accused whom she indicated in the courtroom during the latter part of February 1948 (R 307), at which time the witness escorted by a soldier, Reiko in the company of accused, and another couple, all had gone to the Primary School in the Ikebukuro area (R 308). The witness had seen accused's face on this occasion by the lights in front of the Ikebukuro Station (R 310).

6. Discussion.

The accused was found guilty of a specification which alleges that accused "did * * * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Captain (Chaplain) John A. Ryan, by shooting him with a firearm."

Murder is "the unlawful killing of a human being with malice aforethought." By "unlawful" is meant without legal justification or excuse (MCM 1928, par 148a, p.162). "Malice aforethought" has been defined as follows:

> "* * Malice * * is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. * * malice is implied from any deliberate or cruel act against another, however sudden" (Commonwealth v. Webster, 5 Cush 296; 52 Am Dec 711).

The Manual for Courts-Martial provides that "malice aforethought" may be found when, preceding or co-existing with the act by which death is caused, there is an "intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not" (MCM 1928, par 148a, p.163). Malice may be inferred from the use of a deadly weapon in a manner likely to, and which does, cause death (Wharton's Crim Law, 12th Ed 1932, Vol I, sec 420, pp.654-655). The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton's Crim Law, Vol I, sec 420, p.631).

The evidence introduced by the prosecution shows that accused, on the night of 5 April 1948, while in the company of Reiko Maeno, a Japanese female who admitted that she was a prostitute, shot Captain (Chaplain) John A. Ryan with a firearm and inflicted on Chaplain Ryan a wound from which he died within a matter of minutes. The above facts, testified to by Reiko Maeno, were substantially corroborated in material detail by prosecution's witness, Seiko Motohashi, also admittedly a prostitute. The evidence introduced by the defense, including that submitted by the accused, disputes and denies that accused shot and killed Chaplain Ryan.

Since the case presented a conflict in the evidence of the prosecution and defense, it was the court's function and duty to resolve such conflict as it was its duty to weigh the evidence and determine the credibility of witnesses.

It is the opinion of the Board of Review that the record of trial contains competent and substantial legal proof of each essential element

of the offense charged which justified the court's findings of guilty.

The Board of Review is not unmindful of the fact that in order to arrive at its findings, the court was required to give credence to the testimony of certain of the prosecution's witnesses who admittedly were prostitutes. It is further noted that these same witnesses also admitted to the making of prior statements inconsistent with their testimony to the court.

The fact that these witnesses were prostitutes in no way disqualified them or made them incompetent as witnesses in a case involving homicide, nor does unchastity or lewdness in such a case raise a presumption of untruthfulness so as to make their respective testimony unworthy of belief (Sec 1420, Wharton's Crim Evidence, 12th Ed, p.2329; Butler v. State, 113 Southern Rep (Fla) 699,700). The same rules for determining the credibility of witnesses apply to such witnesses, and upon the showing that each of them had made inconsistent prior statements on the subject of their testimony to the court, it was the function of the court to attach such weight to the witnesses' testimony as was warranted by it (Par 124, MCM 1928, p.132).

7. The record of trial shows that the testimony taken at accused's trial was currently transcribed from day to day so that at the termination of the trial a complete transcription of the testimony with the exception of that which was taken on the last day was available. The court requested that a copy of the transcript of the testimony be furnished it for use in its deliberations since such transcript had been used by both counsel in their closing arguments. Both the trial judge advocate and the defense counsel agreed to such use by the court and the court kept with it, when it closed to deliberate on its findings, the transcript of testimony together with the exhibits in the case (R 348-349). Whether a jury in a criminal case may have the use of the indictment, exhibits, copy of the written instructions of the court, or a transcript of any or all of the testimony to aid it in its deliberations has been held to be in the court's discretion. (C.I.T. Corporation et al. v. United States, 150 F.2d 85,91; United States v. Schanerman, 150 F.2d 941,945). Since there is nothing to show nor is it contended, that the transcript of testimony used by the court in its deliberations varied in any respect from the transcript of record which was signed by the defense counsel prior to its authentication, and since the trial judge advocate and defense counsel affirmatively approved of and consented to the use by the court during its deliberations of the transcript of testimony, such use cannot be said to have prejudiced accused's substantial rights.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of

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

C. O. Wolfe, Judge Advocate

C. J. Berkourtz, Judge Advocate

J. W. Lynch, Judge Advocate

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

JAGN-CM 333014

UNITED STATES	)	FIFTH ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Carson, Colorado, 10 August
Private MERLE E. BROOKS, JR.	)	1948. Dishonorable discharge
(15254435), Headquarters	)	and confinement for three and
Detachment, Area Service Unit	)	one-half (3½) years. Federal
5022, Camp Carson, Colorado.	)	Reformatory.

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

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

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

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

Specification 1: In that Private Merle E. Brooks, Jr., Headquarters Detachment Area Service Unit 5022, did, at Camp Carson, Colorado, on or about 20 May 1948, feloniously take, steal and carry away a Japanese Samurai sword, army type, value about $50.00; a Japanese Samurai sword, navy type, value about $50.00; a Japanese Halbred, value about $50.00, of a total value about $150.00, the property of Lieutenant Colonel John F. Snider.

Specification 2: In that Private Merle E. Brooks, Jr., Headquarters Detachment Area Service Unit 5022, did, at Camp Carson, Colorado, on or about 8 June 1948, feloniously take, steal, and carry away an Emerson portable radio, value about $18.00, the property of Technician Fourth Grade Setzer.

Specification 3: In that Private Merle E. Brooks, Jr., Headquarters Detachment Area Service Unit 5022, did, at Camp Carson, Colorado, on or about 15 June 1948, feloniously take, steal, and carry away an Emerson portable radio, value about $12.00, the property of Private First Class Steve V, Turicek.

Specification 4: In that Private Merle E. Brooks, Jr., Headquarters Detachment Area Service Unit 5022, did, at Camp Carson, Colorado, on or about 19 June 1948, feloniously take, steal, and carry away a Landow, seventeen jewel, calendar type wrist watch, value about $25.00, the property of Private First Class Perry A. Cucchiarella.

Specification 5: In that Private Merle E. Brooks, Jr., Headquarters Detachment Area Service Unit 5022, did, at Camp Carson, Colorado, on or about 19 June 1948, feloniously take, steal, and carry away a Shick electric razor, value about $15.00, the property of Private First Class Perry A. Cucchiarella.

Specification 6: (Disapproved by Reviewing Authority).

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

Specification: In that Private Merle E. Brooks, Jr., Headquarters Detachment Area Service Unit 5022, having been duly placed in confinement in Post Stockade on or about 29 June 1948, did, at Camp Carson, Colorado, on or about 14 July 1948, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority disapproved the finding of guilty of Specification 6, Charge I, approved "Only so much of the finding of guilty of Specification 1, Charge I, as finds the accused guilty of larceny, of the property alleged, at the time and place alleged and of the ownership alleged, of a value of less than $20.00 * * *. Only so much of the finding of guilty of Specification 4, Charge I, as finds the accused guilty of larceny, at the time and place alleged and of the ownership alleged of a Landow, seventeen jewel calendar type wrist watch, value about $15.00 * * *. Only so much of the finding of guilty of Specification 5, Charge I, as finds the accused guilty of larceny, at the time and place alleged and of the

ownership alleged, of a Schick electric razor, value about $8.00 * * *. 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 and one-half years," designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence is legally sufficient to sustain the findings. The only question presented is the legality of the sentence imposed as to the term and place of confinement.

4. Specifications 4 and 5 allege larceny of a watch and razor, respectively, the property of Private First Class Perry A. Cucciarella on 19 June 1948. The proof conforms to the allegations of the offenses charged. The watch and razor were stolen, according to the evidence adduced, on the date alleged, from the footlocker of Private First Class Perry A. Cucciarella. There is nothing contained in the record of trial that indicates anything other than a single larceny, which should have been alleged in but one specification. The rule in such cases is stated in paragraph 149g, MCM, 1928:

> "Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification."

The election made to charge the single larceny as two offenses presents two important questions. First, may punishment be imposed for each offense as a separate larceny? Second, for punishment purposes, may the values found in the single act charged as two offenses be aggregated? Since the two offenses charged constituted one larceny and were a part of the same transaction, it is unnecessary to decide whether, by being pleaded separately they became different aspects of that transaction, because in either case separate punishment cannot be imposed for each offense alleged. Such a ruling would violate both the intent and spirit of the rule established in paragraph 80, MCM, 1928, that:

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

That values in two or more specifications may not be aggregated for purposes of confinement in a penitentiary was concluded by the Board in CM 121178, Vicknair (1918), where the value of the three specifications totaled more than fifty dollars, and the Board is unable to recognize any distinction in principle where the purpose is to aggregate values to sustain a sentence of confinement in excess of that authorized for either of the offenses charged when considered as a single, separate offense.

To so hold would be inconsistent with the principle underlying the provisions of paragraph 104c, MCM, 1928, that:

> "In determining the maximum punishment for two or more separate and distinct, but like, offenses against property, values as found in different specifications can not be aggregated."

The approved finding as to each of the Specifications does not include a value in excess of twenty dollars, hence we must conclude the maximum confinement authorized for the violations alleged thereunder may not exceed confinement at hard labor for six months. It follows that the total confinement imposable is three years, comprising three six month periods for the larcenies alleged in Specifications 1, 2 and 3, as none exceeded twenty dollars in value, six months for Specifications 4 and 5, as one transaction, and one year for the excape from confinement.

Confinement of accused in a Federal reformatory is in violation of Article of War 42. He was not convicted of any offense of a civil nature punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910 (18 U.S.C., 1946 Ed., sec. 468), or by the law of the District of Columbia (AW 42; CM 319499, Smith, 71 BR 412). It has been long settled that offenses, none of which singly authorize penitentiary confinement, may not be aggregated in order to impose such confinement (CM 152605, Berry (1933)).

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to sustain the findings of guilty 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 in a place other than a penitentiary, Federal reformatory, or correctional institution.

Chas. L. Young, Judge Advocate.

Frank C. Alfred, Judge Advocate.

George B. Springston, Judge Advocate.

CSJAGN-CM 333014 1st Ind
CSJAGO, Dept. of the Army, Washington 25, D. C.
TO: The Secretary of the Army.

1. Pursuant to the provisions of Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) there is transmitted herewith for your action the record of trial and accompanying papers in the case of Private Merle E. Brooks, Jr. (15254435), Headquarters Detachment, Area Service Unit 5022, Camp Carson, Colorado, together with the holding by the Board of Review.

2. The Board of Review holds the record of trial (a) legally insufficient to support the designation of a penitentiary as the place of confinement and (b) legally sufficient to support only so much of the term of confinement of three and one-half years as involves confinement at hard labor for three years. I concur in the holding as to (a) but do not concur as to (b) relating to the authorized term of confinement.

Accused was found guilty of two Specifications alleging, respectively, the larceny of a watch, value $15, and a razor, value $8, both the property of one Cucchiarella. The evidence shows that both articles were taken at the same time and place. The rule of the Manual for Courts-Martial is that the larceny of several articles in substantially one transaction is but a single larceny and should be pleaded in a single Specification. The pleading under two Specifications was, therefore, erroneous. The Board of Review holds that accused cannot properly be punished under both Specifications because of a second rule of law that where two offenses constitute different aspects of the same act punishment may be imposed only with reference to the act in its most important aspect.

It is my view that we are concerned here only with error in pleading and that it is our duty under Article of War 37 to ascertain whether the error has injuriously affected the substantial rights of the accused. The rule as to punishment for different aspects of the same act has always been construed, and I think properly, to cover aspects which constitute distinct offenses such as robbery and larceny, escape and desertion, and the like and should not be applied to the larceny of different articles at the same time as in the instant case. Applying the principles of Article of War 37 in the instant case it is to be observed that had the larceny been properly charged under a single Specification the values of the stolen articles would have been aggregated to the total of $23 and the punishment would, therefore, have been the same as might be adjudged under the two Specifications as pleaded. No injury to accused resulted from the faulty pleading and it must be

concluded, therefore, that the error in pleading did not injuriously affect the substantial rights of accused.

It is recommended that the sentence as adjudged be confirmed but that the designation of the place of confinement be changed to a United States Disciplinary Barracks.

3. Two forms of action are inclosed. Form A conforms to my opinion, Form B to the holding by the Board of Review.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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

CSJAGK - CM 333032

11 January 1949

UNITED STATES	)	ZONE COMMAND AUSTRIA
v.	)	Trial by G.C.M., covened at Salzburg, Austria, 12-17 August 1948. To be hanged by the neck until dead.
Private ROBERT A. BECKOFF (RA 19246800), Troop "B", 68th Constabulary Squadron	)	

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

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

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

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

Specification 1: In that Private Robert A. Beckoff of Troop "B", 68th Constabulary Squadron, did, acting in conjunction with Private Claude Phelps, Jr., Troop "B", 68th Constabulary Squadron, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony, viz, murder, commit an assault upon Anton Naegele, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

Specification 2: In that Private Robert A. Beckoff of Troop "B", 68th Constabulary Squadron, did, acting in conjunction with Private Claude Phelps, Jr., Troop "B", 68th Constabulary Squadron, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony, viz, murder, commit an assault upon Josef Schaedler, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

Specification 3: In that Private Robert A. Beckoff of Troop "B", 68th Constabulary Squadron, did, acting in conjunction with Private Claude Phelps, Jr., Troop "B", 68th Constabulary Squadron, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony, viz, murder, commit an assault upon Hubert Schaertler, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

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

Specification: In that Private Robert A. Beckoff, Troop "B", 68th Constabulary Squadron, did, at or near Langen, Austria, on or about 19 June 1948, with malice aforethought, willfully, deliberately, feloniously and unlawfully kill one Franz Berlinger, a human being, by shooting him with a pistol

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence of one previous conviction was introduced. He was sentenced to be hanged by the neck until dead, all the members present at the time the vote was taken concuring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For reasons which will hereinafter appear, only a brief statement of the facts is necessary. The Evidence shows that on 18 June 1948 the accused and Private Claude Phelps, Jr. attempted to cross the Austrian-Swiss border near Hard, Austria, without having proper authorization papers. They were detained by gendarmes Naegele, Schaedler and Schaertler. Accused and Phelps were each armed with pistols and when the gendarmes attempted to search them they drew their weapons and opened fire upon the gendarmes who withdrew to cover and returned the fire. None of the parties was wounded. Accused and Phelps retreated from the area and became separated. On the following day, 19 June 1948, accused appeared at the border near Bregenz, Austria, where a gendarme named Berlinger attempted to take him in custody. Accused disarmed Berlinger of his carbine and shot him in the head with a .45 caliber U.S. Army pistol. Berlinger died almost immediately as a result of the wound.

4. At the inception of the proceedings accused Beckoff was brought to trial together with Private Claude Phelps, Jr. on charges and specifications as follows:

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

Specification 1: In that Private Claude Phelps, Jr., and Private Robert A. Beckoff, both of Troop "B", 68th Constabulary Squadron, acting jointly and in pursuance of a common intent, did, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony, viz, murder, commit an assault upon Anton Naegele, by willfully and feloneously shooting at him with dangerous weapons, to wit, pistols.

Specification 2: In that Private Claude Phelps, Jr. and Private Robert A. Beckoff, both of Troop "B", 68th Constabulary Squadron, acting jointly and in pursuance of

a common intent, did, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony, viz, murder, commit an assault upon Josef Schaedler, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

Specification 3: In that Private Claude Phelps, Jr. and Private Robert A. Beckoff, both of Troop "B", 68th Constabulary Squadron, acting jointly and in pursuance of a common intent, did, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony, viz, murder, commit an assault upon Hubert Schaertler, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

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

Specification: In that Private Robert A. Beckoff, Troop "B", 68th Constabulary Squadron, did, at or near Langen, Austria, on or about 19 June 1948, with malice aforethought, willfully, deliberately, feloniously and unlawfully kill one Franz Berlinger, a human being, by shooting him with a pistol.

The defense challenged Colonel Peter P. Salgado, Infantry, for cause. The challenged member was sworn upon voir dire and after being questioned by counsel the court was closed and upon being opened the President announced that the challenge was not sustained (R 11).

Major Robert E. Cullis, Infantry, was also challenged by the defense for cause. He was similarly sworn and examined as to his competency to serve on the court. The court was closed and upon being opened the President announced that the challenge was not sustained (R 14).

The prosecution then asked, "Does the defense have a peremptory challenge against any member, except the law member?" Defense counsel thereupon asked the court to determine the nature of the proceedings. He contended that although Charge I and its specifications alleged joint offenses, Charge II and its specification alleged murder with respect to the accused Beckoff only, and the proceedings therefore amounted to a common rather than a joint trial. He cited authorities and made an extended argument contending that <u>each</u> accused was entitled to one peremptory challenge. The trial judge advocate argued that the trial was joint inasmuch as the parties had been brought to trial together on the same charge sheet and in the same proceedings. The law member ruled, no member objecting, that the case would proceed as a joint trial. The prosecution then stated, "Does the defense desire to exercise its right to one peremptory challenge against any member of

the court, except the law member?" Counsel then challenged Colonel Salgado peremptorily, and this officer withdrew from the presence of the court (R 15-21). The court entertained further discussion with respect to whether the proceedings were a joint or common trial and one member announced his objection to the prior ruling of the law member in allowing only one peremptory challenge to the "side." The court was closed and upon being opened the President announced that the ruling of the law member was sustained (R23-25). The trial judge advocate then asked if either accused objected to being tried by any member of the court then present. The following matter responsive thereto is quoted from the record:

"PROSECUTION: Does the accused Phelps object to being tried by any member of the court now present?

"DEFENSE COUNSEL: The accused Phelps does not object, without having waived his right to his objection to being tried in a common trial with regard to the specification of Charge II, which relates to Private Beckoff.

"PROSECUTION: Does the accused Beckoff object to being tried by any member of the court now present?

"DEFENSE COUNSEL: The accused Beckoff does not object to being tried by any member of the court now present; however, without waiving his objection that this is a common trial and that each of the accused is entitled to a peremptory challenge. It is the same as regards to Private Phelps, he does not waive the contention that this is a common trial and each of the accused is entitled to one peremptory challenge.

"PROSECUTION: Does the accused Beckoff desire to exercise any further challenge?

"DEFENSE COUNSEL: Yes, the accused Beckoff desires to exercise the right of peremptory challenge.

"PROSECUTION: I believe the previous challenge was made on behalf of the accused Phelps.

"DEFENSE COUNSEL: The accused Phelps has already exercised his right to peremptory challenge by challenging peremptorily Colonel Salgado.

"PROSECUTION: Does the accused Beckoff object to being tried by any member now present?

"DEFENSE COUNSEL: The answer remains the same.

"PROSECUTION: The question is withdrawn.

"PRESIDENT: I didn't understand the last question.

"PROSECUTION: It was my understanding that the last challenge made by the defense was made on behalf of the accused Phelps. That challenge was ruled out of order by the court. My further question was whether or not the accused Beckoff desired to make any challenges before answering to the question as to whether he objected to trial by any member of the court now present. I withdrew the last question.

"LAW MEMBER: The president would like to have the record read. The original challenge, -- when it was made. That is when Colonel Salgado was challenged.

"(The reporter read the record as follows:
'PROSECUTION: Does the defense desire to exercise its right to one peremptory challenge against any member of the court, except the law member?
DEFENSE COUNSEL: The defense challenges Colonel Salgado peremptorily.')

"DEFENSE COUNSEL: We withdraw then our contention that Colonel Salgado was challenged by the accused Phelps because at that time it was a ruling that this was a joint trial and a peremptory challenge at that time is from the side.

"PROSECUTION: Does the answer of the accused Beckoff remain the same to the question of whether he objects to being tried by any member of the court now present?

"DEFENSE COUNSEL: The accused Beckoff does not object to being tried by any member of the court now present; however, he does not waive his contention that this is a common trial and that each of the accused is entitled to one peremptory challenge.

"PROSECUTION: The previous challenge was made by the side and not by an individual accused.

"The court will be sworn.

"(The members of the court and the personnel of the prosecution were then sworn.)" (R 26-28)

Both accused were thereupon arraigned upon the charges and specifications as set forth at the beginning of this paragraph. Counsel for the defense made a motion for severance of the charges, which was denied and each accused then pleaded not guilty to all the charges and specifications (R 30).

Before witnesses were called counsel for the accused moved for a severance as to the accused Beckoff. The court heard further argument, after which it granted the motion (R 37). The court caused the specifications of Charge I to be amended so as to read as set forth in paragraph 2 hereof and Private Phelps withdrew from the court room. No further right to peremptory challenge was granted and accused Beckoff was arraigned upon Charge I and its specifications as amended (par 2), to which he pleaded not guilty.

5. Discussion

Private Beckoff and Private Phelps came before the court on Charge I and three specifications thereunder, each of which alleged that at or near Hard, Austria, on or about 18 June 1948, they, acting jointly and in pursuance of a common intent and with an intent to commit a felony, viz., murder, committed an assault upon each of three named individuals. Charge II and the specification thereunder alleged with respect to Private Beckoff only that at or near Langen, Austria, on or about 19 June 1948, he murdered a named individual.

At the commencement of the proceedings, that is, prior to the court

being sworn, the defense challenged two members of the court for cause, neither of which was sustained. When the trial judge advocate asked if the defense desired to exercise one peremptory challenge as to any member except the law member the defense requested the court to determine the nature of the proceedings. The law member ruled that it was a "joint trial." The accused were, therefore, granted only one peremptory challenge as a "side." Such challenge was exercised against one of the members of the court against whom a challenge for cause had been previously "not sustained." The defense counsel again argued that the proceedings should be considered as a "common trial" rather than a "joint trial." Upon the objection of one of the members to the ruling of the law member that the trial was "joint", the court went into a closed session, and, upon reopening, the president announced that the ruling of the law member was sustained. The prosecution then asked each of the accused if they objected to being tried by any member then present. The defense counsel again reiterated his objection that it was a "common" and not a "joint" trial. He insisted that, as the peremptory challenge already exercised was on behalf of accused Phelps, accused Beckoff was entitled to one peremptory challenge. Without ruling again upon the objection of the defense, and without granting to the accused Beckoff a peremptory challenge, the court was sworn. Before proceeding to hear witnesses or to receive any evidence the court granted a severance as to accused and proceeded to appropriately amend the specifications under Charge I and rearraign accused Beckoff. The court excused accused Phelps, who thereupon retired from the court room. The defense made no further contentions as to the right of accused Beckoff to a peremptory challenge in his own right.

It is important to note that each of the accused were before the court concerning the charges and specifications upon which trial was ordered up until the severance was effected. The problem is thus presented as to whether the proceedings up to that point should be considered "common" or "joint." In cases where there is a plurality of accused the specifications or pleadings are resorted to to determine the nature of the proceedings. In the instant case the specifications under Charge I allege a joint offense as to the accused, therefore, it is obvious that a trial of the accused upon this charge and its specifications <u>only</u> would have been a "joint trial" (par 91, TM 27-255). These charges alleging joint offenses, however, were consolidated with a separate charge and specification alleging that accused Beckoff <u>alone</u> committed a separate and distinct crime of a much more serious nature at a different time and place. The latter charge could be substantiated only upon evidence separate and distinct from that necessary to prove the former charge. Thus the only element common to the offenses under Charge I and the offense under Charge II is that Beckoff was named as accused in each. Does such a common element make the proceedings here under consideration "common"? The problem of joinder of parties and offenses under various situations was thoroughly and completely discussed in CM 319774, <u>Deakins</u>, 69 BR 79. It was there stated at page 87 that -

"*** the rule as to authority for common trials in court-martial procedure is found only in the law as applied in the Federal courts, since it is not found in the Manual for Courts-Martial, and it therefore follows that there may be a common trial only when the prerequisites set forth in the Federal Rules are met."

The Rules of Criminal Procedure for the District Courts of the United States, promulgated by the Supreme Court pursuant to Section 3771, Title 18, U.S. Code (formerly Sec. 687, Title 18, U.S.C.) provides:

"RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

"(a) Joinder of Offenses.

"Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar charater or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"(b) Joinder of Defendants.

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

"RULE 13. TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS

"The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information."

In the instant case the necessary facts prerequisite to permitting a joinder under the Federal Rules quoted above are not present as these offenses were totally separate and distinct. They occurred at different times and places, and were provable by different evidence and witnesses. It was pointed out, however, in United States v. Kelley, 105 Fed (2d) 912,

that although a consolidation of indictments not permitted under the Federal Rules was "technically an error it would not have been ground for reversal." We are of the opinion that although under the Federal Rules of Criminal Procedure it was "technically an error" to direct the trial of the offenses herein together, nevertheless as they were in fact joined in the same charge sheet the proceedings herein were in effect a so-called "common trial" until the motion for severance by the defense was granted by the court.

Having determined that trial herein was a "common trial" until severance, we will now take up the question as to whether or not the substantial rights of the accused Beckoff were prejudiced by reason of the fact that the court allowed the defense but one peremptory challenge.

Article of War 18 provides, in pertinent part, that

> "Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause."

The Manual for Courts-Martial, 1928, at paragraph 58d, further provides that -

> "In a joint trial all accused constitute the 'side' (AW 18) of the defense and are entitled to but one peremptory challenge."

It has been held that the words "joint trial" as used in the Manual do not include a common trial. In other words, in a common trial, each accused is entitled under Article of War 18 to one peremptory challenge. (CM 195294, Fernandez, 2 BR 205; CM 287210, Reynolds, 6 BR (NATO-MTO) 85.)

Here the record is clear that the one peremptory challenge granted to the defense was exercised on behalf of accused Phelps. It is also clear that defense counsel vigorously and persistently contended during every stage of the proceedings and until the court was sworn that the trial was a "common trial," consequently, it cannot be said that there was ever any waiver of the right of accused Beckoff to exercise one peremptory challenge. The fact that defense counsel no longer urged upon the court after it was sworn that accused Beckoff was entitled to a peremptory challenge in his own right cannot be construed as other than an acquiescence to the ruling of the court as a superior authority (CM Reynolds, supra). Such failure on the part of the defense should not be termed as a waiver of the right of accused Beckoff to exercise a peremptory challenge. In view of these circumstances it follows that the failure of the court to grant accused Beckoff a peremptory challenge in his own right was prejudicial error. That such error was prejudicial is particularly true when it is recalled that the defense exercised two challenges for cause, neither of which

was sustained. The one peremptory challenge exercised on behalf of accused Phelps was against one of the members challenged for cause. Is it not reasonable to assume the defense desired to exercise the other peremptory challenge, to which it was entitled, against the other member who was unsuccessfully challenged for cause?

The granting of the severance and the trying of Beckoff alone did not cure the error already committed, if anything it operated to emphasize the error. Accused Beckoff was tried and convicted without benefit of his substantial right to a peremptory challenge. Such action resulted in a trial by a court which was not duly constituted (CM Reynolds, supra).

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

14 January 1949

CSJAGK - CM 333032 1st Ind

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

TO: Commanding General, Zone Command Austria, APO 541, c/o Postmaster, New York, New York

1. In the case of Private Robert A. Beckoff (RA 19246809), Troop "B", 68th Constabulary Squadron, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the findings of guilty and the sentence be disapproved. Upon taking such action you will have authority to direct a rehearing.

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

(CM 333032).

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.

CSJAGK - CM 333085

23 DEC 1948

UNITED STATES)	HEADQUARTERS SECOND ARMY
)	
v.)	Trial by G.C.M., convened at Fort Eustis, Virginia, 12 August 1948. Dismissal and total forfeitures.
)	
Captain EVAN H. CRANK, JR.)	
(O-1637238), Signal Corps,)	
2164th Army Service Unit,)	
Fort Eustis, Virginia.)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Evan H. Crank, Jr., Signal Corps, 2164th Army Service Unit, Fort Eustis, Virginia, having knowledge of the commission of a felony, to wit: the embezzlement of One Thousand Seven Hundred and Fifty Dollars ($1,750.00), lawful money of the United States, the property of the Post Communications Services Account, Fort Eustis, Virginia, by Technical Sergeant Arnold W. Jones, from on or about and between 1 December 1947 to about 31 December 1947, did on or about 1 January 1948 and thereafter, wrongfully, unlawfully and wilfully conceal, and fail and refuse to disclose and make known the same to any person in civil or military authority under the United States.

Specification 2: In that Captain Evan H. Crank, Jr., ***, having knowledge of the commission of a felony, to wit: the embezzlement of One Hundred Sixty Dollars ($160.00), lawful money of the United States, the property of the Post Communications Services Account, Fort Eustis, Virginia, by Technical Sergeant Arnold W. Jones, on or about 2 January 1948, did on or about 2 January 1948 and thereafter, wrongfully, unlawfully and wilfully conceal, and fail and refuse to disclose and make known the same to any person

in civil or military authority under the United States.

Specification 3: In that Captain Evan H. Crank, Jr., ***, being at the time an officer of the United States, having received public money, to wit, funds of the Post Communications Services Account, Fort Eustis, Virginia, which money he was not authorized to retain as salary, pay or emolument, did, at Fort Eustis, Virginia, from about 1 November 1947 to 31 January 1948, fail to deposit said monies as provided by law, this in violation of Section 91, United States Criminal Code, 35 Statute 1105, as amended.

Specification 4: In that Captain Evan H. Crank, Jr., ***, did, at Fort Eustis, Virginia, on or about 15 August 1947, borrow the sum of Five Hundred Dollars ($500.00) from Master Sergeant William Ober, 2164th Army Service Unit, an enlisted man, this to the prejudice of good order and military discipline.

Specification 5: In that Captain Evan H. Crank, Jr., ***, did, at Fort Eustis, Virginia, on or about 3 February 1948, borrow the sum of Seven Hundred Dollars ($700.00) from Staff Sergeant William H. Shields, Jr., 2164th Army Service Unit, an enlisted man, this to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of the charge and all specifications excepting however the words "and refuse" of Specifications 1 and 2. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

By appropriate orders of the Commanding General, Fort Eustis, Virginia, dated 23 May 1947, the accused was appointed Post Signal Officer of the 2164th Army Service Unit, Station Complement. The same orders designated him as the Accountable and Responsible Officer for the Post Signal funds and property. He was acting in such capacity at all times hereinafter mentioned (R 24, Pros Ex 4).

Captain Neill D. Buie, TC, Headquarters Fort Eustis, Virginia, testified that he had completed certain courses in accounting and had about 12 years' experience in such matters. On 15 March 1948, pursuant to orders by the deputy post commander he had made an audit of the Post Signal Communications Services Account. The audit covered the period

1 August 1947 to 31 March 1948. The witness identified certain documents as consisting of collection vouchers and disbursing vouchers referred to as "six bulky sets of records." These were received in evidence, after having been examined by the accused, as Prosecution Exhibit 2, but were later withdrawn and substituted therefor was a photostatic record of the Post Signal Communications Services Account as entered on WD AGO Form 11-160 by accused for the months of November and December 1947 and January, February and March 1948. This record disclosed entries of deposits made on the dates and in the amounts as follows:

Date	Amount
Nov 4	$3250.77
Nov 24	2476.70
Dec 1	2107.72
Dec 2	1456.53
Dec 22	3696.70
Jan 2	3990.12
Jan 7	1363.68
Feb 4	1547.25
Feb 9	821.28
Feb 17	1773.70
Feb 20	448.32
Feb 28	389.43
Feb 28	1825.94
Mar 2	1944.18
Mar 4	2034.58
Mar 12	3538.87
Mar 17	766.88
Mar 17	378.12
Mar 22	616.44
Mar 25	552.55
Mar 27	823.27

It was stipulated that a document, prepared by the witness, which was received in evidence as Prosecution Exhibit 3 was a true statement of the collections of the Signal Account showing the total of the daily collections made between the dates deposits were entered as shown in Prosecution Exhibit 2. The statement is as follows:

"COLLECTED

"From 1 November to 3 November 47 - $4,469.09
From 4 November to 22November 47 - $3,320.41
From 24 November to 1 December 47 -$1,652.22
From 2 December to 6 December 47 - $2,523.60
From 8 December to 20 December 47- $3,307.17

From 22 December 47 to 6 January 48 -	$3,219.73
From 7 January to 15 January 48 -.	$2,249.24
From 16 January to 13 February 48 -	$4,533.95
From 4 February to 7 February 48 -	$821.28
From 9 February to 16 February 48 -	$1773.71
From 17 February to 19 February 48 -	$448.32
From 20 February to 27 February 48 -	$389.42
From 28 February to 1 March 48 -	$1944.18
From 2 March to 3 March 48 -	$2034.58
From 4 March to 11 March 48 -	$2038.87
From 12 March to 16 March 48 -	$1145.00."

By mathematical computations, which the witness explained in detail, Captain Buie determined that there existed a difference between the balance called for by Prosecution Exhibit 2 and the cash accused had on hand amounting to the sum of nineteen hundred and ten dollars, or "The shortage was $1910 even." Prior to the trial the witness confronted the accused with these findings. Accused admitted the shortage and as far as the witness could recall accused stated it occurred in November 1947. Accused stated further that "Sgt Jones" had admitted to him that he had taken about $1700.00 from the fund at one time and later had taken $160.00 from the cash box (R 16-23,29).

Mr. Stuart J. Lottier, 1605 Chesapeake Ave., Hampton, Virginia, the manager of the bookkeeping department of the First National Bank, Newport News, Virginia, testified that his bank was the depository of the funds of the Post Signal Communications Services Account, Fort Eustis, Virginia. Mr. Lottier identified, and there was received in evidence without objection as Prosecution Exhibit 6, a letter to the bank dated 27 May 1947 stating that accused, whose signature appeared thereon, had been appointed custodian of the fund and was authorized to sign checks thereon. The witness was requested to refer to the bank's ledger entries, which he presented in court, and state when and what deposits had been made for the period 1 November 1947 to 12 April 1948 when the account was closed. He stated that the records disclosed deposits made on the dates and in the amounts as follows:

Date	Amount
5 Nov 47	$3,250.77
24 Nov 47	2,476.70
2 Dec 47	2,107.72
8 Dec 47	1,456.53
22 Dec 47	3,696.70
7 Jan 48	1,363.68
16 Jan 48	3,990.12
4 Feb 48	1,547.25

9 Feb 48	821.28	
17 Feb 48	1,773.70	
21 Feb 48	448.32	
28 Feb 48	1,825.94	
28 Feb 48	389.43	
2 Mar 48	1,944.18	
4 Mar 48	2,034.58	
13 Mar 48	3,538.87	
17 Mar 48	766.88	
17 Mar 48	378.12	(R 24-28).

The court took judicial notice of the provisions of Department of the Army Technical Manual 24-205 entitled, "Administrative Procedures for Communications Services" December 1946 and particularly paragraph 93b thereof providing that,

> "Collections may be deposited daily, and there will be, in every case, a daily deposit if the total daily collections equal or exceed $200. When collections received in payment for unofficial services cannot be balanced and turned in to the cashier until after the close of available banking facilities, they will necessarily be carried over until the following day." (R 16,32)

Technical Sergeant Arnold W. Jones testified that during the times in question he was chief clerk in the Post Signal Office, Fort Eustis, Virginia, and that accused was his immediate superior officer. He handled the correspondence, bills, vouchers and "cash monies" relating to the office. Sergeant Jones stated that sometime in December 1947 accused had told him there was a $1700 shortage in the fund and asked him if he knew anything about it. He replied, "No sir" but during the discussion which followed stated that he would try to sell his house and replace the money. Witness did not want to reveal the matter to his wife, who was required to sign any deed conveying his house and he was unable to get the money. Another shortage in the fund occurred in January 1948. The amount was $160.00 and Captain Crank had accused the witness of taking this money. It was mutually understood by witness and accused that these shortages would not be revealed to any other persons and the witness would be given time to "get the money." Sergeant Jones stated that he knew the provisions of TM 24-205 and that accused must have had knowledge thereof because he had seen him read the manual. Deposits had never been made when the cash on hand amounted to $200 or more as was required by the Manual. Deposits were withheld during December and January until the daily collections amounted to enough to "make up" for the existing shortage. On cross-examination Sergeant Jones stated that he and accused were the only persons having access to the funds. When asked if he had not told accused that he took the money, witness asked if he had to answer

inasmuch as "My case hasn't been up for approval yet." The law member ruled that the witness answer, it appearing that he had been convicted. Witness then stated that he had told accused that he did not take the money (R 30-35).

It was stipulated by the parties, the accused expressly concurring, that if Brigadier General G. C. Stewart, 015349, Commanding General, Fort Eustis, Virginia, were present he would testify as follows:

> "I have been in command of Fort Eustis, Virginia since 10 August 1946. I first learned of a possible shortage in the funds of the Post Signal Communications Services Account on 14 March 1948 through a telephone call from Mrs. Arnold W. Jones, wife of Technical Sergeant Arnold W. Jones, Chief Clerk, Signal Section, Post Signal Office. On 15 March 1948 I detailed Capt Neill D. Buie to audit this account. On the same date Capt Crank, custodian of this fund, reported to me that a shortage of $1910 existed in this fund. This is the first report of any kind that Capt Crank made to me concerning this shortage." (R 36-37)

Mrs. Catherine Jones, wife of Sergeant Arnold Jones, testified that in early March 1948 she notified General Stewart that her husband was missing and was being accused by Captain Crank of taking money from the Signal fund (R 38).

Without objection, there was received in evidence as Prosecution Exhibit 8 a sworn statement made by accused to Captain Jesse H. Baker,TC, on 22 June 1948. The record discloses that accused had been fully advised of his rights and gave his statement freely and voluntarily. Briefly, accused stated that between 2-22 December 1947 he discovered a shortage of $1750 in the Post Communication Services Account of which he was custodian. He and Sergeant Jones were the only persons having access to the funds. He called the sergeant to his desk and Jones admitted taking the money to pay some pressing obligations. Sergeant Jones requested time to sell his house and repay the money. Sometime in January Sergeant Jones admitted taking $160.00 from the collections on the telephone accounts. Jones never made reimbursements of the funds and on 8 March disappeared and was not heard from until apprehended by the Federal Bureau of Investigation in New York (R 41-43).

Master Sergeant William L. Ober, 2164th Army Service Unit, testified that he was wire chief under accused's supervision in the Post Signal Office, Fort Eustis, Virginia. He stated that on 15 August 1947 he had made a loan of $500 to accused. At accused's request the transaction was accomplished by the witness delivering to accused his personal

check made payable to the Post Signal Communications Fund. The amount of the loan was repaid the same month (R 7).

Staff Sergeant William H. Shields, 2164th Army Service Unit, stated that he was assigned to the Post Signal Office, Fort Eustis, Virginia. On 3 February 1948 he had made a loan of $700.00 to accused, receiving accused's personal note therefor. $500 of the loan had been repaid, leaving $200 due and owing. A photostatic copy of the mentioned note was received in evidence as Prosecution Exhibit 1. On cross-examination, Sergeants Ober and Shields each stated that he had not received any advantage or preferment, insofar as he knew, by reason of having made a loan to his commanding officer (R 6-12).

4. For the Defense

After being duly advised of his rights, accused elected to be sworn as a witness in his behalf. He recited in chronological order the history of his military service from the time of his enlistment in 1935 at Fort Benning, Georgia. He was commissioned second lieutenant in October 1942 and had spent two years and ten days as a company signal officer in the European Theater of Operations. He had never received any "indoctrination" in the handling of Post Signal Funds. Under the provisions of the "Manual, TM 24-205", he was authorized to and had appointed a chief clerk, Technical Sergeant Jones, to assist him. Accused knew of no Army Regulation which directed that he handle the funds in accordance with TM 24-205. He had complete confidence in Sergeant Jones who usually collected the accounts due, deposited the money in the safe, and prepared the deposit slips. The irregularity in making deposits was due partly to the time required in going to the bank at Newport News and the difficulty in procuring transportation. He stated that he had mentioned these difficulties to the Deputy Post Commander in August, but that no further arrangements had been made. When the weather permitted he used a jeep for transportation. On other occasions he provided the gasoline at his own expense and used Sergeant Shields' car or that of Lieutenant Aker. He had never been authorized to deposit Signal funds with the Post Finance Officer in lieu of making the trip to Newport News. Accused admitted borrowing the mentioned money from Sergeants Ober and Shields but he had extended no privileges to either of them by virtue thereof.

With respect to Technical Manual 24-205, accused stated that "It's a guidance to handling the accounts in the Signal Office." Without objection there was received in evidence as Defense Exhibit "A" a copy of a letter from Headquarters, Second U.S. Army, as follows:

"AIAFI 141 Ft Eustis 7 May 1948

SUBJECT: Audit - Post Communication Services Account

TO: Commanding General
Fort Eustis
Virginia

"1. The inclosed copies of audit pertaining to the Post Communication Services Account, your station, are forwarded for distribution as indicated.

"2. With reference to the irregularities and discrepancies reported in paragraphs 6 and 7 thereof, attention is invited to letter this headquarters, 25 August 1947, copy inclosed, wherein the unauthorized practice of keeping excessive amounts of cash on hand in the Signal Office was brought to your attention.

"3. For the purpose of preventing a repetition of this condition, the Signal Officer will deposit funds received from unofficial telephone calls, including taxes, with the bank in which the account of the Post Communication Services is maintained, or with the local Disbursing Officer on Standard Form 1044 at the close of each day's business, or as soon thereafter as practicable, whenever such funds on hand at the end of the day exceed $200.00. The Disbursing Officer will account for these funds in his special deposit account.

"4. It is further desired that information be furnished regarding the action taken in connection with the shortage of $1910.00, reported to exist in this account. It is assumed that a portion of this loss pertains to funds collected for the Western Union Telegraph Company, who carry a blanket bond to cover such losses. If this assumption is correct, any action taken in connection with this loss should be coordinated with them.

"BY COMMAND OF LIEUTENANT GENERAL GEROW:

/s/ G. W. Zeller
G. W. ZELLER
Capt., A.G.D.
Asst. Adjutant General

2 Incls
1. Audit PCS (trip)
2. Cy ltr hq 2d A
25 Aug 47

A CERTIFIED TRUE COPY:

/s/ George R. Grathwohl
GEORGE R. GRATHWOHL
Captain, TC
Asst Adj"

On cross-examination accused stated that he requested Sergeant Ober to make the loan by check payable to the Post Communication Services Account in order that he could cash the check. He had not read every word of TM 24-205, but "didn't see any harm in it." Accused was

shown a letter dated 25 August 1947 which was identified as an inclosure to Defense Exhibit A, and stated that he had read the letter. He admitted making the entries on Prosecution Exhibit 2 (WD AGO Form 11-160), which constituted the records of the Post Communications Services account from 1 November 1947 to and including 31 March 1948. With respect to the matter of transportation, accused stated that a jeep was made available to him 24 hours each day, but it was an open vehicle, and considering weather conditions it was not "adequate transportation." The trial judge advocate pointed out to the accused certain entries on Prosecution Exhibit 2 showing that on various dates he had collected amounts of money considerably in excess of that shown to have been deposited. Asked to explain the discrepancy, accused replied, "I left it up to the chief clerk to make the deposit, assuming he would incorporate all the money in the safe in the deposit." When it was pointed out to accused that the records showed that on 22 December his deposits exceeded collections by nearly four hundred dollars, he stated that the excess must have been "the balance from what was failed to deposit the time before" (R 53). Accused stated that he discovered a shortage of $1750 on about 15 December and Sergeant Jones admitted having taken it. Deposit slips were made out and the amount thereof was entered on the WD AGO Form 11-160 as of the date the slip was prepared. Deposits were not actually made until some time later because the money was not in the fund due to the existing shortage. He had to wait until the daily collections amounted to enough to equal the amount called for on the deposit slip, which in some instances took weeks. As an example, his records (Pros Ex 2) showed a deposit of $3990.12 on 2 January 1947. The bank's record did not disclose any deposit on 2 January 1947 but did show a deposit on 16 January 1948 of $3990.12. Accused stated that on 2 January he had $3990.12 less $1750, which Sergeant Jones had taken and agreed to replace. He assumed that Jones would meet him at the bank with the money. When Jones failed to produce the money he did not make a deposit but returned with the money, about $2200. On 7 January 1948 he had deposited $1363.68. Accused admitted that he was attempting to cover up the shortage so that when it was repaid it would "clear my books." He kept carrying the shortage forward to the current month (R 54). He knew Sergeant Jones had taken the money and that he was trying to repay it. On 15 March 1948 he had notified General Stewart and Colonel Poindexter of the shortage. Between 15 December 1947 and 15 March 1948 he had not made known the loss to anyone of higher authority (R 55). From about 15 December 1947 to 3 February 1948 accused had prepared the deposit slips and made the deposits - he had not relied upon Sergeant Jones at all. (R 58).

5. Discussion

As amended by the court, Specifications 1 and 2 each allege in effect that accused, having knowledge of the commission of a felony, viz., embezzlement of $1750.00 (Spec 1) and $160.00 (Spec 2), property

of the Post Communications Services Account, by Technical Sergeant Arnold W. Jones, did, from about 1 January 1948 as to the first embezzlement and 2 January 1948 as to the second embezzlement, and thereafter, willfully and unlawfully conceal and fail to disclose and make known the same to any person in civil or military authority under the United States.

Section 251, Title 18, U.S.Code, provides as follows:

"Misprision of Felony. Whoever, having knowledge of the actual commission of the crime of murder or other felony cognizable by the courts of the United States, conceals and does not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, shall be fined not more than $500, or imprisoned not more than three years, or both."

Upon the evidence herein presented, including accused's own sworn testimony, there can be no doubt but that during December 1947 he acquired knowledge of the actual embezzlement by Sergeant Jones of the sum of $1750 and in January 1948 of the sum of $160, and that he concealed the fact in each case by false entries in his records. The falsity consisted of the entering of deposits in his records as having been made on certain dates which actually were not made until later as he had to wait until the amount called for by the deposit slip was obtained from the future daily collections. He failed to make any disclosure of the embezzlement to superior military authorities until March 1948 when an audit was commenced. Each embezzlement was a felony as defined by law (Secs. 100 and 541, Title 18, U.S.C.). For a further discussion of the offense of misprision of a felony see CM 203989, Fox, 7 BR 315-319. The explanation offered by accused that he was merely giving Sergeant Jones an opportunity to sell his house and replace the monies might have been considered by the court as a mitigating circumstance in fixing the sentence. Such purpose, however, cannot serve as any legal justification or excuse for accused's acts.

With respect to Specifications 4 and 5, the evidence shows that on the dates alleged accused borrowed the stated amounts of money from the described soldiers who were members of his command and under his immediate supervision. Accused admitted borrowing the money from the persons alleged. The fact that one of the loans had been promptly repaid and that the other was in the process of being repaid is immaterial to the issues. Also, it is of no legal consequence that no military preferment or other benefit was accorded the lenders by accused. The act of borrowing money from an enlisted man by a commissioned officer is enough to constitute a military offense.

"The obligation that flows from indebtedness to a

subordinate, especially of the same organization, has a tendency to weaken authority and may be the cause of improper favor. Such an impairment of required relationship has been uniformly held to be prejudicial to good order and military discipline." (CM 275535, Wilson, 48 BR 71,75.)

Specification 3 alleges substantially that accused, having received public money, to wit, funds of the Post Communications Services Account, which money he was not authorized to retain, did, from 1 November 1947 to 31 January 1948, fail to deposit said monies as provided by law, in violation of Section 91, U.S. Criminal Code, 35 Stat. 1105, as amended. The described statute is Section 177, Title 18, U.S. Code, and provides as follows:

> "Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer or some public depositary of the United States, when required so to do by the Secretary of the Treasury or the head of any other proper department, or by the General Accounting Office, shall be deemed guilty of embezzlement thereof and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years. (Mar. 4, 1909, ch. 321, sec. 91, 35 Stat. 1105; May 29, 1920, ch. 214, sec. 1, 41 Stat. 654; June 10, 1921, ch. 18, sec. 304, 42 Stat. 24.)"

We note that Specification 3 does not specifically allege the regulation or departmental directive requiring that the money or funds referred to be deposited "with the Treasurer or some public depositary of the United States." We believe that such requirement is one of the elements constituting the offense denounced by the said statute. We also note that the above quoted statute provides, in the event an accused has been found guilty of a violation thereof, that he will be given a mandatory sentence consisting of a fine and a term of confinement. The court, in the instant case, adjudged neither a fine nor any term of imprisonment. A detailed discussion of these questions, however, is unnecessary because of the view we take of the applicability of the statute to the situation here presented.

By reference to Prosecution Exhibit 2 and Department of the Army Technical Manual 24-205 it appears that the funds of the "Post Communications Services Account" consisted of (1) collections from individuals for non-official use of communications services, including applicable service charges, (2) cash collections made at the post signal office in connection with out-paid unofficial telegraph messages, in-collect unofficial telegraph messages, and unofficial telegraphic money orders, (3) voluntary contributions by way of discounts granted by telegraph

companies in lieu of commissions to cover services performed by Government employees, and (4) any other receipts pertaining to the handling of unofficial communications (par 89, TM 24-205). It does not appear from the record that any of these funds were required to be covered into the Treasury of the United States, either directly or indirectly, and we are not aware of any law or regulation to that effect. It was the duty of accused, among others, to "act as custodian of the post communication services account, draw checks against bank deposits to defray the cost to the Government of unofficial communication services, and transmit monthly to the Central Post Fund any moneys becoming available in excess of the cost of these services" (par 7r, TM 24-205). It is necessary, therefore, to determine whether the phrase "money of the United States" as used in Section 177, Title 18, U.S. Code, has reference to and was intended to cover funds of the character of which accused was custodian in this case. It is conceded that, for reasons unnecessary to set forth in detail, the United States has sufficient special proprietary interest in the funds in question to sustain a conviction in an ordinary case of embezzlement or larceny thereof (CM 199737, Taft, 4 BR 163,164; CM 319858, Correlle, 69 BR 183,200). In the Taft case, supra, which involved funds of the Army Motion Picture Service, the Board of Review took occasion to say at page 164:

> "*** Its funds and other property, including coupon books, are purchased from profits accruing from the exhibition of motion pictures and are not public funds, although they are quasi-public in their nature in the same manner as are post exchange funds and company funds, ***.
>
> * * *
>
> "*** The existing practice of alleging ownership of money and property pertaining to quasi-public funds in the organization to which the fund pertains, such as a designated post exchange or company fund, should not be departed from. ***"

In United States v. Mason, 281 U.S. 517, the defendant, a clerk of the United States Court for the District of Massachusetts, was indicted on three counts for embezzlement of certain funds said to be a "portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him." The counts were laid under "Secs 5490 and 5497 of the Revised Statutes, and the act of March 3, 1875, Chapter 144 (18 Stat., p. 479)" respectively. As amended (such amendments not being material to this discussion) the statutes referred to are Sections 175, 182 and 101, respectively, of Title 18 of the United States Code. Sections 175 and 182 each contains the language "public moneys" in describing the property as being the subject of the offense. Section 101 relates to what is termed "property of the United States." In affirming the action of the lower court, which had sustained a demurrer as to the three counts mentioned, the United States Supreme Court, after considering at length the legal requirements

imposed upon a clerk with respect to the disposition of money officially collected by him, said,

> "*** even the duty to pay the surplus shown by the return or audit is not governed by the statutes, relating to embezzlement, which have been referred to in support of these counts. The amount with which the clerk is chargeable upon his accounting is not the 'public money' or 'the money or property of the United States' within the meaning of their provisions, *** Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent." (Underscoring supplied.)

In the present case, after paying proper charges such as tolls due commercial communication agencies, accused was required to transfer any surplus in the fund to the "Central Post Fund." There is no showing that he was required to pay any part of the fund directly or indirectly into the United States Treasury. We conclude therefore that the Post Communications Services Account Fund of which accused was custodian is not "money of the United States" within the meaning of Section 177, Title 18, U.S.Code, and therefore the finding of guilty of Specification 3 cannot be sustained. It is recognized that the proof shows that accused wrongfully failed to deposit the funds of the Post Communication Services Account as was required by the provisions of TM 24-205, however, under the language of Specification 3 we are of the opinion that the offense pleaded cannot be construed as necessarily including the military offense shown to have been committed.

6. Records of the Department of the Army show that accused is 33 years of age and married. He enlisted in the Army in 1935, attended Officer Candidate School, and was commissioned a second lieutenant, Signal Corps, AUS, in 1942. He served in the Mediterranean and European Theaters of Operations from 1943 to 1945. His adjectival efficiency ratings have averaged "Excellent."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 3 of the Charge, but legally sufficient to support the findings of guilty of the Charge and the remaining specifications, legally sufficient to support the sentence and to warrant confirmation of the sentence.

Robert D. Silver, Judge Advocate

Earl M. Bradley, Judge Advocate

Harley A. Lanning, Judge Advocate

CSJAGK - CM 333085 1st Ind 12 JAN 1949

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Evan H. Crank, Jr. (O-1637238), Signal Corps, 2164th Army Service Unit, Fort Eustis, Virginia.

2. Upon trial by general court-martial this officer was found guilty of two offenses of misprision of a felony by willfully concealing and failing to report an embezzlement of $1750.00 and $160.00, respectively, property of the Post Communications Services Account, Fort Eustis, Virginia (Specs 1 and 2); of failing to deposit monies collected by him as custodian of the Post Communications Services Account, as required by law in violation of Section 177, Title 18, U.S.C. (Spec 3), and of two offenses of borrowing money from enlisted personnel of his unit (Specs 4 and 5), all in violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally insufficient to support the findings of guilty of Specification 3 of the Charge, but legally sufficient to support the finding of guilty of the Charge and Specifications 1, 2, 4 and 5 thereof, legally sufficient to support the sentence and to warrant confirmation of the sentence.

Accused was the Post Signal Officer of the 2164th Army Service Unit, Fort Eustis, Virginia. He was also the accountable and responsible officer of the Post Signal Fund. Technical Sergeant Arnold W. Jones was chief clerk in his office, and the two were the only persons having full access to the safe and the monies of the fund. The First National Bank of Newport News, Virginia, was the depositary of the fund and by the provisions of paragraph 93(b), Department of the Army Technical Manual 24-205 (Administrative Procedures for Communications Services), of which the accused had knowledge, he was required in every case to make a daily deposit of funds collected when the amount equalled or exceeded $200.00. He was provided with a jeep for the purpose of making the trips to the bank. Accused failed to make the deposits as required and accumulated excessive sums of money, withholding deposit thereof in some cases for periods of weeks. About 15 December 1947 accused discovered a shortage in the fund of $1750.00. Shortly thereafter there was revealed a further

shortage of $160.00. He conferred with Sergeant Jones who admitted taking the money and requested time to sell his house and replace it. Accused agreed not to disclose the shortage to any person until the money was replaced, and concealed the shortage by making false entries in his records. Jones failed to sell his house and replace the money and went absent without leave. An audit of the fund was made in March 1948, at which time the total shortage was discovered. Accused's concealment of each shortage was a violation of Section 251, Title 18, U.S. Code (misprision of felony).

The Board of Review is of the opinion that Specification 3, alleging a violation of Section 177, Title 18, U.S. Code, should be disapproved because the funds of which accused was custodian, and which he failed to deposit as required were not "money of the United States" or public funds within the meaning of the statute. I concur in that opinion.

On 15 August 1947 accused borrowed $500 from Master Sergeant William Ober and on about 3 February 1948 he borrowed $700 from Staff Sergeant William H. Shields. At the time of trial the loan from Ober had been repaid and $200 remained owing on the loan from Shields. Both lenders were members of accused's organization and directly under his command. No preferment or benefit appears to have been shown either Ober or Shields by reason of the loan.

Technical Sergeant Jones was tried and convicted by general court-martial for embezzlement of the funds involved herein. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for seven years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial for action under Article of War 50½. That record of trial has been examined by a Board of Review in this office and held legally sufficient to support the findings of guilty and the sentence.

4. Records of the Department of the Army show that accused is 33 years of age and married. He enlisted in the Army in 1935, attended Officer Candidate School, and was commissioned a second lieutenant, Signal Corps, AUS, in 1942. He served in the Mediterranean and European Theaters of Operations from 1943 to 1945. His adjectival efficiency ratings have averaged "Excellent."

5. I recommend that the findings of guilty of Specification 3 of the charge be disapproved but that the sentence be confirmed and carried into execution.

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

CM 333,085

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 3, Jan 14, 1949).

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

(305)

18 NOV 1948

CSJAGQ - CM 333087

UNITED STATES v. Private First Class BILLY J. SHEETS (RA 38447343), 85th Quartermaster Depot Company, Camp Hood, Texas.	2D ARMORED DIVISION Trial by G.C.M., convened at Camp Hood, Texas, 20 and 29 July 1948. Dishonorable discharge and confinement for one and one-half (1½) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
BAUGHN, SKINNER and STEVENS, 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 64th Article of War.

Specification: In that Private First Class Billy J. Sheets, 85th Quartermaster Depot Company, did, at Hope, Arkansas, on or about 5 June 1948 offer violence against Captain Van Peterson, his superior officer, who was then in the execution of his office, in that he, the said Private First Class Billy J Sheets, did threaten the said Captain Van Peterson by [doubling his fists and advancing towards him and]* saying "I'll whip the shit out of you, you son-of-a-bitch. I ain't** scared of you. I've had a General Court-Martial before" or words to that effect.

He pleaded not guilty to the Charge and original Specification, which was amended during the trial as indicated in the footnotes hereto. He was found guilty of the Charge and of the Specification as amended. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for three (3) years. The reviewing authority approved the sentence but reduced the period of confinement to one and one-half (1½) years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

*Bracketed words added by amendment during trial (R 4, 16).
**Words "I ain't" changed to "I'm not" by amendment during trial (R 4, 16).

3. The evidence adduced is sufficient to establish accused's guilt of the Specification, both as originally drafted and as amended. The only questions to be determined by the Board of Review are the propriety of the court's failure to sustain a defense challenge to two of its members and the effect of the amendment of the Specification.

The trial proceeded upon the Specification as originally drafted until both prosecution and defense had rested and the court had recessed (R 15). Upon the reconvening of the court nine days later the President stated:

> "The court on its own motion, was requested to instruct the trial judge advocate to amend the Specification. The court reconvened to consider the case under the Specification as amended. The court rules the original Specification, though defective, is in its opinion sufficient to fairly apprise the accused of the nature of the charge intended and the court will proceed to try the case under the amended Specification." (R 16).

The defense stated it would like to "challenge for cause two members of the court, the President and the Law Member," on the ground of positive and definite opinion as to guilt or innocence of the accused. The defense pointed out that

> "*** the President of the court, the Law Member and the Trial Judge Advocate appeared in the Staff Judge Advocate's office without the defense being present, the case was discussed and the Specification was changed. The court believed a conviction could not be obtained under the Specification as it was written, and therefore, instructed it to be changed." (R 16).

The contention of the defense was that the court's belief arose after having heard the evidence, that "a few" members of the court were "biased in their opinion" and that although the Trial Judge Advocate was present at the amendment conference the defense, in disregard of its rights, was not notified in advance and not represented. The defense stated, however, that it neither contended that it was presently unaware of the change in the Specification nor requested additional time to prepare its case (R 17). The two challenged members withdrew from the courtroom (R 18, as corrected) and the court did not sustain the challenge (R 18).

4. With respect to the joint challenge by the defense to the President and Law Member, Article of War 18 provides that the court "shall not receive a challenge to more than one member at a time." (See also MCM, par. 58a, p. 44). The challenged member and the challenger's opponent have a right that the challenge shall be passed upon by all the remaining members of the court. But the enjoyment of this right is

frustrated in the case of a joint challenge because no challenged member is eligible to pass upon a challenge against himself (MCM, par. 58f, p. 47; CM 243215 (1943) Owen, 27 BR 305, 309; CM 260637 (1944), Arthur, 39 BR 381, 392).

> "If the defense was aware of reasonable grounds to challenge for cause any member of the court, its refusal to exercise its opportunity to do so in the manner prescribed by the statute, constituted an effective waiver (CM 219582 (1942))." /Braden, 12 BR 305, 307/(CM 238266 (1943), Campbell, 24 BR 215, 220).

Although the law member should have warned the defense to make its challenges separately, and although the Braden case involved a challenge to the entire membership of the court, the quoted language may be applied to the challenge under consideration. Moreover, in any event, it does not appear from the record that the defense sustained its burden of showing good ground for its challenge (MCM, par. 58f, p. 46). Obviously, grounds of challenge for cause cannot include opinions as to guilt derived from hearing all the evidence in the case, whether manifested in an attempt to conform pleadings to proof or otherwise. And although the alleged exclusion of the defense from the amendment conference may bear upon questions as to the amendment's validity and effect, hereinafter considered, it falls far short, in the Board's opinion, of indicating that the President and law member should not have continued to sit as members of the court "in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness and impartiality" (MCM, par. 58a, p. 45).

5. Turning to the questions involved in the amendment, the Specification as originally drafted failed to state an offense in violation of Article of War 64. It charged in effect that the accused offered violence against his superior officer, then in the execution of his office, by threatening him violence in highly insulting and disrespectful language.

> "But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the Article." (Winthrop's Military Law & Precedents, 570; MCM, par. 134a, p. 148).

Although the phraseology of the Specification amounts in effect to a charge of disrespectful behavior towards the accused's superior officer in violation of Article of War 63, it is inadequate to state such a violation

(see MCM, App. 4, Form 24, p. 241) or to put accused upon notice of a charge thereof. The Specification does, however, in the Board's opinion, allege disrespectful conduct by accused toward his superior officer which is a disorder in violation of Article of War 96. The designation of the wrong Article of War is immaterial (MCM, par. 28, p. 18).

After the evidence was in and both sides had rested, the court, evidently as a result of consultation with the Trial Judge Advocate and Staff Judge Advocate, but without consulting the accused or his counsel (R 16-18), permitted the amendment of the Specification by the addition of an allegation of accused's physically attempting or menacing violence against his superior officer: by "doubling his fists and advancing towards him". It is noted that this amendment consisted merely of an addition to the Specification, leaving the remainder unchanged and in effect, except for the immaterial substitution of "I'm not" for "I ain't". The effect of the amendment, which was made without the consent of the accused or his counsel, then, was to increase the offense from a violation of Article of War 96 to a capital offense in violation of Article of War 64 (cf. MCM, par. 104c, p. 98). The court's action in permitting such an amendment ex parte was unauthorized and improper, even assuming, as is not established by the record, that the amendment was made at the direction of the convening authority (MCM, par. 78c, p. 65 and CM 145316 (1921), Dig. Op. JAG, 1912-1940, sec. 452(5), pp. 335-336 as to findings; CM (ETO) 1991 (1944) Pierson, 6 BR (ETO) 73, 80 as to amendment). The cited authorities make clear the rule that a court may not properly, either by amendment or by its findings or both, increase either the quality or quantity of the offense alleged in the Specification. The provision (MCM, par. 73, p. 57) that the court may permit a defective Specification to be so amended as to cure such defect, granting the defense a continuance if deemed necessary, is inapplicable here because the defect was not of a curable nature. As indicated, the Specification failed to state an offense in violation of Article of War 64 and of course was not "sufficient fairly to apprise the accused of the offense intended to be charged", as required by the Manual provision. This failure could not be remedied by amendment to conform to proof without injuriously affecting the accused's substantial rights within the meaning of Article of War 37, which article significantly contains the proviso that the act upon which the accused has been tried must constitute an offense under one or more of the Articles of War. The Board of Review is therefore of the opinion that the purported amendment of the Specification was illegal and ineffectual.

6. The effect of the foregoing is not, however, to void the findings of guilty and sentence in toto. The unauthorized parts of the court's action may be separated and nullified as illegal without affecting the remainder (e.g.: CM 145316, supra). The illegality of the purported

amendment could prejudice the accused's rights, within the meaning of Article of War 37, only to the extent it was reflected in the findings and sentence. Removal of the unauthorized words "doubling his fists and advancing towards him and" leaves the Specification in its original form, charging a violation of Article of War 96, though erroneously designated a violation of Article of War 64, and the evidence is adequate to support it. The accused cannot be prejudiced by a finding of guilty of this offense, with which he was adequately charged, and to that extent the Board holds the findings of guilty legal. Likewise, so much of the sentence adjudged as does not exceed the maximum punishment imposable for the closely related offense of behaving with disrespect toward a superior officer in violation of Article of War 63 (MCM, par. 104c, p. 98) is legal.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the finding of guilty of the Specification, excepting the words "doubling his fists and advancing towards him and", legally sufficient to support only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves forfeiture of two-thirds pay per month for six months and confinement at hard labor for a like period.

On Leave ,
_____, Judge Advocate

T. E. Skinner, Judge Advocate

E. L. Stevens, Jr., Judge Advocate

(310)

NOV 24 1948

CSJAGQ - CM 333087 1st Ind

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

TO: Commanding General, 2d Armored Division, Camp Hood, Texas

1. In the case of Private First Class Billy J. Sheets (RA 38447343), 85th Quartermaster Depot Company, Camp Hood, Texas, attention is invited to the foregoing holding by the Board of Review which holding is hereby approved. It is recommended that so much of the finding of guilty of the Specification as involves a finding of guilty of the words "doubling his fists and advancing towards him and", be disapproved; that only so much of the finding of guilty of the Charge be approved as involves a finding of guilty of violation of Article of War 96; and that only so much of the sentence be approved as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. Upon taking such action you will have authority to order execution of the sentence.

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 333087)

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, DC

(311)

19 NOV 1948

CSJAGH CM 333181

UNITED STATES v. First Lieutenant MORGAN W. DAVIS, JR., 01948577, Transportation Corps, 500th Railroad Grand Division, United States Army Military Government in Korea.	HEADQUARTERS XXIV CORPS Trial by G.C.M., convened at Seoul, Korea, 19,20 August 1948. Dismissal, total forfeitures, and confinement for three (3) years.

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

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

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that First Lieutenant Morgan W. Davis, Transportation Corps, attached to 500th Railroad Grand Division, United States Army Military Government in Korea, did, at or near Yong Dong Po, Korea, on various dates between about 5 May 1948 and about 8 June 1948, in conjunction with Kim, Bong Choon, Lee Ho Yong and Private First Class Johnny Krause, feloniously take, steal and carry away about 40 cases of electric light bulbs, each containing about 500 bulbs, value in excess of $50.00, the property of the United States.

Specification 3: In that First Lieutenant Morgan W. Davis, Transportation Corps, attached to 500th Railroad Grand Division, United States Army Military Government in Korea, did, at or near Yong Dong Po, Korea, on or about 4 June 1948, in conjunction with John H. Daley and Kim, Bong Choon, feloniously take, steal and carry away sixty-one reels lead covered air cable, value about $20,000.00, the property of the United States.

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

Specification 1: In that First Lieutenant Morgan W. Davis, Transportation Corps, attached to 500th Railroad Grand Division, United States Army Military Government in Korea, did, at or near Yong Dong Po, Korea, on or about 4 June 1948, unlawfully and feloniously agree and conspire with John H. Daley and Kim, Bong Choon, to defraud the United States by agreeing to steal and sell seventy-eight reels lead covered air cable, value about $25,000.00, the property of the United States and did commit overt acts of stealing and selling the same pursuant to said conspiracy and in execution thereof.

Specification 2: In that First Lieutenant Morgan W. Davis, Transportation Corps, attached to 500th Railroad Grand Division, United States Army Military Government in Korea, did, at or near Yong Dong Po, Korea, on or about 4 June 1948, in conjunction with John H. Daley and Kim, Bong Choon, unlawfully, willfully and feloniously, sell seventy-eight reels lead covered air cable of the value of about $25,000.00, the property of the United States.

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

Specification: In that First Lieutenant Morgan W. Davis, Transportation Corps, attached to 500th Railroad Grand Division, United States Army Military Government in Korea, did, at or near Yong Dong Po, Korea, on or about 1 April 1948, in conjunction with Kim, Bong Choon, wrongfully, willfully and feloniously sell to unauthorized person or persons two cases of soap of American manufacture contrary to and in violation of the provisions of Circular No. 39, Headquarters United States Army Forces in Korea, dated 24 March 1947, then in full force and effect.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Specification 3, Charge I, except the figure "$20,000.00," substituting therefor the figure "$11,000.00," of the excepted figure not guilty, of the substituted figure, guilty, guilty of Specifications 1 and 2, Charge II, except the figure "$25,000.00" appearing in each Specification, substituting therefor in each Specification the figure "$14,000.00," of the excepted figure, not guilty, of the substituted figure, guilty, and guilty of the other Specifications and of Charge I and the Additional Charge. There was no finding as to Charge II. No

evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority disapproved the finding of guilty of Specification 1 of Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

The evidence pertinent to the findings of guilty is summarized as follows.

Accused is in the military service and in March 1948 and for some time thereafter was train master at Yong Dong Po (R 13,73). On approximately the first of April 1948, accused had a conversation with his interpreter, Kim, Bong Choon, about the sale of some soap. This conversation was held in the presence of Private First Class Johnny R. Krause, yardmaster at Yong Dong Po, who was under accused's command (R 13,19,20). Accused asked Kim to find a buyer for some soap stating that he had three cases of soap he would like to sell for $60.00. Kim told accused he would undertake to find a buyer (R 20). Accused and Krause went to the officers' mess at the 7th Division where accused had a conversation about soap with a cook (R 13). The following day when Krause went to the Bachelor Officers' Quarters to drive accused to his office he found some soap in accused's jeep. The soap was contained in two cardboard cases. One of the cases was opened by Krause and he saw large size cakes of soap, dark brown in color. Having been a cook during his military career, Krause was familiar with "G.I. soap" and he stated that the soap in the carton was in fact "G.I. soap". The legend "Hard Soap" was written on the cartons and in addition there was writing specifying the lot number, weight, and quantity. There was nothing to indicate where the soap was produced. That afternoon, accused, accompanied by Krause and Kim, took the soap to the Hoi In Hospital. There delivery of the soap was made to two Koreans, one of whom was Lee, Chin Sup (R 13-18,23). Lee, Chin Sup gave $60.00 in military currency to his companion and the companion handed the currency to accused. Lee, Chin Sup was not authorized to make purchases at Army Sales Stores (R 22-24).

Around the first part of May, accused asked Kim to borrow money for him for the purpose of buying a horse. Kim borrowed 130,000 yen from Lee, Chin Sup. When Kim was called upon for repayment by Lee, Chin Sup he asked accused to assume the debt. Accused stated he was without cash but proposed that Lee, Chin Sup be given eight cases of light bulbs amounting to 4,000 bulbs and in return therefor the debt was to be satisfied and in addition Lee, Chin Sup was to pay $1,000.00. Lee, Chin Sup

acquiesced in the deal but upon receiving the cases of lights complained that there were only 1400 bulbs in the eight cases. Accused told Kim, Bong Choon to give Lee, Chin Sup eleven more cases which was done (R 27, 32). Lee, Chin Sup in fact paid $820.00 instead of the agreed $1,000.00 (R 29,32). He received the first eight cases from a boxcar in the Yong Dong Po railroad yard on either 7 or 8 May, and the following morning went back and received eleven cases. The boxcar from which the bulbs were taken was about thirty meters from accused's office and accused was in the office looking out when the cases were taken. Lee, Chin Sup was taken to the boxcar by Kim, Bong Choon and an American soldier (R 29,30).

The nineteen cases taken by Lee, Chin Sup were marked "Operation 38" (R 33).

Krause testified that on 6 May, on instructions of accused, he took the interpreter Kim and some other Koreans to Car Number 22195 to insure that they took no more than eleven cases of lights, and on that occasion saw eleven cases of light bulbs unloaded from Car Number 22195. This car contained "Operation 38" material destined for shipment to North Korea (R 35). Krause denied that promises had been made to him in consideration of his testimony. The prosecution, however, in open court stated that Krause had been granted immunity (R 15).

During the first part of May, accused asked Lee, Ho Yong, also known as "BOQ Lee," to find a buyer for ten cases of light bulbs. Accused wished to realize $500.00 on the sale. Lee, Ho Yong found a buyer and on 7 May with Krause and the buyer went to Car Number 22195 and took ten cases of light bulbs which were brought to the buyer's house. Lee, Ho Yong received $500.00 in two installments from the buyer and gave the money to accused (R 36,38,43). A month later, at accused's request, Lee, Ho Yong again contacted a buyer for electric light bulbs. On this occasion the bulbs were taken from Car Number 5423 which was assigned to "Operation 38" and contained "Operation 38" material. Krause delivered eleven cases of bulbs and was given 200,000 yen by Lee, Ho Yong. Krause subsequently turned the money over to accused. When leaving the freight yard with the bulbs, they were halted by Transportation Police but were allowed to continue on their way when vouched for by Krause (R 37,38,39,43,44). Accused, on receiving the 200,000 yen from Krause, gave it to Lee, Ho Yong to have changed into military currency. Half of the yen was used, however, to "fix" some policemen, and the remainder was converted to military currency and given to accused (R 44).

In the latter part of May, a shipment of telephone cable arrived in the Yong Dong Po railroad yards. A week later accused asked

Kim, Bong Choon to find a purchaser for cable. Kim contacted Chang, Kyung Yung, an electrical contractor, who was receptive to the idea of purchasing telephone cable. Kim brought Chang, Kyung Yung to accused and acted as interpreter in the ensuing transaction. Accused asked for $2000.00 in military currency for each boxcar of cable. Chang, however, would not agree to a price until he saw the cable (R 45,53,56). Chang testified that 4,000,000 yen was the agreed price of sale (R 55). Accused assured Chang and Kim, Bong Choon that the deal was legitimate and that he had contacted Mr. Daley, a transportation official (R 45,53). The following day, 4 June, Kim, Bong Choon ordered Ko, Tai Heung, a yardmaster at Yong Dong Po, to switch boxcars 1867 and 5784 onto Saki Siding (R 62). Chang, Kyung Yung arrived at the freight yard with three Korean trucks. He was met by accused and Kim, Bong Choon; the latter gave him a slip with English characters and informed him that the slip showed a legal sale of the cables. Kim and accused pointed out to Chang the two cars containing the cables. The cars pointed out contained "Operations 38" material (R 46,53,61). Chang started to unload the cables from the boxcars onto his trucks. He completely unloaded one car and was unloading the other when he was interrupted by Son, Ho Kyung, a freightmaster at Yong Dong Po. At the time Chang had loaded 61 cables onto his trucks and 17 cables remained in one car. Son, Ho Kyung testified that the cars being unloaded were "Operation 38" boxcars located at the Saki Siding (R 53,66,70,71). Chang took the 61 cables to the Chosun Choong Ki Company in Yong Dong Po, but later transferred some of it to Cho Il Warehouse in Seoul as he was going to sell the cable in Seoul (R 58,59). Chang identified Prosecution Exhibits 1 and 2 as pictures of cables similar to or the same as those which he had purchased. Prosecution Exhibit 1 portrays a side view of a wooden covered cylindrical object bearing thereon printing descriptive of the object encased, and including the following legends "Operation 38" and "made in Occupied Japan." (R 54,55).

Upon cross-examination Chang first denied that he told the "CID" where the cable was located but added that when he was asked by the "CID" he did tell the location of the cables. He denied that he was beaten by the "CID" prior to being interrogated but explained that while in "CID" custody he was taken to Heuk Suk Dong where Kim, Bong Choon was supposed to live. They were a few hours late and Chang was struck on the back once with a little stick, following which he was treated at the 377th Station Hospital. This incident occurred prior to the time Chang made a statement to the "CID." At the time of trial Chang had been detained for 47 days (R 59-61).

At the time the unloading of the cable was interrupted, Chang informed Kim, Bong Choon who thereupon went looking for accused to inform him of the incident. Kim finally located accused in his room

at the BOQ and told him what had happened. Accused had Kim get Mr. Daley from the next room. Daley and accused talked together for a few minutes in the presence of Kim and then left the Bachelor Officers' Quarters accompanied by Kim. They were going to an Army unit next to "31st Infantry Circle" but on their way accused asked Kim to get out near the Han River. At the time accused assured Kim that he was going to "fix everything out," and asked Kim to bring the money to the office the next morning. Kim was unable to get any money from Chang although he went to Chang's house every day for several days. Chang was unable to sell the cable and finally Kim was arrested by the "CID." (R 47).

On cross-examination Kim testified that he had been in Seoul and Yong Dong Po for about a year and that prior to that he had been in Pong Song City, North Korea, where he worked in a cornstarch factory. He left North Korea because it was very hard for him to live on his wages. He came directly to Seoul and stayed at a hotel. He stated he did not have relatives in South Korea, but added that his brother-in-law helped him to live in Seoul. In addition when he left North Korea his family gave him money. Prior to the time he went to work for accused he secured income from occasional work as a laborer (R 47,48). With reference to the cable transaction, he testified:

"Q. Kim, is it not a fact that you were the individual who went ahead and made the deal for the cable and than when Lt Davis found out about it he ordered you to see to it that that cable was not removed from those cars?

* * *

A. No, it is not true.

* * *

Q. Did Lt Davis tell you at any time that that cable was not to be removed from those cars?
A. No, he did not.

Q. Did you report to Lt Davis the fact that cable had been removed from the cars?
A. Yes, I did.

Q. Did he tell you at any time to see that the cable was put back into the cars, after it had been removed?
A. Yes, he told me once.

Q. Did you tell him that the cable had been put back into the cars?
A. No, I did not." (R 49,50)

He then told Chang to put back all the cable but that was not done. Kim did not receive any money from Chang on account of the transaction and did not think that Chang had paid anyone else (R 50).

Captain Thomas M. Lapatka, the officer in charge of "Operation 38", testified that all "Operation 38" property was property of the United States (R 73,81). In the course of his duties Captain Lapatka handled invoices pertaining to the various supplies comprising "Operation 38" (R 74). He had seen 80 drums of cable belonging to "Operation 38" in the Seoul Electric Company yard. He was informed that the 80 drums had been shipped from Seoul to Yong Dong Po in three separate cars, two drums in Car Number 422, forty drums in Car Number 5784 and 38 in Car Number 1869 (R 77). Subsequently Captain Lapatka found 38 of the drums in the Cho Il Company warehouse, 23 more in an old machinery shed in Yong Dong Po and 17 drums in Car Number 5784. The two drums which were shipped to Yong Dong Po in Car Number 422 were untouched. There were no drums in Car Number 1869 (R 74). The total valuation of the drums shipped in Car Numbers 5784 and 1869 as determined from the invoices together with an added fifteen percent for shipping charges was $14,317.50, and the total valuation of 61 drums of cable was $11,580.50 (R 78).

Light bulbs ranging in size from 40 watts to 1000 watts were packed 500 to a case. The cheapest bulb packed was worth seven cents. The value of a case of the cheapest bulbs would be $42.00 including carrying charges (R 81).

On cross-examination, Captain Lapatka admitted that his only knowledge of the value of cable and light bulbs was obtained from invoices received by him from the Far East Command (R 82).

William Schuckhardt, Agent, 25th Criminal Investigation Detachment, testified that on 23 June, acting on information received, he found a quantity of electric cable hidden in the warehouse of the Chosun Choong Ki Company. Subsequently, on the basis of information secured by investigation, accused was interrogated. Agents Enston and Leary participated with Schuckhardt in the interrogation and a stenographer was also present. Accused was advised of his rights under Article of War 24. On 27 June, accused made a statement in response to questions propounded to him. The statement was taken down by a stenographer in shorthand and transcribed. Schuckhardt identified Prosecution Exhibit 4 as the statement accused made on 27 June. The statement was not read back to accused as he had previously stated that he did not desire to sign it. Schuckhardt stated that to his knowledge the statement reflected the questions asked and the answers made. Accused made another statement on 29 June. It was considered desirable to procure another statement in order to secure more information with reference to Daley. Prior to taking the second statement some mention was made of Communist activity but Schuckhardt did not know whether accused was induced to make the second statement to clear himself of complicity in Communist activity. Schuckhardt identified Prosecution Exhibit 5 as the second statement made by accused.

Like the first statement, it was taken down in shorthand by a stenographer and transcribed and Schuckhardt testified it reflected the questions asked and the answers made (R 86-91,93).

Accused elected to testify as to the circumstance surrounding the making of his second statement. He testified that on 29 June he was taken to CID headquarters, where Agent Leary, in the presence of Agents Schuckhardt and Enston, told him that the case being investigated had political implications, and that for accused to clear himself it would be necessary to clarify the other matter which had come up in the investigation. Specifically, Leary told him that Kim, the interpreter, and Lee, who worked at the Bachelor Officers' Quarters, were from North Korea and had both worked at the Pyongyang Cornstarch Factory, a Communist organization, manufacturing gun powder, and that there was every indication that the two were sent to South Korea to conspire with South Koreans and the occupation forces "to entangle the occupation forces in black market activities and discredit them in the Southern Zone." Accused responded that regardless of what he might have done in Korea he had not conspired with any foreign agent to do anything harmful to the Government, and that he would make a second statement to clear himself of any suspicion of disloyalty to the United States (R 91-92). On cross-examination accused admitted that his second statement was voluntarily made to clear up any political implications (R 92).

Both statements were introduced into evidence over objection (R 93; Pros Exs 4 and 5).

In the earlier statement, accused admitted that he knew Krause had removed ten boxes of light bulbs from "Operation 38" boxcars and had given them to Lee, Ho Yong. Accused denied, however, that Krause had acted on his orders. At one time Krause had given yen to accused but accused refused to tell why he had accepted the yen and would not state how much yen he had received. At the time Krause had told accused that the money was from Lee, Ho Yong, and accused assumed it was in payment for electric light bulbs. Accused gave the money to Lee and told him to get it out of the "BOQ." Accused denied that he gave the yen to Lee for the purpose of having it converted to military payment certificates, and denied that he subsequently received military payment certificates from Lee. Accused knew of another instance when Krause removed eleven cartons of light bulbs but did not recall giving Krause any instructions in connection with the removal. He also denied knowledge of another taking of eight cases of light bulbs by Kim, Bong Choon an hour previous to the removal of the eleven cartons, or that he knew that the eight cases were given to Lee, Chin Sup. He could not recall that on the transaction involving Lee, Chin Sup there was a shortage of bulbs and that he gave Lee, Chin Sup an additional eleven cases of bulbs. He denied receiving money from Kim, Bong Choon in connection with three

illegal sales of light bulbs taken from the boxcars at Yong Dong Po Saki Siding. He denied discussing the sale of two cars of telephone wire, but claimed he had forbidden Kim to take any of the wire after Kim had asked permission to take some. He admitted that Krause had told him that he (Krause) had given Lee ten cases of light bulbs.

In his second statement accused related that in March, when "Operation 38" started, everything was going smoothly. He was approached by Krause who stated he was an emissary for Kim who wanted to purchase window glass. This was approximately a week and a half after Kim had started working for him. Accused told Krause: "Nothing doing on the window glass." A lot of light bulbs were coming through and on the week following 28 April Kim approached accused with a proposition on light bulbs. At the time accused needed some cash and assented. Accused believed that Kim took eight cases of lights at the time but was not sure as he did not witness the taking. Later accused was notified that Kim had come back and had taken more cases. Accused "raised hell about that," but subsided as he figured he was "over a barrel." He subsequently entered into a deal with Lee and had Krause accompany Lee when the latter took some light bulbs in order to insure that payment was made. Krause received 200,000 yen from Lee which he turned over to accused. The same night accused returned the 200,000 yen to Lee to convert into military payment certificates. Lee later claimed he used the money to bribe some policemen and accused actually received nothing on the transaction.

A short time later Kim suggested a deal in wire to accused. Accused talked the matter over with Daley and an agreement was attained. Further talks took place between accused and Kim but the latter could not state what price he could get. Three or four nights after their first conversation Daley and accused agreed that the wire would be taken the following day. At three o'clock in the morning Daley and accused went to Yong Dong Po and removed the car cards from the cars and they arranged to be at Yong Dong Po in the morning to alleviate any suspicions the Koreans might have about the removal of the wire. Kim, however, had the cars shifted to the Saki Siding. During the day, accused had business at the Engineer Supply Yard and was there when Kim came to him and told him that the Korean station guards had interrupted the taking of the cable. Accused refused to go to the scene and told Kim to drop the matter. Later on accused told Kim to bring the cable back and when accused was subsequently informed by Krause that the cars involved were sealed up tightly, he believed that everything was all right. It was not until four or five days later, when Kim told him that the money for the cable would be forthcoming, that accused realized the cable had not been returned.

Accused also admitted that three months earlier he had sold a couple of cases of soap to Kim for sixty dollars.

4. Evidence for the defense.

Accused after being apprised of his rights elected to make an unsworn statement. He stated that he was a high school graduate and had attended college for six months. He married when he left college and has three children, the eldest being eleven years of age and the youngest, a year and a half. He worked six months for a municipal power company and was laid up for a year with injuries. In 1938 he went to work on the WPA as a laborer and when he quit the WPA in 1939 he went to work for the Erie Railroad. He was working as a conductor when he enlisted in the Army in 1942. He was graduated from OCS in November 1944. He had foreign service in the Philippines and Korea from August 1945 to April 1946, and was discharged in May 1946. He was recalled to active duty in January 1947 and in January 1948 was sent to Korea. His last efficiency rating which was given at Camp Stoneman was 6.1. His ratings prior to discharge had ranged from 3.4 to 5.0. He had never been in trouble before either in civilian life or in the Army.

With reference to the merits of the case he stated:

> "I am not trying to justify my position here or trying to excuse myself. Because of financial difficulties, I allowed myself to become involved in the situation I find myself in--something that was done on the spur of the moment. All I ask now is the court's consideration." (R 95).

No witnesses were introduced by the defense.

5. Accused was found guilty of larceny, in conjunction with named confederates, during the period extending from 5 May 1948 to 8 June 1948, of 20,000 light bulbs of a value in excess of fifty dollars, property of the United States (Chg I, Spec 2). The evidence shows that during the period in question accused was trainmaster at Yong Dong Po, Korea, and that boxcars containing "Operation 38" supplies were located in the train yard at Yong Dong Po. "Operation 38" supplies were property of the United States destined to be shipped to North Korea in payment for electric power furnished to South Korea. About the first part of May accused, in consideration of a debt of 130,000 yen owing to Lee, Chin Sup and a payment of $1,000.00, authorized the acquisition of a total of nineteen cases of electric light bulbs on two occasions by Lee, Chin Sup. The nineteen cases each marked "Operation 38" were taken from boxcars at Yong Dong Po. In this transaction Kim, Bong Choon, accused's interpreter, acted as broker and was present when the bulbs were taken. On the second taking by Lee, Chin Sup, Private First Class Johnny Krause was present to insure that Lee, Chin Sup did not take more than the agreed number of cases.

On two occasions, the first in the early part of May and the other a month later, accused utilized the services of Lee, Ho Yong, a "BOQ"

attendant, to sell electric light bulbs. Lee, Ho Yong was successful on both occasions and a total of 21 cases of light bulbs were taken from boxcars assigned to "Operation 38" and turned over to the purchaser. Krause was present at each taking pursuant to accused's instructions. Other testimony established that light bulbs were packed 500 to a case.

The evidence justifies the findings of the court that accused did in conjunction with the named confederates, feloniously take, steal, and carry away 20,000 light bulbs, property of the United States. The legal sufficiency of the finding as to value will be hereinafter discussed.

Accused was found guilty of conspiring with one Daley and Kim, Bong Choon to defraud the United States by agreeing to steal and sell 78 reels of lead covered air cable of a value of about $14,000.00, property of the United States, and of the commission of acts of stealing and selling in connection therewith (Chg II, Spec 1); of the larceny of 61 of the reels of a value of about $11,000.00 (Chg I, Spec 3); and of the wrongful sale of 78 drums of cable of a value of about $14,000.00 (Chg II, Spec 2). The evidence outside accused's confession shows that accused and his interpreter, Kim, Bong Choon, discussed the sale of two boxcars of "Operation 38" cable. The two boxcars in question contained 78 reels of lead covered air cable. Kim secured a purchaser and subsequently, pursuant to the purchase agreement, 61 drums of cable were removed from the two boxcars. Thus were shown an unlawful combination of at least two persons for the purpose alleged, and the connection of accused therewith, and the unlawful sale and larceny alleged. The evidence without accused's confession was sufficient to sustain the findings of guilty under consideration with the exception of Daley's complicity, and the findings as to value. The latter will be subsequently discussed. Daley's complicity in the conspiracy, sale, and larceny was established by accused's confession. The evidence hitherto related justified the consideration of accused's confession by the court (United States v. DiOrio, 150 F.2d 938).

Testimony as to the value of the goods involved in the findings of guilty hitherto discussed were given by the officer in charge of the project from which the goods were taken. This officer testified that his knowledge of the value of the goods taken was acquired from invoices furnished him by the Far East Command. By way of interpolation it may be explained that the stolen cable was, and the stolen bulbs were probably, manufactured in Japan under the occupation authorities. We have in this case, therefore, no Department of the Army price lists from which guidance may be had for a correct valuation of the goods involved. In determining whether the correct value of the goods involved has been attained by the court we must, therefore, determine the competency of the evidence of value. Captain Lapatka gave as the value of the goods their cost to the Government plus the added costs of transportation, presumably to Yong Dong Po, the place where they were stolen. In other words the

value he assigned was the cost to the Government of getting similar goods to the same place.

It would not be consistent with the exercise of common sense to require any other standard of value in this case, particularly a standard of market value. Notice may be taken of the unsettled economic conditions existing in Korea, of the circumstance that the local economy is supported by transfusions of American supplies, that a market in the sense with which we are familiar does not exist, and that a sale of the goods involved here, untainted by larceny, would result in the setting of a value far in excess of that found.

We must then consider whether Captain Lapatka was qualified to give testimony to such value. We are of the opinion that he was. We believe that the test of the competency of a witness to testify as to value has been correctly stated in Whitney v. Thatcher, 117 Mass 53, Section 719, Wigmore on Evidence, 3rd Edition:

> "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify."

Under the rule enunciated we believe clearly that the witness was qualified to testify as to value. The witness was in charge of a project transporting goods to North Korea and his liability in connection with the project was measured by the value of the goods involved. In the absence of anything indicating that he protested that the liability imposed upon him was too great, it must be presumed that the correct assessment was made. In the conduct of his business, the transportation of government goods, the witness, in measuring his liability in connection therewith, relied upon the information upon which one in his position would usually rely. We are of the opinion that Captain Lapatka's testimony as to value was competent and supported the findings of the court as to value.

Finally accused was found guilty of the wrongful sale to unauthorized persons of two cases of soap of American manufacture in violation of Circular 39, Headquarters USAFIK, 24 March 1947 (Add Chg, Spec). The prohibitions contained therein are matters of importance, directive in nature and evidently of permanent duration and as such became part of the written military law, and accused was chargeable with notice of the prohibitions (CM 291176, Besdine, 18 BR (ETO) 181,186). Among

other prohibitions of Circular 39 is the following: "Trading in American goods with other than American personnel or authorized personnel."

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

Authorized personnel are "All persons who are authorized by law or regulation to make purchases at Army sales stores, commissaries, or exchanges."

And unauthorized personnel are "Persons not defined as American personnel or authorized personnel."

American goods are defined as "any goods, wares, merchandise, or other personal property of any kind which either:

> "(1) Are of American origin, growth, production, or manufacture."

The record of trial shows that at the time and place alleged accused, with Kim, Bong Choon acting as broker, sold two cases of soap to one Lee, Chin Sup, a Korean national who was not authorized to make purchases at Army sales stores, commissaries or post exchanges. The record otherwise shows that the soap in question was packed in cartons bearing the legend "Hard Soap" and was of the type of soap commonly known as "G.I. soap." It must be concluded that the soap in question was of American production. The findings of guilty of the Additional Charge and its Specification are warranted by the evidence.

6. Accused made two pretrial statements which were reduced to writing but were not signed by him. The statements were taken down and transcribed by a stenographer who was not called as a witness. A "C.I.D." agent who was present at the times the two statements were made by accused testified that the two transcribed statements reproduced the questions asked of and the answers made by accused. The statements as transcribed were not read to accused. The two transcribed statements were admitted in evidence. There was no oral testimony as to the statements made by accused. We are of the opinion that the lack of signature by accused and the circumstance that the transcribed statements were not read to accused, are not impediments to the admissibility of the transcribed statements into evidence. While it may be preferable to have the stenographer who took and transcribed the statements judicially authenticate the statements, and better practice to have had the transcribed statements read to accused, if, as in this case, th-

evidence shows that the transcribed statements accurately reflect what was said by accused, the transcribed statements represent the best evidence of what accused said. Likewise the refusal of accused to sign the statements is not an impediment to its admissibility. A similar factual situation was considered in State v. Donatello, 148 A 776, 106 N.J.L. 397 and the court stated:

> "And where as here, a confession of accused, made voluntarily, which was reduced to writing by another person, but which the defendant refused to sign, when it was presented to him for that purpose, 'until he sees his counsel' or 'on the advice of counsel,' and for no other reason, it was not prejudicial error to admit such written confession, it appearing that the writing was clearly proved, before its admission in evidence, to be entirely accurate, with no evidence -- not even a suggestion --that there was any inaccuracy in the writing, although the accused was accorded ample opportunity if he could. In this connection it is to be borne in mind that the fundamental object of proof of a confession is to render it trustworthy."

The defense further attacked the admissibility of accused's second statement on the ground that it was involuntary. Taking at face value accused's version of the circumstances surrounding the making of his second statement we are of the opinion that the statement was voluntary and competent. Accused testified that he was told of the probability that two of the Koreans implicated with him in his offenses were communist agents bent upon discrediting the United States Army Forces occupying Korea, and that accused should clear himself of complicity in any such plot. Accused made his second statement for the purpose of clearing himself of any suspicion of disloyalty.

Confessions induced by threat or promises of reward are incompetent, and generally speaking there are two grounds for holding confessions so induced as incompetent, the constitutional right against self-incrimination, and the fear that the confession improperly induced might not be true. In this case neither of the two grounds of incompetency are present. In the first place accused was not threatened or compelled to make a statement in order to avoid prosecution for disloyalty. Thus incompetency on the ground that accused's constitutional privilege against self-incrimination was infringed is without foundation. Similarly there is no evidence of bargaining. There is no complaint that accused, being aware that he had in fact been disloyal, had struck a bargain by which in return for his confession to the offenses here charged he had been assured that he would not be prosecuted for disloyalty. There is no basis, therefore, for a belief that accused made a false confession for the purpose of evading a prosecution for disloyalty, and no other reason may be advanced upon which a doubt as to the veracity of the

statement may be based. Since the confession was not compelled, and since the verity of the confession is not open to attack, it cannot be said there existed any impediment to its admission in evidence.

7. Accused after being apprised of his rights to testify, or to make an unsworn statement, or to remain silent, elected to make an unsworn statement. After recounting his personal history, both civilian and military, he stated "Because of financial difficulties, I allowed myself to become involved in the situation I find myself in - - something that was done on the spur of the moment." This statement made before the court is subject to but one interpretation, an admission of guilt of the offenses charged and as such could be considered by the court as evidence (Par 76, MCM 1928; CM 237487, Lemley, 24 BR 11,18; CM 252086, Kissell, 33 BR 331,339; CM 260491, Dessenberger, 39 BR 287, 291).

8. Original Charge II, containing two specifications, was laid under Article of War 96, as was the Additional Charge containing one specification. There were findings of guilty of all specifications of the two Charges under consideration, a finding of guilty of the Additional Charge, but no finding as to Charge II. A finding as to a charge is determined by and contingent upon the findings as to the specification contained in the charge, and in the case of a charge containing more than one specification a finding of guilty of one specification and not guilty of the other specifications necessitates a criminatory finding as to the Charge (Par 78b, MCM 1928, p.64). When, as in this case, no finding is made as to the Charge although criminatory findings are made as to the Specifications, there is no prejudice to the substantial rights of accused (CM 241956, Blount, 26 BR 371,373). Accused's criminal liability is determined by the findings as to the Specifications.

9. Accused's personal history as disclosed in his unsworn statement has been hereinbefore set forth and since it is in substantial accord with Department of the Army records it is unnecessary again to recount it.

10. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years is authorized upon conviction of violations of Articles of War 93 and 96.

C. O. Wolfe, Judge Advocate

E. J. Berkowitz, Judge Advocate

Geo Lynch, Judge Advocate

CSJAGH CM 333181 1st Ind

JAGO, Department of the Army, Washington 25, D. C. 2[illegible]

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Morgan W. Davis, Jr., 01948577, Transportation Corps, 500th Railroad Grand Division, United States Army Military Government in Korea.

2. Upon trial by general court-martial this officer was found guilty of larceny of twenty light bulbs, property of the United States of a value of about twenty dollars (Chg I, Spec 1); larceny, in conjunction with named confederates, of twenty thousand light bulbs property of the United States of a value in excess of fifty dollars (Chg I, Spec 2); larceny, in conjunction with named confederates, of 61 drums of cable, property of the United States, of a value of about $11,000.00 (Chg I, Spec 3), in violation of Article of War 93; conspiracy to defraud the United States by stealing and selling 71 drums of cable, property of the United States, of a value of $14,000.00 (Chg II, Spec 1); wrongful sale of 71 drums of cable (Chg II, Spec 2); and wrongful sale of American produced goods in violation of standing orders (Add Chg, Spec), in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority disapproved the findings of guilty of Specification 1 of Charge I, 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.

From March 1948 until after the dates of the alleged offenses, accused was trainmaster at Yong Dong Po, Korea, and as such had access to materials belonging to the United States being transported by rail to North Korea intended as payment for electric power being furnished to Southern Korea. The overall operation for shipping materials to North Korea was entitled "Operation 38." In the period extending from 1 May to 8 June 1948 accused, through the agency of two Korean employees, sold 20,000 light bulbs belonging to "Operation 38". The bulbs, which were packed in case lots of 500, were taken from boxcars assigned to "Operation 38"; the services of an enlisted man were generally utilized by the accused in effecting the transactions.

In the early part of June 1948 two boxcars containing a total of 78 drums of lead covered cable of a value of about $14,000.00 were at Yong Dong Po awaiting shipment to North Korea. Accused in conjunction with one Daley, a civilian transportation official, and accused's Korean interpreter, conspired to steal and sell the contents of the two boxcars. An agreement of sale was consummated between accused and a Korean electrical contractor, pursuant to which the latter was to take the cable. The Korean contractor had unloaded 61 drums of cable when he was interrupted by a Korean railroad employee. The 61 drums which had a value of about $11,000.00 were subsequently recovered.

In the early part of April 1948 accused sold two cases of soap of American production to an unauthorized person in violation of a local directive.

Accused made an unsworn statement to the court in which he stated:

> "I am not trying to justify my position here or trying to excuse myself. Because of financial difficulties, I allowed myself to become involved in the situation I find myself in - - something that was done on the spur of the moment. All I ask now is the court's consideration."

4. Accused is thirty years of age, married and the father of three minor children ranging in age from a year and a half to ten years. He is a high school graduate and completed six months of college work. In civilian life he was successively employed by the WPA and the Erie Railroad. He had enlisted service from November 1942 to November 1944 when he was commissioned a Second Lieutenant. He was subsequently promoted to First Lieutenant. He was separated from the service in April 1946 and returned to active duty in January 1947. He had foreign service in the Philippines and Korea from August 1945 to April 1946. His present foreign service in Korea extends from January 1948. His efficiency ratings of record are "Excellent" and "Superior."

5. I recommend that the sentence be confirmed and carried into execution, and that an appropriate United States Penitentiary be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 199, Dec 14, 1948).

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

CSJAGH CM 333288

17 DEC 1948

UNITED STATES	)	NURNBERG MILITARY POST
	)	
v.	)	Trial by G.C.M., convened at Erlangen, Germany, 23, 24 August 1948. Dismissal.
	)	
First Lieutenant DALE W. SHORE, O-1339399, Detachment "C", 7810 Station Complement Unit, APO 66.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Dale W. Shore, Infantry, Detachment "C", 7810 Station Complement Unit, contemptuously disregarding his obligations as an officer and a gentlemen, did, at Erlangen in Germany, during the night of 24-25 June 1948, wickedly and lasciviously share his bed in the Bachelor Officers Quarters there with a woman (now deceased), Mrs. Bette Joe Griffin, the wife of Captain Harold F. Griffin, Field Artillery, Army of the United States, who was on that occasion well known to the said Lieutenant Shore as the wife of a then living officer in the Army of the United States.

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

3. The evidence for the prosecution shows that accused, a member of Detachment "C", 7810th Station Complement Unit, APO 66, United States Army, was in the military service of the United States on 24 June 1948, and on the day of trial (R 9,14).

During the morning of 24 June 1948, Mrs. Bette Joe Griffin, the wife of Captain Harold F. Griffin (R 10), attempted to commit suicide

in their home in Erlangen, Germany (R 52). That evening, at approximately 8:00 p.m., as Captain Griffin was about to leave his home to spend a social evening without Mrs. Griffin, Herwick Kock, the Griffins' German houseman, suggested to Captain Griffin that since Mrs. Griffin was intoxicated and might again attempt suicide, he, Kock, be permitted to follow Mrs. Griffin in the event she left the house. Captain Griffin approved Kock's suggestion (R 52,23,24). Subsequent to Captain Griffin's departure, Mrs. Griffin also left the house and rode her bicycle to the residence of Dr. and Mrs. Marcus with whom she visited. Kock followed Mrs. Griffin to the Marcus house and remained with her while she was there, and when she returned to her own home at approximately 10:30 p.m., he accompanied her (R 50,52). Mrs. Griffin then changed her clothes, left her home and proceeded on foot to the Erlangen Sub-Post Officers' Club in Erlangen. Kock followed Mrs. Griffin, and when he saw her enter the Officers' Club, he returned to the Griffin home (R 50).

It was about midnight on 24-25 June 1948 when Mrs. Griffin appeared in the lounge of the Officers' Club in an intoxicated condition. Accused, who was the Club Officer (R 20), James H. Railey, the manager of the snack bar, and Sergeant Chapman were drinking at the bar. Mrs. Griffin approached accused and suggested that either she buy him a drink or he buy her one, and thereupon accused bought drinks for all present (R 20, 30,35). Shortly after 1:00 a.m., Mrs. Griffin asked accused if he could furnish her with a couch on which to sleep, and when accused replied that he would take her home, she left the room (R 30,33). Anxious to close the Club at this time, accused telephoned the Griffin residence and was advised by Kock, the houseman, that Captain Griffin was not at home and that no transportation was available with which to come and get Mrs. Griffin. Accused then stated to Kock that he would bring her home in his car (R 31,51,53). Accused went to Mrs. Griffin who was in a room in the Club adjoining the bar. After assisting her down the stairs, and carrying her to his car, he placed her therein and drove away from the Club (R 31,41).

Captain Griffin, in the company of Lieutenant William E. Hartline, spent the evening of 24 June 1948 and the early morning of 25 June 1948 at the Grand Hotel in Nurnberg, Germany, and the French Club in Zirndorf, Germany (R 15). At the Grand Hotel, Griffin and Hartline drank several drinks, spoke to several people and watched the floor show when it was presented. They left the hotel when it closed and went to the French Club where they satisfied their gastronomical wants with steak. After eating, they discovered that additional alcoholic libation was not procurable since the bar had closed at 2:00 a.m. They departed from the French Club and returned to Erlangen where Lieutenant Hartline let Captain Griffin out at the Captain's home (R 15,24).

Captain Griffin entered his home and inquired of Kock, the houseman, as to the whereabouts of Mrs. Griffin. Informed by Kock that Mrs.

Griffin was at the Officers' Club and that the accused had called on the telephone and had stated that he would drive her home, Captain Griffin telephoned Lieutenant Hartline and requested him to come to his home and drive him to the Officers' Club to get Mrs. Griffin (R 15,26, 51). Lieutenant Hartline then came to Captain Griffin's home and from there transported him to the Officers' Club (R 15,51). They entered the Club and conducted a thorough but unsuccessful search for Mrs. Griffin, floor by floor and room by room (R 16,20,24,26). However, on the third floor of the Officers' Club, in one of the two rooms comprising accused's apartment, they saw and spoke with accused's fiancee, Miss Clara Traczenko, who was employed by the Officers' Club as cashier. Miss Traczenko had last seen accused in the Club below at approximately 8:00 p.m. on the previous evening (24 June 1948). He was dressed in his regular uniform at that time. She had come up to his apartment and was waiting for him to escort her to her home as was his usual custom since they had become engaged (R 21,35).

Having determined that Mrs. Griffin was not in the Officers' Club, Captain Griffin and Lieutenant Hartline returned to Captain Griffin's home. From there they proceeded to the Bachelor Officers' Quarters located on Oberst Drausnickstrasse, Erlangen, where all single male personnel of the Erlangen Sub-Post, 33rd Field Artillery Battalion and 5th Field Artillery Battalion lived. From the Charge of Quarters they obtained the location of accused's billet and went to it (R 16,17). Captain Griffin kicked down the door which was secured by a chain night-lock and rushed into the room. Lieutenant Hartline, attempting to follow Captain Griffin into accused's room but momentarily impeded by the smashed door still attached to the door frame by the chain night-lock, heard what sounded like a light switch being snapped on, a window being opened and Captain Griffin's shout of "Stop, you son-of-a-bitch, or I'll shoot." When Lieutenant Hartline finally effected his entrance into the room, it was lighted and Captain Griffin was leaning out of an outside window, the sash of which was slowly swinging shut. On a bed in the room under a pile of covers was Mrs. Griffin. Captain Griffin yanked the covers from Mrs. Griffin and she was revealed in the nude except for her brassiere (R 17,18,28). In the room was feminine wearing apparel, consisting of a black skirt and a pair of "lower underclothing," and masculine clothing consisting of a shade 33 "ETO" jacket with insignia of a first lieutenant of Infantry thereon, a khaki shirt and coat, and a pair of shade 33"O.D." trousers. In the trousers were found several keys, a cigarette lighter, accused's brown leather wallet and AGO card and a small leather purse which Captain Griffin identified as Mrs. Griffin's. The Griffins and Lieutenant Hartline then left the Bachelor Officers' Quarters, the Lieutenant taking with him the clothing and personal belongings which were found in the room (R 18).

Lieutenant Hartline then drove Mrs. Griffin, clad only in her brassiere, and Captain Griffin from the Bachelor Officers' Quarters

to their home. Upon arrival, Captain Griffin threw Mrs. Griffin and items of feminine wearing apparel out of the car (R 19,52). Captain Griffin took Mrs. Griffin into their home, dressed her and then he, she and Lieutenant Hartline returned to accused's billet at the Bachelor Officers' Quarters. From there, they proceeded to the Officers' Club and when they entered accused's apartment at about 3:30 o'clock in the morning of 25 June 1948, they were accompanied by two military policemen (R 19,20,22,28,37,43).

At a time after Captain Griffin and Lieutenant Hartline had searched the Officers' Club for Mrs. Griffin and had from there departed, but prior to their return at approximately 3:30 a.m., Miss Traczenko, from a window in accused's third floor apartment in the Officers' Club, observed accused walking along the road toward the Club. When accused did not come directly to his quarters after entering the Club, Miss Traczenko went to the room on the floor immediately below. There she found him dressed in a tee-shirt and fatigue trousers, lying on a couch (R 22,37). She induced him to accompany her to his quarters on the floor above, and shortly thereafter Captain Griffin, Mrs. Griffin, Lieutenant Hartline and the two military policemen entered the apartment. Captain Griffin indicated accused to the military policemen and said, "This is the guy, take him boys." He then walked up to accused who was sitting on a couch, called him a "Son-of-a-bitch" and other derogatory names, threatened to kill him if he could and kicked him in the face. Accused assertively declared to Captain Griffin, in the presence of all assembled, that he was innocent of the commission of any wrongful act upon Mrs. Griffin and requested that Captain Griffin verify his assertion of innocence by asking Mrs. Griffin, "if he had done anything to her." Accused was given permission by the military policemen to change to a complete uniform after which he was taken to the Erlangen Military Police Station (R 20,22,38,43,45).

It was past 3:00 o'clock on the morning of 25 June 1948 when accused, accompanied by the military policemen, the Griffins, and Lieutenant Hartline, arrived at the Military Police Station. One of the group brought in a bundle of military clothing consisting of an ETO jacket, a pair of pants and a shirt. Corporal Joseph Pidel, on duty as desk sergeant, spoke with and took a statement from each of the Griffins and Lieutenant Hartline in the presence and hearing of the accused. Captain Griffin's statement identified accused as the person who had jumped out of the window of the room where Mrs. Griffin was found when he had kicked down the door to gain entrance, while Mrs. Griffin's statement alleged that accused had promised to find her a place to sleep when she refused to allow him to take her home. Accused refused to make a statement, assigning as his reason for his refusal that Captain Griffin had threatened his life (R 44,45,46).

At approximately 3:30 a.m., Captain Leland H. Williams, the Officer of the Day at Erlangen Sub-Post during the period 24-25 June 1948, arrived at the Military Police Station in response to a call. The desk sergeant gave Captain Williams a report and the statements which he had taken from each of the Griffins and Lieutenant Hartline. Captain Williams asked accused to read the statements and Captain Griffin and Lieutenant Hartline if they had any comment or changes to make in their respective statements. Mrs. Griffin's physical condition rendered her unable to read her statement. When he received no comments, Captain Williams arranged for Mrs. Griffin to be taken to a hospital and ordered the others to return to their quarters and stay there until sent for later in the morning by the Commanding Officer. Before leaving, accused acknowledged that he was the owner of the clothing which was at the Military Police Station (R 47,48).

Later, at noon on the same day, accused lunched and drank beer with Captain Griffin and Lieutenant Hartline at the Officers' Mess at which time their relationship was cordial and there was no manifest or apparent feeling of enmity on the part of Captain Griffin toward accused (R 27).

On the day accused was brought to trial, Captain and Mrs. Griffin were both deceased (R 10).

4. The evidence adduced for the defense shows that accused was not living in the Bachelor Officers' Quarters on 24-25 June 1948 and had not lived there since March 1948. He was living at the Erlangen Sub-Post Officers' Club. He used the room assigned to him in the Bachelor Officers' Quarters only as a place to keep part of his clothes. However, First Lieutenant C. A. Arnold had spent several nights and weekends in the room at the Bachelor Officers' Quarters assigned to accused with and without accused's knowledge and permission (R 62,66,67) but Lieutenant Arnold had not used the room on the night of 24-25 June 1948 (R 68).

The accused, after having been duly advised of his rights by the court, elected to make an unsworn statement as follows:

> "I only want to make a statement on two things. I wish to tell the court that I never have had sexual intercourse with Mrs. Griffin in any way, nor have I ever shared a bed with Mrs. Griffin." (R 71).

5. Accused was arraigned on the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Dale W. Shore, Infantry, Detachment "C", 7810 Station Complement Unit, contemptuously

disregarding his obligations as an officer and a gentleman, did, at Erlangen in Germany, during the night of 24-25 June 1948, wickedly and lasciviously share his bed in the Bachelor Officers' Quarters there with a woman (now deceased) who was on that occasion well known to the said Lieutenant Shore as the wife of a then living officer in the Army of the United States.

Before pleading to the above Charge and Specification, the defense made a motion to strike the Specification on the ground that "it is so vague and indefinite that the defendant is unable to know with preciseness and exactitude what he is being charged with, that is to say, the name of the woman is not given here." (R 5) Without ruling on the motion of the defense, the court asked the prosecution if it desired to amend the Specification. The prosecution, after taking a five-minute recess, advised the court that it wished to amend the Specification to read as follows:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Dale W. Shore, Infantry, Detachment "C", 7810 Station Complement Unit, contemptuously disregarding his obligations as an officer and a gentlemen, did, at Erlangen in Germany, during the night of 24-25 June 1948, wickedly and lasciviously share his bed in the Bachelor Officers Quarters there with a woman (now deceased), Mrs. Bette Joe Griffin, the wife of Captain Harold F. Griffin, Field Artillery, Army of the United States, who was on that occasion well known to the said Lieutenant Shore as the wife of a then living officer in the Army of the United States.

When the defense acknowledged that it had no objection to the Specification as amended, the court granted prosecution's motion to amend the Specification (R 7). The defense then stated to the court that it had no challenges for cause, that it was satisfied with the court then serving, and that it did not desire to make a motion for a continuance. Thereupon, accused pleaded "not guilty" to the Amended Specification and the Charge (R 8).

A careful and thorough examination of the specification which the defense sought to strike on the grounds of indefiniteness and uncertainty shows that it fairly and sufficiently apprised the accused of the offense with which it was intended that he be charged. Further examination of the record of trial and papers attached thereto indicates that the identity of the woman whose name was initially omitted from the Specification was known to all interested parties at the time that the motion to strike was interposed. Under such circumstances, the omission from the specification of the name of the woman with whom it was alleged accused committed the

offense constituted merely an inartistic pleading. The omission, although a defect, did not prejudice accused's substantial rights, inasmuch as it was cured by amendment of the specification upon arraignment with permission of the court and accused's expressed consent (CM 322052, Shamel, 71 BR 19, 31).

Accused, thereafter, declined an offer by the court to have the matter continued. Instead, he joined issue and proceeded to trial on the merits.

The action of the court was wholly in accordance with the procedure prescribed in such cases. The defective specification, which nevertheless sufficiently and fairly apprised the accused of the offense intended to be charged, was brought to the court's attention by the defense's motion to strike. The court permitted the specification to be amended so as to cure the defect. An offense different from the one originally charged was not thereby created so as to require compliance with Article of War 70. Upon the clear showing from all the circumstances before the court that the accused had not in fact been misled in the preparation of his defense, which in the instant case was manifested by accused's declination of the offer of a continuance, the court properly proceeded with the trial (Para 73, MCM 1928, p.57).

6. We next concern ourselves with the competency of the evidence of record, exclusive of its legal sufficiency to sustain the findings of guilty. Our examination of the record of trial shows that on several occasions during the course of accused's trial, the trial court permitted the prosecution to introduce in evidence inadmissible and incompetent testimony to none of which the defense interposed any objection. The testimony deemed by us to have been admitted erroneously is set forth below:

a. Lieutenant Hartline, a witness for the prosecution, after testifying that certain items of male military uniform were seen by him in the room where Mrs. Griffin was found in bed, testified as to what was found in said clothing as follows:

"Q. Did you search the clothing?
A. Yes, I did.

Q. What did you find in the clothing?
A. Keys, various kinds of keys, cigarette lighter, a small leather purse which belonged to Mrs. Griffin which was identified by the Captain /Griffin/ and a brown leather man's wallet." (R 18) (underscoring supplied)

b. Clara Tracsenko, a witness for the prosecution, was permitted to give testimony as to certain statements made in accused's presence

and hearing by Captain Griffin, who was not available as a witness at the time of trial by reason of his prior demise, and to accused's reply thereto as follows:

"Q. Did Captain Griffin do anything?
A. No, he turned to the MPs and told them, 'This is the guy, take him, boys', something like that. I cannot tell with the same words he told.

Q. Did he speak to Lt Shore?
A. Oh, yes, he called him names, 'you so and so,' and half dozen other ones, and then he started towards him, and kicked him in the face and said 'I'll kill you, if I can and I will be glad to do it.'

Q. And then, what did Lt Shore say?
A. He said, 'Please, Captain don't do it. I haven't done nothing. I can swear on a bible. Ask your wife.'" (R 38)

It should also be noted that earlier in accused's trial Lieutenant Hartline, a witness for the prosecution, testified concerning this identical incident as follows:

"Q. Who was with you at that particular time?
A. Captain Griffin and two MPs.

Q. Will you state to the court, what, if anything, transpired?
A. I walked into the room---in front---I was the first man in the room; behind me, Captain Griffin and behind him two MPs. As I walked in the door Lt Shore was sitting on this couch. Captain Griffin walked up in front of him and said something like, 'You dirty son-of-a-bitch' or words to that effect and kicked him in the face.

PRESIDENT: Kicked who in the face?

A. Kicked Lt Shore in the face.

Q. At that particular moment, did Lt Shore make a statement?
A. Yes, he did.

Q. What did he say?

DEFENSE: I object.

LAW MEMBER: On what grounds.

DEFENSE: On grounds of hearsay.

LAW MEMBER: Objection overruled.

A. Lt Shore said, 'I didn't do anything to your wife. Ask her if I did anything to her'." (R 20).

c. Corporal Joseph Pidel, a witness for the prosecution, after giving evidence that he was the desk sergeant on duty at the Erlangen Military Police Station at the time that accused arrived there accompanied by the two military policemen, the Griffins and Lieutenant Hartline, was allowed to testify to statements made in accused's presence and hearing by Captain Griffin. The witness's testimony in that regard was as follows:

"Q. Did you have any conversation with any of these people?
A. I talked to all of them.

Q. Was Lt Shore present when you spoke to these people?
A. Yes.

Q. Where was Lt Shore standing when you talked to these people?
A. He was standing on the left side of my desk.

Q. How far?
A. About a foot and a half.

Q. Who did you speak to first?
A. Captain Griffin, I believe.

Q. What did Captain Griffin say?
A. Captain Griffin told me he went to Lt Shore's billets, broke the door down and found Mrs. Griffin in bed there, and Lt Shore was supposed to have jumped out the window.

Q. Did Captain Griffin say he saw Lt Shore jump out the window?
A. Yes.

Q. Was Lt Shore standing close to you when these words were spoken?
A. Yes.

Q. Was he within hearing?
A. Yes.

Q. Did he make any explanation?
A. He said nothing.

Q. Did you ask him if he had anything to say?
A. He said he did not want to make a statement, due to the fact the Captain threatened his life. ". (R 45)

On cross-examination Corporal Pidel was permitted by the court to testify to the statements made by Mrs. Griffin at the same time and place which testimony was as follows:

"Q. At the time you talked with Captain Griffin, did you also talk to Mrs. Griffin?
A. Yes.

Q. What was her explanation as to what happened that night?
A. She was up at the Club and got to feeling high. She went to Lt Shore and asked for a bed to sleep in.

Q. Did she give any explanation why she asked Lt Shore for a bed rather than go home?

PROSECUTION: I object. I believe it is entirely immaterial.

LAW MEMBER: Take the answer. Answer the question.

A. Mrs. Griffin said she asked Lt Shore for a bed, and the Lt said he would take her home and she did not want to go home, and after she had refused to go home, then, Lt Shore said he would try to find some place for her to sleep." (R 46).

d. Captain Leland H. Williams, a witness for the prosecution, who was officer of the day at Erlangen Sub-Post at the time of the occurrence of the incident under consideration, was permitted to give testimony with reference to all the statements made in accused's presence and hearing at the military police station and of accused's actions when confronted with them in transcribed form as follows:

"A. I was called down, and the desk sergeant told me what the situation was, and gave me reports of statements he had already taken. I read the statements and turned around and saw Mrs. Griffin sitting in a chair. So, after reading the statements, I asked Lt Shore to read the statements, also asked Captain Griffin and Lt Hartline--asked them if they had any comments or changes to make in the statements. Mrs. Griffin was in such a condition she could not read the statements. Since there were no comments, I arranged for the military police to send Mrs. Griffin to the hospital for medical attention and blood test. The officers, I told them to return to their quarters and stay there until the next morning when the Post Commander would send for them. Lt Shore asked to have his clothes checked--they were laying on the desk. I forget who checked the clothes, but I stood by with Lt Shore, and when he checked the clothes, he identified his clothes and stated that there was one set of keys missing and one shoe." (R 47,48)

As to the underscored portion of Lieutenant Hartline's testimony (a, supra), it is undeniable that it was hearsay and objectionable as such. Lieutenant Hartline's statement to the effect that the leather purse belonged to Mrs. Griffin clearly was not based on his own knowledge but on the identification of it by Captain Griffin and, therefore, that portion of the testimony which characterized the purse as the property of Mrs. Griffin should have been excluded.

The remainder of the testimony indicated by us to have been erroneously admitted, namely, that relating to the statements which each of the Griffins made in the presence and hearing of accused (b, c, and d, supra), would also be inadmissible as hearsay since the authors of the statements were not under oath, not subject to cross-examination and not available as witnesses so that the court might observe their demeanor (para 113a, MCM 1928), unless said testimony was admissible by virtue of some other rule of evidence. Although the record of trial furnishes no suggestion as to the legal basis or theory under which the trial court accepted the tender of this testimony, the circumstances under which Captain and Mrs. Griffin made their respective statements and the fact that the statements were incriminating, leads us to the conclusion that all concerned mistakenly believed that the said testimony was admissible because the incriminating statements concerned were made in the presence and hearing of the accused. We proceed to examine the evidence on this assumption.

It is generally recognized that when an inculpatory and/or accusatory statement is made by a third party in the presence and hearing of one accused of crime and is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible against him as evidence of his acquiescence in its truth. The incriminating statement is not objectionable as hearsay evidence because it is not offered to prove the fact asserted but to show the reaction of the accused to it when it was made (Wharton's Criminal Evidence, 11th Ed, Sec 656, Egan v. United States, 137 F.2d 369,380). Extreme care and caution must, however, be exercised by a court in receiving evidence of statements made by third parties in the presence and hearing of an accused (Skiskowski v. United States, 158 F.2d 177,181) for it is all too common an error to believe that everything said in the presence of an accused is, ipso facto, admissible against him (DiCarlo v. United States, 6F.2d 364,366). Thus, it has been held that it was error to admit in evidence the testimony of a witness to an incriminating statement of a third party made in his presence and hearing on the theory of tacit or silent admission, when there is evidence that accused unequivocally denied the truth of the statement (Amezaga v. United States, 296 F. 915,916; Skiskowski v. United States, supra, 182); or where his conduct or the substance or manner of his reply to the incriminating statement made in his presence was not such that an admission, partial or otherwise, of the truth of said statement could be inferred therefrom (Egan v. United States, 137 F.2d 369; State v. D'Adame, 86 Atl Rep 414,416).

Considering Miss Traczenko's testimony (b, supra), in light of the authoritative legal principles cited above, it is clear that it was admitted erroneously. Captain Griffin's statement, "This is the guy, take him boys," made by him in accused's presence to the military policemen who accompanied him when he returned to accused's Officers' Club apartment, was accusatory in nature. In addition, it identified accused to the military policemen as the object of their nocturnal call. However, accused's positive and unequivocal denial of criminality directly in response to Captain Griffin's accusation nullified the possibility of inferring from his conduct that he acquiesced in the truth thereof. Thus, Miss Traczenko's testimony regarding Captain Griffin's incriminating statement, retained its hearsay character, and the trial court erred when it eventually developed that accused had denied its truth by considering it in arriving at its findings.

With reference to the testimony of Corporal Pidel and Captain Williams concerning the incriminating statements made by Captain and Mrs. Griffin in accused's presence at the Erlangen Military Police Station, and which statements accused did not refute, contradict or deny (c and d, supra), the record of trial shows that accused, if not in technical arrest, was in effectual custody at the time the said incriminating statements were made. Although judicial opinion differs widely as to whether an inculpatory and/or accusatory statement made in the presence and hearing of a person accused of crime who is in arrest or custody is admissible against him (2 Wharton's Criminal Evidence, 11th Ed, Sec 661), the Board of Review and the federal courts have taken the view that when an accused is under arrest or in custody, and a statement which tends to incriminate or implicate him is made in his presence, he is under no duty to deny or make any statement concerning the crime charged, and that such state of arrest or custody effectively precludes the admission in evidence against him of the incriminating statement not denied by him, or of the fact that he remained silent when the incriminating statement was made in his presence and hearing (CM 248464, Adams, 31 BR 293,295; CM 270871, Shirley and Wright, 45 BR 351, 356; Yep v. United States, 83 F2d 41,43 and cases cited thereunder; United States v. Lo Biondo et al., 135 F2d 130,131). The basis of this view is that it is common knowledge that a person under arrest serves his purpose best by remaining silent, and that, therefore, an accused's silence in the face of an incriminating statement made in his presence does not raise an inference that he acquiesces in the truth thereof, but rather that he had elected to stand on his constitutional rights to remain silent (2 Wharton's Criminal Evidence, 11th Ed, Sec 661).

Thus, it becomes clear that the testimony of Corporal Pidel (c, supra), and Captain Williams (d, supra), insofar as it related to the incriminating statements made by Captain and Mrs. Griffin, respectively, in accused's presence and hearing which was incompetent as hearsay was

not admissible as a tacit or silent admission of accused for the reason that he was in custody at the time the statements were made. While in custody, accused was under no duty to deny, refute or contradict the incriminating statement of Captain Griffin which identified him as the person who was in the Bachelor Officers' Quarters' room where Mrs. Griffin was found and who departed therefrom by way of the window when Captain Griffin kicked down the room door; nor was accused required to reply to the statement of Mrs. Griffin that he had promised to find her a place to sleep; nor did accused have to comment on these statements after they had been reduced to writing and Captain Williams handed them to him for examination. Accused was fully within his rights as a person in custody being charged with an offense to refuse to make a statement to Corporal Pidel concerning the offense in the face of the incriminating statements of Captain and Mrs. Griffin. Likewise, it was his right to remain silent and to make no comment or denial after reading said statements, and neither his refusal to make a statement of his own nor his failure to deny the statements of Captain and Mrs. Griffin when they were read by him constituted acquiescence by him in their truth or rendered them admissible against him.

7. The record of trial does not contain an express waiver, oral or written, by the defense of its right to object to the incompetent testimony set forth in paragraph 6a, b, c and d, supra, nor is there any indication that the defense understood its right to object thereto and did not desire to assert it. In such a case, the failure of the defense to object to the admission of the incompetent evidence does not constitute a waiver of the right to object and render the error harmless (para 126c, MCM 1928; CM 231727, Walton, 18 BR 289,294; CM 238557, Whitford, 24 BR 281,282).

8. Having shown that accused's conviction of the offense charged was based on a body of evidence partially illegal, and further that accused did not waive his right to object to said illegal evidence, the prime question to be determined is whether the admission of the illegal evidence "injuriously affected the substantial rights of the accused" within the purview of Article of War 37. In CM 300644, Pheil, 4 BR (ETO) 91, a case involving the question of whether the erroneous admission into evidence of an accused's confession prejudicially affected his substantial rights, the Board of Review ably stated the rule and test applicable in such cases at page 104 in the following language:

"The rule governing such situation has been succinctly stated:

> 'It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence

of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. CM 127490 (1919): (Underscoring supplied).

'The rule 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. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. CM 130415 (1919).' (Dig Op JAG, 1912-30, sec 1284, p.634) (Underscoring supplied).

"The foregoing principles were elaborated in the dissenting opinion of Colonel Archibald King in CM 211829, Parnell. Colonel King's opinion was approved by The Judge Advocate General and formed the basis of the subsequent action of the Secretary of War.

"The fate of the accused in the instant case is not to be determined by the simple expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. Such process would be an over simplification and would wholly ignore the actualities of the trial. The court had before it both legal and illegal evidence. It is an impossibility for the Board of Review to measure the influence of the illegal evidence upon the court, and should it attempt to do so it would be usurping the functions of the court (CM ETO 132, Kelly and Hyde). A reviewer in considering the record of trial to determine whether the 'legal evidence of itself substantially compelled a conviction' cannot ignore the impact upon the mind of the court of the illegal evidence. For this reason the Board of Review in CM 127490 (supra) particularly qualified its pronouncement by the statement 'nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction.' (Underscoring supplied). An accused has not received a fair and impartial trial if his conviction is based upon a body

of evidence part of which is legal and which standing alone possesses only sufficient weight to tip the scales in favor of its sufficiency but does not contain the robust quality of moral certainty and determinativeness, and part of which is illegal composed of confessions which are some of the 'strongest forms of proof known to law.' The Board of Review undoubtedly had this situation in mind when it adopted the qualification last quoted in its holding CM 127490 (supra)."

It is for the Board of Review to determine, by applying the test laid down above, whether the residuum of legal evidence, by itself, which remains in the record of trial after the illegal evidence has been eliminated therefrom, is or is not "of sufficient probative force as virtually to compel a finding of guilty (CM 130415, supra)." Were we to regard the record of trial in light of all the evidence therein contained, it would show that when Captain Griffin effected his violent entrance into the room assigned to accused at the Bachelor Officers' quarters, accused fled therefrom by way of the window; that the practically nude Mrs. Griffin was found reposing in bed in the room; and that male military clothing of a first lieutenant of Infantry found in the room contained accused's AGO card and leather wallet and Mrs. Griffin's leather purse. Such a body of evidence supplied more than ample basis for the court to conclude that accused wickedly and lasciviously shared his bed with Mrs. Griffin at the time and place alleged. Indeed, its forcefulness was sufficient, to exclude "any fair and rational hypothesis except guilt" (para 78a, MCM 1928) and to dissipate any presumption of innocence. However, when the erroneously admitted testimony is expunged, the probative potency of the legal evidence of record is vastly diminished. The record of trial then merely shows that Mrs. Griffin left the Officers' Club with accused; that she was later found practically nude in bed in a Bachelor Officers' Quarters' room assigned to accused; that in said room was found an Infantry first lieutenant's uniform containing items of personal property belonging to accused; and that accused subsequently returned to the Officers' Club and was found in a room therein reclining on a couch and attired in a tee-shirt and fatigue trousers.

Although this is wholly circumstantial evidence, it might, nevertheless, have been sufficient to support the findings of guilty (CM 286524, Butler, 17 BR (ETO) 23,27) if the record of trial had not been initially tainted by the admission of incompetent evidence. But once any substantial quantity of illegal evidence is received at the trial of an accused, more than a determination that the legal evidence of record is sufficient to support the findings of guilty is required if the reception of the illegal evidence is not to be held to vitiate said findings. The test laid down in the Pheil case, supra, is that the

remaining legal evidence must be "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (p.105, citing CM 130415). We assume, without deciding, that after the illegal evidence has been excluded, enough legal evidence remains of record to support the conviction and proceed to determine whether or not it "virtually," "substantially" and "practically" "compels" a finding of guilty.

It may be said of the evidence of record, aliunde the illegal evidence, that it compels the inference that accused brought Mrs. Griffin to his assigned Bachelor Officers' Quarters' room. Similar compulsion, however, is not present with reference to other essential elements of the offense charged, namely, that his purpose in so doing was "wicked and lascivious" and that Mrs. Griffin's occupancy of the bed in the room was in furtherance of that purpose. The vastly different evidential picture assumed by the record of trial when the illegal evidence is eliminated therefrom makes it at once apparent that the illegal evidence which showed that it was accused who fled from the room when Captain Griffin broke in, that Mrs. Griffin's leather purse, together with personal belongings of accused, was found in the military uniform in the room, and that accused remained silent in the face of incriminating statements made in his presence and hearing, provided the body of evidence which compelled the finding of accused's guilt of the offense alleged. But with the exclusion of the illegal evidence from the record, not only is the forceful probative influence of the illegal evidence effaced, but its countervailing and nullifying effect on other legal evidence, favorable to the accused's cause, is also removed. The record of trial, after the exclusion of the illegal evidence, then shows prosecution's witnesses to have testified that the person in the room with Mrs. Griffin was not identified (R 27,29), that there were no signs of "wickedness" in the room when Mrs. Griffin was found (R 28), that there was no previous cordiality or intimacy between accused and Mrs. Griffin (R 23,40), and that accused and Captain Griffin convivially broke bread and drank beer in company of each other at noon following the incident (R 27). It also should be noted that the record of trial fails to show, other than by similarity of items and persons present, that the military clothing taken by Lieutenant Hartline from accused's assigned Bachelor Officers' Quarters' room (R 18) was the same clothing of which accused claimed ownership at the Military Police Station (R 48), or how accused was dressed at the time he returned to the Officers' Club (R 36,37). Thus, it is clear in the instant case that it was the illegal evidence and its neutralizing and nullifying effect on other evidence of record which removed all question of reasonable doubt from the mind of the court and that the legal evidence of record, standing alone, lacks that quality of certainty and determinativeness necessary to classify the remaining

legal evidence as "compelling" of a finding that accused wickedly and lasciviously shared his bed with Mrs. Griffin at the time and place alleged. It is, therefore, the opinion of the Board of Review that the reception and admission in evidence of the illegal evidence prejudiced the substantial rights of accused.

9. The records of the Department of the Army show that accused is 32 years of age and married. He is a high school graduate. In civilian life he was a welder and diesel mechanic. He had enlisted service from 18 January 1945 to 1 November 1945 on which latter date he was commissioned a second lieutenant. He was subsequently promoted to first lieutenant 27 April 1947. His service in the European Theater commenced on 6 January 1948. His efficiency reports of record show four ratings of "Excellent" and two of "Superior."

10. The court was legally constituted and had jurisdiction of the person and the offense. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

C. D. Woefe, Judge Advocate

C. J. Berkowitz, Judge Advocate

J. W. Lynch, Judge Advocate

CSJAGH CM 333288 1st Ind

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

TO: Secretary of the Army

1. In the case of First Lieutenant Dale W. Shore, O-1339399, Detachment C, 7810 Station Complement Unit, APO 66, attention is invited to the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in the holding only in part.

2. Accused was found guilty of a Specification laid under Article of War 95 alleging that "contemptuously disregarding his obligations as an officer and a gentleman" he did "wickedly and lasciviously share his bed in the Bachelor Officers Quarters" with a woman known to be the wife of another officer. The Board of Review is of the opinion that because of the erroneous admission in evidence of certain hearsay statements of the woman and her husband (both being deceased at the time of trial) the findings must fall in their entirety. It is my view that there is competent evidence, unaffected by hearsay, that, with a wicked purpose, accused shared his bed with the woman in that in his presence he permitted her to occupy a bed in his quarters while she was extremely drunk under circumstances indicating an intention to occupy the bed with her, and that his action was discreditable and violative of Article of War 96. There is no adequate proof that he actually occupied the bed with the woman, and I do not, therefore, find sufficient basis for the finding that accused acted in contempt of his obligations, or lasciviously, or that he was guilty of dishonorable conduct within the purview of Article of War 95. The findings should be modified accordingly.

3. The competent evidence shows that a Mrs. Griffin, wife of a Captain Griffin, went to an Officers' Club in Erlangen, Germany, of which accused was the officer in charge, and late at night, while very drunk, asked accused to find a bed on which she might sleep. He said he would take her to her home whereupon she left him. Later accused telephoned to her home and told a servant, the only person present, that he would bring Mrs. Griffin to her home nearby. He then led or carried her to his automobile and left the vicinity of the club. A short time later Captain Griffin and another officer broke into a room assigned to accused (but not habitually occupied by him) in a Bachelor Officers' Quarters some considerable distance from the Officers' Club. A noise such as might be made by the opening of a window in the room was heard after the door was broken, but before the witness to this fact effected entry. Mrs. Griffin was in a bed in the room, beneath covers. She was in the nude except for a brassiere. No visible signs of intercourse were observed. No one else was present.

Captain Griffin, on breaking into the room, went to the window, leaned out and shouted a command to stop "or I'll shoot." A blouse and trousers in the pockets of which articles belonging to accused, including an identification card bearing his name, were in the room.

At about 3:00 a.m., a short time after the room was raided accused was found at the Officers' Club dressed in fatigue garments. Captain Griffin confronted him there, kicked him in the face, and threatened to kill him. Accused said "I didn't do anything to your wife. Ask her if I did anything to her." On the same day accused and Captain Griffin had lunch together and were apparently on friendly terms.

A witness testified for the prosecution (hearsay) that in the course of questioning at a Military Police station soon after the disturbances, Captain Griffin stated that accused had been in the room in the Bachelor Officers' Quarters with Mrs. Griffin and had jumped from the window. In response to questions by the defense this witness testified that Mrs. Griffin stated that she had refused to go to her home and that accused had then said that he would try to find her a place to sleep.

Accused made an unsworn statement that he had never had intercourse with or shared a bed with Mrs. Griffin.

4. Accused is a high school graduate, 32 years of age, who had enlisted service from 18 January 1945 to 1 November 1945, on which latter date he was commissioned. His efficiency ratings as an officer have been excellent and superior.

5. It is recommended that so much of the findings of guilty of the Specification as involves the words "contemptuously disregarding his obligations as an officer and a gentleman" and "lasciviously" be disapproved, that only so much of the finding of guilty of the Charge as involves a finding of guilty of violation of Article of War 96 be approved, and that the sentence be confirmed but commuted to a reprimand and forfeiture of $100 pay, and that the sentence as thus commuted be carried into execution.

6. I inclose herewith two forms of action: Form A to be used if you agree with the holding by the Board of Review and Form B to be used in the event that you agree with my recommendations.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 5, Jan 14 1949).

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

CSJAGK - CM 333420

29 NOV 1948

UNITED STATES	YOKOHAMA COMMAND
v.	Trial by G.C.M., convened at APO 503, 10 September 1948. Dismissal
Captain ROBERT K. HUMMEL (0-40874), Eighth Army Transportation Section, APO 503	

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

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

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

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

Specification 1: In that Captain Robert K Hummel, Transportation Corps, Eighth Army Transportation Section, APO 343, being then and there a married man, having a lawful wife living, did, at the Bachelor Officers' Quarters, Eighth Army Transportation School, in the vicinity of Tokyo, Honshu, Japan, on or about 24 February 1948, wrongfully, dishonorably and unlawfully have sexual intercourse with one, Jane Parmenter, a woman not his wife.

Specification 2: In that Captain Robert K Hummel, ***, did, at or in the vicinity of Tokyo, Honshu, Japan, between 15 November 1947 and 24 February 1948, openly, licentiously, wrongfully and unlawfully occupy a bedroom in the Bachelor Officers' Quarters at the Eighth Army Transportation School, APO 181, with Jane Parmenter, a woman not his wife.

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

Specifications 1 and 2: (Findings of not guilty).

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

Specification 1: In that Captain Robert K. Hummel, ***, while officer of the day at the 8001st Transportation Corps Depot,

APO 503, did, at or in the vicinity of Yokohama, Japan, on or about 22 May 1948, wrongfully have with him within the said depot area in a 1/4 ton truck, a woman, a Japanese national, to the prejudice of good order and military discipline.

Specification 2: In that Captain Robert K Hummel, ***, did, in the vicinity of Yokohama, Japan, on or about 22 May 1948, wrongfully transport a female Japanese national in a United States Government owned vehicle.

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I, the Additional Charge, and the specifications thereto, but not guilty of Charge II and its specifications. No evidence of previous convictions was presented. Accused 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. For the Prosecution

It was stipulated by the prosecution and defense, accused specifically assenting thereto, that at all times between the dates, 15 November 1947 and 22 May 1948, the accused, Captain Robert K. Hummel, was lawfully married to Onita W. Hummel and that she resided in Battle Creek, Nebraska (R 10).

On motion of the prosecution, and over the objection of defense counsel, the court took judicial notice of Circular No. 133, Headquarters 8th Army, dated 9 May 1946, which is as follows:

"HEADQUARTERS EIGHTH ARMY
United States Army
Office of the Commanding General
APO 343

"CIRCULAR
NUMBER 133 9 May 1946

TRANSPORTATION OF JAPANESE IN GOVERNMENT VEHICLES.

"1. Section VI, Circular No. 74, this headquarters, 14 March 1946, is rescinded.

"2. The transportation of Japanese females in United States Government vehicles is prohibited except in the following cases:

a. Employees of the United States Government are authorized to be transported upon official business.

b. Transportation of groups of Japanese by Red Cross representatives, special service officers, or officers performing similar functions in small units,

when such transportation is for authorized social functions in troop locations.

"3. In either of the exceptions authorized in paragraph 2, the driver of the vehicle, or the officer in charge of the convoy will bear a written authorization signed by the company or higher unit commander authorizing this use of transportation. Authorization will not be general but will be specific for each trip.

"4. Nothing in the above exceptions will be construed as authorizing the transportation of Japanese females for the purpose of individual company or entertainment. (AG 451)(D)

"BY COMMAND OF LIEUTENANT GENERAL EICHELBERGER:

OFFICIAL:

CLOVIS E. BYERS
Major General, GSC
Chief of Staff

WARD W. CONQUEST
Colonel, AGD
Adjutant General

DISTRIBUTION: 'Z' plus 'A'

CERTIFIED TRUE COPY

/s/ George E. Slade, Major FA
Investigating Officer"

At about 0530 hours on the morning of 15 November 1947, First Lieutenant Thomas L. Bell, Headquarters 8th Army Transportation School, while engaged in the performance of his duty as officer of the day, passed accused's room located in the Bachelor Officers' Quarters at the school and observed accused inside the room dressing. Miss Jane Parmenter was also in the same room and she was clothed only in a slip. There were no shades on the windows to the room, which was on the direct route Lieutenant Bell followed in traveling from his quarters to the Transportation School Headquarters. Again on 15 December 1947 Lieutenant Bell was officer of the day and as he passed accused's room, at about the same time as previously mentioned, he observed accused and Miss Parmenter leaving accused's quarters. On cross-examination Lieutenant Bell asserted that he had never worn glasses, that he well knew the parties to whom he referred and that he positively identified them on the occasions mentioned (R 65-68).

Miss Machie Suzuki testified that in December 1947 and January 1948 she was employed as a maid in the officers' quarters where accused was billeted at the 8th Army Transportation School. She was acquainted with Miss Jane Parmenter, having met her in accused's room. There was only one bed in his room and on occasion when she had been called to serve drinks she saw Miss Parmenter in the bed and at other times sitting in a chair. The witness recalled that on two or three occasions Miss Parmenter was in

the bed dressed in her slip or nightgown. In the normal course of her duties Miss Suzuki observed "the girl's clothing hanging in Captain Hummel's room." At other times she saw Miss Parmenter wearing those clothes. On cross-examination the witness stated that she was sure the incidents she related occurred more than four different times between November 1947 and February 1948. On occasion the accused was with "the girl" in his room and at other times she was alone therein (R 54-64).

Mr. Kiishi Okuda testified that he was employed as interpreter and custodian of the officers' quarters at the 8th Army Transportation School. At about "Christmas time" in 1947 he had met Miss Jane Parmenter and thereafter observed her in company with the accused at the club and also in accused's room. On three or four occasions in the early months of 1948 he had served drinks to both parties in accused's room. It was after 2000 hours when he performed these duties and accused was usually dressed in a lounging robe and Miss Parmenter wore "what you call ladies' underwear." On one or more occasions when he had served wine she was in the bed. At about 0200 hours on one morning in February accused had awakened the witness saying, "I got Miss Parmenter with me" and "I'm hungry and I want some food or drinks." On cross-examination the witness asserted that he could not recall the exact dates of the incidents related because it had been seven or eight months prior to the trial (R 44-54).

Major Benjamin A. Lentz, TC, Commandant, Headquarters Eighth Army Transportation School, Tokyo, Honshu, Japan, testified that accused was a member of his command during the latter part of 1947 and until about 28 February 1948. At about 0500 hours on 24 February 1948 witness heard the noise of a jeep being started near accused's room in the Bachelor Officers' Quarters area at the 8th Army Transportation School. Through the window in the front room of his quarters he observed a woman with features similar to those of Miss Jane Parmenter getting into a jeep with the accused. The parties drove away and Major Lentz went to accused's room and turned on the light. There were two glasses and a bottle on a table near the bed. One of the glasses was stained with lipstick. "The bedclothes and sheet were drawn back over the foot of the bed in a mess. There was lipstick on the pillow and several bobby pins in the bed. About midway down the bed there were several wet spots." Major Lentz searched the area for accused but could not find him. Shortly before 0600 hours the witness, in company with Lieutenant Greene, the officer of the day, returned to accused's quarters and found his jeep parked outside and accused in his room undressing. The major, in an informal manner asked accused, "Did you have Janie in your room overnight?" Accused replied, "No." After a pause Major Lentz said, "Don't lie to me, Robert." After another pause accused said, "Yes, I did," and "I'm sorry, Ben." He thereupon requested to talk to Major Lentz in private and Lieutenant Green left the room. After some conversation in which the major recalled to accused that his conduct had become a matter of much notoriety and that he had previously warned him in regard to his relations with Miss Parmenter, Major Lentz told accused that "You leave me no alternative but to prefer

charges against you." Major Lentz and accused had been on friendly terms at all times for the period of about seven years acquaintance and at the time of the foregoing incident accused was executive officer to the major (R 17-44). The defense objected to the admission in evidence of the statements made by accused to Major Lentz on the grounds that accused was not advised of his rights (R 18).

Corporal Earl J. Proctor, 793rd Transportation Base Company, testified that he was "Charge of Quarters TC Depot" on the night of 21-22 May 1948 and accused was "OD." At about midnight and as a result of a telephone call he had received from the guard, Proctor made an investigation and found that accused and a Japanese girl whom he identified as a prostitute were sitting in a U.S. Army jeep in "Area 3." This area was "off limits" to Japanese nationals. Proctor identified the girl as a Japanese he had seen frequently "around the Sakuragi-cho Station" (R 74-79). The record discloses that accused was acting officer of the day in accordance with a mutual agreement with Major Paul V. Plapp whom he "owed" a tour of several months standing (R 69).

Private Enos M. Sierre, Headquarters Company, 2nd Medium Port, was on military police duty at the Sakuragi-cho Station on the night of 21-22 May 1948. He saw the accused in a jeep with a Japanese girl and requested a trip ticket. Accused had none. Proctor asked accused if he was authorized to "carry" a Japanese female, to which accused replied, "No" and stated also that he "knew it was wrong" (R 79-82).

Mr. Shonosuki Kaneko, a civilian guard, testified that accused entered "Area 3" with the Japanese girl in his jeep at 2348 hours on the night in question. He had reported the incident to the Charge of Quarters. Accused had requested him to "Please do not tell anybody what you saw"(R 82-88).

4. For the Defense

Miss Theodora C. Black, Natural Resources Section, G.H.Q., stated that she had known accused since October 1947, and had observed him in company with Jane Parmenter at the officers' club. She asserted that accused had a good reputation among the girls and officers who attended the club (R 92). Major Harold S. Conway testified that he had entertained accused in his home and had observed him at the club. He never saw any acts of misconduct on the part of accused (R 94). Major Harold S. Sanderson, TC, Port Command, Kobe Base, testified that he had known accused since 1942 when they were on duty at Camp Edwards, Massachusetts. He had also observed accused's performance of duty at Fort Eustis, Virginia, and at that time considered him to be a superior officer (R 96).

The president of the court explained to accused his rights as a witness and he elected to remain silent (R 97).

5. Rebuttal

The prosecution called Major Lentz in rebuttal to the character evidence presented by the defense. The witness stated that he had known accused for several years, that he had a good reputation in the States among his fellow officers but that since joining his command the "boys in general didn't have a very high regard for him." Many of the personal problems brought to the attention of the witness by members of the command involved conduct of the accused (R 98).

6. Comment

Before pleading to the general issue defense counsel moved the court to strike either Specification 1 or 2 of the Additional Charge, asserting that they were unreasonably duplicitous. When this motion was overruled counsel moved to strike both specifications on the ground that no unlawful act was pleaded.

Specification 1 of the Additional Charge alleges that at the time and place set forth therein accused did "wrongfully have with him within the said depot area in a 1/4 ton truck, a woman, a Japanese national, to the prejudice of good order and military discipline." The depot area, or Area "3" as it appears to have been described, is shown to have been "off limits" to Japanese nationals. The accused was the officer of the day. He entered this area with the Japanese girl and when the civilian guard questioned the girl's presence with him in the jeep accused requested the guard to not report what he had seen. Upon this state of facts the court was justified in concluding that the girl's presence in the jeep had no relation to accused's official duties and that his conduct was wrongful as alleged. Accused's statement to the guard shows that he, the acting officer of the day, knew the area was "off limits" to the girl and that his condonation of her presence therein was prejudicial to good order and military discipline.

Specification 2 appears to have been laid under Circular No. 133, Headquarters Eighth Army, 9 May 1946, heretofore quoted. The circular denounces "transportation" of Japanese females in U.S. Government vehicles with certain exceptions not here material. To transport means to convey, to carry or convey from one place to another. The evidence shows that shortly after accused was seen sitting in the jeep with the Japanese girl, in the "off limits" area, he arrived with her at the railroad station where the military police questioned his authority to "carry" her. He told the military police that he did not have a trip ticket and knew it was wrong. This evidence is sufficient to establish the wrongful transportation of the girl within the meaning of the circular. It shows also that accused knew his act was wrongful. Counsel argued that inasmuch as Specification 1 did not allege that the described area was "off limits" and Specification 2 made no reference to Circular 133 neither specification alleged a military offense. He also contended that there is no evidence tending to show that

accused had knowledge that the depot area was "off limits" to Japanese nationals or that he was aware of the provisions of Circular 133. As we construe the language of both specifications, the word "wrongfully" used therein is sufficient to apprise accused that the act denounced was in violation of some law, regulation or order applicable to military personnel. In the absence of a showing to the contrary an accused is charged with knowledge of the provisions of the circulars, directives and orders applicable generally to his command (CM 332590, Loughlin; CM 307372, Manly, 61 BR 79, 82). The situation here is to be distinguished from that prevailing in CM 308766, Lattimer, 4 BR (A-P) 139,145, where knowledge of the provisions of the circular in question was a disputed issue, and also from CM 330683, Snyder, where the act denounced was said to have been a violation of the by-laws of a noncommissioned officers' club. Having knowledge then that the area described in Specification 1 was "off limits" and that the circular prohibited the transportation of Japanese females in Government vehicles, accused cannot successfully complain that he was misled by the failure of the specifications to set forth specifically the orders or directives violated. We are also of the opinion that the specifications are not unreasonably duplicitous within the meaning of paragraph 27, Manual for Courts-Martial, 1928.

Objection was entered by counsel to the action of the court in taking judicial notice of the provisions of Circular No. 133 without actually receiving the same into evidence, but the authority of the court in this regard is beyond question (MCM, 1928, par 125, p 135).

We now consider briefly the evidence relative to the findings of guilty of Charge I and its specifications. It may be stated that, irrespective of one's personal concept of what is improper moral and social conduct, illicit sexual relations and cohabitation by persons in the military service have uniformly been held to constitute offenses against the military code (CM 322254, Weston, 71 BR 99,101). No citations from the numerous State statutes and the Code of the District of Columbia are necessary to establish that the military code is not unique in this respect. And it may well be that such relationships on the part of an officer, in the more aggravated forms, may constitute a violation of Article of War 95 (CM 276250, Harvey, 48 BR 239,247). This is particularly true in cases where, by virtue of the attendant notoriety among military personnel such misconduct tends to render the offender dissolute in the eyes of his associates, thereby compromising his status as an officer.

The proof shows that Jane Parmenter was not accused's wife. On 24 February 1948 at an early morning hour accused's commanding officer observed the two leaving accused's quarters. The results of Major Lentz's investigation of the incident, including the findings of feminine accessories in accused's bed leave no doubt but that her presence therein culminated in illicit sexual relations as alleged. Counsel contends that although such relations may be shown by circumstantial evidence, the proof in this case

is insufficient to establish the act. But the circumstantial evidence is such that the court did not, nor do we, interpret the facts as showing merely a platonic association between the parties devoid of the natural inclinations of the flesh. Over the several months' period of time alleged in Specification 2 of Charge I accused was observed quite frequently in the presence of the person named, and under the most intimate circumstances in his room. On various occasions her clothes were observed to be kept therein. The regularity of her presence in his room at night and morning appears to have become a matter of common knowledge among the Japanese servants at the quarters and also among military personnal at the school. Conceding that cohabitation implies more than a casual or isolated sojourn, there can be no doubt that the proof in this case establishes the fact alleged and we deem it more appropriate to leave the details to the record.

It has been suggested by defense counsel in his brief that the confession, or admission, of accused to Major Lentz after the latter had said, "Don't lie to me, Robert," should have been excluded as accused had not been advised of his rights. We have no reason to assume, however, that accused, a regular Army officer with considerable military experience, was not cognizant of his rights and he made no such contention at the trial. The parties to that transaction were personal friends of long standing. No military order as such was given accused. Major Lentz merely asked accused a question and told him not to answer falsely. Military titles were not employed and accused took his commanding officer aside and made what appears to be a free and voluntary statement expressing regret that the incident had occurred. The failure to read or recite the provisions of Article of War 24 will not necessarily vitiate a confession otherwise voluntarily given (CM 255335, Besherse, 50 BR 73,85), and an adjuration to speak the truth is not coercion within the meaning of Article of War 24 (CM 296141, Nichols, 28 BR (ETO) 371,372). Other questions raised have been considered.

6. Accused is 30 years of age. He graduated from Culver Military Academy, Culver, Indiana, and the University of Mississippi. He was an instructor and coach at Culver when ordered to active duty as a second lieutenant of Infantry in June 1942. His adjectival efficiency ratings have been either superior or excellent. In February 1947 accused was appointed first lieutenant, Quartermaster Corps, Regular Army.

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

Edwin T. Gilmer, Judge Advocate

James W. Bull, Judge Advocate

(On Special Duty), Judge Advocate

CSJAGK - CM 333420 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Robert K. Hummel (O-40874), Eighth Army Transportation Section, APO 503.

2. Upon trial by general court-martial this officer, a married man, was found guilty of wrongfully having sexual intercourse with a woman not his wife and of wrongfully occupying a bedroom with a woman not his wife in the bachelor officers' quarters, 8th Army Transportation School, in violation of Article of War 95 (Charge I and Specs 1 and 2 thereof); of wrongfully having a Japanese woman with him in a depot area and of wrongfully transporting the woman in a U. S. Government vehicle in violation of Article of War 96 (Add'l Charge and Specs 1 and 2 thereof). 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 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 sentence and to warrant confirmation of the sentence.

At the time of the alleged offenses accused, a married officer, was excecutive officer of the 8th Army Transportation School, Tokyo, Japan. His wife then resided in the United States. During the latter part of 1947 and until about March 1948 he was seen regularly in company with one Jane Parmenter. In the early morning of 15 November 1947 the officer of the day at the school, while passing accused's quarters in the bachelor officers' area, observed accused and Miss Parmenter dressing inside his room. At about the same hour of the morning a month later the same officer observed them leaving accused's quarters. On numerous occasions during the period first mentioned, the Japanese servants attached to accused's quarters observed Miss Parmenter in his room, sometimes clothed in her sleeping apparel and in bed. They also noticed certain of her clothes were left in accused's room. In the early morning of 24 February 1948 Major Benjamin A. Lentz, TC, Commandant of the School, who had previously warned accused concerning his conduct with Miss Parmenter, observed accused taking her away from his quarters in a jeep. He went to accused's room where he found bobby pins in his bed, damp spots near the center thereof,

and lip stick on a glass which was near a bottle on the table. Later accused returned to his room and after questioning by Major Lentz admitted that the girl had been with him the previous night.

On the night of 21-22 May 1948, accused was acting as officer of the day. At about midnight he was seen in the depot area with a Japanese girl in his jeep. The area was "off limits" to Japanese nationals. Later military police saw him with the same girl near a railroad station in the Tokyo area and requested a trip ticket. He had none. They also asked him if he had any specific authority to "carry" the girl in a Government vehicle. He replied in the negative and stated that he "knew it was wrong". The record shows that 8th U.S. Army had by a circular of long standing prohibited the transporting of Japanese females in military vehicles.

4. Accused is 30 years of age. He graduated from Culver Military Academy, Culver, Indiana, and the University of Mississippi. He was an instructor and assistant coach at Culver when ordered to active duty as a second lieutenant of Infantry in June 1942. His adjectival efficiency ratings have been either superior or excellent. In February 1947 accused was appointed first lieutenant, Quartermaster Corps, Regular 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 it meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
Incl 1 - Record of Trial
Incl 2 - Form of action

(GCMO 198, Dec 14 1948).

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

19 JAN 1949

CSJAGN-CM 333433

UNITED STATES v. Private First Class FORTUNO ALVARO-RODRIGUEZ (RA 30433018), Headquarters and Headquarters Battery, 98th AAA Gun Battalion (SM), Fort Buchanan, Puerto Rico.	UNITED STATES ARMY FORCES, ANTILLES Tried by G.C.M., convened at Fort Brooke, 1 October 1948. Dishonorable discharge and confinement at hard labor for one (1) year. The Detention and Rehabilitation Center, Fort Buchanan, Puerto Rico.

HOLDING by the BOARD OF REVIEW
BAUGHN, SKINNER and CRANE, 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 93d Article of War.

Specification 1: In that Private First Class Fortuno Alvaro-Rodriguez, Headquarters and Headquarters Battery, 98th AAA Gun Bn (SM), Fort Buchanan, Puerto Rico, did, at Army Beach, Fort Brooke, Puerto Rico, on or about 29 August 1948, with intent to do him bodily harm, commit an assault upon Corporal Ambrosio Vazquez, by willfully and feloniously striking the said Corporal Ambrosio Vazquez on the body with his hands.

Specification 2: In that Private First Class Fortuno Alvaro-Rodriguez, Headquarters and Headquarters Battery, 98th AAA Gun Bn (SM), Fort Buchanan, Puerto Rico, did, at Army Beach, Fort Brooke, Puerto Rico, on or about 29 August 1948, with intent to do her bodily harm, commit an assault upon Virginia Gonzalez, by willfully and feloniously striking the said Virginia Gonzalez on the body with his hands.

He pleaded not guilty to and was found guilty of the Charge and both Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the Detention and Rehabilitation Center, Fort Buchanan, Puerto Rico, or elsewhere as the Secretary of the Army might direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence, summarized briefly and in pertinent part for reasons hereinafter set forth, is as follows:

a. Prosecution: At about 2230 hours, 29 August 1948, Virginia Gonzalez, a Puerto Rican domestic servant, was attending a dance at Army Beach, San Juan, Puerto Rico, when a soldier she did not know asked her to dance. After she had danced with him two or three times, the soldier invited her to have a beer with him. While with the soldier, it commenced to rain. During their search for shelter, the soldier tried to kiss Miss Gonzalez and told her that God had made her for him. He also stated that his advances meant nothing "because you are going to be my wife." She tried to return to her friends but the soldier grabbed her and pulled her into the ladies rest room. There he "pressed" her neck and chest, struck her upon the face and body, apparently to prevent an outcry, and tried to "make contact" with her (R. 7-9, 11).

Upon hearing cries and protestations emanating from the ladies room, Corporal Ambrosio Vazquez, the caretaker at Army Beach, entered the room and saw the soldier, with "*** his penis in his right hand ***", pushing Miss Gonzalez against the wall (R. 16, 18, 20). When Corporal Vazquez attempted to turn on a second and larger light in the rest room, the soldier struck him above the left eye with his fist, knocking him to the floor. The assailant continued to strike the Corporal until Miss Gonzalez screamed whereupon the assailant fled (R. 16-18, 19, 20, 24). Corporal Vazquez called upon the guard to shoot but the soldier made good his escape (R. 17, 24).

Miss Gonzalez, who was nervous and crying, was taken to an Army hospital and a sedative was administered to her. Corporal Vazquez was likewise taken to the hospital where an examination disclosed swelling around his left eye. In addition, he could not move his jaw for several days (R. 15-20).

At the trial, as well as during the pretrial investigation, Miss Gonzalez insisted that the accused was not the soldier who assaulted her (R. 9, 12, 34). Even upon recall, Miss Gonzalez denied that, during a recess interview with the Trial Judge Advocate at the Post Exchange, she had stated the accused was the person who had assaulted her (R. 33).

Contrary to Miss Gonzalez's testimony, Corporal Vazquez identified the accused as the assailant, testifying that he had known the accused for more than four or five months and had seen him several times each week at Army Beach (R. 15-18, 20). Earlier in the evening Corporal Vazquez had noticed that the accused was wearing a light orange sport shirt or sweater and light blue civilian pants. He was also carrying a camera (R. 21, 22). Corporal Vazquez told accused that dancing in a sweater was not permitted. The accused

then found a shirt to wear and put the sport shirt or sweater and camera behind the radio and amplifier (R. 22). A camera and sport shirt were later found upon the premises.

Corporal Jose M. Vidal, the charge of quarters at accused's organization on 29 August 1948, testified that accused came into the orderly room at about 2300 or 2330 hours and instructed him to state that accused arrived at the battery at "nine thirty", should Corporal Vidal be asked. The next day accused told Corporal Vidal to say that accused "bought me ice cream that night in the PX". Corporal Vidal followed accused's instructions at the investigation conducted by Colonel Davison. However, after accused explained to Corporal Vidal "That he (accused) was in trouble downtown, some kind of girl in the Army Beach and they tried to accuse him of the case", Corporal Vidal "knew the truth" and explained everything to his Battery Commander (R. 26-28, 31). Accused was dressed in dark civilian type trousers and a white T-shirt with stripes on the sleeves (R. 30).

b. Defense. Miss Gonzalez, Corporal Vidal and Corporal Vazquez were recalled as witnesses for the defense. The first mentioned testified that she had never told Captain Logan the accused was the soldier who tried to kiss her, and that she did not change her statement because it was true (R. 41, 42). Corporal Vidal stated that the accused was wearing a white T-shirt with some markings on the sleeves on the night of 29 August 1948 and that this shirt was similar to a white T-shirt with a blue border introduced in evidence as a shirt taken from the soldier at Army Beach by Corporal Vazquez (R. 50, 51, 56, 57). Upon cross-examination, this witness testified that the accused was known as "El Mago" because of his ability to perform coin tricks and other slight-of-hand (R. 57, 58).

Corporal Vazquez identified a camera (Def Ex 1) and a white T-shirt (Def Ex 2) as the items which accused placed behind the radio at the Army Beach dance hall on 29 August 1948. The two exhibits were admitted without objection (R. 56, 57). The accused was wearing a light orange sport shirt with short sleeves at the time of the "presumed" assault. He also related that accused's nickname is "El Mago" (R. 57, 58).

First Lieutenant Frederick L. Gemmer, 542nd Military Police Service Company, testified that he conducted a "line up" for identification purposes in which five men from accused's Battery were first marched in before Corporal Vazquez who failed to identify any one as the accused. The same five persons with the accused added to the group repeated the process whereupon Corporal Vazquez positively and without hesitation, identified the accused as the assailant (R. 52-55). In Lieutenant Gemmer's opinion, however, the best identification procedure would have been to change all personnel of the group for the record identification parade (R. 52).

Florencio Tevenal-Valle, a civilian watchman at the Army-Navy Beach, stated that on the night of 29 August 1948 he heard somebody say, "Shoot him. Stop him, watchman, stop that son-of-a-gun". He saw a tall, dark, heavy-set man running out of the gate. "Sergeant" Vazquez gave him the order to shoot. The man was "much taller, much darker and much heavier" than the accused. The man was wearing "some kind of a dark cream color" sport shirt at the time of the incident (R. 57).

The accused, after being duly warned of his rights, elected to remain silent.

4. The supporting papers forwarded with the record of trial show that the accused had requested Captain Ernest J. Logan, the Trial Judge Advocate, as his defense counsel at the pretrial investigation in the event one William R. Colberg, his first choice, were unable to be present.

Concerning this matter, the defense counsel, in his argument to the court, made the following assertion:

> "....It happens that during this investigation the same party who is the prosecution today was the defense counsel representing the accused, and this statement given by Miss Gonzalez was then very well received and approved by the brilliant legal mind of the prosecution. Of course, the table has turned around and now the prosecution, without any apparent legal reason, stands up in here in this court and announces that he will begin his case by impeaching the testimony honestly given and sworn to by this Miss Gonzalez. In short, Miss Gonzalez, on the date of the investigation, the date that Captain Logan went over to see her, and today in court and on the second recall by the court, denied that this accused ever, and I say ever, placed a finger on her. *** It would be material also to note that the prosecution, after inviting this witness to lunch at the recess of this court, could not make her change the original testimony. That's so much for Miss Gonzalez...." (R. 65-66).

In response to these observations and comments of defense counsel, the Trial Judge Advocate stated in his closing argument:

> "...First, the inquiries made by the defense as to my acceptance of the statement of Miss Gonzalez at the time I was acting as counsel for the accused. At this time I would like for it to be known in the record that I was requested by the accused to act as his counsel prior to my having any knowledge that I would be the one prosecuting this case. I informed the accused it would be necessary for him to secure other counsel. ..." (R. 67).

5. From the foregoing, it is manifest that the record presents three questions, viz: the sufficiency of the evidence relative to the degree of the assault charged, the sufficiency of the evidence as to the identity of the assailant, and the legal effect of having counsel for the accused at the investigation serve as the Trial Judge Advocate during accused's trial on the same charges. Although related to a controversial principal of law, since it concerns a "felonious" striking with the hand, (see Sec. 451 (7) Dig. Ops. 1912-1940), little difficulty is encountered in disposing of the first question posed for the reason that it involves no evidentiary conflict and, therefore, bears no direct relationship to the third and most critical question, as hereinafter discussed. Conversely, with respect to the issue

of the assailant's identity, the record contains a substantial conflict. Relative to this aspect of the case, as well as that presented by the preceding question, the functions of the Board of Review, in accordance with Article of War 50½, normally would be limited to a judicial determination of whether the evidence adduced provided a reasonable basis for the findings of the court, as approved by the reviewing authority, without regard for the weight to be accorded the evidence. There being a serious question presented by reason of accused's prior representation by the Trial Judge Advocate, however, the Board must additionally concern itself with the effect of this conflicting evidence, relative to the assailant's identity, considered in the light of the irregular prosecution in the case.

In connection with the matter of Captain Logan's dual relationship to the accused, as above disclosed, it is a well settled doctrine, founded upon reasons of justice and public policy and supported by a great majority of judicial decisions, that an inviolate privilege attaches to communications between attorney and client. This most sacred relationship, which according to Wigmore, "goes back to the reign of Elizabeth, where it already appears as unquestioned" has been zealously guarded by the courts since the 16th Century (CM 331574, Lloren, July 1948).

From the following excerpt from the Manual for Courts-Martial, 1928, it is clear that this privileged relationship is equally an integral part of our system of military jurisprudence:

> "He [the Defense Counsel] will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; *** to represent the accused with undivided fidelity, and not to divulge his secrets or confidence ...." (MCM, 1928, par. 45b, p. 35) (Underscoring supplied).

It is also well settled that a violation of this confidential relationship by defense counsel, or by an officer to whom the law imputes the relationship of attorney, advisor, or counsel, is sufficient in itself to constitute such error as to be ".... incapable of being remedied by the curative provisions of Article of War 37" (CM 331574, Lloren, supra).

Although by involving fundamentally the same legal concepts and principles, the instant case presents a problem much more difficult of solution for the reason that the record does not affirmatively reflect a violation of the privileged relationship by Captain Logan. The Board must therefore decide the matter upon the basis that such an inconsistent relationship existed and the effect thereof when considered in the light of the highly contradictory evidence as to the assailant's identity.

With respect to the actions of a defense counsel in subsequently acting as accused's prosecutor in the same proceedings, it has been held that this alone, if done over defense objection, constitutes reversible error. Ward v. State, 242 Pacific (Oklahoma) 575. An earlier decision in the same

jurisdiction held that, as a matter of law, an attorney was disqualified to prosecute in an instance where he had previously appeared for defendant, moved for a continuance and waived preliminary examination of the defendant (Steeley v. State, 187 Pacific 821). Perhaps the most comprehensive treatment of the problem involved is found in People v. Gerold, 265 Illinois 448. In that precedent, wherein the conviction was reversed solely because of the existence of such dual relationship of defense counsel and prosecutor in the same case, the court stated in pertinent part:

> "*** The rule has long been firmly established that an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties. When he has once been retained and received the confidence of a client, he cannot enter the service of those whose interests are adverse to that of his client or take employment in matters so closely related to those of his client or former client as in effect to be a part thereof. Weeks on Attorneys (2d Ed.) Sec. 120, 271; 1 Thornton on Attorneys, Sec. 174. This rule is a rigid one; designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties. ***. He owes to his client fidelity, secrecy, diligence, and skill, and cannot take a reward from the other side. He is not, as a general rule, allowed to divulge information and secrets imparted to him by his client or acquired during their professional relation unless authorized to do so by the client himself. Hatch v. Fogerty, 40 How. Prac. (N.Y.) 492. It is the glory of the legal profession that its fidelity to its clients can be depended upon; that a man may safely go to a lawyer and converse with him upon his rights in litigation with absolute assurance that that lawyer's tongue is tied from ever discussing it. U.S. v. Costen, 38 Fed. 24. ***".

Of even more significance with regard to the present case, since it necessarily involves more than the problem of privileged communication, is the following language from the same legal authority:

> "*** This rule has been so strictly enforced that it has been held that an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general manner, even though while acting for his former client he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment. Pierce vl Palmer, 31 R. I. 432, Ann. Cas. 1912B, 181, 77 Atl. 201, and cases cited in note. If this is the rule in civil cases, the law will not be less strict in criminal proceedings, especially as to the duty in this regard resting upon counsel for the state.

Such an officer is acting in a quasi judicial capacity, and he and those associated with him should represent public justice and stand indifferent as between the accused and any private interest. It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his statutory or legal rights as it is to prosecute him for the crime with which he may be charged. State v. Osborne, 54 Or. 289, 20 Ann. Cas. 627, 103 Pac. 62. The canons of ethics of the American Bar Association and various state associations in this country are in accord on this subject with the rule just stated. An attorney cannot be permitted to assist in the prosecution of a criminal case if by reason of his professional relations with the accused he has acquired a knowledge of the facts upon which the prosecution is predicated or which are closely interwoven therewith. Wilson v. State, 16 Ind. 392; Com. v. Gibbs, 4 Gray (Mass.) 146. The members of the profession must have the fullest confidence of their clients. If it may be abused, the profession will suffer by the loss of the confidence of the people. The good of the profession, as well as the safety of clients, demands the recognition and enforcement of these rules. State v. Halstead, 73 Iowa, 376, 35 N. W. 457. <u>It is unnecessary that the prosecuting attorney be guilty of an attempt to betray confidence; it is enough if it places him in a position which leaves him open to such charge; and this disqualification may arise by reason of services rendered by him in a civil case as well as in a criminal case</u>. State v. Rocker, 130 Iowa, 239, 106 N. W. 645; 2 Thornton on Attorneys, Sec. 693, 700. The administration of the law should be free from all temptation and suspicion, so far as human agencies are capable of accomplishing that object, and public policy strongly demands that one who has been employed on one side should not be permitted to appear on the other side. It is not sufficient to say that the law will not permit him to disclose any fact which may have been communicated to him. 'If he knows the vulnerable points in the case, *** there are many ways by which those points might be made available *** besides disclosing them as a witness.' Gaulden v. State, 11 Ga. 47. 'The case might easily be put that a most honest man so changing his situation might communicate a fact appearing to him to have no connection with the case,' and yet which might turn out to be the vital point, therein. ***. It is the obtaining of this knowledge from his client as his confidential adviser and attorney that precludes him from accepting such employment ***' (Cholmondeley v. Clinton, 19 Ves. Jr. (Eng.) 261) (Underscoring supplied).

A study of precedents from other states and from Federal jurisdictions similarly shows that, as a general rule with but few exceptions, convictions are reversed and remanded if an attorney has acted as prosecution subsequent to serving as defense counsel for the same accused on the same charges (see also 7 Corpus Juris Secundum 830). Although the same precise question appears not to have been answered by an authoritative military tribunal, it is interesting to note the language of a pertinent part of Article of War 11, as recently

revised and included in the Manual for Courts-Martial 1949, to wit:

> "*** Provided further, That no person who has acted as a member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution: ***" (Public Law 253, 80th Congress).

While the above modification presently has no application, not being effective until 1 February 1949, it is clearly indicative of the development of the law based upon public policy as reflected by legislative pronouncement.

It is indeed doubtful, for the same reasons expressed in the foregoing authorities, if a conviction by a military tribunal could be upheld, where it was undisputed that the defense counsel subsequently served as accused's sworn prosecutor in the same proceedings. The fact that the defender - prosecutor was an officer in the Army of the United States, and the accused was a soldier, would seemingly magnify the gravity of the error and add to the vulnerability of the record. In the instant case, however, the Board is not limited in its decision to the matter of counsel alone. Through the pale of confusion manifest in the record of trial, there remains a substantial question as to the quantity and quality of the evidence adduced on the issue of the identification of the accused as the assailant as heretofore mentioned.

As previously indicated, it is now almost axiomatic that the Board of Review does not weigh the evidence or usurp the functions of the court other than to determine that there exists a reasonable basis for the courts findings (CM 212505, Tipton, 10 BR 237, and cases therein cited). There nevertheless descends upon the Board an additional duty of considering whether the evidence is clear and convincing in a proceeding where there is an error reasonably related to such evidence. Somewhat analogous to the situation in the instant case, since both evidentiary and procedural matters receive equal mention under Article of War 37, is the instance wherein a confession, not obtained by force or duress, but otherwise erroneously procured, has been received in evidence. Of the effect of the quantity and quality of other evidence adduced upon such erroneous admissions, the Board of Review has recently stated:

> "In view of Article of War 37 which provides that the proceedings of a court-martial shall not be held invalid nor the findings or sentence be disapproved on the ground of improper admission of evidence unless it shall appear that the error 'has injuriously affected the substantial rights of the accused', it is necessary to determine whether the above is prejudicial within the contemplation of that article. In so doing, it is necessary for the Board of Review to determine whether the legal evidence of guilt appearing in the record, independent of the erroneously admitted confession, is relatively conclusive or inconclusive, or whether it may be said with reasonable certainty that the conviction would have resulted had such evidence been excluded (CM 316223, Evans, 71 BR 385; CM 329711, Tumang (15 April 1948)). It is obvious that evidence improperly admitted might affect the result in one case and not

in another. It follows, therefore, that a conviction in one instance may be upheld because of quality and quantity of the evidence independent of that erroneously admitted (CM 237711, Fleischer, 24 BR 89, 99, 100), while in another case the admission of improper evidence by the prosecution would constitute substantial and prejudicial error and require setting aside the conviction" (CM 211829, Parnell, 10 BR 133, 137; CM 316223, Evans, supra) (CM 330141, Slater, 78 BR 275, 277).

Similar to a degree are the considerations in the present case. As previously noted, there is clearly error relating to counsel. With respect to the nature of the evidence adduced and the effect of such error upon the evidence, it should be noted that at the very outset of the trial, Captain Logan made the following statement before introducing Miss Gonzalez as his witness:

"The circumstances of this case compel me to call this witness as a prosecution witness. I do not vouch for her veracity as a witness and I shall endeavor to impeach her."

Thereafter, this witness declined to identify the accused as her assailant. Additionally, the record reflects the unusual picture of the same Trial Judge Advocate interviewing this witness through an interpreter during the noon recess and then attempting to impeach her testimony on the critical issue of accused's identification during the subsequent proceedings. With respect to conduct of this character, the Board of Review is not required, especially in view of the conflicting evidence on the issue of the assailant's identity, to speculate as to the reasons for the Trial Judge Advocate's persistent effort to "break" this witness. Conceivably the Trial Judge Advocate could have entertained a feeling of moral certainty that Miss Gonzalez was committing perjury and therefore most vulnerable because of what accused had told him in confidence during their attorney-client relationship. This possibility is but one of many the Board would have to resolve against the accused to uphold the conviction.

Accordingly, in applying the above reasons, concepts, and principals to the present case, it becomes clear that the evidence of accused's identification as the assailant is inconclusive and unsatisfactory and so tainted with error relating to counsel as to have a prejudicial effect. It must therefore be concluded that it affirmatively appears from the record of trial considered in its entirety that the substantial rights of the accused were injuriously affected within the contemplation of Articles of War 37 and 50½.

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

Wilmot T. Baughn, Judge Advocate

[illegible], Judge Advocate

G. E. Crane, Judge Advocate

CSJAGQ CM 333433 1st Ind

JAGO, Dept of the Army, Washington 25, D. C. JAN 28 1949

TO: Commanding General, Headquarters, United States Army Forces, Antilles, APO 851, c/o Postmaster, Miami, Florida

1. In the case of Private First Class Fortuno Alvaro-Rodriguez (RA 30433018), Headquarters and Headquarters Battery, 98th AAA Gun Battalion (SM), Fort Buchanan, Puerto Rico, I concur in the foregoing holding by the Board of Review and recommend that the findings of guilty and the sentence be disapproved. Upon taking such action, you will be authorized to order 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 333433).

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.

CSJAGH CM 333452

5 January 1949

UNITED STATES v. First Lieutenant JACKSON R. ROBERTS, O-1330775, Headquarters 7th Infantry Division, APO 7.	)))))))	7TH INFANTRY DIVISION Trial by G.C.M., convened at Seoul, Korea, 13 September 1948. Dismissal and total forfeitures.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Jackson R. Roberts, Headquarters, 7th Infantry Division, was, at Yong Dung Po, Korea, on or about 28 August 1948, drunk in uniform in a public place, to wit, the Dependent's Club.

Specification 2: In that First Lieutenant Jackson R. Roberts, Headquarters, 7th Infantry Division, did, in conjunction with First Sergeant Frank X. Cromer, Headquarters Company, 7th Infantry Division, at Seoul, Korea, on or about 29 August 1948, wrongfully transport two Korean females in a government vehicle.

Specification 3: In that First Lieutenant Jackson R. Roberts, Headquarters, 7th Infantry Division, did, at Seoul, Korea, on or about 29 August 1948, at Military Police Gate No. 6, Camp Sobinggo, Korea, wrongfully and unlawfully make false and fraudulent representations to Private Donald J. Handley, a military policeman in the execution of his duty as guard at said Gate No. 6, that he, Lieutenant Roberts, was taking two Korean females, who were then in his vehicle, to the 7th Military Police Platoon Headquarters, or words to that effect, with intent to deceive said military policeman into

permitting said Korean females to pass his gate and into Camp Sobinggo Area.

Specification 4: In that First Lieutenant Jackson R. Roberts, Headquarters, 7th Infantry Division, did, at Seoul, Korea, on or about 29 August 1948, in conjunction with First Sergeant Frank X. Cromer, Headquarters Company, 7th Infantry Division, wrongfully and unlawfully bring, have and entertain two Korean females in his, Lieutenant Roberts' quarters in the Quonset Huts, Junior Officers Quarters, 7th Infantry Division, under circumstances of a nature to bring discredit upon the military service.

He pleaded guilty to specification 1 of the Charge and the Charge, and not guilty to specifications 2, 3 and 4 of the Charge. He was found guilty of all specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. The Board of Review adopts the statement of the evidence and the law contained in the review of the 7th Infantry Division Staff Judge Advocate, dated 16 September 1948.

4. Records of the Army show that accused is 24 years of age, divorced, and has two dependents. He is a high school graduate. In civilian life he was an apprentice carpenter employed by the Goodyear Tire and Rubber Company of Akron, Ohio. He was commissioned second lieutenant, Infantry, Army of the United States, on 16 January 1945, and was promoted to first lieutenant on 16 March 1946. He served as an enlisted man from 19 April 1943 until he was commissioned as an officer. He served overseas in the Mediterranean Theater from 17 March 1945 to 18 August 1946. He was again sent overseas in March 1948. He is authorized the European-African-Middle East and The World War II Medals and the Occupation ribbon. His efficiency ratings of record are Very Satisfactory (1) and Excellent (7).

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 dismissal and total forfeitures

is authorized upon conviction of violations of Article of War 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

CSJAGH CM 333452 1st Ind

JAGO, Department of the Army, Washington 25, D.C., 11 January 1949

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Jackson R. Roberts, O-1330775, Headquarters 7th Infantry Division, APO 7.

2. Upon trial by general court-martial this officer was found guilty of being drunk in uniform in a public place; of wrongfully transporting two Korean females in a government vehicle; of wrongfully making false representations to a military policeman as to the presence of the Korean females; and of wrongfully bringing the two Korean females into his quarters, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, under date of 23 September 1948, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48, but by letter recommended that the sentence be commuted to a forfeiture of $50.00 of his pay per month for twelve months. I returned the record of trial to the reviewing authority advising him that he was empowered to take the action recommended. However, a different officer in the meantime assumed command and upon receipt of the record, he approved the sentence and returned the record of trial for action pursuant to Article of War 48, without recommendation that the sentence be commuted.

3. A summary of the evidence may be found in the review of the 7th Infantry Division Judge Advocate, dated 16 September 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.

On the evening of 28 August 1948 the accused, dressed in a class "A" uniform, together with three enlisted men, visited the Dependents' Club, Yong Dung Po, Korea. While there accused became drunk. Later that night accused and Sergeant Cromer, together with two Korean women, drove up to gate number 6 in Camp Sobinggo area, Korea, in an Army jeep dispatched to Sergeant Cromer. Accused told the military police guard at the gate that he was taking the two women to the Military Police Platoon. The vehicle and occupants were then permitted to enter. They did not go to

the Platoon but instead went to the quarters of accused where shortly thereafter the Provost Marshal discovered them in rooms of the accused. The accused was naked, Sergeant Cromer was lying on a couch, nude and apparently asleep, and the two Korean women were in a clothing closet, one dressed only in a white slip and the other wearing a flowered dress which was unbuttoned in front exposing her nude body. The women had no official authorization to ride in the vehicle or be in the Camp. Women visitors, by official orders, were prohibited in private quarters of officers at Camp Sobinggo and also by official orders Korean Nationals could not be carried in a government vehicle except on official business and when authorized by the trip ticket issued to the driver of the vehicle. The accused after having been advised of his rights as a witness elected to remain silent. The defense offered no evidence.

4. The accused is 24 years of age, divorced, and has two dependents. He is a high school graduate. In civilian life he was an apprentice carpenter employed by the Goodyear Tire and Rubber Company of Akron, Ohio. He was commissioned second lieutenant, Infantry, Officers Reserve Corps, on 16 January 1945, and was promoted to first lieutenant on 16 March 1946. He served as an enlisted man from 19 April 1943 until he was commissioned as an officer. He served overseas in the Mediterranean Theater from 17 March 1945 to 18 August 1946, and was again sent overseas in March 1948. He is authorized the European-African-Middle East and the World War II Medals and the Occupation Ribbon. His efficiency ratings of record are Very Satisfactory (1) and Excellent (7). There is no record of previous convictions or disciplinary action.

5. I recommend that the sentence be confirmed but in view of the nature of the offenses, the age of accused, his prior enlisted service and relatively short period of commissioned service, the absence of any prior disciplinary action and the initial recommendation of the reviewing authority who referred the case to trial, I further recommend that the sentence be commuted to a reprimand and forfeiture of fifty ($50.00) dollars pay per month for six months, and that the sentence as thus modified by carried into execution.

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

2 Incls
1 Record of trial
2 Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 4, Jan 14, 1949).

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

CSJAGH CM 333860

13 JAN 1949

UNITED STATES v. Corporal HERBERT L. HAYNES, RA 34013910, and Corporal RALPH E. LUSSMYER, RA 16205545, both of Headquarters Detachment, 7810 Station Complement Unit.	)))))))))	NURNBERG MILITARY POST Trial by G.C.M., convened at Nurnberg, Germany, 19, 20 October 1948. Both: Dishonorable discharge and confinement for thirty (30) years. United States Penitentiary, Lewisburg, Pennsylvania.

REVIEW by 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 soldiers named above.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Corporal Ralph E. Lussmyer and Corporal Herbert L. Haynes, both Headquarters Detachment 7810 Station Complement Unit, acting jointly and in pursuance of a common intent, did, at or near Cadolzburg, Bavaria, Germany, on or about 12 September 1948, forcibly, feloniously and against her will, have carnal knowledge of Maria Schoenleben.

Accused pleaded not guilty to and were found guilty of the Charge and its Specification. No evidence of previous convictions was introduced as to accused Lussmyer. As to accused Haynes there was introduced evidence of a previous conviction by summary court-martial for speeding. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentences as to each accused but reduced the period of confinement to thirty years, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence.

(Introductory: It was stipulated for the record that accused Haynes is dark-haired and accused Lussmyer, red-haired (R 11).)

a. For the prosecution.

Accused, at the time of trial, were members of Headquarters Detachment, 7810 Station Complement Unit, Nurnberg Military Post (R 6).

On the night of 11 September 1948 the accused attended a dance at Cadolzburg, where they were joined by Helmut Scheidig and the latter's companions, and the group "went drinking wines and brandies" (R 9). The presence of the accused at the dancewas also noted by Hans Beckmann, Ernst Fischer, Luise Flohr, and Maria Schoenleben, the prosecutrix, who had attended the dance in a group (R 14,15,30,31,40,48). The accused and Scheidig left the dance at 1:00 a.m. when it was over. All were somewhat drunk, accused Lussmyer being "strongly drunk" and Haynes "less so." Scheidig had to hold Lussmyer, but Haynes was able to walk by himself very easily. Scheidig rode with accused in their jeep to the railroad station in Cadolzburg with Haynes driving (R 10,11).

Maria Schoenleben left the dance when it was over and started for her home. She was accompanied by Luise Flohr, Hans Beckmann, Hans Bittner, Georg Flohr, Ernst Fischer, and two other people. When she reached the Schwadermuhle, there were in her immediate group Hans Beckmann, Luise Flohr and herself, and at that point accused stopped their jeep about a meter or two away and addressed the group. Although Maria could not understand the language used by accused, she thought they meant for her group to get into the jeep. Luise and Maria stood there and Luise called to Hans Beckmann to come to their assistance. When Hans approached, Lussmyer drew some object which looked like a firearm and directed it toward him (R 49,50). Beckmann and Luise went away. Haynes turned the car "half right over the road and grabbed Maria and held her." She shouted very loud and Georg Flohr and Hans Fischer came running up. Lussmyer got out of the jeep and "directed towards them an object which looked like a revolver," and they also ran away. Lussmyer threw Maria's bicycle into the back of the jeep and then took Maria from Haynes and put her into the jeep and climbed in after her. Maria was sitting between Haynes and Lussmyer and the latter held her by the hand and the leg (R 50,51,59).

On cross-examination Maria explained that she remained at the jeep after Luise and Hans Beckmann left because she could not leave. When Luise left, Maria was at least two or three meters from her. Maria was holding her bicycle and if she attempted to get away she would have run

into Luise. When the jeep was turned around her escape was blocked by it in one direction and in the other she was blocked by Hans Beckmann who was standing there with Luise's bicycle. After the car was turned around and Haynes had grabbed her she shouted "Luise, Luise, I can not get away." At the time, she was standing on the left side of the jeep. Maria admitted that in her pretrial statement she had stated that the red-haired soldier was the driver of the jeep and also that in her pretrial statement she had made no mention of her shouts when she was seized by accused (R 55-59).

Hans Beckmann testified that he was with Luise Flohr and Maria Schoenleben on the Zirndorf road when they met accused near the Schwadermuhle. He and the accused did not have any conversation but just snapped words at each other. Accused's jeep was stopped at the time. Hans understood accused to be beckoning the two girls to the vehicle and that accused Lussmyer was threatening him away. Hans felt that he was being threatened because Lussmyer was searching for some object which Hans could not recognize. Hans left the vicinity of the jeep. Luise called to him to stop but he merely slowed down. He heard a woman crying for help in German. Then Luise drew up to him and they rode on. Later the jeep passed them going in the direction of Seukendorf (R 15-17).

Luise Flohr understood the accused to tell Hans Beckmann to go away and when Hans left, she left, too, and hid. When she was leaving she called to Maria to leave, but the latter did not come (R 40,41).

Upon cross-examination she admitted that at a pretrial lineup she was unable to identify the black-haired soldier (Haynes) as one of the soldiers she saw on the night in question, but that subsequently upon being helped by a representative of the CID she did identify him (R 45). Neither of accused tried to take Luise into the jeep (R 46).

Ernst Fischer was some 40 to 50 meters from the jeep when it stopped. With him were Georg Flohr, Katie Drexler, and Anna Shauer. When Maria Schoenleben shouted for help Ernst and Georg Flohr ran towards the jeep. When they arrived at the jeep Ernst saw the red-haired American, and another American was sitting in the jeep with Maria. Ernst asked in German what had happened. The red-haired American jumped at Ernst using profane language. He had a firearm or something of that kind in his hand (R 32,33,39). Ernst retreated about 20 meters and the jeep, in which Maria was sitting between the two soldiers, went off in the direction of Seukendorf. After the jeep passed, Fischer, Beckmann and the others continued on in the direction of Seukendorf also. The progress of the jeep could be seen on account of the headlights. Shortly before Seukendorf it was observed to turn left (R 33). Beckmann testified that the jeep was one and a half to two kilometers away when it turned (R 17). It proceeded on its new course a way and stopped and

the jeep lights went out. Next a woman's cries were heard for a period of approximately fifteen to twenty minutes and Fischer identified the cries as those of Maria Schoenleben (R 18,33,34). According to Beckmann his distance to the jeep from where he was standing was two kilometers by road (R 26). The distance in a straight line would be one to one and one-half kilometers (R 27). After the jeep lights were turned on, the jeep proceeded toward Seukendorf (R 18,34). Upon cross-examination Beckmann stated that although there was a house close by they did not go to it for help because they did not believe the occupants of the house would get up (R 27).

Maria testified that after the jeep started up in the direction of Seukendorf she kept defending herself and yelling the whole way but it did not get her anywhere. They did not continue into Seukendorf but instead turned left at a field road leading to Seukendorfer Hill. While the jeep was making the turn Maria tried to drag the steering wheel around. The jeep was stopped at a clover field and the lights turned off. Haynes placed a blanket under his arm, took Maria by the hand and dragged her from the jeep. He put Maria on the ground, put the blanket down, threw Maria onto it and then laid down on top of her. Maria identified a torn pair of panties as being the ones she wore that night and testified that Haynes tore them as he was trying to put his "genital" into her "vagina." The panties were introduced into evidence as Prosecution Exhibit 3. Prior thereto Maria had no opportunity of getting up. Haynes finally succeeded in placing his genital into her vagina and at the time Maria had a feeling of being wounded, she felt hurt. Maria had never had sexual intercourse before. When Haynes was finished he put Maria back into the jeep and drove back in the direction of Seukendorf. At the first house they came to, Maria told accused she had to get out. She was let off and Lussmyer dismounted and took her bicycle out of the jeep and returned it to her. When she arrived home she retired without telling her parents of what had happened but when her comrades came she told about what had happened (R 51-55). Beckmann, Fischer, and Luise Flohr testified that at that time Maria told them she had been raped (R 18,34,42).

Upon cross-examination Maria admitted that in a pretrial statement she had stated "During the trip I didn't shout. I didn't yell." (R 58).

During the trip she was held by the hand and leg (R 60). When they finally stopped, the "blackhaired soldier" took his blanket, took Maria by the hand, stepped out of the jeep and pulled Maria out (R 61). He

walked about two meters away from the jeep pulling Maria along with him and then put the blanket down with one hand. At this point Maria was not yelling but "just" said, "I have to go home, I have to go home." She yelled when accused came towards her, and when he put his penis into her vagina she shouted so loud she was heard at the Erzleitenmuhle. When she yelled the accused put his hand over her mouth which was how she received three scratches (R 62-63).

Accused "just" laid her on the ground and then got right on top of her. Maria used one hand to close her vagina but did not use her other hand. She "slipped back with her legs and * * defended herself." Accused snatched her hand away and tore her panties. She did not cross her legs at any time. Before accused had inserted his penis Maria started to wiggle around. Accused had his left hand over her mouth but she did not know to what employment his other hand was put. She admitted that in her pretrial statement she had stated that the soldier inserted his penis without using his hands (R 63-65). While accused was raping her she yelled "Nicht gut, nein, nicht gut." She had been menstruating since the previous noon and by the words "Nicht gut, nicht gut" meant that she did not want to have intercourse during her monthly period (R 66). On redirect examination she stated another reason for not wanting to have intercourse, as follows: "I didn't want to have intercourse with him because I was afraid that he would try to kill me, or shoot me, or do something else to me." (R 67) Upon examination by the court she stated that even had there not been violence she would not have desired to have sexual intercourse with the soldier (R 67).

On the afternoon of 12 September 1948 Maria was examined by Doctor Alfred Mayer. Doctor Mayer testified that his examination of Maria disclosed blood traces about the outer lips of the vagina. Since Maria was in her menstrual period Doctor Mayer could not determine the cause of the blood traces. The maidenhead no longer existed but Doctor Mayer could not determine if it had been penetrated recently. Doctor Mayer also found scratches on the upper lip of the face, which he estimated had been inflicted twelve to fifteen hours prior to examination. Doctor Mayer had the impression that Maria was slightly perturbed (R 28-29).

b. For the defense.

Sergeant First Class Francis C. Tarpley, assistant supply sergeant in the 7810 Station Complement Unit, Nurnberg, Germany, testified that accused Lussmyer had been working for him for about three months and had the reputation of being a good soldier. Sergeant Tarpley had occasion to observe Lussmyer in the company. Tarpley had never seen Lussmyer drink nor had he heard of him drinking. Lussmyer never bragged

to Tarpley of accomplishments with women and was not the type of man who would go out looking for a girl. Tarpley had never heard any comments that Lussmyer was rough and ungentlemanly in his conduct with women (R 71,72,73). On cross-examination Tarpley admitted nobody had ever stated to him that Lussmyer was a man beyond reproach or that he was a man who always acts like a gentleman with women (R 73,74).

Captain Edward F. Eskew testified that he was accused's commanding officer, that Haynes was first cook in the detachment and that Lussmyer was assistant supply sergeant. There were fifteen German girls employed as waitresses in the detachment mess hall and Captain Eskew never observed anything untoward in Haynes' relationship with them. Captain Eskew rated Haynes excellent in the performance of his military duties, had never found him to be untruthful, and stated that to his knowledge Haynes did not drink to excess. Captain Eskew likewise rated Lussmyer as excellent in the performance of his military duties, and stated that he had observed Lussmyer at two company parties and that on those occasions his conduct toward women was gentlemanly. Upon cross-examination Captain Eskew stated that in large part his ratings of accused were based upon their ability and willingness to work (R 74-76).

First Lieutenant Alexander Rattrey testified that he was executive officer of accused's unit, had observed Haynes' conduct with the German waitresses employed by the unit and had never seen anything "out of the way." Lieutenant Rattrey had received complaints from the girls concerning other enlisted men but none pertaining to Haynes. Lieutenant Rattrey's opinion of Lussmyer was similar to the one he had of Haynes. Both men in his opinion had a reputation for sobriety (R 77-79).

Lieutenant Colonel Eldon J. Hart testified that he had known Lussmyer for a year and a half and had been successively deputy commander and post inspector at Lussmyer's former post. In these positions he would have had knowledge of any delinquency reports pertaining to Lussmyer had there been any. He did not, however, recall that there had been such delinquency reports. He further stated that Lussmyer had a reputation of being a good soldier (R 80,81).

After being apprised of his rights thereto, the accused Haynes elected to be sworn and testify. He testified that he had been in the military service for approximately seven and a half years and had foreign service totaling about six years and eight months, and had last left the States on 5 July 1946. He had served overseas during the war with the 115th Field Artillery Detachment as mess sergeant. He is entitled to wear the Defense, American Theater Ribbon, Good Conduct, Victory, and ETO Ribbons with four battle stars on the latter. He is twenty-eight years of age

and had never been married. He had been assigned to the Nurnberg-Furth Military Post since June 1947. During the weekend of "11th-12th September 1948" Haynes had a special duty pass. A special privilege pass was given to men for use when off duty and was given to those men who had performed their duties well and had not received company punishment within six months (R 82-83).

About 2:30 on the afternoon of 11 September 1948 Haynes and Lussmyer went to the Park Hotel, and each had a shot of whiskey and one beer. They left the Park Hotel between three and three-thirty and went to Zirndorf in a jeep which Haynes owned. They remained in Zirndorf until eight o'clock when they went to a dance in Cadolzburg. At the dance they had wine and danced. They met three Germans whom Haynes knew and sat at a table with them. They danced with none of the witnesses who had appeared at the trial and of all the witnesses who appeared, Haynes noticed only the one mechanic. Haynes and Lussmyer left the dance when it was over around one o'clock. At that time neither had too much to drink. They headed back to Zirndorf taking the road going through Furth. After they had driven approximately a mile they came up to two girls and a boy riding bicycles. Haynes suggested to Lussmyer that they see if they could pick up the girls. When Haynes and Lussmyer stopped the jeep the girls were told to come over to the jeep. Haynes did not recall who called them over but stated they were addressed in German. The girls dismounted from their bicycles and came over to the jeep. Both Haynes and Lussmyer talked to the girls, Haynes desiring to know if they wanted to take a ride. He asked the question for the same reason any man would want a girl. He did not, however, have any intent to rape anybody, nor did he intimate to Lussmyer that they accomplish their purpose by rape. One girl did not "bite" and "went on in front of the jeep a little piece." The other girl was still hanging around alongside the jeep. Haynes had her by the hand trying to persuade her to get into the jeep but she could have gotten away had she so desired. At the point where the jeep was stopped the road was narrow and Haynes started up the jeep and pulled it over to the left a couple of yards. The girl started to get in the jeep and Lussmyer came around, put her bicycle in the jeep, took her by the hand and helped her into the jeep. She did not scream nor did she resist. Her companions did not attempt to rescue her. Haynes did not observe any weapon in Lussmyer's hand and denied that there was any weapon in the jeep. After the girl got into the jeep Haynes drove off. Haynes did not see Lussmyer holding the girl by the arm and leg and did not know of any reason why he should. He added, however, that Lussmyer might have been playing with her leg. Haynes had some conversation with Lussmyer while they were riding along but what they intended to do with the girl was not a subject of the conversation. Neither announced that he intended to rape the girl. As for Haynes there was no necessity for rape inasmuch as he could get whatever he wanted for a couple of chocolate bars. After driving for about five or six minutes they stopped. Haynes did not have a watch with him and did not know the time. There was nobody around who could observe his actions. He turned off the motor and lights and dismounted from the jeep. He reached back into the jeep, helped the girl

out, picked her up and set her on the ground. Haynes did not give any instructions to Lussmyer, who remained in the jeep, to give a warning if anybody approached, and Lussmyer gave no indication to Haynes that he would act as lookout (R 84-91).

Prior to setting the girl on the ground Haynes released her and used both of his hands to spread his blanket. The girl remained standing, did not scream, and made no effort to get away. She did say that she had to get home but Haynes told her "in a moment." After he laid her down he sat beside her for about two minutes and went through the "ordinary routine" and then got on top of her. Both were fully dressed. Haynes did not ask her to remove her panties because it was not necessary that they be removed with the type of panty she was wearing, nor would it be necessary to tear the panties. He denied that on the night in question the girl was wearing the panties which were exhibited to the court as Prosecution Exhibit 3, and stated that the panties which were exhibited to the court were of a different texture than the ones the girl wore on the night in question. The prosecutrix had her hands on her private part but they were removed. In response to the question whether he or the prosecutrix removed the hands Haynes stated "I guess she helped me. I pulled it away anyhow." He moved the panties to one side. The prosecutrix did not yell but said "Nicht Gut, Nicht Gut; verboten." Accused was not pinning her to the ground and had the impression that he could have sexual intercourse without the use of force, inasmuch as the prosecutrix was not making any resistance. Haynes had had affairs with girls smaller than the prosecutrix and it was impossible to have intercourse with them if they put up a fight. The prosecutrix did not cross her legs, nor did she slap him or pull his hair. She did not start anything until after he had inserted his penis, when she screamed. In Haynes' opinion she screamed because of pain. He explained that since he was a big man it might have hurt a little, and added that he had hurt a lot of big women. When it was over Haynes had the impression that she had enjoyed it. He admitted that during the excitement he might have scratched her but that was not as a result of using force. During the entire occurrence Lussmyer sat in the jeep and later when Lussmyer was rejoined in the jeep, there was no conversation regarding what had taken place. Haynes drove the girl to the place she indicated was her home and let her out. At no time during the ride did the prosecutrix indicate to Haynes that she felt she had been raped (R 92-98).

Upon cross-examination Haynes testified that after the dance Scheidig and the latter's friend rode with him for the purpose of pointing out the road to Zirndorf. They missed the road to Zirndorf and Scheidig and his friend were let out of the jeep. After leaving Cadolzburg Haynes saw three persons on the road, two women and a man. He at no time saw anyone else approach the jeep. He reiterated that he and Lussmyer never discussed the possibility of raping the girl, and that he had not seen

any weapon in Lussmyer's hand. If Lussmyer had anything in his hand Haynes would have seen it. After the incident with the girl Haynes and Lussmyer went to Burgfarrnbach where they remained about an hour or an hour and a half. They then went to the home of Rosa Guethlein and Erica Fuchs, arriving there at about "fifteen to twenty minutes until four." (R 92-101).

The accused Lussmyer after being apprised of his rights elected to remain silent.

c. Rebuttal.

First Lieutenant John L. Lewis testified that on 22 August he was the "AW 70 investigation officer" in connection with charges against Haynes, and that in the course of his investigation he questioned accused Lussmyer. Prior to questioning Lussmyer, Lewis warned him of his rights under Article of War 24. Thereupon Lussmyer made a statement (R 105-106). Lieutenant Lewis identified Prosecution Exhibit 4 as the statement made by Lussmyer and the statement was admitted in evidence over objection by the defense (R 106,107). In offering the exhibit the Trial Judge Advocate stated: "The court has heard four or five witnesses testify to the good character of the accused Lussmyer. Therefore, there has been introduced evidence as to the good character and reputation, and for truth and veracity The court, furthermore, heard under oath the accused Haynes testify as to certain things that he and the accused Lussmyer did in the early morning hours of 12 September 1948. I am introducing this, sir, to show that there is a very, very wide variance as to this only against the accused Lussmyer, and is not in any way used against the accused Haynes." (R 106-107). Lussmyer's statement is entirely exculpatory and coincides with Haynes' testimony only as to matters not in issue. It recites their attendance at a dance in Cadolzburg on the night in question until 1:00 o'clock in the morning, the fact of leaving the dance and driving to Burgfarrnbach where they attended another dance for a short period of time, and their going to the home of Rosa where they arrived at about 0200 hours. Lussmyer denied that there were any girls in the jeep on the night in question after 2000 hours, that there was a bicycle in the jeep, and also that he saw any scratches on Haynes' face or bloodstains on his clothing (R 107; Pros Ex 4).

4. The evidence thus shows that at sometime after 0100 hours on the night of 11-12 September 1948, the accused were driving to Seukendorf from Cadolzburg, Germany, and at a point on the road approximately one mile out of Cadolzburg came upon two German girls, one of whom was Maria Schoenleben, the prosecutrix, and a German boy. Accused Haynes stopped the vehicle in which he and accused Lussmyer were driving, and the accused

beckoned the girls to approach the jeep. When the German boy approached the jeep he was threatened and frightened away. The prosecutrix was seized by Haynes but the other girl went off with the German boy. Other Germans who heard the screams of the prosecutrix approached the jeep but were also threatened and frightened away by Lussmyer who appeared to have a firearm in his hand. Lussmyer dismounted from the vehicle, placed the prosecutrix' bicycle in the back of the vehicle, seized the prosecutrix from Haynes' grasp and forced her into the jeep. Haynes drove off in the direction of Seukendorfer, the prosecutrix imprisoned between him and Lussmyer with the latter holding the prosecutrix by the arm and leg. Prior to reaching Seukendorfer they turned off on a side road and stopped next to a field. The prosecutrix screamed and yelled during the entire trip. After the vehicle was stopped Haynes dismounted, secured a blanket, and then pulled the prosecutrix from the jeep. Accused proceeded to a distance of about two meters from the jeep and spread the blanket upon the ground, meanwhile retaining his grasp upon the prosecutrix. He laid her upon the ground and placed himself over her. The prosecutrix who had been menstruating since the previous noon, uttered phrases in German expressing her distaste for what was about to happen and screamed. He placed his hand over her mouth to stifle her screams thereby scratching her. She slipped back with her legs and resisted. She had one hand shielding her private part but it was pulled away by accused. In the course of the struggle her panties were torn. Despite her struggles accused effected penetration.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent." (Para 149b, MCM 1928). As to Haynes the competent evidence of record sustains every element of the offense committed. The defense in this case as evinced by the defense counsel upon his cross-examination of the prosecution's witnesses and his examination of the accused Haynes was that there was consent and lack of resistance on the part of the prosecutrix. We are of the opinion that the competent evidence afforded an ample basis to negative the defense proposition. Considering the language barrier the prosecutrix nevertheless made known to accused by her screams and struggle that she was not in fact consenting to Haynes' conduct. That her resistance was ineffectual does not make it any less real. The court had evidence that the prosecutrix was less than eighteen years of age and a virgin and from the evidence it may be concluded that her latter status was not due to the prior exercise of the wiles of a woman experienced in warding off male importunities of the type here narrated. Contrariwise the testimony of Haynes establishes that he is no novice in inter-sexual encounters, but had previous engagements in which he was opposed by defenses unavailable to the prosecutrix by reason of her inexperience. The circumstance that she was carried off by force from a group of her friends in the early hours of the morning must certainly have terrorized her thereby lessening her powers of resistance. Where, in fact, the victim is overcome by fear her resistance

is unnecessary to sustain a charge of rape (CM 240674, Rimke, 26 BR 91,96). Her resistance in any event was commensurate with the circumstances in which she found herself, a captive of two members of the occupying forces in an isolated spot in the deep of night (CM 266302, Brown, 43 BR 221,228).

The prosecutrix admitted that prior to trial she had stated that penetration had been effected without manual manipulation by either accused or herself, while at the same time she was moving her body from side to side. In her testimony at the trial she stated that accused was holding one hand over her mouth and also stated that she did not know to what employment he put his other hand. It is extremely unlikely that penetration was accomplished under the circumstances related by the prosecutrix in her pretrial statement, and it is concluded that, in fact, due to her state of mind at the time of the attack, she did not know in whatmanner penetration was accomplished.

The findings of guilty of rape as to the accused Haynes are sustained by the evidence.

With reference to Lussmyer the evidence shows that he forcibly placed the prosecutrix in the vehicle, threatened away her would-be rescuers, and held the prosecutrix in the vehicle until their arrival at the scene of the rape. Haynes in his testimony admitted that he and Lussmyer wanted to pick up the girl for the purpose of sexual intercourse but claimed that at no time did the thought of rape enter his mind or that of Lussmyer, and further that the subject of rape was not discussed by them. Opposed to this testimony are the inferences which can be drawn from their actions preceeding the rape. Their seizure by force and violence of the prosecutrix from a group of her friends in the deep of night and carrying her to an isolated spot are susceptible to the inference that more was intended than frustration of their desires, and that in fact, Haynes' accomplishment was their intendment. In this view of the evidence which was rightfully within the contemplation of the court, Lussmyer was an aider and abettor to Haynes in the latter's commission of the offense charged and hence liable as a principal, whether charged as an aider and abettor or as a principal (CM 273817, Johnson, et al, 6 BR (ETO) 291,295; CM 284438, Rape, et al, 14 BR (ETO) 131,137).

It is shown that after the arrival of the group at the scene of the rape, Lussmyer, although present, stood by idly and took no part in Haynes' rape of the prosecutrix and for the purpose of this discussion it may be conceded that he did not act as lookout. Nevertheless such inaction on his part did not constitute a withdrawal of his participation in the offense charged. The law applicable to the factual situation under consideration has been stated as follows:

"* * * the responsibility of one who has counseled and advised the commission of a crime, or engaged in a criminal undertaking, does not cease, unless within time to prevent the commission of the contemplated act he has done everything practicable to prevent its consummation. It is not enough that he may have changed his mind, and tried when too late to avoid responsibility. He will be liable if he fails within time to let the other party know of his withdrawal, and does everything in his power to prevent the commission of a crime." (People v. King, 30 Calif 2d 185, 85 Pac 2d 928,939)

The evidence supports the findings of guilty as to accused Lussmyer.

5. After the defense rested, at the offer of the prosecution, a voluntary pretrial statement of Lussmyer was admitted in evidence against accused Lussmyer solely over objection by the defense. Although the ground upon which the offer was made by the prosecution is utterly without merit, viz, to impeach Lussmyer by showing that his pretrial statement varied from Haynes' testimony, the statement was properly received in evidence, Paragraph 121, Manual for Courts-Martial 1928, provides that the court may permit a case closed by either or both sides to be reopened for the introduction of further testimony previously omitted. In this case it was quite proper for the court after the case had been closed by both sides to receive Lussmyer's pretrial voluntary statement for what it was worth.

6. Accused Haynes is 29 years of age and single. He had prior service from January 1941 to November 1945. His current enlistment extends from 22 May 1946. He has had a total of approximately seven years of foreign service. His service has been characterized as excellent.

Accused Lussmyer is 25 years of age and single. His service extends from 17 January 1946 and has been characterized as excellent.

7. The court was legally constituted and had jurisdiction of the persons and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused as modified by the reviewing authority. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in apenitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so

punishable by penitentiary confinement by Section 278, Criminal Code of the United States (18 USC 457).

C. O. Wolfe, Judge Advocate

L. J. Berkowitz, Judge Advocate

J. W. Lynch, Judge Advocate

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

CSJAGK - CM 334214

10 JAN 1949

UNITED STATES v. First Lieutenant EDWARD ANGUS BROWN (0-2017342), Headquarters and Headquarters Company, 17th Transportation Major Port	BREMERHAVEN PORT OF EMBARKATION Trial by G.C.M., convened at Bremerhaven, Germany, 7 December 1948. Dismissal and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
SILVERS, SHULL 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 specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Edward A. Brown, Headquarters and Headquarters Company, 17th Transportation Major Port, did, at Bremerhaven, Germany, between on or about 9 February 1948 and 28 September 1948, feloniously embezzle by fraudulently converting to his own use Military Payment Certificates of a value of $3194.06, the property of Bremerhaven Port of Embarkation Casino Club Officers' Mess Fund intrusted to him as custodian by the said Bremerhaven Port of Embarkation Casino Club Officers' Mess Fund.

He pleaded not guilty to and was found guilty of the charge and its specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, designated the 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. <u>For the Prosecution</u>

By verbal orders of the Commanding General, Bremerhaven Port of Embarkation, the accused was, on 9 February 1948, appointed Club Director, Officers' Club, Bremerhaven Area, Assistant Custodian, BPE Officers' Club Fund, and Custodian, Class "B" Mess Fund, Casino Officers' Mess. The verbal orders were confirmed and made of record by paragraph 11, Special Orders 36, Headquarters Bremerhaven Port of Embarkation, 13 February 1948. The accused performed the above enumerated duties until 28 September 1948. (R 14, Pros Ex 12)

The assets of the Casino Officers' Mess Fund were transferred from First Lieutenant Noal A. Christensen to the accused on 9 February 1948. This transfer was evidenced by a document certified by Lieutenant Christensen and signed by accused, who acknowledged receipt of the assets therein shown, totaling $6,673.31 (R 9,10, Pros Ex 2).

The record of trial shows that on several occasions between 3 April 1948 and 3 September 1948 the accused drew various checks in his capacity as custodian of the above mentioned funds. These checks were used by him to make up shortages temporarily so that the shortages would not be reflected in the monthly inventory. The cash was counted by the inventory officer after the first of the month. Before each inventory the accused would draw a check to cover the shortage of the previous month. This had been going on for four months with an ever increasing shortage. (Pros Ex 1)

In August 1948 Headquarters European Command issued a directive to the effect that all Class "B" messes operated by clubs would have their funds merged with the parent fund. On 25 August 1948 in compliance with the directive Lieutenant Colonel Frank V. B. Couch, BPE Club Officer, issued instructions to the mess officers operating messes in the various facilities of the BPE Officers' Club to accomplish the merger by 1 September 1948. They were to deposit their assets based upon their closing statements of 31 August 1948, to the account of the BPE Officers' Club Fund. (R 15) Lieutenant Colonel Couch spoke to the accused many times, over the 'phone and personally, urging him to complete and turn in his records. Finally on 28 September 1948 after Lieutenant Colonel Couch threatened to take more positive action, accused accomplished the transfer, stating that he was short the amount of $3,194.06. Upon being queried as to the shortage, accused stated that the money had been stolen from him under the following circumstances: On 3 September 1948 he had withdrawn the fund from the American Express Company in order to deposit it to the BPE Officers' Club Fund account. In so doing he had taken the money to the Casino Club to count it prior to making the deposit. While counting the money it became necessary for him to go to the latrine next door. He placed the money in the top drawer of his desk and was away about eight minutes. Upon his return to the office, the money was gone. Colonel Couch took the accused to the office of the executive officer, Colonel George H. Molony, where the above story was repeated. Colonel Darling, Chief of Special Services, stated in the presence of the accused that he had discovered a shortage of roughly $3,000 in the Casino Mess Fund account. Colonel Molony

requested the Criminal Investigation Division to investigate the case. (R 8) Subsequently the accused made a sworn statement before Colonel Morrison, the provost marshal, and James M. Salles, an agent of the Criminal Investigation Division. This statement appears to have been given voluntarily by the accused and after he had been warned of his rights under the provisions of Article of War 24. This statement, which was received in evidence as Prosecution Exhibit 16, recited substantially the same information previously given to Colonel Couch and Colonel Molony with the additional assertion by accused that he had placed the money which he had withdrawn from the American Express Company in two envelopes - $1312.04 in one envelope from the "U.S. and Allied Civilian Mess Fund" and $3194.06 in the other envelope from the "Casino Officers' Mess Fund." Sergeant Stickley had opened the safe and placed the envelopes therein. The envelopes were not marked with any monetary value but were merely numbered #1 and #2 for the accused's own identification. The sergeant did not know the contents of the envelopes. On 7 September the accused deposited the $1312.04 with the American Express Company. On 8 September he took the envelope containing the $3194.06 to the club office. While verifying the cash he placed the money in his desk drawer and went to the bathroom. Upon his return, five minutes later, the money was gone. (R 7)

Sergeant Douglas Stickley testified that he did not know the combination of the safe after July 1948, that he did not place the two envelopes identified #1 and #2 in the safe for the accused, nor did he put anything else in the safe for him (R 22-23).

On 29 September Colonel Morrison took the accused to Colonel Molony's office. The accused was advised by Colonel Molony that it was not necessary for him to make any statement whatsoever, that any statement he made must be purely voluntary, that he could not be required to answer any question that might incriminate or degrade him, and that anything he stated could be used against him. No promises or threats were made to accused at any time during the investigation. The accused stated, "It's a case of misappropriation of funds," and then after being sworn made and signed a statement, witnessed by Colonel Molony and Colonel Morrison, which was received in evidence, without objection, as Prosecution Exhibit 1. The statement reads in pertinent part:

> "When it all started - I do not know the exact date - but it was a matter of drawing a check on the account to be used for shortage. Since the cash was counted by the Inventory Officer after the first of the month, another check would be drawn on the first of the month to cover the shortage of the previous month. This has been going on for the past four months and building up in size. On the third of September when I withdrew the cash from the bank I was able to liquidate most of my indebtedness and had hoped that I could borrow

enough money in the meantime to replace the amount of money taken. This shortage was brought to light on the 28th of September when I could not produce a deposit slip for the money for Colonel Couch. That's just about the story of it, Colonel.

* * *

"Molony: You did use the money for yourself?
Brown: Yes sir
Molony: Is the whole shortage now $3,194.06
Brown: Yes, sir

* * *

Molony: Of this figure, $3200 roughly, that you are short, Brown, how much of that is due to your own misappropriation for yourself, and how much is due to operation?
Brown: Approximately $2200 is mine, and the other $1000 over a period of time is the mess's.
Molony: And you admit to actually misappropriating to your own use $2200 of mess funds?
Brown: Yes, sir.
Molony: How long has this been going on, Brown?
Brown: Five or six months, sir.

* * *

Molony: I don't believe that you would just steal. I can't help but feel, Brown, that there is something behind this thing. Are there any extenuating circumstances that you would like to bring out?
Brown: It was just living beyond my means, Colonel. That sums it all up." (Pros Ex 1, pp 1,2,3,5)

Major Elbert T. Allen testified that he made an audit of the records and accounts of the Officers' Mess at the Bremerhaven Port of Embarkation Casino Club. A check written on the Bremerhaven Port of Embarkation Casino Mess account with the American Express Company for $3,194.06 dated 3 September 1948, payable to cash and indorsed by accused was identified by the witness and admitted in evidence as Prosecution Exhibit 10. A certified copy of the American Express Company, Bremerhaven Office, statement of the accounts of the fund for the period 4 June 1948 to 3 September 1948 and showing the withdrawal on the latter date of the balance $3,194.06 was admitted in evidence as Prosecution Exhibit 11. No objection was made to the admission of these documents in evidence (R 9-13).

Lieutenant Colonel Couch testified that the cash assets of the Casino Mess Fund were $3,194.06, as shown by the balance sheet, on deposit in the American Express Company (Pros Ex 11); that this amount should have been turned over to him by the accused, and upon his failure to turn over the money accused had stated that he was short in that amount.

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

After being advised of his rights as a witness accused elected to

make an unsworn statement through counsel in which he stated his age, birthplace and close relatives. This statement also gives his educational background and his Army assignments including combat duty.

5. Discussion

It is axiomatic that a court cannot consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed. That is to say, there must be evidence of the corpus delicti other than the confession itself (MCM, 1928, par 114a, p 115). The accused herein admitted withdrawing, for his personal use, the sum of $3,194.06, property of the Bremerhaven Port of Embarkation Casino Club Officers' Mess Fund. Evidence for the prosecution, aliunde accused's confession, established that on 3 September 1948 there was $3,194.06 on deposit with the American Express Company, Bremerhaven Office, to the credit of this fund and that on that day he withdrew the money by check and retained or disposed of the money adversely to his trust. When called upon to account he failed to do so, and

> "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." (Underscoring supplied) (CM 320308, Harnack, 69 BR 323,329.)

Accused's statement that at the time he took the money he intended to make restitution thereof by borrowing or other means is not a defense to the embezzlement of the funds (CM 253054, Howard, 34 BR 235,250; CM 276435, Meyer, 48 BR 331,338).

6. Department of the Army records indicate that accused is 25 years of age, married, and has one child. He completed high school at Buffalo, New York, and attended the University of Buffalo for 1-1/2 years. In civilian life he was employed as a production clerk. He entered on active duty as an enlisted man on 16 February 1943. He served with the Anti-tank Company of the 121st Infantry, 8th Infantry Division, attaining the rank

of corporal. He was commissioned a second lieutenant on 3 May 1945, after successfully completing Officers' Candidate School at Fountainbleau, France. He was promoted to first lieutenant on 23 October 1946. He had foreign service in the European Theater from 5 December 1943 to 11 July 1945. His current tour of foreign service extends from 30 October 1947.

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 finding of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Charles L. Silvus, Judge Advocate

Lewis F. Shull, Judge Advocate

Harley A. Lanning, Judge Advocate

CSJAGK - CM 334214 1st Ind

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

TO: The Secretary of the Army

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of First Lieutenant Edward Angus Brown (0-2017342), Headquarters and Headquarters Company, 17th Transportation Major Port.

2. Upon trial by general court-martial this officer was found guilty of embezzlement of about $3,194.06, property of the Bremerhaven Port of Embarkation Casino Club Officers' Mess Fund, in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, designated the 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 thereof.

4. The accused was Custodian, Class "B" Mess Fund, Casino Officers' Mess. This position was held by him from 9 February 1948 until 28 September 1948. In August 1948 a directive was issued by Headquarters European Command to the effect that all Class "B" messes operated by clubs would have their funds merged with the parent fund. In compliance with that directive, Lieutenant Colonel Frank V. B. Couch, as custodian of the Bremerhaven Port of Embarkation Officers' Club Fund, issued instructions to the mess officers in the various facilities of the Bremerhaven Port of Embarkation Officers' Club to accomplish the merger by 1 September 1948. The merger was to be accomplished by depositing the assets of these messes based upon their closing statements of 31 August 1948, to the credit of the account of the Bremerhaven Port of Embarkation Officers' Club Fund, which account was maintained in the American Express Company, Inc.

Between 1 September and 28 September 1948 Lieutenant Colonel Couch communicated with the accused several times by 'phone and orally urged him to complete his records and transfer his funds. On 28 September 1948 the accused turned over the records of the Casino Club Mess Fund as of 31 August 1948. An audit disclosed that the fund was short

$3,194.06. At the time of the transfer, the accused told Colonel Couch that the above amount of money had been stolen from him under the following circumstances: On 3 September 1948 he withdrew $3,194.06 from the American Express Company, Inc., in order to deposit it to the Bremerhaven Port of Embarkation Officers' Club account. He took the money to the Casino Club and while in the act of counting it it became necessary for him to go to the latrine next door. He placed the money in a drawer of his desk. When he returned about eight minutes later the money was gone. He did not report the loss because he had hoped to replace the money. After being warned of his rights under the 24th Article of War the accused repeated the above statement in the presence of Colonel George H. Molony, Executive Officer, Bremerhaven Port of Embarkation, Lieutenant Colonel Burton O. Morrison, Provost Marshal, and Lieutenant Colonel Couch. After this interview Colonel Molony requested the Criminal Investigation Division to make an investigation of the loss of the money.

On 29 September 1948 accused went to Colonel Molony's office for a further conference concerning the shortage in the fund where he was again advised of his rights respecting self-incrimination. He stated that he understood his rights and added, "It's a case of misappropriation of funds." Accused then signed another statement, under oath, in Colonel Molony's and Colonel Morrison's presence. This statement is a complete confession by the accused that he appropriated the money in question for his own personal use. The Bank Statement of the account, and a cancelled check, show that on 3 September 1948 the accused received in cash the balance of the fund then on deposit - $3,194.06, which is the sum alleged to have been embezzled.

5. Department of the Army records show that this officer is 25 years of age, married and has one child. He graduated from high school and attended the University of Buffalo, New York, for 1-1/2 years prior to enlisting in the Army 16 February 1943. He served with the 8th Infantry Division, attaining the rank of corporal. He was commissioned a second lieutenant on 3 May 1945, after successfully completing Officers' Candidate School at Fountainbleau, France. He was promoted to first lieutenant on 23 October 1946. He had foreign service in the European Theater from 5 December 1943 to 11 July 1945. His current tour of foreign service extends from 30 October 1947. He has three efficiency reports of "Excellent" and four of "Very Satisfactory."

6. I recommend that the sentence be confirmed and carried into execution, and that a United States Disciplinary Barracks be designated as the place of confinement.

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

Cm 334214

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 2, Jan 14, 1949).

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

CSJAGN-CM 334251

27 JAN 1949

UNITED STATES v. Recruit GEORGE E. FINEHOUT (RA 16179034), Company B, 26th Infantry (RCT).	)))))))	1ST U. S. INFANTRY DIVISION Trial by G.C.M., convened at Bamberg, Germany, 18 November 1948. Dishonorable discharge and confinement for one (1) year and four (4) months. Disciplinary Barracks.

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

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

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

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

Specification 1: In that Recruit George E. Finehout, Company B, 26th Infantry (RCT), did, without proper leave, absent himself from his organization at Grafenwohr, Germany, from about 6 September 1948 to about 17 September 1948.

Specification 2: In that Recruit George E. Finehout, Company B, 26th Infantry (RCT), did, without proper leave, absent himself from his organization at Grafenwohr, Germany, from about 20 September 1948 to about 3 October 1948.

Specification 3: In that Recruit George E. Finehout, Company B, 26th Infantry (RCT), did, without proper leave, absent himself from his organization at Bamberg, Germany, from about 3 October 1948 to about 23 October 1948.

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

Specification: In that Recruit George E. Finehout, Company B, 26th Infantry (RCT), having been duly placed in arrest in quarters, at Bamberg, Germany, on or about 3 October 1948, did, at Bamberg, Germany, on or about 3 October 1948, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Recruit George E. Finehout, Company B, 26th Infantry (RCT), did, at Bamberg, Germany, on or about 3 October 1948, wrongfully strike Private Allen C. Wells on the face with his fist and wrongfully bite the said Private Allen C. Wells on the ear and finger.

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

Specification 1: In that Recruit George E. Finehout, Company B, 26th Infantry (RCT), did, at Bamberg, Germany, on or about 3 October 1948, feloniously take, steal, and carry away Military Payment Certificates of the value of $10.00, one (1) O.D. cap, two (2) cartons of cigarettes, ten (10) handkerchiefs, one (1) pair of combat boots, one (1) set of spades, one (1) box of candy, one (1) cargo pack, one (1) stationary, and shaving articles of a total value of more than $20.00, the property of Private Allen C. Wells.

Specification 2: (Finding of Not Guilty).

Specification 3: (Finding of Not Guilty).

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 1, 2 and 3 of Charge I and Charge I, of the Specification of Charge II and Charge II, of the Specification of Charge III and Charge III, except the words "strike Private Allen C. Wells on the face with his fist," substituting therefor the words "grab Private Allen C. Wells," of Specification 1 of Charge IV and Charge IV, except the words "one (1) O.D. cap," and "shaving articles." Evidence of one previous conviction for absence without leave 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 seventeen months. The reviewing authority approved only so much of the finding of the Specification, Charge III, as finds that the accused did, at the time and place alleged, wrongfully bite Private Allen C. Wells on the ear and finger, only so much of the finding of Specification 1 of Charge IV as finds that accused did, at the time and place and from the person alleged, feloniously take, steal and carry away Military Payment Certificates of the value of $10.00, two (2) cartons

of cigarettes, ten (10) handkerchiefs, one (1) pair of combat boots, one (1) set of spades, one (1) box of candy and one (1) stationary, of the total value of not more than $20.00 and only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year and four months, designated the Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial contains evidence sufficient to sustain all of the Specifications and Charges except Specification 1 of Charge IV and Charge IV. The only questions presented are the legality of the findings pertaining to Specification 1 of Charge IV and Charge IV and the legality of the sentence.

4. The only proof of the allegations of Specification 1 of Charge IV is the testimony of the owner of the articles stolen, Private Allen C. Wells, that the articles were missing (R. 20), and accused was seen with a bag (R. 17, 18) and that accused stated to Private Wells on the date alleged "that he had some cigarettes and candy he was going AWOL with" which Private Wells "figured * * * were mine because I was missing that" (R. 12). No evidence was adduced that in any manner connected accused with the articles Private Wells said were missing, consequently there is no proof of the offense charged, as required by paragraph 149g, Manual for Courts-Martial, 1928.

5. The maximum period of confinement imposable for the offenses of which accused was legally found guilty is six months for the assault and battery (Spec. Chg. III), three months for the breach of arrest (Spec. Chg. II) and the absence without leave of 3 October 1948, as these offenses were different aspects of the same act (par. 80a, MCM, 1928), thirty-nine days for the absence without leave initiated on 20 September 1948 (Spec. 2, Chg. I), and thirty-three days for the absence without leave initiated on 6 September 1948 (Spec. 1, Chg. I), comprising a total confinement imposable of eleven months and twelve days.

6. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1 of Charge IV and Charge IV, legally sufficient to support the findings of guilty of the remaining Specifications and Charges as approved 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 eleven months and twelve days.

Thos. E. Young, Judge Advocate.

Frank E. Alfred Judge Advocate.

George B. Springston, Judge Advocate.

CSJAGN-CM 334251 1st Ind
CSJAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 1st U. S. Infantry Division, APO 1, c/o Postmaster, New York, New York.

1. In the case of Recruit George E. Finehout (RA 16179034), Company B, 26th Infantry (RCT), I concur in the holding by the Board of Review and recommend that the findings of guilty of Specification 1 of Charge IV and Charge IV 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 eleven months and twelve days. Upon taking such action you will have authority to order execution of the sentence.

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

(CM 334251).

1 Incl
Record of trial

14 1st INF. DIV.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

CSJAGN-CM 334370

25 January 1949

U N I T E D S T A T E S V. Recruit JAMES F. DRISCOLL (RA 16204125), Headquarters & Headquarters Company, 187th Glider Infantry, 11th Airborne Division, APO 468.	)	11TH AIRBORNE DIVISION Trial by G.C.M., convened at Camp Crawford, Hokkaido, Japan, 23 November 1948. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
YOUNG, 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Recruit James F. Driscoll, Headquarters and Headquarters Company, 187th Glider Infantry did, without proper leave, absent himself from his station at Camp Stoneman, California, from about 7 November 1947 to about 20 January 1948.

Specification 2: In that Recruit James F. Driscoll, Headquarters and Headquarters Company, 187th Glider Infantry, did, without proper leave, absent himself from his station at Fort Knox, Kentucky, from about 15 February 1948 to about 19 March 1948.

Specification 3: In that Recruit James F. Driscoll, Headquarters and Headquarters Company, 187th Glider Infantry Regiment did, without proper leave, absent

himself from his station at Camp Crawford, Japan, from about 16 April 1947 to about 28 April 1947.

Specification 4: In that Recruit James F. Driscoll, Headquarters and Headquarters Company, 187th Glider Infantry Regiment did, without proper leave, absent himself from his station at Camp Crawford, Japan, from about 2 May 1947 to about 17 August 1947.

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

Specification: In that Recruit James F. Driscoll, Headquarters and Headquarters Company, 187th Glider Infantry Regiment, having been duly placed in confinement in Post Stockade, Camp Crawford, Japan, on or about 28 April 1947, did, at Sapporo, Japan, on or about 2 May 1947, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. 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 a period of two years. The reviewing authority approved the sentence, designated the 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 record of trial is legally sufficient to support the findings of guilty of Charge I and its Specifications. The only question to be considered is the legal sufficiency of the record of trial to support the findings of guilty of Charge II and its Specification and the sentence. Only the evidence relating to the Specification of Charge II will, therefore, be discussed.

4. To establish the confinement of accused, there was introduced in evidence, without objection, original guard report for 18 April to 16 May 1947 of Camp Crawford containing an entry showing accused "received * * * for confinement 1630," and confined 28 April by authority of confinement order (R. 10; Pros. Ex. 6). The exhibit also contained a remark for the guard tour of 29-30 April 1947 "Driscoll, James F. Admitted 161st Hospital."

There was also introduced and admitted in evidence, over objection by the defense, extract copy of morning report of Headquarters and Headquarters Company, 187th Glider Infantry Regiment. This entry reads as follows:

"1 May 1947
Correction (28 Apr 47)

Driscoll James F RA 16204125 Pvt
TDY Div Track Team Sendai
Honshu Japan to Conf Regt'l
Stockade

SHOULD BE

Driscoll James F RA 16204125 Pvt
AWOL to Conf Regt'l Stockade" (R. 7; Pros. Ex. 2).

To show the escape of accused, the prosecution relied on a duly authenticated extract copy of a morning report of Headquarters and Headquarters Company, 187th Glider Infantry Regiment for 27 May 1947 and original entry in the Camp Crawford guard book for the tour 1920 May 1947 "Pvt. Driscoll, Jesse F. AWOL from 161 Stat. Hosp. 2 May 1947. Report turned in to this Regt. Guard House 1130 20 May 47" (R. 17; Pros. Ex. 7). The morning report contained the following entry:

"Driscoll James F RA 16204125 Pvt
Conf Regt'l Stockade to AWOL
(EDCMR 2 May 47 1000)" (R. 7; Pros. Ex. 3).

Thereafter the prosecution introduced as a witness Nubuo Matsuoko, an employee in the Police and Prison Office in Camp Crawford, who identified himself as technical advisor for the occupation forces in Camp Crawford. This witness testified that from on or about 3 March 1946 for about one year and seven months he worked in the Police and Prison Office of Camp Crawford as police and prison clerk. He identified Prosecution Exhibits 6 and 7, testifying that the entries were correct to the best of his knowledge and belief (R. 10, 11).

On examination by the court, the following colloquy occurred:

"Questions by the president:

Q Did the officer of the day personally inspect the 161st Hospital in an attempt to determine whether Recruit James F. Driscoll was in the hospital on the day in question?
A No, sir. I think about ten days after he was confined in the hospital one officer of the day went to the hospital and then found he had gone.

Q The entry in this book represents the absence on the day that the officer of the day inspected and found Private Driscoll not present, is that statement correct?
A Yes, sir, it is.

Q On whose specific instruction did you make the entry in this book of that particular day's absence?
A One provost sergeant told me upon check made by the officer of the day he found Driscoll went AWOL from hospital.

Q And upon the sergeant's instructions you made the entry in this book?
A No, sir, I gave the information to the officer of the day before making proper entry on guard book.

Q You gave the information to the officer of the day for proper entry into this book. Was that officer of the day the same person that inspected the 161st Hospital and found the accused absent?
A I think so, sir, but I am not sure.

Q Did the officer of the day verify that absence when he checked this book and signed it as a true, official document?
A Yes, sir.

Q He did check it?
A Yes, sir.

* * *

LAW MEMBER: The court will disregard such of the evidence offered by this witness as pertains to the means by which it was determined that Recruit Driscoll went AWOL from the hospital as hearsay evidence" (R. 12-13, 14).

5. The proof required to establish an escape from confinement, the offense alleged in the Specification of Charge II, is (a) that accused was duly placed in confinement, and (b) freed himself from the restraint of his confinement before set at liberty by proper authority (par. 139b, MCM, 1928).

The evidence is uncontradicted that accused was confined in the Post Stockade on or about 28 April 1947 as alleged. The evidence is likewise uncontradicted that he was transferred to the 161st Station Hospital during the guard tour 29-30 April 1947. There is sufficient competent evidence in the record of trial to establish the absence without leave of accused, initiated 2 May 1947, as alleged.

The Board of Review is not unmindful of the legal principle enunciated in paragraph 112, Manual for Courts-Martial, 1928, that a condition having been shown to have existed at one time, in the absence of any indication to the contrary, there is a presumption that the condition continues. However, in the instant case, the prosecution having shown accused confined in the stockade on 27 or 28 April 1948, rebutted

the presumption of continuance of this condition by its own evidence that he was transferred to the 161st Station Hospital on or about 29 or 30 April 1947, and that he absented himself without leave from there. It is recognized that Prosecution Exhibit 3, morning report of Headquarters and Headquarters Company, 187th Glider Infantry Regiment, shows accused "Conf Regt'l Stockade to AWOL (EDCMR 2 May 47 1000)," and morning report entries "are competent evidence of the facts recited in them except as to entries obviously not based on personal knowledge" (Par. 117a, MCM, 1928, p. 121). It has been held that the lack of such personal knowledge may be established by other intrinsic evidence (CM 307173, Sabansky, 60 BR 394; CM 277601, Jensen, 51 BR 171; 4 Bull. JAG 86-88, March 1945).

The prosecution established by positive evidence that accused was removed from the company to the stockade, and thence to the hospital. Obviously it appears that the entry in the company morning report was based on information furnished by the hospital to the stockade and by the stockade to the company. It therefore might be considered that the entry was based on hearsay twice removed, hence the prima facie evidence of regularity was refuted by the prosecution in the presentation of its case.

It is clear that accused did not escape from his confinement in the Post Stockade as alleged. It is definitely established that he was transferred to the hospital on 29 or 30 April 1947, and thereafter absented himself without leave from that installation. The record is silent as to the imposition of any physical restraint of the accused at the hospital at the time of the alleged escape and as to the manner in which he went or was taken to the hospital, whether or not under guard. Furthermore no evidence was adduced from which it may be inferred that he was under physical restraint of any kind while in the hospital and at the time he absented himself therefrom. Although the witness Matsueka referred to a period of "ten days after he (accused) was confined in the hospital," it is certain from all his testimony and other evidence introduced by the prosecution that he could not and did not know of any physical restraint or other conditions under which accused was kept while in the hospital, and was merely expressing his opinion of the status of accused without any basis in fact.

In a similar case of alleged escape, in which accused was taken from the guardhouse and admitted as a patient in the hospital, from which he absented himself without leave, the Board of Review held that where the evidence failed to show physical restraint the evidence was not legally sufficient to support the sentence (CM 219725, Lowry, 12 BR 309, 311). Similar conclusions were reached in the case of CM 244521, Humphrey, 28 BR 337 wherein accused was a member of an honor company at a rehabilitation center, and after receiving permission to go to the station hospital, disappeared while in the neighborhood of the hospital.

In view of the proof required by the Manual for Courts-Martial to establish escape, and the legal principles contained in the above decisions, the conclusion is inevitable that, in the absence of proof of physical restraint, accused may not properly be found guilty of escape from confinement.

6. The authorized maximum sentence to confinement for the offenses of absence without leave of which accused was found guilty under the Specifications of Charge I is as follows: Specification 1, six months; Specification 2, three months and nine days; Specification 3, one month and six days; Specification 4, six months (par. 104c, MCM, 1928). The maximum period of confinement to which accused may be sentenced is therefore one year, four months and fifteen days.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specifications, legally insufficient to support the findings of guilty of the Specification of Charge II and Charge II, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, four months and fifteen days.

Chas. E. Young, Judge Advocate.

Frank C. Alfrid, Judge Advocate.

George B. Springston, Judge Advocate.

CSJAGN-CM 334370 1st Ind
CSJAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 11th Airborne Division, APO 468, c/o Postmaster, San Francisco, California.

1. In the case of Recruit James F. Driscoll (RA 16204125), Headquarters and Headquarters Company, 187th Glider Infantry, 11th Airborne Division, APO 468, I concur in the holding by the Board of Review and recommend that the findings of guilty of the Specification of Charge II and Charge II be disapproved and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, four months and fifteen days. Upon taking this 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 334370).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

AGYW 250.411 Driscoll, James F. (Enl) 2nd Ind 28 FEB 1949
(25 Jan 49)

Hq Eighth Army, APO 343, c/o Postmaster, San Francisco, California

TO: Commanding General, 11th Airborne Division, Camp Campbell, Kentucky

1. Forwarded pursuant to paragraph 87a, MCM, 1949.

2. Request that this headquarters be furnished twenty copies of the general court-martial orders when published.

FOR THE COMMANDING GENERAL:

W. D. Richardson
W. D. RICHARDSON
CWO, USA
ASST ADJ GEN

1 Incl:
n/c

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

JAGK - CM 316986

7 NOV 1946

UNITED STATES v. Privates COLE L. BOYKIN (32412802), 292nd Military Police Company, and WILLIE R. SAXTON (34744243), 827th Tank Destroyer Battalion.	WESTERN BASE SECTION US FORCES, EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 19-20 July 1946. BOYKIN: Dishonorable discharge and confinement for six (6) years. SAXTON: Dishonorable discharge and confinement for four (4) years. Each: Disciplinary Barracks.

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

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

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

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

Specification 1: In that Private Cole L. Boykin, 292nd Military Police Company, United States Forces, European Theater, in conjunction with Private Willie T. Duncan, did, at or near Raphele, France on or about 20 December 1945, knowingly and willfully dispose of by sale to a French civilian a 2½ ton 6x6 truck, value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

Specification 2: (Finding of not guilty).

Specification 3: In that Private Cole L. Boykin, ***, in conjunction with Private Willie R. Saxton and Private Jessie Williams, did, at or near Raphele, France on or about 22 December 1945, knowingly and willfully dispose of by sale to a French civilian, four (4) tires, value of more than fifty dollars ($50.00), property of the United States furnished and intended for the military service thereof.

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

Specification: In that Private Cole L. Boykin, ***, did, at

Calas, France on or about 15 August 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Marseille, France on or about 13 January 1946.

The accused Saxton was tried upon the following charges and specifications:

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

Specifications 1,2,4,5, and 7: (Finding of not guilty).

Specification 3: In that Private Willie R. Saxton, 827th Tank Destroyer Battalion, United States Forces, European Theater, in conjunction with Private Jessie Williams, did at or near Arles, France on or about 30 November 1945, knowingly and willfully dispose of by sale to unknown civilians, three (3) tires, value of more than fifty dollars ($50.00), the property of the United States furnished and intended for the military service thereof.

Specification 6: In that Private Willie R. Saxton, ***, in conjunction with Private Cole L. Boykin, did, at or near Marseille, France on or about 22 December 1945, knowingly and willfully dispose of by sale to a French civilian, four (4) tires value of more than fifty dollars ($50.00), the property of the United States furnished and intended for the military service thereof.

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

Specification: In that Private Willie R. Saxton, ***, did at or near Calas, France on or about 26 October 1945 desert the service of the United States, and did remain absent in desertion until he was apprehended at or near Marseille, France on or about 12 January 1946.

Each accused pleaded not guilty to all charges and specifications. The accused Boykin was found not guilty of Specification 2 of Charge I and guilty of Specifications 1 and 3, Charge I, and Charge I, and guilty of the Specification and Charge II. The accused Saxton was found not guilty of Specifications 1,2,4,5,7 of Charge I, guilty of Specifications 3 and 6, Charge I, and Charge I, guilty of the Specification and Charge II. No evidence of any 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; the accused Boykin, to be confined at hard labor for twelve years; the accused Saxton to be confined at hard labor for eight years. The reviewing authority approved the sentence as to each accused, reduced the period of confinement to six years in the case of Boykin and to

four years in the case of Saxton, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement for each accused, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty as to the accused Boykin, and legally sufficient to support the findings of guilty of the specification and Charge II as to the accused Saxton, and legally sufficient to support the sentence as to each accused, but legally insufficient to support the findings of guilty, as to the accused Saxton, of Specifications 3 and 6 of Charge I and Charge I.

In view of this holding discussion will be limited to that portion of the record of trial considered legally insufficient.

The only question to be considered is the admissibility of the accused Saxton's extra-judicial confession and its effect upon his substantial rights. The accused vigorously objected to the admission of this confession in evidence and testified as to the manner in which it was obtained as follows:

> "Q. Will you tell the court in your own words how, and under what circumstances the confession was obtained from you by the agent, Noeman Lane?
>
> "A. About the statement. He told me that if I did not make out a statement they would beat me up bad. I wouldn't make a statement. They asked me about 'Rico' and Williams. I told them I didn't know, and they said I did.
>
> "They said if I did not tell them that I knew him they would take me out in the woods and beat me with a rubber hose, they also said they would kill me if I did not make that statement. Then the CID agent, Lane, he took me in a room and made me make out a statement, then he, Lane, took a hose this long (indicating about an eight inch span), so I got tired of him buzzing me around and went on and made a statement.
>
> "Q. What date were you put in jail?
>
> "A. January 10.
>
> "Q. Was it a French or American jail?
>
> "A. French jail.
>
> "Q. In a room by yourself?
>
> "A. Yes, in a room by myself, sir.
>
> * * *
>
> "Q. Did you have any food while there?
>
> "A. Not that night.
>
> "Q. Did you have anything to eat?
>
> "A. Next morning, about 12 o'clock, they gave me some sandwiches.
>
> "Q. What kind of sandwiches?
>
> "A. Meat loaf." (R. 44)

"Q. On the eleventh of January?

"A. On the eleventh of January, that time made at the CID in Marseille. They handcuffed me to the radiators and they left me there all day. I did not eat and they took me away.

"Q. Where did you sleep?

"A. In Marseille jail.

"Q. What kind of a jail was it?

"A. Just a little shack, an American jail.

"Q. Where did you .. what did you do the next day?

"A. They took me back to the CID headquarters.

"Q. Did you eat?

"A. Not until twelve o'clock.

"Q. What did you have to eat?

"A. A meat sandwich.

"Q. What did you do in the CID headquarters?

"A. I made a statement.

"Q. What happened?

"A. I told them I would not but all that day before we are left ...

"Q. Were you warned of your rights?

"A. Yes, sir.

"Q. By an officer?

"A. A CID man, sir.

"Q. Did they ever threaten you?

"A. Yes.

"Q. When did that take place?

"A. Well, of rights I did not know; and they told me; and so he slapped me around; and then after that he told me I would make the statement out and I made them that statement." (R. 45)

In rebuttal to this testimony the prosecution introduced evidence of the general reputation of the agent securing the confession and his general mode of talking to and treating witnesses. One witness testified that he was present during part of the interrogation of the accused and that while he was present no threats were made against the accused. The confession having been challenged as being involuntarily procured and the defense having offered evidence in support of its objections, it then became incumbent upon the prosecution to adduce evidence showing the voluntary nature of the confession. This the prosecution failed to do. It is not sufficient merely to show the general method ordinarily employed by the person procuring the confession. The crux of the question is what was done in this particular case.

There being no evidence in the record of trial, except the involuntary confession of the accused, which connects Saxton with the offenses charged in Specifications 3 and 6 of Charge I, the convictions thereon must fail.

4. For the foregoing reasons the Board of Review holds as to the

accused Boykin the record of trial legally sufficient to support the findings of guilty and the sentence. The Board of Review holds as to the accused Saxton the record of trial legally insufficient to support the findings of guilty of Specifications 3 and 6 of Charge I, and Charge I, but legally sufficient to support the findings of guilty of the Specification and Charge II and legally sufficient to support the sentence.

Chester D. Silvers, Judge Advocate

Carlos E. McAfee, Judge Advocate

Elbert E. Stewart, Judge Advocate

JAGK - CM 316986 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Western Base Section, US Forces, European Theater, APO 513, c/o Postmaster, New York, New York.

1. In the foregoing case of Privates Cole L. Boykin (32412802), 292nd Military Police Company, and Willie R. Saxton (34744243), 827th Tank Destroyer Battalion, attention is invited to the foregoing holding by the Board of Review that as to accused Boykin the record of trial is legally sufficient to support the findings of guilty and the sentence and as to the accused Saxton the record of trial is legally insufficient to support the findings of guilty of Specifications 3 and 6 of Charge I and Charge I, but legally sufficient to support the findings of guilty of the Specification and Charge II and legally sufficient to support the sentence, which holding is hereby approved. Upon disapproval of the findings of guilty, as to Saxton, of Specifications 3 and 6 of Charge I and Charge I, you will have authority to order execution of the sentences as to both accused.

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

(CM 316986).

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.

JAGQ - CM 315523

30 October 1947

UNITED STATES v. Sergeant CLARENCE A. HUNTINGTON (RA 39936228), Medical Detachment, 1st Infantry Regiment, APO 6-1.	6TH INFANTRY DIVISION Trial by G.C.M., covened at APO 6, 19 August 1947. Dishonorable discharge and confinement for life. Penitentiary.

HOLDING by the BOARD OF REVIEW
JOHNSON, SCHENKEN 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Clarence A. Huntington, Medical Detachment, First Infantry, APO #6, did at Taegu, Korea, on or about the 27th April 1946, forcibly and feloniously, against her will, have carnal knowledge of An Kyung Buni.

Accused pleaded not guilty to, and was found guilty of the Specification and Charge. No evidence of previous convictions were introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Inasmuch as the Board of Review holds that there was an error of substance in the procedure, the evidence need not be summarized.

4. The accused was first brought to trial on 20-21 May 1946, found guilty of the Specification and Charge, and sentenced to dishonorable

discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½. The Board of Review held that the record of trial was legally insufficient to support the findings and sentence, which holding was concurred in by the Judge Advocate General, whereupon the reviewing authority disapproved the sentence and ordered a rehearing.

At the rehearing on 19 August 1947, "Major Thomas J. Trainor, Hq. 6th Sig Co" sat as a member of the court (R.2). "Lt Col Thomas J Trainor, Hq 6th Inf Div" had previously sat as a member of the court that first heard the case on 20-21 May 1946 (R. 2 - original Record of Trial). Reference to the special orders appointing the two courts shows that Lieutenant Colonel Trainor and Major Trainor have identical Army serial numbers which precludes any doubt that they are one and the same person.

Article of War 50½ provides that a rehearing:

> "shall take place before a court composed of officers not members of the court which first heard the case."

Thus, all members of a court which first hears a case are by statute made legally ineligible to sit as members at a rehearing of the same case. Since in this case one of the members at the rehearing sat as a member of the court that first heard the case, it follows that the court, at the rehearing, was not legally constituted, and was without jurisdiction to try the accused and that its proceedings, including the findings and sentence were null and void ab initio (CM 196472, Tallent, 3 BR 2; par. 410 (7), Dig. Ops. JAG 1912-1940).

It is noted that at the rehearing, Major Trainor announced in open court that he had sat on a court trying a similar case "about a year ago" but he did not know whether it was the same case (R. 3-4). The trial judge advocate had in the courtroom the previous record of trial (it was identified by his first witness) and it is difficult to understand why Major Trainor's name was not checked against the list of court members shown in that previous record of trial. The fact that Major Trainor stated he had not formed an opinion (R. 4) is incosequential; he was ineligible to sit as a member regardless of h ow much or how little he remembered of the original hearing.

5. For the reasons stated above, the Board of Review holds that the record of trial is not legally sufficient to support the findings and sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

JAGQ - CM 315523 1st Ind

JAGO, Dept. of the Army, Washington 25, D.C., 12 November 1947

TO: Commanding General, 6th Infantry Division, APO 6,
c/o Postmaster, San Francisco, California

1. In the case of Sergeant Clarence A. Huntington (RA 39936228), Medical Detachment, 1st Infantry Regiment, APO 6-1, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and recommend that the findings of guilty and the sentence be disapproved. Upon taking the action recommended you will have authority to direct a rehearing.

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

(CM 315523).

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls.
2 Records of Trial

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

JAGH - CM 318705 14 May 1947

UNITED STATES	)	KOREA BASE COMMAND
v.	)	Trial by G.C.M., convened at Korea Base Command, 14-16 November 1946. Dismissal and confinement for one (1) year
Second Lieutenant JOSEPH R. JACKSON (0-1334862), Infantry	)	

HOLDING by the BOARD OF REVIEW
HOTTENSTEIN, SOLF, and SMITH, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Joseph R. Jackson, Inf., 876th Quartermaster Supply and Sales Company, APO 59, for the purpose of obtaining the exchange of (¥3000) Three thousand Korean Yen to U. S. Dollar Instruments in the sum of ($200.00) two hundred Dollars, to be issued by Postal Officer, APO 970, Branch Unit 1, an officer of the United States Army, duly authorized to issue such dollar value instruments, did, at Pusan, Korea, APO 970, Branch Unit 1, on or about 22 January 1946, make a certain certificate, viz: "Application to Purchase U. S. Dollar Instruments - Military", which said Application to Purchase as he, the said Second Lieutenant Joseph R. Jackson then knew contained a statement that "Net pay per month $237.90" and a statement that "the foreign currency listed herein, presented for exchange to U. S. Dollar Instruments was legally obtained as payment of pay and allowances from a disbursing

officer, United States Army, and was not obtained from sale of property, blackmarket currency operations or other illegal sources; that the source of the foreign currency were as follows:

Accumulated pay and allowances.

which statements were false and fraudulent in that Second Lieutenant Joseph R. Jackson received as net pay for the month of Dec. 1946, ($ None) No pay claimed Dollars, i.e., (¥- None) No pay claimed Yen, and that prior 22 January 1946, and during the month of January 1946, Second Lieutenant Joseph R. Jackson had filed "Application to Purchase U. S. Dollar Instruments - Military" on none filed 1946, and were then known by the said Second Lieutenant Joseph R. Jackson to be false and fraudulent.

Specification 2: In that Second Lieutenant Joseph R. Jackson, Inf., 876th Quartermaster Supply and Sales Company, APO 59, for the purpose of obtaining the exchange of (¥ 750.00) Seven thousand five hundred Korean Yen to U. S. Dollar Instruments in the sum of ($500.00) Five hundred Dollars, to be issued by Postal Officer, APO 970, Branch Unit 1, an officer of the United States Army, duly authorized to issue such dollar value instruments, did, at Pusan, Korea, APO 970, Branch Unit 1, on or about 8 February 1946, make a certain certificate, viz: "Application to Purchase U. S. Dollar Instruments - Military", which said Application to Purchase as he, the said Second Lieutenant Joseph R. Jackson then knew contained a statement that "Net pay per month $237.00" and a statement that "the foreign currency listed herein, presented for exchange to U. S. Dollar Instruments was legally obtained as payment of pay and allowances from a disbursing officer, United States Army, and was not obtained from sale of property, blackmarket currency operations or other illegal sources; that the source of the foreign currency were as follows:

Sale of personal property brought from the United States--(4 watches).

which statements were false and fraudulent in that Second Lieutenant Joseph R. Jackson received as net pay for the month of January 1946, ($ None) no pay claimed Dollars, i.e., (¥ None) no pay claimed Yen,

and that prior to 8 Feb. 1946, and during the month of Feb. 1946, Second Lieutenant Joseph R. Jackson had filed "Application to Purchase U. S. Dollar Instruments - Military" on none 1946, and were then known by the said Second Lieutenant Joseph R. Jackson to be false and fraudulent.

Specifications 3 through 20 are identical with Specification 2, except as to date of application, amounts involved, declared sources of foreign currency, months during which alleged net pay was received, and dates on which prior Applications to Purchase U. S. Dollar Instruments had been filed. The variations are summarized as follows:

Spec	Date (1946)	Amounts Yen	Amounts Dollars	Declared Source of Foreign Currency	Mo. during which alleged Net Pay was recd (1946)	Dates on which Appls were filed (1946)
3	14 Feb	9000	600	Pay & Allowances (accum) 2 mo $330; Debts Collected $270	Jan	8 Feb
4	21 Feb	7500	500	Sale of personal property brought fr U.S. (4 watches, 2 pens)	Jan	8-14 Feb
5	23 Feb	6000	400	Collection of Debts	Jan	8,14,21 Feb
6	25 Feb	7500	500	Collection of Debts	Jan	8/14,21,23 Feb
7	26 Feb	7500	500	Collection of Debts	Jan	8,14,21,23,25 Feb
8	27 Feb	7500	500	Collection of Debts	Jan	8,14,21,23,25, 26,27 Feb
9	28 Feb	7500	500	Collection of Debts	Jan	8,14,21,23,25, 26,27 Feb
10	1 Mar	7500	500	Collection of Debts	Feb	1 Mar
11	2 Mar	7500	500	Collection of Debts	Feb	1,March
12	4 Mar	7500	500	Collection of Debts	Feb	1,2,March
13	5 Mar	7500	500	Collection of Debts	Feb	1,2,4 Mar
14	6 Mar	7500	500	Collection of Debts	Feb	1,2,4,5 Mar
15	7 Mar	7500	500	Collection of Debts	Feb	1,2,4,5,6 Mar
16	8 Mar	7500	500	Collection of Debts	Feb	1,2,4,5,6,7 Mar
17	9 Mar	7500	500	Collection of Debts	Feb	1,2,4,5,6,7,8 Mar
18	11 Mar	7500	500	Collection of Debts	Feb	1,2,4,5,6,7,8,9 M
19	12 Mar	7500	500	Collection of Debts	Feb	1,2,4,5,6,7,8,9, 11 Mar
20	13 Mar	7500	500	Collection of Debts	Feb	1,2,4,5,6,7,8,9, 11,12,13 Mar

He pleaded not guilty to the Charge and all Specifications thereunder and was found guilty of the Charge and Specifications 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 thereunder. Of Specification 1 of the Charge he was found guilty, except the words, "and that prior to January, 1946, and during the month of January, 1946, Second Lieutenant Joseph R. Jackson had filed 'Application to Purchase U. S. Dollar Instruments - Military' on none filed 1946, and were then known by the said Second Lieutenant Joseph R. Jackson to be false and fraudulent". Of Specification 2 of the Charge he was found guilty, except the words "and that prior to 8 February, 1946, and during the month of February, 1946, Second Lieutenant Joseph R. Jackson had filed 'Application to Purchase U. S. Collar Instruments - Military' on 22 January, none, 1946, and were then known by the said Second Lieutenant Joseph R. Jackson to be false and fraudulent". Of Specification 10 of the Charge he was found guilty, except the words "and that prior to 1 March 1946, and during the month of March 1946, Second Lieutenant Joseph R. Jackson had filed 'Application to Purchase U. S. Dollar Instruments - Military' none 1946, and were then known by the said Second Lieutenant Joseph R. Jackson to be false and fraudulent". No evidence of any previous convictions was int introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence, remitted the forfeitures and one year of the confinement adjudged and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is summarized as follows:

On motion of the prosecution the court took judicial notice of the following:

Letter Headquarters XXIV Corps (AG 123.7 (TFIAC) dated 4 January 1946, Subject: Exchange of Foreign Currencies, which provides in relevant part:

> "1. The following instructions on the above subject from General Headquarters, United States Army Forces, Pacific, APO 500 Advance, 2 January 1946 are published for information and compliance:
>
> * * *
>
> '2. There is no obligation for disbursing officers to accept for remittance, savings or exchange amounts of foreign currency in excess of cash pay and allowances disbursed to military personnel and dollar instruments converted by them through official channels. Transfers of amounts in excess of the total cash disbursed as pay and allowances and dollar instruments cashed can only

be accomplished as a direct cost to the United States. For this reason, adequate currency control measures must be taken to reduce to a minimum transfers of currency acquired from sales of property, black market currency transactions and other dealings through which channels acceptable status is sought for lage amounts of illicitly acquired foreign currency.

'3. Every transaction which transmits a dollar credit to the United States or reqlizes a dollar credit through Soldiers' Deposits, or effects the purchase of War Bonds for cash or Post Office Money Orders, or accomplishes the exchange of foreign currency for United States currency or the exchange of one foreign currency for another, will be supported by a certificate stating that the foreign currency presented for exchange was obtained from a United States Army disbursing officer in payment of pay and allowances and was not acquired from sale of property, black market currency operations or other illicit sources. The certificate may be appropriately modified for use of authorized non military personnel where currency was received by them as pay and allowances, but not from a United States Army disbursing officer.

'4. Normally, the amount of foreign currency which an individual may exchange per month will not exceed an amount representing one month's pay and allowances. When the application is in excess of that mounnt, the applicant will certify in detail the sources of additional amounts. The disbursing officer or postal officer will analyze the certificate before the exchange is made and will base his decision to make the exchange or to reject the application upon the facts presented.'

* * *

'7. The procedure for effecting the exchange of foreign currency is prescrib ed as follows:

a. Military personnel:

(1) Officer will submit certified application form direct to disbursing officer or postal officer for action.

* * *

c. Certificates and affidavits received by disbursing officers will be retained. Those received by postal officers will accompany the funds which the latter transfers to a disbursing officer. Those received by Unit Commanding Officers will be retained in the unit.

d. Sample forms appropriate to the various types of exchange transactions are inclosed."

* * *

"APPLICATION TO PURCHASE U.S. DOLLAR INSTRUMENTS - MILITARY

"1. _____
(Last Name) (First Name) (M.I.) (ASN) (Grade) (Orgn)

2. Net Pay per Month$ _____

3. Dollar Instruments Desired: Dollar Amount

U. S. Currency . . . . . _____

Soldiers Deposits. . . . . _____

P. T. T. . . . . _____

D. O. Payment Order. . . . . _____

War Bonds . . . . . _____

P. O. Money Order . . . . . _____

Total _____

Equivalent in Foreign Currency _____

4. I certify that the foreign currency listed hereon, presented for exchange to U. S. Dollar instruments, was legitimately obtained as payment of pay and allowances from a disbursing officer, United States Army, and was not obtained from sale of property, black market currency operations or other illicit sources; that the sources of the foreign currency were as follows:

_____

_____

I further certify that during the calendar month, I have made no foreign exchange transactions other than those listed hereon:

DATE	PLACE	INSTRUMENT PURCHASES	AMOUNT IN DOLLAR

Date _____ Signature _____

(AFPAC ADVON AGO No. 1)
Revised 10 Dec 45"

Circular No. 127, General Headquarters, United States Army Forces Pacific, dated 12 December 1945 which provides in revelant part:

"2. EXCHANGE OF UNITED STATES CURRENCY ON ARRIVAL IN PACIFIC.a. Personnel arriving in the Pacific area with United States currency will exchange it for circulating local currency.
b. Within seventy-two hours after arrival, commanding officers will inform all personnel of the exchange requirement and of existing facilities to convert excess United States currency into U. S. Savings Bonds, Soldier's Deposits, United States Military Disbursing Officers' Payment Orders, or to transmit funds to addresses in the United States by Postal Money Orders or Personal Transfer Account Plan."

Letter Headquarters XXIV Corps (123.7 (TFXAG) 20 February 1946, subject: Exchange of Foreign Currencies which provides in relevant part:

"1. The following instructions on the exchange of foreign currencies, received from CINCAFPAC under date of 12 February 1946, are published for the information and guidance of all concerned and supercede all previous directives on the subject from this headquarters:
'To prevent military personnel possessing yen currency obtained from sales of property, black market currency transactions and other illicit sources from utilizing it to their own advantage by converting it to U. S. currency or dollar instruments, this directive is issued. It is effective immediately and supercedes instructions contained in our radio ZX 25748, 17 October 1945; Every transaction which transmits a dollar credit to the U. S. (excepting voucher or payroll deductions) or realizes a dollar credit through soldiers

deposits, or affects the purchase of government bonds or postal money orders for cash, or accomplishes the exchange of yen currency for U.S. currency or for other foreign currency will be supported by a signed certificate stating that the currency presented for exchange was obtained by the individual from an U.S. Army Disbursing Officer in payment of pay and allowances or from other legitimate sources. Officers and authorized civilian personnel will submit certified applications direct to a disbursing officer or Army Postal Officer for action.*** Disbursing officers, postal officers, unit commanding officers and unit personnel officers acting upon applications for currency exchange will take such steps as are necessary to satisfy themselves that the yen currency was legitimately acquired. They will refer doubtful cases to the lowest echelon of command whose commander has a finance officer as a member of his staff, such as a division or base commander, for final decision. Postal officers in Japan and Korea will cash incoming postal money orders in yen only. ****Holdings in excess will be converted into dollar instruments. Normally the amount of foreign currency which an individual may exchange per month will not exceed the amount which has been received as cash pay and allowances. Amounts in excess will be stated in detail in individual's application. These instructions have equal application to foreign correspondents, War Department civilian employees, Red Cross and other authorized personnel. You will take measure to insure that U.S. currency is withdrawn from personnel arriving in Japan and Korea within 72 hours after arrival. You are authorized to establish such additional control which you deem suitable to prevent the transmission of illicitly acquired funds to the U.S.

"2. The phrase 'other legitimate sources' is interpreted to include pay for services received by company barbers, tailors, watch repairmen, or any payment for services performed in addition to military duties. It does not include funds acquired by gambling or as the proceeds of sales."

It was stipulated that if Major S. Pitt, Finance Department, 0-473397 were present in court and sworn as a witness, he would testify that he was the Finance Officer of the 6th Division from February 1946 to September 1946, inclusive, and that he was the official custodian of the records of the 6th Division Finance Office. That twenty certificates identified as prosecution's Exhibits 1-20, inclusive, were withdrawn by Major Pitt from the records of his office and that they were delivered to the Judge Advocate XXIV Corps (R 7-8).

Lieutenant Colonel A. W. Farwick, Finance Department, the Disbursing Officer of the 231st Finance Section, identified the accused's War Department Form 35, Officer's Identification Card, Signature Card which was introduced into evidence as prosecution's Exhibit 24 (R 8-9). The witness was qualified as a handwriting expert and testified that the signature on the identification card which purports to be that of Joseph R. Jackson was executed by the same person who signed the certificates contained in prosecution's Exhibits 1-20, inclusive (R 9). The witness also identified the pay record card relevant to the accused's pay and allowances account from 1 December 1945 through 30 September 1946 (WD Form 14-5) which was received into evidence as prosecution's Exhibit 25 (R 12). This exhibit shows that the accused drew no pay during the period 1 December 1945 through 30 June 1946, and that his gross pay for that period was $301.40 per month. He had a Class E allotment of $160.30 and a Class N allotment of $6.60 per month, respectively. His monthly net pay was $109.25 (R 10-12).

Captain Walter W. Fritze, the postal Officer of XXIV Corps identified prosecution's Exhibits 2A to 20A, inclusive, as photostatic copies of Application for Domestic Money Orders, Money Order Coupons and Stubs which were issued to the accused pursuant to his applications. Prosecution's Exhibits 2A to 20A, inclusive, were received into evidence without objection (R 15-16). Captain Fritze testified that pertinent regulations provide that money orders will not be issued unless accompanied by a properly executed application to purchase U. S. dollar instruments including the certificate therein contained (AFPAC ADVON AGO No. 1, Revised 10 Dec 45) (R 16).

The accused's application to purchase U.S. dollar instruments bearing certificates described in Specifications 1 to 20, inclusive, were received into evidence without objection as prosecution's Exhibits 1-20, inclusive (R 16).

Prosecution's Exhibit 1, stamped 22 January 1946 contains the following relevant entries:

"APPLICATION TO PURCHASE U S DOLLAR INSTRUMENTS - MILITARY

1. Jackson Joseph R. 01334862 2nd Lt. Inf.
(Last Name) (First Name) (M.I.) (ASN) (Grade) (Orgn)

2. Net Pay per month $ 237.90

3. Dollar Instruments Desired: Dollar Amount

* * *

P. O. Money Order . . . . . $ 200.00
Total 200.00
Equivalent in Foreign Currency. . . . 3000¥

(430)

4. I certify that the foreign currency listed hereon, presented for exchange to U.S. DOLLAR instruments, was legitimately obtained as payment of pay and allowances from a disbursing officer, United States Army, and was not obtained from sale of property, black market currency operations or other illicit sources; that the source of the foreign currency were as follows:

Accumulated pay and allowances

I further certify that during the calendar month, I have made no foreign exchange transactions other than those listed hereon:

Date	Place	Instrument Purchased	Amount in Dollars
	None		

Date 22 Jan 46 Signature Joseph R. Jackson

2nd Lt. Inf."

Prosecution's Exhibits 2-20, inclusive, are identical except that the net pay per month in each is stated as $237.00, and except for the dates, amounts involved, and stated source of foreign currencies and certificate as to prior exchange transactions during the calendar month. These variations are tabulated as follows:

"Pros Ex	Stamped &/or Written Date (1946)	Amount Dollar	Yen	Stated Source	Certificate as to prior exchange transaction
2	28 Feb	500	7500	Collection of Debts	Blank
3	14 Feb	600	9000	Pay & allowances (Accum) 2 mos.$330 Debts Collected $270	Blank
4	21 Feb	500	7500	Sale of Personal Property brought fm U.S. (4 watches-2pens)	Blank
5	23 Feb	400	6000	Collection of debts	Blank
6	25 Feb	500	7500	Collection of debts	Blank
7	26 Feb	500	7500	Collection of debts	Blank
8	27 Feb	500	7500	Collection of debts	Blank
9	8 Feb	500	7500	Sale of Personal Property brought fm U.S. (4 watches)	'None'

Pros Ex	Stamped &/or Written Date (1946)	Amount Dollar	Yen	Stated Source	Certificate as to prior exchange transaction
10	1 Mar	500	7500	Collection of debts	Blank
11	2 Mar	500	7500	Collection of debts	Blank
12	4 Mar	500	7500	Collection of debts	Blank
13	5 Mar	500	7500	Collection of debts	Blank
14	6 Mar	500	7500	Collection of debts	Blank
15	7 Mar	500	7500	Collection of debts	Blank
16	8 Mar	500	7500	Collection of debts	Blank
17	9 Mar	500	7500	Collection of debts	Blank
18	11 Mar	500	7500	Collection of debts	Blank
19	12 Mar	500	7500	Collection of debts	Blank
20	13 Mar	500	7500	Collection of debts	Blank"

Major Carl O. Ingman, Headquarters Korea Base Command, testified that he was appointed the investigating officer in the instant case and that he interviewed the accused during the course of his investigation. After warning the accused of his rights against self-incrimination the latter stated that during the period from January to April 1946 he was assigned to the 876th Quartermaster Supply and Sales Company, Pusan Korea. During this period he purchased postal money orders in the approximate total amount of $9500 which he sent to the United States (R 19-20). The accused admitted that he had executed and signed the certificates in question (Pros Exs 1-20) and that he had received the postal money orders by virtue of such certificates in exchange for the appropriate amounts of Korean yen. He states he had obtained the biggest portion of the Korean yen involved playing poker, but that a portion of the money was the proceeds of the sale of some watches and pens which he had brought from the United States, and a part represented his pay and allowances (R 20). He further stated that he had gambled with fellow officers, most of whom were strangers to him, in his quarters. He admitted that he drew no pay and allowances during the months of January, February, March, and April 1946, that he drew seven months pay in June 1946, and that his total net pay for January, February, March, and April after allotments were deducted, amounted to approximately $350 (R 21).

4. The evidence for the defense is summarized as follows:

After his rights as a witness were explained to him by the defense counsel the accused elected to be sworn as a witness and testified that he is twenty-five years of age, married, and the father of two boys (R 32). He has had twelve and one-half years of schooling and had three and one-half years of basic ROTC. He was the commander of a state guard unit prior to his enlistment. He was commissioned through OCS and served six months before leaving the United States for Korea where he arrived on 1 November 1945. He was aboard ship for seven days and gambled extensively during the journey, winning approximately $3,000. Prior to embarkation he was last paid in October at which time he received approximately

$400 in pay and travel allowances (R 33). Shortly after his arrival at Korea he exchanged his dollars into Korean yen in accordance with existing regulations. He was stationed at Pusan, Korea, and gambled frequently in his quarters, winning a considerable amount of money. The accused named several officers with whom he gambled and stated that they were no longer in Korea. In January 1946, the accused consulted Colonel Worley, the Finance Officer of the 40th Division with respect to the disposition of his funds. The latter recommended that he purchase money orders at the Army Post Office, which advice the accused followed (R 35). At the postal unit in Pusan, Korea, the accused was told to fill out the certificate in question and was told that the Post Office would not accept more than $500 or $600 per day from any individual. Accordingly, the accused made his transmission in installments either personally or through the unit mail clerk. With respect to the statement contained on each certificate that his net pay is $237.00 the accused stated that he did not know exactly how much net pay was but that he made a rapid calculation deducting insurance allotments and deductions of meals from his gross pay. The statement concerning net pay was a mistake of fact and the accused had no fraudulent intent with respect thereto (R 36).

With respect to the statements that the source of the foreign currency involved was "Collection of Debts" the accused stated that he told both the personnel at the finance office and at the Army Post Office that the money represented gambling winnings and that he was told to state the source to be "Collection of Debts," which, technically, it was."

He also stated that the postal clerk told him it was not necessary to complete the item headed "I further certify that during the calendar month I have made no foreign exchange transactions other than those listed hereon" (R 37).

His activities had been investigated six or seven times by various agencies, and he testified that he was told by Colonel Lambert, the Inspector General for ASCOM 24 that it was recommended that no charges be brought against him (R 39).

On cross-examination he admitted that he was paid cash for his gambling winnings at the end of each game (R 39-40). He also admitted that he knew that he had made several foreign exchange transactions each month. He has had a $160 allotment in favor of his wife since November 1945 but had not thought about it when he stated that his net pay was $237.00 per month (R 40).

Over objection by the defense, the trial judge advocate asked whether some of the investigations concerning which the accused had testified, involved the disappearance of Government property from warehouses of which the accused was in charge. After the defense's objection was overruled the accused answered in the affirmative (R 43).

On examination by the court the accused stated that in the certificate wherein it was stated that the source of foreign currency was accumulated pay and allowances he meant his own pay and allowances received in the United States prior to embarkation. He also stated that he did in fact sell watches and pens although he does not recall how many (R 46).

Second Lieutenant John M. Brown, 3344th Transportation Corps Truck Company, testified that he has known the accused for seven months, knows his reputation in his organization, and that he has a good reputation for truth and honesty in his organization. The witness stated that he has seen the accused gambling but has never seen him lose money (R 47).

The accused's commanding officer, Captain Roy E. Wilson, 31st Infantry, testified that the accused was initially investigated concerning suspected black market activities by the witness (R 48-49), and that his investigation indicated that the accused was "absolved of any connection with wrongdoing." The witness stated that he knows the accused's reputation for truth and honesty and that such reputation is very good. The witness had also recommended the accused for a commendation (R 49).

5. Evidence for the court:

Colonel A. W. Farwick, recalled as a witness for the court, testified that in January 1946, gambling profits were not considered a legal source of funds for transmission to the United States and that exchange of foreign currency obtained as gambling profits for dollar instruments was prohibited. The reason for such a regulation is to close a possible loophole for the exchange of funds obtained from black market sources for dollar instruments (R 50).

6. The accused stands convicted of twenty specifications each of which avers that on the date and place alleged he made a false certificate as to: (a) his net pay per month, and (b) the source of foreign currency to be exchanged, for the purpose of obtaining the exchange of a specified amount of Korean yen to U. S. dollar instruments to be issued by the postal officer at APO 970, Branch Unit 1.

In order to support a conviction for the offense alleged the record must show that it was both alleged and proved that the accused: (a) made a certain official statement, (b) that the statement was false, (c) that the accused knew it to be false, and (d) that such false statement was made with the intent to deceive the person to whom it was made (CM 262360, Campbell, 41 BR 58; CM 316750, Ortiz-Apente; CM 318167, Green).

7. It is noted that in the findings with respect to Specifications 1, 2, and 10 of the Charge the court excepted from the findings of guilty the words:

"and that prior to '(the date alleged)' and during the month of '(the month alleged)' 1946, Second Lt. Joseph R. Jackson had filed 'Application to Purchase U. S. Dollar Instruments - Military' on none filed 1946, and were then known by the said Second Lt. Joseph R. Jackson to be false and fraudulent" (Underscoring supplied).

Thus the court found that the accused, at the times and places alleged, for the purposes alleged made certain certificates which contained the statements alleged, and which statements were false and fraudulent.

The findings of guilty of Specifications 1, 2, and 10, therefore, specifically exclude a finding that the accused knew that the alleged statements were false and fraudulent. It is obvious that the court inadvertently excepted the words "and were then known by the said Second Lieutenant Joseph R. Jackson to be false and fraudulent" under a mistaken impression that they pertained solely to the preceding allegation concerning previous currency exchange transactions. But in the absence of a finding that the accused knew his statement to be false and fraudulent, the specification as found does not state an offense.

Accordingly, it is our opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, and 10 of the Charge.

8. Evidence was introduced as to each of the remaining specifications concerning the falsity of the certificate;

"I further certify that during the calendar month, I have made no foreign exchange transactions other than those listed hereon. None" (or blank).

contained on each Application to Purchase U. S. Dollar Instruments (Pros Exs 1-20).

Although each of the mimeographed specifications avers, and the evidence shows, facts from which it might reasonably be inferred that the above quoted certificates were false, and that the accused knew them to be false, the making of these certificates was not alleged, apparently through inadvertence. Consequently, the evidence adduced concerning the falsity of those certificates may not be considered as evidence of the accused's guilt.

9. There remains for consideration whether the record is legally sufficient to support the findings that the accused made the false official statements with respect to (a) his net pay per month, and (b) the sources of the foreign currency which was exchanged for dollar instruments.

We will consider the proof to support the findings of guilty with respect to these categories of alleged false statements in inverse order.

10. Each application signed by the accused bore the following mimeographed certificate:

> "I certify that the foreign currency listed hereon *** was legally obtained as payments of pay and allowances from a disbursing officer, United States Army, and was not obtained from sale of property, black market currency operation or other illegal source; that the source of the foreign currency were as follows":

The handwritten entries thereunder pertinent to each specification are:

Specification 3:

"Pay and Allowances (accum) 2 months $330

"Debts collected $270" (Pros Ex 3).

Specification 4:

"Sale of personal property brought from the United States (four watches and two pens)" (Pros Ex 4).

Specifications 5 to 9 (incl.), and 11 to 20 (incl.):

"Collection of debts" (Pros Exs 5-9, incl., and 11-20, incl.).

No evidence was introduced to show the falsity of accused's statement that the source of a portion of the foreign currency involved in Specification 3 was "Pay and Allowances (accum) 2 months $330."

The only pertinent evidence introduced was that of the accused's testimony that he had received approximately $400 as pay and travel allowances in October 1945 prior to his departure for Korea. Since the disposition of the sum was not shown by the prosecution, it cannot be said that the prosecution proved beyond a reasonable doubt that the accused's statement was false.

No evidence was introduced to establish the falsity of the accused's certificate that the source of foreign currency involved in Specification 4 was the "Sale of personal property brought from the United States (four watches and two pens)" although it appears that the accused violated existing regulations forbidding the exchange of currency obtained by sale of personal property for dollar instruments. The mimeographed portion of the certificate expressly states that "the foreign currency listed herein was legally obtained from a disbursing officer, United States Army,

and was not obtained from the sale of property***"but that statement is expressly negatived in the portion of the certificate prepared in accused's own handwriting wherein he expressly stated that such source was the "sale of personal property."

Thus it would appear that the accused made a full disclosure as to the source of the currency, which cannot be construed to be a false statement or a statement made with intent to deceive, although it may indicate that the accused violated existing regulations. Since accused was not charged with a violation of the pertinent regulations he cannot be punished for that offense.

With respect to Specification 4, we must next consider whether the portion of the mimeographed statement on the application that:

> "the foreign currency listed herein *** was legally obtained as payment of pay and allowances from a disbursing officer, United States Army."

amounted to a false statement on the part of the accused in view of his subsequent statement on the same certificate that the source of the foreign currency was the sale of personal property.

If the mimeographed portion of the certificate quoted above were to be interpreted as pertaining to the accused's pay and allowances, it would follow that the statement is false. It must be noted, however, that the certificate does not expressly state that the currency had been obtained as his pay and allowances. The application form used by the accused was intended to implement the directive from General Headquarters, United States Army Forces, Pacific, dated 2 January 1946, which provides in relevant part:

> "Every transaction which transmits a dollar credit to the United States *** or effects the purchase of *** Post Office Money Orders, or accomplishes the exchange of foreign currency for United States currency *** will be supported by a certificate stating that the foreign currency presented be obtained from a United States Army disbursing officer in payment of pay and allowances and was not acquired from sale of property, black market currency operations and other illicit sources" (Emphasis supplied).

This directive was obviously ambiguous in that it did not specify whether it pertained to currency obtained as the applicant's pay or allowances or the pay and allowances of any other individual or individuals.

"Every transaction which transmits a dollar credit * * * or effects the purchase of * * * postal money orders for cash * * * will be supported by a signed certificate stating that the currency presented for exchange was obtained by the individual from a U. S. Army Disbursing Officer in payment of pay and allowances or from other legitimate sources and was not acquired from the sale of property, black market currency operations or other illicit source" (Emphasis supplied).

In the directive published by Headquarters XXIV (AG 123.7 (TFXAG)) 20 February 1946, which implements the foregoing directive the following explanatory statement is made:

"". The phrase (other legitimate sources' is interpreted to include pay for services received by company barbers, tailors, watch repairmen, or any payment for services performed in addition to military duties. It does not include funds acquired by gambling or as the proceeds of sales."

It is obvious that although the pertinent regulation had been clarified by the directive of 12 February 1946, the use of the ambiguous form of application which was attached as an exhibit to the 2 January 1946 directive was continued at the Army Post Office at Pusan, Korea.

In view of the fact that the same form certificate was required for the exchange of Korean currency obtained as payment for services performed in addition to military duties, it must necessarily be construed to include funds obtained from other individuals, provided that the currency was initially obtained "as payment of pay and allowances from a disbursing officer, United States Army."

If we were to construe the language of the prepared form as pertaining to the applicant's pay and allowances only, it would follow that every individual using that form to effect the exchange of foreign currency obtained legitimately as pay for services performed in addition to his military duties, would be guilty of making a false official statement.

Since the record does not show that the ultimate source of the currency described in the specification was anything other than pay and allowances, it was not shown beyond a reasonable doubt that the prepared protion of the certificate amounted to a false statement by the accused in this case.

That which we have said with respect to the prepared portion of the certificate as to the source of foreign currency, as it applies to Specification 4, applies with equal force to each of the remaining specification under consideration.

That which we have said with respect to the prepared portion of the certificate as to the source of foreign currency, as it applies to Specification 4, applies with equal force to each of the remaining specifications under consideration.

The stated source of foreign currency involved in Specification 5 to 9 and 11 to 20, inclusive, was "Collection of Debts," and the source of a portion of the currency involved in Specification 3 was "Debts Collected $270."

The uncontradicted evidence shows that the true source of the foreign currency under consideration was gambling profits including some $3,000 which the accused won aboard ship en route to Korea. In his sworn testimony the accused stated that he disclosed the true source of this currency to personnel at the Finance Office and at the Post Office, but that he was advised to state the source to be "Collection of Debts, which technically, it was."

The accused's testimony shows clearly that the statement was not a full and frank disclosure as to the source of the currency. It may reasonably be inferred that the statement was made with the intent and hope that it would mislead any person who might examine the application officially.

The problem presented by the evidence is not whether the statement was made with intent to deceive, but rather whether the statement was false. As the accused indicated in his testimony, the receipt of gambling profits is technically the collection of a debt.

The prosecution attempted to show that the gambling winnings were collected at the close of each game, that no IOU's were obtained by the accused, and that consequently no debt was ever due the accused. This contention is not tenable. The term debt is defined as "that which is due from one person to another." (Webster's New International Dictionary). The fact that a relatively short time elapsed between the time the accused received credits for gambling winnings until he collected his winnings does not alter the character of the transaction, the collection of a gambling debt.

In our opinion the accused's statement amounted to a failure to make a full disclosure as to the source of foreign currency which he desired to exchange for postal money orders. So considered, the statement does not constitute a false statement and constitutes no offense. Failure to make a full disclosure is not tantamount to making specified and particularized false statements with deceitful intent (CM 245666, Wallin, 29 BR 433; CM 156021 (1919) Dig Op JAG 1912-40, Sec 454 (49)).

The language of the Board of Review in CM 262360, Campbell, 41 BR 58, is appropriate to the instant case:

> "The fact that his selection of language might be deemed cagy does not alone justify branding his statement as a false statement made with intent to deceive. Before a conviction of the offense alleged can be sustained there must be evidence beyond a reasonable doubt, that the statement is both false and made with intent to deceive. The evidence in the instant case does not measure up to this standard" (Underscoring supplied).

Accordingly, we are of the opinion that the record of trial is not legally sufficient to support so much of the finding of guilty of each specification under consideration as finds that the accused made false statements with respect to the sources of foreign currency as alleged in Specifications 3 to 9, inclusive, and 11 to 20, inclusive.

11. Deleting the allegations discussed above, each of the remaining specifications avers that the accused at the time and place alleged, and for the purpose of obtaining the exchange of stated amounts of Korean yen to United States Dollar Instruments in equivalent amounts made a certain certificate, viz: "Application to Purchase U. S. Dollar Instruments - Military" which application, as the accused then knew contained a statement that "net pay per month $237.00," which statement was false and fraudulent in that the accused received and claimed no pay for the previous month, and which statement the accused knew to be false and fraudulent.

The uncontradicted evidence shows that the accused filed no claim for pay during the period from December 1945 until 30 June 1946. During this period his credit for gross pay and allowances amounted to approximately $301 per month. He testified that he mad e a Class E allotment of $160 in favor of his wife effective November 1945. The remaining monthly debits during the period in question were an insurance deduction of $6.60 and deductions of approximately $23 for meals. His total monthly debits were approximately $190, and his net credits were approximately $110.

The prosecution thus proved that his net pay was not $237 as the accused had stated on each application for Purchase of Dollar Instruments. The accused attempted to explain his statement by testifying that he had forgotten about his $160 allotment and had made a hasty calculation of his pay after deductions for meals and his insurance allotments had been made. The accused's explanation was not convincing, particularly since he had no pay vouchers during the period and the court, apparently, gave his explanation little credence.

There is no doubt that the statements concerning the accused's net pay were false, and there is but little doubt that the accused knew them to be false. The only question for consideration is whether the statements were made with intent to deceive. The determination of this question requires a consideration as to whether the statements were material to the accused's intended purpose to effect exchanges of foreign currency to dollar instruments.

As noted above, the stated source of the Korean currency (except as to a portion of the currency involved in Specification 3) was the sale of personal property or the collection of debts.

Considering those stated sources, it is difficult to see the materiality of any statement concerning the accused's net pay. Since the accused stated that the sources of the currency were something other than his pay and allowances, the personnel at the Army Post Office who processed his application could not be influenced in any way by his statement that his net pay was $237. Furthermore, each postal money order was in an amount which was greater than his stated net pay, thus putting all concerned on notice that further inquiry should be made as to the source of the currency. (See par 4, ltr AG 123.7 (TFXAG), Hq XXIV Corps, 4 Jan 1946, Pros Ex 22).

The immateriality of the statement concerning the accused's net pay, insofar as Specifications 4 to 9 and 11 to 20, inclusive, are concerned creates a reasonable doubt that the statements were made with intent to deceive. Since the statements were immaterial to the source stated they could not have had the affect of deceiving the persons to whom they were made, and it may not be reasonably inferred that the accused attempted to deceive anyone thereby.

With respect to the identical statement alleged in Specification 3, the problem remaining for consideration is whether the statement as to net pay is material to the stated source of foreign currency a portion of which was "Pay and Allowances (Accum) 2 mos. $330."

We have already concluded that there was no proof that the latter statement was false. Therefore, we must presume it to be true and that the source of the currency was pay and allowances received by the accused prior to his arrival in Korea. It follows that any statement concerning the accused's present net pay is not material to pay and allowances accumulated at some other time. The accused may well have construed the requirement in the form that his net pay be stated as pertaining to the period during which the pay was earned. Viewed in this light the statement is not necessarily false for his net pay and allowances prior to making an allotment in favor of his wife effective in November 1945 was approximately $250.00 which was in excess of the stated net pay.

12. For the reasons stated, we are of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specifications 3 to 9, inclusive, and 11 to 20, inclusive.

13. The accused is 25 years of age, and is a high school graduate. War Department records show that he is married and the father of two children. His civilian occupation prior to enlistment was that of a senior inspector at the Lockheed Aircraft Corporation at Burbank, California. He has been enrolled in the Basic Course, ROTC for three and one-half years. He enlisted in July 1944 and was graduated from the Infantry Officers Candidate School on 7 May 1945 as a second lieutenant, Army of the United States. His efficiency rating from 7 May 1945 to 30 June 1945 was 4.7 (Excellent) and 6.1 (Superior) from 1 July 1945 to 31 December 1945.

14. The Board of Review has considered a letter to The Adjutant General from First Lieutenant Charles B. Sillery, AGD-Res, dated 7 January 1947 pertaining to clemency on behalf of the accused.

15. The court was legally constituted and had jurisdiction of the person and the offenses. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

/s/ A. Hottenstein, Judge Advocate

(On Leave) Judge Advocate

/s/ Philip L. Smith Judge Advocate

CERTIFIED A TRUE COPY:

Walter D. Bowa

WALTER D. BOWA
Capt., Inf
Acting Staff Judge Advocate

UN 5 " 1947

JAGH - CM 318705 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, Korea Base Command, APO 901

1. In the case of Second Lieutenant Joseph R. Jackson (O-1334862), Infantry, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the finding of guilty and the sentence be disapproved.

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

(CM 318705).

1 Incl
R/T

THOMAS H. GREEN
Major General
The Judge Advocate General

JAGF CM 313446 1st Ind

WD, JAGO, Washington 25, D. C. AUG 5 1946

TO: The Under Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by Act of 20 August 1937 (50 Stat. 724; 10 U.S.C.A. 1522), is the record of trial in the case of Private Garnett H. Cunnagin (16067837), Squadron A, 324th Army Air Forces Base Unit, Chatham Field, Georgia.

2. The majority of the Board of Review holds the record of trial legally insufficient to support the findings and sentence. The third member dissents from that holding. I do not concur in the holding of the Board of Review.

3. The accused was charged with desertion at Chatham Field, Georgia, on or about 2 January 1944 terminated by surrender at Detroit, Michigan, on or about 22 December 1945, in violation of Article of War 58. He was arraigned on 14 March 1946. He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for twenty years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of War may direct, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

4. An extract copy of a morning report of accused's organization showed him absent without leave as of 1700 hours, 2 January 1944. Stipulated testimony of a military policeman proved that accused surrendered himself, in civilian clothes, on 22 December 1945 and that at the time he surrendered, he stated that he was giving himself up because he had learned the authorities were looking for him.

5. The defense presented evidence to substantiate the claim of accused that he went absent without leave because of the serious illness of his wife and that he had no intention of deserting the service but intended to return as soon as his earnings permitted her to receive proper care. The wife testified at the trial that she had telephoned accused from Kansas in January 1944 and informed him that she was confined in a hospital and was without sufficient funds. She further asserted that accused came home to her and looked after her. A statement from a doctor indicated that accused's wife had been subjected to

an operation in 1941 and that her condition would have a tendency to make her introspective and to cause her to worry. Accused himself testified that after his wife had telephoned him that she was ill, he applied for leave which was refused. He then joined his wife in Chicago and from there they went to Detroit. He worked as a motor mechanic for 23 months. At the same time he held a job in a hotel under an assumed name. He denied he intended to desert the service and asserted that at all times he intended to return thereto when he had earned sufficient money to provide for his wife. On cross-examination he admitted his unauthorized absence from the service on 8 January 1944; that he made from eighty to one hundred dollars a week during his absence and that his wife owned a 1940 LaSalle automobile.

6. The difficulty in the case arises out of the statement made to the court by the trial judge advocate before the introduction of any evidence. The record does not show the verbatim statement but the reporter summarized the same as follows:

> "The trial judge advocate then made an opening statement in which he advised the court that the accused could not be found guilty of being absent without leave, as the limitation on time as set forth in AW 39 had run against this offense. The trial judge advocate further advised the court that the court could either 'acquit' the accused or find him guilty of AW 58 as charged." (Single quotation supplied)(R6)

The majority holding of the Board of Review has correctly stated that the only issue before the court was whether accused intended not to return to the military service. The period of unauthorized absence was admitted and the defense devoted its entire effort to show that accused was guilty of absence without leave and not desertion. The majority holding of the Board of Review also correctly stated:

> "That the court could have found the accused guilty only of the lesser included offense of absence without leave, and, in the absence of a plea of the Statute of Limitations (AW 39) seasonably interposed by the defense, could have adjudged punishment accordingly notwithstanding the fact that more than two years had elapsed between the date of the offense and the date of the arraignment, is firmly established law (CM 201537, Fauts, 5 BR 157; CM 231504, Santo, 18 BR 235; CM 274482, Talbott, 47 BR 185)."

The statement of the trial judge advocate that the Statute of Limitations had run upon the offense of absence without leave was correct (AW 39). It put the defense on notice of the availability of the defense. However, the trial judge advocate further advised the court that it could only either acquit accused or find him guilty of desertion as charged. There is an implication in this latter statement that the

trial judge advocate attempted thereby to foreclose the court's right to consider accused's guilt of the lesser included offense of absence without leave. The majority holding of the Board of Review is premised on the proposition that such attempted circumscription of the court's deliberative process was prejudicial to accused. There is nothing in the record, however, to indicate that the court accepted or acted upon the theory suggested by the remarks of the trial judge advocate, or that the remarks of the trial judge advocate influenced the court to reach findings of guilty it would not otherwise have reached.

7. In spite of the fact that the Statute of Limitations, if pleaded would have barred punishment for the offense of absence without leave, the court was not prohibited from finding the accused guilty thereof in the absence of a plea in bar. In the absence of any indication in the record to the contrary it must be presumed that the court was familiar with the law in this respect. Remarks by a trial judge advocate are not the equivalent of instructions to a jury. It cannot be assumed that because a trial judge advocate gratuitously makes an erroneous argument or statement of the law, the court-martial adopts the error as its own. The Manual for Courts-Martial even forbids the trial judge advocate from giving his opinion on any point of law arising during the trial except when it is asked by the court in open court or in the proper discharge of his duties to prosecute (MCM, 1928, par. 41d, p. 32).

Assuming that it was error for the trial judge advocate to make the statement in question it is manifest that the error was not fatal to the proceedings. Article of War 37 provides, inter alia, that:

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused."

The context of this article is clear. It forbids the disapproval of a sentence on account of errors in procedure unless it affirmatively appears that the substantial rights of the accused person have been injuriously affected. This is but an application of the modern effort in criminal procedure to avoid emphasis on technicalities and to achieve substantial justice. The article has been so construed in

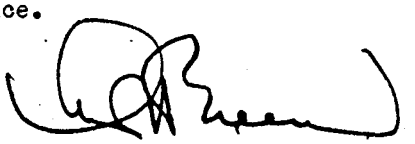
court-martial practice (CM 219575, Mathis, 12 BR 281, 301). In defining the duties of reviewing authorities the Manual for Courts-Martial states the matter thus:

> "A. W. 37 vests a sound legal discretion in the reviewing authority to the end that substantial justice may be done. The effect of a particular error within the purview of A. W. 37 should be weighed by him in the light of all the facts as shown by the record, and, unless it appears to him that the substantial rights of the accused were injuriously affected, he should disregard the error as a basis for holding the proceedings invalid, or for disapproving a findings or the sentence." ***(MCM 1928, par. 87b, p. 74).

I conclude that the record of trial is legally sufficient to support the findings of guilty and the sentence and that no error prejudicial to the substantial rights of the accused was committed at the trial.

8. The reviewing authority reduced accused's period of confinement to ten years. In view of all the facts and circumstances connected with the offense and in order that the sentence may be brought within the standards of the postwar clemency program I recommend that the dishonorable discharge be suspended and that the confinement be further reduced to six years.

9. I transmit herewith forms of action for your use; one (Form A) for use in the event you are in accord with the conclusion of the majority of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence; and one (Form B) for use in the event you agree with the conclusion set forth in this, my dissent, that the record of trial is legally sufficient to support the findings of guilty and the sentence, and approve my recommendation for modification of the sentence.



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

THOMAS H. GREEN
Major General
The Judge Advocate General

[Compiler's note: Holding and dissent in this case was published in Vol. 63, p. 71-79. The Under Secretary of War concurred with the conclusion set forth in this indorsement.]

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TITLE

DATE	BORROWER'S NAME	EXT.
11/21/94	R Mudem	44907